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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 09th January, 2018
Pronounced on: 18th January, 2018

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ARB.P. 747/2017, IA No.287/2018

M/S CCC BUILDERS MERCHANT PRIVATE LIMITED

..... Petitioner

Through : Ms.Manmeet Arora and
Ms.Samapiha Biswal and
Mr.Keshav Sehgal, Advocates.

versus

CONTAINER CORPORATION OF INDIA LIMITED

..... Respondent

Through : Mr.D.D.Singh and Ms.Seeratdeep
Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The brief facts as alleged by the petitioner are:
 - a) The respondent awarded the LOI dated 09.09.2009 in favour of the petitioner for civil works of "strengthening of existing pavement with M-50 Grade CC Block Pavement at ICD, Balasore, (Orissa)";
 - b) the petitioner company submitted performance bank guarantees dated 15.09.2009 for a sum of Rs. 11,07,398/- and 08.10.2009 for a sum of Rs. 2,56,000/- respectively, issued by Axis Bank Limited, amounting to 5% of the

contract value, equivalent to a total sum of Rs.13,63,398/-;

- c)* on 30.10.2009 the petitioner and the respondent executed the Contract;
- d)* the petitioner completed and handed over the project to the Respondent, within the extended period of the Contract, i.e. on 08.11.2010;
- e)* the petitioner, raised the 3rd and final bill dated 03.02.2011 amounting to Rs.1,25,00,000/-;
- f)* on 09.02.2011 the 3rd and final bill was forwarded to the respondent by M/s RITES Limited, the project management consultant of the respondent company;
- g)* on 10.09.2012 the respondent illegally rescinded the Contract on false and baseless grounds and threatened to forfeit the security deposit and encash the performance bank guarantees of the petitioner;
- h)* on 18.09.2012 the Petitioner duly replied to the aforesaid letter of the Respondent, urging the Respondent to revoke the illegal rescission of the Contract.
- i)* the respondent wrote to Axis Bank Limited on 21.09.2012 to invoke the Performance Bank Guarantees submitted by the Petitioner, without giving any reasons whatsoever for invocation of the same;
- j)* on 24.09.2012 the petitioners filed an arbitration petition under Section 9 of the Arbitration and Conciliation Act, 1996, bearing no. O.M.P. No. 907 of 2012, seeking stay

of the invocation of the performance bank guarantees by the respondent. This Hon'ble Court was pleased to grant stay of invocation of the performance bank guarantees, through its Order dated 24.09.2012;

- k)* on 03.10.2012 this Court disposed of O.M.P. No. 907 of 2012 since the performance bank guarantees had already been invoked and granted liberty to the petitioner to seek interim relief in arbitral proceedings, as and when commenced, in accordance with law;
- l)* on 10.01.2013, the Respondent unilaterally transferred an amount of Rs. 63,36,522/-, to the account of the Petitioner and intimated the Petitioner vide its letter dated 14.01.2013 that the said payment was made against the gross bill of Rs. 1,08,42,722/-, settled by the Respondent. The Respondent had however had illegally and arbitrarily deducted monies under various heads such as recovery for rejection of blocks, recovery for lower grade blocks, etc. The Respondent deducted TDS on the said amount and furnished the return in respect of the same on 07.05.2013, which has been disclosed in Form 26AS of the Petitioner Company for the Assessment Year 2013-14;
- m)* on 25.03.2013 the petitioner sent a Notice of Arbitration dated 25.03.2013, calling upon the respondent to make payment of the legitimate dues payable to the petitioner company, and invoking arbitration to resolve the disputes

and differences between the parties in terms of Clause 64 of the Contract. This was received by the respondent on 28.03.2013;

- n)* on 23.04.2013 the respondent replied to the said Notice of Arbitration vide letter dated 23.04.2013, denying all the claims made under the said Notice of Arbitration of the Petitioner on false and baseless grounds;
- o)* the petitioner company sent letters dated 23.04.2013 and 02.08.2013, reiterating its stand, and urged the Respondent to appoint an arbitrator for resolution of the disputes between the parties;
- p)* the respondent refused to accede to the request of the petitioner to initiate arbitration proceedings vide its reply letters dated 01.05.2013 and 21.08.2013;
- q)* on 07.11.2014 the petitioner approached this Court for appointment of an Arbitrator by way of arbitration petition under Section 11 of the Arbitration and Conciliation Act, 1996 bearing Arb. Pet. No. 502 of 2013. On 07.11.2014, the Court considered that the value of the claims raised by the petitioner was in excess of 20% of the value of the Contract. This Court was pleased to dismiss the petition as withdrawn, with liberty to the petitioner, to take recourse to appropriate remedy;
- r)* the petitioner sent a notice of arbitration dated 06.11.2017, for appointment of arbitrator in terms of Clause 64 of the Contract and for commencement of

arbitral proceedings to adjudicate upon the unresolved disputes and differences between the parties within a period of seven days from the receipt of the present communication, whereby the petitioner has intimated the respondent of its decision to restrict its claims to 20% of the total contract value i.e. Rs. 55,70,000/- (approximately). The respondent has deliberately not replied to the said Notice dated 06.11.2017 till date. The respondent has failed to act under the procedure agreed between the parties for appointment of Arbitrator under Clause 64 of the Contract dated 30.10.2009. Hence, this petition.

2. Clause 64(1) (i) of the General Conditions of Contract is as under:

“64(1) (i)- Demand for Arbitration :-

In the event of any dispute or difference between the parties here to 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 'excepted 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 then dispute or difference be referred to arbitration.”

3. Clause 36.1 of Special Condition of Contract is as under:

“36.1 The provision of clause 63 & 64 of General Conditions of Contract will be applicable only for settlement of claims or disputes between the parties for value less than or equal to 20% of the value of the contract and when claim or disputes are of value more than 20% of the value of the contract, provision of clause 63 & 64 and other relevant clauses of the General Conditions of Contract will not be applicable and arbitration will not be remedy for settlement of such disputes.”

4. The counsel for the respondent contends where the dispute is of the value more than 20% value of the contract the arbitration clause would not apply. Admittedly the total value of the contract initially was Rs.2.72 crores but later was revised to Rs.2.78 crores. In paras No. 10 and 11 of the petition the petitioner says:

“ 10. That till date the Respondent has withheld the said legitimate dues of the Respondent Company, and the disputes between the parties remain unresolved even as on date. The Petitioner has now decided to restrict its claims to the extent of 20% of the value of the Contract, amounting to Rs. 55,70,000/- (approximately), on account of its claims against the Respondent, including but not limited to Recovery towards rejection of blocks, testing charges, Bank Guarantees, Security Deposit and Interest, for efficacious

disposal of the disputes in terms of the arbitration procedure under the Contract. There can now be no impediment in commencement of the arbitral proceedings, in view of the reduction of the claims.

11. That in terms of the aforesaid decision of the Petitioner, the Petitioner sent a Notice of Arbitration dated 06.11.2017, for appointment of arbitrator in terms of Clause 64 of the Contract and for commencement of arbitral proceedings to adjudicate upon the unresolved disputes and differences between the parties, whereby the Petitioner has intimated the Respondent of its decision to restrict its claims to 20% of the total Contract Value i.e. Rs. 55,70,000/- (approximately). The said Notice dated 06.11.2017 was delivered by hand to the registered address of the Respondent on the same day as well as by email, speed post and courier.”

5. Bare perusal of the above would reveal the petitioner has restricted its claim to 20% of the value of the contract. Even the notice dated 06.11.2017 for demand for arbitration, refers to clause 64(1) of the contract and speaks of restricting of claim to 20% of the total value of the contract and hence the arbitration clause is applicable.

6. Secondly the learned counsel for the respondent raised an issue of limitation stating interalia since the final bill was settled in the year 2013 the claim of the petitioner is highly barred by limitation.

7. Now section 11(6A) of the Arbitration and Conciliation Act 1996 read as under:

“11(6A) 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.”

8. Per Section 11 (6A), this Court need not go into question of limitation and at this stage it only needs to see if there exist an arbitration agreement and in the present case it exist.

9. In *Duro Feleguera, S.A. vs. Gangavaram port Limited* (2017) 9 SCC 729 the Court held:

“14. The Arbitration and Conciliation (Amendment) Act, 2015 (w.e.f. 23.10.2015) has brought in substantial changes in the provisions of the Arbitration and Conciliation Act, 1996. After the Amendment Act 3 of 2016, as per the amended provision of sub-section (6A) of Section 11, the power of the court is confined only to examine the existence of the arbitration agreement. It further clarifies that the decision of appointment of an arbitrator will be made by the Supreme Court or the High Court (instead of Chief Justice) and under Section 11(7), no appeal shall lie against such an appointment.”

10. Though in I may also refer to *M/s S.B.P. & Co. vs. M/s.Patel Engineering Ltd. and Anr.* AIR 2006 Supreme Court 450 wherein the Supreme Court held:

“Merely because the main purpose was the constitution of an arbitral tribunal, it could not be taken that the exercise of power is an administrative power. While constituting an arbitral tribunal, on the scheme of the Act, the Chief Justice has to consider whether he as the Chief Justice has jurisdiction in relation to the contract, whether there was an arbitration agreement in terms of Section 7 of the Act and whether the person before him with the request, is a party to the arbitration agreement. On coming to a conclusion on these aspects, he has to enquire whether the conditions for exercise of his power under Section 11(6) of the Act exist in the case and only on being satisfied in that behalf, he could appoint an arbitrator or an arbitral tribunal on the basis of the request. It is difficult to say that when one of the parties raises an objection that there is no arbitration agreement, raises an objection that the person who has come forward with a request is not a party to the arbitration agreement, the Chief Justice can come to a conclusion on those objections without following an adjudicatory process. Can he constitute an arbitrary tribunal, without considering these questions? If he can do so, why should such a function be entrusted to a high judicial authority like the Chief Justice. Similarly, when the party raises an objection that the conditions for exercise of the power under Section 11(6) of the Act are not

fulfilled and the Chief Justice comes to the conclusion that they have been fulfilled, it is difficult to say that he was not adjudicating on a dispute between the parties and was merely passing an administrative order. It is also not correct to say that by the mere constitution of an arbitral tribunal the rights of parties are not affected. Dragging a party to an arbitration when there existed no arbitration agreement or when there existed no arbitrable dispute, can certainly affect the right of that party and even on monetary terms, impose on him a serious liability for meeting the expenses of the arbitration, even if it be preliminary expenses and his objection is upheld by the arbitral tribunal. Therefore, it is not possible to accept the position that no adjudication is involved in the constitution of an arbitral tribunal.”

11. However the aforesaid judgment was considered in *Indian Oil Corporation Ltd. vs. SPS Engineering Ltd.* (2011) 3 SCC 507 (old Act) wherein the Supreme Court held:

“13. This Court, in National Insurance Co. Ltd. vs. Boghara Polyfab Private Limited [2009 (1) SCC 267] following the decision in SBP & Co. v. Patel Engineering Ltd. [2005 (8) SCC 618], identified and segregated the issues that may be raised in an application under section 11 of the Act into three categories, as under :

"22.1. The issues (first category) which the Chief Justice/his designate will have to decide are :

(a) Whether the party making the application has approached the appropriate High Court?

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement?

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim?

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection?

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration)?

(ii) Merits or any claim involved in the arbitration."

14. xxx ... The Chief Justice or his designate is not expected to go into the merits of the

claim or examine the tenability of the claim, in an application under section 11 of the Act. The Chief Justice or his Designate may however choose to decide whether the claim is a dead (long-barred) claim or whether the parties have, by recording satisfaction, exhausted all rights, obligations and remedies under the contract, so that neither the contract nor the arbitration agreement survived. When it is said that the Chief Justice or his Designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time barred claim and there is no need for any detailed consideration of evidence. We may elucidate by an illustration: If the contractor makes a claim a decade or so after completion of the work without referring to any acknowledgement of a liability or other factors that kept the claim alive in law, and the claim is patently long time barred, the Chief Justice or his Designate will examine whether the claim is a dead claim (that is, a long time barred claim). On the other hand, if the contractor makes a claim for payment, beyond three years of completing of the work but say within five years of completion of work, and alleges that the final bill was drawn up and payments were made within three years before the claim, the court will not enter into a disputed question whether the claim was barred by limitation or not. The court will leave the matter to the decision of the Tribunal. If the distinction between apparent and obvious dead claims, and claims involving disputed issues of limitation is not kept in view, the Chief

Justice or his designate will end up deciding the question of limitation in all applications under section 11 of the Act.”

12. In view of section 11(6A) of the Act and the Law discussed above, I allow the petition under Section 11 of the Arbitration and Conciliation Act and appoint Sh.Amarnath, District Judge (Retd.) (Mobile No.9958697030) as an Arbitrator. The parties to appear before him on 06.02.2018. The arbitration proceedings shall be held under the aegis of Delhi International Arbitration Centre (DIAC) with fee schedule as applicable. Necessary Declaration(s) be made.

13. Petition stands disposed of in terms of the above. The pending application also stands disposed of.

JANUARY 18, 2018

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YOGESH KHANNA, J