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

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Date of decision: 26.09.2017

+ ARB.P. 186/2017

CSE INFRA

Through

..... Petitioner
Mr.Vivekanand, Adv.

versus

UNION OF INDIA & ANR.

Through
UOI

..... Respondent
Mr.N.Prashana Kumar Nair, Adv. for

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. This is a petition under section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator to adjudicate the dispute between the parties. The case of the petitioner is that respondent No.2 on behalf of respondent No.1 invited tenders for execution of work named and styled as "Construction of Two Lane Road overbridge in lieu of an existing level crossing No.-524-C AT Km 1570/18-20 near Chodiala Station alongwith other allied works on Laksar-Sharanpur Section". The tender of the petitioner was accepted and the work was awarded to the petitioner vide letter dated 18.4.2013 by respondent No.2. A formal agreement was executed on 19.9.2013.

2. The respondent sent a notice dated 23.3.2015 terminating the contract and encashing the FDR by way of security and performance guarantee received. On 25.3.2015 the petitioner filed a petition seeking interim orders from this court. Vide order dated 26.3.2015 the respondents were directed not to encash the two FDRs during pendency of the arbitration proceedings. The petitioner invoked the arbitration clause No.64 on 13.5.2015. The petitioner had sought to raise 34 claims against the respondent. On 6.10.2015 the respondents have appointed the arbitral tribunal to adjudicate 17 out of 34 claims raised by the petitioner. Grievance of the petitioner is that entire claims had to be referred to the arbitrator and not by pick and choose policy of the petitioner.

3. Learned counsel for the respondent submits that he has filed his reply. He submits that the balance claims which were not referred to Arbitrator are excepted matters under clause 63 of the GCC and hence, not referable to arbitration.

4. Learned counsel for the Petitioner in response submits that the respondents cannot take a decision on their own as to which matters are accepted matters and not covered by the arbitration clause. He relies upon judgment of the Division Bench of the Allahabad High Court in ***Agarwal Company vs. Union of India through General Manager, Northern Railway 2015 (3) R.A.J. 468 (All.)***. The case pertains to the respondent where a Division Bench of the Allahabad High Court relying upon the judgment of the Supreme Court in ***National Insurance Company Ltd. vs. M/s. Boghara Polyfab Pvt.Ltd., AIR 2009 SC 170*** held that in such an eventuality where the respondents feel that a particular matter is an accepted matter it should refer the same to the arbitral tribunal subject to their objection who would

adjudicate the same on an application under section 16 of the Act as to whether the Tribunal has jurisdiction to decide the same or not.

5. Learned counsel for the petitioner further states that this Court may appoint an independent Arbitrator/Arbitral Tribunal keeping in view the fact that the respondents have not taken steps for appointment of an Arbitrator in terms of the arbitration clause despite receipt by appropriate notice invoking the arbitration clause. He further submits that even if for some reason this court were to refer the balance disputes to the same arbitral tribunal, a direction should be passed to the arbitral tribunal to continue to adjudicate the disputes despite any retirement or transfer of any of the members of the Tribunal. He submits that his experience in arbitration against the respondent shows that the proceedings linger on for years on account of the fact that vacancies arise due to transfer of Members of the Tribunal or retirement of the Tribunal who thereafter cease to be on the arbitral tribunal.

6. Relevant portion of the said judgment of the Allahabad High Court in ***Aggarwal Company vs Union of India Thru General Manager, Northern Railway (supra)*** reads as follows:-

“8. These observations make it abundantly clear that whether a particular claim, which has been made by a contractor, is arbitrable or conversely, whether it has been excepted or excluded from the purview of arbitrability, cannot lie in the exclusive domain of the other party to the contract. Where a reference to arbitration is made outside the Court, a party making the reference on a claim which has been raised by the contractor, may do so subject to its reservations on the arbitrability of the claim. Hence, in the present case, it would have been open to the competent authority, while referring the claims to arbitration, to reserve its objections on the ground that a particular claim is an excepted matter which is not capable of being arbitrated

upon. The arbitral tribunal would under Section 16 of the Act have the jurisdiction to decide as to whether a particular claim falls within an excepted matter or is within the purview of the arbitration agreement. What the third respondent has done by declining to even refer the claim to arbitration, is to prevent the arbitral tribunal from inquiring into whether the claim is arbitrable in the first place. This, in our view, is impermissible. If a reference to arbitration were to be made through the Court under Section 11 of the Act, there is no ambiguity about the legal position in view of the decision of the Supreme Court in *Boghara Polyfab* (supra). The issue as to whether the claim was arbitrable or fell within the scope of an excepted matter, must be left to the arbitral tribunal. Neither the Chief Justice nor his designate under Section 11 of the Act can decide an issue which pertains to the third category enlisted in the decision in *Boghara Polyfab* (supra). Similarly, where a reference to arbitration has taken place outside the Court, a party to the arbitral agreement cannot preclude the arbitral tribunal from deciding as to whether the claim is arbitrable or whether it pertains to an excepted matter. That issue has to be determined by the arbitral tribunal.

9. This principle finds support from the decision of the Supreme Court in *J.G. Engineers Private Limited v. Union of India* and another, MANU/SC/0527/2011 : 2011 (5) SCC 758, where it was held that a contract cannot provide that one party will be the arbiter to decide whether he committed breach or whether the other party committed a breach and this is a question which can only be decided by the arbitral tribunal, where there is an arbitration agreement. Whether a particular claim is arbitrable or not and whether an objection that a claim falls within an excepted matter is tenable, is within the jurisdiction of the arbitral tribunal under Section 16 of the Act.”

7. Reference may also be had to the judgment of the Supreme Court in

the case of *National Insurance Co.Ltd. vs. Boghara Polyfab Pvt. Ltd.* (*supra*) where the Supreme Court held as follows:-

“17.1) The issues (first category) which Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement.

17.2) The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are:

(a) Whether the claim is a dead (long barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

17.3) The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are :

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.

It is clear from the scheme of the Act as explained by this Court in *SBP & Co.*, that in regard to issues falling under the second category, if raised in any application under [section 11](#) of the Act, the Chief Justice/his designate may decide them, if necessary by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice of his Designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The Chief Justice/his

designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue.”

8. Keeping in view the above, I direct the respondent to refer the balance claims also to the same arbitral tribunal for adjudication of the disputes subject to their objection that the said matters are excepted matters.

9. Keeping in view the submissions of learned counsel for the respondent, it is directed that the arbitral tribunal constituted by the respondents shall continue to function till the adjudication of the disputes between the parties and passing of an appropriate Award, as per law. On transfer or retirement, the member of the Tribunal shall not cease to be on the Arbitral Tribunal.

10. Petition stands disposed of. All pending applications, if any, also stand disposed of.

JAYANT NATH, J

SEPTEMBER 26, 2017

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