



2024:DHC:7838



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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision : 08.10.2024

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ARB.P. 1451/2024 and IA No.39670/2024 (condonation of delay in refilling the petition)

SHREE SHYAM ENTERPRISES

.....Petitioner

Through: Mr. Yomesh Dutt Sharma and Ms.
Tripti Goswami, Advocates.

versus

DELHI TOURISM AND TRANSPORTATION
DEVELOPMENT CORPORATION LTD.

.....Respondent

Through: Ms. Ankita Sarangi, Advocate.

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 (hereinafter 'the A&C Act') seeks appointment of a Sole Arbitrator to adjudicate the disputes between the parties.
2. The disputes between the parties have arisen in the context of an e-tender floated by the respondent for construction of World Class Skill Centre (G+2) at ITI, Jaffarpur, New Delhi (SH: Civil and Electrical Works) issued by Chief Project Manager (TOURISM) DTTDC Ltd. Delhi.
3. The said tender was accepted by the respondent *vide* Letter of Acceptance dated 30.05.2019 issued by the Executive Engineer (JP) DTTDC Ltd., New Delhi.
4. Subsequently, an agreement No.02/EE(JP)/DTTDC/2019-20, dated



21.06.2019 was executed between the parties.

5. The work in connection with the Contract was to be completed on 17.11.2019, however, it is stated that due to covid-19 situation, the petitioner was granted extension of time for completion for work till 27.12.2021 and the said work was completed by the said date. A completion certificate dated 27.12.2021 was also issued by the respondent to the petitioner.

6. Disputes between the parties have arisen on account of alleged delay in payment of the final bill and on account of certain monetary claims of the petitioner against the respondent.

7. Admittedly, the Agreement between the parties contains an arbitration clause as under :-

**Settlement of
Disputes &
Arbitration**

“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 considers 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 on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days*



request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with the decision of the Chief Engineer, the contractor may within 30 days from the receipt of the Chief Engineer decision, appeal before the Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'. If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), 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 for appointment of arbitrator on prescribed proforma as per Appendix XV, failing



which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

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.

- (ii) *Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by 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. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.*

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or Additional Director General or Director General, CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.



It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that 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 equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and



published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.”

8. Disputes having arisen between the parties, a legal notice dated 29.05.2023 was issued by the petitioner to the respondent, whereby, the petitioner requested the respondent to take requisite steps under the aforesaid Clause 25 of the Agreement. The said communication was followed by a communication dated 01.02.2024 intimating the petitioner's intention to seek arbitration in respect of the disputes.

9. Further, *vide* communication dated 27.02.2024, the petitioner specifically requested for constitution of DRC as contemplated under Clause 25(i) for consideration of the claim sought to be raised by the petitioner. No response to any of these communications is stated to have been sent by the respondent to the petitioner.

10. Finally, *vide* communication dated 24.04.2024, the petitioner served a notice dated 24.04.2024, *inter alia*, stating as under :-

“Sub: Notice under clause 25(ii) of the agreement for appointment of arbitrator.

Dear Sir,

In reference to above matter certain disputes has arisen out of the said contract & we had served notices to concern EE, CPM on 01.02.2024 but till date there is no response from the concerned officials. We had also served notice to · you on 01.02.2024, but till date these is no response. We had also



served you notice under clause 25(i) for constitution of DRC for resolving our disputes but till date there is no response.

Now we are serving you notice under clause 25(ii) of the agreement for appointment of arbitrator. We are enclosing Annexure-1 (Performa for appointment of arbitrator) & Annexure - II (List of claims) for ready reference. If department fails in appointment of arbitrator within prescribed limit of 30 days as per agreement, then we have no option but to approach Hon'ble High Court for further legal action & for that department will be fully responsible. You are requested to appoint the arbitrator at the earliest.”

11. Even, the said notice remained un-replied. Consequently, the present petition came to be filed by the petitioner.

12. In the reply filed on behalf of the respondent, the only ground for resisting the request for constitution of an arbitral tribunal is as under :-

“5. That Department of Training and Technical Education was the Client Department for whom the Respondent Corporation tendered the execution of work. That the Respondent Corporation was just handling the project on behest of Client Department and is suffering the claim of the Petitioner due to funds being withheld by the Client Department. That the tendered amount of the work was Rs. 2,52,52,525/- and the sole reason for withholding certain amount from the final bill for the want of funds from the Client department.

Therefore, the client department should be made a party to this present Application for proper and speedy adjudication as they are the Primary party which got the benefit of the work done by the petitioner.

6. That the Respondent Corporation is actively pursuing the release of funds from the Client Department. In the interest of expediency and efficiency, it is submitted that either the Client Department be joined as a necessary party to these



proceedings, or, in the alternative, the Respondent Corporation be granted additional time to secure the release of said funds, thereby enabling the clearance of the Petitioner's dues without further prolonging these proceedings or incurring unnecessary legal costs."

13. I find no merit in the aforesaid objection raised on behalf of the respondent.

14. The petitioner herein has no privity of Contract with the Department of Training and Technical Education on whose behalf the respondent corporation allegedly tendered the execution of work. The petitioner's privity of contract is only with the respondent.

15. Clearly, the petitioner is not concerned with any arrangement that the respondent may have with the Department of Training and Technical Education concerning the financial liability in connection with the Contract in question.

16. Since the existence of the arbitration agreement between the parties is not disputed, there is no impediment in constituting an arbitral tribunal to adjudicate the disputes between the parties.

17. Further, in terms of the judgment of the Supreme Court ***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 and this Court in ***Kotak Mahindra Bank Limited v. Narendra Kumar Prajapat***, 2023 SCC OnLine Del 3148 and ***Radhika Engineering Co. v. Telecommunication Consultants India Limited***, 2024 SCC OnLine Del 4264, any unilateral appointment of Arbitrator by the respondent is



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impermissible and it is incumbent on this Court to appoint an independent Arbitral Tribunal to adjudicate the disputes between the parties.

18. Accordingly, Ms. Justice (Retd.) Deepa Sharma, Former Judge, Delhi High Court (Mob. No.:9910384631) is appointed as a sole Arbitrator to adjudicate the disputes between the parties.

19. The respondent shall be entitled to raise appropriate jurisdictional/preliminary objections as regards the claim sought to be raised before the learned Sole Arbitrator, which shall be duly considered and adjudicated by the learned Sole Arbitrator, in accordance with law.

20. 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.

21. 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.

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

23. 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.

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

25. The present petition stands disposed of in the above terms. The pending application is also disposed of.

SACHIN DATTA, J

OCTOBER 8, 2024/r, dn