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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 10th January, 2024

+ **ARB.P. 969/2023 & I.A. 24445/2023**

MR GAJENDRA MISHRA Petitioner
Through: Mr. Subhasish Bhowmick and Ms.
Manisha Pandey, Advs. (M.
8800141304)

versus

POKHRAMA FOUNDATION & ANR. Respondents
Through: Mr. Satendra K. Rai and Ms. Saloni
Sharma, Advs. (M. 9971969272)

**CORAM:
JUSTICE PRATHIBA M. SINGH**

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking appointment of Arbitrator, arising out of the agreement dated 13th November, 2021 executed between Respondents-Pokhrama Foundation and Petitioner-M/s. DM Construction. As per the said agreement, the Petitioner was to set up a school at Lakhi Sarai District, Bihar, subject to certain payments to be received from the Pokhrama Foundation.
3. It is averred that the disputes had arisen between the parties when the Respondents failed to clear the bills and vide letter dated 13th November, 2022, the said contract was terminated by the Respondent. The Petitioner replied to the aforementioned letter on 23rd November, 2022, refuting various contentions. The Petitioner asserted claims regarding the release of GST value for amounts on which the Respondents have deducted and deposited TDS of



RA-8th. It is further averred in the letter that a late fee of Rs. 50/- per day, along with 18% interest, is being levied. In respect of other amounts claims have been raised in terms of Annexure 15 attached to the said letter dated 23rd November, 2022. Since no payments were received, the Petitioner invoked arbitration vide letter dated 3rd April, 2023. In reply, the main contention, which has been taken by the Respondent, is that the required procedure, in terms of the arbitration clause 52, has not been followed by the Petitioner.

4. Today, Id. Counsel for the parties have addressed arguments. The arbitration clause in the present petition reads as under:

“52. SETTLEMENT OF DISPUTES / ARBITRATION:

52.1 All disputes and differences of any kind whatsoever arising out of or in connection with this Contract as also with regard to the implementation, meaning, interpretation or implications of the various clauses of the Contract and those of the Contract Documents or in respect of any other matter or thing arising out of or relating to the development and construction of the Project whether during the progress of the work or after their completion shall be communicated by the Contractor in writing to the Owner / Project Manager and all possible efforts would be made by the Parties to sort out and resolve all such matters of controversy, disputes and differences, amicably with due dispatch and effective priority. In case, the Contractor and the Project Manager were unable to resolve such issues amicably latest within 10 working days from the date of receipt of such communication by the Project Manager. In such eventuality the Owner / Project Manager shall take their decision thereon without any undue delay and preferably within next 10 working days and there upon they shall notify in writing such decision to the Contractor with in next 5 working days

52.2 Decisions, directions and clarifications



pertaining to measurements, drawings and certificates taken by the Owner shall be final and binding on the Parties. The Decisions so taken with respect to any matter the decision for which is specially provided for by these or other special conditions to be given and made by the Project Manager with or without the concurrence of the Owner or of the Architect are exempted matters for the purpose of Arbitration proceedings and shall not be set aside on account of non-observance of any formality, any omission, delay or error in proceeding in or about the same or on any other ground or for any reason. They shall be specifically excluded from the scope of arbitration proceedings hereinafter referred to.

52.3 Subject as aforesaid in Clauses 52.1 and 52.2, all disputes and differences whatsoever, which shall at any time hereafter arise between the Parties hereto, touching or concerning this Agreement or its interpretation or effect or as to the rights, duties, obligations and liabilities of the Parties hereto or either of them by virtue of this Agreement or otherwise as to any other matter in any way connected with or arising out of or in relation to the subject matter of this Agreement shall be referred to the Arbitration in accordance with the provisions of Arbitration and Conciliation Act 1996. The Parties agree that the reference of the disputes and differences between the Parties would be made to the Sole Arbitrator, to be appointed Jointly.

The jurisdiction and arbitration venue shall be at Delhi. The procedure for the arbitration shall be determine by the Arbitrator. Costs of such arbitration shall be equally shared between the Owner and the Contractor. The Parties undertake to abide and remain bound by the award of the Arbitrator so rendered.

52.4 The Contractor shall not, except with the consent in writing of the Owner and Project Manager, in any way delay the carrying out of the Work by reason of such



matter, question or dispute being referred to arbitration. On the contrary the Contractor shall proceed with the work with all due diligence and shall, until the decision of the arbitrator is given, abide by the decision of the Project Manager. The award of the arbitrator shall not relieve the Contractor of his obligations to adhere strictly to the Owner's / Project Manager's instructions with regard to the actual carrying out of the Work save and except as the Award may specifically affect such instructions.

52.5 This tender shall be subject to the jurisdiction of the courts at Delhi.”

5. A perusal of the above clause would show that if any dispute arises, the matter was to be referred to the Project Manager first for conciliation and thereafter, arbitration clause had to be invoked. However, this sole objection, which has been raised by the Respondent, when considered in the light of the termination notice issued on 13th November, 2022, would show that the same would not be tenable. In fact, in the said letter of termination dated 13th November, 2022, the Respondent No.2-Dr. Anil Seth himself terminates the contract and states as under:

Due to the above-stated reasons, we are hereby terminating our contract with the DMC.

To round out the termination, we have decided to get our bills audited by a third party. As we told you in our last meeting on 2nd November, whatever the audit's outcome, it will be respected. We intend to pay any money that might be outstanding after the risk and cost for rectification and shoddy works is deducted.

Yours sincerely,

(Anil Sethi)

P.S.: Please see attached pictures and reports showing the quality of work executed and the wrong usage of wires.

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6. The conciliation mechanism has, therefore, been given a go-by, by the Respondent itself as his signatures are there on the termination notice. The Respondent has not resorted to approaching the Project Manager before terminating the contract. It is in fact hypocritical for the Respondent to argue that the Petitioner ought to approach the Project Manager, especially when the contract itself is terminated and there is no Project Manager at this point. Under such circumstances, no resolution or settlement or conciliation through Project Manager would be possible in this matter. The Termination letter, in fact, concludes by stating that any amount that may be held to be outstanding after risk and costs, is intended to be paid by the Respondent. There are, clearly, claims by the Petitioner, which require to be adjudicated by arbitration in view of the clear clause between the parties.

7. The present is a case wherein the Sole Arbitrator would be liable to be appointed for adjudicating the disputes. Accordingly, **Mr. Shashank Garg, Advocate (M:9811526671)**, who is present in Court, is appointed as the Sole Arbitrator for entering reference and adjudicate the disputes that arise. Both the parties are agreeable for arbitral proceedings to be adjudicated under the aegis of DIAC. Let the parties appear in DIAC before the Id. Arbitrator on **15th February, 2024 at 4:00 pm.**

8. Insofar as the prayer for deletion of Respondent No.2 - Dr. Anil Sethi from the array of parties in the application *i.e.* **I.A. 24445/2023** is concerned, the agreement would show that it is between two entities *i.e.* Pokhrama Foundation and M/s DM Construction. Both would have to be represented by their respective officials in the arbitral proceedings. However, no individual can be made a party to the arbitral proceedings when the said individual is not a party to the agreement in the personal capacity.



9. The Petitioner is free to summon any person including the Managing Trustee, who has issued the termination letter as a witness, if it deems appropriate. However, the Respondent No.2 would not be a party to the arbitral proceedings, which would only be between the Petitioner and Respondent No.1. Accordingly, the application being *I.A.24445/2023* for deletion of Respondent No.2 is allowed and is disposed of.

10. Any observations made in the present order would not affect the arbitral proceedings. The Registry is directed to supply a copy of the present order to the DIAC on their e-mail id: delhiarbitrationcentre@gmail.com, for further proceedings.

11. Accordingly, Petition is disposed of.

**PRATHIBA M. SINGH
JUDGE**

JANURARY 10, 2024/dk/ks