

(2022) 02 DEL CK 0098

In the Delhi High Court

Case No : Arbitration Petition No. 241 Of 2020

M/S Satish Chand Rajesh Kumar Pvt. Ltd.

APPELLANT

Vs

New Delhi Municipal Council

RESPONDENT

Date of Decision : 10-02-2022

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9, 11(6), 12(1), 12(5)

Citation : (2022) 02 DEL CK 0098

Hon'ble Judges : Sanjeev Narula, J

Bench : Single Bench

Advocate : Sanjay Bansal, Karan Sharma, Mohit Siwach

Final Decision : Disposed Of

Judgement

Sanjeev Narula, J

1. The present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 [hereinafter "the Act"] seeking a direction

to the Respondent to appoint an Arbitrator in terms of the arbitration clause [Clause 25] contained in the General Conditions of Contract [hereinafter

"GCC"] that forms part of the Agreement dated on 15th March, 2018.

2. At the outset, Respondent contends that the present petition deserved to be dismissed and insists that without following the pre-arbitration

mechanism envisaged under the arbitration clause, an Arbitrator cannot be appointed by this Court.

3. Before proceeding to examine the merits of the afore-noted contention, a brief narration of facts is necessary and read as under: -

3.1. The Petitioner viz. M/s. Satish Chand Rajesh Kumar Pvt. Ltd. [hereinafter "SCRKPL"] being the L-1 bidder, was awarded work of -

Redevelopment of Bapu Samaj Sewa Kendra, Panchkuian Road, New Delhi vide the work award letter No. D/659/EE(BM-I) dated 13th

March, 2018 and an Agreement No. 72/EE/(BM-I)/2017-28 was drawn up on 15th March, 2018. Letter of Acceptance was issued on 07th February,

2018 [hereinafter "LoA"] with a scheduled date of completion of the said project as 21st August, 2019. SCRKPL also furnished a performance

guarantee in terms of paragraph No. 2 of the LoA.

3.2. According to SCRKPL, the Respondent viz. New Delhi Municipal Corporation [hereinafter "NDMC"] failed to provide the drawings which

were required for the commencement of the work, and this led to delay in the execution of the work. Additionally, payments due under the Agreement

were withheld and costs owing to damages as well as loss caused due to idling of the staff, etc are owed to SCRKPL.

3.3. In these circumstances, disputes arose between the parties and SCRKPL sought adjudication/ reference of the disputes in terms of Clause 25 of

GCC. The said clause reads as follows: -

"CLAUSE 25

SETTLEMENT OF DISPUTES AND 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 materials 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 Three months from the receipt of the contractor's letter.

If the Superintending Engineer fails to 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 a list of disputes with amounts claimed 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 (DRC) 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 the Chief Engineer for appointment of

arbitrator on prescribed proforma 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 a 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 (i) above, disputes or difference shall be

referred for adjudication through arbitration by a sole arbitrator appointed by the Chairperson, NDMC, if there be no Chairperson, the

administrative head of NDMC. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or 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 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 chairperson NDMC or the administrative head of

NDMC, 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) the Jammu and Kashmir Arbitration and Conciliation Act 1977 (35% of 1997) or any

statutory modifications or re-enactment thereof and the rules made there under 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, 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.â??

Â [Emphasis supplied]

Efforts made by SCRKPL for resolution of disputes â?

3.4. SCRKPL vide letter dated 24th October, 2019 addressed to the Superintending Engineer [hereinafter â??SEâ?] specified the disputes/ claims

raised by them and requested SE to consider and resolve them. This communication was followed by another dated 21st November, 2019 sent to the

Chief Engineer [hereinafter â??CEâ?] requesting it to appoint an Arbitrator in terms of Clause 25(ii) of GCC for adjudication of claims raised by

SCRKPL.

3.5. In response to the aforementioned communication, NDMC vide reply dated 28th November, 2019 alleged that an â??action of termination/

determination of the Agreement was taken by them due to lapseâ?? on part of SCRKPL on account of the delay in execution of the work by them.

It was further stated that since SCRKPL had intended to invoke Clause 25 of GCC, the matter will now be examined further for the appointment of

the Arbitrator.

3.6. In the meantime, the office of the CE responded to SCRKPL vide communication dated 16th December, 2019 (in respect of SCRKPLâ??s

request for appointment of an Arbitrator) and informed that SCRKPLâ??s first appeal submitted on 21st October, 2019 before SE was not to be

entertained since SCRKPL â?" till date â?" had not raised any claim(s) before the â??Engineer-in-Charge of the workâ?? as per Clause 25 of GCC.

SCRKPL was thus called to make their claims before the Engineer-in-Charge [hereinafter â??EICâ?] in the first instance and in case SCRKPL was

not satisfied, then they could approach the SE.

3.7. In these circumstances, SCRKPL responded vide letter dated 18th December, 2019 and denied the allegations raised. They again called upon

NDMC to proceed to adjudicate the claims raised by SCRKPL and/ or appoint an Arbitrator. By way of the same communication, SCRKPL also

intimated NDMC regarding the interim restraint Order dated 10th December, 2019 passed by this Court. Copy thereof was also sent to SE.

3.8. In absence of a response, SCRKPL approached the Chairperson of NDMC on 06th January, 2020 and requested that an Arbitrator be appointed

in terms of Clause 25(ii) of GCC.

3.9. In the meantime, though there was no response from the office of the Chairperson of NDMC, SE proceeded to pass a detailed Order dated 14th

January, 2020, and held the claims of SCRKPL to be baseless and devoid of merit.

3.10. On 01st February, 2020, SCRKPL corresponded with: (a) Executive Engineer/ EIC [hereinafter "EE"] (with copies thereto to the

Chairperson of NDMC, CE and SE) " requested it to appoint an Arbitrator; (b) SE " categorically stating that the Order passed by it was not

accepted by them. It was also reiterated that Clause 25 of GCC has already been invoked by them and a Section 9 Petition is pending adjudication

before this Court, (c) CE " reiterating that Section 9 Petition is pending before this Court and contents of letter dated 16th December, 2019 are

contrary to the provisions under Clause 25 of GCC.

3.11. Again, on 17th February, 2020 - SCRKPL approached the office of the Chairperson of NDMC and made, yet another request for appointment

of an Arbitrator for adjudication of claims raised by them. As per the said communication, SCRKPL also reminded the Chairperson of NDMC

regarding the Petition filed under Section 9 of the Act before this Court, wherein SCRKPL has a stay order in its favour relating to the encashment of

the bank guarantee. The said communication was also enclosed an Appendix " XV titled - "Notice for appointment of Arbitrator".

3.12. In the above background, SCRKPL has been constrained to file the present petition due to failure on part of NDMC to appoint an Arbitrator.

4. Mr. Karan Sharma, counsel for NDMC does not deny existence of the arbitration agreement contained in Clause 25 of GCC, however, places

reliance on the same clause to resist adjudication of disputes through arbitration. After completion of pleadings, when this petition came up for hearing

on 03rd December, 2021 - NDMC's counsel, on instructions, stated that SCRKPL should approach the final adjudicating authority i.e., the CE.

Although this contention of NDMC was disputed by SCRKPL, nevertheless the Court observed that SCRKPL would be free to contact the CE

before the matter is heard and decided.

5. Taking this opportunity, SCRKPL yet again knocked the doors of NDMC authorities, hoping that this time perhaps, an avenue for resolution of

disputes would be provided to them. SCRKPL first sent a communication on 10th December, 2021 to the office of the CE and suggested that any

retired CPWD Officer could be appointed as an Arbitrator in order to save time and money.

6. Despite being aware of the Order dated 03rd December, 2021 passed by this Court and the stand taken by the Mr. Sharma, counsel representing

NDMC, a communication was sent by EE/ EIC dated 18th January, 2022 wherein it was stated that SCRKPL should approach the CE. What remains

a mystery to this Court is how a communication (dated 10th December, 2021) addressed by SCRKPL to SE, came to be responded by EE/ EIC (vide

letter dated 18th January, 2022).

7. Nevertheless, SCRKPL yet again, approached CE on 25th January, 2022 and put forth their claims and called upon NDMC to take a decision.

8. SCRKPL's efforts to resolve disputes with NDMC commenced in 2019 and till date the disputes stand unresolved and undetermined.

NDMC continues to assert that the petition should be dismissed, and the matter should be referred to Dispute Resolution Committee [hereinafter

DRC], as envisaged under Clause 25(i) of GCC. The stalemate continues.

9. Be that as it may, the aforementioned facts demonstrate the manner in which NDMC attempts to defeat the object of the Act i.e., meant for a speedy

resolution of disputes by way of arbitration. Mr. Sharma states that the Petition should be dismissed, and DRC should adjudicate the disputes/ claims

raised. At this stage, NDMC's insistence for resolution of disputes through DRC seems in vain since NDMC itself has repeatedly rejected claims

raised by SCRKPL and have taken a firm stand that the termination of the Agreement by NDMC is valid and proper. The Court sees no merit/

reason whatsoever for SCRKPL to again approach NDMC authorities for resolution of disputes through DRC mechanism.

10. That said, Clause 25 of GCC, extracted above, provides for the mechanism for resolution of disputes and has two parts to it - (a) the first part is applicable when the contractor considers any work(s) demanded of him to be outside the requirement of the Agreement, record or a decision given in writing by the EIC or any matter in connection with or arising out of the Agreement or carrying out the work to be unacceptable, (b) the second part, is applicable to other decisions, except those enumerated in sub-para (i) of Clause 25. The decisions as contemplated in the first part, are deemed to be excepted matters which are considered to be final, binding and not referable for adjudication to an Arbitrator. The second part provides for the mechanism of arbitration, where the Chairperson of NDMC is entrusted with the authority to appoint an Arbitrator for resolution of disputes. In the instant case, as noted above, NDMC defended its action of termination and rejected all monetary claims claimed by SCRKPL. Therefore, the Court is unable to agree with the proposition that the matter be considered as an excepted matter where the finality would only be the decision of DRC. SCRKPL is seeking resolution of its disputes through the mechanism of arbitration as contemplated under Clause 25(ii) of GCC.

11. Multiple attempts made by SCRKPL by approaching various authorities/officers at NDMC from October, 2019 till January, 2022, SCRKPL have been only stonewalled by NDMC. Further, despite a restraint order continuing against them, NDMC do not seem to look out for an avenue for resolution of disputes. Till date, NDMC has not attempted to appoint an Arbitrator in terms of the arbitration clause contained in the GCC. They continue to vehemently oppose the appointment of the Arbitrator and contend that the pre-arbitration mechanism has been sidestepped by SCRKPL. SCRKPL has repeatedly approached NDMC for adjudication of disputes through arbitration, to which it has received vague responses, as noted above. In any case, NDMC has failed to perform the functions entrusted to them as per Clause 25 of GCC. Furthermore, in view of the judgment of the Supreme Court in Perkins Eastman Architects DPC and Ors. v. HSCC (India) Ltd. AIR 2020 SC 59 the right of the Chairman of NDMC to unilaterally appoint an Arbitrator is impermissible in law.

12. In light of the above, the Petition not only deserves to be allowed, but calls for imposition of cost against NDMC for the stand being taken before

the Court, which is evidently with an object only to delay the proceedings and nothing else.

13. The present petition is allowed. Accordingly, Honâ??ble Mr. Justice Rajiv Sahai Endlaw (Retd.), former Judge of this Court [Contact No.: +91

9717495002] is appointed as the Sole Arbitrator to adjudicate the disputes between the parties arising out of and in relation to the Agreement No.

72/EE/(BM-I)/2017-28 was drawn up on 15th March, 2018.

14. The parties are directed to appear before the learned Arbitrator, as and when notified. This is subject to the learned Arbitrator making the

necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

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15. The learned Arbitrator appointed by the Court shall fix his fee in consultation with counsel for the parties.

16. It is clarified that the Court has not examined any of the claims of the parties and all the rights and contentions of the parties 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.

17. Cost of Rs. 25,000/- is imposed against the Respondent viz. NDMC, which is directed to be deposited with the Lawyerâ??s Welfare Fund, within

a period of four weeks from today.

18. In view of the foregoing, the present petition stands disposed of.