

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Arbitration Application No. 112/2017

M/s Mukesh Associates, Registered Office: 2/6, Ranganathar Avenue, Perumal Malai Main Road, Narasothipally, Salem - 636004 Tamil Nadu Through Its Managing Partner, Mr. D. Mukesh
-----Petitioner

Versus

Malviya National Institute Of Technology, Jaipur, Address:
Malviya National Institute Of Technology (Mnit), Jawahar Lal
Nehru Marg, Jaipur - 302 017
-----Respondent



For Petitioner(s) : Mr. Harshal Tholia
For Respondent(s) : Mr. Sarthak Rastogi

HON'BLE MR. JUSTICE MOHAMMAD RAFIQ

Judgment

//Reportable//

23/02/2018

This application under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed by M/s. Mukesh & Associates seeking appointment of an Arbitrator in terms of its agreement dated 23.03.2015 with the respondent.

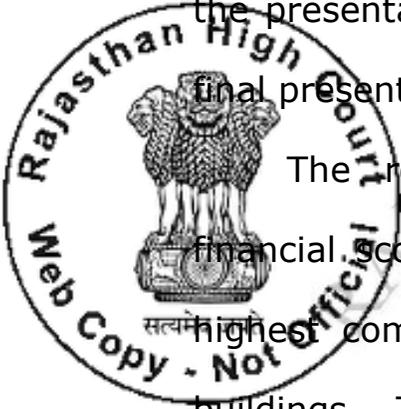
As per the averments in the application, the petitioner is a registered partnership firm. It is a multidisciplinary consultancy firm based in Salem and is engaged in the business of offering consultancy in Architecture, Planning, Civil Infrastructure, Environmental Engineering, Project management, Quality auditing, Monitoring and Evaluation amongst other services. The petitioner is also registered under the provisions of Micro, Small and Medium Enterprises Development Act, 2006 as a 'Small Enterprise' providing services. Respondent - Malviya National Institute of

Technology, Jaipur, was established in 1963 as Malviya Regional Engineering College, Jaipur, as a joint venture of the Government of India and the Government of Rajasthan. Subsequently, on 26.06.2002, the respondent college was given the status of National Institute of Technology. The respondent issued an expression of interest dated 03.07.2012 for providing comprehensive consultancy services from design concept to completion (not including tendering and project management), for construction of various buildings having a built-up area of about 25000 square meter. A pre-bid meeting was held on 25.07.2012 and the minutes thereof were circulated on 09.08.2012 clarifying certain terms. It was also clarified that the date of submission of EOI was extended to 22.08.2012. The petitioner submitted the EOI on 18.08.2012 for all four buildings i.e. Academic Block, Convention Centre, Guest House and Hostels. When no reply was received by it, the petitioner sent letter dated 27.11.2012 to the Director of the respondent vide e-mail and fax message requesting an update on the status of the EOI submitted by the petitioner. The respondent informed the petitioner on 22.03.2013 that the petitioner had qualified the eligibility criteria for the consultancy work of the proposed academic block, convention centre, guest house and boys and girls hostels. The petitioner, vide letter dated 22.03.2013, was requested to present its conceptual plan before the Architect Selection Committee on 31.03.2013. The petitioner duly presented its conceptual plan on 31.03.2013 as per the schedule. The respondent, vide letters dated 02.08.2013 and 08.08.2013, informed the petitioner that it has been shortlisted by the Architect Selection Committee for final presentation and a detailed request for proposal document along-



with master plan of the institute was also submitted to the petitioner. In response to those letters, the petitioner submitted its financial proposals for all four buildings vide letters dated 09.09.2013. Pursuant thereto, the respondent, vide letter dated 24.09.2013, scheduled the final presentation for all the four buildings on 05.10.2013. The petitioner submitted a soft copy of the presentations vide its letters dated 04.10.2013 and gave the final presentation on 05.10.2013 as scheduled by the respondent.

The respondent evaluated the combined technical and financial score and declared that the petitioner has secured the highest combined technical and financial score for all the four buildings. The respondent decided to award the work of architectural consultancy of boy's hostel, international hostel and studio apartments in MNIT and further decided not to go ahead with the academic block, convention centre and guest house at that stage. A meeting was held on 15.08.2014 wherein it was decided that the work of architectural consultancy of proposed boys hostel, international hostel and studio apartments at MNIT be awarded to the petitioner at the rate of 0.9% of tendered cost of project. The petitioner was required to make several modifications in the conceptual plan, which were duly carried out by the petitioner. Despite the work carried out by the petitioner, there was substantial delay in signing the final document. Several requests made by the petitioner in that behalf remained unattended. The petitioner, vide letter dated 05.11.2014 and thereafter vide letter dated 12.01.2015 requested the respondent to sign the agreement. The Stage-1 services as per the agreement were completed by the petitioner even before the agreement was signed and executed between the parties in view of the petitioner



having been selected. Based on the discussions and suggestions in several meetings, revised drawings incorporating the suggestions were presented to the Director, the Dean (P&D), Architect R.N. Sharma, HOD, Department of Architecture & Planning and MNIT team on 23.12.2014, which were accepted by the Director. All the designs were approved by the Director except minor revisions which were also duly carried out by the petitioner. All the concept designs, drawings, preliminary estimate etc. required for Stage-1 were submitted to the respondent on 28.02.2015. After several discussions with the respondent, the petitioner also submitted the plinth area estimate cost for the proposed infrastructure development on 15.12.2014 and revised cost estimate on 24.02.2015 which worked out to Rs.3,97,32,42,593/-.

Mr. Harshal Tholia, learned counsel for the petitioner argued that since the petitioner had failed to carry out the work as per the conceptual designs, the petitioner sent a detailed letter dated 09.03.2015 to the respondent stating that the details of services already rendered and requesting the respondent to sign the agreement and expedite the Stage-1 payment. The agreement was finally signed and executed on 23.03.2015 at Jaipur, in which it was agreed that the payment due to the petitioner up to Stage-1 would be computed on the basis of preliminary estimates of development cost. The petitioner therefore issued invoices dated 09.04.2015 for a sum of Rs.40,17,901/- towards Stage-1 services, which was inclusive of service tax of Rs.4,41,983/- at the rate of 12.36%. Thereafter the petitioner sent several reminders vide letters dated 20.05.2015, 15.06.2015, 07.09.2015 and 14.09.2015 to the respondent to release the payment in terms of the agreement and also to schedule a meeting to decide the future



course of action but that too of no avail. Subsequently, at the final stage, the petitioner made a conditional offer to the respondent to restrict its invoice to Rs.30,00,000/- plus service tax at the rate of 14% vide letters dated 07.10.2015 and 29.04.2016. Even that too failed to evoke any response from the respondent. Finally, the petitioner was constrained to issue letter dated 06.02.2017 to the respondent as per Clause 5.6.5 of the Agreement and requested the respondent to settle the issue by mutual agreement. On failure of the respondent to reply, the petitioner served notice dated 03.04.2017 requesting the respondent for appointment of an Arbitrator and for that purpose the petitioner nominated Mr. L.K. Agarwal, Chief Engineer (Retd.) as an Arbitrator. However, the respondent, vide letter dated 01.05.2017, wrongfully denied the legitimate claim of the petitioner by contending that the Stage-1 is not complete and no approval has been accorded to the conceptual design presented by the petitioner as approved by the Institute.

Mr. Sarthak Rastogi, learned counsel for the respondent, submitted that Clause 5.4 of the agreement is the Clause pertaining to the fee for providing consultancy, according to which the respondent shall pay for the Comprehensive Architectural and Engineering consultancy services of Hostels, Studio Apartments and Allied Facilities of respondent as quoted and approved in the Financial Proposal as 0.9% of total development cost or tendered cost of lowest bidder after negotiation, whichever is lesser, in various stages as per agreement. Clause 5.5 relates to payment schedule. In Stage-1 of the Clause 5.5, there are two sub stages (I) Approval of concept design and (ii) Submission of preliminary estimate. For releasing payment of first stage tasks



enumerated at both the sub stages are to be accomplished. No previous approval was presented by the respondent. It was therefore that in response to the notice of the petitioner, the respondent demanded from the petitioner to produce copy of any approval accorded by the respondent. Once it is shown that the concept design has not been approved, then preparation of preliminary estimate by the petitioner did not carry any meaning.

The application should be dismissed.

Having heard learned counsel for the parties and perused the material on record, this court finds that after introduction of sub-section (6A) in Section 11 of the Act of 1996 added by the 2015 Amendment, the High Court, while considering the application under sub-section (4), (5) or (6) of Section 11 of the Act of 1996, notwithstanding any judgment, decree or order of any Court, is required to merely examine the existence of an arbitration agreement. The Supreme Court in *Duro Felguera S.A. Vs. Gangavaram Port Limited* – (2017) 9 SCC 729, while considering the effect of Section 11(6A), held that the intention of the legislature is clear that the court should and need only look into one aspect – the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple – it needs to be seen if the agreement contains a Clause which provides for arbitration pertaining to the disputes, which have arisen between the parties to the agreement. In view of what has been discussed by their Lordships, the scope of the power with the Chief Justice or his nominee under Section 11(6) of the Act of 1996 earlier than introduction of the Arbitration and Conciliation (Amendment) Act, 2015 with effect from 23.10.2015, was much



wider in view of the decisions in S.B.P. & Co. Vs. Patel Engineering Ltd. and Another – (2005) 8 SCC 618 and National Insurance Co. Ltd. Vs. Boghara Polyfab Private Limited – (2009) 1 SCC 267. This position continued till Section (6A) was inserted in Section 11 of the Act by way of amendment brought about in 2015. However, after aforesaid amendment, all that this Court is required to see is whether an arbitration agreement exists – nothing more, nothing less. The intention of the legislature in doing so is essentially to minimize the Court's intervention at the stage of appointment of the arbitrator. Indisputably, in the present case, Clause 8 of the agreement provides for reference of a dispute to the arbitration for adjudication. Clause 5.6.5 of the agreement reads as under:-

"5.6.5 Arbitration

During the period of the project, MNIT JAIPUR will endeavor to provide Mukesh & Associates any assistance as required, which will not involve any financial implications. In the unfortunate situation of any and all disputes, disagreement and controversies arising in any manner, which cannot be settled by mutual agreement between MNIT JAIPUR and Mukesh & Associates, the matter shall be submitted to arbitration.

For, this MNIT JAIPUR and Mukesh & Associates shall nominate (in writing) one Arbitrator each. In turn, these two Arbitrators shall nominate an umpire. In case these two Arbitrators do not agree on any particular matter, the decision of the Umpire shall be final and binding on both MNIT JAIPUR and Mukesh & Associates. All other provisions of the Arbitration and Conciliation Act 1996 (with amendments) shall apply and the venue of Arbitration shall be MNIT Jaipur. The courts at Jaipur shall have the exclusive jurisdiction to try all disputes, if any, arising out of this agreement between the parties."

In view of existence of the arbitration clause, this court cannot go into any other aspect including about the limitation, raised by the respondent as all these questions are writ large to be considered by the Sole Arbitrator.

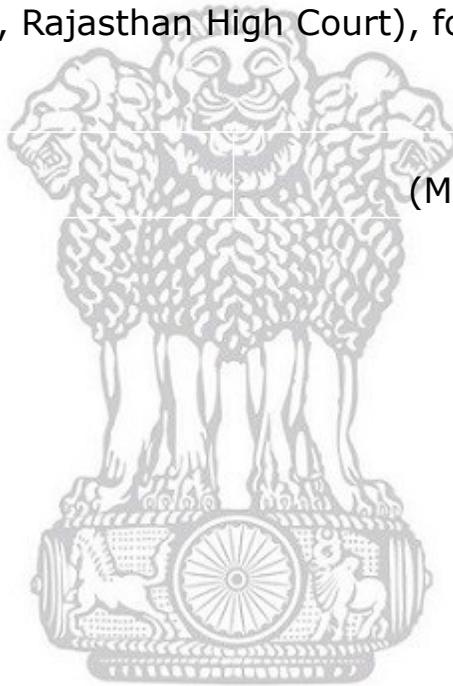


In view of above, present application deserves to succeed and the same is allowed. Hon'ble Mr. Justice Bhanwaroo Khan (former Judge, Rajasthan High Court), R/o E-734, Gandhi Nagar, Jaipur (Cell No.9829225441), is hereby appointed as an independent sole arbitrator to resolve the disputes between the parties. Payment of the costs of arbitration proceedings and the arbitration fees shall be made as per the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015 read with Manual of Procedure for Alternative Dispute Resolution, 2009 of this Court, as amended from time to time.

A copy of this order be sent to Hon'ble Mr. Justice Bhanwaroo Khan (former Judge, Rajasthan High Court), for needful.

(MOHAMMAD RAFIQ),J

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