

(2022) 12 DEL CK 0106

In the Delhi High Court

Case No : Arbitration Petition No. 1016 Of 2022

M/S Thermal Engineers And Insulators Pvt. Ltd.

APPELLANT

Vs

Delhi Tourism And Transportation Development Corporation
Ltd

RESPONDENT

Date of Decision : 15-12-2022

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 12

Citation : (2022) 12 DEL CK 0106

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Shubham Jaiswal, Siddhant Nath

Final Decision : Allowed

Judgement

Navin Chawla, J

1. This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short, the 'Act') seeking the appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the work of 'Construction, Up-gradation and face lifting of Govt. Sarvodaya Co-ed Vidyalaya Sec- 9, Rohini (School ID: 1413010) at Rohini, New Delhi-110085'.

2. The Arbitration Agreement between the parties is contained in Clause 25(ii) of the General Conditions of Contract (in short, 'GCC').

3. Disputes having arisen between the parties with regard to the alleged payment due to the petitioner for the above work, the petitioner filed a petition under Section 11 (6) of the Act being ARB. P. No.1097/2021, titled M/s Thermal Engineers and Insulators Pvt. Ltd. v. Delhi Tourism and Transportation Development Corporation Ltd.. The same was disposed of by the order of this Court dated 28.02.2022 observing that in terms of Clause 25(i) of the GCC, the petitioner was to first file an appeal before the Chief Engineer; and failing any

decision thereon, the petitioner had the remedy to a further appeal before the Dispute Resolution Committee (in short, 'DRC'); and only thereafter, the remedy to file a petition under Section 11 of the Act would be available to the petitioner. The petition was, therefore, dismissed as being premature.

4. The petitioner thereafter filed an appeal before the Chief Engineer on 12.03.2022. Failing to get a response thereto, the petitioner requested for the constitution of a DRC, vide letter dated 02.05.2022. As even this request was not responded to, the petitioner invoked the Arbitration Agreement vide notice dated 14.06.2022 and thereafter, filed the present petition.

5. The learned counsel for the respondent opposes the maintainability of the present petition on the ground that the petitioner has executed an undertaking whereby it has received a sum of Rs.61,23,683/- (Rupees Sixty-One Lakh Twenty-Three Thousand Six Hundred Eighty-Three only) towards the 'full and final bill payment' of the subject-work. He submits that in view of the said document, the Arbitration Agreement contained in the original work contracts stood discharged. In support, he places reliance on the judgment of the Supreme Court in Indian Oil Corporation v. NCC Limited, 2022 SCC OnLine SC 896.

6. On the other hand, the learned counsel for the petitioner submits that the said alleged undertaking was obtained by the respondent by withholding the payment of the running account bills of the petitioner. The same therefore, cannot be relied upon. He submits that, in any case, this will be a dispute to be adjudicated by the Arbitrator.

7. I have considered the submissions made by the learned counsels for the parties.

8. In Vidya Drolia v. Durga Trading Corporation (2021) 2 SCC 1, the Supreme Court has held that the Court at the stage of exercise of powers under Section 11 of the Act is only to prima facie consider the existence of the Arbitration Agreement; it cannot enter into a detailed adjudication of the claims and counter-claims made by the parties on that issue. Such issues are to be necessarily left for the Arbitral Tribunal to determine.

9. The same was reiterated by the Supreme Court in Indian Oil Corporation (supra) observing as under:

"89....Therefore, even when it is observed and held that such an aspect with regard to 'accord and satisfaction' of the claims may/can be considered by the Court at the stage of deciding Section 11 application, it is always advisable and appropriate that in cases of debatable and disputable facts, good reasonably arguable case, the same should be left to the Arbitral Tribunal. Similar view is expressed by this Court in the case of Vidya Drolia (supra). Therefore, in the facts and circumstances of the case, though it is specifically observed and held that aspects with regard to 'accord and satisfaction' of the claims can be considered by the Court at the stage of deciding Section 11(6) application, in the

facts and circumstances of the case, the High Court has not committed any error in observing that aspects with regard to 'accord and satisfaction' of the claims or where there is a serious dispute will have to be left to the Arbitral Tribunal....Even at the stage of deciding Section 11 application, the Court may prima facie consider even the aspect with regard to 'accord and satisfaction' of the claims."

10. In the order dated 21.09.2022 passed in ARB. P. No.1058/2021 titled Thermal Engineers and Insulators Pvt. Ltd. v. Delhi Tourism and Transportation Development Corporation Ltd., which is between the same parties, a Coordinate Bench of this Court, placing reliance on the observations of the Supreme Court in Vidya Drolia (supra), and in similar circumstances, had appointed an Arbitrator.

11. In the present case, the petitioner alleges that the so-called Undertaking of full and final settlement had been obtained by the respondent by exercising economic duress and by withholding the payment of the Running Bills of the petitioner. He has drawn my attention to various documents in support of his submission, including pointing out that the alleged Undertaking is undated and shows that the amount was not even received on the date of its execution. I am not intending to refer to these documents in detail as, prima facie, in the facts of the present petition, it is difficult to reach a conclusion on the plea raised by the parties without carrying out an extensive study of the documents and other evidence led by the parties. Such an exercise shall be beyond the jurisdiction of this Court at the stage of considering an application under Section 11 of the Act.

12. In view of the above, I see no impediment in appointing an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the above-mentioned Work.

13. I appoint Mr. H.L. Bajaj, ex-Member of the Appellate Tribunal for Electricity (Mobile- 9810870808) as a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the above-mentioned Work.

14. The Arbitrator shall give the disclosure in terms of Section 12 of the Act before entering upon the reference.

15. The fee of the Arbitrator shall be in accordance with Fourth Schedule of the Act.

16. It is made clear that this Court has not expressed any opinion on the issue of full and final settlement of the claims by the petitioner as claimed by the respondent. This issue shall be considered by the Arbitrator.

17. The petition is allowed in the above terms.