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

+ **ARB. P. 751/2017**

Date of decision: 19th December, 2017

KSC CONSTRUCTION CO. Petitioner
Through Mr.S.W.Haider, Adv.

versus

UNION OF INDIA Respondent
Through Mr.Jagjit Singh, Sr. Standing
counsel for Railways with Mr.Preet Singh,
Adv.

**CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA**

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) has been filed seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the work pertaining to Construction of Limited height subway in lieu of U/M L-Xing no. C-95 at Km. 106/2-3 and C-98 at Km. 108/9-109/0 on DLI-BTI section under ADEN/JHI by cut and cover method was awarded to the petitioner on 1st October, 2014 for Rs.2,86,93,655/-.

2. The agreement between the parties has an arbitration agreement in form of clause 64 of the General Conditions of Contract, 2010, which is reproduced hereinbelow:

“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.”

64(1)(ii)(a)— The demand for Arbitration shall specify the matters which are in question or subject of the dispute or differences as also the amount of claim term wise. Only such dispute(s) or difference(s) in respect of which the demand has been made together with counter claims or set off shall be referred to arbitration and other matters shall not be included in the reference.

64(1)(ii)(a)— the Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.

(b) The claimant shall submit his claim stating the facts supporting the claim along with all relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.

(c) The Railway shall submit its defence statement and counter claim(s), if any, within a period of 60 days of

receipt of copy of claim from Tribunal thereafter unless otherwise extension has been granted by Tribunal.

64(1)(iii)—No new claim shall be added during proceedings by either party. However, a party may amend or supplement the original, claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.

64(1)(iv)- if the contractor(s) does/do not prefer his/their specific and final claim in writing within a period of 90 days of receiving the Intimation from the Railways that the final bill is ready for payment he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect to these claims.

64(2)— Obligation during pendency of arbitration— Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due to payable by the Railways shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should continue during arbitration proceedings.

64(3)(a)(i) — in case where, the total value of all claims in question added together does not exceed Rs.10,00,000/- (Rupees Ten Lacs only), the Arbitral Tribunal consist of a sole arbitrator who shall be either the General Manager or a gazetted officer of Railway not below the grade of JA grade nominated by the General Manger in that behalf. The sole arbitrator shall-be appointed within 60 days from the days when a written and valid demand for arbitration is received by Railway.

64(3)(a)(ii) --- In cases not covered by Clause 64(a)(1), the Arbitral Tribunal shall consist of a panel of three. Gazetted Rly. Officers not below JA grade, as the arbitrators'. For this purpose, the Railway will send a panel of more than 3 names of Gazette Rly. Officers of one or more departments, of the Rly. To the contractor who will be asked to suggest to General Manager upto 2 names out of panel for appointment as contractor's nominee. The General Manger shall appoint at east one out of them as the contract's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel, or from outside the panel, duly Indicating the presiding arbitrator from amongst the 3 arbitrators so appointed. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts department. An officer of Selection Grade of the Accounts department shall be considered of equal status to the officers in SA grade of other departments of the Railways for the purpose of appointment of arbitrators.

3. Counsel for the petitioner submits that though in the petition it has been mentioned that the claim of the petitioner would be Rs.1,05,82,063/-, in fact, the petitioner would be confining his claim to an amount of Rs.99 lacs. He submits that in view thereof, Clause 64 (3)(A) (i) would be applicable and a Sole Arbitrator would have to be appointed for adjudicating the dispute between the parties. Counsel for the respondent does not deny that there has been an amendment in this clause and the figure of Rs.10 lacs has been substituted by Rs.1 crore.

4. The petitioner invoked the arbitration agreement vide its notice dated 3rd August, 2017, however, having received no reply, the present petition was filed.

5. Counsel for the respondent submits that a reply has been filed, however, the same is not on record.

6. I have perused the copy of reply which has been filed. Reply has been returned back to the counsel for the respondent who may check up with the Registry and get the same placed on record after removing office objections, if any.

7. The objection taken by the respondent is that the petitioner, while submitting his final bill had given a No Claim Certificate and it is on that basis that the final bill had been paid to the petitioner. It is, therefore, submitted that there was a satisfaction of the agreement and there is no dispute that has to be adjudicated before the arbitral tribunal under the agreement.

8. Counsel for the petitioner disputes the above position.

9. In any case, the fact whether there was a full and final satisfaction of the agreement by way of this No Claim Certificate, is a question to be determined by the Arbitrator. This contention of the respondent is, therefore, not acceptable.

10. It is further contended by the respondent that certain disputes raised by the petitioner would fall under the 'excepted

matters’ and certain disputes are beyond the terms of the contract and, therefore, cannot be referred to arbitration.

11. In my view, even these questions would have to be determined by the Arbitrator. In terms of Section 11 (6A) of the Act, this Court is to confine with examination to the existence of an Arbitration Agreement. The respondent does not deny the existence of an Arbitration Agreement and invocation thereof.

12. In ***Duro Felguera, S.A. v. Gangavaram Port Limited*** (2017) 9 SCC 729 Supreme Court, while examining the scope of Section 11(6A), has held as under:-

“47. what is the effect of the change introduced by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as “the 2015 Amendment”) with particular reference to Section 11(6) and the newly added Section 11(6-A) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”) is the crucial question arising for consideration in this case.

48. Section 11(6-A) added by the 2015 Amendment, reads as follows:

11. (6-A) 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.

(emphasis supplied)

From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect-the existence of an arbitration agreement. What are the factors for deciding as to whether there is any arbitration agreement is the next question. The resolution to that is simple-it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement”.

13. In view of the above, I find no impediment in appointing a Sole Arbitrator for adjudicating the disputes that have arisen between the parties.

14. I hereby appoint **Mr.Amit Chadha, Advocate**, D-25, IInd Floor, Vikaspuri, New Delhi-110008, Mobile-9911116613 and 9212729912 as the Sole Arbitrator. He shall submit his disclosure in terms of Section 12 of the Act before proceeding with the reference. The arbitration shall be held under the aegis of the Delhi International Arbitration Centre (DIAC).

Arbitration procedure and the fee shall be governed by the DIAC Rules.

15. The petition is allowed in the above terms, with no order as to costs.

Dasti.

NAVIN CHAWLA, J

DECEMBER 19, 2017
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