



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

% Date of Decision: 30.01.2025

+ **ARB.P. 1127/2022**

M/S HMBS TEXTILES PRIVATE LIMITEDPetitioner
Through: Mr.Sahil Garg, Mr.Abhinav Jain, Ms.
Samikshi Jain and Mr.Mithil
Malhotra, Advocates.

versus

MINISTRY OF ROAD TRANSPORT AND HIGHWAYS,
NEW DELHIRespondent
Through: Mr.Shubhranshu Padhi, Mr.Jay
Nirupam, Mr.D.Girish Kumar,
Mr.Pranav Giri, Mr.Ekansh Sisodia
and Mr.P. Prasad, Advocates.

**CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI**

JUDGMENT (ORAL)

1. The present petition has been instituted u/s 11 of the Arbitration & Conciliation Act, seeking appointment of an independent and impartial Sole Arbitrator for adjudication of the disputes that have arisen between the parties.
2. Petitioner claims that on 29.09.2021, Respondent invited/floated tender for *'providing permanent restoration to valley side slips occurred during monsoon of 2019-20 by soil nailing with tie back system to RCC retaining walls from Km 86.200 to 99.200 (Charmadi Ghat) of NH-73 (old*



NH-234), Mangalore-Tumkur Section on Engineering, NH- 73-KNT-2019-20-904)'. That the Petitioner Company being eligible for the Tender submitted its bids as per the quantities and specifications provided in the NIT and the GCC. Petitioner Company was declared as the Lowest Bidder (L1) and accordingly LOA dated 09.12.2021 was issued, constituting a duly binding agreement between the parties. After the execution of which, the contract agreement in terms of the NIT and LOA was to be executed between the Parties. It is stated that the said agreement provided was for different quantities (as specified in Schedule -B) than the ones mutually agreed between the parties vide tender and binding LOA dated 09.12.2021.

3. Despite having apprised the Respondent Dept. of the same, they still failed to incorporate the originally agreed quantities. Petitioner company protested for the unilateral change in terms of the contract. Multiple letters were issued to the Respondent Dept. to execute the contract in strict consonance with the terms of the NIT and LOA. The respondent department issued communication dated 17.01.2022 intimating that the bid of the Petitioner company is rejected during Financial Evaluation by the duly constituted committee for the reason 'as per the directions of Chief Engineer, NH, Bng dated 14.01.2022'.

In light of the same, vide notice dated 19.01.2022, the Petitioner invoked the arbitration clause.

4. Learned counsel for the petitioner submitted that the Arbitration clause i.e. **Article 26 (Dispute Resolution)** and **Article 26.03. (Arbitration)** is embedded in the draft agreement and is not disputed by the parties. Furthermore, the jurisdiction clause is provided in the agreement,



where-under it is mentioned that Courts in New Delhi., shall alone have the exclusive jurisdiction to try and entertain any dispute, etc.

5. Learned counsel for Respondent had submitted that there can be no appointment of arbitrator since there is no agreement signed between the parties much less an agreement containing an arbitration clause. It is further stated that the Petitioner has placed reliance on the clauses contained in the draft agreement accompanying the bid documents which never culminated into a signed agreement. In addition, learned counsel points out that the NIT is merely a bid document, which contained information for the purpose of procuring financial and technical bids. The NIT included several other documents such as the Draft Agreement, the Schedules and the Reference for Proposal (RFP). Therefore, NIT is a public document which contained the details of Proposed Work. Lastly, it is argued that the arbitration clause relied upon by the Petitioner is in the draft agreement and thus cannot be deemed to be an obligatory signed agreement between the parties. Thus, no binding terms or obligations were ever created. The bidding documents are merely ancillary documents to the NIT and only provide for the purpose of information and do not entitle any rights. Reference in this regard has been placed by the counsel on BSNL v. Telephone Cables Ltd. reported as **(2010) 5 SCC 213**.

6. I have heard the submissions of the counsels and have also perused the relevant material on record.

7. This Court initially deems it apposite to refer to the relevant clauses as laid down in the tender documents, specifically the “Request for Proposal”



document (hereinafter referred to as the RFP). The expressions “LOA”, “Lowest Bidder”, “Preferred Bidder” have been categorically defined.

“**Lowest Bidder**” as defined under **Clause 1.2.6** shall mean “*the Bidder who is quoting the lowest BID price*”.

“**Selected Bidder**” as defined under **Clause 3.3.1** shall mean “*Subject to the provisions of Clause 2.16.1, the Bidder whose BID is adjudged as responsive in terms of Clause 3.1.6 and who quotes lowest price shall be declared as the selected Bidder (the "Selected Bidder")*”.

Clause 3.3.4 reads as “*After selection, a Letter of Acceptance the "LOA" shall be issued in the format set forth in Appendix-VIII, in duplicate, by the Authority to the Selected Bidder and the Selected Bidder shall, within 7(seven) days of the receipt of the LOA, sign and return the duplicate copy of the LOA in acknowledgement thereof. In the event the duplicate copy of the LOA duly signed by the Selected Bidder is not received by the stipulated date, the Authority may, unless it consents to extension of time for submission thereof, appropriate the BID Security of such Bidder as Damages on account of failure of the Selected Bidder to acknowledge the LOA.*”

The relevant clause of the draft agreement providing for resolution of disputes through arbitration is extracted hereunder:-

“26. 3. Arbitration

(i) Any dispute which remains unresolved between the parties through the mechanisms available/prescribed in the Agreement, irrespective of the 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.

27.1 Governing Law and Jurisdiction

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- This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the Courts at (Delhi/ shall have exclusive jurisdiction over the matters arising out of or relating to this Agreement”

8. This Court takes note of the fact that the Respondent having acknowledged the Petitioner to be the lowest bidder, had issued the LOA dated 09.12.2021 to the Petitioner Company thereby designating the same as the “Selected Bidder”. This Court further observes that the petitioner, in the capacity of the selected bidder, had also submitted a Performance Security (BG No. LOBG201052106509) vide letter dated 05.01.2022, in terms of Clause 3.3.5 which lays down the obligation of the selected bidder following the acknowledgement of the LOA issued by the Respondent.

9 Positive reference in the above regard is also made to the case of Jhar Mining Infra Private Limited v. CMD, Managng Coalfields Ltd. & Ors, reported as **2022 SCC OnLine Ori 3027**, wherein it has been as under:-

“12. It must be noted at the outset, therefore, that by acknowledging that the Petitioner as the lowest bidder i.e. L1 and therefore, the 'Preferred Bidder', the LoI was issued by MCL to the Petitioner. There is prima facie merit in the contention of the Petitioner that by accepting the LoI a contractual relation came into existence between the parties.

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18. While therefore, there may not be a concluded formal contract, it would not be entirely correct for MCL to contend that there is no contractual relationship whatsoever between the parties. The reference in Clause 4(A).37 to the disputes arising "during the course of execution" has to be understood as disputes arising even prior to the actual execution of the contract, since clause 1.3.2.5 envisages obligations of the parties at a stage even prior to the formal execution of the contract”

10. The scope of enquiry vested with the Court when exercising jurisdiction under Section 11 of the Arbitration and Conciliation Act is no longer *res integra*. The same is limited to forming a prime facie opinion as



to the existence of an agreement between the parties. Recently, the Supreme Court in SBI General Insurance Co. Ltd. vs. Krish Spinning reported in **2024 INSC 532** while relying on In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899 clarified the law on the scope and standard of judicial scrutiny that an application under Section 11(6) of the Act, 1996 can be subjected to. The relevant paragraphs have been reproduced for convenience:-

“114. In view of the observations made by this Court in In Re: Interplay (supra), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in Vidya Drolia (supra) and adopted in NTPC v. SPML (supra) that the jurisdiction of the referral court when dealing with the issue of “accord and satisfaction” under Section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in In Re: Interplay (supra).

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125. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the arbitral tribunal is equally, if not more, capable to decide upon the appreciation of the evidence adduced by the parties. We say so because the arbitral tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material.”

11. In the present case, the petitioner Company had been declared as the lowest bidder, pursuant to which the LOA dated 09.12.2021 was issued by the Respondent Company to the Petitioner accepting their offer and directing the Petitioner to submit the requisite Performance Security in terms of clause 3.3.5 of the RFP., which was complied with via letter dated



05.01.2022. This Court also deems it apposite to refer to the letter dated 11.01.2022, where while noting the revision in the quantities originally specified in the contract agreement, the Petitioner Company agreed to complete the additional work at the same rates, however under a separate work order. Further attention is also drawn to the letter dated 13.01.2022 wherein the Petitioner had again specified that the Respondent had unilaterally deviated from the originally agreed terms and conditions as specified under the NIT and the LOA.

12. This Court, in the above facts and circumstances and keeping in mind the principles established in the above-noted case law, is satisfied that the arguments put forth by the counsel for the petitioner as to the existence of a valid agreement have merit.

13. However, it is deemed fit to confine the findings on the existence of the agreement as prima facie view. In first blush, it does appear that the arbitration clause 26.03 in the draft agreement circulated as part of tender document, will govern the disputes between the parties, even though the contract agreement was yet to be signed by the parties, pending which, the disputes arose. In view thereof, in the fitness of things, let the respondent call upon the arbitral tribunal to rule on its jurisdiction on question of existence of arbitration agreement, if so desired by the respondent, by way of an appropriate application.

14. The present petition is accordingly disposed of with the following directions:-

- i) The disputes between the parties under the subject agreement are referred to the Arbitral Tribunal.



- ii) Justice Dr. Bharat Bhushan Parsoon, Former Judge, Punjab and Haryana High Court, is appointed as the Arbitrator to adjudicate the disputes between the parties.
- iii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi (hereinafter, referred to as the “DIAC”). The remuneration of the learned Arbitrator shall be in terms of DIAC (Administrative Cost and Arbitrators Fees) Rules, 2018 or as the parties may agree.
- iv) The learned Arbitrator shall furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
- v) It is made clear that all the rights and contentions of the parties, including on the existence and validity of the Arbitration Agreement, the arbitrability of any of the claim/counter-claim, any other preliminary objection, need and legality of interim relief, as well as contentions on merits of the dispute by either of the parties, are left open for adjudication by the Arbitral Tribunal.

15. The parties shall approach the learned Arbitrators within four weeks from today.

**MANOJ KUMAR OHRI
(JUDGE)**

JANAURY 30, 2025/jsv