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

% **Date of Decision: 05.04.2024**

+ ARB.P. 1239/2022

GAJENDRA SINGH Petitioner

Through: Mr. Sanjoy Bhaumik, Adv.

versus

DELHI URBAN SHELTER IMPROVEMENT BOARD

..... Respondent

Through: Mr. Naveen Raheja, Ms. Meenakshi
Jha and Mr. Anant Vijay Singh, Adv.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (ORAL)

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('the A&C Act') has been filed by the petitioner seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.
2. The arbitration agreement between the parties is incorporated in an agreement dated 31.03.2018, entered into between the parties for carrying out the work of "*Construction of Community Facility Centre/C. Hall Building at Dakshinpuri*".
3. A letter of acceptance was issued in favour of the petitioner on 15.03.2018. The contract agreement was thereafter executed on 31.03.2018. The contract agreement contemplated that the date of issuance of the letter of acceptance shall be date for the purpose of commencement of work. The scheduled period for completion of the work was "365 days from the start of



work”. Admittedly, the said period came to an end on March, 2019.

4. The contract agreement contains an Arbitration Clause in the following terms:

“Clause 25 -Settlement of Disputes & Arbitration

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

(i) If either party considers any work demanded of or denied to it to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge or if the Engineer in Charge considers any act or decision of the contractor on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable and is disputed, such party shall promptly within 15 days of the arising of the disputes request the Chief Engineer or where there is no Chief Engineer, the Member Engineer (CE/ME) who shall refer the disputes to Dispute Redressal Committee (DRC) within 15 days along with a list of disputes with amounts claimed if any in respect of each such dispute. The Dispute Redressal Committee (DRC) shall give the opposing party two weeks for a written response, and, give its decision within a period of 60 days extendable by 30 days by consent of both the parties from the receipt of reference from CE/ME. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule ‘F’. Provided that no party shall be represented before the Dispute Redressal Committee by an advocate/legal counsel etc. If the Dispute Redressal Committee (DRC) fails to give its decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC) or expiry of time limit given above, then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer, DUSIB, in charge of the work or if there be no Chief Engineer, the Member Engineer of the DUSIB or if there be no Member Engineer, the Chief Executive Office, DUSIB (CE/ME/CE) for appointment of arbitrator on prescribed proforma as per Appendix XV, under intimation to the other party.

It is a term of contract that each party invoking arbitration must exhaust the aforesaid mechanism/settlement of claims/disputes prior to invoking arbitration.

The CE/ME/CEO shall in such case appoint the sole arbitrator or one



of the three arbitrators as the case may be within 30 days of receipt of such a request and refer such disputes to arbitration. Wherever the Arbitral Tribunal consists of three Arbitrators, the contractor shall appoint one arbitrator within 30 days of making request for arbitration or of receipt of request by Engineer-in-charge to CE/ME/CEO for appointment of arbitrator, as the case may be, and two appointed arbitrators shall appoint the third arbitrator who shall act as the Presiding Arbitrator. In the event of

- a. A party fails to appoint the second Arbitrator, or*
- b. The two appointed Arbitrators fail to appoint the Presiding Arbitrator, then The Chief Executive Officer, DUSIB shall appoint the second or Presiding Arbitrator as the case may be.*

Disputes or difference shall be referred for adjudication through arbitration by a Tribunal having sole arbitrator where Tendered amount is Rs. 100 Crore or less. Where Tendered Value is more than Rs. 100 Crore, Tribunal shall consist of three Arbitrators as above. The requirements of the Arbitration and Conciliation Act, 1996 (26 of 1996) and any further statutory modifications or reenactment thereof and the rules made there under and for the time being in force shall be applicable.

It is also a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed, if any, in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the decision of the DRC.

It is also a term of this contract that any member of the Arbitration Tribunal shall be a Graduate Engineer with experience in handling public works engineering contracts at a level not lower than Chief Engineer (Joint Secretary level of Government of India). This shall be treated as a mandatory qualification to be appointed as arbitrator.

Parties, before or at the time of appointment of Arbitral Tribunal may agree in writing for fast track arbitration as per the Arbitration and Conciliation Act, 1996 (26 of 1996) as amended in 2015 whereby the counter claims if any can be directly files before the Arbitrator without any requirement of reference by the appointing authority, the Arbitrator shall adjudicated on only such dates as are referred to him by the appointing authority and give separate award again each disputes and referred to him an in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/- the Arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid as per the Act.

The place of arbitration shall be as mentioned in Schedule F. In case there is no mention of place of arbitration, the arbitral tribunal shall determine the place of arbitration. The venue of the arbitration shall be such place as may be fixed by the Arbitral Tribunal in consultation with both the parties. Failing any such agreement, then the Arbitral Tribunal shall decide the venue.”



5. Disputes having arisen between the parties, a communication dated 12.10.2020 was addressed by the petitioner to the Executive Engineer stating as under:

“

Dated: 12.10.2020

To

*The Executive Engineer,
CO6, DUSIB, Maharani Bagh,
New Delhi-110014.*

Name of work: MLA LAD FUND, SH: C/o Community Facility Centre/C. Hall Building at Dakshinpuri. (Project ID: 000010274).

*Ref.:-1. Your office letter no. AL-78/WJ..../2017-18/D-332 dated 15.03.2018.
2. Our letter dated 21.03.2018.
3. Your office letter no. WJ-6981(16)..../D-379 dated 29.03.2018.
4. Our letter dated 20.04.2018.
5. Our letter dated 17.06.2019.*

Dear Sir,

*1. Your goodself awarded the above mentioned work for Rs.1,34,12,124 vide your letter dated 15.03.2018 with period of completion of work of 365 days i.e. upto 30.03.2019.
2. We deposited the Performance Guarantee of .Rs 6,71,000 as TDR dated 20.03.2018, valid upto 20.02.2.020 vide our letter dated 20.03.2018. In this way we complied the requirements to start the work.
3. Your goodself, vide your letter dated 29.03.2018 acknowledged the receipt of Performance Guarantee and asked us to take over the possession of site for starting the work. But when the site was not handed over to us inspite of our various requests to the Assistant Engineer, we informed you this fact and requested you to hand over the site for starting the work. You neither replied to our letter nor handed over the site to us inspite of our various meetings and our letter dated 17.06.2019 by which we again informed you that site was still not handed over to us and again requested you to hand over the site for starting the work but all this has been waste so far.
4. Thus, a long period of 2 years and 6 months has elapsed whereas the stipulated period for completion of work was 31.03.2019. You have neither conveyed your decision, or handed over the site. We inform you goodself that we are still prepared for execution of the work. It is requested to kindly convey your decision in this matter at the earliest, say upto 31.10.2020 to enable us to act accordingly.
5. it is also to inform your goodself that we have been deprived of earning*



our profit by completing this work upto 31.03.2019 for no fault on our part. It is important to note that we are contractor by profession and the only source of earning for our bread-butter is by execution of our works. Therefore, we again request your goodself to kindly decide the matter at the earliest so that we may earn our due profit by execution of this work.

We are grateful to your goodself for your necessary action as requested above at the earliest.

Yours faithfully

*-sd-
(Gajendra Singh)"*

6. No response is stated to have sent by the respondent to this communication. According to learned counsel for the petitioner, the said communication dated 12.10.2020, whereby the Executive Engineer of the respondent was called upon to take decision in the matter was in terms of the stipulation contained in Clause 25, whereby the petitioner was required to submit his representation to the Engineer In-charge.
7. It is the contention of learned counsel for the petitioner that the concerned Executive Engineer to whom the communication dated 12.10.2020 was sent was acting as the Engineer In-charge in respect of the project in question.
8. Thereafter, the termination notice dated 24.05.2022 was sent by the petitioner to the Executive Engineer of the respondent whereby the petitioner sought to terminate the contract.
9. Again, vide letter dated 18.06.2022, sent by the petitioner to the Superintending Engineer of the respondent, the concerned Superintending Engineer was intimated about the alleged loss suffered by the petitioner and was requested to make the requisite payment to the petitioner. The same was followed by communications dated 11.07.2022, 01.08.2022 and 04.08.2022,



addressed to the Chief Engineer.

10. None of the aforesaid communications are stated to have received any response from the respondent. Finally, the petitioner addressed a letter dated 23.08.2022 to the Chief Engineer, requesting that a Disputes Redressal Committee be constituted to adjudicate the disputes between the parties. The same was also not responded to by the respondent.

11. Finally, an arbitration notice dated 20.09.2022 was sent by the petitioner to the respondent whereby the petitioner invoked the arbitration clause contained in Clause 25 of the GCC and sought appointment of an arbitrator. Even the said letter was not responded to by the respondent.

12. It is noticed that the concerned dispute resolution clause i.e. Clause 25 required the petitioner, in the first instance, to approach the concerned Engineer In-charge in the event of any disputes between the parties. The petitioner has shown that after the disputes arose between the parties, the concerned communication to the Engineer In-charge was sent on 12.10.2020. The petitioner invoked the arbitration on 20.09.2022 only after exhausting the rigours of Clause 25.

13. In these circumstances, learned counsel for petitioner submits that an independent Sole Arbitrator is required to be appointed to adjudicate the disputes between the parties.

14. The respondent has sought to resist the present petition primarily on the ground that the disputes/claims sought to be raised by the petitioner are hopelessly time barred. It is contended that the contract in question was entered into on 31.03.2018. The period contemplated for completion of work expired in March, 2019. It is submitted that the invocation of the arbitration was after expiry of 03 years from the stipulated date of completion of work.



It is submitted that the claims sought to be raised being hopelessly time barred, the present petition is required to be dismissed. It is emphasized that in terms of Article 55 and Article 137 of the Limitation Act, the prescribed period of limitation for instituting the claim expired on 15.05.2021 (i.e. upon expiry of 3 years from 15.05.2018, the scheduled date for handing over the site to the petitioner).

15. Having considered the respective contentions of parties, I find no impediment in constituting an arbitral tribunal to adjudicate the disputes between the parties and also to rule upon the objection/s taken by the respondent as regards the claims sought to be raised by the petitioner, being time barred. The reasons are enumerated hereunder.

16. Limitation is normally a mixed question of fact and law, and would lie within the domain of the arbitral tribunal. In **BSNL v. Nortel Networks (India) (P) Ltd.**¹, it has been held as under:

“47. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.

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53.2. In rare and exceptional cases, where the claims are ex facie time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.”

17. Moreover, in terms of the settled legal position, an arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability and unless the dispute is manifestly and/or ex facie non-arbitrable, the rule is to refer the dispute to arbitration. In **Vidya Drolia v.**



Durga Trading Corpn.², it has been held as under:

“154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”

18. Recently, in ***Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re***³, it has been held as under:

“163. The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence-competence, only prima facie proof of the existence of an arbitration agreement must be adduced before the referral court. The referral court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the

¹ (2021) 5 SCC 738

² (2021) 2 SCC 1

³ 2023 SCC OnLine SC 1666



arbitral tribunal. This position of law can also be gauged from the plain language of the statute.

*164. Section 11(6A) uses the expression “examination of the existence of an arbitration agreement.” The purport of using the word “examination” connotes that the legislature intends that the referral court has to inspect or scrutinize the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression “examination” does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provides that the arbitral tribunal can “rule” on its jurisdiction, including the existence and validity of an arbitration agreement. A “ruling” connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the referral court is only required to examine the existence of arbitration agreements, whereas the arbitral tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by this Court in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*”*

19. The issue of limitation in the present case has to be adjudicated in the light of the fact that (i) the performance guarantee that was submitted by the petitioner in terms of Clause 1 of the agreement between the parties was never returned by the respondent to the petitioner and in fact, continues to be with the respondent till date; (ii) although the time period for completion of the work expired in March, 2019, the agreement continued to subsist and was not formally terminated. It was the petitioner himself which was constrained to terminate the agreement only on 24.05.2022. Even prior thereto, the petitioner is stated to have addressed communications to the Executive Engineer, the Superintending Engineer and the Chief Engineer, as contemplated in Clause 25 (supra), which were not responded to. Even thereafter, the petitioner continued to follow up with the respondent for constituting DRC prior to sending the invocation notice on 20.09.2022.

20. In these circumstances, the issue as to whether the claims/invocation of arbitration is time barred, is itself an issue which requires an intricate



factual inquiry, which is best left to be done by a duly constituted arbitral tribunal.

21. Learned counsel for the petitioner also submits that in terms of the order dated 10.01.2022 passed by the Supreme Court in Suo Motu Writ Petition (Civil) No. 3/2020, the period from 15.03.2020 till 28.02.2022, is required to be excluded for the purpose of limitation and the invocation of arbitration is within the period of limitation. This issue came up for consideration before this court in ***Sudhanshu Bhardwaj v. AIR India Ltd.***⁴, wherein it has been held that “*the entire period from 15.03.2020 to 28.02.2022 is required to be excluded in computing the period of limitation. It follows that the period of limitation would stop running on 15.03.2020 and would start running again on 01.03.2022.*”

22. Considering the aforesaid aspects, I find no impediment in appointing an independent Sole Arbitrator to adjudicate the disputes between the parties as mandated in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.***⁵, and also to rule upon the objection/s taken by the respondent.

23. Accordingly, Mr. Ganesh Khemka, Advocate (Mob. No.:9463441118) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

24. The respondent shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability/limitation, which shall be duly considered and decided by the learned arbitrator, in accordance with law. It is made clear that the observations made hereinabove are only for the purpose of deciding the present petition and shall not preclude the learned arbitrator

⁴ 2023 SCC OnLine Del 8177

⁵ (2020) 20 SCC 760



from taking an independent view after considering the facts and circumstances of the present case.

25. 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.

26. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

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

28. 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.

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

30. The present petitions stand disposed of in the above terms

SACHIN DATTA, J

APRIL 5, 2024/cl