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

% ***Date of Decision : 25.09.2024***

\+ **ARB.P. 1496/2024**

NS ASSOCIATES PVT LTD .....Petitioner

Through: M. Tarique Siddiqui, Mr. Sunil Verma, Mr. Rakshan Ahmed, Mohd. Bilal, Mr. Fajallu Rehman, Ms. Lakshmi and Mr. Anirudh Sharma, Advs.

versus

NEW DELHI MUNICIPAL COUNCIL .....Respondent

Through: Mr. Ashish Tiwari, Addl. SC and Mr. Anurag Tiwari, Mr. Sahib Patel, Advs. for NDMC through v/c)

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (Oral)

IA No.40404/2024 (Exemption)

1. Allowed, subject to all just exceptions.

2. Application stands disposed of.

ARB.P. 1496/2024

3. The present petition has been filed by the petitioner under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as *the A&C Act*) seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.

4. The disputes between the parties have arisen in the context of an agreement between the parties for construction of 188, Type-II, (10 Stories Tower), at Aliganj, New Delhi. In terms of the said agreement, the stipulated

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date of start of work was 08.04.2017 and the stipulated date of completion was 07.01.2019. It is the case of the petitioner that various hindrances were encountered during the execution of the work as a result of which it was not completed within the stipulated period. Certain time extension applications are also stated to have been filed by the petitioner before the respondent. It is further submitted that by 31.12.2019, the petitioner had submitted 18 (eighteen) RA bills against civil works and the first RA bill against electrical work; there were huge arrears of payment due to the petitioner, which were not being released by the respondent despite repeated requests.

5. In the aforesaid background, disputes have arisen between the parties.

6. Admittedly, the agreement between the parties contains an Arbitration Clause in the following terms:

> "**CLAUSE 25 Settlement of Disputes & Arbitration** is reproduced as under:
> 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 Three Months 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

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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 the 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 (1) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chairperson, NDMC, If there be no Chairperson, the administrative head of NDMC 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 Chairperson NDMC or the administrative head of NDMC as aforesaid, should act as arbitrator and if for any reason that is not possible, matter shall not be referred to arbitration at all.

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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 NDMC 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) the Jammu and Kashmir Arbitration and Conciliation Act 1977 (35% of 1997) (As the case may be) 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 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, shall be paid equally by both 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."

7. Learned counsel for the petitioner has drawn attention to the correspondence addressed by the petitioner to the Superintending Engineer, the Chief Engineer and the Chairman of the respondent, prior to seeking constitution of an arbitral tribunal and in compliance with the rigours of Clause 25 (supra). However, since the grievances of the petitioner remained unaddressed, the petitioner addressed a letter dated 12.01.2022 stating as under:

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"*3. Despite our various requests, the issues related to execution of project including financial issues raised by us were not resolved by Engineer-in-charge (EIC) i.e. Executive Engineer (BM-PK). Hence being aggrieved by the action & written response of EIC, we disputed the same through various communications to Engineer-in-charge (EIC) i.e. Executive Engineer (BM-PK) time to time.*

4. The grievances/disputes communicated by us to EIC have not been resolved, hence we vide our letter number 229 dated 04.08.2020 in terms of clause 25 (Settlement of Disputes & Arbitration) of the General Conditions of the Contract (GCC) requested the ***Superintending Engineer (SE)*** *to look into and resolve our pending issues and pending dues of Rs.7.12 crore and to give its decision for smooth & expeditious work execution.*

5.Even after expiry of three (3) months period from the date of letter dated 04.08.2020 invoking clause 25 GCC, the SE did not give its findings, hence we submitted appeal to Chief Engineer (CE) vide our letter number 256 dated 16.11.2020 mentioning the disputes and requesting CE to give its decisions/ findings as there was indecision on pending disputes/ issues on part of Engineer-in-charge (EIC) and Superintending Engineer (SE) on our pending issues and-our claims of Rs. 7.12 crore.

6. In terms of clause 25 GCC, the Chief Engineer did not give its decisions/findings on our appeal (submitted vide our letter dated 16.11.2020) within one month, hence under clause 25 GCC, we submitted appeal along with list of disputes with amounts claimed in respect to each such disputes to the Chairman NDMC (i.e. the competent authority) for the constitution of Dispute Redressal Committee (DRC) vide our letter number 294 dated 28.01.2021 to resolve/ decide the disputes within a period of 90 days from the date of receipt of contractors appeal.

7. That despite the lapse of 90 days period from the date of receipt of appeal dated 28.01.2021, the competent authority did not even constitute the Dispute Redressal Committee (DRC) to resolve/ decide the disputes, hence we being left with no option are opting for further necessary remedial action as enshrined in clause 25 GCC, seeking appointment of arbitrator on prescribed proforma as per 'Appendix XV' of the contract

8. That prior to invoking arbitration seeking appointment of sole arbitrator; we-the invoking party has exhausted all the steps/ mechanism of settlement of claims/ disputes as mentioned in the clause 25 GCC. However our disputes/claims have not been addressed/

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adjudicated by the concerned authorities.
9. We hereby under clause 25 GCC invoke arbitration seeking appointment of sole arbitrator by the Chairperson, NDMC for settlement of claims/ disputes as mentioned in 'Appendix XV' duly enclosed with this letter. Our statement of claims and other necessary documents are enclosed as per 'Appendix XV' of our agreement."

8. No response was sent by the respondent to the aforesaid communication.

9. Learned counsel for the respondent, who appears on advance notice, does not dispute the existence of the arbitration agreement. He accedes that that an independent Sole Arbitrator be appointed to adjudicate the disputes between the parties.

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

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

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

13. The learned Sole Arbitrator shall be entitled to the fee in accordance with Fourth Schedule of the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

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

15. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator

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on their merits, in accordance with law.

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

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

SACHIN DATTA, J

SEPTEMBER 25, 2024/cl

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