



2024:DHC:6127



\$~52 & 53

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

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Decided on: 13.08.2024+ **ARB.P. 1240/2024**

M/S BKB TRANSPORT P LIMITED

.....Petitioner

versus

NTPC LTD

.....Respondent

+ **ARB.P. 1242/2024**

M/S BKB TRANSPORT PRIVATE LIMITED

.....Petitioner

versus

NTPC LTD

.....Respondent

Appearance:-

Mr. Vivek Raja, Mr. Kaushik Poddar & Ms. Shreya Tewari, Advocates for M/s BKB Transport Pvt. Ltd. in Item Nos. 52 & 53.

Mr. Puneet Taneja, Mr. Anil Kumar, Mr. Manmohan Singh Narula & Mr. Amit Yadav, Advocates for NTPC Ltd. in Item Nos. 52 & 53

CORAM:**HON'BLE MR. JUSTICE PRATEEK JALAN****PRATEEK JALAN, J. (ORAL)****I.A. 36162/2024(Exemption) in ARB.P. 1240/2024****I.A. 36192/2024 (Exemption) in ARB.P. 1242/2024**

Exemptions allowed, subject to all just exceptions.

The applications stand disposed of.

ARB.P. 1240/2024 & ARB.P. 1242/2024

1. The petitioner has filed these two petitions under Section 11 of the Arbitration and Conciliation Act, 1996 ["the Act"], for appointment of an arbitrator to adjudicate disputes arising out of two agreements between



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the parties - one dated 13.05.2022 and the other dated 17.06.2022 [“contract agreements”]. The contract agreements were executed pursuant to purchase orders issued by the respondent for transport of coal. They are admittedly in similar terms, and therefore both petitions are disposed of by this common judgment.

2. The petitioner claims that disputes arose with regard to non-payment of invoices under the contract agreements, as a result of which it invoked the arbitration clauses contained therein, by separate letters dated 12.03.2024. The letters did not elicit a response, but the respondent has purported to constitute an “Expert Settlement Council” [“ESC”] for settlement of the disputes. However, the petitioner does not wish to accept the reference to the ESC, and instead seeks adjudication by arbitration.

3. Mr. Puneet Taneja, learned counsel for the respondent, raises two issues - one regarding the jurisdiction of this Court to entertain these petitions, and the second regarding compliance with the pre-arbitration procedure specified in the contract agreements.

4. Adjudication on both these points requires reference to certain provisions of the contract agreements, General Conditions of Contract [“GCC”] and Special Conditions of Contract [“SCC”], which are set out below¹ :

“CONTRACT DOCUMENT

7.0 SETTLEMENT OF DISPUTES

*7.1 It is specifically agreed by and between the parties that all the differences or disputes arising out of the Contract or touching the subject matter of the Contract **shall be decided by process of***

¹ The provisions of these documents are admittedly identical in both cases.



Settlement of Disputes as specified in Clause 7 of the General Conditions of the Contract as amended and the provisions of the Arbitration & Conciliation Act, 1996 including any statutory modifications or re-enactment thereof and the rules made there under shall apply **and Delhi Courts alone shall have exclusive jurisdiction in all matters arising under this Contract.** The arbitrator shall give reasoned/speaking award.

* **As mentioned in SCC**²

“SPECIAL CONDITIONS OF CONTRACT

The following Special Conditions of Contract (SCC), Section-V, shall supplement/ amend the General Conditions of Contract (GCC) Section-IV of Standard Bidding Document, wherever there is a conflict, the provisions in SCC shall prevail over those in the GCC of Standard Bidding Document. The corresponding clause number of the GCC is indicated in parentheses.

SCC Cl No.	GCC Clause Ref, if any	Special Condition of Contract
	xxxx	xxxx
2.0	Laws governing the Contract (GCC Clause 6.1)	This Contract shall be governed by the Indian Laws for the time being in force. <u>The Courts at Raipur shall have jurisdiction, in all matters.</u>
3.0	Settlement of Disputes (GCC Clause 7) GCC Sub-Clause 7.3.3	<u>Place of Arbitration: Delhi</u> ³

“GENERAL CONDITIONS OF CONTRACT

A. CONTRACT AND INTERPRERATION

1. Definitions

(c) **“Contract Documents”** mean the following documents that constitute the Contract between the Employer and the Contractor:
(i) The Contract Agreement alongwith its appendices
(ii) Letter of Award alongwith its. appendices,
(iii) **Special Conditions of Contract**
(iv) Technical Specifications and Bid Drawings
(v) **General Conditions of Contract**
(vi) The Bid and Schedule of Quantities submitted by the Contractor.”

² Emphasis supplied.

³ Emphasis supplied.



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xxxx

xxxx

4. Order of the precedence of the Documents

4.1 The several documents forming the Contract are to be taken as mutually explanatory of one another, detailed drawings being followed in preference to small scale drawings, figured dimensions in preference to scale and Special Conditions in preference to General Conditions.

4.2 In the case of discrepancy between Schedule of Quantities, the Specifications and/or the Drawings, the following order of precedence shall govern:

- (a) Description in Schedule of Quantities
- (b) SCC
- (c) Technical Specifications
- (d) Drawings

4.3 If there are varying or conflicting provisions made with in any document forming part of the Contract, the Engineer-in-Charge shall be the deciding authority with regard to the intention of the document.

4.4 Any error in description, quantity or rate in Schedule of Quantities or any omission therefrom shall not vitiate the Contract or release the Contractor from the execution of the whole or any part of the Works comprised therein according to drawings and specifications or from any of his obligations under the Contract.

xxxx

xxxx

xxxx

6. Laws governing the Contract

6.1 This Contract shall be governed by the Indian laws for the time being in force. **The Courts at Delhi shall have jurisdiction, in all matters unless otherwise stated in the SCC.**

xxxx

xxxx

xxxx

7. Settlement of Disputes

7.1 Mutual Consultation

If any dispute of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract, including without prejudice to the generality of the foregoing, any question regarding its existence, validity or termination, or the execution of the Works, whether during the progress of the Works or after their completion and whether before or after the termination, abandonment or breach of the Contract, the **parties shall seek to resolve any such dispute or difference by mutual consultation. If the parties fail to resolve such a dispute or difference by mutual consultation, then the dispute may be settled**



through Expert Settlement Council/ Arbitration / other remedies available under the applicable laws.

7.2 Resolution of Dispute through Expert Settlement Council

If the parties fail to resolve such a dispute or difference by mutual consultation, the dispute **if the parties agree, may be referred to Conciliation** in cases involving disputed amount up to Rs 250 crores, which is to be arrived at considering the claim and counter claim of the parties to the dispute.

7.3 Arbitration

7.3.1 If the process of mutual consultation and/or ESC fails to arrive at a settlement between the parties as mentioned at GCC Sub-Clauses 7.1 & 7.2 above, Employer or the Contractor may, within Thirty (30) days of such failure, give notice to the other party, with a copy for information to the ESC (as applicable), of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given. The mechanism of settling the disputes through arbitration shall be applicable only in cases where the disputed amount (i.e. total amount of Claims excluding claims of interest) does not exceed Rs. 25 crores. In case the disputed amount exceed Rs. 25 Crores, the parties shall be within their rights to take recourse to remedies as may be available to them under the applicable laws other than Arbitration after prior intimation to the other party. There shall be no arbitration where the claim amount is only up to Rs. 5 lakhs.

The parties at the time of invocation of arbitration shall submit all the details of the claims and the counter-claims including the Heads/Sub-heads of the Claims/Counter-Claims and the documents relied upon by the parties for their respective claims and counter-claims. The parties shall not file any documents/details of the claims and counter-claims thereafter.

The claims and the counter claims raised by the parties at the time of invocation of the arbitration shall be final and binding on the parties and no further change shall be allowed in the same at any stage during arbitration under any circumstances whatsoever.

The parties to the contract shall invoke arbitration within Six months from the date of completion of the execution of work under the contract or the termination of the contract as the case may be and the parties shall not invoke arbitration later on after expiry of the said period of six months. The parties shall not invoke arbitration other



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than in the case of completion of execution of work or the termination of the contract as mentioned above.

Notwithstanding the above, in case of disputes with Indian Contractor who is a Central Government Department /Enterprise /organisation or a State Level Public Enterprise (SLPE), the aforesaid limit of Rs 25 crores shall not be applicable and arbitration proceeding may be commenced irrespective of the amount involved in dispute if the dispute could not be resolved through Conciliation as brought out at GCC Sub Clause 7.2 above.”⁴

5. As far as the jurisdiction of this Court is concerned, there is some inconsistency between the final contract agreements and the SCC. The arbitration clause in the final contract agreements clearly provides that the courts in Delhi, alone, shall have exclusive jurisdiction in all matters arising under the contract agreements. However, in the SCC, while Delhi has been designated as the place of arbitration, clause 2.0 of the SCC, read with clause 6.1 of the GCC, vests jurisdiction in the courts in Raipur.

6. The general rule laid down by the Supreme Court in *BGS SGS Soma JV v. NHPC Ltd.*⁵ and *Indus Mobile Distribution Pvt. Ltd. V. Datawind Innovations Pvt. Ltd. & ors.*⁶ is that the place of arbitration specified in a contract is also the seat, and that the Courts having jurisdiction over the seat of arbitration have exclusive supervisory jurisdiction over the arbitral process, absent any indication to the contrary. The question in the present case is whether clause 2.0 of the SCC, which provides for jurisdiction of the courts at Raipur, is sufficient to dislodge the normal presumption that the seat of arbitration is at the place where the arbitration is conducted.

7. I am of the view, upon reading of the contractual provisions of this

⁴ Emphasis Supplied.

⁵ (2020) 4 SCC 234.



case, that it is not so; most importantly, because the contract agreements subsequently entered into provide for exclusive jurisdiction of the Delhi courts. The precedence of the contractual agreements over the SCC and the GCC is consistent with the enumeration of the documents in clause 1 (c) of the GCC. Further, the judgment of this Court in *Reliance Infrastructure Ltd. v. Madhyanchal Vidyut Vitran Nigam Ltd.*,⁷ upon a consideration of the authorities, also holds that exclusive jurisdiction vested in a particular Court, by an arbitration clause, would prevail over a generic contractual provision with regard to jurisdiction. All these factors point towards Delhi being both the venue and the seat of arbitration in the present case. This Court, therefore, has jurisdiction to entertain the present petitions.

8. On the question of pre-arbitral proceedings, Mr. Taneja submits that the parties be referred to the ESC constituted by the respondent. However as noted above, the petitioner is disinclined to submit itself to the jurisdiction of ESC. Upon a reading of clauses 7.1, 7.2 and 7.3 of the GCC set out above, I am of the view that the reference to the ESC was intended to be a voluntary exercise, with the option being given to the parties to submit to the jurisdiction of the ESC, or to move from the stage of mutual consultation directly to arbitration. This is indicated by the last sentence in clause 7.1, which provides that upon failure of mutual consultation, the disputes “may” be settled through ESC or arbitration or other remedies available in law. Clause 7.2 also incorporates the volition of parties by the use of the phrase, “*if the parties agree*”. Learned counsel

⁶ (2017) 7 SCC 678.

⁷ 2023 SCC OnLine Del 4894.



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on both sides stressed that the arbitration clause in 7.3.1, is triggered only *“If the process of mutual consultation and/or ESC fails to arrive at a settlement between the parties.”* As I read this clause, it makes it clear that arbitration may follow either mutual consultation directly, or ESC, if it has been invoked. On a conjoint reading of these clauses, I am of the view that the provision for reference to the ESC was intended to be optional. The petitioner having declined to exercise this option, the matter cannot be compulsorily referred to the ESC.

9. The question of mutual consultation between the parties remains. Mr. Taneja submits that an attempt be made to resolve the matter prior to arbitration being entered into. This suggestion is acceptable to Mr. Vivek Raja, learned counsel for the petitioner, also.

10. In view of the above, the petitions, alongwith pending applications, are disposed of by referring the disputes to arbitration under the aegis of Delhi International Arbitration Centre, Shershah Road, New Delhi-110503 [“DIAC”]. DIAC is requested to nominate an Arbitrator from its panel. As the issues are similar in both cases, DIAC may consider appointing a common arbitrator, although both the arbitration proceedings will be considered as independent proceedings for all purposes, and parties will be entitled to raise independent claims and counterclaims in each case.

11. The arbitration proceedings will be governed by the Rules of DIAC, including as to remuneration of the learned Arbitrator.

12. The learned Arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.

13. DIAC is requested to defer the reference for a period of six weeks



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from today to enable parties to attempt a mutual settlement. Either party may approach DIAC to enter into the reference after lapse of the said period.

14. All rights and contentions of the parties on the maintainability of the claims and on merits are left open for adjudication by the learned Arbitrator.

PRATEEK JALAN, J

AUGUST 13, 2024

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Signature Not Verified

Digitally Signed
By: SHITU NAGPAL
Signing Date: 14.08.2024
19:32:01

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