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

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Reserved on: 13th November, 2017
Pronounced on: 20th November, 2017

+ **ARB.P. 456/2017**

V. K. SOOD ENGINEERS AND CONTRACTORS..... Petitioner
Through : Mrs.Anusuya Salwan, with
Ms.Renuka Arora and Ms.Nikita
Salwan, Advs.

versus

GENERAL MANAGER NORTHERN RAILWAY..... Respondent
Through : Ms.Geetanjali Mohan, Adv.

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The Petitioner M/s V.K. Sood Engineers & Contractors, a registered partnership firm with Mr. Puneet Kumar Sood and Vineet Kumar Sood as its Partners in the ratio of 99%:1% on 03.01.2012 was awarded the work of "Construction Of Road Bridges in lieu of Level Crossing No.52-C at Km. 75/6-7 at Garhmukteshwar on Moradabad - Ghaziabad Section over Moradabad Division" vide letter dated 03.01.2012. A contract agreement dated 30.03.2012 was executed between the parties.

2. The stipulated date of start was 03.01.2012 and the stipulated date of completion was 02.01.2013. The contract value was of ₹6,97,64,729.01. The final date of completion of contract was 30.09.2016.

3. It is alleged one another firm viz., M/S V.K. Sood Engineers & Contractors- DDS(JV) was awarded another work by the respondent which was satisfactorily completed but the respondent issued a recovery notice of ₹1.79 crores against the said sole partnership firm which notice was challenged before the competent Court and it obtained a stay order. Later the respondent intended to recover the said amount from the petitioner herein despite the submissions of the petitioner that it is a distinct entity from M/s V.K. Sood Engineers & Contractors DDS(JV). The respondent rather acted illegally and withheld 17th running bill of the petitioner. The petitioner filed OMP(I)(COMM) No. 242/2016 where vide order dated 31.08.2016 the respondent was directed to release the payment within 4 weeks. The respondent filed an appeal FAO(OS) (COMM) 5/2017 but deposited ₹44,09,733 after deducting recoveries. Matter was remanded and was allowed by single judge vide order dated 17.07.2017.

4. The petitioner then sent a legal notice dated 24.04.2017 for balance payment and/or to appoint arbitrator relying upon clause viz., 64(1)(i), which runs as under :

64 (1) (i) - Demand for Arbitration-In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any, such case, but except in any of the "excepted matters" referred to in Clause 63 of these conditions, the contractor, after 120 days but within 180 days of his presenting his

final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

5. Learned counsel for the respondent relied upon para 6 of Annexure K2 and para 2.5.1 of the conditions of contract to say there is no privity of contract between the parties as the contract was entered into by the respondent with the partnership firm wherein Puneet Kumar Sood and Vineet Kumar Sood were partners but later on 01.04.2014 without prior permission of the respondent, the constitution of the partnership firm was changed and Mr. Pramod Kumar Bhatia was taken as a partner as Mr. Vineet had left the partnership firm. This was in violation of the terms of the contract reproduced herein below.

"Para 6 of Annexure K-2: Once the tender has been submitted, the constitution of the firm shall not be allowed to be modified/ altered /terminated during the validity of the tender as well as the currency of the contract except when modification becomes inevitable due to succession law etc. In which case prior permission should be taken from Railway and in any case the minimum eligibility criteria should not get vitiated. The reconstitution of the firm in such cases should be followed by notary

certified Supplementary Deed. The approval of change of constitution of the firm, in any case, shall be at the sole discretion of Railway and the tenderer shall have no claims whatsoever. Any change in constitution of the Partnership Firm after opening of tender shall be with the consent of all the partners and with signature of all partners as that in Partnership Deed. Failure to observe

this requirement shall render the offer invalid and full EMD shall be forfeited. If any partners withdraws from the firm after opening of tender and before award of tender, the offer shall be rejected. If any new partner joins the firm after opening of tender but prior to award of contract, his/her credentials shall not qualify for consideration towards eligibility criteria either individually or in proportion to his share in the previous firm. In case the tenderer fails to inform Railway beforehand about any such changes/modifications in the constitution which is inevitable due to succession law etc. and the contract is awarded to such firm, then it will be considered a breach of contract conditions, liable for determination of contract under Clause 62 of General Conditions of Contract.

Para 2.5.1: The Railway will not be bound by any power of attorney granted by tenderer/s or by changing's in the composition of firm made subsequent to the execution of contract. The Railway may however recognized such power of attorney and change after obtaining proper legal advice cost of which shall be chargeable to contractor.

6. Learned counsel for the respondent alleged the petitioner was not entitled to change the constitution of its firm except with the prior permission of the respondent and that too only on a condition of succession etc., and not otherwise. However the learned counsel for the petitioner referred to two letters dated 2.05.2014 and of dated 5.05.2014 whereby the petitioner had intimated the respondent qua the change in its constitution. Though the letter dated 02.05.2014 is denied by the respondent but it cannot deny letter dated 05.05.2014 since had replied to

it. It is alleged by the petitioner despite those letters being sent to the respondent, the respondent did not object or terminate the contract but rather allowed the petitioner to complete the substantial work thereafter and hence now cannot allege it had no privity of contract with the petitioner.

7. The learned counsel for the respondent also raised a plea of limitation in reference to clause 64(1)(i) stating inter alia the petitioner did not approach the respondent within the period prescribed. The learned counsel for the petitioner submits the law is settled qua reduction of period of limitation by any term of contract, being void to such an extent, per Section 28 of the Indian Contract Act. However, I need not go into such details as the learned counsel for the respondent says she would have no objection to the appointment of an arbitrator, provided the following issues viz (a) privity of contract between the parties and (b) of limitation are left open; hence such issues are left open to be determined by the arbitrator.

8. In the circumstances, Sh. B.S. Mathur, Retired ADJ (Mobile No.9873724057) is hereby appointed as a sole arbitrator to adjudicate the disputes between the parties. The fee of the arbitrator shall be in accordance with the fee schedule of the Delhi International Arbitration Centre, High Court of Delhi, New Delhi.

9. Petition is disposed of.

YOGESH KHANNA, J

NOVEMBER 20, 2017
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