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

+ **ARB.P. 518/2017**

J & S CONSTRUCTIONS

..... Petitioner

Through: Mr S. W. Haider, Advocate.

versus

UNION OF INDIA

..... Respondent

Through: Mr N. Prashant Kumar Nair,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **16.05.2018**

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying as under:-

“a) appoint an independent arbitrator to adjudicate upon all the 11 claims of the petitioner amounting to Rs.6,64,26,730.43/-, (Rupees Six Crores Sixty Four Lac Twenty Six Thousand Seven Hundred Thirty and Forty Three Paise Only) as raised in the invocation notice or in the alternative the left out 6 claims being claims no.3, 6, 8, 9, 10 & 11 of the petitioner be referred before the said independent arbitrator.”

2. The disputes had arisen between the parties in relation to the agreement dated 06.07.2011 (hereafter 'the Agreement') which includes an arbitration clause. The said agreement includes an arbitration clause, which reads as under:-

“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 ‘expected 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) – 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 termwise. 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 alongwith 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 or 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 Manager 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(3)(a)(i), 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 Manager shall appoint at least 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. In view of the disputes that have arisen between the parties, the petitioner invoked the arbitration clause by a letter dated 11.01.2016 seeking reference of its claims – eleven in number – which the petitioner desires to be referred to arbitration. Thereafter, the respondent constituted an arbitral tribunal in terms of the said clause. The said Arbitral Tribunal consists of two serving officers and one former employee of the Railways. Although the Arbitral Tribunal was constituted, the respondent referred only some of the claims (five in number) and did not refer the balance six claims claiming that the same were excepted matters. It is in this context that the petitioner approached this Court for appointment of an arbitrator to adjudicate the said claims.

4. The learned counsel appearing for the respondent submitted that the said claims were not referred, as they were excepted matters. However, the learned counsel appearing for the petitioner disputes that any of the said claims falls within the scope of excepted matters. Plainly, this is a contentious issue, which is not necessary for this Court to decide in this proceeding.

5. The question whether any matter is within the scope of the arbitration clause shall also at the first instance be required to be adjudicated by the arbitral tribunal. Thus, the arbitrator(s) are required to be appointed to adjudicate the six claims raised by the petitioner. This would also include the question as to the arbitrability of those said claims.

6. The learned counsel appearing for the petitioner submits that the remaining six claims be also referred to the Arbitral Tribunal constituted to adjudicate the other claims raised by the petitioner. However, at this stage, learned counsel appearing for the petitioner states that the Arbitral Tribunal so constituted is ineligible to conduct any arbitral proceedings in view of the express language of Section 12(5) of the Act. He further submits that the respondent had forwarded a letter dated 23.08.2017 calling upon the petitioner to waive the applicability of Section 12(5) of the Act as introduced by the Arbitration and Conciliation (Amendment) Act, 2015. However, the petitioner is unwilling to enter into any such agreement waiving the applicability of Section 12(5) of the Act.

7. The learned counsel for the respondent does not dispute that the Arbitral Tribunal so constituted is ineligible to act as such by virtue of Section 12(5) of the Act. In view of the above, the learned counsel appearing for the respondent states that instead of an arbitral tribunal of three members, a sole arbitrator be appointed to adjudicate the disputes in question.

8. In view of the consensus between the parties, a sole arbitrator is required to be appointed to adjudicate the subject disputes. This Court is also of the view that since the Arbitral Tribunal constituted to adjudicate other five claims raised by the petitioner is ineligible to act as such, it would be apposite that the said disputes are also referred to the independent arbitrator appointed to consider the six claims that were not referred to arbitration.

9. In view of the above, Mr C.M Nayar, Judge (Retd.) (Mobile no. 9811200328) is appointed as a Sole Arbitrator to adjudicate the disputes that

have arisen between the parties and as set out by the petitioner in its letter dated 11.01.2016. This is subject to the Arbitrator making the necessary disclosure under section 12 of the Act and not being ineligible under section 12(5) of the Act.

10. The Arbitrator shall fix the fee in consultation with the counsel for the parties and having regard to the fourth schedule to the Act.

11. The parties are at liberty to approach the Arbitrator for further proceedings.

12. The petition is disposed of in the above terms.

VIBHU BAKHRU, J

MAY 16, 2018

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