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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 20th May, 2024+ **ARB.P. 321/2024**

M/S KLD CREATION INFRASTRUCTURE PVT.LTD.

..... Petitioner

Through: Ms Anurita Panda, Advocate.

versus

NATIONAL HIGHWAYS AND INFRASTRUCTURE
DEVELOPMENT CORPORATION LIMITED

..... Respondent

Through: Ms Rajdipa Behura, Mr Philomon
Kani, Ms Neha Dobriyal, Ms Simrat
Kaur Sareen, Advocates.**CORAM:****HON'BLE MR. JUSTICE AMIT BANSAL****AMIT BANSAL, J. (ORAL)**

1. This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter '*the Act*') seeking appointment of an independent sole arbitrator to adjudicate the disputes between the parties. The disputes between the parties have arisen out of a Termination Notice dated 18th July, 2023 issued by the Respondent-National Highways & Infrastructure Development Corporation Limited (NHIDC).
2. Notice in the present petition was issued on 5th March 2024.
3. The background of the dispute is that the Petitioner was awarded a contract to undertake "*Rehabilitation and up-gradation of road from design*



km 19.300 to km 31.300 (Total length: 12.000 km) of Agartala – Khowai section on NH 108 B to two lane with paved shoulder in the state of Tripura on EPC basis (Package-II) (hereinafter ‘EPC Contract’).” As part of the said EPC Contract, the Petitioner was to execute the construction work in compliance with the specified technical standards and within the agreed timeframe.

4. The Petitioner contends that the EPC Contract clearly enumerated certain obligations on the part of the Respondent. Specifically, the Respondent was required to have procured an encumbrance-free ‘Right of Way’ (ROW) for at least 90% of the total length of the Project Highway prior to the ‘Appointed Date’, which was later declared to be 8th June, 2021. Additionally, the Respondent was required to provide this 90% of the ROW to the Petitioner within 30 days of signing the EPC Contract. In the present petition, it is further claimed by the Petitioner that the Respondent did not comply with the aforementioned contractual obligations, and there were several encumbrances preventing the Petitioner from executing their work.

5. It is further claimed by the Petitioner that the Respondent refused to correct its SAP system to pay the Petitioner what was rightfully due under the various Stage Payment Statements raised by it, which were calculated in accordance with the scope of work enumerated in Schedule B of the EPC Contract. According to the Petitioner, this non-payment, had a cascading effect on the finances of the Petitioner, affecting its ability to mobilize manpower and resources.

6. In addition to the abovementioned issues, it is also claimed that the Respondent delayed in approving the Petitioner’s bills and its technical



designs, hampering its ability to execute work fully. According to the Petitioner, this led to a situation where despite attempting to diligently carry out its duties under the Contract, the Petitioner was prevented from doing so. As a result, the Petitioner was unable to meet the milestones that were enumerated in the EPC Contract. It is the case of the Petitioner that the Respondent, with the view to shift the blame from itself for failing to perform its contractual obligations, began sending cure notices along with regular letters accusing the Petitioner of slow progress of work, non-completion of milestones, and other consequent failures that cascaded from the non-provision of the contractually obligated encumbrance-free ROW.

7. However, the Respondent admits that it awarded an Extension of Time, but according to the Petitioner this was merely an eye-wash measure, without correcting the underlying mistakes, thereby setting up the Petitioner to fail. When the Petitioner was struggling to meet the milestones due to the non-availability of the work front and the cash flow crisis caused by the Respondent, the Respondent declared the Petitioner as a Non-Performer, debarring it from participating in any of its tenders. Thereafter, the Respondent then issued a notice of intention to terminate to the Petitioner on February 24, 2022, for slow progress of works, non-completion of milestones, and other consequent failures. The Petitioner claims to have responded to the Termination Notice on 9th March, 2022, and thereafter, continued the work as per the EPC Contract and the extension.

8. It is averred by the Petitioner that on 14th February, 2023, after the expiry of the period of the EPC Contract, the Petitioner requested an extension of time, which was duly granted by the Respondent *vide* letter



dated 14th March, 2023. Thereafter, it is claimed that while the Petitioner was executing the Contract, without issuing any notice, the Respondent suddenly terminated the EPC Contract on 18th July, 2023, without affording any opportunity to the Petitioner to make any representation to the Respondent.

9. *Vide* the reply to the Termination Notice dated 27th July, 2023, the Petitioner had invoked Conciliation under Clause 26.2 of the EPC Contract. However, the Respondent failed to acknowledge the same and proceeded to issue a fresh Notice inviting Bids for the subject project. Accordingly, the Petitioner has moved the present Petition seeking appointment of a Sole Arbitrator.

10. Reply has been filed on behalf of the respondent. In the reply, the respondent has not objected to the existence of the arbitration clause in the EPC Contract.

11. The Court has heard Id. Counsels for all the parties and perused the record.

12. At the outset, reference may be made to the clause for Dispute Resolution, Conciliation and Arbitration (Clause 26) contained in the EPC Contract. The said clause is extracted as under:

“26.1 Dispute Resolution

(i) Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 26.2.

(ii) The Parties agree to use their best efforts for resolving all Disputes



arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non- privileged records, information and data pertaining to any Dispute.

26.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Authority's Engineer, or such other person as the Parties may mutually agree upon (the "Conciliator") to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Conciliator or without the intervention of the Conciliator, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) business days from the date of reference to discuss and attempt to amicably resolve the Dispute. **If such meeting does not take place within the 30 (thirty) business day period or the Dispute is not amicably settled within 30 (thirty) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to In Clause 26.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3 but before resorting to such arbitration, the parties agree to explore conciliation by the Conciliation Committees of Independent Experts set up by the Authority in accordance with the procedure decided by the panel of such experts and notified by the Authority on its website including its subsequent amendments.** In the event of the conciliation proceedings being successful, the parties to the dispute would sign the written settlement agreement and the conciliators would authenticate the same. Such settlement agreement would then be binding on the parties in terms of Section 73 of the Arbitration Act. **In case of failure of the conciliation process even at the level of the Conciliation Committee, either party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3.**

26.3 Arbitration

(i) Any dispute which remains unresolved between the parties through the mechanisms available/prescribed in the Agreement, irrespective of any claim value, which has not been agreed upon / reached settlement by the parties, will be referred to the Arbitral Tribunal as per the Arbitration and Conciliation Act.



(ii) Deleted

(iii) *The Arbitral Tribunal shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 26 shall be final and binding on the Parties as from the date it is made, and the Contractor and the Authority agree and undertake to carry out such Award without delay.*

(iv) *The Contractor and the Authority agree that an Award may be enforced against the Contractor and /or the Authority, as the case may be, and their respective assets wherever situated.*

(v) *This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder. Further, the parties unconditionally acknowledge and agree that notwithstanding any dispute between them, each Party shall proceed with the performance of its respective obligations, pending resolution of Dispute in accordance with this Article.*

(vi) *In the event the Party against whom the Award has been granted challenges the Award for any reason in a court of law, it shall make an interim payment to the other Party for an amount equal to 75% (seventy five per cent) of the Award, pending final settlement of the Dispute. The aforesaid amount shall be paid forthwith upon furnishing an irrevocable Bank Guarantee for a sum equal to 120 % (one hundred and twenty per cent) of the aforesaid amount. Upon final settlement of the Dispute, the aforesaid interim payment shall be adjusted and any balance amount due to be paid or returned, as the case may be, shall be paid or returned with interest calculated at the rate of 10% (ten per cent) per annum from the date of interim payment to the date of final settlement of such balance."*

13. A perusal of the above clauses would reveal that in the event that Conciliation between the parties fails, the disputes between the parties may be referred to arbitration. The same interpretation would be in conformity with Clause 26.3 (i) of the EPC Contract which specifically provides that any unresolved disputes between the parties can be referred to Arbitration. The said clause ensures that there is a clear path for dispute resolution when amicable settlement and conciliation efforts have been exhausted. The Petitioner, having exhausted the conciliation process as per Clause 26.2, is now entitled to seek the appointment of an independent Sole Arbitrator to



adjudicate the disputes arising from the contract, in accordance with the Act and the terms of the EPC Contract.

14. The Act was amended by the Arbitration and Conciliation (Amendment) Act, 2015 and the said amendment introduced Section 11(6A) of the Act. As per the judgment of the Supreme Court in *BSNL v. Nortel Networks Private Ltd.*, (2021) 5 SCC 738, the said amendment was based on the recommendations of the 246th Report of the Law Commission of India. Further, *BSNL* (supra) also stated that the effect of the amendment to the Act was that if the existence of the arbitration agreement was not in dispute, all other issues would be left for the arbitral tribunal to decide.

15. Therefore, the role of the Court is limited to verifying the existence of a valid arbitration agreement. Once the court confirms that the arbitration agreement exists, it refrains from delving into other issues, which are to be decided by the arbitral tribunal or sole arbitrator as the case may be.

16. In view of the above position, counsels for the parties jointly submit that a sole arbitrator may be appointed under the aegis of the Delhi International Arbitration Centre, Delhi High Court (hereinafter referred to as 'DIAC'). All the rights and contentions of the parties are left open to be adjudicated upon by the Id. Sole Arbitrator.

17. Accordingly, Mr Amiet Andlay, Advocate [+91-9811151686] is appointed as the sole arbitrator to adjudicate the disputes between the parties. The arbitration will be held under the aegis of the DIAC.

18. The remuneration of the learned arbitrator shall be in terms of the Fee Schedule of the DIAC.

19. Copy of this order be sent to the Secretary, DIAC at email id-



delhiarbitrationcentre@gmail.com.

20. Accordingly, the petition is disposed of.

**AMIT BANSAL
(JUDGE)**

MAY 20, 2024

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