

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

% Order delivered on: 22nd August, 2016

+ **ARB.P. 40/2016**

SACHDEVA & COMPANY Petitioner
Through Mr.Arun Batta, Adv.

versus

DELHI-GURGAON SUPER CONNECTIVITY LTD..... Respondent
Through Mr.D.Kishore Kumaar, Adv. and
Mr.Ashish Dholakia & Mr.Gautam
Bajaj, Advs.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J. (ORAL)

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") for the appointment of an Arbitrator to adjudicate the disputes having arisen between the parties.
2. The facts of the case as per the petition are as under:
 - i) The respondent being Concessionaire of NHAI for the conversion of existing Delhi-Gurgaon section of National Highway-8 from 14.3 KM to 42.0 KM, vide its letter dated 1st August, 2010, offered the petitioner a contract for the supply of labours, supervisors etc., which was duly accepted by the petitioner. By the letter dated 1st February, 2009, the respondent again offered the petitioner similar Contract for one year expiring on 31st January, 2010. The said Contract was also accepted by the petitioner.

- ii) By letter dated 29th January, 2010, the Contract of the respondent was renewed for a further period of one year from 1st February, 2010 to 31st January, 2011.
 - iii) By letter dated 31st January, 2011, the respondent once again offered for the renewal of the contract for a further period of one year w.e.f. 1st February, 2011 to 31st January, 2012 on the terms and conditions as contained in the original Agreement dated 1st February, 2008.
 - iv) The said contract of the petitioner was renewed by the respondent from time to time and it was last renewed by the respondent, vide its letter dated 16th October, 2013 for a period from 1st May, 2013 to 30th April, 2014.
 - v) The petitioner had raised invoices for the services provided by it to the respondent in the month of February, 2014 in terms of the contract between the parties.
 - vi) The petitioner submits that despite of the repeated requests and reminders, the respondent had failed to pay a sum of Rs.1,07,84,914/- due and outstanding against it up to July, 2014.
 - vii) Thereafter, the petitioner issued a legal notice dated 28th July, 2014 for invoking the arbitration clause.
 - viii) By letter dated 26th August, 2014 the respondent had demanded certain documents from the petitioner, which were duly supplied by the petitioner. However, till date, the respondent has not paid the amount; rather it has been raising false and frivolous disputes and contentions. Thus, the present petition has been filed by the petitioner in January, 2016.
3. Reply on behalf of the respondent has been filed.

4. The respondent admits that it had entered into an Agreement with the petitioner vide contract dated 1st February, 2008 by which the petitioner was to provide manpower on the Delhi-Gurgaon expressway. This contract was valid for a period of one year only and expired on 31st January, 2009 with the efflux of time.

5. It is submitted by the respondent that the Agreement was extended vide a fresh contract executed on 1st February, 2009 with entirely different terms and conditions, particularly with regard to the clause pertaining to the settlement of disputes. This contract was valid from 1st February, 2009 to 31st January, 2010 and it also expired with the efflux of time. The dispute resolution mechanism of this contract provided that in the event of there being any dispute arising out of the contract, it would first be referred to VP(HR) of the respondent-Company for the settlement and if the dispute is not settled, the matter would be referred to arbitration and in that case the Arbitrator would be appointed by the respondent-Company.

6. Thereafter, a fresh contract valid for one year from 1st February, 2010 to 31st January, 2011, with the same dispute resolution clause as in the contract dated 1st February, 2009, was executed on 29th January, 2010. This contract also expired with the efflux of time. Thereafter, the contract was extended for one year from 1st February, 2011 to 31st January, 2012 by letter dated 31st January, 2011.

7. It is submitted by the respondent that the main plea of the petitioner is that by letter dated 31st January, 2011, the respondent had extended the contract from 1st February, 2011 to 31st January, 2012 on the terms and conditions contained in the original contract dated 1st February, 2008 and thereafter, the contract continued to be renewed on the terms and conditions of the original contract dated 1st

February, 2008. The petitioner has prayed for the appointment of an Arbitrator under Clause 12 of the original contract dated 1st February, 2008. As per the respondent, contract dated 1st February, 2008 had expired after which a new contract with entirely different terms and conditions, particularly with regard to the clause pertaining to settlement of disputes was entered into. Therefore, the petitioner has no right to get an Arbitrator appointed in terms of the original contract dated 1st February, 2008 and the letter dated 31st January, 2011 only makes a general reference to another contract and does not make a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract. Such a general reference does not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. It is trite law that an arbitration clause from one contract can be incorporated into another contract only by a specific reference to the arbitration clause. It is therefore submitted that there exists no agreement to arbitrate between the parties.

8. It is further submitted that assuming, without admitting, that the dispute can be referred to arbitration on the basis of the terms and conditions contained in the contract dated 1st February, 2008, the respondent submits that the arbitration clause contained in the said contract provides that the disputes arising out of the contract shall be referred and settled in accordance with the Rules of Arbitration of the Indian Council of Arbitration. Therefore, this Court can appoint an Arbitrator under Section 11 (6) of the Act only when there is a failure on the part of the institution to appoint the Arbitrator or there is a failure to appoint an Arbitrator in terms of the procedure agreed upon by the parties. There has been no default on the part of the institution

as the dispute itself has not been referred to the institution. The petition, therefore, is not maintainable.

9. The petitioner in its rejoinder stated that in the extension, by the letter dated 31st January, 2011 and the subsequent extensions, were agreed to be on the same terms and conditions as that of the Contract dated 1st February, 2008, meaning thereby that all the terms and conditions of the Contract dated 1st February, 2008 including the Arbitration Clause are deemed to be part and parcel of the extended Contract from 1st February, 2011 onwards.

10. It is admitted in the rejoinder that as per the Contract dated 1st February, 2008, it was agreed that all the disputes and differences between the parties shall be referred and settled by arbitration in accordance with the Rules of Indian Council of Arbitration. However, it does not say that the arbitration shall be conducted by the Indian Council of Arbitration. The said Clause only implies that the arbitration proceedings shall be conducted by an independent Arbitrator by following the Rules of Arbitration of the Indian Council of Arbitration. Since, there is no requirement for referring the disputes under the Arbitration Clause to the said institution of Indian Council of Arbitrator, therefore, all the allegations are made without any force.

11. Clause 12 of the original contract dated 1st February, 2008 provided for the dispute resolution mechanism which reads as under:

"All disputes and differences that may arise out of or in connection with the operation of the above contract shall be referred and settled by arbitration in accordance with the rules of arbitration of the Indian Council of Arbitration and the award shall be binding to both parties".

12. Rules 1, 4, 5, 15 and 20 of the Arbitration of the Indian Council of Arbitration read as under:

“Rule 1:

- i. These rules may be called the "Rules of Arbitration of the Indian Council of Arbitration".
- ii. These rules shall apply where parties have agreed in writing that (a) a dispute has arisen or (b) a dispute which may arise between them in respect of a defined legal relationship whether contractual or not shall be settled under the Rules of Arbitration,

Rule 4:

- i. Any dispute relating to any commercial matter including shipping, sale, purchase, banking, insurance, building construction, engineering, technical assistance, know-how, patents, trademarks, management consultancy, commercial agency or labour, arising between two or more parties in India or a party or parties in India and a party or parties in a foreign country or between foreign parties who agree or have agreed for arbitration by the Council or under the Rules of Arbitration of the Council, shall be determined and settled in accordance with these Rules.
- ii. The Council shall also be competent to administer the conduct of arbitration in any dispute or difference relating to a commercial transaction between parties as mentioned in sub-clause (a) where they have agreed to have their dispute arbitrated under any other Rules of Arbitration or otherwise and have agreed to have such arbitration administered by the Council, wholly or in respect of some matters arising out of such arbitration.
- iii. The Council shall be competent to function as Appointing Authority as contemplated under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Rule 5:

Wherever the Parties have provided or agreed for arbitration by the Indian Council of Arbitration or for arbitrator under the Rules of Arbitration of the Council, these rules or any

amendment thereof in the form obtaining at the time the dispute is referred to arbitration of the Council, shall apply.

Rule 15:

Any Party wishing to commence arbitration proceedings under these rules (Claimant) shall submit to the Registrar a written request (application) for arbitration which shall include or be accompanied by:-

- a. the names and full addresses of the parties to the dispute
- b. statement of the claim and facts supporting the claim, points at issue and relief or remedies sought with other details of the claimant's case.
- c. original or duly certified copies of the arbitration agreement, any contract or agreement out of or in connection with which the dispute has arisen and such other documents and information relevant or relied upon.
- d. Registration fee of Rs. 1000/-.

Rule 20:

All statements, replies and other documents and papers submitted by the parties and all appended documents must be supplied in triplicate. Where there is more than one arbitrator or more than one opposing party, the parties shall within the time specified furnish to the Registrar such number of further copies as may be required by the Registrar."

13. Similar issue has been discussed by this Court in the case of ***Transair & Ors. v. M/s Kuwait Airways & Ors*** in O.M.P. No. 21/2013 passed on 21st October, 2013 wherein it was held as under:-

"40. In this backdrop, if one closely examines the conception of the institutional arbitration, then it can be realized that the rules of the institution providing for the mode of the conducting the arbitration shall govern the arbitration to the extent the said rules provide for the appointment, replacement and all other processes and steps which are required to be taken during the course of conducting the arbitration and the applicability of the substantive law shall thus vary accordingly.

The said rules of institutions for the conducting of reference shall be treated as the agreement between the parties or agreed procedure for the purposes of the derogable or non mandatory provisions of the Act.

41. Russel on Arbitration by David St. John Sutton, Judith Gill and Mathew Gearing, 23rd Edition, Thomson, Sweet & Maxwell, discusses extensively on the subject of Institutional arbitration and arbitration rules. The learned author proceeds to observe that the reference in the arbitration clause to such rules of arbitration constitutes an agreement in writing for the purposes of the Section 5 of the Arbitration Act in UK which is similar to the Indian Act and for that purpose it is an agreement between the parties for the purposes of the non-mandatory provisions of the Act of 1996. The learned Author observes thus:

"5-101 Institutional arbitration and arbitration rules.

Various institutions promulgate rules for use in arbitrations which set out, in varying degrees of detail, the procedure to be adopted in an arbitration conducted under those rules. These institutions include both commercial associations (such as GAFTA and FOSFA) and institutions whose very existence is designed to facilitate arbitration (such as the Chartered Institution of Arbitrations and, in the international context, the ICC and LCIA). **A reference in the arbitration clause to such rules of arbitration constitutes an agreement in writing for the purposes of s.5 of the Arbitration Act 1996 and may therefore be an agreement between the parties for the purposes of the non-mandatory provisions of the 1996 Act.**"

(Emphasis Supplied)

42. It is further noteworthy to mention that institutional arbitration is a device by way of which the parties agree to resolve their disputes by way of arbitration by subjecting themselves to the rules of the institution for the purposes of conducting the reference and the rules of such institution normally provide for all the necessary processes and challenges which are preferred during the course of conducting of the arbitration including the matters of appointment, replacements etc. The said rules are made in the form of

comprehensive codes so that the matters relating to appointment and replacement could be decided by the parties through institution without approaching the court. The learned Author of Russel on Arbitration has succinctly put forth the advantages of the institutional arbitration wherein one of the significant advantage is that the mode of appointment and replacement can be decided by parties without interference of the court. The learned author observes thus:

"5-101 Advantages of institutional arbitration. The institution concerned may perform a number of different roles in connection with arbitration proceedings. However, its principal function will usually be to deal with the administration of the reference in accordance with its rules. The main advantages of having the arbitration administered by an institution in this way are that:

- it provides a procedural framework for the case;
- it may be able to provide specialist services or arbitrators with particular expertise;
- it may serve to relieve the parties and the tribunal of some of the administrative burden of conducting the reference;
- **The institution can deal with challenges to and replacement of arbitrators without the need to involve the courts.**" (Emphasis Supplied)

43. The Learned author further observes in his book that in the cases where the rules provide comprehensive code containing the challenges, the said rules become the agreement to the contrary by the parties for the purposes of derogable or mandatory provisions of the Act of 1996 in UK which is akin to Indian Act. The learned Author observes thus:

"5-101 Rules providing procedural framework. Whether administered or not, arbitration under the different rules is intended to provide a procedural framework for the conduct of the reference. The rules do not provide an exhaustive code designed to cover all

points that might arise in the course of the arbitration, but rather set out the powers, duties and obligations of the tribunal and the parties so that they know what can and cannot be done, and by whom, in determining the procedure to be adopted in the particular reference. Similar guidance is given by the Arbitration Act, 1996, **but the arbitration rules will normally provide a more complete code than the framework provided by the Act, for example by specifying time limits for the services of written submissions and appointment of the tribunal. They will often also constitute an agreement between the parties for the purposes of many of the non-mandatory provisions of the 1996 Act.**" (Emphasis Supplied)

44. On the fair reading of the aforementioned excerpts quoted from Russel on Arbitration, it is clear that the rules of arbitration of an institution in the cases relating to institutional arbitration may provide for several challenges as a framework to conduct the reference including the appointment process, replacement process etc which may be departed from the provisions of the Act and in such cases, the rules would act as an agreement to contrary for the purposes of the provisions of the Act based on model law where such provisions are permitted by the law to be deviated from subject to the contract to the contrary."

14. Applying the said proposition of law to the present case, the petitioner is at liberty to approach the institution to decide the said disputes. It is not necessary to go into the merits of the contentions of the parties. The contentions of both the parties are left open to be decided by the competent forum.

15. The present petition before this Court at present is not maintainable and, therefore, the same is accordingly disposed of.

**(MANMOHAN SINGH)
JUDGE**

AUGUST 22, 2016