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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 17.12.2024

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ARB.P. 1484/2024**J.P. KAPOOR, PROPRIETOR OF M/S J.P. KAPOORPetitioner****Through: Mr. Vivekanand and Mr. Abhishek
Semwal, Advs.****versus****DELHI DEVELOPMENT AUTHORITY & ANRRespondents****Through: Mr. Keshav Sehgal, Adv. (through
v/c)****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 referred as 'the A&C Act') seeks appointment of a Sole Arbitrator to adjudicate the disputes between the parties.
2. These disputes stem from a Letter of Award dated 21.01.2017, through which the petitioner was awarded the contract for "*M/O completed scheme under South Zone of NA-II, SH: C/o Rain water harvesting chambers at different buildings/office complex within the Jurisdiction of SWD-2/DDA*". The total value of the contract was ~~₹~~₹63,95,250/-, and the stipulated completion period was 60 days, with the scheduled completion date set as 04.04.2017.



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3. Subsequently, an agreement bearing no. 42/EE/SDW-2/DDA/2016-17 dated 25.01.2017 was executed between the parties.
4. The relevant conditions of contract contained an arbitration clause as under: -

“CLAUSE 25

Settlement of Disputes & Arbitration

(A) Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein 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 the Contractor's Appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Engineer Member for appointment of Arbitrator, failing which, the said decision



shall be final, binding and conclusive and not referable to adjudication by the Arbitrator.

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 who shall be a technical person having the knowledge and experience of the trade, appointed by the Engineer Member, DDA. It will be no objection to any such appointment that the arbitrator so appointed is a DDA employee that he had to deal with the matter to which the contract relates and that in the course of his duties as DDA employee, he has expressed his views in all or any of the matter in dispute of difference. 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 terms 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 the Engineer Member, DDA, as aforesaid, should act as arbitrator and, if, for any reason that is no 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 the payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the DDA 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 there under 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,



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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 the 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.

(B) The Decision of the Superintending Engineer regarding the quantum of reduction as well as justification thereof in respect of rates for sub standard work which may be decided to be accepted will be final and could not be open to Arbitration.”

5. The petitioner avers that following the award of work, the petitioner mobilized labour, staff, tools, plants, and other equipment required to ensure timely execution. However, the work could not be executed within the stipulated period for the reasons primarily attributable to the respondents and its agencies. The project was finally recorded as complete on 07.08.2018.

6. Disputes between the parties have arisen on account of alleged non-payment of the outstanding monetary entitlements of the petitioner under the said agreement. The petitioner submits that the undisputed payment of final bill was to be made within six days of completion i.e. by 06.02.2019 under Clause 9 of the agreement, however the same was not paid in time. The respondents made part payments of the final bill only on 14.04.2019.



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However, these payments excluded significant amounts, with rates for extra and substituted items remaining unpaid or undervalued.

7. The petitioner further submits that unjustified deductions were made from the final bill. Payments for extra and deviated items were either delayed or settled at incorrect rates inconsistent with prevailing market standards.

8. It is stated that the petitioner repeatedly sent communications to the Engineer-in-Charge and the Superintending Engineer, requesting the resolution of the dispute between the parties. However, to no avail.

9. Thereafter, the petitioner invoked arbitration via a letter dated 13.11.2019, requesting the competent authority to appoint an independent arbitrator. However, instead of addressing the petitioner's claims, the respondents retaliated by imposing a 10% penalty under Clause 2 for alleged delays in completion. This penalty, communicated through a letter dated 17.12.2019, was objected to by the petitioner on 07.01.2020.

10. Despite repeated reminders, the competent authority failed to appoint an arbitrator, resultantly, the petitioner sent a follow-up letter on 07.01.2020. Eventually, the Engineer Member of DDA unilaterally appointed Mr. Ram Lakhan Singh as the sole arbitrator on 24.01.2020. The arbitrator issued an award on 04.11.2020, partially allowing some claims while rejecting others.

11. The petitioner filed objections under Section 34 of the A&C Act before the District Judge, Commercial Courts, Saket, challenging the award as being contrary to law, and on account of improper appointment of the Arbitrator. On 14.03.2024, the Court set aside the award, declaring the arbitrator's appointment to be unilateral, void, and contrary to Section 12(5) of the Act.



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12. Thereafter, the petitioner invoked fresh arbitration *vide* letter dated 21.03.2024, proposing a panel of independent arbitrators. The respondents replied to the same *vide* letter dated 11.06.2024. The same is reproduced as under -

“Please refer your letter under reference on the subject cited above vide which you have requested to EM/DDA for Invocation of Clause 25 and for appointment of arbitrator, in this regard, it is informed that after due deliberation, your request for appointment of arbitrator has been rejected by the competent authority.”

13. The petitioner has now approached this Court, through the present petition, seeking the appointment of a Sole Arbitrator to adjudicate the dispute/s.

14. Learned counsel for the respondents does not dispute the existence of the arbitration agreement. As such, in terms of the judgment of the Supreme Court in ***In Re: Interplay between Arbitration Agreement under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899***, 2023 SCC OnLine SC 1666 and ***SBI General Insurance Co. Ltd. v. Krish Spinning***, 2024 INSC 532, there is no impediment to constituting an arbitral tribunal to adjudicate the disputes between the parties.

15. Further, it is incumbent on this Court to appoint an independent Sole Arbitrator in terms of judgments of the Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd*** (2020) 20 SCC 760, ***TRF Limited v. Energo Engineering Projects Ltd***, (2017) 8 SCC 377, ***Bharat Broadband Network Limited v. United Telecoms Limited.***, 2019 SCC OnLine SC 547; and judgment/s of this Court in ***M/s. M.V. Omni Projects (India) Ltd. V. Union of India, Through Dy. Chief Engineer/Const.- II/Northern Railway*** 2024:DHC:7874.



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16. Accordingly, Mr. Jayant Kumar, Advocate (Mob. No.: +91 9654425878) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

17. The respondents shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability, which shall be decided by the learned arbitrator, in accordance with law.

18. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosure as required under Section 12 of the A&C Act.

19. At request of respective counsel, it is directed that the arbitration shall take place under the aegis of and under the rules of the Delhi International Arbitration Centre (DIAC).

20. All rights and contentions of the parties in relation to the claims/counter claims are kept open, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.

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

22. The present petition stands disposed of in the above terms.

SACHIN DATTA, J

DECEMBER 17, 2024/sv