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

+ **ARB.P. 365/2017**

**M/S. M.D.ESTHAPPAN INFRASTRUCTURE
(P) LIMITED**

..... Petitioner

Through: Mr. K.L. Varghese, Senior Advocate
with Ms. Santha Varghese, Mr. Rahul
Varghese, Mr. Sanand Ramakrishnan,
Mr. Rajeev Mishra and Mr. Madan
M. Bora, Advocates.

versus

M/S. GAIL (INDIA) LIMITED

..... Respondent

Through: Ms. Purnima Maheshwari, Advocate.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

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27.02.2018

This petition under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred as to 'Act') has been filed by the petitioner seeking appointment of a Sole Arbitrator to adjudicate the disputes that have arisen between the parties in relation to the 'Fax of Acceptance' dated 17th January, 2013 and the formal Agreement dated 6th February, 2013 in relation to the construction of RGMC and Office Building at Kochi.

The agreement between the parties contains an Arbitration Agreement in form of clause 107.1 of the General Conditions of Contract.

The dispute having arisen, the petitioner gave a notice of invocation of arbitration vide its letter dated 15th February, 2017. The respondent has not responded to the same forcing the filing of the present petition by the petitioner.

The counsel for the respondent submits that the present petition is not maintainable as the petitioner had executed a 'No Claim Certificate' dated 5th July, 2016 pursuant to which the final payment for the awarded work had also been released in favour of the respondent on 5th October, 2016. She further submits that upon the request of the petitioner, the respondent had also issued a letter dated 13th January, 2017 confirming the completion of the work *albeit* with delay attributable to the petitioner. She submits that in view of the full and final settlement, no dispute between the parties can be said to have arisen for being referred to the arbitration. She also places reliance on the judgment dated 5th May, 2017 passed by this Court in RFA (OS)(COMM) 6/2016 ***GAIL (India) Limited v. Punj Lloyd Limited*** to contend that in any case, the claim raised by the petitioner would not be maintainable as the Price Reduction Schedule had been implemented from the 19th RA bill onwards till the last payment and without protest from the petitioner. She submits that the said deduction was rightly made as the petitioner had not claimed any *force majeure* condition during the execution of the work. She further relied upon order dated 19th May, 2017 passed by the *High Court of Chhattisgarh at Bilaspur in Arbitration Application No.40 of 2016, M.A. Builders v. Union of India and Ors.* and also order dated 2nd May, 2017 passed by the High Court of Allahabad in Arbitration

Application No.25 of 2013 ***Prestige Urban Infratech Pvt. Ltd. v. Lucknow Development Authority and Ors.*** to contend that once there is an accord and satisfaction, reference to arbitration cannot be made.

The counsel for the petitioner vehemently denies that there was any accord or satisfaction of the disputes. He submits that the “No Claim Certificate” had been issued only so as to ensure that the payment is released in favour of the petitioner without any delay and the petitioner had repeatedly lodged protest against the deductions made by the respondent from the RA bills.

I have considered the objections raised by the counsel for the respondent, however, I find no merit in the same.

Section 11 (6A) of the Act is reproduced herein below:

“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.”

A reading of the above provision would make it amply clear that while exercising jurisdiction under Section 11 of the Act, the Court has to confine its examination only to the question of existence of an arbitration agreement. Reference in this regard may be made to the order dated 19th December, 2017 passed by this Court in ***KSC Construction Company v. Union of India*** Arbitration Petition 751/2017, wherein relying on the judgment of the Supreme Court in ***M/s. Duro Felguera, S.A. V. M/s. Gangavaram Port Limited*** (2017) 9 SCC 729, this Court had reiterated that the question whether certain

disputes fall under the “excepted matters” or are beyond the terms of the contract are questions to be determined by the arbitrator and this Court cannot refuse to appoint an arbitrator based on such pleas. The same principle shall apply to the effect of execution of ‘No Claim Certificate’. Whether such ‘No Claim Certificate’ was executed freely or under coercion or the effect thereof, is a question to be determined by the arbitrator and not by this Court while exercising its powers under Section 11 of the Act. Similarly, whether the petitioner can challenge the Price Reduction Schedule or the application thereof to the facts of the case, is again for the arbitrator to decide.

The existence of the arbitration agreement in this case has not been denied by the respondent.

The judgment of this Court in *GAIL (India) Limited (supra)* relied upon by the counsel for the respondent was passed on an appeal under Section 37 of the Act and at the stage of considering the validity of the final award passed by the arbitrator and, therefore, would have no application to the present petition, which is only at the stage of appointment of an arbitrator.

The judgment of *M.A. Builders (supra)* relied upon by counsel for the respondent relates to an invocation of arbitration prior to the coming into force of the Amendment Act, 2015 and does not consider the effect of Section 11(6A) of the Act and, therefore, would equally not be applicable to the facts of the present case. The same is the case with the judgment of Allahabad High Court in *Prestige Urban Infratech Pvt. Ltd. (supra)*.

In view of the above, I find no impediment in appointing a Sole

Arbitrator to adjudicate the disputes that have arisen between the parties in relation to the above mentioned 'Fax of Acceptance' and the agreement executed between the parties.

I appoint Mr. Justice Kailash Gambhir (Retd. Judge of High Court of Delhi), W-67, Greater Kailash 1, New Dehli-110048, as a Sole Arbitrator to adjudicate the disputes that have arisen between the parties. I am also informed that he is on the panel of arbitrators of the respondent. The arbitrator shall give his disclosure statement in terms of Section 12(1) of the Act before proceeding with the reference. All contentions of either party shall remain open before the Arbitrator appointed by me.

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

NAVIN CHAWLA, J.

FEBRUARY 27, 2018

Rekha