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

+ ARB.P. 344/2024

NAFEES AHMEDPetitioner

Through: Mr. Avinash Trivedi, Advocate

versus

DELHI TOURISM AND TRANSPORTATION
DEVELOPMENT CORPORATION LTDRespondent

Through: Mr. Abhimanyu Garg, Adv.

+ ARB.P. 345/2024

MR. NAFEES AHMEDPetitioner

Through: Mr. Avinash Trivedi, Advocate

versus

DELHI TOURISM AND TRANSPORTATION
DEVELOPMENT CORPORATION LTDRespondent

Through: Ms. Ankita Sarangi, Adv.

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

ORDER (ORAL)

09.07.2024

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1. These petitions are filed under Section 11(6) of the Arbitration and Conciliation Act, 1996¹ for referring the disputes between the petitioner and respondent to arbitration.

2. The petitioner was awarded the work of construction of a World Class Skill Centre at Jahangirpuri, IIT, Delhi in Arb. P. 344/2024,

¹ "the 1996 Act" hereinafter



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whereas, in Arb. P. 345/2024, the petitioner was awarded the work of construction of Additional M.P. Hall, Lab, Activity Room and Upgradation, Face Lifting of Shahbad Daulatpur (ID: 1310431), Delhi-110 042. According to Mr. Avinash Trivedi, learned counsel for the petitioner, the work was completed but certain bills raised by the petitioner were remained unpaid. He also submits that the petitioner is entitled to escalation.

3. Clause 25 of the General Conditions of Contract² which apply to the present contract envisages settlement of disputes by arbitration after following a detailed pre-arbitral protocol. The clause reads thus :

“CLAUSE 25:

SETTLEMENT OF DISPUTES & ARBITRATION

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 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 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

² “GCC” hereinafter



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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 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 the list of disputes with amounts 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 Contractor's appeal. The constitution of Dispute Redressal Committee 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 Chief Engineer for appointment of arbitrator on prescribed performa 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 the 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 Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Special Director General or the Director General, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment 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



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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 Chief Engineer CPWD or Additional Director General or Special Director General or Director General, CPWD, as aforesaid should act as arbitrator and if for 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 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 Government 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 reenactment thereof and the rules made thereunder 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, 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 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.”



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4. Mr. Trivedi submits that the reference to the Superintending Engineer and the Chief Engineer in Clause 25, in the context of the respondent-organization, is required to be substituted by the Chief Project Manager and the Managing Director. This position is not disputed by Mr. Abhimanyu Garg, learned Counsel for the respondent.

5. Mr. Trivedi submits that, in accordance with the protocol envisaged by Clause 25 of the GCC, the petitioner addressed a representation to the Chief Project Manager on 25 September 2023 to consider the petitioner's claims. On no response being forthcoming from the Chief Project Manager, the petitioner appealed to the Managing Director³ of the respondent on 30 October 2023 and also prayed that, if necessary, a Dispute Resolution Committee (DRC) be constituted to look into the petitioner's grievances.

6. Learned Counsel are *ad idem* that no DRC has been constituted in the Respondent Organization.

7. In these circumstances, the petitioner addressed a notice under Section 21 of the 1996 Act to the MD of the respondent on 4 January 2024, seeking reference of the disputes between the parties to arbitration. No response is forthcoming from the respondent.

8. In these circumstances, the petitioner has approached this Court under Section 11(6)⁴ of the 1996 Act seeking reference of the disputes

³ "MD" hereinafter

⁴ (6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or



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to arbitration.

9. Mr. Garg, learned counsel for the respondent, submits that the petitioner has raised allegations of coercion, which have to be looked into.

10. Consequent on introduction of sub-Section 6(A) in Section 11, the Supreme Court has in several decisions held that the jurisdiction of the Referral Court is now circumscribed. I have had occasion to refer to the occasion to refer the law in this context in my recent decision in *ESRI R & D Center India Pvt Ltd v. Ambience Towers Pvt Ltd*⁵, in which it is noticed that the insertion of sub-section (6A)⁶ in Section 11 by the Arbitration & Conciliation (Amendment) Act, 2015, was intended precisely to dilute the effect of earlier judicial pronouncements, including *National Insurance Co. Ltd v. Boghara Polyfab Ltd*⁷, *U.O.I. v. Master Construction Co.*⁸ and *New India Assurance Co. v. Genus Power Infrastructure Ltd*⁹, of which the decision in *Genus Power Infrastructure* held that the referral Court was, while exercising jurisdiction under Section 11(6) of the 1996 Act, also required to examine any allegation of fraud or coercion if raised by either party. This position, it was held by the Supreme

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

⁵ Judgment dated 4 July 2024 in Arb P 1268/2023

⁶ (6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

⁷ (2009) 1 SCC 267

⁸ (2011) 12 SCC 349

⁹ (2017) 9 SCC 729



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Court in *Duro Felguera S.A. v. Gangavaram Port Ltd*¹⁰ and *Mayawati Trading Pvt Ltd v. Pradyut Deb Burman*¹¹, no longer survived after the insertion, in Section 11, of sub-section (6A).

11. Coercion, or its absence, is a complex question, purely of fact, which has necessarily to be examined by the arbitral tribunal. Even where fraud was alleged, the Supreme Court, in *Vidya Drolia v. Durga Trading Corporation*¹², held that it was only where serious fraud was alleged to have vitiated the very execution of the arbitration agreement, as could be decided without leading evidence, that the referral court could return a finding thereon.

12. Ms. Sarangi, learned counsel for the respondent submits that dispute in Arb. P. 345/2024 stands discharged by accord and satisfaction. *Vidya Drolia* answers this submission, too, by holding, in para 148 of the report, that a plea of discharge of the claim by accord and satisfaction has to be left for decision in arbitration:

“148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. *Similar would be the position in case of disputed “no-claim certificate” or defence on the plea of novation and “accord and satisfaction”*. As observed in *Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd.*¹³, it is not to be expected that commercial men while entering

¹⁰ (2017) 9 SCC 729

¹¹ (2019) 5 SCC 362

¹² (2021) 2 SCC 1

¹³ 2007 UKHL 40 : 2007 Bus LR 1719 (HL)



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transactions *inter se* would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.”

(Emphasis supplied)

13. *Vidya Drolia*, in no uncertain terms, holds that, in the interests of arbitral autonomy and keeping in mind the need for circumspection while interfering, judicially, with the arbitral process, the referral Court should, ideally, leave all issues of fact and law to be decided by the arbitral tribunal. The occasion for the referral court to examine such issues is, therefore, clearly now an exception; the rule being otherwise.

14. Thus viewed, the disputes between the parties are *prima facie* arbitrable.

15. The GCC does not stipulate the venue of arbitration. However, the parties are situated in Delhi and the work was carried out in Delhi. As such, this Court has jurisdiction to deal with the matter.

16. The claim of the petitioner in Arb. P. 344/2024 is in the region of ₹ 4.5 crores whereas the claim of the petitioner in Arb. P. 345/2024 is in the region of ₹ 1 Crore.

17. Learned counsel for the petitioner submits that, as the parties are the same and the disputes are common, these matters may be referred to a common Arbitrator.



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18. In these circumstances, the disputes between the parties stand referred to Mr. P.V. Dinesh, Senior Advocate (Tel. 9811210223) as the arbitrator to arbitrate on the disputes between the parties.

19. All questions of fact, law, jurisdiction, limitation and the like are open to be urged before the learned Arbitrator. This Court expresses no view thereon.

20. The learned Arbitrator is requested to file the requisite declaration under Section 12 of the 1996 Act within a week of entering on arbitration.

21. The fees of the learned Arbitrator shall also be fixed in accordance with Fourth Schedule to the 1996 Act.

22. The petitions stand disposed in the aforesaid terms with no orders as to costs.

C.HARI SHANKAR, J

JULY 9, 2024/yg

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