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& Solicitors

Arbitration agreement envisaging unilateral appointment of arbitrator though void may be saved using doctrine of severability

M/s. Jyoti Sarup Mittal vs. The Executive Engineer-XXIII, South Delhi Municipal Corporation

Case No. ARB. P. 275/2021 & I.A. No. 2725/2021

Date 12 July 2021

Court High Court of Delhi

Coram Hon'ble Mr. Justice Vibhu Bakhru

1. FACTUAL MATRIX

- 1.1 M/s. Jyoti Sarup Mittal (**“Petitioner”**) and South Delhi Municipal Corporation (**“Respondent”**) entered into an agreement dated 21 November 2006, for the execution of the works relating to improvement to drainage system in a specific part of Delhi. The Respondent awarded the contract for a sum of Rs. 25,30,28,517/- and stipulated 06 December 2006 as the commencement date and 05 December 2008 as the completion date.
- 1.2 The Petitioner completed the works on 31 May 2010 and claimed that the delay was attributable to the Respondent due to several reasons. The Petitioner submitted an application for extension of time (**“EOT”**) that remained pending. The final bill for payment was submitted by the Petitioner on 16 August 2011 that was not processed until March 2017. The Petitioner claimed that it made repeated requests for payment of dues that went unheard. Although, the grievances of the Petitioner were heard in a meeting dated 11 August 2016 wherein the payment of the dues were disputed by the Respondent on account of reasons attributable to the Petitioner.
- 1.3 Albeit, the Petitioner’s final bill was cleared on 01 March 2017, the Petitioner asserted that it did not include their claim for EOT. After repeated efforts of the Petitioner that went in vain; vide notice dated 12 May 2020, the Petitioner invoked the dispute resolution clause. Surprisingly, the Respondent did not reply to any correspondence sent by the Petitioner in this regard on multiple occasions.
- 1.4 Vide letter 23 September 2020, the Petitioner requested the Commissioner of the Respondent to appoint a Sole Arbitrator however, the Petitioner did not receive any response to the same. Thus, the Petitioner approached the Hon’ble Delhi High Court (**“Delhi High Court”**) under Section 11 of the Arbitration and Conciliation Act, 1996 (**“1996 Act”**) praying for the appointment of an arbitrator.

2. CONTENTIONS OF THE PETITIONER BEFORE THE DELHI HIGH COURT

- 2.1 It was the case of the Petitioner that it had issued a notice to refer the dispute to arbitration and in this regard, the Executive Engineer had convened a meeting and noted that the payment was delayed for various reasons including non-finalization of extra items and substitute items. Moreover, even the case for EOT had not been finalized.
- 2.2 The primary grievance of the Petitioner was premised on the fact that, the request for EOT was not considered in the final sum disbursed to the Petitioner. Additionally, the Petitioner argued that since the Respondent had requested not to initiate any arbitration/litigation, assuring the sums would be considered, it was not open to the Respondent to now allege the limitation bar with respect to the same.

3. CONTENTIONS OF THE RESPONDENT BEFORE THE DELHI HIGH COURT

- 3.1 The Respondent premised its submissions on four grounds; *firstly*, an agreement to refer to the disputes to arbitration did not exist between the Petitioner & Respondent as the parties did not sign the General Conditions of the Contract (“GCC”) that contained the arbitration clause. *Secondly*, it was contented that clause 25 of the agreement that contained the dispute resolution mechanism was ‘contingent’ on the Commissioner of the Respondent appointing an arbitrator. In this regard, the Respondent placed reliance on the decision of the Hon’ble Supreme Court of India (“**Supreme Court**”) in the case of *Oriental Insurance Company Ltd.*¹
- 3.2 *Thirdly*, it was argued that the invocation of arbitration by the Petitioner was barred by limitation since in view of the facts, there was an absence of any averment as to any acknowledgment which could have extended the period of limitation. As being a money claim, the period of limitation had expired in 2014. In this regard, reliance was placed upon the decision of the Supreme Court in *Bharat Sanchar Nigam Limited*.² *Lastly*, it was argued that the Petitioner did not comply with the pre-arbitration process and had failed to exhaust all remedies before approaching the court of law. To buttress the submission, reliance was placed upon the judgment of the Supreme Court in *United India Insurance Co. Ltd.*³

4. ISSUES

- 4.1 Whether the Commissioner of the Respondent was empowered to unilaterally appoint the Sole Arbitrator?
- 4.2 Whether the entire agreement between the parties to refer the dispute to arbitration will be void or non-existent in case the appointment mechanism is considered to be void?

5. JUDGMENT

- 5.1 At the outset, it was observed by the learned single judge that despite the signed copy of the GCC or the agreement not being produced, the agreement to refer the parties to arbitration was evident enough. Thus, the first ground of the Petitioner was not merited.
- 5.2 The learned single judge then identified the principal controversy in the present case that pertained to the fact as to whether a Sole Arbitrator could be unilaterally appointed by the Commissioner. In this regard, the Delhi High Court placed strong reliance upon the judgments of the Supreme Court in the cases of *TRF Ltd.*⁴ and *Perkins Eastman Architects*⁵ to observe that it was no longer permissible in law for the Commissioner of the Respondent to appoint an arbitrator unless the Petitioner agreed for such appointment in writing. After briefly examining the legislative history, the

¹ *Oriental Insurance Company Ltd. vs. Narbheram Power and Steel Pvt. Ltd.*, (2018) 6 SCC 534.

² *Bharat Sanchar Nigam Limited & Anr. vs. Nortel Networks India Pvt. Ltd.*, 2021 SCC OnLine SC 207.

³ *United India Insurance Co. Ltd. vs. Hyundai Engineering and Construction Co. Ltd.* (2018) 17 SCC 607.

⁴ *TRF Ltd. vs. Energo Engineering Projects Ltd.*, (2017) 8 SCC 377.

⁵ *Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd.*, 2019 SCC OnLine SC 1517.

learned single judge was not inclined to accept the arguments advanced by the Respondent to this extent.

- 5.3 The Delhi High Court then moved to examine the second issue that was of greater importance. It was observed that according to the expansive reading of the decisions in *TRF Ltd.*⁶ and *Perkins Eastman Architects*⁷ and legislative history, the wordings of the clause cannot be read in such a manner so as to render the clause ineffective of reference merely because the clause only permitted a unilateral appointment mechanism.
- 5.4 In view of the learned single judge, the entire arbitration clause will not fail merely because the mechanism for appointment of an arbitrator by the Commissioner is no longer permissible. To substantiate the same, reliance was placed upon the doctrine of severability⁸ where the reference of disputes was considered to be severable from the appointment mechanism.
- 5.5 The learned single judge then relied upon the judgment in the case of *Indian Oil Corporation Ltd.*⁹ and held that in view of the facts, it is necessary for the Delhi High Court to appoint an arbitrator and the wording of the clause that only restricts the power of appointment to the Commissioner cannot interfere or supersede the power of the Delhi High Court.
- 5.6 The Delhi High Court concluded the judgment on two fronts viz., (i) where there exists a contentious issue and the same is beyond the power of the court under Section 11 of the 1996 Act, the reference to arbitration is best-suited and (ii) the fact that the Petitioner had followed all tiers and exhausted all remedies before approaching the Delhi High Court. With these two conclusions, the petition was allowed by the Delhi High Court.

6. PSL OPINION

- 6.1 The judgment of the Delhi High Court yet again marks the proactive stance of the Indian Courts to give effect to the parties' intention to settle disputes through arbitration. Whilst the position of law on unilateral clauses was well settled, the present judgment sheds light on severability of the arbitration clause in sync with the pro-arbitration approach adopted by Courts under Section 11.

⁶ *Supra* note 4.

⁷ *Supra* note 5.

⁸ *Chloro Controls India (P) Ltd. vs. Severn Trent Water Purification Inc. & Ors.*, (2013) 1 SCC 641.

⁹ *Indian Oil Corporation Ltd. and Ors. vs. M/s. Raja Transport (P) Ltd.*, (2009) 8 SCC 520.