

\$~20

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

+ O.M.P. (COMM) 237/2016

LALL CONSTRUCTION CO. Petitioner
Through: Mr. Chandan Kumar, Adv.

versus

THE GENRRAL MANAGER NORTHERN
RAILWAY BARODA HOUSE Respondent
Through: None.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

%

06.05.2016

IA 5631/2016

Exemption allowed subject to all just exceptions.

Application stands disposed of.

O.M.P. (COMM) 237/2016

The challenge in the petition is to the award dated 17th March, 2016 whereby the learned Arbitrator has held that there is no arbitration agreement between the parties in view of the supplementary agreement dated 14th February, 2010.

The facts in brief are that on 1st August, 2007, the petitioner was awarded contract for supplying and laying blanketing material 600 mm thick over top of formation from Km 0.00 to Km 16.250 in connection with

Abohar-Fazilka new BG Railway line. The work was executed on 15th August, 2009. A supplementary agreement dated 14th February, 2010 was executed between the parties. The petitioner invoked the arbitration clause as according to the petitioner, disputes have arisen. Respondent refused to appoint an Arbitrator in view of the supplementary agreement dated 14th February, 2010 in which according to the respondent, the arbitration clause has perished.

The petitioner filed a petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 which was decided by this Court vide order dated 20th November, 2012 wherein this Court had appointed Mr. Justice Jaspal Singh (Retired Judge of this Court) as the Sole Arbitrator to arbitrate upon the disputes between the parties.

Being aggrieved, respondent filed an SLP before the Supreme Court and the Supreme Court while dismissing the petition, passed the following order:

“Upon hearing the counsel, the Court made the following order.

Heard learned counsel for the parties and perused the relevant materials.

We do not find any legal and valid ground for interference. The special leave petition is dismissed. However, the petitioner is at liberty to raise an issue pertaining to the purport and effect of

the supplementary agreement in the course of arbitration proceedings.”

In view of the order of the Supreme Court, an issue has arisen before the learned Arbitrator, whether in view of the supplementary agreement dated 14th February, 2010, the dispute between the parties was arbitrable.

It is in this context, learned Arbitrator has decided that in view of the supplementary agreement dated 14th February, 2010 the arbitration clause has washed away.

In other words, in the absence of any agreement, learned Arbitrator held that he cannot arbitrate over the disputes.

Mr. Chandan Kumar, learned counsel for the petitioner would urge that in view of Section 16 (1) (a) of the Arbitration and Conciliation Act, 1996 the arbitration clause which forms part of the contract would still subsist and the effect of the same cannot be said to have been washed away.

Mr. Kumar states that such a plea was taken by the petitioner before the learned Arbitrator and the same was not considered, but Mr. Kumar would concede that no such averment is made in the present petition. Be that as it may, reading of Section 16 (1) (a) of the Arbitration and Conciliation Act, 1996 would not help the case of Mr.Kumar. The clause does not

contemplate a situation which arises in the present petition. There is no dispute that the supplementary agreement dated 14th February, 2010 was executed and the relevant clause in the supplementary agreement which has been relied upon by the learned Arbitrator, reads as under:

“It is further agreed and understood by and between the parties that the arbitration clause contained in the said principal agreement shall cease to have any effect and/or shall be deemed to be non-existent for all purposes.”

The relevant Para in the award wherein the learned Arbitrator deals with the particular clause in the supplementary agreement reads as under:

“And, what does it signify? I have already observed that in view of the order of the Supreme Court, it is no more open to challenge the legality and validity of its execution. What then was its purport and thus its effect? To my mind it was to wash away completely the earlier arbitration agreement entered into between the parties. In other words it became non-existent” and that too “for all purposes” and thus ceased “to have any effect”, It was not the case of the Claimant nor was it argued, even obliquely that the said clause had no retrospective effect, In any case, since it obliterates completely the “arbitration clause contained in the said principal agreement” it does operate retrospectively. Anyhow, the Supplementary Agreement was entered into on February 14, 2010. Even if that part of the Supplementary Agreement which has been reproduced by me above is taken to be prospective and not retrospective, as on February 14, 2010 it ceased to exist. Thus, as I see it, I am being asked to arbitrate on the basis of a non-existent arbitration agreement. It did not exist on the date I was appointed. It does not exist even today. And if that be so, and it being so, how can I deal with the claims? This, to my mind, was the purport and

effect of that part of the Supplementary Agreement as reproduced by me above.”

Suffice to state, the reasons given by the learned Arbitrator being plausible one, this court in exercise of its power under Section 34 of the Arbitration and Conciliation Act, 1996 would not like to interfere with the award passed by the learned Arbitrator.

Accordingly, the petition is dismissed.

V. KAMESWAR RAO, J

MAY 06, 2016

jg