

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE**

HON'BLE SHRI JUSTICE VIVEK RUSIA

ON THE 14th OF MARCH, 2023

ARBITRATION CASE No. 52 of 2022

BETWEEN:-

**M/S A.K. SHIVHARE INFRASTRUCTURE PVT. LTD.
A LIMITED COMPANY INCORPORATED UNDER
THE COMPANIES ACT, 1956, HAVING ITS OFFICE
AT 16, EADEN GARDEN, CHUNA BHATTI, KOLAR
ROAD, BHOPAL M.P. REPRESENTED THROUGH
ITS DIRECTOR AND RESOLVED ATTORNEY MR.
PRADEEP SHIVHARE S/O KHOOB CHAND
SHIVHARE, AGED ABOUT 51 YEARS, NEAR
PANCHAYATI DHARAMSHALA, MORENA
(MADHYA PRADESH)**

.....APPLICANT

*(SHRI SUNIL JAIN, LEARNED SENIOR ADVOCATE ALONG WITH SHRI
SIDDHARTHA KUMAR JAIN, LEARNED COUNSEL FOR THE APPLICANT.)*

AND

**1. UNION OF INDIA, THROUGH THE DIRECTOR
GENERAL, MINISTRY OF ROAD, TRANSPORT
AND HIGHWAYS, TRANSPORT BHAWAN,
SANSAD, MARG, NEW DELHI (DELHI)**

**2. UNION OF INDIA, THROUGH CHIEF ENGINEER
AND REGIONAL OFFICER, MORTH, 2ND
FLOOR, NIRMAN BHAWAN, ARERA HILLS,
BHOPAL (MADHYA PRADESH)**

**3. UNION OF INDIA, THROUGH MANAGING
DIRECTOR, M.P. ROAD DEVELOPMENT
CORPORATION LTD., ARERA HILLS, BHOPAL
(MADHYA PRADESH)**

.....RESPONDENTS

(MS. MINI RAVINDRAN, LEARNED COUNSEL FOR THE RESPONDENT NO.3.

SHRI ASHUTOSH SHARMA, LEARNED COUNSEL FOR THE RESPONDENT NO.1 AND 2)

Reserved on : 28.02.2023

Delivered on : 14.03.2023

This petition coming on for orders this day, the court passed the following:

ORDER

The applicant has filed this present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking the appointment of an Arbitrator by virtue of Arbitration Clause 26.3 in the agreement dated 26.02.2018.

[1] The Ministry of Road Transport and Highways i.e. Respondent No.1 invited proposals from the bidders for “Rehabilitation and Upgradation of intermediate lane flexible pavement to 2 lanes with paved shoulders Rigid Pavement on Khilchipur-Jirapur Road from Km 5.500 to Km 22.910 on Khilchipur to Jirapur section of newly declared NH-752B including the section from km 5.500 to km 22.910 [(17.410+7.748 (Overlay on existing) km)] in the State of Madhya Pradesh on EPC Mode”. The applicant participated in the tender process and stood as L1. Accordingly, an agreement was executed with the respondents. According to the agreement respondent, No.2 MPRDC issued a work order dated 28.02.2018 for a contract amount of Rs.65,62,00,000/- with a completion period of 18 months including the rainy season and a maintenance period of four years.

[2] According to the applicant, during the pendency of the contract, the work of supervision was transferred from MPRDC to N.H. Division of Madhya Pradesh Public Works Department. According to the applicant the work was completed and as per the estimated cost of the work was 65.62 Crore but liability on account of GST was excluded. At the time of the audit of the accounts, it came to the notice that the amount of Rs.7,51,99,414/- has wrongly been deducted under the head of the GST account. Vide notice dated 05.01.2022 the applicant demanded a refund from the respondents. When the aforesaid refund was not accepted, the applicant vide notice dated 18.01.2022 invoked the arbitration clause and filed this petition before this Court.

[3] Respondents No.1 and 2 have filed the return that the arbitration clause cannot be invoked directly unless the steps for conciliation have been taken under Clause 26.3 of the agreement hence, at this stage this application is not maintainable as premature and liable to be dismissed. Respondents No.1 and 2 have also stated that the applicant had received the final bill as a full and final settlement therefore, there is no dispute existed between the parties. The GST refund issue can be raised before the authorities under the CGST/SGST Act.

[4] Respondent No.3 has filed the return by submitting that no relief has been claimed from MPRDC, the work had already been transferred to M.P.P.W.D., NH Division, Bhopal and this fact was very much in the knowledge of the applicant.

[5] Shri Sunil Jain, learned Senior Advocate for the applicant submits that once a dispute of any nature has occurred, the same is liable

to be referred to the Arbitrator. All the issues raised by the respondents are liable to be decided by the learned Arbitrator. Hence one former High Court judge be appointed as sole arbitrator.

[6] Shri Ashutosh Sharma, learned counsel for the respondent No.1 and 2 has placed reliance on a judgment passed by the Apex Court in the case of *Cauvery Coffee Traders, Mangalore v/s Hornor Resources (International) Company* reported in (2011) 10 SCC 420 decided on 13.09.2011 and prayed for dismissal of this application. Learned counsel appearing for respondent No.3 submits that MPRDC was engaged as an agency, to supervise the work and entire payments were made by respondents No.1 and 2, hence the name of respondent No.3 be deleted with cost.

Appreciation and conclusion

[7] The arbitration clause No.26.3 in the agreement dated 26.02.2018 is reproduced below:

26.3 Arbitration.

26.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally finally settled by arbitration in accordance with the rules of arbitration of the SOCIETY FOR AFFORDABLE REDRESSAL OF DISPUTES (SAROD).

26.3.2 Deleted.

26.3.3 The arbitrators 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.

26.3.4 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.

26.3.5 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.

26.3.6 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.

[8] It is clear from the aforesaid arbitration clause that the parties did agree that in case of any dispute which is not resolved amicably by conciliation as provided in Clause 26.2 same shall be finally settled by way of conciliation and thereafter by way of the arbitration in accordance with *the Rules of Arbitration of society for affordable redressal of dispute (SAROD)*. Even if the parties did not enter in the conciliation proceedings, the dispute is liable to be settled by arbitration in accordance with the rules of arbitration of the SAROD.

[9] During the course of arguments, Shri Jain Learned Senior Advocate produced the rules of SAROD in which Rule 4 provides the mode of the commencement of arbitration and as per Rule 4.1 any party wishing to commence the arbitration under these rules shall apply to the secretary and serve to the other party a written notice of arbitration

which shall include a request that the dispute be referred to arbitration etc.

Rule 4 is reproduced hereinbelow:

Rule 4-Commencement of Arbitration

4.1. Any Party wishing to commence an arbitration under these Rules ("the Claimant") shall file with the Secretary and serve on the other Party ("the Respondent), a written Notice of Arbitration ("the Notice of Arbitration which shall include the following:

- a. a request that the dispute be referred to arbitration;
- b. the names, addresses, telephone numbers, fax numbers and email addresses of the Parties to the dispute;
- c. a reference to the arbitration clause or any separate arbitration agreement that is invoked and provide a copy of the arbitration clause or arbitration agreement;
- d. a reference to the contract out of which the dispute arises and provide a copy of the contract where possible;
- e. a brief statement describing the nature and circumstances of the dispute.
- f. the relief or remedy sought, including the amount of claim if quantifiable at the time the Notice or Arbitration is filed.
- g. a proposal as to the number of arbitrators (ie one or three), if the parties have not previously agreed on the number, and
- h. the name of the Claimant's nominated arbitrator.

4.2. The date of filing of the Notice of Arbitration with the Secretary is the date of commencement of the arbitration for the purpose of these Rules.

4.3. A filing fee of 2-25,000/- (Ten thousand) (plus 18% GST) or any amount decided by Governing Body from time to time is payable at the tune of filing the Notice of arbitration.

4.4. Primary Membership of SAROD shall be a pre-requisite for invoking arbitration under these Rules.

[10] Learned Senior Advocate for the applicant has placed reliance on following three judgments: [i] *Ravindra Kumar Verma v/s M/s BPTP Ltd. and another* reported in *2014 SCC OnLine Del 6602*

decided on *18.11.2014*. [ii] *Demerara Distilleries Private Limited and another v/s Demarara Distillers Limited* reported in (2015) 13 SCC 610 decided on *24.11.2014*. [iii] *M.K. Shah Engineers and Contractors v/s State of M.P.* reported in (1992) 2 SCC 594 decided on *05.02.1999*. There is no dispute about the law laid down in the above judgments but in this case, this application is not maintainable under Section 11 of the Act of 1993.

[11] In view of the above, since the applicant and respondents had agreed to the agreement on a procedure to be followed for appointing an arbitrator or arbitrators and if the aforesaid procedure fails only then the applicant can approach this Court by way of a petition under Section 11(6), therefore, the applicant is required to exhaust the remedy available under the aforesaid SAROD Arbitration Rules for affordable redressal of dispute. Accordingly, the present petition is **dismissed**. The applicant is free to approach SAROD for seeking the appointment of an arbitrator as discussed above.

The MPRDC has unnecessarily been made a party in this AC as the work in question was already with respondents No. 1 and 2 or MPPWD (National Highway Division). Hence the cost of litigation incurred by the MPRDC is liable to be recovered from the applicant for which the MPRDC is free to recover by any mode available in the law.

(VIVEK RUSIA)
J U D G E

Divyansh