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

\+ **ARB.P. 519/2015**

M/S. JAIPRAKASH HYUNDAI CONSORTIUM ..... Petitioner

Through: Mr. Lovkesh Sawhney, Advocate.

versus

SJVN LIMITED ..... Respondent

Through: Mr. Uttam Datt, Advocate.

CORAM: JUSTICE S.MURALIDHAR

<u>O R D E R</u>

% **08.12.2016**

1. This is a petition by Jaiprakash Hyundai Consortium (JHC) against SJVN Limited under Section 11(6) of the Arbitration and Conciliation Act, 1996 (Act) seeking the appointment of an Arbitrator to adjudicate the disputes between the parties arising out of a contract No. 3 dated 24th June, 1993, awarded by the Respondent to the Petitioner for executing civil works of pressure shafts and power house complex of Nathpa Jhakri Hydro Electric Project.

2. The case of the Petitioner is that it was issued a certificate of substantial completion of works as of 31st December, 2002 by the Respondent by the letter dated 16th January, 2003. It is stated that although the final bill had been settled the maintenance certificate has not been issued even as of date.

3. According to the Petitioner during the execution of the works under the

contract No.3, quantities actually executed under several items exceeded the quantities indicated in the bill of quantities (BOQ). Further several extra items and additional works were also ordered by the Engineer-in-Charge (EIC), which were executed by the Petitioner. It is claimed that in actual execution, 91 items deviated beyond 130%, 75 items deviated to less than 70% and 138 items were not executed at all.

4. The subject matter of the present petition concerns dispute No.24, which came to be referred to the Dispute Resolution Board (DRB), a body created under the Dispute Settlement clause of the contract.

5. At this stage it is important to refer to the Tripartite Agreement (TPA) on 13th June, 2003 between the Respondent, the Petitioner as well as the DRB. In terms of the TPA, the DRB comprising three persons was constituted under the provisions of the modified clause 67 of the General Conditions of the Contract. Clause (III) of the said TPA sets out the procedure to be following for re-constitution of the Board if any member/members of the Board were not performing their functions properly. It also envisages a situation where the member/members of the Board might resign or withdraw from the DRB. The said TPA states that DRB is to be operational throughout the duration of the contract and that the agreement would terminate "on satisfactory completion of works and issue of a Maintenance Certificate as provided under the Contract referred to above and on settlement of all outstanding disputes involving financial claims." It further provides that the parties may "by mutual consent decide not to terminate this Agreement for such further period as may be mutually agreed to." It further envisages in clause (XII) that any disputes between

the parties arising out of the work or other items, which cannot be resolved by negotiation and mutual concurrence between the parties, shall be referred to arbitration as per Modified Clause 67 of the General Conditions of the Contract.

6. Dispute No.24 was referred to the DRB which gave two "in principle awards" on 24th October, 2006 and 6th August, 2009 for extra and deviated items executed by the Petitioner under the contract.

7. It is necessary at this stage to deal with the maintainability of the present petition on the ground of limitation. It is submitted that the DRB had given "in principle award" on 24th October, 2006 itself setting out the amounts that were payable to the Petitioner and therefore the period of limitation would begin to run from that date itself.

8. On perusal of the Award dated 24th October, 2006 of the DRB it is seen that what, in fact has been decided is the mark up percentage for the deviated and extra items. On the basis of the recommendations of the DRB the parties were expected to work out the eligibility of items for payment under deviation beyond plus or minus 30% and the quantities thereof. Further under the modified Clause 67 of the Contract in case the disputes involving individual claims up to Rs. 5 crore, the decision of the DRB was to be binding on the parties. Where it was more than Rs. 5 crores, and where despite the recommendation of the DRB the dispute remained unresolved, either party could seek a review before the DRB. If even after the review, the parties failed to resolve the disputes, either party could seek arbitration. It is only within a period of 30 days after receiving the recommendation of the DRB that either party could invoke the arbitration

clause and seek reference of the disputes to arbitration.

9. The Court is therefore, not able to agree with the submission of the Respondent that the first in principle set of recommendations of the DRB made on 24th October, 2006 was a final decision as regards the disputes raised by the Petitioner.

10. It also requires to be noticed that the parties went again before the DRB for working out the revised rates in terms of its first set of suggestions made on 24th October, 2006. The DRB then gave a further set of recommendations on 6th August, 2009. It recommended that payment/adjustment for deviated items be made in terms of Annexure A "as per mutually agreed fresh rate."

11. According to the Petitioner both parties finalised a list of such payments against deviated extra and additional items on 10th September, 2010. This, however, is disputed by the Respondent since document setting out such decision is endorsed only by the Petitioner and not the Respondent.

12. Be that as it may, it appears that despite the second set of recommendations by the DRB on 6th August, 2009 disputes between the parties did not get resolved. Letters were written by the Respondent to the Petitioner on 20th April, 2012 referring to the fact that the recommendations of the DRB were accepted by both parties. Although the DRB had recommended the mark up of 49.21%, the Respondent and the Petitioner had agreed to 41% as mark up. On that basis the amount payable to the Petitioner in respect of extra and deviated items was worked out to

Rs.8,25,98,074 against which an ad hoc payment of Rs.9,55,32,000 had already been paid by the Respondent to the Petitioner on 22nd June, 1998. After making the adjustment, the Respondent claimed that the Petitioner owed it Rs.1,29,33,926 and this was recoverable along with simple interest at 10% per annum from 22nd June, 1998 till date of payment.

13. However by reply dated 12th September, 2012, the Petitioner refuted the above stand of the Respondent and sought a review of its decision. It was stated that the rates for the quantities of BOQ items that had increased/decreased by more than 30% of the BOQ quantities and extra and additional items of works executed as per instructions of the EIC should be analyzed in line of the recommendations of the DRB and payment made to it against the claim under Dispute No.24. On 21st October, 2012, the Petitioner wrote again to the Respondent pointing out that no communication had been received and made a request for referring of the disputes to the Board of Arbitrators. This stand of the Petitioner appears to be justified since indeed the dispute between the parties remained unresolved as is evident from the letter dated 12th September, 2012 of the Petitioner.

14. On 23rd January, 2013, the Respondent took the stand that the DRB had already given its recommendations on 24th October, 2006 and 6th August, 2009, which were conclusive and binding on the parties and, therefore, the request for invoking arbitration was not tenable.

15. The present petition has been filed within a period of two years thereafter. In the meanwhile on 4th November, 2013 the Presiding Arbitrator wrote to the Respondent seeking its response with respect to the

contract provisions involving the DRB procedure. This was followed by another letter dated 16th December, 2013 by the Presiding Members of the DRB calling upon the Respondent to convey its agreement to the reference made by the Petitioner. On 31st December, 2013 the Respondent wrote to the Presiding Member of the DRB maintaining that the claim of the Petitioner was time barred. The Petitioner on 14th October, 2014, requested the DRB to take up the claims made by it. On 28th October, 2014, the Presiding Arbitrator again wrote to the Respondent drawing its attention to the provisions of the TPA and pointing out that "there appears no reason for not entertaining the request of the Claimant to adjudicate the referred dispute by the DRB."

16. In its response dated 25th November, 2014, the Respondent took the stand that the last meeting of the DRB was held on 1st October, 2010 at Delhi and thereafter the DRB had ceased to exist since there were no outstanding disputes involving financial claims to be decided by the DRB. This was refuted by the Petitioner by its letter dated 29th December, 2014.

17. In the above circumstances the present petition has been filed seeking reference of the disputes to the DRB.

18. The Court is therefore of the view that in the light of the above narration of the facts it is not possible to come to the conclusion at this stage that the claims of the Petitioner has become time barred or that the invocation of the clause in the contract by the Petitioner seeking reference of the disputes to the DRB has become time barred. The Court leaves it to the DRB to decide whether any or all the claims of the Petitioner are

barred by limitation.

19. Another objection raised by the Respondent is that in the guise of getting dispute No.24 referred to DRB again the Petitioner was seeking to include further items of claims which may be barred by limitation and which in any event are not tenable since a decision on such claims has already been taken by the DRB.

20. The above contention of the Respondent can also be examined by the DRB itself. In other words, all the contentions of either parties as regards tenability of any of the claims of the Petitioner or counter claims of the Respondents are left to be decided by the DRB.

21. In the event of any of the Members of the DRB being unable to function as such or not being available, the parties will refer to the procedure prescribed in the TPA, which set up the DRB.

22. The Court clarifies that it does not agree with the submission of the Respondent that the DRB has ceased to exist. In terms of clause 13 of the TPA, the DRB continues to function till such time the final maintenance certificate is issued and all financial disputes are resolved. Clearly that stage has not yet been reached.

23. Consequently the Court directs that the parties will now appear before DRB on 6th February, 2017 at 11:00 a.m. If the above date is not convenient to all or any of the DRB Members then the revised date, which should not be later than ten days thereafter should be informed by the DRB to both parties, at least, two weeks in advance.

24. Further if the disputes between the parties remained unresolved even after the decision of the DRB then the procedure envisaged in the contract/TPA will be resorted to.

25. The petition is disposed of in the above terms.

S. MURALIDHAR, J.

DECEMBER 08, 2016
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