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

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Date of decision: 08.11.2019

+ ARB.P. 355/2019

V R TECHICHE CONSULTANTS PRIVATE LIMITED

..... Petitioner

Through: Mr. Anurag Sharma and Mr. Sunil
Singh Parihar, Advocate.

versus

INDIAN HIGHWAYS MANAGEMENT COMPANY LIMITED

..... Respondent

Through: Ms. Soumya Priyadarshinee,
Advocate.

**CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH**

JYOTI SINGH, J. (ORAL)

1. This is a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act') for appointment of an Arbitrator.

2. A contract was entered into between the petitioner and the respondent on 10th February, 2015 for traffic survey on various National Highways. The same was valid for a period of five years with an extension of one year at the discretion of the respondent. During the pendency of the contract the petitioner noticed that the respondent had on its website issued a fresh tender for traffic survey using portable ATCC system. Since the scope of work in

the said tender was substantially the same as that of the contract with the petitioner, the petitioner approached the respondent for resolving some issues and seeking clarifications. A pre-bid meeting took place between the parties.

3. The petitioner on learning that the work may be Awarded to another contractor filed an application under Section 9 of the Act in this Court, being OMP (I) (COMM) 207/2018. An interim order was passed by this Court on 7th May, 2018 restraining the respondent from terminating the contract and allowed respondents to open the bids subject to further orders of the Court. Petitioner participated in the bid process but also invoked arbitration vide notice dated 10th August, 2018. Thereafter a petition under Section 11(6) of the Act was also filed, being Arb.P.No.35/2018.

4. During the pendency of the petition under Section 9 of the Act, parties resolved certain disputes and entered into a settlement which was recorded in writing on 19.11.2018. Terms of the said settlement are as under:

"Therefore, the committee proposed two options to M/s VR Techniche Consultants Pvt. Ltd as per below:"

a) To conduct the balance traffic surveys as per rate quoted by L1 agency of Phase-III

b) To abide by the Legal process

During discussion with representatives of M/s VR Techniche Pvt. Ltd. for the above said proposal, they confirmed their reply for the above mentioned (a) option above, the representative of M/s VR Techniche Consultants Pvt. Ltd. gave their consent that they agree to match the rate of L1 agency of Phase III REP."

5. In terms of the said settlement, the petitioner had agreed to conduct the balance traffic surveys by matching the L-1 rate quoted by the other agency, for Phase-III REP. The petition under Section 9 was disposed of in
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view of the settlement by an order dated 27.11.2018. Relevant part of the said order is as under:

“3. According to Ms. Priyadarshinee, in view of what has been decided at the meeting dated 19.11.2018, there is presently no dispute obtaining between the parties and therefore, the present petition need not be actioned further.

4. The record shows that the counsel for the parties had been taking time to arrive at a settlement. Since a settlement has been arrived at, to my mind, nothing survives in the captioned petition.

5. In any event, the captioned petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996, therefore, in my opinion, no relief can be granted at this juncture in the captioned petition.

6. Vide order dated 21.01.2019, the Arb. P. 35/2019 filed under Section 11 of the Act was also disposed of with the following order:

“Admittedly, the Petitioner did not protest after the Conciliation Meeting on 19.11.2018 or challenge the finding of the settlement recorded in the order dated 27.11.2018. The present petition is relying upon the earlier invocation of arbitration by notice dated 10.08.2018 and is therefore not maintainable.”

7. Learned counsel for the respondent has raised a preliminary objection to the maintainability of the petition. It is contended that during the pendency of the petition under Section 9 of the Act, the parties had arrived at a settlement, which was duly recorded and this Court had accordingly disposed of the petition. Even the petition under Section 11 was disposed of.

The claims sought to be raised in the notice of invocation which are a subject matter of the present petition are the same as had been raised earlier and on which settlement was recorded. Neither of the two judicial orders have been assailed by the petitioner. The argument thus is that the settlement between the parties and the two judicial orders have attained finality and it is not open to the petitioner to seek adjudication of the same very disputes by invoking fresh arbitration. Since the petitioner is not entitled to a second arbitration, on disputes already settled, it cannot seek appointment of the arbitrator through the present petition.

8. Learned counsel for the petitioner on the other hand contends that the objection of the respondent is misconceived. When the settlement process was going on between the parties, there were two options which were given to the petitioner and the petitioner had agreed to the first option viz. matching the price with the L-1 agency. Nothing beyond this was settled and that is the reason that when the petition was disposed of by this Court, it had categorically recorded the stand of the respondent that 'presently' no dispute remained between the parties. The word 'presently' is of great significance according to the petitioner. Learned counsel further contends that there is a valid and subsisting arbitration agreement and there has been no settlement or adjudication of the disputes between the parties, being raised here more particularly, the issue of differential amounts.

9. Learned counsel for the petitioner further contends that in fact, SOWIL, a party identically placed as the petitioner had been granted liberty to agitate the issue of differential amount, vide order dated 30.10.2018 passed in Arb. P. 593/2018. It is pointed out that this fact has been recorded in the order dated 07.05.2018, passed by this Court in the case filed by the

petitioner being OMP(I)(COMM) 207/2018. It is further submitted that neither the Minutes of the Meeting nor the order dated 27.11.2018 make any reference to the issue of differential amounts which is now sought to be adjudicated by the petitioner. This issue has been raised by the petitioner for the first time in its notice invoking arbitration on 21.01.2019. Therefore, it is a different and a fresh cause of action.

10. I have heard the learned counsels for the parties and examined their contentions.

11. A perusal of the notice of invocation dated 21.01.2019 clearly shows that the dispute that the petitioner is now seeking to adjudicate through the process of arbitration is with regard to the differential amount to the tune of Rs. 8,58,63,481/-. The said disputes are stated to have arisen after the settlement meeting dated 19.11.2018. There is merit in the contention of the petitioner that what was settled in the meeting was only with regard to the petitioner agreeing to match its price, which was higher at that time, with the price of the agency who was L-1. This is evident from a reading of the minutes of the meeting quoted above. Petition under Section 9 of the Act was disposed of on account of this settlement and the Court had clearly recorded that for the present, there was no dispute surviving between the parties. Even the petition under Section 11 of the Act was disposed of on the basis of the said settlement dated 19.11.2018 as the subject matter of the petition was the invocation dated 10.08.2018.

12. It is clear that the dispute with regard to the alleged claim of the petitioner with regard to the differential amount could not have arisen when the settlement was arrived at. Needless to say that the two judicial orders being relied upon by the respondent also did not relate to the claim of the

differential amount. Thus, the petitioner is right in invoking arbitration afresh for the alleged claims of differential amount. I also find merit in the argument that SOWIL was similarly placed and once the Court had granted liberty to the said party to invoke arbitration with respect to its claim for differential amount, there is no reason why the petitioner herein should be deprived of the said liberty.

13. In my view, the petitioner has clearly substantiated that the claims being sought to be referred to arbitration through the present proceedings are different from the ones which had been settled and the subject matter of the earlier litigation. The petition thus deserves to be allowed.

14. At this stage, learned counsels for both the parties suggest the name of Hon'ble Mr. Justice Badar Durrez Ahmed, former Chief Justice of Jammu & Kashmir High Court to be appointed as a Sole Arbitrator to adjudicate the disputes between the parties.

15. With the consent of the parties, Hon'ble Mr. Justice Badar Durrez Ahmed, former Chief Justice of Jammu & Kashmir High Court is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.

16. The address of the learned Arbitrator is as under:

Hon'ble Mr. Justice Badar Durrez Ahmed,
Former Chief Justice, Jammu & Kashmir High Court
14, Friends Colony (West), Block-A, Mathura Road,
New Delhi-110065

17. The learned Arbitrator shall give disclosure under Section 12 of the Act before entering upon reference.

18. Fee of the Arbitrator shall be fixed as per Fourth Schedule of the Act.

19. The petition is disposed of along with the pending applications in the aforesaid terms.

JYOTI SINGH, J

NOVEMBER 08, 2019
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