

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

% **Judgment reserved on: 27th May, 2016**
Judgment pronounced on: 17th June, 2016

+ **O.M.P. (T) (COMM.) No.16/2016**

JMC PROJECTS (INDIA) LTD. & ANR Petitioners
Through Mr.Dayan Krishnan, Sr. Adv. with
Mr.Karan Luthra & Ms.Sunita
Gupta, Advs.

versus

MRT SIGNALS LTD. Respondent
Through Mr.Chetan Sharma, Sr. Adv. with
Mr.Rajat Mittal, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioners in the above said matter have filed petition under Section 14(1)(b) read with Section 15(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") to appoint any independent and neutral person as substitute sole Arbitrator to adjudicate upon the disputes arisen between the parties under both MoUs dated 14th October, 2014.

2. The brief facts of the case are that admittedly on 2nd September, 2014 Railway Vikas Nigam Limited (RVNL) had invited a tender for construction of roadbed, bridges, supply of ballast, installation of track (excluding supply of rails), electrical (general electrification), signalling and telecommunication works in Ahmedabad Division of Western Railway, Gujarat, India in two packages.

3. The petitioner No. 1 and 2 along with the respondent signed two independent MoUs dated 14th October, 2014 for Package-I and Package-II respectively in the format prescribed under the tender conditions and formed a Joint Venture by the name of JMC-KPTL-MRTS (JV) for submission of bids for both Package-I and Package-II of the tender floated by RVNL. As per the MoU, the petitioner No.1 was the lead member of the Joint Venture. The said MoUs contained an arbitration clause i.e. Clause 13 therein.

4. The petitioners filed a petition being OMP (I) No.142/2015 on 6th April, 2015 under Section 9 of the Act before this Court against the respondent for certain interim reliefs.

5. The petitioners on 6th July, 2015 also invoked arbitration under Clause 13 of the MoUs dated 14th October, 2014 and nominated Mr.Gopal Jain, Senior Advocate as Sole Arbitrator to resolve the disputes between the parties. The respondent replied to the said notice and initially did not agree to the appointment of Mr.Gopal Jain as Sole Arbitrator.

6. This Court on 8th July, 2015 passed an order in OMP (I) No.142/2015, the relevant portion of the same reads as under:

"2. Learned senior counsel for the respondent submits that the petitioners have already appointed Mr.Gopal Jain, Senior Advocate, as an arbitrator and this application may be treated as an application under Section 17 of the Arbitration and Conciliation Act and be heard and decided by the Ld. Arbitrator.

3. Learned senior counsel for the petitioners has no objection to the submissions made by the learned counsel for the respondent.

4. In view of the submissions made by the learned senior counsel for both the parties, the parties shall place

the copy of this petition under Section 9 of the Arbitration and Conciliation Act, 1996 and its reply before the Ld. Arbitrator who shall treat the same as an Application under Section 17 of the Arbitration and Conciliation Act and shall list the same for hearing."

7. The sole Arbitrator entered reference on 16th July, 2015 and fixed a date for hearing the application under Section 17 of the Act in accordance with the directions passed by this Court by order dated 8th July, 2015.

8. The respondent thereafter on 17th July, 2015 filed an application being I.A. No.17708/2015 in OMP (I) No.142 of 2015 for modification/clarification of the order dated 8th July, 2015.

9. This Court on 6th October, 2015 passed the following order and disposed of the above said application being I.A. No.17708/2015:

"3. On 08th July, 2015, the learned senior counsel for the respondent had submitted that this petition under Section 9 of the Arbitration and Conciliation Act be treated as an application under Section 17 of the Arbitration and Conciliation Act to be considered by the learned arbitrator to which the petitioners had no objection. In that view of the matter, this Court had disposed of the petition by treating the objection as an application under Section 17 of the Arbitration and Conciliation Act by the learned arbitration.

4. The order dated 08th July, 2015 is clarified to the extent that this Court had not examined that correctness of the appointment of the arbitrator and no submissions in respect thereof were made by learned counsel for the parties before this Court. The parties are, therefore, at liberty to raise the issue with respect to the appointment of the arbitrator before the appropriate forum in accordance with law.

5. The application is disposed of in the above terms."

10. The sole Arbitrator on 2nd December, 2015 expressed his inability to act as an Arbitrator in the matter.

11. The petitioners took steps for appointment of a substitute Arbitrator under Section 15 (2) of the Act and sent a notice dated 10th December, 2015 to the respondent nominating Justice (Retd.) Pradeep Kant to act as the sole Arbitrator to resolve the disputes between the parties arising out of the MoUs dated 14th October, 2014.

12. The respondent by letter dated 6th January, 2016 replied to the notice dated 10th December, 2015 and denied the validity of the Arbitration Agreement as also the earlier appointment of Mr.Gopal Jain, Senior Advocate as the sole Arbitrator. The respondent further stated that the appointment of Justice (Retd.) Pradeep Kant to act as sole Arbitrator in substitution of Mr.Gopal Jain was neither in terms of the MoUs or the Act.

13. The respondent has filed the reply. It has been noticed from the reply that instead of giving suggestion about the appointment of neutral person as sole Arbitrator, the respondent again contested the prayer on merit by stating that there is no Arbitration Agreement subsisting between the parties. Since the agreement dated 14th July, 2014 expressly ceased to remain in force after the bid submitted by the petitioners and the respondent, the same was not accepted by RVNL. This was on 18th December, 2014. Under those circumstances, the question of appointment of arbitrator to adjudicate upon the alleged disputes and differences arising out of the MoUs in question does not arise, taking into consideration the fact that the petitioners thereafter invoked the Arbitration Agreement long back on 6th July, 2015.

14. The respondent has also denied the appointment of Mr. Gopal Jain, Senior Advocate as Arbitrator and also denied the fact that it was on the basis of its submissions that the petitioners' Section 9 application was treated as Section 17 application as alleged. There was obvious typographical error in the order dated 8th July, 2015, whereas it was the Senior counsel of the petitioners who had submitted that Section 9 application be treated as Section 17 application, however, what has been recorded is that the respondent's Senior counsel made such submission. This typographical error was corrected by order dated 6th October, 2015. It is also alleged that neither the arbitration clause in the MoU survives nor the Arbitrator if any appointed has the jurisdiction to decide the disputes arising out of the MoUs and the arbitration clause is invalid and not subsisting.

15. It is also submitted by the respondent that there is neither any arbitration Agreement nor is there any arbitrable dispute so that an Arbitrator is required to be appointed to adjudicate any dispute between the parties. The petitioners have no claim exceeding Rs.2 crores as alleged.

16. It is a settled law that while considering the petition for appointment for Arbitrator or substitute Arbitrator, merit of the case cannot be gone into. It is also a settled law that before the Arbitral Tribunal, an application under Section 17 of the Act is maintainable if liberty is granted by the Court at the time the petition under Section 9 is disposed of. The respondent has not denied the factum of existence of an agreement between the parties. *Prima facie*, there is no force in the submission of the respondent that since the work is not conducted by the parties with the Railways, therefore, the question of any dispute

towards the agreement does not arise. The submission of Mr.Chetan Sharma, learned Senior Counsel at this stage cannot be accepted.

17. Under these circumstances, the prayer made in the petition for substituting and appointing an independent and neutral person as Arbitrator is allowed. Accordingly, Justice V.K. Shali (retired Judge of this Court) (Mobile No.9717495000) is appointed as sole Arbitrator to adjudicate the disputes arising from the MoUs dated 14th October, 2014 between the parties as mentioned in the present petition. The parties are also allowed to file their respective claims and counter-claims before the Arbitrator. Liberty is granted to the respondent to raise all the grounds as mentioned in the reply to the petition.

18. The Arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The fees of the learned Arbitrator shall be in terms of the schedule of the amended Act. The parties to appear before the Arbitrator on 11th July, 2016 for directions.

19. The petition is accordingly disposed of.

20. Copy of this order be given *dasti* to the learned counsel for the parties and a copy thereof be delivered to the learned Arbitrator forthwith.

(MANMOHAN SINGH)
JUDGE

JUNE 17, 2016