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

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Date of decision: 08.09.2017

+ ARB.P. 106/2017

M/s SAM INDIA BUILT WELL (P) LTD. Petitioner
Through Mr.Vivekanand, Advocate

versus

UNION OF INDIA & ANR. Respondents
Through Mr.Praveen Kumar Jain, Advocate
with Sh.A.K.Jalan, Executing
Engineer.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. This petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'the Act'*) seeking appointment of an arbitrator to adjudicate the disputes between the parties.
2. Some of the relevant facts are that the work for construction of Head Quarter building of Punjab National Bank, Sector 10, Dwarka, New Delhi was awarded to the petitioner on 16.06.2012. The work is said to have been completed on 04.11.2013 against the stipulated date of completion of 26.02.2013. On 23.09.2014, the petitioner requested for arbitration to adjudicate the disputes that had arisen between the parties. On 22.10.2014, the concerned authority appointed the sole arbitrator to adjudicate the dispute/claim of the petitioner. The learned arbitrator entered into reference and passed the award on 24.08.2015. The respondents had accepted the award and made payment to the petitioner in terms of the award dated

24.08.2015. Pursuant to this payment, the petitioner had also on 24.10.2015 issued an NOC to the respondents.

3. It is the case of the petitioner that on 08.05.2015, i.e. just three months prior to the award, the respondent took out a circular pointing out the rates for the monthly cost indices under clause 10(C)(A) issued for Delhi including NOIDA, Gurgaon, Faridabad and Ghaziabad by the CPWD Directorate for TMT 500 bars issued upto May, 2013, which were all based on the rates of SAIL only. Thereafter from June, 2013 onwards these were on the basis of the minimum of the rates of JSPL, JSW and SAIL. The circular further states that some of the officers have not taken action due to which some ambiguity has arisen in the payment of variation under clause 10(C)(A) in the contracts under their charge, which were entered into before May, 2013. Relevant provisions of the circular read as follows.

“2. Prior to issue of abovesaid O.M., the rates for the monthly cost indices of 10 CA issued for Delhi including NOIDA, Gurgaon, Faridabad and Ghaziabad by the CPWD Directorate for TMT 500 bars were issued up to May, 2013, which were all based on the rates of SAIL only. Thereafter from June, 2013 onwards these were on the basis of the minimum of the rates of JSPL, JSW and SAIL.

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4. It has come to the notice of this Directorate that above said action has not been taken by many of the SDGs/ADGs/CEs due to which some ambiguity has arisen in the payment of variation under clause 10 CA in contracts under their charge, which were entered into before May, 2013. In such cases respective SDGs/ADGs/CEs may take the necessary appropriate corrective action for 10 CA indices on case to case basis if already demanded by contractors.

5. The rates of SAIL for TMT 500 steel reinforcement as considered by this office for 10CA for the period from May,

2013 to Feb., 1015 for Delhi NCR Region are given in Annexure-A to take appropriate necessary action.”

6. Based on this circular, it is the contention of the petitioner that as the contract was completed on 04.11.2013 i.e. after May, 2013, the petitioner is entitled to the benefits as stated in the circular dated 08.05.2015. He submits that the circular has come to his knowledge recently after passing of the award and hence, the new bills based on this circular have been raised on the respondents. He further submits that this particular dispute may be referred for arbitration.

7. The learned counsel appearing for the respondents has opposed the present petition on the following grounds:

i) He submits that the claim of the petitioner is barred under Order 2 Rule 2 CPC inasmuch as the petitioner has raised all the claims at the time of first invocation of the arbitration clause. He relies upon judgment of the Division Bench of this court in the case of ***Delhi Development Authority v. Alkarma, AIR 1985 Delhi 132*** to support his contention.

ii) He further submits that after receipt of the payment pursuant to the award dated 24.08.2015, the petitioner has given an NOC on 24.10.2015 based on the entire claims raised by him. He submits that the arbitration agreement stands merged in the award and nothing survives to adjudicate. To this effect, he relied upon the judgment of the Calcutta High Court in the case of ***Sudhir Kumar Saha And Ors. vs J.N. Chemicals Private Ltd. And Ors., AIR 1985 Cal. 454.***

8. The fact of the matter is that the dispute which is sought to be referred to arbitration has its genesis in the office memorandum dated 08.05.2015 issued by the respondents themselves. The petitioner is seeking reference of

the dispute which arise out of and relates to the said office memorandum dated 08.05.2015. When the original claim petition was filed, there was no occasion for the petitioner to seek adjudication of the disputes which relate to or arise out of the said Office Memorandum dated 08.05.2015 as this has been issued subsequently.

Even otherwise, it is settled legal position that successive reference under the same arbitration agreement is permissible if two separate cause of action arise at different stages of the arbitration agreement (Ref: ***Dolphin Drilling Ltd. v. ONGC, 2010 3 SCC 267***).

9. Under amended Arbitration and Conciliation Act, 1996, Section 11(6A) has been added, which reads as follows:

“The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.”

10. In the above context reference may be had to the judgment of the Division Bench of the Madras High Court in the case of ***Jumbo Bags Ltd. v. The New India Assurance Co.Ltd., 2016 (3) CTC 769/ (MANU/TN/0353/2016)***, wherein the court in para 20 held as follows:

"20. The relevant submissions of the learned counsel for the parties have been examined.

I. Whether the amended provisions as per the Arbitration and Conciliation (Amendment) Act, 2015 will apply?

There can be little doubt, in the context of the pleas advanced on the issue of reference of disputes to arbitration as to whether the issue proceeds under the unamended Act or the amended Act does have an impact. The introduction of Section 11(6-A) of the Arbitration and Conciliation (Amendment) Act, 2015 thus seeks to

restrict the scope of scrutiny by the court only in the case of existence of an arbitral agreement. Thus, in a sense, whether the particular aspect would fall within the scope of the arbitration clause or not, or whether arbitration would be the appropriate remedy itself would be issues to be placed before the arbitrator. However, while introducing this amendment, Section 26 makes it quite clear that unless the parties agree, the provisions of the principal Act would continue to apply and those provisions would be applicable only to the arbitral proceedings commenced on or after 23.10.2015."

11. Under the aforesaid newly added provision, the court has to confine itself while considering any application under Section 11(6) to the examination of the existence of an arbitration agreement. The issues which have been raised by the respondents, namely, about the claim being barred under Order 2 Rule 2 CPC or in terms of the earlier award an NOC is issued by the petitioner are left open to be adjudicated upon by the learned arbitrator.

12. Accordingly, leaving all the issues raised by the respondent open, a direction is issued to the respondents to appoint an arbitrator in terms of the arbitration clause within four weeks from today. The petition is disposed of.

JAYANT NATH, J.

SEPTEMBER 08, 2017/v