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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 276/2016

SRICO PROJECTS PVT. LTD.

..... Petitioner

Through: Mr. R.M. Sinha, Advocate.

versus

INDIAN OIL FOUNDATION

..... Respondent

Through: Mr. Rajat Navet and Mr. Kushagra
Pandit, Advocates.

CORAM: JUSTICE S.MURALIDHAR

ORDER

09.01.2017

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1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act') seeking the appointment of an Arbitrator to adjudicate the disputes between the Petitioner, Srico Projects Pvt. Ltd. ('SPPL'), and the Respondent, Indian Oil Foundation, arising out of a contract dated 10th April, 2013 entered into between the parties consequent upon the Respondent awarding the Petitioner the work of "construction of tourist infrastructure facilities comprising of building works, interior works, internal and external electrical works, fire fighting, horticulture and landscaping etc. around Konark Sun Temple Complex in Orissa".

2. In terms of the contract, the proposed date of completion of contract was 10th October, 2014. However, the project was unable to be completed within the stipulated time for reasons which need not be discussed in the present order. What is relevant, however, is that Respondent terminated the contract on 16th September, 2015.

3. The Petitioner filed OMP (I) 536 of 2015 seeking to restrain the Respondent from invoking bank guarantees ('BGs') furnished by the Petitioner. This petition was dismissed by the Court holding that the invocation of the BGs by the Respondent was "neither fraudulent nor any special equities are made in favour of the Petitioner."

4. By a letter dated 14th December, 2015, the Petitioner invoked the arbitration clause and sought reference of the claim appended to the letter to arbitration in terms of Clause 9.0.1.1 of the General Conditions of Contract ('GCC'). In response thereto, by a letter dated 18th December, 2015, the Respondent informed the Petitioner that in terms of the aforementioned clause, the Petitioner was "entitled to request for arbitration of notified claims only which are included in the final bill." It was pointed out that the Petitioner had neither submitted its final bill upon joint measurements nor had given details of the notified claims. It was informed that the final bill for settlement in terms of Clause 6.6.0.0 was "still awaited" and, therefore, the request for appointment of an Arbitrator was not tenable "at the stage."

5. On 19th December, 2015, the Petitioner wrote to the Respondent stating that it was submitting the scrutinised bills with protest in respect of Brickbats laying in Main Avenue and pathway and filling sand in the main parking open area. The Petitioner also enclosed the list of all its claims and reiterated its request for appointment of an Arbitrator.

6. By a letter dated 12th January, 2016, the Respondent pointed out that in accordance with Clause 6.6.1.0, the Petitioner was required to give notice in

writing of all its claims arising out of any deductions made or threatened by the owner from any Running Account ('RA') Bills within ten days of the issue of the order relating to any works for which a claim was being made. Having gone through the claims submitted by the Petitioner along with its final bill, the Respondent was of the view that they did not justify as 'notified claim' under the GCC.

7. Thereafter, the present petition was filed in which notice was issued to the Respondent on 9th May, 2016. Pursuant thereto, the Respondent has filed a reply where it reiterated that "only notified claims" which have been included in the final bill can be referred to arbitration. It is further stated that under Clause 9.0.2.0, the question whether the claim qualifies as a 'notified claim' can only be decided by the General Manager ('GM') of the Respondent. The Petitioner was yet to approach its GM for a decision on the claims. It is, accordingly, contended that the petition itself is pre-mature.

8. In its rejoinder the Petitioner submits that the GM cannot decide upon the legal rights of the parties and it is the Arbitrator who can finally decide them.

9. Mr. R.M. Sinha, learned counsel appearing for the Petitioner apart from reiterating the contentions raised in the petition submitted that the statement of claims appended to the letters dated 14th December, 2015 and 19th December, 2015 could not be rejected in their entirety. They may have included claims which ought to have been notified and those which did not. He submitted that this decision whether any particular claim does not qualify

to be referred to arbitration should be decided by the Arbitral Tribunal ('AT') itself and not by the Court. He submitted that under Section 11(6A) of the Act, as inserted with effect from 23rd October 2015, all that the Court was required to do was to examine the existence of an arbitration agreement between the parties and nothing more.

10. Mr. Rajat Navet, learned counsel appearing for the Respondent, on the other hand, submits that in terms of the arbitration clause, the only agreement between the parties is for reference of claims that are notified and determined as such by the GM to arbitration and nothing else. Having agreed to the above conditions of the contract, it was not open to the Petitioner to seek reference of such claims which were not even notified. He placed reliance on the decision of this Court dated 12th February, 2015 in Arbitration Petition No. 334 of 2014 (*IOT Infrastructure & Energy Service Ltd. v. Indian Oil Corporation Ltd.*) where the Court was interpreting an identical clause.

11. Clause 9.0.1.0 of the GCC reads as under:

“Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.0.2.0 hereof, any dispute arising out of a Notified Claim of the CONTRACTOR included in the Final Bill of the CONTRACTOR in accordance with the provisions of Clause 6.6.3.0 hereof, if the CONTRACTOR has not opted for the Alternative Dispute Resolution Machinery referred to in Clause 9.1.1.0 hereof, and any dispute arising out of any claims of the OWNER against the CONTRACTOR shall be referred to the arbitration of a Sole Arbitrator selected in accordance with the provisions of clause 9.0.1.0 hereof. It is specifically agreed that the OWNER may prefer its Claim(s) against the CONTRACTOR as counter-claim(s) if a Notified Claim of the

CONTRACTOR has been referred to arbitration. The CONTRACTOR shall not, however, be entitled to raise as a set-off defence or counter-claim any claim which is not a Notified Claim included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof."

12. The above clause in turn refers to Clauses 6.6.1.0 and 6.6.3.0 which read as under:

"Should the CONTRACTOR consider that he is entitled to any extra payment or compensation in respect of the works over and above the amounts due in terms of the Contract as specified in Clause 6.3.1.0 hereof or should the CONTRACTOR dispute the validity of any deductions made or threatened by the OWNER from any Running Account Bills, the CONTRACTOR shall forthwith give notice in writing of his claim in this behalf to the Engineer-in-Charge and the Site Engineer within 10 (ten) days from the date of the issue of orders or instructions relative to any works for which the CONTRACTOR claims such additional payment or compensation or of the happening of other event upon which the CONTRACTOR bases such claim, and such notice shall give full particulars of the nature of such claim, grounds on which it is based, and the amount claimed. The OWNER shall not anyway be liable in respect of any claim by the CONTRACTOR unless notice of such claim has been given by the CONTRACTOR to the Engineer-in-charge and the Site-Engineer in the manner and within the time aforesaid and the CONTRACTOR shall be deemed to have waived any and all claims and all his rights in respect of any claim not notified to the Engineer-in-Charge and the Site Engineer in writing in the manner and within the time aforesaid."

"6.6.3.0 Any claims of the CONTRACTOR notified in accordance with the provision of Clause 6.6.1.0 hereof as shall remain at the time of preparation of Final Bill by the CONTRACTOR shall be separately included in the Final Bill prepared by the CONTRACTOR in the form of a Statement of

Claims attached thereto, giving particulars of the nature of the claim, grounds on which it is based, and the amount claimed and shall be supported by a copy(ies) of the notice(s) sent in respect thereof by the CONTRACTOR to the Engineer-in-Charge and Site Engineer under Clause 6.6.1.0 hereof. In so far as such claim shall in any manner or particular be at variance with the claim notified by the CONTRACTOR within the provision of Clause 6.6.1.0 hereof, it shall be deemed to be a claim different from the notified claim with consequence in respect thereof indicated in Clause 6.6.1.0 hereof, and with consequences in respect of the notified claim as indicated in Clause 6.6.3.1 hereof.”

13. A careful scrutiny of Clause 9.0.1.0 reveals that there is a distinction between the claims preferred by the Contractor and those preferred by the Owner i.e., the Respondent herein. As far as the Contractor is concerned, only such of those claims which qualify as ‘notified claims’ and which are included in the final bill can be referred to arbitration. However, as far as the Respondent is concerned, there is no such limitation. While it is arguable that such a clause would not be fair or reasonable, the fact is that the Petitioner has accepted the said clause and signed the agreement. It cannot now wriggle out of it. In fact, there is no challenge as such to the clause itself.

14. If the definition of a ‘notified claim’ in terms of Clause 6.6.1.0 is read with Clause 6.6.3.0, then it is clear that the agreement between the parties is only that such notified claims of the Contractor can be referred to arbitration and nothing else. This was noticed by the Court in ***IOT Infrastructure & Energy Service Ltd. v. Indian Oil Corporation Ltd.*** (*supra*) where while analysing the aforementioned clauses, the Court observed as under:

“Under Clause 6.6.1.0 if the Contractor feels that he is entitled to any extra payment over and above the amounts due under the contract, he should give notice in writing to the Engineer-in-charge within 10 days from the date of issue of the order. Such ‘notified claims’ are, in terms of Clause 6.6.3.0 to be separately included in the final Bill in the form of a statement of claim attached thereto. Clause 6.6.3.1 states that the Respondent would not be liable in respect of a notified claim not specifically reflected in the final Bill. It is therefore clear that only notified claims included in the final bill can be referred to arbitrator. Under clause 9.0.2.0 once the GM decides that a certain item is not notified and cannot be referred to arbitration then it would stand excluded from arbitration.”

15. The Court is not persuaded to take a different view of the identical clause in the present contract. In other words, only such of those claims of the Petitioner which have been accepted as ‘notified claims’ by the GM can be referred to arbitration. The stand of the Respondent that in the absence of such ‘notified claims’ there cannot be a reference of the list of claims appended to the Petitioner’s letters dated 14th and 19th December, 2015 to arbitration is, accordingly, upheld.

16. This, however, does not leave the Petitioner without a remedy. It will be open to the Petitioner to seek other appropriate remedies in accordance with law.

17. The petition is dismissed but, in the circumstances, with no order as to costs.

S. MURALIDHAR, J

JANUARY 09, 2017/dn