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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 4.9.2018

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ARB.P. 71/2018

DHARAMPAL SATYAPAL LTD.

..... Petitioner

Through: Mr. Deepak Dhingra with Ms.
Miranda Solaman and Mr. Sameer
Sidhar, Advs.

versus

RAVI KUMAR

..... Respondent

Through: Mr. Arun Batta with Ms. Neha
Kumari, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

1. By this petition, filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as '1996 Act'), the petitioner seeks appointment of an arbitrator in the matter.

2. Mr. Batta, who, appears for the respondent, resists the petition.

3. Broadly, the background in which this petition is filed is as follows:

3.1 The petitioner issued a Letter of Intent (in short 'LOI') dated 2.7.2013, awarding a contract to the respondent for installing a fire fighting system. Based on the LOI, a formal agreement dated 1.8.2013 was executed between the parties. The value of the contract was fixed at Rs.2,16,30,037/-. In addition to this sum, service tax was also to be paid by the petitioner.

3.2 The record shows that the value of the contract was enhanced to

Rs.3,06,61,409/-, as the scope of the work was enhanced. The record also shows that a handing over certificate was generated on 2.2.2014.

4. Given the aforesaid circumstances, Mr. Batta says that since the work was completed and a handing over certificate was issued, obviously, no dispute subsists between the parties and hence, no arbitration proceedings need be triggered. In support of this submission, Mr. Batta alludes to the fact that the defect liability period, which was fixed as six months under the contract obtaining between the parties, expired on 2.8.2014. It is further submitted by Mr. Batta that the bank guarantee, which had been furnished by the respondent, has also been released by the petitioner, which, according to him, is further proof of the fact that the contract stood discharged by performance.

5. I have heard the counsel for both the parties and perused the record.

6. Apart from anything else, the petitioner, it appears, in and about 28.9.2017, served upon the respondent a legal notice calling upon the respondent to have the matter adjudicated by an arbitrator. The petitioner, in this behalf, proposed the name of a former Judge of this Court. In the said notice, the petitioner adverts to the fact that on 24.3.2015, a “snag list” was handed over to the respondent. It is further averred in the very same communication that a final snag list would be handed over to the respondent after the pump room located in the petitioner’s premises was activated. It is the case of the petitioner that on 8.4.2015, the pump room along with jockey pump room became operational.

7. The petitioner takes the position that the pump room got flooded and therefore, the need arose to carry out rectification qua the work executed by the respondent. The petitioner asserts that since, the rectification work was not carried out the said work had to be awarded to another contractor. It is claimed that in and about 29.8.2016, a work order in the sum of Rs. 1,05,38,309 (inclusive of service tax) was issued for carrying out rectification.

8. There is no dispute that the respondent refuted the assertion made in the legal notice dated 28.9.2017 vide a written communication dated 30.10.2017. The position taken in the said response was similar to what has been represented before me by Mr. Batta, that is, the work under the contract obtaining between the parties had been completed; the defect liability period is over, and that in sum, there is no dispute subsisting between the parties.

9. This apart, Mr. Batta has also raised the argument that the claim is time barred. For this purpose, Mr. Batta drew my attention to the fact that the legal notice dated 28.9.2017 was issued more than three years after the expiry of the defect liability period was over.

10. As has been said by this Court, time and again, that the jurisdiction of this Court under Section 11, especially, after the amendment made in the 1996 Act is to see, firstly, whether the petition is filed in a court of competent jurisdiction, and secondly, as to whether or not the arbitration agreement is in existence. Insofar as the first aspect is concerned, there is no dispute as regards the jurisdiction of this court qua the matter at hand. As regards the second aspect, Section 11(6A) of the 1996 Act provides a complete answer.

Section 11(6A) of the 1996 Act makes this abundantly clear that the court, while exercising jurisdiction under Section 11, is to only ascertain as to whether or not an arbitration agreement is in existence. In fact, the Supreme Court in *M/s. Duro Felguera, S.A. vs. M/s. Gangavaram Port Limited*, (2017) 9 SCC 729 has indicated, thus, in so many words. The same is extracted hereafter:

“...59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267; (2009) 1 SCC (Civ) 117]. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected...”

11. Notwithstanding the above, since, an objection has been raised that there is no dispute between the parties, I may only advert to two paragraphs from the reply dated 30.10.2017. These paragraphs are 3(c) & (f). For the sake of convenience, the same is extracted hereafter:

“...3 (c) Our client, after handing over the site to your client was informed that due to negligence on part of your client and for other reasons not attributable to our client in respect of the works carried out by our client, there has been an event of severe flooding in the lower/basement floor of the building, where the Pump

Room was located. Due to such flooding, there was sever damage caused to various equipments including the Fire Fighting Systems and your client was taking appropriate measures to get the premises repaired and taking other measures to mitigate the losses.

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(f) Needless to mention here that in such circumstances, any contractor would like to oblige a good client in order to procure future business. In view whereof, your client had prepared a List of Works required to be done and measures to be performed for restoration of the Pump Room. Subsequently, the list titled as “Snag List” was handed over to our client as well. Our client was requested to help in performing certain acts and giving his expert advice so that minimum expenses could be incurred for restoration of the Pump Room. Our client did his best and helped the officials of your client and taking all remedial steps to restore the premises. Needless to mention that your client had also engaged third party contractors for carrying out other associated works which fell outside the scope of work of our client. The details of the other works, such as civil works, electrical and water proofing works etc. awarded to such other third party contractors, are however not known...”

(emphasis is mine)

12. Clearly, a perusal of the said paragraphs would show that a “snag list” was generated by the petitioner and that the respondent did attempt to cure the defects, *albeit*, gratuitously to procure business in future from the petitioner and not as a matter of any obligation under the subject contract.

12.1. Therefore, the fact that a dispute obtains between the parties is *prima facie* made out by the Petitioner.

13. Likewise, the contention of Mr. Batta that the dispute is time barred is something which would have to be tried and tested before the learned Arbitrator.

14. Given the aforesaid circumstances, to my mind, the objections raised by Mr. Batta may have substance on merits, the same, however, cannot be taken into account by this Court at this juncture. It would be for the learned Arbitrator to examine the veracity of the defence, if any, that the respondent will take before the learned.

15. Accordingly, for the foregoing reasons, I am inclined to appoint an arbitrator in the matter. Mr. Bharat Bhushan, former Additional District Judge (Mob. 9899285640) is, accordingly, appointed as an Arbitrator. Counsel for both the parties agree that the fee and the rules applicable to the arbitration proceedings conducted under the aegis of Delhi International Arbitration Centre (DIAC) should be made applicable to the instant proceedings as well. It is ordered accordingly.

16. The captioned petition is, thus, disposed of in the aforementioned terms.

RAJIV SHAKDHER, J

SEPTEMBER 04, 2018

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