

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Reserved on :22.11.2024

Pronounced on:11.12.2024

Arb P No.52/2024

M/s Varindera Constructions Ltd.,
Registered office at 408-409,
Suneja Towers District Center,
Janakpuri, New Delhi,
through its Managing Director
Sh. Varinder Kumar Garg, Age:63 years. **...Petitioner**

Through: Mr. R.K. Gupta, Sr. Advocate with Mr.
Uday Bhaskar, Advocate.

versus

1. Union of India,
Through Engineer-in-Chief,
Army HQ, Integrated HQ of MOD,
Kashmir House, Rajaji Marg,
New Delhi - 110011.
2. Head Quarters,
Chief Engineers (AF) Zone,
C/o 39 Wing, AF C/o 56 APO
3. Commander Works Engineers (AF) Leh,
PIN-900465 C/O 56 APO
4. Garrison Engineer (AF) THOISE
Military Engineering Services,
PIN 937219 C/O 56 APO **...Respondent(s)**

Through: Mr. Vishal Sharma, DSGI

Coram: HON'BLE THE CHIEF JUSTICE

JUDGMENT

1. The petitioner has filed this arbitration petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking for appointment of an arbitrator for resolution of disputes between the petitioner and respondents herein in view of arbitration clause 70 of the Contract Agreement.
2. The facts-in-brief, as gathered from the arbitration petition, are that in response to NIT for construction of 3x Twin Hangers at Air Force Station Thoise, the bid submitted by the petitioner-company was accepted by respondent No.2 for a lump sum amount of Rs.71,00,00,000/- (Rupees Seventy One Crore only). The date of handing over/commencement of work was scheduled as on 09.10.2015 and the work was required to be completed within 36 months with scheduled date of completion being 08.10.2018. It is contended that though the work remains suspended from October to April-May due to extreme cold conditions, even then the petitioner-company was able to complete around 70% of the contract work by October, 2018 and was expected to complete the work by the next working season in 2019, but the respondents, in a dramatic turn of events, took a decision to change the entire design of the Central Heating System by opting to go for a new technology by providing Radiant Floor Heating in the Hanger Portion in lieu of Fan Coil Units as provided under Schedule 'A' Part-XII of the Contract Agreement. Thus, it resulted in change of the design of flooring of the Hanger portion as the PE-RT Pipes as per the new scope of work were to be embedded in the PQC Layer. Since the MES Department introduced this new technology and changed the nature as well as scope of the contract, it was their responsibility to provide the new design and details to the petitioner-company for execution of the work.

However, the MES department did not provide the new design for about 2 ½ years and, thereafter, decided to delete the entire work for Central Air Heating System from the scope of the contract including providing PE-RT Pipes. It is submitted that during this period the respondents issued as many as 11 extensions for completion of the work and the last extension was granted on 24.02.2024 upto 13.09.2024, and, all these extensions were granted by the department for reasons not attributable to the petitioner-company. Since the petitioner-company was suffering huge losses, besides the costs of materials increased manifolds in the last nine years and that serious disputes had arisen between the parties to the contract, the petitioner company vide communication dated 19.03.2024, while invoking Clause 70 of the Contract Agreement, issued notice to the respondents for appointment of an Arbitrator for resolution of disputes between the parties during the currency of the contract. However, the respondents neither responded to the notice nor appointed the Arbitrator; hence the petitioner-company has approached this Court under Section 11(6) of the Arbitration and Conciliation Act for appointment of an independent Arbitrator for resolution of disputes between the parties.

3. Objections have been filed on behalf of respondents averring therein that in terms of Clause 70 of the Contract Agreement, the alleged disputes cannot be referred for arbitration until after the completion or alleged completion of the works or termination or determination of the contract under Conditions No.55, 56 and 57 thereof. It is further averred that 11 extensions have already been granted to complete the contract, but the work is yet to be completed. The petitioner has sought further extension of time; the same is under consideration and is likely to be granted.

4. Heard learned counsel appearing for the parties, considered their rival contentions and also perused the file.

5. The stand of petitioner-company is that it had completed around 70% of the contract work upto the scheduled date of 08.10.2018 and was expected to complete the entire work by the next working season of 2019 had the respondents in a dramatic turn of events not taken a decision to change the entire design of the Central Heating System by opting to go for a new technology by providing Radiant Floor Heating in the Hanger Portion in lieu of Fan Coil Units as provided under Schedule 'A' Part-XII of the contract agreement, which also resulted in change of the design of the flooring of the Hanger portion. The further stand of petitioner-company is that since the MES Department had introduced this new technology, as such it was its responsibility to provide the new design, but the MES Department failed to provide the new design for about 2 ½ years and, thereafter, decided to delete the entire work for Central Air Heating System from the scope of contract. Not only this, there were number of other issues but the respondents had failed to take any decision for years together. While invoking the arbitration clause, the petitioner-company has specifically averred that during these nine years the costs of materials have increased manifolds, as a result of which the petitioner-company is suffering huge losses.

6. Although the respondents have filed objections to the present petition, but a perusal of the same reveals that the respondents have not rebutted any of these assertions of the petitioner-company; meaning thereby the delay in completing the contract work cannot be attributed to the petitioner-company that too when after completion of about 70% of the contract work, the

respondents took a decision to entirely change the design of Central Heating System. Even the respondents in the objections have not objected to granting of 11 extensions to the petitioner-company in completing the contract work, rather they were willing to even grant 12th extension to the petitioner-company for completion of the contract work.

7. As regards the contention of respondents that the alleged disputes cannot be referred for arbitration until the completion of contract work, the petitioner-company in the rejoinder has specifically stated that as per Clause 28.1.4(c) of Military Engineering Services, Manual on Contracts, if some disputes arising out of an interpretation of the provision in a contract may go to the very root of the contract and involve substantial financial effect which, if not settled expeditiously, may become a reason for the inability of the contractor to progress the work as per Schedule, in such cases, the Accepting Officer may agree to refer the disputes to arbitration during the currency of the contract, if so requested for by the contractor.

8. The petitioner-company in the rejoinder has specifically undertaken that it will not opt for second arbitration after the completion of the contract if the present petition is allowed by this Court. Learned counsel for the petitioner also made a statement to the same effect in the open Court when the matter came to be reserved.

9. Viewed thus, the present petition is allowed and Mr. Arvind Kumar Arora, DG (Pers), MES Department is appointed as the Sole Arbitrator to adjudicate and resolve the disputes between the parties. Learned arbitrator to enter upon the reference after issuance of notices to the parties and shall make the award in accordance with law. The arbitrator shall be at liberty to assess his

fee in accordance with rules, if any, governing the field. The fee shall be borne by both the parties in equal proportion.

10. Registry to send a copy of this order to the learned arbitrator.

Jammu
11.12.2024
(Anil Sanhotra)

(Tashi Rabstan)
Chief Justice

Whether the order is reportable ?
Whether the order is speaking ?

Yes/No
Yes/No