



2024:DHC:6673



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ O.M.P. (T) (COMM.) 83/2024 & I.A. 37807/2024, I.A. 37808/2024

MINISTRY OF ROAD TRANSPORT AND HIGHWAYS
(MORTH) THROUGH ITS CHIEF ENGINEER (NH RANDB)

.....Petitioner

Through: Mr. A.P. Singh, Adv. with Ms.
Akanksha Das, Adv.

versus

M/S DILIP BUILDCON LIMITED AND
MOSTOBUDIVELNYI ZAHIN NO 112 (JOINT VENTURE)
(MS DBL MBZ JV)Respondent

Through: Mr. Jayant Mehta, Sr. Adv.
with Mr. Dharendra Negi, Mr. Shaurya Rohit
and Ms. Diva Saigal, Adv.

+ O.M.P. (T) (COMM.) 84/2024 & I.A. 37809/2024, I.A. 37810/2024

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CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

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**JUDGMENT (ORAL)****30.08.2024**

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O.M.P. (T) (COMM.) 83/2024

1. Arbitral proceedings between the petitioner and the respondent are under way. A three-member arbitral tribunal is in *seisin* of the disputes.
2. Justice Manmohan Singh, a former Judge of this Court, is the respondent's arbitrator. Dr. Ashwinie Kumar Bansal, a practicing advocate has been appointed as the petitioner's arbitrator by the International Centre for Alternative Dispute Resolution¹. These two arbitrators appointed Justice Lok Pal Singh, a retired Judge of the High Court of Uttarakhand, as the presiding arbitrator.
3. This Arbitral Tribunal is presently, as already noted, in *seisin* of the dispute between the parties.
4. The petitioner has approached this Court for a declaration that the appointments of Dr. Bansal, as the petitioner's arbitrator, and, consequently, the appointment of Justice Lok Pal Singh, as the presiding arbitrator, are illegal.

Facts

5. The dispute between the parties arose in the context of an

¹ "ICADR" hereinafter



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Engineering, Procurement and Construction² contract between the petitioner and the respondent. Clauses 26.1 to 26.3.6 of the contract deals with dispute resolution, and read thus:

“26.1 Dispute Resolution

26.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 26.2.

26.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.”

26.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Authority's Engineer, or such other person as the Parties may mutually agree upon (the "Conciliator") to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Conciliator or without the intervention of the Conciliator, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) business days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) business day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 26.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3.

26.3 Arbitration

² EPC



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26.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 26.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules"), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be [Delhi], and the language of arbitration proceedings shall be English.

26.3.2 There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

26.3.3 The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 26 shall be final and binding on the Parties as from the date it is made, and the Contractor and the Authority agree and undertake to carry out such Award without delay.

26.3.4 The Contractor and the Authority agree that an Award may be enforced against the Contractor and/or the Authority, as the case may be, and their respective assets wherever situated.

26.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

26.3.6 In the event the Party against whom the Award has been granted challenges the Award for any reason in a court of law, it shall make an interim payment to the other Party for an amount equal to 75% (seventy five per cent) of the Award, pending final settlement of the Dispute. The aforesaid amount shall be paid forthwith upon furnishing an irrevocable Bank Guarantee for a sum equal to 120 % (one hundred and twenty per cent) of the aforesaid amount. Upon final settlement of the Dispute, the aforesaid interim payment shall be adjusted and any balance amount due to be paid or returned, as the case may be, shall be paid or returned with interest calculated at the rate of 10% (ten per cent) per annum from the date of interim payment to the date of final settlement of such balance."

6. The respondent issued a notice of dispute to the Director

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General (Road Development) and Special Secretary, Ministry of Road Transport & Highways, Government of India (MoRTH) on 5 March 2024, seeking convening of a meeting of the Chairman/Director General, MoRTH and the Chairman of the respondent within seven business days as envisaged by Clause 26.2 of the agreement, so that the dispute could be amicably resolved.

7. The meeting was never convened.

8. Accordingly, on 19 March 2024, the respondent issued a notice to the petitioner under Section 21 of the Arbitration and Conciliation Act, 1996³, naming Justice Manmohan Singh as the respondent's arbitrator and calling on the petitioner to nominate its arbitrator, as envisaged by Clause 26.3.2 of the agreement.

9. At this stage, the petitioner wrote to the respondent on 4 April 2024, suggesting that the dispute could be resolved by conciliation. The respondent replied on 9 April 2024. While not expressing any objection to the proposal for conciliation, it was made clear that the reply was without prejudice to the respondent's right to seek recourse to the arbitral remedy as envisaged in the contract.

10. As the petitioner did not appoint its arbitrator in accordance with Clause 26.3.2 within 30 days of receipt of the Section 21 notice dated 19 March 2024, the respondent wrote to the ICADR on 1 May 2024, calling on the ICADR to appoint the petitioner's arbitrator.

³ "the 1996 Act", hereinafter



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11. The ICADR, *vide* letter dated 3 May 2024, addressed to both parties, nominated Dr. Ashwinie Kumar Bansal, Advocate, as the petitioner's arbitrator. Dr. Bansal was, incidentally, one of the Governing Council members of the ICADR.

12. Justice Manmohan Singh and Dr. Bansal proceeded to appoint Justice Lok Pal Singh as the presiding arbitrator. Thus, came to be constituted the three-member arbitral tribunal which is presently in *seisin* of the dispute between the parties.

Rival Contentions

13. In support of the challenge raised in this petition, Mr. A.P. Singh, learned Counsel for the petitioner, raised various contentions. He first submits that the appointment of the arbitral tribunal is vitiated *ab initio*, as the respondent had failed to exhaust the prescribed pre-arbitral protocol envisaged in Clause 26.2 of the contract. He submits that the first step envisaged by Clause 26.2, in the case of a dispute between the parties, was a reference to the Independent Engineer (IE) or such other conciliator as the parties mutually agreed upon, who would attempt to mediate and amicably settle dispute. It was only if such attempted mediation failed that either party could seek a joint meeting of the DG, MoRTH and the respondent's Chairman within seven days. The respondent, however, he submits, skipped the first step and directly wrote to the DG, MoRTH to convene a meeting with the its Chairman within seven days. Skipping of the first conciliatory step was, according to Mr. A.P. Singh, unacceptable and resulted in

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breach of the pre-arbitral protocol envisaged in the contract which, in turn, vitiated the appointment of the arbitral tribunal in its entirety.

14. The second submission of Mr. A. P. Singh is that, after the Section 21 notice had been issued by the respondent to the petitioner on 19 March 2024, the petitioner actually wrote to the respondent on 4 April 2024, suggesting resolution of the dispute, and the respondent proactively accepted the suggestion in its response on 9 April 2024. As such, once the parties were exploring the possibility of resolution of the dispute by conciliation, Mr. Singh's contention is that the respondent ought not to have written to the ICADR to appoint the petitioner's arbitrator and the ICADR, in its turn, ought not to have gone ahead to do so. He also seeks to point out, in this regard, that the ICADR was not informed about the attempt at conciliation as reflected by the communications dated 4 and 9 April 2024.

15. Mr. Singh's third contention is that the ICADR should not have appointed its own Governing Council member as the petitioner's arbitrator. This, he submits, does not inspire confidence, and party confidence is the very *raison d'être* of the arbitral process.

16. To support his submissions, Mr. Singh placed reliance on the judgment of a coordinate Bench of this Court in *Airport Authority of India v Meenambakkam Realty Pvt Ltd*⁴, in which the court was concerned with a similar arbitration clause and went ahead to appoint an arbitral tribunal in place of the arbitral tribunal which was in *seisin*

⁴ 2024 SCC OnLine Del 45



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of the dispute between the parties. He exhorts this Court to do likewise.

17. Mr. Mehta, learned Senior Counsel for the respondent submits that there is no substance in the petitioner's contentions. He submits that the initial provision for conciliation in Clause 26.2 of the agreement is only directory. There is, therefore, nothing illegal or irregular in the respondent having approached the DG, MoRTH at the first instance without any attempt at conciliation prior thereto.

18. Mr Mehta further submits that, in its response dated 9 April 2024, to the petitioner's communication dated 4 April 2024, the respondent had clearly stated that its response was without prejudice to its right to seek arbitral reliefs as envisaged by the contract.

19. Insofar as the appointment of Dr. Bansal as the petitioner's arbitrator is concerned, Mr. Mehta submits that there is no proscription against such appointment and there can be no justifiable reason for the petitioner to dispute the independence or impartiality of Dr. Bansal.

Analysis

20. I have heard learned Counsel for the parties and perused the material on record.

21. I do not find myself in agreement with any of the contentions advanced by Mr. A.P. Singh.

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22. Mr. Singh submits that the respondent was in breach of Clause 26.2 of the agreement as it had not attempted conciliation before writing to the DG, MoRTH. The submission cannot be accepted. Mr. Mehta is correct in his submission that the tenor of Clause 26.2 indicates that the first step of conciliation, envisaged in the clause, is more directory than mandatory. The clause clearly states that, in the event of a dispute between the parties, either party “*may* call upon the Authority’s Engineer....or the conciliator” to mediate and assist the parties in arriving at an amicable settlement. The use of the word “*may*” itself indicates that there is no mandatory requirement on the party seeking an initial attempt at conciliation. It has been held, in *Sub-Committee on Judicial Accountability v UOI*⁵ and *Sahodara Devi v Govt of India*⁶ that though, on occasion, the word “*may*” has been interpreted as “*shall*”, “normally the word ‘*may*’ is used to grant a discretion and not to indicate a mandatory direction”. The word “*may*” is regarded as imperative only where it “gives power coupled with performance of a public duty”.⁷

23. That apart, the clause goes on to state that “failing mediation by conciliator *or without the intervention of the conciliator*”, either party could require the dispute to be referred to the Chairpersons of the parties, for a joint meeting to be convened within seven days to settle the dispute. The words “without the intervention of conciliator” also makes it clear that attempt at an initial resolution of dispute by

⁵ (1991) 4 SCC 699

⁶ (1972) 3 SCC 156

⁷ State v I. K. Nangia, (1980) 1 SCC 258



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conciliation was not an inexorable *sine qua non* before bipartite settlement by the Chairpersons was attempted.

24. I cannot, therefore, subscribe to Mr. Singh's contention that the respondent, in not having exhausted an initial attempt at conciliation before writing to the DG, MoRTH on 5 March 2024, breached the protocol envisaged by Clause 26.2 of the agreement.

25. Mr. Singh's second submission is that, even after the Section 21 notice had been issued by the respondent to the petitioner on 19 March 2024, the petitioner had suggested resolution of dispute by conciliation in its letter dated 4 April 2024 addressed to the respondent, and the respondent had positively responded in its reply dated 9 April 2024. Ergo, he submits, the respondent ought not to have written to the ICADR to appoint the petitioner's arbitrator, having agreed to a conciliatory attempt at settlement.

26. I cannot agree. The mere fact that the respondent, in its reply dated 9 April 2024, expressed willingness to sit across the table, cannot operate as a fetter on the respondent pursuing the remedy of arbitration, which was available to it under Clause 26.2. Once the respondent had sought the holding of a joint meeting between the DG, MoRTH and the respondent's Chairman within seven days, and no such meeting was held, the residual remedy of arbitration, under Clauses 26.2 and 26.3.1, became available to the respondent.

27. That reference had to be in accordance with Clause 26.3.1 read

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with Clause 26.3.2. The respondent had to write to the petitioner, seeking reference of the dispute to arbitration, and suggesting its own nominee arbitrator. The petitioner had, thereafter, to reply within 30 days, naming its nominee arbitrator. *That period of 30 days was not halted by the intervening communications between the petitioner and the respondent on 4 April 2024 and 9 April 2024. It was incumbent on the petitioner to nominate its arbitrator within 30 days of 19 March 2024, when the respondent had written to the petitioner.* Admittedly, the petitioner did not do so. *Ipsa facto*, the respondent became entitled to have the petitioner's arbitrator appointed as per the protocol envisaged by the contract.

28. As per Clause 26.3.1 of the contract, the rules of the ICADR applied. The ICADR was, therefore, empowered to appoint the petitioner's arbitrator, as the petitioner had defaulted in appointing its arbitrator within 30 days of receipt of the notice invoking arbitration. There was, therefore, nothing illegal or irregular in the ICADR proceeding to appoint an arbitrator to represent the petitioner. Indeed, had the ICADR not done so, the ICADR might have been remiss in the duty cast on it by the contract between the parties.

29. Mr. Singh's submission that, as the parties were exploring settlement by conciliation, the respondent ought not to have written to the ICADR, and the ICADR ought not to have proceeded to appoint the petitioner's arbitrator, too, therefore, fails to convince.

30. Mr. Singh further suggested that the ICADR ought not to have

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appointed its own Governing Council member as the petitioner's arbitrator. I do not see why not. There is no proscription, in the contract or elsewhere, proscribing the appointment of a member of the Governing Council of the ICADR as an arbitrator, whether by the ICADR or otherwise.

31. Dr. Bansal is a practicing advocate, and his competence to arbitrate is not in question. Nor, fairly, does Mr. Singh question his impartiality or independence. As such, this objection is also without substance.

32. In view of the aforesaid, the challenge to the arbitration of the dispute by the presently constituted arbitral tribunal is found to be without substance. It is accordingly rejected.

33. No case for issuing notice is made out. The petition is dismissed *in limine*.

O.M.P. (T) (COMM.) 84/2024

34. The facts of this case, and the issue in controversy, are identical, except that the respondent's arbitrator was Justice G. S. Sistani, also a retired Judge of this Court, and the petitioner's arbitrator was Dr. Anmol Rattan Sidhu, a Senior Advocate.

35. Ergo, following the above judgment, this petition is also dismissed *in limine*.



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36. Pending applications in both petitions do not survive for consideration and are accordingly disposed of.

C. HARI SHANKAR, J.

AUGUST 30, 2024

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Click here to check corrigendum, if any

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