



2024:DHC:8362



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

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Date of Decision : 25.10.2024+ **ARB.P. 1489/2024****AURIONPRO SOLUTIONS LIMITED**

.....Petitioner

Through: Ms. Manasi Chatpalliwar, Mr. Pranav
Proothi and Mr. Aditya Singh,
Advocates.

versus

**GOVERNMENT OF NCT OF
DELHI TRANSPORT DEPARTMENT**

.....Respondent

Through: Mr. Vedansh Vashisht, 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. The disputes between the parties have arisen in the context of a Master Service Agreement for implementation of Automatic Fare Collection System, dated 01.10.2020, subsequently amended by way of an amendment agreement dated 01.09.2021 (hereinafter '*the Agreement*'), under which the Petitioner was appointed as the System Integrator for implementation of Automatic Fare Collection System in cluster buses in NCT Delhi.

2. A perusal of the Agreement shows that the same contains a dispute resolution clause as under:-

"25. GOVERNING LAW AND DISPUTE RESOLUTION



(a) *This Agreement shall be governed by and construed in accordance with the laws of India, without giving effect to conflict of law rules.*

(b) *Any dispute arising out of or in connection with this Agreement or the SLA shall in the first instance be dealt with in accordance with the escalation procedure as set out in the Governance Schedule set out as Schedule V of this Agreement.*

(c) *Parties agree that they would try to resolve the dispute mutually through management discussions at various levels. and if not satisfied with such resolution, the matter would be referred to Deputy Transport Commissioner and then next level to Commissioner (Transport)*

(d) *If not satisfied with the resolution provided by Commissioner (Transport), disputes or differences shall be referred for adjudication through arbitration by a sole arbitrator appointed by Commissioner (Transport).*

(e) *Further, within thirty (30) days of receipt of such notice from either party, any dispute or difference whatsoever arising between the parties to this Contract out of or relating to the construction, meaning, scope, operation or effect of this Contract or the validity of the breach thereof shall be referred to a sole Arbitrator. There shall be a single arbitrator with the following preference - Retired High court judge; Retired Chief Secretary of Govt.; Retired Joint Secretary or above rank from Govt. of India. If the parties cannot agree on the appointment of the Arbitrator within a period of one month from the notification by one party to the other of existence of such dispute, then the Arbitrator shall be appointed by the High Court of New Delhi, India. The provisions of the Arbitration and Conciliation Act, 1996 will be applicable and the award made there under shall be final and binding upon the parties hereto, subject to legal remedies available under the law. Such differences shall be deemed to be a submission to arbitration under the Indian Arbitration and Conciliation Act, 1996, or of any modifications, Rules or re-enactments thereof. The Arbitration proceedings will be held Delhi, India. Any legal dispute will come under the sole jurisdiction of New Delhi, India.*

(f) *The award of the Arbitrator shall be final and binding as per Arbitration and Conciliation Act 1996. The cost of Arbitration proceeding shall be equally borne by the Parties.*

(g) *The Arbitrator with the written consent of the parties can extend*



the time to make and publish his award as per Arbitration Conciliation Act, 1996.

(h) The venue of the arbitration proceeding shall be New Delhi.

(i) Compliance with laws: Each party will comply with all applicable export and import laws and regulations.

(j) Risk of Loss: For each hardware item, System Integrator bears the risk of loss or damage up to the time it is delivered to the System Integrator/TRANSPORT DEPARTMENT-GNCTD-designated carrier for shipment to TRANSPORT DEPARTMENT-GNCTD or TRANSPORT DEPARTMENT GNCTD' s designated location.

(k) Third party components: System Integrator will provide all third-party components solely on a pass through basis in accordance with the relevant third-party terms and conditions."

3. According to the petitioner, the disputes between the parties have arisen on account of the fact that despite the petitioner having carried out its contractual obligations and having concluded 98% of its performance obligations, it has not been paid its contractual dues. Further, on 07.06.2024, a termination order was issued by the respondent. The respondent also invoked the petitioner's performance bank guarantees submitted in terms of the Agreement.

4. It is also disclosed that the petitioner had also filed a petition under Section 9 of the A&C Act pursuant to invocation of the performance bank guarantees by the respondent, which was disposed of by this Court, specifically noting that it shall be open to the petitioner to agitate its disputes before the Arbitrator to be appointed in terms of the aforesaid dispute resolution clause.

5. A perusal of the dispute resolution clause reveals that prior to invocation of the arbitration, it is contemplated that the parties would make an attempt to resolve the disputes through mutual discussions. In the regard,



reference is apposite to certain judgments rendered by this Court wherein it has been held that any prescription in a dispute resolution clause which requires the parties to exhaust amicable resolution process/conciliation etc., are directory and not mandatory.

6. 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)

7. 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. Demarara 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.”

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

9. 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.

10. The existence of the arbitration agreement is apparent from the perusal of the Clause 25(e) of the Agreement between the parties. In view of the judgments of the Supreme Court in ***Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re***, 2023 SCC OnLine SC 1666, and in ***SBI General Insurance Co. Ltd. v. Krish Spinning***, 2024 INSC 532, it is incumbent on this Court to appoint an independent Sole Arbitrator to adjudicate the disputes between the parties.



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11. Accordingly, Ms. Justice (Retd.) Deepa Sharma, Former Judge, Delhi High Court (Mob. No.:9910384631) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.
12. It is also agreed by the parties that any preliminary/jurisdictional objection raised by the respondent including as to whether the claim sought to be raised by the petitioner are barred by limitation or otherwise, shall be considered and decided by the Arbitrator at the outset before adjudicating the disputes on merit. It is directed accordingly.
13. 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.
14. It is agreed between the parties that the arbitration shall take place under the aegis of and under the rules of Delhi International Arbitration Centre (DIAC). It is directed accordingly.
15. It is clarified that this Court has not expressed any opinion as regards merits of the respective contentions of the parties, on the merits of the matter.
16. The present petition stands disposed of in the above terms.

SACHIN DATTA, J

OCTOBER 25, 2024/at