



2024:DHC:6895



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ARB.P. 847/2024**

BALAJEE INFRATECH AND CONSTRUCTIONS

PVT LTD

.....Petitioner

Through: Mr. Vikas Goel, Mr. Ritesh
Sharma and Mr. H. Singh, Advs.

versus

**THE CHIEF ENGINEER NATIONAL HIGHWAY P W
PUBLIC WORKS DEPARTMENT GOVERNMENT OF
MAHARASHTRA**

.....Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT (ORAL)

06.09.2024

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1. This is a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996¹, for reference of the disputes between the parties to arbitration.

2. Notice in this petition was issued on 31 May 2024. Three weeks from the date of service were granted for reply with two weeks for rejoinder. Notice stands served on the respondent by Speed Post on 25 June 2024. The respondent has not condescended to file a reply to this petition. When the matter is called out, there is no response on behalf of the respondent either.

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3. The court is not inclined to wait for the respondent to appear, especially as, after the recent decision of the Supreme Court in ***SBI General Insurance Co Ltd v. Krish Spinning***², the remit of a Section 11(6) court is extremely limited. The court is only to examine whether there exists an arbitration agreement between the parties and whether the Section 11 (6) petition has been filed within three years of the Section 21 notice.

4. In the present case, the dispute arises in the context of an Engineering, Procurement and Construction³ Agreement dated 11 April 2018, whereunder the petitioner was contracted by the respondent for rehabilitation and upgradation of part of NH 353B. The agreement envisages resolution of disputes firstly by amicable resolution, failing which by arbitration. The covenants of the EPC Agreement, to the extent relevant, read thus:

“26.1 Dispute Resolution

26.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 26.2.

26.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

26.2 Conciliation

In the event of any Dispute between the Parties, either Party may

¹ “the 1996 Act”, hereinafter

² 2024 SCC OnLine SC 1754

³ “EPC” hereinafter

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call upon the Authority's Engineer, or such other person as the Parties may mutually agree upon (the "Conciliator") to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Conciliator or without the intervention of the Conciliator, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) business days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) business day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 26.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3.

26.3 Arbitration

26.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally settled by arbitration in accordance with the rules of arbitration of the SOCIETY FOR AFFORDABLE REDRESSAL OF DISPUTES (SAROD).

26.3.2 Deleted.

26.3.3 The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 26 shall be final and binding on the parties as from the date it is made, and the Contractor and the Authority agree and undertake to carry out such Award without delay."

5. As is seen from the above clauses, an initial attempt at resolution of the disputes by conciliation is required to be made. In accordance with the protocol envisaged by Clauses 26.1 and 26.2 of the contract, the following steps were taken:

(i) The petitioner wrote to the respondent's Engineer on 12 January 2024, seeking conciliation.

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(ii) Following this, a conciliation meeting was held on 12 February 2024. The disputes, however, remained unresolved.

(iii) The petitioner thereafter wrote on 4 March 2024 to the respondent seeking a convening of a joint meeting of the Chairman of the respondent and the Chairman of the petitioner within seven business days.

(iv) No meeting, as required by Clause 26.2, was convened within the aforesaid period of seven business days and the disputes remain unresolved.

6. In this scenario, the petitioner was clearly entitled to invoke arbitration, which the petitioner did *vide* notice dated 9 April 2024.

7. Though Clause 26.3.1 of the contract envisages the arbitration being conducted in accordance with the rules of arbitration of the Society for Affordable Redressal of Disputes⁴, a co-ordinate Bench of this court has, in its decision dated 22 March 2024 in ***Rani Constructions Pvt Ltd v UOI***⁵, held that the provision for resolution of disputes through SAROD could not be thrust on a contractor who was not a member of the SAROD, as the rules of the SAROD required the party to become a member before arbitration through the SAROD could be attempted.

8. The petitioner is not a member of the SAROD. This Court has



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followed the decision of *Rani Constructions* recently in *Manarajan Brahma v National Highways & Infrastructure Development Corporation Ltd*⁶.

9. The petitioner cannot, therefore, be constrained to approach the SAROD for resolution of the disputes.

10. As the respondent did not reply to the petitioner's notice under Section 21, the petitioner has approached this Court under Section 11(6) of the 1996 Act.

11. Following the decision of the Supreme Court in *SBI General Insurance*, the Court is required to appoint an arbitrator to arbitrate on the disputes between the parties.

12. Accordingly, the disputes stand referred to arbitration.

13. The principal claim of the petitioner is stated to be in the region of ₹ 117 crores.

14. This Court requests Hon'ble Mr. Justice S. Ravindra Bhat (Tel. 9818000160), an eminent former judge of the Supreme Court as well as of this Court, to arbitrate on the disputes between the parties.

15. The fee of the learned arbitrator shall be settled by the learned arbitrator in consultation with the parties.



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16. The learned arbitrator is also requested to file the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on reference.

17. This Court has not expressed any opinion on the merits of the matter. All issues of fact and law, preliminary and on merits, would remain available to be urged in the arbitral proceedings.

18. Let a copy of this order be forwarded by the Registry to the Respondents by all modes including email.

19. The petition stands allowed in the aforesaid terms.

C. HARI SHANKAR, J.

SEPTEMBER 6, 2024/yg

Click here to check corrigendum, if any