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

+ **CS(OS) 1511/2013**

SJVN LIMITED

..... Plaintiff

Through Mr. Uttam Datt, Advocate.

versus

JAIPRAKASH HYUNDAI CONSORTIUM (JHC) Defendant

Through Mr. Lovekesh Sawhney, Advocate.

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Date of Decision: 27th August, 2018.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J (Oral)

I.A.No.14973/2017

1. Present application has been filed under Order VII Rule 11 CPC read with Sections 5, 34(1), 35 & 36 of the Arbitration and Conciliation Act, 1996 for rejection of the plaint on the grounds of limitation and that the decision of the Dispute Review Board (hereinafter referred to as 'DRB') is an arbitral award, which is final and binding. It is also averred in the application that the present suit amounts to forum-shopping and *malafide* practice.

2. Learned counsel for the applicant/defendant states that in accordance with the modified Clause 67 of the General Conditions of Contract (for short "GCC") read with Tripartite Agreement between the parties and the DRB,

the decision of the DRB is an arbitral award. The modified Clause 67 of the GCC is reproduced hereinbelow:-

“(i) If the Contractor considers any work demanded of him to be outside the requirements of the Contract or considers any decision of the Engineer-in-Charge on any matter in connection with or arising out of the Contract or carrying out of work to be unacceptable, he shall promptly ask the Engineer-in-Charge in writing for written instructions or decision. There-upon the Engineer-in-Charge shall give his written instructions or decision within a period of thirty days of such request.

Upon receipt of the written instructions or decision, the Contractor shall promptly proceed without delay to comply with such instructions or decision.

If the Engineer-in-Charge fails to give his instructions or decision in writing within a period of thirty days after being requested for or if the Contractor is dissatisfied with the instructions or decision of the Engineer-in-Charge, the Contractor may within thirty days after receiving the instructions or decision, file a written appeal with the CMD, NJPC stating clearly, and in detail, the basis for the objection. The CMD will consider the written appeal and make his decision on the basis of the relevant Contract provisions, together with the facts and circumstances involved in the dispute. The decision will be furnished in writing to the Contractor within thirty days after the receipt of the Contractor's written appeal.

If the Contractor is dissatisfied with this decision, the Contractor, within a period of fifteen days from the receipt of the decision, shall indicate to the CMD, NJPC (SJVN Ltd) his intention to refer the matter to the Disputes Review Board (DRB) and within a period of another fifteen days shall formally appeal to the Disputes Review Board.

The constitution of the Disputes Review Board and the procedure to be adopted by it for resolving the disputes is elaborated in the Annexure-A, provided, however, all such

disputes which may arise to the Constitution of the Board, shall be taken up for consideration at its first meeting convened not later than 30 days upon its constitution. As specified para 1 of Annex-A, the disputes involving the individual up to Rs.50.00 (fifty) million shall be binding on the NJPC (SJVN Ltd) and the Contractor. In the case of the dispute involving individual claim beyond Rs.50.00 (fifty) million, if inspite of the recommendations/decision of the Disputes Review Board, the dispute remains unresolved, either party, within 15 days of the receipt of the aforesaid recommendations/decision of the Board, may appeal the decision back to the Board for review. However, if even after this review of its recommendations/decision by the Disputes Review Board, the two parties still fail to resolve the dispute, either party may resort to arbitration. In that case, within a period of 30 days of the receipt of the Disputes Review Board's final recommendations/decision, the party desiring to resort to arbitration shall indicate its intention to refer the dispute to Arbitration, failing which, the said final recommendations/decision of the Disputes Review Board shall be conclusive and binding.

(ii) The dispute arising between a foreign Contractor and the NJPC (SJVN Ltd) shall be referred to the adjudication of three Arbitrators, one to be nominated by the NJPC (SJVN Ltd), the second by the Contractor and the third by the President of the International Chamber of Commerce. The arbitration shall be conducted in accordance with the provisions of Indian Arbitration Act, 1940 or any statutory amendments thereof or at the Contractor's option, in accordance with the Rules or procedure for arbitration of the International Chamber of Commerce, Paris.

The term "Foreign Contractor" applies to a Contractor who is not registered in India and is not a juristic person under Indian Law.

(iii) The disputes arising between an Indian Contractor and the NJPC shall be resolved by 'arbitration' in accordance with the provisions of Indian Arbitration Act, 1940 or any statutory amendments thereof. The Board of arbitrators shall be

constituted by three 'arbitrators' one to be nominated by the Contractor, the second by the NJPC and the third by the Secretary (Power), Ministry of Energy, Govt. of India.

The term 'Indian Contractor' applies to a Contractor who is registered in India and is a juristic person under Indian Law or to a Joint Venture of Indian and Foreign firms eligible for price preference as stipulated in Para 1.29.2 (Chapter-I) of these documents.

(iv) The said arbitrators shall have full power to open up, revise and review any decision, opinion, direction, certificate of value etc. relating to the matter of dispute.

(v) If either of the parties fail to appoint its arbitrators in pursuance of sub-clauses (ii) and (iii) above, within sixty days after receipt of the notice of the appointment of its arbitrators, then the President of International Chamber of Commerce in case of Foreign Contractor or the Secretary (Power), Ministry of Energy, Govt. of India in case of Indian Contractor, as the case may be, shall have the power, at the request of either party to appoint arbitrator. A certified copy of the President's /Secretary (Power)'s order making such an appointment shall be furnished to both the parties.

(vi) Neither party shall be limited in the proceedings before such arbitrators to the evidence or arguments already put before any authority hereinabove provided for the purpose of obtaining its said recommendation/decisions. No recommendations/decisions given by the DRB shall disqualify any of its members from being called as a witness and giving evidence before the arbitrators on any matter whatsoever relevant to the dispute or difference referred to the arbitrators as aforesaid.

(vii) The reference to arbitration may proceed notwithstanding that the Words shall not then be or be alleged to be complete, provided always that the obligations of the NJPC (SJVN Ltd), the Engineer-in-Charge and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works. Neither party

shall be entitled to suspend such Work to which the dispute relates and payment to the Contractor shall be continued to be made in terms of the Contract.

(viii) (a) *All arbitration shall be held at New Delhi, India.*
(b) *the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.*

(ix) *The decision of the majority of arbitrators shall be final and binding upon the parties. The expenses of the arbitrators as determined by the arbitrators shall be shared equally by the NJPC (SJVN Ltd) and the Contractor. However, the expenses incurred by each party in connection with the preparation, presentation etc. of its cases prior to, during and after the arbitration proceedings shall be borne by each party itself.*

(x) *All awards of arbitration shall be in writing and shall state reasons for the amounts awarded.”*

(emphasis supplied)

3. In support of the submission that the decision of the DRB is an arbitral award, learned counsel for the applicant/defendant relies upon the judgment of the Himachal Pradesh High Court in ***Satluj Jal Vidyut Nigam Limited Vs. M/s Nathpa Jhakri Joint Venture*** passed on 07th June, 2006 in OMP No.113/2005 in Civil Suit No.56/2004. The relevant portion of the said judgment is reproduced hereinbelow:-

“..... At the time of hearing of this application, I was informed by the learned counsel of the parties that there are number of other suits wherein the same point is involved and, therefore, I permitted the counsel who are appearing in other matters to address me on the limited question as to whether the order of the DRB amounts to an Arbitral award or not?”

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Modified Clause 67 has two distinct parts. The first part relating to disputes including individual claims up to Rs.50 million and the second part relates to disputes involving individual claims above Rs.50 million. In my opinion, the intention of the parties was clear that in so far as the disputes up to Rs.50 million are concerned the decision of the DRB was final and binding. It was only a recommendation as far as claims beyond Rs.50 million are concerned. A careful reading of modified Clause 67, Annexure-A thereto as well as the tripartite agreement entered into between the parties and the DRB clearly show that the members of the Board are to act impartially and in a judicial manner. The members are to be totally independent and in fact are to disclose their conflict of interest, if any, before becoming members. The members of the DRB are appointed with the consent of both parties. Modified Clause 67, Annexure-A and the tripartite agreement in no uncertain terms lay down the procedure to be followed by the DRB. The procedure prescribed is a fair procedure in consonance with the Rules of Natural Justice. The contractor is given an opportunity to put forth his claims, the plaintiff has an opportunity to rebut the same, both parties can lead evidence and have a right to be heard. The procedure prescribed to determine the rights of the parties is an impartial and judicial procedure which is fair to both sides and gives equal opportunity to both parties.

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.....However, the intention of the parties is to be deciphered from all the attending circumstances. As already held above the parties had agreed that the decision of the DRB would be final and binding in case of individual claims up to Rs.50 million. It would indeed be a paradox if in disputes involving a higher amount the parties were required to go in for arbitration but in disputes involving lower amounts they were to approach the Law Courts. This in my view was not the intention of the parties. The parties in my opinion were ad idem on the issue that the decision of the DRB was an award within the meaning of the Arbitration and Conciliation Act.

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In my opinion, this arbitral award would be executable under Section 36 of the Arbitration and Conciliation Act, 1996.

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.....It is quite obvious that the parties had agreed that as far as disputes up to Rs.50 million are concerned the decision of the DRB would be final, binding and in the nature of arbitral award.

An Arbitral Award is final and binding under Section 35 of the Act and enforceable as a decree under Section 36 of the Act. Section 5 of the Act lays down that no judicial authority shall intervene in matters governed by Part-I of the Act except as provided for under that part. Judicial intervention is provided for only under Section 34 of the Act.

In view of the above discussion, I hold that in the present case since the decision of the DRB involves an individual dispute not exceeding Rs.50 million, it amounts to an arbitral award. The said award could have been challenged only under Section 34 of the Arbitration and Conciliation Act, 1996. OMP NO.113 of 205 is consequently allowed and it is held that the present suit is not maintainable and is hereby dismissed with costs."

(emphasis supplied)

4. Learned counsel for the defendant states that the above said judgment has been accepted by the plaintiff and no appeal was filed against the same. Thus, according to him, the aforesaid judgment is final and binding.
5. Per contra, learned counsel for the plaintiff states that the present suit is maintainable as subsequent to the decision of the DRB, the defendant had refused to pay any amount to the plaintiff on the ground that it was entitled to set-off and there had been a subsequent settlement.

6. Learned counsel for the plaintiff further submits that the judgment in ***Satluj Jal Vidyut Nigam Limited*** (supra) is inapplicable to the present factual scenario as in the said case, the plaintiff had sought to challenge the decision of the DRB, while in the present case the plaintiff seeks a declaration that the decision of the DRB is factually and legally correct.

7. He also points out that in the present case, the plaintiff is independently seeking a relief of decree of the amount that had been awarded by the DRB.

8. Learned counsel for the plaintiff lastly states that since in the present case, the decision of the DRB is in excess of Rs. 5 crores, the recommendation of the DRB is not binding and not in the nature of a final award.

9. Having heard learned counsel for the parties, this Court is of the view that the issues raised in the present application are not *res integra*. The High Court of Himachal Pradesh after interpreting the same dispute resolution Clause 67 and after hearing the plaintiff and the defendant has already held that the decision of the DRB amounts to an arbitral award. The said judgment has attained finality and cannot be challenged by filing a separate proceeding in another High Court.

10. The fact that in the present case the plaintiff does not challenge the decision of the DRB but only seeks a declaration that the decision of the DRB is factually and legally correct makes no difference to the nature of the decision of the DRB.

11. Even though the DRB's decision in the present case is in excess of Rs. 5 crores, the remedy is provided in Clause 67 itself if the parties are

unable to resolve their disputes despite DRB's decision/recommendations. Under Clause 67 either of the parties can take recourse to arbitration.

12. Consequently, in view of the judgment in *Satluj Jal Vidyut Nigam Limited* (supra), this Court is of the view that the relief sought by plaintiff for declaration that the decisions of the DRB dated 20th September, 2008 and 12th August, 2009 are factually and legally correct, is not maintainable.

13. This Court is further of the view that it cannot decree the amount that has already been awarded by the DRB as the said dispute had already been adjudicated in favour of the plaintiff and against the defendant. Grant of such a relief would also amount to re-litigation and re-determination of disputes that had already been adjudicated upon by a Forum agreed upon between the parties.

14. In the event, the defendant refuses to pay to the plaintiff for any reason whatsoever, the remedy lies with the plaintiff in filing appropriate proceedings in accordance with law.

15. Consequently, the present suit is dismissed with liberty to the plaintiff to file appropriate legal proceedings in accordance with law. The rights and contentions of all the parties are left open.

MANMOHAN, J

AUGUST 27, 2018
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