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

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Date of Decision: 04.11.2024+ **ARB.P. 1329/2024****M/S RKMT BUILDCON PRIVATE LIMITED**

.....Petitioner

Through: Mr. Sumit Rana, Mr. Arun Dalal,
Advvs.

versus

**GOVERNMENT OF NATIONAL
CAPITAL TERRITORY OF DELHI**

....Respondent

Through: Mr. Avishkar Singhvi, Adv (ASC),
Mr. Naved Ahmed, Mr. Vivek Kumar
Singh, Mr. Shubham Kumar, Advvs.**CORAM:****HON'BLE MR. JUSTICE SACHIN DATTA****SACHIN DATTA, J. (Oral)**

1. The present petition has been filed by the petitioner under Section 11(6) of the Arbitration and Conciliation Act (hereinafter '*the A&C Act*') seeking reference of certain claims to arbitration.
2. The disputes between the parties have arisen in the context of a tender issued by the respondent for (Civil and Electrical work) vide NIT No. 01/CE/HMZ/PWD/2018-19 for the work of "*Remodelling of 94 nos. Delhi Govt. Dispensaries to Polyclinics. SH: Remodelling of 20 Nos. DGD at various places in constituencies of District North of Delhi including Water supply, sanitary installations, Electrical installations, AC, Firefighting system etc. (Package- I)*".



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3. The petitioner emerged as the lowest bidder pursuant to the tender process and the letter of award dated 01.12.2018 was issued in favour of the petitioner.
4. The relevant conditions of contract contained an arbitration clause as under:-

“CLAUSE 25

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 the contractor consider any work demanded of him 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 Additional Director General (CE/ ADG) 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/ADG. 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*



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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, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Director General, CPWD (CE/ ADG/DG) 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 of settlement of claims/disputes prior to invoking arbitration.

The CE/ADG/DG 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/ ADG/DG 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 Director General, CPWD shall appoint the second or Presiding Arbitrator as the case may be.

(ii) Disputes or differences 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 re-enactment thereof and the rules made there under and for the time being in force shall be applicable.

It is 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



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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. Subject to provision in the Arbitration and Conciliation Act, 1996 (26 of 1996) as amended in 2015 whereby the counter claims if any can be directly filed before the arbitrator without any requirement of reference by the appointing authority, the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and 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. It has been brought out in the petition that in terms of the aforesaid arbitration agreement, the Chief Engineer of the respondent has appointed Mr. Bharat Bhushan Makkar, a retired SDG of CPWD as Sole Arbitrator to adjudicate certain claims. The said Arbitral Tribunal is seized the following claims:-

Nature of Claim	Description in Brief	Amount (INR)
Claim No.1	Work done, final bill submitted on 23.01.2023 for civil work and on 22.02.2023 for electrical work but not paid	4,16,60,512.00
Claim No.2	Claim on account of escalation not paid under clause 10C, 10CC of the contract	2,26,04,522.00
Claim No.3	Damages and losses on account of	7,02,55,328.00



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	prolongation of contract for the reasons attributed to the department	
Claim No.4	Claim on account of unlawful withheld amount under clause 5 of the contract	38,00,620.00
Claim No.5	Claim on account of unlawful recovery from 6 th R/A bill as interest on advance payment	24,81,616.00
Claim No.6	Claim on account of compound interest on claims 1 to 6 @ 10% per annum from the due date of realisation of payments.	Not pressed
Claim No.7	Pre-suit, pendent-lite and future compound interest @ 10% per annum	
Claim No.8	Cost of Arbitration fee to be paid to the Arbitral Tribunal, Consultants, Advocates, Venue charges and other expenses to be spent	Amount shall be intimated after concluding of arbitration proceedings.

6. The petitioner has sought to refer certain additional claims to the same Arbitral Tribunal. However, the concerned Chief Engineer has failed to refer the said additional claims to the existing Arbitral Tribunal. The said additional claims are as under :-

Nature of Claim	Description in Brief	Amount (INR)
Additional Claim No.1	Claim on account of Security Deposit deducted from the R/A bill & Final bill.	<u>Civil Work-</u> 47,50,774.00 <u>Electrical Work-</u> 25,88,025.00 Total- 73,88,799.00
Additional Claim No.2	Claim on account of delay of R/A bill as per specified period under Clause 7 of the contract	49,16,156.00
Additional Claim No.3	Claim on account of GST from 12% to 18% from 22/07/2022 on the gross amount of payments made after 22/07/2022 to the	8,28,405.00



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	Petitioner on the actual basis to be calculated on reallocation of payment	
Additional Claim No.4	Claim on account of GST to be paid by the Petitioner @18% on the award amount to be calculated on realization on actual basis	

7. It is noticed that the learned Sole Arbitrator Mr. Bharat Bhushan Makkar was unilaterally appointed by the respondent in terms of the aforementioned arbitration agreement between the parties. Notwithstanding, that such unilateral appointment has been frowned upon in a catena of judgments¹, learned counsel for the petitioner submits that the prayer in the present petition is confined to seeking that the aforesaid additional claims of the petitioner be referred to the aforesaid Arbitrator appointed by the Chief Engineer of the respondent vide letter dated 25.04.2024. It is submitted that for this purpose, the petitioner is desirous of waiving the provisions of Section 12(5) of the A&C Act and enter into an express agreement with the respondent in this regard, to enable the aforesaid Arbitrator to exercise jurisdiction and to adjudicate the claims.

8. In the circumstances, this Court accedes to the aforesaid prayer made on behalf of the petitioner. Accordingly, the additional claims are referred to arbitration by the Sole Arbitrator appointed by the respondent, subject to the parties entering into an express agreement waiving Section 12(5) of the A&C Act. In case, there is impediment in this regard, the parties are at liberty to avail appropriate remedies under law.

¹ *Naveen Kandhari v. Jai Mahal Hotels Pvt. Ltd.*, 2018 SCC OnLine Del 9180; *Sunil Sethi v. Hero Fincorp Ltd.*, 2024 SCC OnLine Del 1476; *Perkins Eastman Architects DPC v. HSCC (INDIA) Limited*, (2020) 20 SCC 760; *TRF Limited v. Energo Engineering Projects Limited*, (2017) 8 SCC 377; *Bharat Broadband Network Limited v. United Telecoms Limited*, (2019) 5 SCC 755; *Kotak Mahindra Bank Ltd. v. Narendra Kumar Prajapat*, 2023 SSC OnLine Del 3148; and *Radhika Engineering Co. v. Telecommunication Consultants India Ltd.*, 2024 SCC OnLine Del 4262



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9. The present petition stands disposed of in above terms.

NOVEMBER 4, 2024/uk

SACHIN DATTA, J