

\$~1

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

+ ARB.P. 342/2016

SCG CONTRACTS INDIAPVT LTD Petitioner
Through: Mr Kshitiz Khera, Advocate.

versus

ENGINEERS INDIA LIMITED Respondent
Through: Mr Navin Kumar, Advocate for R-1.
Ms Kanika Agnihotri, Advocate for
NDMC (R-2).

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

20.03.2017

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an arbitrator be appointed to adjudicate the disputes that have arisen between the parties in relation to the agreement dated 12.04.2010 (hereafter 'the Agreement') relating to Area Development Works for Inner and Outer Circle of Connaught Place for re-development of Connaught Place, New Delhi.

2. The Agreement between the parties contains an arbitration clause which is set out below:-

**“83.0 SETTLEMENT OF DISPUTES BY
ARBITRATION**

83.1 Settlement of Disputes by Arbitration other than

mentioned in 83.2 below:

Except where otherwise provided in the Contract any question, dispute or difference that shall arise between Owner on the one hand and the Contractor on the other hand as to the construction, intent, meaning or effect of the Contract Documents, designs, drawings, specifications, estimates or any one of them or as to any further Drawings to be prepared or as to the application of the Schedule Of Rates, to the measurements taken or as to the materials or the quality thereof or as to execute the same whether arising during the progress of Work, or within six (6) months of completion of abandonment thereof or as to any matter or thing, whether of the nature aforesaid or otherwise, however, arising out of or in any way relation to or connected with the Contract then **EVERY SUCH QUESTION, DISPUTE OR DIFFERENCE** (except where otherwise herein expressly provided) shall be referred to a Sole ARBITRATOR to be appointed by the parties by mutual consent within one (1) month from the date of notice of either party requiring an arbitrator to be appointed for resolving such disputes.

In the event of the parties being unable to agree to a sole arbitrator within the specified time, the sole arbitrator shall be appointed by the Managing Director of Owner/EIL.

Any dispute(s) or difference(s) with respect to or concerning or relating to any of the following matters are hereby specifically excluded from the scope, purview and ambit of this Arbitration Agreement with the intention that any dispute or difference with respect to any of the said following matters and/or relating to the Arbitrator's jurisdiction with respect thereto shall not and cannot from the subject matter of any reference or submission to arbitration, and the Arbitrator shall have no jurisdiction to entertain the same or to render any decision with respect thereto, and such matter shall be decided by the Owner/Engineer-in-Charge prior to the Arbitrator proceeding with or proceeding further with the reference. The said excluded matters are:

- With respect to or concerning the scope of existence or otherwise of the Arbitration Agreement.
- Whether or not Notified claim is included in the Contractor's final bill in accordance with the provisions of relevant clause.

Such submission shall be deemed to be a submission to arbitration within the meaning of the Indian Arbitration Act or any statutory notification thereof (prevailing as on date). The Award of the sole Arbitrator shall be final and binding upon the parties.

This arbitration agreement between the parties clearly stipulates that the Sole Arbitrator shall be required to give a SPEAKING AWARD.

Meanwhile in order to ensure the Work being proceeded within continuity, the Contractor shall (in the case or any such question, dispute or difference) act upon and effect to the order of the Engineer-in-Charge and no payment due or payable by the Owner to the Contractor or vice versa shall be withheld on account of such arbitration unless such payments are the direct subject of such arbitration proceedings."

3. The arbitration clause is not in dispute. However, the only controversy sought to be raised by the petitioner and respondent No. 1 (EIL) is with regard to whether EIL is liable for the obligations under the Agreement in its individual capacity; whereas the petitioner asserts that the Agreement is with EIL, EIL disputes the same and claims that it has no separate and independent liability as it entered the Agreement in capacity as an agent of respondent No.2 (NDMC).

4. The contract for award of the works in question was awarded to the

petitioner pursuant to an invitation to tender issued by EIL. The petitioner's bid was accepted and EIL issued a letter of intent dated 22.01.2010 (LOI). It is pointed out that letter of intent had clearly mentioned that EIL was issuing the LOI as a constituted attorney of NDMC.

5. Mr Navin Kumar, the learned counsel for EIL has also drawn the attention of this Court to the agreement dated 21.05.2008 entered into between NDMC and EIL whereby EIL was appointed as a consultant for the project in question.

6. Ms Agnihotri, the learned counsel appearing for NDMC does not dispute that EIL had entered into the Agreement as an attorney (agent) of NDMC, however, she submits that EIL is responsible for contesting the subject disputes raised by the petitioner. She relied on clause 16 of the said agreement between EIL and NDMC, which reads as under:-

“16. SETTLEMENT OF DISPUTE AND ARBITRATION:

16.1 If any dispute or difference arises out of or relates to this Contract whether during the progress of the Work or after its completion or whether before or after the termination, abandonment or breach of the Contract and such dispute or difference cannot be resolved by both the parties, either party shall, within thirty (30) calendar days, give the other notice in writing of the existence of such dispute, specifying its nature and the point at issue. The notice shall also include a detailed description of the facts of the dispute with relevant dates, names of personnel involved, references to relevant documentation (with copies attached), the pertinent Contract provision(s), and a statement of contentions and conclusions.

Upon providing such notice the parties shall endeavour to

settle the dispute or difference in an amicable manner through direct discussions between representatives designated by Chairman of both the parties at the first instance.

In the event of failure of such efforts for amicable settlement the dispute shall be referred to Permanent Machinery of Arbitration (PMA) in the Department of Public Enterprises in terms of OM No. DPE/4(10)/2001-PM.-GL 1 Government of India, Ministry of Heavy Industries and Public Enterprises dated 22nd January, 2004.”

7. She submitted that although NDMC had constituted EIL as its attorney for executing the project, however, all correspondence and all relevant facts relating to the Agreement are only in the knowledge of EIL and not in the knowledge of NDMC. She submits that in terms of clause 16 of the agreement between EIL and NDMC, EIL has undertaken the task of defending any dispute on behalf of NDMC. Although NDMC is obliged to reimburse the cost, the litigation with the petitioner has to be contested by EIL.

8. Ms Agnihotri also submits, on instructions, that an arbitrator may be appointed to adjudicate the disputes raised by the petitioner. However, EIL must be made a party to the said arbitration proceedings. It is only EIL who is in position to defend the disputes now sought to be adjudicated.

9. Mr Kumar, appearing for EIL, states that EIL would have no objection to participate in the arbitration proceedings, *albeit*, with clear understanding that no award would be made against EIL and EIL would

be reimbursed all costs incurred for contesting the dispute. He does not dispute that - considering that the entire correspondence between the petitioner in relation to the project was with EIL - EIL would be necessary and proper party. EIL had awarded the contract; and EIL had also administered the execution of the contract on behalf of NDMC.

10. In view of the consensus between the learned counsel of the parties that (i) EIL would represent NDMC in the arbitral proceedings and safeguard the interest of NDMC and (ii) both EIL and NDMC would be parties to the arbitral proceedings, it is necessary that an arbitrator be appointed to adjudicate the disputes between the parties.

11. Accordingly, Justice Aftab Alam (Retired) (Mob. No. +91 9868219005), a former Judge of the Supreme Court of India, is appointed as the sole arbitrator to adjudicate the disputes between the parties. This is subject to the arbitrator making the necessary disclosure under Section 12 of the Act and not being ineligible under Section 12(5) of the Act.

12. The arbitrator shall fix his fees in consultation with the learned counsel for the parties.

13. The parties are at liberty to approach the arbitrator for eliciting the necessary disclosure and for further proceedings.

14. EIL would be a party to the arbitration agreement for the limited purpose as indicated above. It is further clarified that this would not preclude NDMC for instituting any proceedings as may be advised against EIL. Needless to mention that if any proceedings are instituted, the same

would be considered in accordance with law.

15. The petition is disposed of.

16. *Dasti.*

VIBHU BAKHRU, J

MARCH 20, 2017
RK

