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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% **Date of Decision: 13.11.2024**+ **ARB.P. 1776/2024**

SHRI KR ANAND

.....Petitioner

Through: Mr. Mukesh Kumar, Adv. (through
v/c)

versus

NEW DELHI MUNICIPAL COUNCIL

.....Respondent

Through: Mr. Sanjay Sharma, Adv. (through
v/c)**CORAM:****HON'BLE MR. JUSTICE SACHIN DATTA****SACHIN DATTA, J. (ORAL)****IA No.44836/2024 (Exemption)**

1. Allowed, subject to all just exceptions.
2. Application stands disposed of.

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3. Issue notice. Learned counsel, as aforesaid, on behalf of the respondent accepts notice.
4. 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 for resolving the disputes between the parties.
5. A notice inviting tender dated 13.08.2009 was issued by the respondent for construction of 'park and ride and holding facilities at the Safdarjung Airport (Common Wealth Games - 2010)'. The said construction was to be completed in two phases wherein Phase-I was scheduled to be



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completed by 31.08.2010 and Phase-II was scheduled to be completed by 20.01.2010. The entirety of the construction was to be completed for a consideration of Rs. 32,40,73,665/-.

6. Consequently, the parties entered into an agreement no. 83/EE(R-II)/NDMC/2009-10 dated 04.12.2009. Clause 25 of the said agreement contains an arbitration clause as follows:-

“Clause 25

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or material 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 or 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 or written instructions 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 letter 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, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chairperson, NDMC for appointment of arbitrator failing which the said decision shall be final, binding and conclusive and not referable to adjudication by the arbitrator.



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(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 Chairperson, NDMC or if there be no Chairperson, the administrative head of the 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 list of disputes with amounts claimed in respect of each such dispute alongwith 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 Chairperson or the administrative head of the NDMC, as aforesaid should act as arbitrator and if 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 claim 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 provision of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory or re-enactment thereof and the rules modifications 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 claim/disputes by any party exceeds Rs.100,000.00 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 arbitrator shall be deemed to have entered on the reference on the date he issued 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



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manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.”

7. The disputes having arisen between the parties on account of alleged outstanding monetary entitlement of the petitioner. The petitioner had sent a demand notice on 28.05.2013 setting out the claims which according to the petitioner were due and payable to it. The said communication also stated as under:-

“In case the above dues are not settled within the next 15 days of the receipt hereof, the matter may be treated as disputes and will be referred to the Superintending Engineer in terms of Clause-25 of the Contract/Agreement.”

8. The aforesaid communication was followed by the letters dated 17.06.2013 and 27.07.2013 calling upon the concerned executive engineer to settle the disputes/claims.

9. After a hiatus of more than 10 years, it was only on 26.08.2024 that the respondent issued a communication calling upon the petitioner to constitute an arbitral tribunal for adjudicating the disputes between the parties.

10. In the above background, learned counsel for the respondent strenuously contended that the claim sought to be raised by the petitioner are hopelessly time barred. The said contention of the learned counsel for the respondent merits serious consideration. However, since the scope of the present proceedings is confined to ascertaining the existence of the arbitration agreement, as explicitly stated by the Supreme Court in ***SBI General Insurance Co. Ltd. v. Krish Spinning*** 2024 SCC OnLine SC 1754 and ***Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re,*** 2023 SCC



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OnLine SC 1666, the above objections of the respondent would be required to be considered by a duly constituted arbitral tribunal. In SBI it has been specifically held as under:

*“113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in In Re : Interplay (supra) that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a prima facie arbitration agreement **and not any other issues**. The relevant observations are extracted hereinbelow:*

“209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall “examine the existence of a prima facie arbitration agreement and not other issues”. These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the “other issues” also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a timebound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. [...]”

(Emphasis supplied)

114. In view of the observations made by this Court in In Re: Interplay (supra), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in Vidya Drolia (supra) and adopted in NTPC v. SPML (supra) that the jurisdiction of the referral court when dealing with the issue of “accord and satisfaction” under Section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in In Re : Interplay (supra).

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118. Tests like the “eye of the needle” and “ex-facie meritless”, although try to minimise the extent of judicial interference, yet they require the referral court to examine contested facts and appreciate prima facie evidence (however limited the scope of enquiry may be) and thus are not in conformity with the principles of modern arbitration which place arbitral autonomy and judicial non-interference on the highest pedestal.

119. Appointment of an arbitral tribunal at the stage of Section 11 petition also does not mean that the referral courts forego any scope of judicial review of the adjudication done by the arbitral tribunal. The Act, 1996 clearly vests the national courts with the power of subsequent review by which the award passed by an arbitrator may be subjected to challenge by any of the parties to the arbitration.

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125. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the arbitral tribunal is equally, if not more, capable to decide upon the appreciation of the evidence adduced by the parties. We say so because the arbitral tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material.”

11. Since the existence of the arbitration agreement is apparent from a perusal of the Agreement between the parties, there is no impediment to appointing an independent sole arbitrator for adjudicating the disputes between the parties as contemplated in ***Perkins Eastman Architects DPC v. HSCC (INDIA) Limited***, (2020) 20 SCC 760, ***TRF Limited v. Energo Engineering Projects Limited***, (2017) 8 SCC 377 and ***Bharat Broadband Network Limited v. United Telecoms Limited***, (2019) 5 SCC 755.

12. Accordingly, Mr. Justice (Retd.) A. K. Pathak, Former Judge, Delhi High Court (Mob. No.: +91 9910384602) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.



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13. The respondent shall be entitled to raise appropriate objections as regards limitation/jurisdiction, if any, before the learned sole arbitrator which shall be duly considered and decided by the learned sole arbitrator before adjudication of the claim/s on merits.
14. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties the requisite disclosure as required under Section 12 of the A&C Act.
15. The learned Sole Arbitrator shall be entitled to fee in accordance with the IVth Schedule of the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.
16. 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.
17. The present petition stands disposed of.

SACHIN DATTA, J

NOVEMBER 13, 2024/dn