



2024:DHC:8301



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

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Date of Decision : 22.10.2024+ **ARB.P. 1482/2024**

M/S STROYPROEKT LLC-OIA JV

.....Petitioner

Through: Mr. Rajesh Roshan and Mr. Shubham
Verma, Advocates.

versus

NATIONAL HIGHWAYS AND

INFRASTRUCTURE DEVELOPMENT CORPORATION LIMITED

.....Respondent

Through: Mr. Avneesh Garg, Mr. Harsh Pal and
Ms. Iptisha, Advocates.**CORAM:****HON'BLE MR. JUSTICE SACHIN DATTA****SACHIN DATTA, J. (Oral)**

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter '*the A&C Act*') seeks constitution of Arbitral Tribunal to adjudicate the disputes between the parties. The disputes between the parties have arisen in the context of an Engineering Procurement and Construction Agreement dated 29.05.2020 (hereinafter '*EPC Agreement*') for construction of two lane with hard shoulder of Kohima Jessami Road on NH 29 (old NH-150) from existing Km 98.380 (near Chizami Village) to existing Km 120.367 (Nagaland/Manipur Border) [Design Km 95.700 to design Km 117.200] [Design length- 21.500 Km] in the State of Nagaland Under Bharatmala Pariyojana.

2. Disputes between the parties having arisen, a detailed notice dated



20.04.2020 was sent by the petitioner to the respondent setting out the gist of disputes and also the claims sought to be raised by the petitioner on the respondents. *Vide* the said communication, the petitioner specifically requested as under :-

“12. In the alternative, if you/NHIDCL fail to pay the aforesaid claims or dispute the same, please treat this letter as our Notice under Clause 26.1 and Clause 26.2 of the Contract Agreement for Dispute Resolution and Conciliation and we require this dispute to be referred to the Chairman of the Authority/NHIDCL and the Chairman of the Board of Directors of the Contractor for amicable settlement as per the provisions in Clause 26.2 of the Contract Agreement and accordingly, fix a date for conciliation meeting in accordance with the Dispute Resolution provisions in the Contract Agreement.”

3. Admittedly, the respondent did not act in terms of the aforesaid request and did not refer the matter to conciliation. Thereafter, the petitioner invoked arbitration *vide* notice dated 07.06.2024 and sought appointment of a Sole Arbitrator to adjudicate the disputes between the parties.

4. In the aftermath of the arbitration notice, the respondent sought to convene a meeting for conciliation on 28.06.2024, however, the petitioner filed the present petition seeking appointment of a Sole Arbitrator to adjudicate the dispute between the parties.

5. Learned counsel for the respondents opposes the present petition on the ground that the petitioner has not taken recourse to the pre-arbitral conciliation procedure, prescribed in the dispute resolution clause, prior to filing the present petition.

6. In the present case, the dispute resolution clause reads as under:-

“26.1. Dispute Resolution

(i). 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.

(ii) 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 Disputes.

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 30(thirty) business day period or the Dispute is not amicably settled within 30 (thirty) 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 but before resorting to such arbitration, the parties agree to explore Conciliation by the Conciliation Committees of Independent Experts set up by the Authority in accordance with the procedure decided by the panel of such experts and notified by the Authority on its website including is subsequent amendments. In the event of the conciliation proceedings being successful, the parties to the dispute would sign the written settlement agreement and the conciliators would authenticate the same. Such settlement agreement would then be binding on the parties in terms of Section 73 of the Arbitration Act. In case of failure of the conciliation process even at the level of the Conciliation Committee, either party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3.”

26.3. Arbitration



(i) Any Dispute which remains unresolved between the parties

through the mechanisms available/ prescribed in the Agreement, irrespective of any claim value, which has not been agreed upon/ reached settlement by the parties, will be referred to the Arbitral Tribunal as per the Arbitration and Conciliation Act.”

7. Alongwith the reply, the respondent has placed on record a copy of its conciliation policy which incorporates the Standard Operating Procedure (SOP) for conciliation in the event of reference being received from a contractor. Significantly, the Clause 3.1 of the said policy reads as under:-

“3.1 On receipt of a reference from the Contractor (reference to Contractor made herein includes Consultant/Concessionaire) as per provision in the agreement for conciliation of disputes, the Concerned Technical Division shall send a response within 7 working days. NHIDCL shall offer the other party to refer the matter to the Conciliation Committee of Independent Experts as the conciliation is intended to be one consolidated package of settlement. Subject to consent of the other party, the matter would be referred to CCIE established under these guidelines.”

8. In the present case, the timeline mentioned in the arbitration agreement which is also part of the SOP devised by the respondent has not been adhered to by the respondent.

9. Further, it has been held by this Court in a catena of judgments that a contractual prescription requiring parties to participate in pre-arbitration mediation or conciliation prior to invocation of arbitration, is directory and not mandatory.

10. In the case of ***Oasis Projects Ltd. v. National Highway & Infrastructure Development Corporation Limited*** 2023 SCC OnLine Del 645, it was held as under:-

“12. The primary issue to be decided in the present petition is, therefore, as to whether it was mandatory for the petitioner to resort to the Conciliation process by the Committee before invoking arbitration.



Though Article 26.2 clearly states that before resorting to arbitration, the parties agree to explore **Conciliation by the Committee, in my opinion, the same cannot be held to be mandatory in nature. It needs no emphasis that Conciliation as a Dispute Resolution Mechanism must be encouraged and should be one of the first endeavours of the parties when a dispute arises between them. However, having said that, Conciliation expresses a broad notion of a voluntary process, controlled by the parties and conducted with the assistance of a neutral third person or persons. It can be terminated by the parties at any time as per their free will. Therefore, while interpreting Article 26.2, the basic concept of Conciliation would have to be kept in mind.**

(emphasis supplied)

11. In **Kunwar Narayan v. Ozone Overseas Pvt. Ltd.** 2021: DHC: 496, it was held as under:-

*“5. Ms. Pahwa, learned Counsel for the respondents submitted that her only objection, to the petition, was that the petitioner has not exhausted the avenue of amicable resolution, contemplated by Clause 12 of the Share Buyback Agreement. I am not inclined to agree with this submission. The recital of facts, as set out in the petition, indicate that efforts at trying to resolve the disputes, amicably were made, but did not succeed. Even otherwise, the Supreme Court in **Demarara Distilleries Pvt. Ltd. v. Demerara Distilleries Ltd.** and this Court, in its judgment in **Ravindra Kumar Verma v. BPTP Ltd.**, opined that relegation of the parties to the avenue of amicable resolution, when the Court is moved under Section 11(6) of the 1996 Act, would be unjustified, where such relegation would merely be in the nature of an empty formality. The arbitration clause in the present case does not envisage any formal regimen or protocol for amicable resolution, such as issuance of a notice in that regard and completion of any stipulated time period thereafter, before which arbitral proceedings could be invoked. In the absence of any such stipulation, I am of the opinion, following the law laid down in **Demarara Distilleries Pvt. Ltd. and Ravindra Kumar Verma v. BPTP Ltd.** nothing worthwhile would be achieved, by relegating the parties to explore any avenue of amicable resolution. Besides, the appointment of an arbitrator by this Court would not act as an impediment in the parties resolving their disputes amicably, should it be possible at any point of time.”*

12. While placing reliance on the aforementioned judgments, this Court in **Ranjit Construction Company v. Gujarat State Road & Building**



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Department and Others, 2023 SCC OnLine Del 3905, rejected the contention of one of the parties that, before resorting to arbitration, it was mandatory for the parties to exhaust the prescribed pre-arbitral conciliation mechanism.

13. Also, in a very recent case, *Jhajharia Nirman Ltd. v. South Western Railways*, 2024:DHC:7801, this Court has reiterated that clauses in arbitration agreements requiring parties to engage in pre-arbitral dispute resolution processes, such as amicable settlement or conciliation, are directory in nature and not mandatory.

14. In the circumstances, this Court finds no impediment to appointing an independent Sole Arbitrator to adjudicate the disputes between the parties.

15. Learned counsel for the respondent submits that instead of appointing the person named by the petitioner in its arbitration notice, some other person be appointed as a Sole Arbitrator.

16. Accordingly, Mr. Justice (Retd.) Krishna Murari, Former Judge, Supreme Court of India (Mob. No.: 9415308516) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.

17. It is made clear that the respondent shall be entitled to raise appropriate objections as regards jurisdiction/arbitrability, if any, before the learned Sole Arbitrator which shall be duly considered and decided by the learned Arbitrator on merits.

18. 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; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.



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19. The learned Sole Arbitrator shall be entitled to a 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.
20. Parties shall share the arbitrator's fee and arbitral costs, equally.
21. 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.
22. Needless to say, nothing in this order shall be construed as an expression of this court on the merits of the case.
23. The present petition stands disposed of in the above terms.

SACHIN DATTA, J

OCTOBER 22, 2024/at,sv