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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CS(OS) 1281/2008 & IAs No 7953/2008, 11289-91/2008, 142/2010
POKHRYAN ALUMS AND CHEMICALS (P) LTD. Plaintiff
Through Ms. Pallavi Parmar, Adv.

versus

DELHI JAL BOARD Defendant
Through Mr. Suhaas Joshi, Adv.

% Date of Decision: 4th April, 2013

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

IA No.11289/2008

1. Present application has been filed under Section 8 of the Arbitration and Conciliation Act, 1996 on behalf of the defendant-Delhi Jal Board.
2. In the present application it is stated that the plaintiff entered into three contractual agreements dated 22nd March, 1994, 31st May, 1996 and 3rd February, 2000 with the defendant for supply of Alumina Ferric Works. The arbitration clause contained in one of the agreements dated 3rd February, 2000 is reproduced herein below:

“In case of dispute between the parties, it is agreed that all the disputes of any nature will be settled by arbitration in terms of the arbitration clause reproduced herein.

“Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the

quality of workmanship, or materials used or as to any other question, claim, right, matter or thing whatsoever in any way arising out, relating to the contract, designs, drawings, specifications, estimates, instructions orders or these conditions or otherwise concerning the work, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof, shall be referred to the sole arbitrator of the Commissioner, Municipal Corporation of Delhi or any person nominated by the Commissioner on his behalf. The award of the arbitrator shall be final, conclusive and binding on all the parties in this contract.”

3. Learned counsel for the defendant submits that the intention of the parties is clear that in case of dispute between the parties the matter shall be referred to arbitration.

4. On the other hand, learned counsel for the plaintiff states that defendant has waived its right to invoke the arbitration clause as plea of Section 8 of the Arbitration and Conciliation Act, 1996 was not taken in the writ proceedings filed by the plaintiff. In this connection she relies upon the judgment of Supreme Court ***Rashtirya Ispat Nigam Ltd. & Anr. V. M/s Verma Transport Company, AIR 2006 SC 2800*** wherein it has been held as under:

“The expression 'first statement on the substance of the dispute' contained in Section 8(1) of the 1996 Act must be contra-distinguished with the expression 'written statement'. It employs submission of the party to the jurisdiction of the judicial authority. What is, therefore, is needed is a finding on the part of the judicial authority that the party has waived his right to invoke the arbitration clause. If an application is filed before actually filing the first statement on the substance of the dispute, in our opinion, the party cannot be said to have waived his right or acquiesced himself to the jurisdiction of the court. What is, therefore, material is as to whether the petitioner has filed his first statement on the substance of the dispute or not, if not, his application under Section 8 of the 1996 Act, may not be held wholly unmaintainable. We would deal with this question at some details, a little later.

5. Learned counsel for the plaintiff states that the dispute between the parties in the present case pertains only to the agreement dated 3rd February, 2000 and that too with regard to risk purchase. She submits that the arbitration clause is not attracted to the present case inasmuch as the dispute between the parties pertains to an 'excepted matter'. In this connection she has drawn this Court's attention to Clause 6 of the agreement dated 3rd February, 2000 which reads as under:

"6. In case the second party fails to adhere to the delivery schedule given by the first party, the first party reserves the right to purchase or procure the material without any notice at the risk, responsibility and cost of the second party. However, in case of late supplies, the first party reserves the right to impose penalty in accordance to 2 & 3 clauses of the conditions of the contract, in addition to terms No.5 above."

6. In support of her submission learned counsel for the plaintiff also relies upon the judgment of the Supreme Court in **Vishwanath Sood vs. Union of India & Anr. (1989) 1 SCC 657** wherein it has been held as under:-

"9. The Division Bench has construed the expression in Clause 2 in parenthesis that "the Superintending Engineer's decision shall be final" as referring only to a finality qua the department; in other words, that it only constitutes a declaration that no officer in the department can determine the quantification and that the quantum of compensation levied by the Superintending Engineer shall not be changed without the approval of the Government. After referring to certain judicial decisions regarding the meaning of the word "final" in various statutes, the Division Bench concluded that the finality cannot be construed as excluding the jurisdiction of the arbitrator under Clause 25. We are unable to accept this view. Clause 25 which is the arbitration clause starts with an opening phrase excluding certain matters and disputes from arbitration and these are matters or disputes in respect of which provision has been made elsewhere or otherwise in the

contract. These words in our opinion can have reference only to provisions such as the one in parenthesis in clause 2 by which certain types of determinations are left to the administrative authorities concerned. If that be not so, the words “except where otherwise provided in the contract” would become meaningless. We are therefore inclined to hold that the opening part of clause 25 clearly excludes matters like those mentioned in clause 2 in respect of which any dispute is left to be decided by a higher official of the Department. Our conclusion, therefore, is that the question of awarding compensation under clause 2 is outside the purview of the arbitrator and that the compensation, determined under clause 2 either by the Engineer-in-charge or on further reference by the Superintending Engineer will not be capable of being called in question before the arbitrator.”

7. Having heard learned counsel for the parties this Court is of the view that the defendant Delhi Jal Board has not waived its right to seek arbitration.
8. It is settled law that a writ petition cannot be referred to arbitration and consequently non reference to an arbitration clause in the counter affidavit filed by the Delhi Jal Board does not result in waiver of the defendant's right to rely upon the arbitration clause in the present suit.
9. Further, the judgment of the Supreme Court in ***Rashtriya Ispat Nigam*** (supra) is clearly inapplicable to the facts of the present case as the said judgment deals with applicability of Section 8 to a civil suit and not a writ petition. In any event in the said judgment it was held that a Section 8 application would not be allowed if the party filing the said application had already filed its first statement on the substance of the dispute. It was also clarified by the Supreme Court that by opposing a prayer for interim injunction it cannot be said that the party had waived its right to invoke the arbitration clause.
10. This Court is further of the opinion that Clause 6 does not pertain to

excepted matters. Clause 6 of the agreement only empowers the defendant to purchase goods at the risk and cost of the plaintiff.

11. Clause 6 confers no finality on any authority to decide or adjudicate the dispute between the parties.

12. In *Vishwanath Sood* (supra) the Supreme Court held that arbitrator could not decide those disputes which had to be decided by a third party and whose decision was final and binding on the parties.

13. Undoubtedly in the present case the Superintending Engineer has computed the amount payable by the plaintiff as compensation but in the opinion of this Court there is no clause in the contract which attaches any finality to the Superintending Engineer's decision.

14. Consequently, the plaintiff is free to challenge the decision of the Superintending Engineer after invoking the arbitration clause. Accordingly, the present suit of the plaintiff's as well as all the pending applications filed by the parties are referred to arbitration in terms of Arbitration Clause 9 of the agreement dated 3rd February, 2000 and the defendant is directed to appoint an arbitrator within four weeks.

15. With the aforesaid observations the present suit and all pending applications stand disposed of.

MANMOHAN, J

APRIL 04, 2013

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