

M/S Thermal Engineers And Insulators ... vs Delhi Tourism And Transportation ... on 25 February, 2022

Author: Sanjeev Narula

Bench: Sanjeev Narula

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IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 1033/2021

M/S THERMAL ENGINEERS AND INSULATORS PVT. LTD.

..... Peti

Through: Mr. Shubham Jaiswal, Advocate.

versus

DELHI TOURISM AND TRANSPORTATION DEVELOPMENT

CORPORATION LTD.

..... Respo

Through: Mr. Siddhant Nath, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

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25.02.2022

[VIA HYBRID MODE]

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeks appointment of an Arbitrator for adjudication of disputes arising from Letter of Award [hereinafter referred to as "LOA"] dated 11th May, 2016 bearing F. No. DTTDC/Engg./I/(234)/EE(SP)/301 for "Upgradation and face lifting of Rana Pratap Govt. Sindhi Sarvodaya Vidyalaya (School ID: 2128032) at Rajender Nagar, New Delhi (SH: Civil & Electrical Work)".

2. The said LOA is governed by Clause 25 of the General Conditions of the Contract-2014 [hereinafter referred to as "GCC"].

3. The existence of the afore-noted arbitration agreement is not in dispute. The Respondent however strongly contests the maintainability of the present petition, by primarily relying upon an undertaking (undated), signed by the Petitioner, copy whereof is annexed with the reply filed by the Respondent. Since the said undertaking becomes the bone of contention, it is considered appropriate to reproduce the contents thereof, hereinafter:

"UNDERTAKING Name of Work: Upgradation and face lifting of Rana Pratap Govt. Sindhi Sarvodaya Vidyalaya (School ID: 2128032; at Rajender Nagar, New Delhi. (SH: Civil & Electrical Work).

W.O. 09/EE(SP)DTTDC/Engg./2016-17 Received Rs. 13,51,251/- (Rs. Thirteen Lac Fifty One Thousand Two Hundred Fifty only) through cheque / RTGS towards full and final settlement of above noted work/Agreement.

M/s Thermal Engineers & Insulators Pvt. Ltd. Naresh Mittal Director"

4. Mr. Siddhant Nath, counsel for the Respondent, relying upon the afore-noted undertaking, submits that once the Petitioner has categorically accepted the receipt of Rs. 13,51,251/- as full and final payment for the work awarded, it should not be allowed to seek referral to arbitration for recovery of any further amounts. It is further argued that after the receipt of final payment, Petitioner remained silent for a period of more than two years, before issuing a false and frivolous notice dated 7th September, 2020, which shows that the claim is nothing but an afterthought.

5. Mr. Nath also argues that the Petitioner has also not complied with pre-arbitration mechanism as provided under Clause 25 of the GCC, 2014 which mandates that the Petitioner has to approach the authorities of the Respondent's department for resolution of its disputes and only when the said options are exhausted, could the Petitioner seek appointment of an Arbitrator. Lastly, Mr. Siddhant Nath, places reliance upon the judgment of the Supreme Court in ONGC Mangalore Petrochemicals Ltd. v. ANS Construction Ltd.,¹ to argue that Petitioner cannot be permitted to circumvent the undertaking on the make-believe ground of financial duress.

6. Per contra, Mr. Shubham Jaiswal, counsel for the Petitioner, submits that the contentions raised by the Respondent are entirely misplaced. He emphasizes that indeed the undertaking was executed under financial duress, as the Petitioner was not being paid its dues. He explains that although the Respondent had issued a completion certificate dated 28th December 2017, however, the outstanding dues remained. He also relies upon the Hindrance Sheet which categorically notes that the value of the work done by the Petitioner was more than the amount actually paid. As regards the objection raised by the Respondent regarding the non-exhaustion of pre-arbitration mechanism, he submits that numerous correspondences were exchanged with the Respondent prior to filing of the present petition. All such correspondence were either not considered or promptly rejected. Therefore, the Petitioner had no other option but to approach this Court.

7. Having considered the contentions of both the counsels, it clearly emerges that the existence of the arbitration agreement is indeed not in dispute. Thus, the only objection that merits consideration relates to the execution of the undertaking. On this aspect, firstly it must be noted that the jurisdiction of this Court under Section 11(6A) is limited. The law on this aspect is now well established, that after the amendment of the Section 11 of the Act, the jurisdiction of this Court is limited to examining the existence and validity of the arbitration clause. Only in such cases where the Court, on (2018) 3 SCC 37.

a prima facie basis, finds that the claims are ex facie not arbitrable, should the Court decline to refer the disputes to arbitration. The rule of thumb is "when in doubt, do refer" (See: Vidya Drolia and Ors. v. Durga Trading Corp.²).

8. Keeping the above-noted principle in mind, the Court finds that in the instant case, the argument raised by the Respondent, is plainly arguable. This is because, in the Hindrance Sheet prepared by the Respondent, the value of the work done by the Petitioner is valued approximately Rs. 3,46,45,000/-. Against this, concededly, a payment of only Rs. 3,17,70,443/- has been made by the Respondent. Further, it is also a matter of record that after the issuance of the completion certificate on 28th December, 2017, there was a considerable delay on the part of the Respondent, and the final payment was made only on 28th November, 2018. The Petitioner also has grievance with respect to the delay and short payment. What were the circumstances under which their undertaking was executed, and whether the same can be considered to be a complete discharge of the contractual obligations of the Respondent absolving them of all liabilities - is a dispute that would require adjudication, which, in the opinion of the Court, should be agitated before the Arbitral Tribunal.

9. The judgment cited by Mr. Nath, too, is distinguishable on facts, as in the instance case, the Petitioner, after the receipt of payment, sent several communications to the Respondent objecting to the short payment. Although there may have been some delay on the part of the Petitioner in initiating that correspondence, however, the legal effect thereof falls within the realm of adjudication of the arbitrator, which would require adducing of evidence. Thus, the question regarding the effect of the undertaking is left open for the Respondent to raise in arbitration.

10. As regards Respondent's objection regarding Petitioner's failure to opt for the pre-arbitration mechanism, it must be noted that the Petitioner's first communication to the Executive Engineer was sent on 7th September, 2020, which got no response. This was followed by a communication to 12th October, 2020, to Superintendent Engineer and then on 16th December, 2020, to the Director and CEO for seeking constitution of a DRC. Thereafter, the Petitioner sent a reminder on 28th January, 2021 and that also met the same fate. Ultimately the Petitioner then invoked arbitration and sought appointment of an Arbitrator vide notice dated 25th February, 2021. The Respondent replied on 9th March, 2021 and took the objection of Clause 25 of the GCC. In the opinion of the Court, such an objection is too late in the day. The intent behind Clause 25 is only to ensure that matters which can be resolved speedily through internal mechanism should not travel to the Court. However, in this case, till date, the Petitioner has still not found an avenue for adjudication of its disputes. The intent of Clause 25 is therefore completely defeated, and the Court does not find any good ground, at this stage, to reject the petition and relegate the Petitioner to the mechanism as provided under Clause 25 of the GCC.

11. The present petition is thus allowed, and Mr. Amrit Lal Aggarwal (Retd. Chief Engineer, MCD) [Contact No.: +91 9811100361] is appointed as the Sole Arbitrator to adjudicate the disputes that are stated to have arisen from LOA dated 11th May, 2016.

12. The parties are directed to appear before the Sole Arbitrator as and when notified. This is subject to the Arbitrator making necessary disclosure(s) under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

13. The Arbitrator will be entitled to charge his/ her fee in terms of the provisions of the Fourth Schedule appended to the Act.

14. It is clarified that the Court has not examined any of the claims of the parties and all rights and contentions on merits are left open. Both the parties shall be free to raise their claims/counter claims before the learned Arbitrator in accordance with law.

15. In view of the above, the present petition is allowed.

SANJEEV NARULA, J FEBRUARY 25, 2022 as