

THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE

ARBITRATION APPLICATION No.70 of 2023

ORDER:

Mr. S.Ravi Shankar, learned counsel representing Mr. Vakiti Vineeth Reddy, learned counsel for the applicant.

Mr. M.Ravindranath Reddy, learned Senior Counsel representing Mr. B.Srinarayana, learned counsel for the respondent No.1.

2. This application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking appointment of an arbitrator.

3. Facts giving rise to filing of this application briefly stated are that some time in the month of October, 2010, Ministry of Road Transport & Highways floated a tender for awarding contract of widening of existing road to two lanes from Potin to Pangin in the State of Arunachal Pradesh. The respondent No.2 - M/s. ECI Engineering &

Construction Company Limited along with M/s.SREI Infrastructure Finance Limited jointly participated in the said tender. Thereafter, the respondent No.2 and M/s.SREI Infrastructure Finance Limited on 20.02.2012 have incorporated the respondent No.1 - M/s. Potin Pangin Highway Private Limited as special purpose vehicle. On 14.08.2012, the respondent No.3 entered into a concession agreement with the respondent No.1. The respondent No.1 entrusted the work under the agreement dated 04.12.2013 to the respondent No.2. Thereafter, the respondent No.2 entered into a Memorandum of Understanding with the applicant under the contract and entrusted the work to the applicant on fulfilment of certain preliminary steps. The respondent No.2 entered into a contract dated 19.09.2014 with the applicant and handed over the balance construction work under the agreement.

4. The applicant thereafter entered into a contract with the respondent No.1, namely the special purpose vehicle, on 12.08.2017 and the agreement was antedated as 19.09.2014. However, the contract awarded to the

applicant was terminated on 15.11.2018 and the bank guarantees furnished by the applicant worth Rs.95.00 crores and Rs.45.00 crores were encashed. Thereafter, the correspondence between the parties took place between the period from 25.10.2021 to 18.07.2022 where the parties explored the possibility of resorting to the mechanism of resolution of dispute through amicable settlement. The applicant sent a legal notice to the respondent No.1 dated 10.08.2022. The respondent No.1 responded to the aforesaid legal notice by reply dated 29.08.2022. Thereafter, this application was filed on 29.03.2023.

5. Learned counsel for the applicant submits that the contract dated 19.09.2014 exists between the parties which contains an arbitration clause, namely Clause 22.4. It is further submitted that the applicant had explored the possibility of amicable settlement of dispute as provided under Clause 22.3. However, the parties failed to resolve the dispute. Since the period of limitation was expiring, the petitioner was left with no option but to file this application under Section 11(6) of the Act. It is submitted

that as the contract contemplates arbitral tribunal comprising of three arbitrators and the applicant nominates Mr. Justice Manohar Lal Mehta, Former Judge of Delhi High Court, to be its arbitrator. In support of his submissions, reliance has been placed on the decision of the Supreme Court in **Visa International Limited v. Continental Resources (USA) Limited**¹.

6. On the other hand, learned Senior Counsel for the respondent No.1 has submitted that the condition precedent for invocation of the arbitration clause has not been followed by the applicant inasmuch as no attempt has been made by the applicant to seek amicable settlement of the dispute in terms of Clause 22.3 of the contract. It is further submitted that the applicant cannot be allowed to take advantage of its own wrong. Learned Senior Counsel for the respondent No.1 has submitted that the respondent No.1 nominates Mr. Justice N.Ravi Shankar, Former Judge of the High Court of Andhra Pradesh. In support of his submissions, reliance has been placed on the decision of

¹ (2009) 2 SCC 55

the Supreme Court in **M.K.Shah Engineers & Contractors v. State of M.P**² and the decision of the learned Single Judge of the Kerala High Court in **Nirman Sindia v. Indal Electromelts Limited, Coimbatore**³.

7. I have considered the submissions made on both sides and have perused the record.

8. The essential attributes or elements of an arbitration agreement are that i) it should be in writing ii) the parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal iii) the private tribunal should be empowered to adjudicate upon the dispute in an impartial manner, giving due opportunity of hearing to the parties to put forth their case before it and iv) the parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them (See **Jagdish Chander v. Ramesh Chander and others**⁴).

² (1999) 2 SCC 594

³ 1999 SCC OnLine Ker 149 : AIR 1999 Ker 440

⁴ (2007) 5 SCC 719

9. Before proceeding further, it is apposite to take note of the Clauses 22.3 and 22.4 of the contract executed between the parties, which are extracted below for the facility of reference:

22.3 Amicable Resolution

(a) Save where expressly stated to the contrary in the Contract, any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to the Contract including incompleteness of the Works between the Parties and so notified in writing by either Party to the other (the "Dispute") in the first instance shall be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Sub-Clause 22.3(b) below.

(b) In the event of any Dispute between the Parties, either Party may call upon the Employer's Representative to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Employer's Representative or without the intervention of the Employer's Representative, either Party may require such Dispute to be referred to the nominated Directors of the Employer and the Contractor, for the time being for amicable settlement. Upon such reference, the said two Directors shall meet not later than 7 (seven) days of the date of such request to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the said period or the Dispute is not amicably settled within 15 (fifteen) days of such meeting between the said two Directors, either Party may refer the Dispute to mediation in accordance with Sub-Clause 22.3(d) arbitration in accordance with the provisions of Sub-Clause 22.4.

(c) If the Dispute is not resolved as evidenced by the signing of the written terms of settlement within 30 (thirty)

working days of the aforesaid notice in writing such meeting or such longer period as may be mutually agreed by the Parties then the either Party may refer the Dispute to mediation in accordance with Sub-Clause 22.3(d) provisions of Sub-Clause 22.4 shall apply.

(d) The Employer or the Contractor may within a further 90 (ninety) days after the periods stipulated in Sub-Clauses 22.3(b) or 22.3(c), as the case may be, give notice to the other party of its intention to refer the Dispute to mediation (hereinafter referred to as the "**Request for Mediation**").

(e) Provided however if the Request for Mediation is served after the expiration of the 90 day time limit stipulated by Sub-Clause 22.3(d) the recipient shall not be obliged to participate in mediation and the mediation shall not proceed further without the recipient's written consent.

(f) Upon the Dispute being resolved in mediation, such resolution shall be recorded in a settlement agreement and the Parties shall give effect to this agreement accordingly.

(g) It shall be a condition precedent to the commencement of arbitration proceedings under Sub-Clause 22.4 that the issues arising in the Dispute shall have been the subject of a reference to mediation in accordance with Sub-Clauses 22.3(d), 22.3(e) and 22.3(f). If the Parties fail to achieve any settlement at the mediation, either party may refer the Dispute to arbitration and the final decision of an arbitrator under Sub- Clause 22.4.

22.4 Arbitration

(h) Any Dispute, which is not resolved amicably as provided in Sub-Clause 22.3 shall be finally decided by reference to arbitration in accordance the provisions of the Arbitration and Conciliation Act 1996 (or any modifications to or any re-enactments thereof as in force at the time of invocation). The Arbitration Tribunal shall consist three arbitrators; one each to be appointed by the Employer and the Contractor and the third to be appointed by the two

arbitrators appointed by the Employer and the Contractor. The Arbitration Tribunal shall issue a reasoned Award. The exclusive place of arbitration shall be Hyderabad.

(i) Notwithstanding the above, the Employer and the Contractor agree that the right of the Contractor to claim / realize the claims from the Employer shall be restricted to the claims/realization of the claims by the Employer from the Concession Authority/ Authority in terms of the Concession Agreement. Similarly, the Employer and the Contractor agree that the right of the Employer to claim / realize the claims from the Contractor shall be restricted to the claims/realization of the claims by the Concession Authority/Authority from the Employer in terms of the Concession Agreement.

10. Admittedly, the parties had entered into contract which contains an arbitration clause. The only ground on which the prayer made in the application is resisted by respondent No.1 is that the condition precedent for invocation of the arbitration clause has not been fulfilled by the applicant. In the instant case, whether the aforesaid condition has been fulfilled by the applicant or not is the issue which requires determination.

11. The applicant sent a notice to the respondent No.1 on 25.10.2021. In paragraph 16 of the aforesaid notice, it was stated that Clause 22 of the Engineering, Procurement and

Construction contract provides for dispute resolution. It was further stated that as there was no response from the respondent No.1 towards the settlement and payment of dues of the applicant and no communication has been made till date, amicable settlement at this juncture is not viable. The respondent No.1 sent a reply dated 13.11.2021 to the aforesaid notice wherein the applicant was required to adhere to the process enumerated under clause 22.3 of the contract. The applicant thereupon on 19.11.2021 reiterated that no attempt has been made by the respondent No.1 for amicable settlement of dispute despite correspondence dated 18.01.2020, 01.10.2021 and 18.10.2021. The applicant expressed its willingness for amicable resolution of dispute. Thereupon, the respondent No.1 submitted reply on 13.12.2021 and asked the applicant to convey the dates for amicable settlement of the dispute between 27.01.2022 to 27.02.2022 for meeting at Hyderabad. The applicant thereupon by communication dated 25.05.2022 requested for scheduling the meeting sometime in the second week of June, 2022.

12. Thus, on the correspondence referred to in the preceding paragraph, it is evident that the parties did explore the possibility of amicable settlement of dispute between them. However, the same could not materialise.

13. Therefore, in the facts and circumstances of the case, it cannot be inferred that the applicant did not follow the mandatory procedure prescribed under clause 22.3 of the contract. The contract stipulates constitution of the arbitral tribunal comprising of three arbitrators. The contract further stipulates that one arbitrator each shall be nominated by the party and the two arbitrators shall with mutual consent appoint the presiding arbitrator.

14. As agreed to by the learned counsel for the parties, Mr. Justice Manohar Lal Mehta, Former Judge of Delhi High Court (G-35, Jungpura Extension, New Delhi – 110 014; Mobile No.9910384620) and Mr. Justice N.Ravi Shankar, Former Judge of High Court of Andhra Pradesh (House No.13-1-96/1, Prabhat Nagar Colony, Behind Ganga Hospital, Chaitanyapuri, Dilsukhnagar, Hyderabad – 500 060; Mobile No.9491066592) are appointed as

arbitrators. The aforesaid arbitrators shall appoint Presiding Arbitrator.

15. The arbitration application is accordingly allowed.

Miscellaneous applications pending, if any, shall stand closed. However, there shall be no order as to costs.

ALOK ARADHE, CJ

16.02.2024
vs