



2025:DHC:1570



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

% Reserved on : 12.02.2025
Pronounced on : 10.03.2025

+ **ARB.P. 1843/2024**

M/S. ARSS INFRASTRUCTURE PROJECTS LTD.....Petitioner

Through: Mr. Ramesh Singh, Sr. Advocate with
Ms. Monisha Handa, Mr. Rajul
Shrivastav and Ms. Hange Nanya,
Advocates.

versus

NATIONAL HIGHWAY AND INFRASTRUCTURE DEVELOPMENT
CORPORATION LTDRespondent

Through: Mr. Mritunjay Kr. Singh, Mr. Saikat
Khatna, Mr. Harsh Garg, Mr. Akash
Soni, Mr. Rajiv Vijay Mishra and Mr.
Rajeev Kumar Gupta, Advs.

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

JUDGMENT

1. The instant petition has been preferred under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the 'A&C Act'), seeking appointment of Arbitral Tribunal (hereafter, referred to as 'AT') to adjudicate the disputes between the parties.

2. The petition has been premised on the fact that in pursuance of an award of work by the respondent to the petitioner, an EPC Agreement was executed on 09.12.2020. Later, on disputes having arisen between the parties, the respondent issued notice to terminate the Agreement on



25.05.2023. The petitioner contends that Clause 26.2 of the said Agreement provided for dispute resolution and in particular, Clause 26.3 provided for resolution of disputes through the arbitration. In terms of the said clause, the Contractor being registered in India, the venue of the arbitration would be in Delhi. It is further contended that the Agreement also envisages that prior to such reference, the parties would attempt conciliation and, in this regard, would approach the Authority's Engineer (Conciliator) to mediate and assist the authorities in resolving the dispute. It is submitted that despite the petitioner approaching the respondent, the latter failed to appoint any Conciliator, resulting in petitioner making his request for resolution of disputes through the Chairman of the authority under the second part of Clause 26.2. The same resulted in signing of Minutes of Meeting on 13.02.2024 forwarded through letter dated 04.03.2024. Though it is stated that the authorities reached at a settlement, however, the same did not quantify any amount and provided that reconciliation of the payment to the Contractor would be done as per the contract provisions. The contractor thereafter appointed an independent engineer, who assessed and submitted a valuation report. The respondent, however, released a sum of Rs 10,52,71,116/- Crores to which the petitioner protested vide its letter dated 08.07.2024. The petitioner issued another conciliation notice dated 23.08.2024 under Clause 26.2 of the Agreement, the same, however, was denied, resulting in petitioner taking steps for invocation of arbitration under Clause 26.2.

3. Learned counsel for the respondent has taken a preliminary objection to the maintainability of the present petition by contending that the



settlement arrived at between the parties recorded in the Minutes of Meeting (“MoM”) dated 13.02.2024 itself amounts to an award which can only be assailed in appropriate proceedings by the petitioner. While referring to Section 73 of the A&C Act, it is contended that the settlement agreement has been arrived at in pursuance of conciliation proceedings that took place under Part-III of the A&C Act and, therefore, in light of Section 74, is enforceable as an arbitral award. In support, learned counsel refers to the decisions in Haresh Dayaram Thakur v. State of Maharashtra and Others¹, Anuradha SA Investments LLC & Anr. v. Parsvnath Developers Limited & Ors.² and Angle Infrastructure Pvt. Ltd. v. Ashok Manchanda & Ors.³

4. In rejoinder, learned Senior Counsel for the petitioner has refuted the respondent’s contentions and submitted that the settlement was not arrived in any conciliation proceedings for which the appointment of Conciliator was mandatory. It is rather contended that the settlement was arrived in the proceedings mentioned in the latter part of Clause 26.2 for amicable resolution of disputes. It is further submitted that the said settlement was entered by the petitioner at the time it was suffering from financial duress and the said settlement was against the provisions of the contract. Lastly, it is submitted that the scope of examination by referral court under Section 11 of the A&C Act stands well defined in terms of the recent decisions in the Supreme Court in Cox and Kings Private Limited v. SAP India Private Limited & Anr.⁴, Ajay Madhusudan Patel & Ors. v. Jyotrindra S. Patel &

¹ Haresh Dayaram Thakur v. State of Maharashtra and Others reported as (2000) 6 SCC 179

² Anuradha SA Investments LLC & Anr. v. Parsvnath Developers Limited & Ors. reported as 2017 SCC OnLine Del 7970

³ Angle Infrastructure Pvt. Ltd. v. Ashok Manchanda & Ors. reported as 2016 SCC OnLine Del 1534.

⁴ Cox and Kings Private Limited v. SAP India Private Limited & Anr. reported as (2024) 4 SCC 1



Ors⁵ and Aslam Ismail Khan Deshmukh v. ASAP Fluids (P) Ltd⁶ to be limited to examining the *prima facie* existence of the arbitration agreement.

5. To deal with the respondent's contention, the relevant clause being 26.2 and 26.3 of the EPC Agreement are extracted hereunder: -

“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 7 (seven) business day period or the Dispute is not amicably settled within 15 (Fifteen) 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.

26.3 Arbitration

26.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally decided by reference to arbitration by a Board of Arbitrators

⁵ Ajay Madhusudan Patel & Ors. v. Jyotrindra S. Patel & Ors. reported as **2024 SCC OnLine SC 2597**

⁶ Aslam Ismail Khan Deshmukh v. ASAP Fluids (P) Ltd. reported as **(2025) 1 SCC 502.**



appointed in accordance with Clause 26.3.2.”

6. While the petitioner would contend that it had approached the respondent for appointment of a Conciliator in terms of first part of Clause 26.2 vide its letter dated 05.07.2023 which the respondent failed to appoint, the respondent would submit that a Conciliator was appointed as apparent from the communication dated 01.08.2023. A perusal of Clause 26.2 which has been extracted hereinabove would show that the same has been titled as “Conciliation.” This can be contrasted with the wording of Clause 26.3 which is titled as “Arbitration.” Clause 26.3 clearly states that only the disputes which could not have been resolved amicably by conciliation as provided in Clause 26.2, would be decided by arbitration. If the two clauses are read together, it would appear that no such distinction, as contended by the petitioner, has been made between the two parts of Clause 26.2 and rather, the Clause has to be read as a whole as pertaining to conciliation.

7. This becomes even more evident when perusing the letter dated 04.03.2024 and the MoM dated 13.02.2024, both of which refer to the meetings which occurred as “Conciliation Meetings.” A portion of the MoM has been extracted below for convenience: -

Sub: Minutes of Conciliation Meeting with M/s ARSS Infrastructure Projects Ltd. dated 06.10.2023, 19.10.2023 & 27.12.2023 for “Improvement to 2 lane with paved shoulder of NH-40 section from Km93+490 to Km 123+800 (design Km 10+670 to Km 37+550) (Package-II) design length 26.55 km in the State of Meghalaya on EPC Mode under JICA Loan Assistance”

Based upon the request of EPC Contractor vide letter dated 24.07.2023 and 24.08.2023, the Conciliation Meeting under Clause 26.2 of the Contract Agreement was held on 06.10.2023, 19.10.2023 & 27.12.2023 at



NHIDCL, HQ between officials of NHIDCL and representatives of M/ s ARSS Infrastructure Projects Ltd in which following were present:

Sh. Mahmood Ahmed, Managing Director-NHIDCL

Sh. Atul Kumar, Director (T)- NHIDCL

Sh, Nitin Kumar Sharma, Executive Director (T)- NHIDCL

Sh. Ashutosh Mishra, GM(T) - NHIDCL

Sh. Sunil Aggarwal, President & CEO -M/s ARSS

Sh. S.K Khare, Vice President- M/s ARSS

Sh. K.P Verma, Vice President (P)-M/s ARSS

Sh. Anil Kumar, General Manager - M/s ARSS

2. GM(T) briefed the chair about the project, GM(T) further submitted the detailed reasons of termination of Contract.MD, NHIDCL inquired whether 100% land has been given or not. GM(T) submitted that till date only 92% land has been given.

3. The EPC Contractor, M/s ARSS represented that initially the financial progress was 32% however after the reconciliation of payments the progress was reduced to 15%. Further EPC Contractor also expressed that after SPS-11, no payment was made to them which resulted in poor cash-flow leading to slow pace of work.

4. EPC Contractor further expressed that decision of reconciliation of payment made by the Authority is unilateral and not acceptable to them.

5. MD, NHIDCL instructed the technical team to study the reconciliation part in detailed manner with respect to the stipulated contractual provision and it was decided to continue the conciliation meeting on 19.10.2023.

Conciliation meeting on 19.10.2023

6. The conciliation meeting resumed with same attendees as mentioned above.

MD, HIDCL asked whether the detailed study has been conducted to which ED-(T) briefed the details and stated that reconciliation of payment was done as per the recommendations of Committee constituted on 23.03.2023. The dispute is consideration of one of the items of Schedule B i.e. 'Locations of Geometric Improvements' under item 'B. Reconstruction realignment/ bypass (Flexible pavement) of Schedule-H after making payments upto SPS-11 instead of initially considered under item 'A - Widening and strengthening of existing road'.

7.The matter was discussed as per the Contractual provisions. Dir(T) enquired in detail the calculations made by comparing Schedule-B & Schedule-H of the Contract Agreement with respect to Road works items.

8.After detailed deliberations, it was agreed that the rightful consideration can be only as per the Contract Agreement.



9. It was opined that Geometric Improvement is relating to the work on existing alignment which include many aspects of Civil Work such as Vertical Profile correction, Horizontal Profile correction, Strengthening of Curves, etc. on the existing road. Hence, the consideration of earlier constituted committee may not be entirely appropriate.

10. MD, NHIDCL instructed that a fresh Committee Comprising 4 ED's and other relevant members shall be constituted and the matter of reconciliation shall be re-examined in light of aforementioned deliberations. Further, it was conveyed to the EPC Contractor that next meeting will be held after, examination by the revised committee to which EPC Contractor agreed.

Conciliation meeting on 27.12.2023

11. MD, NHIDCL enquired from ED (T) about the recommendation of the revised committee. ED (T) in detail informed the chair that the decision of the committee was found in-conclusive.

12. Thereafter, Competent Authority, NHIDCL opined that the conciliation shall be done as per the contractual provisions of the Contract Agreement between Authority and EPC Contractor only.

13. Further, to that the EPC Contractor requested the chair to foreclose the Contract instead of Terminating due to delay in handing over of ROW along with the request to release the PBG & APBG encashed by NHIDCL upon termination as per the Contract Clause 23.6.1 (a) Et (b). On which the chair informed the EPC Contractor that the encashed BG's (PBG & APBG) cannot be returned as the contract, has been terminated on various defaults of the EPC Contractor.

14. However, the chair directed the EPC Contractor to assess and submit their claims upon termination to NHIDCL as per the directions deliberated in the earlier conciliation meetings. Thereafter, the EPC Contractor submitted that he claims are same as intimated earlier vide letter no. ARSS/SHL/NHIDCL/P-II/22-23/378 dated 27.06.2023 submitted claims of Rs. 176,58,24,763/- (One Hundred Seventy-Six Crore Fifty-Eight Lakh Twenty-Four Thousand Seven Hundred Sixty-Three) due to non-handing over of hinderance free land and various damages to the EPC Contractor (including encashed PBG & APBG).

15. The Technical division also informed chair that NHIDCL has also raised recovery against the EPC Contractor of Rs. 48.92 Cr as per the final bill upon termination including liquidity damages after adjusting encashment of PBG & APBG.

16. Competent Authority, NHIDCL concluded that reconciliation of the payment to the EPC Contractor shall be done as per the EPC Contract provisions and which were followed while processing previous SPSs for computing the payments to the EPC Contractor. The relevant Contractual provision has been referred for the same.



17. That on the full and final settlement payment upon termination as decided through this conciliation meeting dated 27.12.2023 for the subject work, M/s ARSS, the EPC Contractor will not approach any court/Tribunal for any claim/damages/compensation including loss of profit etc in this regard thereafter.

18. Meeting ended with a vote of thanks to the chair.

A perusal of the above extract makes it evident that the meeting has been consistently referred to as a “Conciliation Meeting” as provided for in Clause 26.2. Paragraph No. 17 of the MoM records the undertaking of the petitioner to not approach any court/tribunal for any claim/damages/compensation after receipt of settlement payment. These MoM have been signed by various representatives of the petitioner.

8. In fact, the petitioner itself in its letter dated 08.07.2024 refers to the meetings between the parties as conciliation meetings. The relevant extract of the aforesaid letter is reproduced below:-

“...5. To resolve the Dispute, conciliation meetings conducted between IMHIDCL and EPC contractor and minutes of conciliation meeting was issued on 04.03.2024. It is evident that before issue of Minutes of Conciliation meeting, contractor was made to believe that Secured Advance with interest had already been recovered from encashment of Bank Guarantees on 02.06.2023 in accordance with Article 19.2.8 and Article 26.3.1(b). That is why, we signed Minutes of meeting inspite of our genuine claim of Rs. 178.00 crores....”

Thus, the meetings were, even as per the petitioner’s own understanding, conciliation meetings wherein a settlement had been arrived. Merely because the person conducting the meeting was not the Authority’s engineer, does not mean that the proceedings lost their character. Clause 26.2 itself allows that the conciliation can be conducted by not just the Authority’s Engineer, but also any other such other person as the parties may mutually agree upon. The meeting was attended by senior officials



from both the parties. The contention that because the Authority's Engineer was not present, the meetings ceased to be in the nature of a conciliation proceeding, does not hold water.

9. The petitioner has alleged that the settlement proceedings were vitiated because at that time the petitioner was in financial duress. The veracity of the allegations of the petitioner qua the settlement agreement cannot be looked into by this Court in a petition under Section 11 of the Act. As per Section 74 of the A&C Act, the settlement agreement entered shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30. If the petitioner wishes to challenge the settlement agreement, they would have to take recourse under Section 34 of the A&C Act, subject to the rules of limitation. Reference in this regard may be made to the decision of a Co-ordinate Bench of this Court in Anuradha SA Investments LLC (Supra), wherein it was held:-

28. It is relevant to note that the Conciliator was approached only in January 2016 and the Settlement Agreement was entered into on 03.06.2016. Thus, Section 36 of the Act as amended by virtue of the Arbitration and Conciliation (Amendment) Act, 2015 is applicable and in terms of the amended provisions, the arbitral award is enforceable notwithstanding that an application under Section 34 has been filed. In the present case, the respondents have not preferred any petition for setting aside the Settlement Agreement. It is also not in dispute that in terms of the provisions of the Act, a Settlement Agreement under Section 73 of the Act would be enforceable as an arbitral award under Section 36 of the Act. Thus, this Court finds no merit in the contention that the present petition is not maintainable notwithstanding that the respondents may be within the period of limitation to challenge the Settlement Agreement under Section 34 of the Act, assuming such a challenge is otherwise maintainable.



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10. As per Clause 26.3, only those disputes may be referred to arbitration which could not be resolved by Conciliation under Clause 26.2. Since a settlement agreement has been entered into under Clause 26.2, the dispute cannot be referred to arbitration leaving it open for the petitioner to challenge the said settlement in the appropriate proceedings, subject to limitation.

11. The present petition is dismissed.

**MANOJ KUMAR OHRI
(JUDGE)**

MARCH 10, 2025/ry