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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 424/2015 & IA 19089/2015

GEODESIC TECHNIQUES (P) LTD.

..... Petitioner

Through: Mrs. Yamunah Nachiar and Mr S.
Ravishankar, Advocates.

versus

ERA INFRA ENGINEERING LTD.

..... Respondent

Through: Mr. Manoj K. Singh with Ms. Shweta
Vashist, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER

17.11.2016

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1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act') praying that the dispute that has arisen between the parties concerning the retention amount claimed by the Petitioner be referred for arbitration by the same learned Arbitrator who passed the Award in respect of other disputes between the parties arising out of a work order dated 21st July 2009 placed by the Respondent on the Petitioner for erection of structural steel work, welded in built up sections, trusses and framed work including cutting and hoisting and applying a priming coat of approved steel primer in Raipur Airport.

2. It is not in dispute that the said work order contained an arbitration clause. Subsequently, an amended work order was issued on 26th October 2009 which also contained an arbitration clause.

3. In an Arbitration Petition No. 413 of 2011 filed by the Petitioner, this Court appointed a former High Court Judge as a sole Arbitrator to adjudicate all the disputes and differences between the parties including their claims and counter claims. A final Award was passed by the learned Arbitrator on 16th April 2014. The Petitioner was awarded a net sum of Rs.2,01,56,819 together with interest and costs. The counter claims of the Respondent were rejected. It is pointed out that the retention amount of Rs.39,05,772 was not included in the Award.

4. According to the Petitioner the retention amount became refundable after the expiry of the defect liability period which in terms of the work order was 12 months from the date of completion of the work. It is pointed out that the work of the airport was completed on 27th November 2012. The defect liability period was over on 26th November 2013. Therefore, the cause of action for release of the retention amount arose on that day. It is explained that since at the time of filing the statement of claim before the learned Arbitrator the defect liability period was not over, it was not included in the claims.

5. After the Award was passed, an application was filed by the Petitioner on 15th May 2014 for including the retention amount in the Award amount. The learned Arbitrator passed an order on the said application on 4th July 2014 and accepted the clerical errors pointed out therein. As regards retention amount, the learned Arbitrator observed as under:

“So far as the prayer that the claimant is entitled to retention amount is concerned I am of the view that no

relief can be given in these proceedings. Though the observations made in the Award is that the defect liability has not been incurred by the claimant but making any addition at this stage would not be appropriate. Whatever consequences are to ensue from the observations made at page 87 of the Award can be put across in terms of the procedure available to the claimant. Application disposed of accordingly.”

6. It is in the above circumstances that the present petition has been filed.

7. The petition is resisted by learned counsel for the Respondent by pointing out that there is no invocation of the arbitration clause by the Petitioner in respect of the retention amount. A reference is made to the communication dated 5th February 2015 whereby the Petitioner has unilaterally appointed an Arbitrator. Secondly, it is pointed out that in para 2.13 of the statement of claims filed earlier, the Petitioner had referred to the retention amount and this was also dealt with by the learned Arbitrator. Further in the application filed under Section 33 (5) of the Act, the Petitioner sought to correct the Award to include the retention amount but was declined by the learned Arbitrator. It is submitted that prayer for referring the dispute concerning the retention amount to arbitration is hit by the principle of *res judicata*.

8. Learned counsel for the Petitioner placed reliance on the decisions in ***Indian Oil Corporation Limited v. SPS Engineering Limited (2011) 3 SCC 507*** and ***Steel Authority of India Limited v. Indian Council of Arbitration 2016 IVAD (Delhi) 449*** to urge that the question whether the claim of the Petitioner would be barred by *res judicata* should be left to be decided by the learned Arbitrator.

9. The Court has considered the above submissions. Para 2.13 of the statement of claims filed by the Petitioner did make a reference to the withholding of the retention amount in respect of the running account bills. It specifically mentioned: “Rs. 39,05,772/- is the cumulative amount held by the Respondent as Retention till Running Account Bill -28...”. Further in the Award dated 16th April 2014, the learned Arbitrator referred to the said issue as under:

“It may be seen that basically design job was not the responsibility of the Claimant. It had to do redesigning because of defective concrete columns. The Claimant is entitled to compensation for this but not for all. The amounts which has been indicated in the extra claim bills. The Claimant has already received Rs,7,42,12,006/- under the main work order. The amount which remains outstanding is said to be Rs,39,05,772/-.”

10. It is, therefore, not as if there was no reference whatsoever to the retention amount in the arbitration proceedings that took place. Then under the title ‘default liability’ (which should read as ‘defect liability’), the learned Arbitrator observed as under:

“That so far as no default liability is concerned, the Airport was inaugurated by the President of India and till today, nothing has been pointed out regarding there being any defect. There is thus no liability incurred by the Claimant, under this head.”

11. It is, therefore, not possible to agree with counsel for the Petitioner that the retention amount did not form subject matter of the arbitration that already took place between the parties.

12. This perhaps explains what prompted the Petitioner to file the

application under Section 33 of the Act before the learned Arbitrator seeking correction of the clerical errors as well as the Award in respect of the retention amount. The said prayer in regard to the retention amount was not entertained by the learned Arbitrator. The observation in this regard was: “Whatever consequences are to ensue from the observations made at, page 87 of the Award can be put across in terms of the procedure available to the claimant.”

13. Entertaining the present application under Section 11 of the Act would amount to permitting the Petitioner to bring an issue that has already formed the subject matter of the arbitration. Consequently, while not entertaining the present petition under Section 11(6) of the Act, the Court leaves it open to the Petitioner to seek other appropriate remedies as may be available to it in accordance with law.

14. The petition and the application are accordingly dismissed.

S. MURALIDHAR, J

NOVEMBER 17, 2016

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