



2024:DHC:7195



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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 1046/2024

M/S CHINTELS INDIA LIMITED

.....Petitioner

Through: Mr. Rajshekhar Rao, Sr. Adv.
with Mr. Kotla Harshavardhan, Mr. Raghav
Kohli, Mr. Vishakha Gupta and Mr. Ritikesh
and Ms. Gayatri Gupta, Advs.

versus

M/S BHAYANA BUILDERS PVT. LTD.

.....Respondent

Through: Ms. Manmeet Kaur, Mr.
Gurtejpal Singh and Ms. Aashna Arora,
Advs.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

ORDER (ORAL)

17.09.2024

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

2. The dispute arises in the context of a Contract dated 14 March 2011 executed between the petitioner and the respondent. The petitioner claims that the respondent is in breach of the contract.

3. A notice invoking arbitration was issued by the petitioner to the respondent on 6 January 2023. The respondent replied on 6 February

¹ "the 1996 Act", hereinafter



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2023.

4. As the parties have not been able to arrive at a consensus regarding the arbitration, the petitioner has filed the present petition before this Court under Section 11(6) of the 1996 Act.

5. Ms. Manmeet Kaur, learned Counsel for the respondent, emphatically contends that this dispute is not arbitrable, as it has already weathered one round of arbitration and the award passed based on that occasion was challenged and upheld by the court. As such, she submits that these claims would be barred by *res judicata*.

6. The law regarding the scope of jurisdiction vested in a court under Sections 11(5) and (6) has undergone a complete change with the recent decision in *SBI General Insurance Co Ltd v Krish Spinning*². In para 114 of the decision, the Supreme Court clearly holds, following its earlier decisions in *In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act 1966 and the Indian Stamp Act 1899*³, that “the scope of inquiry at the stage of appointment of arbitrator is limited to the scrutiny of *prima facie* existence of the arbitration agreement, and *nothing else*”. It is also observed that the law laid down in earlier decisions, including *Vidya Drolia v Durga Trading Corporation*⁴ and *NTPC Ltd v SPML Infra Ltd*⁵ can no longer be followed in view of the presently

² 2024 SCC OnLine SC 1754

³ (2024) 6 SCC 1

⁴ (2021) 2 SCC 1

⁵ (2023) 9 SCC 385



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existing conspectus of arbitration law.

7. This Court has, in several decisions, followed ***SBI General Insurance***.

8. The only other aspect which can be seen by a Section 11 Court, according to ***SBI General Insurance***, is whether the Section 11 petition has been filed within three years of the notice issued under Section 21 of the 1996 Act. That requirement is satisfied in the present case.

9. Ms. Manmeet Kaur has placed reliance on a judgment of the High Court of Calcutta in ***Tantia Constructions Ltd v UOI***⁶, on the ground that, in the case of an earlier award dealing with the same issue, the High Court of Calcutta had refused to refer the dispute to arbitration, and the decision was upheld by the Supreme Court *vide* order dated 15 July 2022 in SLP (C) 10722/2022 (***Tantia Constructions Ltd v UOI***).

10. The decision in ***Tantia Constructions*** was rendered prior to the enunciation of law in ***SBI General Insurance*** which is by a bench of three Hon'ble Judges.

11. Given the position of law in ***SBI General Insurance***, it is not possible for this Court to examine the aspect of *res judicata*, raised by

⁶ Order dated 16 September 2021 in AP 353/2020



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Ms. Manmeet Kaur.

12. However, it is clarified that the said aspect as well as all other questions of facts and law would be open to be urged before the learned Arbitral Tribunal.

13. The arbitration clause governing the Contract between the parties reads thus:

“47. Settlement of Disputes/ Arbitration:

All disputes and differences of any kind whatsoever arising out of or in connection with this Contract whether during the progress of the work or after their completion shall be referred in writing by the Contractor to the Owner's Representative, and the Owner shall within 10 days from receipt make and notify its decisions thereon in writing to the Contractor.

Decisions, directions, clarifications, measurements, drawings and certificates with respect to any matter the decision for which is specially provided for by these or other special conditions to be given and made by the Owner's Representative or by the PMC are matters which are referred to hereinafter as exempted matters and shall be final and binding upon the Contractor and shall not be set aside on account of non-observance of any formality, any omission, delay or error in proceeding in or about the same or on any other ground or for any reason and shall be without appeal. They shall be specifically excluded from the scope of arbitration proceedings hereinafter referred to.

Subject to the aforesaid in the event of any dispute or difference between the parties hereto as to the construction or operation of this Contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Owner of any certificate to which the Contractor may claim to be and entitled to or if the Owner fails to make a decision within the aforesaid time, then and in any such case, but except in any of the exempted matters referred to in the above clause, the Contractor after 90 days of his presenting his final claim on the disputed matters, may demand in writing that the dispute or difference be referred to and settled by two arbitrators,



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one to be nominated by the Owner and the other by the Contractor. The award of the Arbitrators or the Umpire, who shall be appointed by the two arbitrators if there is any disagreement between the two Arbitrators before entering on the reference, shall be final and binding on both the parties. The provision as per the Arbitration and Conciliation Act 1996 and subsequent modifications thereon, shall apply to such arbitration. The arbitration venue shall be at New Delhi. The procedure for the arbitration shall be determined by the arbitrators. Costs of such arbitration shall be equally shared between the Owner and the Contractor.

The Contractor shall not, except with the consent in writing of the Owner, the Architect, in any way delay the carrying out of the Work by reason of such matter, question or dispute being referred to arbitration but shall proceed with the work with all due diligence and shall, until the decision of the arbitrator is given, abide by the decision of the Architect and no award of the arbitrator shall relieve the Contractor of his obligations to adhere strictly to the Owner, the Owner's Representative's or the PMC's instructions with regard to the actual carrying out of the Work except as specifically affected by such award."

14. The petitioner, in its Section 21 notice dated 6 January 2023, has appointed Dr. Satish Chandra, a Hon'ble retired Judge of High Court of Allahabad as its arbitrator. The respondent was called upon to nominate its nominee arbitrator.

15. As the respondent did not do so, the petitioner has filed the present petition before this Court to appoint an arbitrator on behalf of the respondent.

16. Accordingly, this Court requests Hon'ble Ms. Justice Gita Mittal, an eminent former Chief Justice of the High Court of Jammu and Kashmir, who has also adorned the Bench of this Court, to arbitrate in the matter on behalf of the respondent.



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17. The learned arbitrator is requested file the requisite disclosure under Section 12(2) of the 1996 Act prior to entering on reference.

18. The fees of the learned arbitrators shall be decided by the learned arbitrators in consultation with the parties.

19. Both the learned arbitrators would proceed to appoint the presiding arbitrator in accordance with law.

20. The petition stands disposed of in the aforesaid terms.

C. HARI SHANKAR, J.

SEPTEMBER 17, 2024

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Click here to check corrigendum, if any