

Thermal Engineers And Insulators Pvt. ... vs Delhi Tourism And Transportation ... on 21 September, 2022

Author: Neena Bansal Krishna

Bench: Neena Bansal Krishna

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IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 1058/2021

THERMAL ENGINEERS AND INSULATORS PVT. LTD.

Through: Mr. Shubham Jaiswal & M
Sharma, Advocates.

versus

DELHI TOURISM AND TRANSPORTATION DEVELOPMENT
CORPORATION LTD.

..... Respon

Through: Mr. Siddhant Nath, Advocate.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

ORDER

% 21.09.2022

1. The present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "A&C Act, 1996") on behalf of the petitioner seeking appointment of an Arbitrator.

2. Facts in brief are that the respondent published a Notice Inviting e-Tender bearing No. 19/EE (PB)/DTTDC/Engg./2015-16 for construction of Additional Rooms for Labs, Classrooms and MP Hall of Government SBV, A Block, Jahangir Puri, New Delhi-110033. The estimated cost of the Project was to the tune of Rs. 3,14,08,638/-. The Letter of Award bearing No. F.No.DTTDC/Engg./1(234)/EE(PB-II)/271 dated 23rd February, 2016 was awarded to the petitioner being the lowest bidder for the bid of Rs. 2,42,47,470/-. The petitioner also submitted the Performance Guarantee of Rs. 13,57,535/- which was accepted by the respondent.

3. According to the Letter of Award dated 23rd February, 2016, the time for completion of the Tender was 180 days, commencing from the 10th from the date of issue of the letter or handing over of the site, whichever was later.

4. It is submitted that the site was provided to the petitioner not before 19th March, 2016. Because of this, reason and other regular and frequent breaches, delays and defaults on the part of the respondent, the work was completed on 31st March, 2018.

5. It is submitted that the justified delay of 597 days was accepted by the Executive Engineer and the same was conveyed to the Chief Project Manager vide extension of time sheet.

6. It is further stated that the amount of work done was to the tune of Rs. 6,00,00,000/- approximately which exceeded the Tender amount of Rs.2,42,47,470/- approximately. The Completion Certificate dated 31st March, 2018 was received by the petitioner, wherein it was mentioned that the petitioner has completed its work without defects and to the satisfaction of the Assistant Engineer (PB-II), DTTDC Ltd., Executive Engineer (PB-II), DTTDC Ltd. and the Chief Project Manager (Tourism), DTTDC Ltd. of the respondent.

7. The petitioner sent several letters in regard to the submission of 10C & 10CA bill and sought release of the payments at the earliest. It is submitted that no payment has been made against the bills. The respondent did not make the payment and the Final Bill was paid by the respondent on 28th February, 2019. However, the full amounts as were due to the petitioner, were not paid in respect of which various representations of the petitioner are still pending.

8. It is submitted that while granting EOT, the petitioner was compelled to write an Undertaking that the petitioner would not claim anything on account of extended period. It is claimed that the said Undertaking was given under economic duress and is, therefore, void and must be treated as withdrawn.

9. Learned counsel on behalf of the petitioner has placed reliance on the decision of this Court in M/s Thermal Engineers and Insulators Pvt. Ltd. vs. Delhi Tourism and Transportation Development Corporation Ltd. ARB.P. 1033/2021 decided on 25th February, 2022.

10. It is submitted that the respondent was not accepting the error on its part and was not making the payment of dues to which the petitioner was entitled. Another Letter dated 03rd November, 2020 was sent to the respondent by the petitioner raising various claims, but the same has not elicited any response from the respondent.

11. The petitioner in terms of Clause 25 (i) of the Agreement (GCC Clauses 2014) requested the Managing Director & CEO of the respondent vide Letter dated 15th December, 2020 to constitute the Dispute Redressal Committee (hereinafter referred to as "DRC") to refer the claims of the petitioner, but the respondent informed the petitioner vide its Letter dated 04th January, 2021 that since the disputes have not been raised before the Chief Engineer, they cannot be referred to the DRC. The respondent asked the petitioner to visit the Office of the Chief Engineer on 14th January, 2021 at 04:00 P.M.

12. It is submitted that the petitioner again sent a letter to the Managing Director & CEO of the respondent and informed him that pursuant to the directions given, the petitioner had visited the Office of the Chief Engineer, but he completely failed to adjudicate upon his claims.

13. After exhausting all the remedies, the petitioner in terms of Clause 25

(i) of GCC again sent a Letter dated 01st March, 2021 for appointment of the Sole Arbitrator to which the respondent replied vide its Letter dated 16th March, 2021 and informed that the petitioner has not raised all the disputes before the Chief Engineer. Again, the petitioner vide Letter dated 15th April, 2021 raised all the disputes before the Chief Engineer, but the exercise done by the petitioner was in vain.

14. It is submitted that the petitioner gave a Notice dated 31 st May, 2021 for appointment of the Sole Arbitrator to the respondent, but no response has been received from the respondent. It is claimed that the respondent has refused to arbitrate the disputes in illegal, misconceived and non-sustainable manner. Therefore, the prayer has been made that an Arbitrator may be appointed.

15. The respondent in its Reply has taken an objection that the final bill was of Rs. 5,05,01,259/- out of which an amount of Rs.4,94,63,074/- was already paid. The respondent made a further payment of Rs. 10,38,185/- to the petitioner against the Final Bill on 25th April, 2019. The petitioner accepted it as a full and final payment and also issued an Undertaking to this effect. Once the Undertaking has already been furnished the petitioner cannot now invoke Arbitration Clause and seek appointment of the Arbitrator. It is stated that the amount having been paid in Full and Final, nothing more remains to be paid to the petitioner.

16. The respondent has further asserted that the petitioner has failed and concealed the Undertaking by not filing it before this Court and the petition is liable to be dismissed on account of deliberate concealment of material facts as has been held by this Court in Satnam Chand Kohli vs. Ashwinder Kumar & Ors. CS(OS) 705/2006 decided on 23rd May, 2016.

17. Moreover, in terms of Clause 25 of the Agreement (GCC Clauses-2014), if the contractor is dissatisfied or raises any dispute, then he has to intimate the Superintendent Engineer within 15 days with the request for written instructions or decision. Thereafter, if the contractor is not satisfied, he may approach the Chief Engineer who shall then consider his decision. An appeal against the decision of the Chief Engineer has to be preferred within 30 days before the Dispute Redressal Committee. Any arbitration invoked without following the approved procedure is not tenable and the petitioner cannot approach the Court for appointment of the Arbitrator. In the present case, the procedure as detailed in Clause 25 has not been followed and the present petition is premature.

Furthermore, Clause 25 (ii) of the Agreement (GCC Clauses-2014) provides that the contractor has to make any demand for appointment of the Arbitrator in writing within 120 days from receiving the intimation from the Engineer-in-Charge that the Final Bill is ready for payment or else the claim of the contractor shall be deemed to be vague. The petitioner herein has received the Final payment on 25th April, 2019 and the demand for appointment of Arbitrator has been made only vide Letter dated 20th September, 2020 which is beyond the stipulated period. Hence, the present petition is not maintainable.

18. The petitioner by way of its additional affidavit has explained that the Final Bill raised was in the sum of Rs. 5,75,84,478/- against which a payment of Rs. 4,76,63,074/- was paid towards the 10th

RA bill, the balance of Rs. 1,01,21,404/- was payable towards the 11th Final Bill. Furthermore, the respondent itself had made the 11th Final Bill of Rs. 05,05,32,764/- after unilaterally making deductions of Rs. 70,00,000/- in the Final Bill submitted by the petitioner. The Final Bill paid by the respondent was neither submitted nor accepted by the petitioner.

19. It is further explained that the petitioner was constrained to give the Undertaking in order to get the payment from the respondent, as the petitioner was hard pressed for funds and had to sign the dotted line either in printed form or otherwise, in order to receive the amount. It is stated that the petitioner was under economic duress and coercion of the respondent that led the petitioner to sign the Undertaking, but the same cannot be considered as voluntary or having discharged the respondent from its liability. The final payment made was of Rs. 10,38,185/-, while another payment of Rs. 06,06,187/- was released by the respondent on 26th April, 2019 i.e., the next day which shows that the Undertaking obtained by the respondent much prior to the date on which the actual payment has been made. It is asserted that the said Undertaking cannot be considered to be in full and final discharge of the liabilities of the respondent and the petitioner has rightly invoked Section 11 of A&C Act, 1996 for appointment of the Arbitrator.

20. Submissions heard.

21. It is not in dispute that the petitioner on conclusion of the work, had raised the Final Bill of Rs. 5.9 crores and Rs.9,86,275/- was paid to him after deductions of the taxes.

22. Learned counsel on behalf of the respondent has argued that Rs. 4.9 crores has already been paid to the petitioner from time to time. However, it has been asserted by the petitioner that Rs. 4.9 crores that was received was against the bills that were submitted from time to time, but the Final Bill was of about Rs. 5.9 crores.

23. The main contention is in regard to the consequence of the Undertaking given by the petitioner while having received the payment against Full and Final bills on 25th April, 2019. The sole objection of the respondent is that the petitioner has already accepted the final bill in full and final satisfaction of its claims and having so accepted the final bill, no arbitrable dispute remains for reference to the Arbitrator for adjudication. The main issue for determination is whether the said full and final payment and the Undertaking given by the petitioner was towards the full settlement thereby leaving no dispute for reference to the arbitration.

24. There is no dispute about there being a valid written Arbitration Agreement. There is also no dispute that the Work Order was given to the petitioner and a Final Bill was raised against which an amount of about Rs. 10,00,000/- was accepted by the petitioner and there was an Undertaking given stating that the petitioner has received the amount in Full and Final settlement. The only question is whether in view of accepting the final bill, there exists no arbitrable dispute which may be referred to arbitration.

25. The scope of the intervention at the stage of appointment of Arbitrator has been narrowed down considerably after the insertion of Section 11(6)(a) of A&C Act, 1996 and essentially, the inquiry is

limited to examining the existence of a valid Arbitration Agreement.

26. In the case of *Vidya Drolia vs. Durga Trading Corporation* (2021) 2 SCC 1, it was observed that the legislative purpose is essential to minimise the Court's intervention at the stage of the appointment of the Arbitrator. It was further explained that the issue of non-arbitrability of a dispute is basic for arbitration as it relates to the very jurisdiction of the Arbitral Tribunal. An Arbitral Tribunal may lack jurisdiction for several reasons and non-arbitrability has multiple meanings. It was observed that non-arbitrable disputes may be those which may not be amenable to adjudication and settlement by arbitration, or may not be covered by the Arbitration Agreement and may be termed as excepted matters and come in the category of excepted matters. The inquiry whether the dispute is governed by the Arbitration Clause can be examined by the court at reference stage itself and may not be left unanswered to be examined by the Arbitral Tribunal. In cases of debatable and disputable facts, the court would may direct the parties to abide by the Arbitration Agreement as the Arbitral Tribunal has the primary jurisdiction and authority to decide the disputes, including the question of jurisdiction and non-arbitrability. Rarely as a demurrer, the court may interfere at the stage of Section 11 of the Act only when it is manifestly and ex facie certain that the Arbitration Agreement is non-existent, invalid or disputes are non-arbitrable. Though, the nature and facet of non-arbitrability would to some extent determine the level and nature of judicial scrutiny. The restricted and limited review is to check and to protect the parties from being forced to arbitrate when a matter is demonstrably „non-arbitrable“ and to weed out the deadwood. It is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism. It was further observed that it is only in very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time barred or that the dispute is non-arbitrable that the court may decline to make a reference. If there is a slightest doubt, the rule is to refer the disputes to arbitration otherwise, it would encroach upon what is essential a matter to be determined by the Arbitral Tribunal.

27. In the present case, the petitioner has explained the circumstances and the alleged Undertaking recording the full and final payment was given in by the petitioner.

28. It has been pointed out by the counsel for the petitioner that the Final Bill was in the sum of Rs. 5.9 crores while the amount released against the final bill was only of Rs. 10,00,000/-. It is a common sense that Rs.

10,00,000/- against the bill of Rs. 5.9 crores cannot be said to have been voluntarily accepted. It is also explained that it is an undertaking does not bear any date. In fact, the signatures on the Undertaking were not obtained at the time of final settlement or else, there would have been no reason for the date not to appear on the said Undertaking. The petitioner has also pointed out that while the amount of Rs. 10,00,000/- approximately paid on 25th April, 2019 is claimed to be towards the full and final settlement, but payment of Rs. 06,06,187/- has been made on 26th April, 2019 and a sum of Rs. 18,000/- has been paid on 30th April, 2019. If the payment received on 25th April, 2019 was towards the full and final settlement, there is no reason for further amounts to have been credited to the account of the petitioner. The petitioner has further explained that it was under

the economic duress that he was compelled to accept the final payment released by the respondent or else, it would have been deprived of even that money.

29. In the cases of *Ambica Construction vs. Union of India* (2006 13 SCC and R.L. Kalathia & Co. vs. State of Gujarat (2011) 2 SCC 475, wherein the contractor claimed to have been coerced to issue a "No Dues Certificate" without which no amount would be released. It was held that merely because a "No Dues Certificate" has been given by the contractor, it cannot be said that there is no arbitrable claim which may be referred to arbitration.

30. The Co-ordinate Bench of this Court in *M/s Thermal Engineers and Insulators* (supra), in a similar situation which came for interpretation, observed that the circumstances under which such Undertaking was accepted and whether the same can be considered to be in complete discharge of the contractual obligations of the respondent absolving him from all liabilities is a disputes which requires adjudication and should be agitated before the Arbitral Tribunal.

31. Likewise, in the case of *Oriental Insurance Co. Ltd. vs. Dicitex Furnishing Ltd.* (2020) 4 SCC 621, a similar plea of being coerced into signing clean discharge was taken. It was observed that the matter was required to be referred to the arbitration for determination if the said discharge was signed under economical and financial duress or tantamount to unconditional and affirmed acceptance of the payments towards Full and Final settlement.

32. Learned counsel on behalf of the respondent has referred to *Indian Oil Corporation Limited vs. NCC Limited* 2022 SCC OnLine SC 896. However, the said judgement is not in respect of Full and Final settlement of the bill. The full and final payment included certain notified claims in terms of the Agreement between the parties. The issue was whether the said claims which were notified was to be determined exclusively by the Superintendent Engineer whose decision in this regard was final. If the Superintendent Engineer concluded these claims to be notified, they came in the category of excepted matters in terms of the Contract between the parties and were not referable to arbitration. The Final bill raised, included certain notified claims which had been held by the Superintendent Engineer to be in the notified claims. In this context, those claims were deleted from the Final Bill while the payment for the remaining was made. It was in the context of the notified claims that it was observed that the findings of the Superintendent Engineer in terms of the procedure agreed by the parties in the Arbitration Clause was final and those notified claims fell in the category of excepted matters and were not referable to arbitration. The said judgement did not pertain to the Undertaking as in the present case; the facts are distinguishable and not applicable to the facts in hand.

33. Considering that there is a valid Arbitration Agreement between the parties and in the light of the facts and discussions, Mr. Amar Nath, District and Sessions Judge (Retd.), Mobile No. 9958697030, is hereby appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

34. The parties are at liberty to raise their respective objections before the Arbitrator.

35. This is subject to the Arbitrator making necessary disclosure as under

Section 12(1) of A&C Act, 1996 and not being ineligible under Section 12(5) of the A&C Act, 1996.

36. The fees of the learned Arbitrator would be fixed in accordance with the Fourth Schedule to A&C Act, 1996 or as consented by the parties.

37. Learned counsels for the parties are directed to contact the learned Arbitrator within one week of being communicated a copy of this Order to them by the Registry.

38. The petition is accordingly disposed of in the above terms.

NEENA BANSAL KRISHNA, J SEPTEMBER 21, 2022 S.Sharma