



2024:DHC:6807



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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 1193/2023

M/S KESPL-ESWAR-ABCPL JV

.....Petitioner

Through: Mr. Saransh Kumar, Adv.

versus

M/S KNR-JKM JV

.....Respondent

Through: Ms. Kiran Suri, Sr. Adv. with
Mr. Sidhant Dwibedi, Mr. Vidushi Garg and
Mr. Manoj Kumar, Advs.**CORAM:****HON'BLE MR. JUSTICE C. HARI SHANKAR****JUDGMENT (ORAL)**

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03.09.2024

1. The Chief Engineer, Highway, PWD, Government of Arunachal Pradesh contracted the task of two laning of a road from Gobuk-Mariyang-Sihjon Nallah Road in the State of Arunachal Pradesh to M/s KNR-JKM JV¹, a joint venture of KNR Constructions Ltd² and JKM Infra Projects Ltd³.

2. The JV entered into a sub-contract with the petitioner, for executing the said work on 24 January 2013. The sub-contract agreement⁴ contained the following dispute resolution clause:

“Dispute resolution: Any dispute between the parties in connection with the execution of the work shall be resolved amicably by the representatives of both the parties failing which the matter howsoever, shall be referred to a common Arbitrator, if agreed upon by all or otherwise to three Arbitrators will nominate the

¹ “the JV”, hereinafter

² “KNR” hereinafter

³ “JKM” hereinafter

the 1st SCA”, hereinafter



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presiding arbitrator and such Arbitration shall be governed by the provisions of the Arbitration Act for the time being in force and the amendments thereon are applicable for Arbitration proceedings. The places of Arbitration shall be at DELHI and the language of arbitration proceedings shall be in English.”

3. Thus, it would be seen that, as per the dispute resolution clause in the 1st SCA, Delhi was the arbitral seat.

4. I may note, even here, that Ms. Kiran Suri, learned Senior Counsel for the respondent, emphatically contended that, the 1st SCA was executed by the petitioner not with the JV but with JKM. She points out that the contract, on each page, was signed only by the authorised signatory of JKM.

5. Mr. Saransh Kumar, learned Counsel for the petitioner, submits, *per contra*, that JKM had signed the 1st SCA only because, at that time, the JV had authorised JKM to do so.

6. The Supreme Court has, in its recent decision in ***SBI General Insurance Co Ltd v Krish Spinning***⁵, limited the scope of examination by a court exercising jurisdiction under Section 11(6) of the 1996 Act to two aspects alone. The first is whether there exists an arbitration agreement between the parties. The second is whether the petition under Section 11(6) has been filed within three years of the issuance of the notice under Section 21 of the 1996 Act.

7. Importantly, the Supreme Court has also observed that, even while examining these aspects, the court is only to undertake a *prima*



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facie exercise. In arriving at a decision on these aspects, if any detailed evaluation of the documents is required, the Supreme Court clearly holds that the said exercise has to be relegated to the arbitral tribunal.

8. On a plain reading, the 1st SCA is, *ex facie*, executed between the JV and the petitioner. This is apparent from the opening recital in the first SCA, which read thus:

“This Agreement is made and executed on this 24th day of January, 2013 at New Delhi

Between

M/s. KNR- JKM JV, a Joint Venture formed between and by M/s. KNR Constructions Limited, KNR House, 3rd&4th Floors, Plot No 113&114 Phase -1, Kavuri Hills, Jubilee Hills Road No 36, Hyderabad -500033 and M/s. JKM Infra Projects Limited, A-14, Sector -7, Noida-201301, Uttar Pradesh, as a Lead Partner represented by its authorized signatory Mr. Vaibhav Jalan, The Jt. Managing Director (herein after referred to as the "CONTRACTOR" or "JKM") of the First part.

And

M/s. KESPL- ESWAR-ABCPL JV, a Joint Venture formed between and by M/s. Absolute Built Concept Private Limited, having its registered office at Plot No. 23, GF, Sunrise Layout, Yelechenahalli, Bangalore- 560 062, M/s Eswar Enterprises# 54 - 20/6-15, plot no 25, Ground Floor, Kanakadurga Gazetted Officers Colony, 2nd lane 1st cross road, Vijayawada - 520 028 and M/s. Katragadda Engineering Services Private Limited having its registered office at # 402 Kaarnik Towers, 6-2-967, Khairatabad, Hyderabad -500 004, as a Lead Partner; represented by its Authorised Signatory Mr. T. Hari Babu, Director Operations (hereinafter referred to as the "SUB-CONTRACTOR" Or "KESPL-ESWAR-ABCPL JV",) of the Second party.”

9. *Prima facie*, therefore, and in exercise of the limited jurisdiction vested in this Court by Section 11(6) of the 1996 Act, it is not possible for this Court to hold that the first SCA was not executed between the

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JV and the petitioner, but between the JKM and the petitioner. Nonetheless, this is only a *prima facie* view, and for the limited purposes of deciding the present petition under Section 11(6), and it shall be open to the respondent to convince the arbitral tribunal, if it so desires, that the first SCA was in fact not executed between the petitioner and the JV but between the petitioner and JKM. This aspect is left open for agitation before the learned Arbitral Tribunal.

10. Ms. Kiran Suri submits that the first SCA was terminated on 6 June 2014 and that the petitioner acknowledged this fact in a letter dated 8 September 2014 addressed to the respondent. Consequent thereto, she points out that, on 17 February 2016, the two constituents of the JV, namely, KNR and JKM, authorised KNR, by a power of attorney, to represent the JV in future transactions.

11. This was followed by a sub-contract between the JV and KNR, executed on 31 March 2016. Acting on the basis of the authority conferred by the power of attorney dated 17 February 2016 and the sub-contract dated 31 March 2016, KNR entered into a second sub-contract agreement⁶, with the petitioner, on 1 April 2016.

12. The petitioner contends that the work that the petitioner was required to execute under the 2nd SCA was part of the work covered by the 1st SCA.

13. The 2nd SCA also envisaged resolution of dispute by arbitration. Clause 32 of the 2nd SCA reads thus:



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“32. Dispute Resolution: Any dispute between the parties in connection with the execution of the work shall be resolved amicably by the representative of both the parties failing which the matter however, shall be referred to a common Arbitrator, if agreed upon by both or otherwise such Arbitration shall be governed by the provisions of the Indian Arbitration Act, 1996 (Amended) for the time being in force and the amendments thereon are applicable for Arbitration proceedings. The place of Arbitration shall be at Hyderabad, Telangana and the language of arbitration proceedings shall be in English. The jurisdiction of courts shall be Hyderabad, Telangana.”

14. Thus, unlike the 1st SCA, the arbitral seat, as per the 2nd SCA, was Hyderabad.

15. The arbitration clause in the 1st SCA envisaged an initial reference of the dispute to a commonly agreed sole arbitrator. If no agreement was possible in that regard, the arbitration clause envisaged the arbitration being conducted by a three-member arbitral tribunal, of which each party was to nominate one arbitrator and the two arbitrators so nominated would nominate the presiding arbitrator.

16. The petitioner therefore addressed a Section 21 notice to the JV as well as to KNR on 24th April 2023, proposing arbitration by a sole arbitrator, for which purpose the petitioner suggested the names of two practicing advocates. The said notice merits reproduction, in *extenso*, thus:

“BY POST/ E-MAIL

24th April 2023

To:

1. M/s KNR-JKM JV
C-27, Sector-26, Noida, Uttar Pradesh - 201 301;

2. M/s KNR Constructions Limited
KNR House, 3rd & 4th Floor, Plot No. 114, Phase - I,

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Kavuri Hills, Hyderabad, Telangana - 5000033.

Our Client:

M/s KESPL-ESWAR-ABCPL JV

#402, Kaarnik Towers, 6-2-967,

Khairatabad, Hyderabad - 500 004.

Subject: Notice seeking appointment of Arbitrator under the dispute resolution clauses of the Sub-Contract Agreements dated 24.01.2013 and 01.04.2016 respectively.

Dear Sirs

We are acting for, and on behalf of, our Client on whose instructions, we address you as under:

1. As you are aware, KNR-JKM JV were awarded the works for execution of "2-Laning Gobuk-Mariyang-Sijhon Nallah from Km 26.210 (Gobuk) to 75.485 (Sijhon Nallah) (Existing Ch. 27.000-75.000) (Net Length-49.275 Km) in Arunachal Pradesh under Package of SARDP-NE" bearing Job No. Ar Package/SARDP-NE/YP/ ArP/PWD/2011-12-48 (hereinafter, referred to as the "**Project**") by the Chief Engineer, Highway, PWD Itanagar (hereinafter, referred to as the "**Employer**").

2. The Project was awarded to KNR-JKM JV by way of the Letter of Acceptance No. CEAP(HW)/WTC-180/GM/2011-12/57-62 dated 06.04.2012. Pursuant to the aforesaid, an Agreement came to be executed between KNR-JKM JV and the Employer on 24.04.2012 (hereinafter, referred to as the "Main Contract").

3. On 24.01.2013, a Sub-Contract Agreement came to be executed between KNR-JKM JV and our Client which awarded the works for execution of the Project to our Client on a back-to-back basis as per the terms and conditions of the Main Contract.

4. Thereafter, on 01.04.2016, another Sub-Contract Agreement came to be executed between our Client and KNR Construction Limited, which is one of the JV partners of KNR-JKM JV, in respect of execution of a part of the works of the Project, viz. "[balance work of Excavation, GSB, WMM, Bituminous work, Culverts, Minor and Major bridges, drains, retaining walls protection and any other allied works as on 31.03.2016 at site in between Km 47.000 (Mariyang) to Km 75.485 (Sijhon) on Two Laning of Gobuk-Mariyang-Sijhon Nallah Road from Km 26.210 to Km 75.485 under SARDP - NE in Arunachal Pradesh".

5. During the execution of the Project, several disputes arose

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between our Client and KNR-JKM JV, including with KNR Construction Limited, in respect of several aspects of the Project. Ultimately, our Client issued a letter on 09.01.2022 bearing reference no. KESPL-ESWAR-ABCPL (JV)/HYDERABAD/A-1/2022, whereby our Client, inter alia, listed out its claims against KNR-JKM JV and requested for such claims to be settled amicably. Be that as it may, no response to the aforesaid letter has been received by our Client till date either from KNR-JKM JV or KNR Construction Limited.

6. In view of the foregoing circumstances, all efforts of our Client to resolve the disputes under the two Sub-Contract Agreements dated 24.01.2013 and 01.04.2016 have failed. Thus, our Client intends for the disputes to be referred to a Sole Arbitrator in a consolidated arbitration in accordance with the dispute resolution clauses of the two Sub-Contract Agreements, both of which envisage the appointment of a common Arbitrator by the parties.

7. Accordingly, our Client proposes the following two (2) names, amongst which one name may be chosen by KNR-JKM JV and KNR Construction Limited: (i) Mr. Shiv Mangal Sharma, Advocate, Supreme Court of India; and, (ii) Mr. Prateek Chaddha, Advocate-on-Record, Supreme Court of India.

8. Thus, our Client calls upon KNR-JKM JV and KNR Construction Limited to select one of the names from the list of two names provided hereinabove as the commonly appointed Sole Arbitrator in for the purpose of adjudicating all disputes between the parties under the Sub-Contract Agreements dated 24.01.2013 and 01.04.2016, within a period of thirty (30) days of receipt of this Notice, failing which our Client shall be constrained to avail any rights, claims and remedies that may be available to our Client in law, or otherwise.

9. Please further note that this request for arbitration has been issued for and on behalf of our Client without prejudice to any of our Client's any rights, claims and remedies that may be available to our Client in law, or otherwise.

Yours sincerely
Sd/-
Saransh Kumar”

17. The respondent responded to the said notice on 3 May 2023, expressing its reluctance to arbitration of the disputes by either of the

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persons named in the petitioner's notice. The reply also sought to contend that the two SCAs were independent and that, therefore, the petitioner was erroneously seeking to conflate the disputes in both the SCAs.

18. The petitioner thereafter, on 27 May 2023, issued a second notice under Section 21 of the 1996 Act to the Counsel who had addressed the reply dated 3 May 2023, denying the contention that the claims of the petitioner in the two SCAs could be vivisected.

19. The petitioner, in this case, nominated a practicing counsel of this Court as the petitioner's nominee arbitrator, following the second protocol envisaged by the arbitration clause in the first SCA, of referring the matter to an arbitral tribunal of three arbitrators. The respondent was, therefore, called upon to nominate its arbitrator.

20. The respondent responded to the said Section 21 notice on 19 June 2023.

21. As the parties have not been able to come to an agreement with respect to arbitration of the dispute, the petitioner has filed the present petition before this Court under Section 11(6) of the 1996 Act.

22. Ms. Kiran Suri submitted that the 1st SCA was executed not with the JV but with JKM alone; that the 1st SCA stood terminated on 6 June 2014 and, whereafter by power of attorney dated 17 February 2016 and sub-contract dated 31 March 2016, the execution of the project was sub-contracted by the JV to KNR; and that it was KNR

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which had entered into the 2nd SCA with the petitioner on 1 April 2016. She, therefore, submits that the two SCAs are completely independent of each other. They have been executed by the petitioner with different parties. The work that is required to be executed under the two sub-contracts is also different. The arbitration clause in the two sub-contracts is also different and the arbitral seat in one case is Delhi and in the second is Hyderabad.

23. In these circumstances, she further submits that the petitioner was not justified either in conflating his claims in both the SCAs or issuing a Section 21 notice covering all the claims in both the SCAs. She, therefore, submits that even the Section 21 notices that have been issued in the present case do not conform to the requirement of Section 21 and, therefore, there is no valid initiation of the arbitral process at all.

24. Mr. Saransh Kumar, learned Counsel for the petitioner, rejoining, submits that his client is willing to restrict his claim to the 1st SCA and does not seek any claim with respect to the 2nd SCA. He also contests Ms. Suri's contention that the 1st SCA was executed with JKM alone. He submits that the first SCA was executed by the petitioner with the JV, and not with JKM alone.

25. Though the Section 21 notices have been issued to both the JV and to KNR, he submits that, as the claims of the petitioner against the JV, relatable to the 1st SCA, are covered by both the Section 21 notices, issued by the petitioner on 24 April 2023 and 27 May 2023, the mere fact that KNR may also have been made an addressee in the

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two Section 21 notice cannot disentitle the petitioner to have his disputes with the JV, qua the 1st SCA, referred to arbitration.

26. Mr. Saransh Kumar further submits that, though, going strictly by the arbitration clause in the 1st SCA, the dispute would have to be referred to a three-member arbitral tribunal, it would be in the interests of expediency if the court appoints a sole arbitrator to arbitrate on the dispute.

27. Ms. Suri, learned Senior Counsel for the respondent, even while maintaining all her objections to the maintainability of the arbitration, including the issue of whether there was any arbitration agreement in existence at all between the petitioner and the respondent (as she submits that the 1st SCA was executed not with the JV but with JKM alone), as well as her submission that the claims are barred by time, has no objection to the disputes being referred to arbitration.

28. Learned Counsel for the petitioner submits that the quantum of the petitioner's claims would be in the region of approximately ₹ 200 crores.

29. In the circumstances, this Court disposes of the present petition in the following terms:

(i) The Court requests Hon'ble Mr. Justice N V Ramana (Mob: 9818000162), learned former Chief Justice of India, to arbitrate on the disputes between the parties. The learned arbitrator would fix his fees in consultation with the parties.

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

(iii) The arbitration shall take place strictly within the confines of the 1st SCA. The submission of Mr. Saransh Kumar that petitioner is restricting his claim to the 1st SCA and does not seek to rely on the 2nd SCA is noted and the petitioner shall remain bound by the said submission.

(iv) Except for the above aspect, all contentions of both sides are left open for being agitated before the learned arbitrator. It shall be open to the respondent to contest the arbitrability of the dispute, and also whether there exists any contractual relationship between the petitioner and the respondent in respect of the 1st SCA. It shall also be open to the respondent to raise all other issues on merits both preliminary as well as including the issue of limitation.

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

C. HARI SHANKAR, J

SEPTEMBER 3, 2024/dsn

Click here to check corrigendum, if any

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