

M S Inderjit Mehta Constructions Pvt. ... vs Union Of India & Anr on 17 March, 2021

Author: Vibhu Bakhru

Bench: Vibhu Bakhru

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IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 56/2021

M S INDERJIT MEHTA CONSTRUCTIONS

PVT. LTD.

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Through: Mr Praveen Chauhan and Mr Vineet
Kumar Wadhwa, Advocates.

versus

UNION OF INDIA & ANR.

.....

Through:

Mr Bhagvan Swarup Shukl
with Mr Sarvan Kumar, A
UOI.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU
ORDER

% 17.03.2021

1. The petitioner has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act'), inter alia, praying as under: -

"(a) Appoint any of the above suggested Retired Judges to act as Arbitrator to decide all the disputes arising out of or in connection with the Contract bearing CA No.CCE (COD)/04/2015-16: "CONSTRUCTION OF WAREHOUSE AND BUILDINGS ALONGWITH ASSOCIATED SERVICES UNDER PHASE-II (PART-1-A) AT COD JABALPUR executed between the Petitioner and Respondent No.1.

(b) Award costs of this Petition to the Petitioner."

2. The respondent had awarded the aforesaid contract to the petitioner and entered into an Agreement on 28.09.2015.

3. Indisputably, disputes have arisen between the parties in connection with the said contract. The petitioner issued a letter dated 31.07.2020 invoking arbitration and requested for the appointment of an Arbitrator. The petitioner followed up its request by sending a letter dated 02.09.2020 requesting for the appointment of an Arbitrator. It is claimed that it did not receive any response,

either to the notice invoking arbitration dated 31.07.2020 or to its subsequent letter dated 02.09.2020.

4. In the aforesaid backdrop, the petitioner has filed the present petition. Concededly, the contract between the parties includes an Arbitration Clause, which reads as under: -

"70. Arbitration - all disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of a [Serving Officer having degree in Engineering or equivalent or having passed final/direct final Examination of sub-Division II of Institution of Surveyor (India) recognised by the Govt. of India] to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the Contract under Condition Nos. 55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos. 52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalised by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceedings hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the Contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, *ex parte*, if either party, in spite of a notice from the Arbitrator fails to take part in the proceedings. The Arbitrator may, from time to time with the consent of the parties, enlarge, the time for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual, item of dispute. [The arbitrator shall give reason for the award in each and every case irrespective of the value of claims or counter claims].

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The Award of the Arbitrator shall be final and binding on both parties to the Contract."

5. The respondent does not dispute that the petitioner had invoked the said Arbitration Clause. However, the respondent has opposed the present petition on the ground that the petitioner has not resorted to Conciliation as required under the Dispute Resolution Clause.

6. Mr Shukla, learned standing counsel appearing for the respondent submitted that in terms of Clause 71 of the General Conditions of Contract (GCC), it is essential that the petitioner first invokes conciliation proceedings before resorting to arbitration. And therefore, the present petition is premature.

7. The learned counsel for the petitioner does not dispute the provision for Conciliation, which is included in the contract. He, however, submits that the said provision is inchoate as the necessary procedure for constitution/appointment of the Dispute Resolution Board/Conciliator has not been agreed to or included in the agreement between the parties.

8. Clause 71 of the GCC reads as under: -

"71. Conciliator - If dispute (other than those for which the decision of the CWE or any person is by the contract expressed to be final and binding) of any kind whatsoever arises between the parties to the contract during the execution of the works, or after completion or after determination/cancellation/termination of the contract, including any disagreement by either party with any action, inaction, opinion, instruction, certificate or valuation by the Accepting Officer or his nominee, the matter in dispute shall, in the first place be referred to the Disputes Resolution Board (DRB) in case of contracts valuing 10 crore or more and to conciliation, by a sole conciliator, in case of contracts valuing less than 10 crore. In case of disagreement with the decision of such DRB or conciliator, any party may invoke arbitration clause.

Procedure for the constitution/appointment of DRB/Conciliator shall be as laid down in the Contract Agreement"

9. Mr Shukla, points out that the GCC were amended pursuant to the instructions issued on 08.04.2015 and Clause 71 was included in the GCC.

10. He further submits that by a letter dated 22.08.2017, the Manual on Contracts, 2007 was also amended. He has referred to the said letter in support of his contention that it is mandatory for the petitioner to have resorted to Conciliation before invoking arbitration.

11. Whilst there is no dispute that a provision for Conciliation was included in the GCC; the learned counsel for the respondent is unable to refer to any documents to show that the contract between the parties had been amended to include any procedure for the constitution of a Dispute Resolution Board.

12. A letter dated 22.08.2017 referred to by the respondent specifically mentions that for ongoing contracts, an amendment to the contract would be required. Paragraph 5 of the letter dated 22.08.2017 reads as under: -

"5. For ongoing contracts where amended Condition 71 of IAFW-2249 is applicable with provn for DRB but where constitution/procedure for DRB has not been included in the contracts, this standard DRB clause may be included through an amendment to contract."

13. However, the respondent has been unable to refer to any document whereby the contract between the parties was amended to incorporate a procedure for the constitution of a Dispute Resolution Board.

14. Considering the above and the fact that there is no dispute as to the existence of the Arbitration Clause, this Court considers it apposite to allow the present petition.

15. Accordingly, this Court proposes to appoint Justice (Retd.) Badar Durrez Ahmad, former Chief Justice, High Court of Jammu and Kashmir (Mobile No.- 7042205786) as a Sole Arbitrator to adjudicate the disputes that have arisen between the parties.

16. The parties are at liberty to approach the learned Arbitrator for eliciting his consent and disclosure required under Section 12(1) of the A&C Act. Let the same be furnished before the next date of hearing.

17. List on 09.04.2021.

VIBHU BAKHRU, J MARCH 17, 2021 MK