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

Pronounced on: 22.03.2024

+ **ARB.P. 1011/2023**

RANI CONSTRUCTIONS PVT. LTD.

..... Petitioner

Through: Mr. Navin Kumar, Ms. Surbhi Aggarwal, Ms. Rashmeet Kaur, Ms. Aarti Mahto, Ms. Bhagya Ajith and Mr. Manoj Shete, Advs.

versus

UNION OF INDIA

..... Respondent

Through: Ms. Nidhi Raman, CGSC alongwith Mr. Zubin Singh, Adv. for R-1/UOI.
Ms. Astha Sharma and Mr. Karan Jaiswal, Advs. for R-2.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 ('A&C Act, 1996') seeks constitution of an arbitral tribunal to adjudicate the disputes between the parties.

2. The disputes between the parties have arisen in the context of an EPC agreement dated 16.11.2017 executed between the parties in respect of the work of "*Rehabilitation and Upgradation to 2-Lane with Paved Shoulder Configuration from existing Km. 122.00 (Dharasu Bend) to Km. 147.230 (Silkyara Bend) (Design Chainage 0.00 to 24.30) of NH-94 in the State of Uttarakhand*".



3. The bids were invited for the said project on behalf of the Ministry of Road Transport and Highway (MORT&H) on 31.03.2017. After valuation of the bids, the authority accepted the bid of the petitioner and issued a letter of acceptance dated 07.09.2017 awarding the contract to the petitioner at a contract price of Rs.149.67 Crores. Subsequent thereto, the aforesaid EPC Agreement was executed between the parties.
4. The disputes between the parties have arisen on various counts, *inter-alia*, the alleged failure on the part of the respondent to pay the legitimate dues of the petitioner against the executed quantities of work, alleged inability of the respondent in making available 90% of the land free from encumbrances at the time of declaration of the appointed date, the deduction of substantial amount from the bills of the petitioner towards liquidated damages, alleged losses sustained by the petitioner on account of prolongation of the work etc.
5. The EPC Agreement between the parties contains a dispute resolution/arbitration clause in the following terms:

“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.

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 call upon the Authority's Engineer, or such other person as the Parties



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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 days period or the Dispute is not amicably settled within 15 (fifteen) days of 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

(i) 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)

(ii) Deleted

(iii) 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.

(iv) The Contractor and the Authority agree that an Award may be enforced against the Contractor and/or the Authority, as the case may be, and their respective assets wherever situated.

(v) This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

(vi) In the event the Party against whom the Award has been granted challenges the Award for any reason in a court of law, it shall make an interim payment to the other Party for an amount equal to 75% (seventy five per cent) of the Award, pending final settlement of the Dispute. The aforesaid amount shall be paid forthwith upon furnishing an irrevocable Bank Guarantee for a sum equal to 120% (one hundred and twenty per cent) of the aforesaid amount upon final



settlement of the Dispute, the aforesaid interim payment shall be adjusted and any balance amount due to be paid or returned, as the case may be, shall be paid or returned with interest calculated at the rate of 10% (ten per cent) per annum from the date of interim payment to the date of final settlement of such balance.”

6. Disputes having arisen between the parties, the petitioner *vide* letter dated 29.06.2022 invoked the conciliation proceedings before the Authority's Engineer in terms of the Article 26.2 of the EPC Agreement. Evidently, the attempt on the part of the petitioner to resolve the disputes through conciliation, did not meet with any success and the conciliation failed.

7. It is the contention of the petitioner that thereafter, the petitioner sought redressal of the disputes between the parties through arbitration. Petitioner *vide* letter dated 15.02.2023 proposed that the disputes be adjudicated by a three-member arbitral tribunal in accordance with the A&C Act, 1996 and sought to appoint the nominee arbitrator. The petitioner admittedly did not take recourse to the rules of the arbitration of the “Society for Affordable Redressal of Disputes (SAROD)” provided under Article 26.3 of the EPC Agreement on the ground that in Rule 4.4 of the SAROD Arbitration Rules, it has been specifically provided as under :-

“4.4 Primary Membership of SAROD shall be a pre-requisite for invoking arbitration under these Rules.”

8. It is the contention of the petitioner that since it is not a primary member of SAROD nor is it desirous of becoming a primary member of SAROD, it is not entitled to invoke the arbitration under SAROD Rules. As such, according to the petitioner, the procedure prescribed in the Arbitration Agreement for constituting the arbitral tribunal has become unworkable and it is in this light that the petitioner addressed the aforesaid letter dated



15.02.2023 proposing that a three-member arbitral tribunal be constituted in terms of provision of the A&C Act, 1996. However, the respondent *vide* letter dated 05.08.2023 asserted that the petitioner must invoke arbitration in accordance with SAROD Rules. The petitioner *vide* letter dated 22.08.2023 reiterated that since the primary membership of SAROD is pre-requisite for invocation under the SAROD Rules, it was not in a position to take recourse to the SAROD Rules.

9. Ultimately, the petitioner filed the present petition seeking constitution of an arbitral tribunal. While issuing notice in the present petition, *vide* order dated 03.10.2023, it was specifically noticed as under:

“2. Learned counsel for the petitioner submits that the aforesaid Arbitration Clause is not workable inasmuch as the relevant rules of arbitration of SAROD, inter-alia, contemplates that the arbitration can be invoked only by the parties who have primary membership of SAROD. It is submitted that neither the petitioner nor the respondent has primary membership of SAROD and therefore, the arbitration mechanism cannot be availed by the petitioner.

3. In view of the aforesaid submission, it is necessary to ascertain whether primary membership of SAROD is a pre-requisite for taking recourse to arbitration under the rules of SAROD. In the circumstances, the Society for Affordable Redressal of Disputes (SAROD) is impleaded as the respondent no.2 in the present petition. Let amended memo of parties be filed by the petitioner within a period of three days.”

10. Thereafter, again *vide* order dated 17.11.2023, learned counsel who appeared on behalf of SAROD sought time to take specific instructions as to whether the primary membership of SAROD is a pre-requisite for taking recourse to the arbitration under the rules of SAROD. Thereafter, a reply was filed on behalf of SAROD in these proceedings wherein it has been specifically averred as under:-

“6. It is submitted that Rule 4.4 of the Society for Affordable



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Redressal of Disputes ("SAROD") Arbitration Rules ("SAROD Rules") provide for primary membership of SAROD for invoking arbitration under the SAROD Rules. It is submitted that Rule 1 of the SAROD Rules defines the scope of its application as when by way of any agreement, submission or reference, arbitration is referred to SAROD or under the SAROD Rules. Rule 1 is reproduced herein below for ready reference:

"1.1 Where any agreement, submission or reference provides for arbitration at the Society for Affordable Redressal of Disputes ("SAROD"), or under the Arbitration Rules of the SAROD and where the case is a domestic arbitration, it shall be conducted in accordance with the following Rules, or such Rules as amended by the SAROD where the amendments take effect before the commencement of the Arbitration. Parties may adopt following clause for inclusion in the contract:

'Any dispute or difference whatsoever arising between the parties and of or relating to the construction, interpretation, application, meaning, scope, operation or effect of this contract or the validity or the breach thereof, shall be settled by arbitration in accordance with the rules of arbitration of the "SAROD" and the award made in the pursuance thereof shall be final and binding on the parties subject to the Provisions of The Arbitration and Conciliation Act, 1996 '."

11. *Vide order dated 15.12.2023, it was specifically recorded as under:-*

"5. On a specific query to the learned counsel for SAROD as to whether SAROD is willing to make its panel available for constitution of the arbitral tribunal, learned counsel for SAROD submits that it will not possible for SAROD to do so, without the petitioner taking membership of SAROD."

12. In view of the above, it is evident that the contractual mechanism that is prescribed for constitution of arbitral tribunal as per SAROD Rules cannot be implemented unless and until both the petitioner and the respondent become members of SAROD.

13. In the aforesaid conspectus, the question that arises for consideration is whether an arbitral institution, whose rules have been adopted by the



parties, and which has been entrusted with the task of constituting the arbitral tribunal, can insist that the parties to the arbitration agreement must take membership of the said institution, as a pre-condition for taking requisite steps in terms of the agreement between the parties.

14. Learned counsel for the petitioner is right in contending that the contractual stipulation whereby the parties agreed that the arbitration would be conducted as per the rules of arbitration of SAROD, did not carry with it an additional obligation that the parties would take primary membership of SAROD.

15. In the present case, the petitioner is willing to pay the applicable fee/charges to SAROD for the purpose of functions to be discharged by SAROD in terms of the arbitration agreement between the parties, however, it is not willing to take primary membership of SAROD.

16. I find merit in the contention of the petitioner that an arbitration agreement under which the parties agree on conducting arbitration as per rules of a particular arbitral institution, cannot be construed as subsuming within it, an additional obligation to become member/s of that arbitral institution. Becoming a member of an arbitral institution, which is a society registered under the Societies Registration Act, 1860, carries with it additional obligation/s which has nothing to do with the agreement between the parties to arbitrate. Such an obligation cannot be insisted as a pre-requisite for taking recourse to arbitration. In the present case, insistence on the part of the SAROD that the parties must take membership of SAROD as a pre-condition for taking necessary steps to constitute an arbitral tribunal as per its rules, impinges on the validity of the appointment procedure; amounts to failure to perform the function entrusted to the concerned



institute under the procedure agreed to by the parties, and consequently attracts Section 11(6)(c) of the A&C Act, 1996 and making it incumbent on this Court to take requisite steps to constitute the arbitral tribunal.

17. Since SAROD rules cannot be applied to conduct of the arbitration between the parties in the present case for the aforesaid reason, and since the parties have not arrived at an agreement for constitution of three-member arbitral tribunal as proposed by the petitioner in notice dated 15.02.2023, it is incumbent on this Court to appoint a sole arbitrator to adjudicate the disputes between the parties.

18. The Supreme Court in ***Sime Darby Engg. SDN. BHD. v. Engineers India Ltd.***, (2009) 7 SCC 545, has held, as per Section 10(2) of the A&C Act, that where the number of arbitrators is not determined, the Arbitral Tribunal shall consist of a sole arbitrator. Relevant extracts of the said judgment are as under:

“23. Section 10 deviates from Article 10 of the UNCITRAL Model Law only in the sense that Section 10(1) of the Act provides that despite the freedom given to the parties to determine the number of arbitrators such numbers shall not be even number. But in default of determination of the number, Section 10(2) provides that the Tribunal is to consist of a sole arbitrator. Therefore, scheme of Section 10(2) of the Act is virtually similar to Article 10(2) of the UNCITRAL Model Law.

24. In the instant case Clause 12.2 of the arbitration clause is silent about the number of arbitrators. Therefore, Section 10(2) of the said Act squarely applies.

25. The learned counsel for the respondent has referred to a passage at p. 185, Paras 4-18 of Redfern and Hunter, Law and Practice of International Commercial Arbitration, 4th Edn. But looking at the said book this Court finds that the said passage was (sic has) not been properly quoted. In Paras 4-15 of the said book it has been provided as follows:

“A sole arbitrator shall be appointed unless the parties have agreed in writing otherwise, or unless the LCIA Court determines that in view of all the circumstances of the case a three-member



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tribunal is appropriate.”

In the said paragraph it has also been stated that there are distinct advantages of referring a dispute to a sole arbitrator on grounds of speed and economy:

“A sole arbitrator does not need to ‘deliberate’ with others, without having to spend time in consultation with colleagues in an endeavour to arrive at an agreed or majority determination of the matters in dispute.” (p. 184)

26. Similar opinion has been expressed in Russell on Arbitration, 23rd Edn. at p. 129, Paras 4-35 with reference to arbitration it has been said: “Where no choice is made, the law implied a reference to a tribunal consisting of a sole arbitrator.” In fact Section 15(3) of the (English) Arbitration Act, 1996 provides for the same. Mustil and Boyd on Commercial Arbitration, 2nd Edn. also contains the same statement of law. At p. 174 of the said book it has been provided that

“an arbitration agreement calls for a reference to a single arbitrator, either if it contains an express stipulation to that effect, or if it is silent as to the mode of arbitration”.

27. In the instant case, the arbitration Clause 12.2 is silent as to the number of arbitrators. The said clause read with Section 10(2) of the Act makes it very clear that the Arbitral Tribunal in the instant case would be consisting of a sole arbitrator.

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29. Insofar as reference to the expression “arbitrator(s)” in Clause 12.3 is concerned, the same does not in any way affect the intention of the parties in Clause 12.2. It is noted in this connection that the parties have freedom to change the number of arbitrators even after the contract has been entered and by mutual consent the parties may amend the contract. If that takes place, in such an eventuality Clause 12.3 provides that the arbitrator or arbitrators have to give reasoned award in respect of each dispute and difference referred. Here also the expression which has been used is “him” which also points to a sole arbitrator.”

19. Accordingly, Mr. Justice (Retd.) S. Ravindra Bhat, Former Judge, Supreme Court of India, (Mobile No.: 9818000160) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

20. The respondent shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability, which shall be decided by the learned



arbitrator, in accordance with law.

21. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A&C Act.

22. The learned Sole Arbitrator shall fix his fees in consultation with the parties.

23. The parties shall share the arbitrator's fee and arbitral costs, equally.

24. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

25. Needless to say, nothing in this order shall be construed as an expression of this court on the merits of the case.

26. The present petition stands disposed of in the above terms.

SACHIN DATTA, J.

MARCH 22, 2024
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