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

% Reserved on: 22nd September, 2022
Decided on: 23rd November, 2022

+ ARB.P. 1065/2022 and I.A. 14679/2022

M/S SUNEHARI BAGH BUILDERS PVT LTD Petitioner

Through: Mr. Avinash Trivedi, Advocate
(Ph.9871441764, e-mail:avinashtrivedi.legal@gmail.com)

versus

AIRPORTS AUTHORITY OF INDIA Respondent

Through: Mr. Digvijay Rai and Mr. Archit
Mishra, Advocates (Enrl. No.
D/1228/2000, Ph. 9873103599, e-mail: digvijayrai@rediffmail.com).

CORAM:

HON'BLE MS. JUSTICE MINI PUSHKARNA

JUDGMENT

% **23.11.2022**

MINI PUSHKARNA, J.

1. By way of the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter called "The Act"), the petitioner seeks appointment of a sole arbitrator to adjudicate the additional disputes between the parties. The petitioner has alternatively prayed for reference of additional disputes/claims no. 6 and 7 to the Learned sole arbitrator, already appointed vide letter dated 13.12.2021.

2. Facts in brief are that the respondent had floated a tender for execution of the work of "Construction of Central Air Traffic Flow

Management (CATFM) and Associated offices at Vasant Kunj, New Delhi”. Petitioner was declared as successful participant in the tender and was awarded the work, pursuant to which an agreement dated 20.01.2016 was executed between the parties for Rs. 11,53,06,853/-.

3. The work was completed by the petitioner on 31.12.2018. Subsequently, petitioner invoked Clause 25 of the General Conditions of Contract (GCC) vide its letter dated 08.04.2020 and 08.06.2020, seeking reference of its disputes to a duly constituted Disputes Resolution Committee (DRC).

4. Thereafter DRC was constituted and matter was referred for adjudication on 01.01.2021. The petitioner submitted 5 claims before the DRC on 02.02.2021. DRC passed the order/recommendations on 22.09.2021, which was sent to the petitioner through email on 13.10.2021.

5. Upon receiving the recommendations of DRC, petitioner issued a letter dated 25.10.2021 seeking to refer total 7 number of claims to arbitration. Respondent however referred only 5 claims of the petitioner to the arbitrator, which formed part of the proceedings before the DRC.

6. It is the case of the petitioner that as per Clause 25 (i) of the agreement, the DRC had to give its decision within 45 days of its constitution. The relevant portion of Clause 25(i) is reproduced as herein for ready reference:-

“Efforts of DRC should be to come to an amicable settlement of outstanding disputes. If parties agree, a written settlement will be drawn out and signed by the parties. DRC will authenticate the settlement Agreement

and furnish a copy to each party. DRC will give its report within 45 days of its constitution.”

7. However, in the present case the DRC was constituted on 01.01.2021 and the DRC had given its order/recommendation on 22.09.2021. Thus, the petitioner by its letter dated 25.10.2021 requested the respondent to refer 7 claims for arbitration. However, respondent after seeking consent of the petitioner out of the three named persons appointed Sh. Pradeep Kumar Gupta, former DG of CPWD as sole Arbitrator vide letter dated 13.12.2021 and referred only 5 claims.

8. Petitioner thereafter sent letter dated 15.12.2021 to the respondent, who is the appointing authority with copy to the learned arbitrator thereby making request for reference of left over claim no. 6 and 7 to the learned arbitrator for adjudication.

9. Claim no. 6 raised by the petitioner is for an amount of Rs. 40,61,196/- towards compensation for delay in decision by the DRC. Claim no. 7 is towards cost of arbitration proceedings.

10. However, the learned arbitrator in the first hearing dated 24.12.2021 observed as follows:

“...Claimants have vide email dated 15.12.2021 addressed to Member (Ping.) AAI with copy to AT and Respondent stated that their complete claims [total 7 Nos.] are not referred to the AT. Claimant was advised by AT that the jurisdiction of AT is defined by appointment letter issued by the competent authority of Respondent wherein only 5 claims have been referred and Claimant should pursue the remaining claims with Respondent.”

11. As per the petitioner, both the aforesaid claims are justified and

that the respondent has deliberately not referred these two claims while appointing sole arbitrator.

12. The respondent by its letter dated 22.02.2022 replied to the letter of the petitioner dated 15.12.2021 and stated that since only 5 claims were submitted before the DRC, therefore claims no. 6 and 7 were not referred for adjudication before the Arbitral Tribunal. The petitioner again wrote a letter dated 04.06.2022 to the respondent with request for reference of claims no. 6 and 7 before the arbitral tribunal. Since the respondent has not referred the said two claims to the sole arbitrator, the present petition has been filed.

13. On behalf of respondent, it is submitted that from the time of execution of the agreement dated 20.01.2016, the petitioner was aware that the arbitrator would have mandate to adjudicate on only such disputes as are referred to him by the appointing authority. The Clause pertaining to dispute resolution stipulates that any dispute “shall be referred in the first place to the DRC”. It is further a term of the contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such disputes along with the notice for appointment of arbitrator and give reference to the rejections of their claims by the DRC. It is thus, submitted on behalf of respondent that no such claim which was not referred to DRC, would be referred to the arbitrator.

14. It is further contended that by his order dated 24.12.2021, the learned arbitrator informed the petitioner that he would adjudicate only upon the disputes referred to by the competent authority of the respondent, and hence decided his jurisdiction under Section 16 of the

Act. Once the arbitrator has decided his jurisdiction by giving a finding that he would not arbitrate on claim no. 6 and 7 of the statement of claim filed by the petitioner, the petitioner cannot invoke the jurisdiction of this Court under Section 11 of the Act, but avail of his remedies as provided under the said Act.

15. It is submitted that the petitioner has approached this Court when the matter is listed for final arguments before the Arbitrator, and hence the present petition is hit by delay and laches. It is contended that no other claim can be raised by the party before the arbitrator, which has not been raised before the DRC. It is thus, submitted on behalf of the respondent that the two claims as raised by the petitioner are clearly *de-hors* the arbitration clause of the agreement.

16. On behalf of respondent, it is further submitted that the petitioner has failed to abide by Section 11(5) of the Arbitration Act, in as much as the petitioner has failed to give any notice seeking appointment of an Arbitrator for these two claims, as envisaged under the Act and in this view, the present application is not maintainable.

17. The respondent has relied upon the following judgments in support of its contentions:-

- (i) ***Cadre Estate Pvt. Ltd. Vs Salochana Goyal and Ors.***, W.P. (C) No. 2782/2010, judgment dated 05.10.2010.
- (ii) ***Gammon India Ltd. and Anr. Vs National Highways Authority of India***, OMP (COMM) 392/2020, judgment dated 23.06.2020.

18. In order to decide the present controversy, it would be useful to refer to the arbitration Clause 25 of the GCC, which is reproduced

herein under:-

“CLAUSE 25

Dispute Resolution and Mechanism and Arbitration

Except where otherwise provided in the Contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of or relating to the Contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

(i) Through Dispute Resolution Committee : Any dispute as stated above shall be referred in the first place to the Dispute Resolution Committee (DRC) appointed by the Executive Director / Member (Planning) / Chairman, Airports Authority of India.

It is also a term of contract that fees and other expense if payable to DRC shall be paid equally by both the parties i.e. AAI and Contractor.

Unless the contract has already been repudiated or terminated, the contractor shall, in every case, continue to proceed with the work with all due diligence.

It is also a term of contract that If the contractor does not make any demand for Dispute Resolution Committee in respect of any claim in writing within 90 (Ninty) days of receiving the intimation from the AAI that the bill is ready for payment, the claim of contracator(s) will be deemed to have been waved and absolutely barred and the AAI shall be discharged and released of all liabilities under the contract in respect of these claims.

(ii) Adjudication through Arbitration:- Except where

the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or differences shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Member (Planning) / Chairman, AAI. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is also a term of contract that If the contractor does not make any demand for appointment of Arbitrator in respect of any claim in writing within 120 (One hundred Twenty) days of receiving the decision /award from Dispute Resolution Committee, the claim of contractor(s) will be deemed to have been waved and absolutely barred and the AAI shall be discharged and released of all liabilities under the contract in respect of these claims.

It is term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such disputes alongwith the notice for appointment of arbitrator and giving reference to the rejection of their claims by the Dispute Resolution Committee.

It is also a term of this contract that no person, other than a person appointed by above mentioned appointing authority, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modification or reenactment thereof and the rules made thereunder and for the time being in force

shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs.1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator; these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, If required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.”

19. The relevant extract of the arbitration clause 25 inserted vide Errata is reproduced herein under for ready reference:-

“(i) Through Dispute Resolution Committee : If a dispute of any kind, whatsoever, arises between the procuring entity and contractor in connection with or arising out of the contract or the execution of the works, whether during

the execution of the work or after their completion and whether before or after the repudiation or termination of the contract, including any disagreement by either party with any action, opinion, instruction, determination, certificate or valuation of the engineer; the matter in dispute shall in the 1st place, be referred to the Dispute Resolution Committee (DRC) appointed by the Chairman, AAI. DRC thus, constituted may act as “conciliator” and will be guided by principles of “conciliation” as included in part III of Arbitration and Conciliation Act 1996. DRC should take into consideration, rights and obligations of parties, usage to trade concern and circumstances surrounding the dispute(s), including any previous business practices between parties.

Efforts of DRC should be to come to an amicable settlement of outstanding disputes. If parties agree, a written settlement will be drawn out and signed by the parties. DRC will authenticate the settlement Agreement and furnish a copy to each party. DRC will give its 5 report within 45 days of its constitution.”

20. Perusal of the aforesaid arbitration clause between the parties clearly shows that the disputes in the first instance were to be referred to the Dispute Resolution Committee (DRC) appointed by the Chairman of the respondent. Pursuant thereto, petitioner herein submitted 5 claims before the DRC on 02.02.2021. Subsequently, the DRC passed its order/recommendation on 22.09.2021. Since the petitioner was also aggrieved of the delay caused by DRC in its decision, the petitioner added two additional claims viz claim no. 6 and 7 before the learned Arbitrator pertaining to compensation for delay in decision by the DRC and cost for arbitration.

21. Reading the arbitration agreement between the parties, it is clear that the parties have agreed that the arbitrator shall adjudicate on only

such disputes as are referred to him by the appointing authority. Thus, in the present case, the appointing authority referred five claims of the petitioner to the arbitrator which have been raised by the petitioner before the DRC. The question raised before this Court is with respect to reference of additional claims viz. claim no. 6 and 7 to the arbitrator. While adjudicating this issue, it is pertinent to bear in mind that the learned arbitrator has already considered the said request of the petitioner with respect to considering claim nos. 6 and 7 and given a finding thereof.

22. As per Clause 25 of GCC, the party invoking arbitration shall have to give list of disputes with amounts claimed in respect of each such disputes along with the notice of appointment of the arbitrator and giving reference to the rejection of their claims by DRC. Thus, Clause 25 sets the jurisdiction for the arbitrator to adjudicate upon the disputes raised by the party and duly referred to the arbitrator. As a consequence, no other claim can be raised by the party before the arbitrator, which has not been raised before the DRC.

23. The definition of arbitration agreement as occurring in Section 7 of the Act itself envisages reference of all or certain disputes between the parties to arbitration in regard to the terms governing the parties. Section 7 stipulates as follows:

“7. Arbitration agreement.—(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”

24. As a rule, an arbitrator is a creature of a contract between the parties and is governed by the terms and conditions of the contract. Supreme Court has held in very categorical terms that the parties are entitled to fix boundaries with respect to jurisdiction and legal authority of the arbitrator by way of the contract between the parties. Thus, in the case of ***Vidya Drolia and Others Vs. Durga Trading Corporation***, reported as (2021) 2 SCC 1, it has been held as follows:-

“27. Arbitration being a matter of contract, the parties are entitled to fix boundaries as to confer and limit the jurisdiction and legal authority of the arbitrator. An arbitration agreement can be comprehensive and broad to include any dispute or could be confined to specific disputes. The issue of scope of arbitrator's jurisdiction invariably arises when the disputes that are arbitrable are enumerated or the arbitration agreement provides for exclusions as in case of “excepted matters”. The arbitration agreement may be valid, but the Arbitral Tribunal in view of the will of the parties expressed in the arbitration agreement, may not have jurisdiction to adjudicate the dispute. The will of the parties as to the scope of arbitration is a subjective act and personal to the parties.”

25. Similarly, it has been held in a catena of judgments that where the reference to the arbitrator is to decide only specific disputes, then the jurisdiction of the arbitrator is restricted to the specific reference. In those cases, the learned arbitrator can decide only those specific disputes. Thus, in the case of ***State of Goa v. Praveen Enterprises***, (2012) 12 SCC 581, it has been held as follows:-

“11. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes.

Where “all disputes” are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counterclaims) subject to any limitations placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator will exclude the excepted matter and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes.

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41. *The position emerging from the above discussion may be summed up as follows:*

(a) Section 11 of the Act requires the Chief Justice or his designate to either appoint the arbitrator(s) or take necessary measures in accordance with the appointment procedure contained in the arbitration agreement. The Chief Justice or the designate is not required to draw up the list of disputes and refer them to arbitration. The appointment of the Arbitral Tribunal is an implied reference in terms of the arbitration agreement.

(b) Where the arbitration agreement provides for referring all disputes between the parties (whether without any exceptions or subject to exceptions), the arbitrator will have jurisdiction to entertain any counterclaim, even though it was not raised at a stage earlier to the stage of pleadings before the arbitrator.

(c) Where however the arbitration agreement requires specific disputes to be referred to arbitration and provides that the arbitrator will have the jurisdiction to decide only the disputes so referred, the arbitrator's jurisdiction is controlled by the specific reference and he cannot travel beyond the reference, nor entertain any

additional claims or counterclaims which are not part of the disputes specifically referred to arbitration.”

26. Hence, it is clear that where the arbitration agreement envisages reference of certain disputes by the appointing authority, then the learned arbitrator has the authority to decide only the said disputes as specifically referred. The Arbitral Tribunals are in the nature of private forum which have been chosen voluntarily by the parties for adjudication of their disputes. Thus, the examination whether the disputes fall within the scope of the arbitration agreement is a significant aspect. In the case of **Booz Allen & Hamilton Inc. v. SBI Home Finance Limited and Others, (2011) 5 SCC 532**, on the aspect of arbitrability, Supreme Court has held as follows:-

“34. The term “arbitrability” has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the Arbitral Tribunal, are as under:

(i) Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).

(ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the “excepted matters” excluded from the purview of the arbitration agreement.

(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim

and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be “arbitrable” if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal.”

27. However, whether or not the disputes are arbitrable and capable of being considered by Arbitral Tribunal, are issues which are required to be considered by the Arbitral Tribunal itself. There are line of judgments to the effect that usually issues of arbitrability/validity are matters to be adjudicated upon by arbitrators. Thus, in the case of ***National Insurance Company Limited v. Boghara Polyfab Private Limited***, reported as (2009) 1 SCC 267, Supreme Court has held as follows:

“22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.”

28. Law in this regard is very clear that parties are governed by the contract and the arbitrator and the arbitration proceedings cannot traverse beyond what has been contemplated in the contract between the parties. Thus, an arbitrator is required to deal with the matters which are within the scope of the contract agreement. Thus, in the case of ***Bharat Coking Coal Ltd. vs. Annapurna Construction***,

(2003) 8 SCC 154, Supreme Court has held as follows:

“22. There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record.”

29. Similarly in the case of ***Managing Director, Army Welfare Housing Organisation vs. Sumangal Services (P) Ltd., (2004) 9 SCC 619***, Supreme Court held as follows:

“43. An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power ex debito justitiae. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference.”

30. Emphasizing the need to construe an arbitration clause strictly, Supreme Court in the case of ***Oriental Insurance Company Limited v. Narbheram Power and Steel Private Limited, (2018) 6 SCC 534***, held as follows:

“23. It does not need special emphasis that an arbitration clause is required to be strictly construed. Any expression in the clause must unequivocally express the intent of arbitration. It can also lay the postulate in which situations the arbitration clause cannot be given effect to. If a clause stipulates that under certain circumstances there can be no arbitration, and they are demonstrably clear then the controversy pertaining to

the appointment of arbitrator has to be put to rest.”

31. Holding that a party cannot claim anything more than what is covered by the terms of the contract, Supreme Court in the case of ***Rajasthan State Industrial Development & Investment Corporation and Another v. Diamond & Gem Development Corpn. Limited and Another***, (2013) 5 SCC 470, held as follows:

“IV. Interpretation of the terms of contract

23. *A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. [Vide United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal [(2004) 8 SCC 644 : AIR 2004 SC 4794] and Polymat India (P) Ltd. v. National Insurance Co. Ltd. [(2005) 9 SCC 174 : AIR 2005 SC 286]]”*

32. Perusal of present case shows that the petitioner has already raised the issue as regards the reference of additional claims no. 6 and 7 before the learned arbitrator. This is in tandem with the law laid down by Supreme Court which empowers an Arbitral Tribunal to rule

upon its own jurisdiction as per the Doctrine of “kompetenz-kompetenz”. Thus, in the present case, the learned arbitrator has already given his finding as regards the reference of the said disputes before him.

33. Section 16 of the Act accords mandate to the Arbitral Tribunal to rule upon its own jurisdiction. Thus, whether or not the matters and claims submitted for arbitration are in accordance with the arbitration agreement are issues within the scope of the authority of the Arbitral Tribunal to give finding on the said issues.

34. In the present case the sole arbitrator has already decided his jurisdiction by giving a finding that he would not arbitrate on claim nos. 6 & 7 of the statement of claim filed by the petitioner. Thus, petitioner cannot invoke the jurisdiction of this court under Section 11 of the Act. The petitioner would have to avail other remedies as provided under the Act or which are available under law.

35. In view of the aforesaid discussion, the present petition is found without any merits and is accordingly dismissed.

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(MINI PUSHKARNA)
JUDGE

NOVEMBER 23, 2022

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