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

+ ARB.P. 338/2017

DCS LTD. (FORMERLY DELTA CONSTRUCTION
SYSTEMS LTD.) Petitioner

Through: Mr Amit Singh, Advocate.

versus

IRCON INTERNATIONAL LTD. Respondent

Through: Mr Chandan Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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15.03.2018

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an arbitrator be appointed to adjudicate the disputes that have arisen between the parties in relation to a contract dated 14.09.2005 for construction of Road upto Subgrade Layer on the Hill Section from Chole to Magna Km 99+000 to 119+430 including construction of Pipe Culverts for Ethiopian Roads Authority at Ethiopia (hereafter 'the Main Agreement').

2. It is stated that certain disputes had arisen in relation to the Main Agreement and the petitioner had sought to refer the claims to the arbitration. However, since, there was no arbitration clause, the

parties, pursuant to the order passed by this Court on 02.02.2015 *in ARB.P. 260/2014* captioned as ‘*DCS Ltd. v. IRCON International Ltd.*’, entered into a supplementary agreement dated 23.02.2015 (hereafter ‘the Supplementary Agreement’) for reference of the aforesaid disputes to arbitration.

3. In terms of Clause 1.2 of the Supplementary Agreement, the parties agreed to settle their disputes in relation to the Main Agreement through arbitration as per the Act.

4. Thereafter, by a letter dated 03.05.2017 (a copy of which has been handed over across to this Court), the Chairman & Managing Director of the respondent referred the disputes in connection with the settlement of claims raised by the petitioner to the Sole Arbitrator.

5. The said claims included loss in over heads due to loss in expected turnover between July 2006 and January, 2007 (Claim no.1.3 in the sum of ₹21,28,200.72/-); and loss in value of equipment written off (depreciated) due to idling of equipment between July, 2006 and January, 2006 [*sic* 2007] (Claim no. 1.4 in the sum of ₹22,40,401.08/).

6. It was the petitioner’s case that the aforesaid claims fell within the scope of 65.8 (C) of the Main Agreement, which reads as under:-

“(a) the amounts payable in respect of any preliminary items referred to in the Bill of Quantities so far as the work or service comprised therein has been carried out or performed, and a proper proportion

of any such items which have been partially carried out or performed.

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- (c) a sum being the amount of any expenditure reasonably incurred by the Contractor in the expectation of completing the whole of the Works insofar as such expenditure has not been covered by any other payments referred to in this Sub-Clause.”

7. The proceedings to resolve the said disputes culminated in an arbitral award dated 04.03.2014 (hereafter ‘the award’).

8. The petitioner’s contention that the aforementioned claims (claim nos.1.3 and 1.4) were contemplated under Section 65.8(C) of the Main Agreement was noted by the Arbitrator in the award in the following manner:-

- “iv) The claimant has stated that from July 2006 till the termination of the contract during which period the design review was taken up by the Client and they had completed the work available in the drawings released to them by June end 2006, their entire establishment was idle as they could not get work fronts to execute the work. The claimant has further stated that the expenditure incurred during this idling period falls under the head of expenditure incurred in anticipation of completion of the whole of the work as contemplated under clause 65.8 (c) and it also includes the head office overhead charges. The claimant has also stated that he is not asking for compensation for the idling

period post termination but is claiming reimbursement of the expenditure incurred in anticipation of the completion of whole of the work which falls under clause 65.8© of the contract and therefore the arbitrator has complete jurisdiction for the adjudication of the same.”

9. The respondent contested the aforesaid claim; it contended that the said claims fell outside the scope of Clause 65.8 (C) of the Main Agreement, as expenditure claimed by the petitioner under those claims were not incurred in contemplation of completion of the whole work. The relevant extract of the impugned award noting the aforesaid contention advanced by the respondent is set out below:-

“Contention of the respondent

Vide submission dated 21.07.2016, the respondent has submitted his response to the submission dated 29.6.2016 by the Claimant. Gist of the submission by the respondent is as under:-

- i) As had been re-affirmed in the 6th hearing dated 23.6.2016 and replies submitted earlier, it is considered that the idling claim between July 2006 and December 2006 does not fall under any of the categories of issues mentioned in clause 74.1 or 65.8 of Conditions of particular application under which the contract was terminated.

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- iii) As has been agreed during the 5th hearing on 10.5.2016, the respondent agrees to pay the expenses verified under clause 65.8 and for which joint verification statement is already submitted, adjusted pro-rate for the value of contract already

released through RA bills. But part (b) of the claim cannot be considered on account of the following reasons:

- The present arbitration is on the matter of claims on account of termination of the contract under clause 74.1 and 65.8 which does not cover idling charges. Idling of resources as stated should have been processed as a separate claim during the course of execution of contract. It is incorrect to make it part of claims under clause 74.1 and 65.8.”

10. The Arbitral Tribunal considered the rival contentions and held that the claims in question made by the petitioner could not be considered as expenditure incurred in anticipation of completion of the whole work. This is expressly noted in para 12 of the award, which is set out below:-

“xii) The claimant has stated that during the above period of July 2006 to Jan. 2007, their entire resources were rendered idle for want of work areas as design review was in progress by the Consultants. In 3rd arbitration meeting held on 15.12.2015, it was brought to the notice of the claimant that the expenses during the above stated idling period do not fall under the jurisdiction of this arbitration proceedings. The above expenditure cannot be considered as an expenditure incurred in anticipation of completion of the whole work. The above matter can be settled by the claimant and the respondent separately. The expenses towards the above stated idling of resources should be filed by the claimant as a separate claim. In view of the above, the claim for the idling of resources is

considered out of purview of the subject arbitration proceedings and hence not discussed further.”

11. The learned counsel appearing for the petitioner contended that the aforesaid finding of the Arbitrator must be read to mean that the Arbitrator had declined to adjudicate the said claims, since it has been expressly stated that the above matter can be settled by the claimant and the respondent separately. And, the expenses towards above stated idling of resources should be filed by the claimant as a separate claim. He stated that in the aforesaid view, an Arbitrator is required to be appointed to adjudicate the said claims of the petitioner, which remain undecided.

12. This Court is unable to accept the aforesaid contention as admittedly, the petitioner had urged before the Arbitral Tribunal that the claims were justified as falling under section 65.8(C) of the Main Agreement. This issue has been squarely decided against the petitioner.

13. After the award was rendered, the petitioner filed an application under Section 33 of the Act for rectification of the award, urging that the said disputes fell within the jurisdiction of the Arbitrator. The same was also rejected by an order dated 04.01.2017 passed by the Arbitrator. The relevant extract of the said order reads as under:-

“4.0 Discussion/decision on the submission by the claimant

a. Request for payment of the expenditure incurred during the period July 2006 to

January 2007

The request of the claimant has been examined. The expenditure incurred by the claimant during the stated idling period from July, 2006 to Jan 2007 cannot be considered as expenditure reasonably incurred in expectation of completing the whole of the work. It is a matter to be separately decided between the claimant and the respondent. In the response dated 20th July, 2016, under para 3(a), the respondent has stated that the stated idling of resources during the above period is beyond the purview of the arbitration proceedings. The respondent has also disputed the stated idling of resources. Mere joint verification of expenditure cannot be construed as acceptance of the respondent for the above claim. The reasons for not admitting the above expenditure as compensation payable to the claimant under the applicable contract conditions have been amply elaborated in the award dated 14th October, 2016.

Decision of the Arbitrator

No change in the arbitration award announced on 14th October, 2016.”

14. The petitioner may be aggrieved by the decision of the Arbitrator to not accept the petitioner's claims under Section 65.8 (C) of the Main Agreement; however, that cannot be a ground for the petitioner to re-agitate the said issues. It is apparent from the above that the disputes raised by the petitioner had been addressed (rightly or wrongly) by the Arbitral Tribunal. Thus, the question of appointing

an arbitrator for adjudicating any further disputes in these proceedings does not arise. The petition is, accordingly, dismissed.

VIBHU BAKHRU, J

MARCH 15, 2018
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