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

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Date of decision: 26.09.2019

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ARB.P. 384/2019

GARG BUILDERS THROUGH SHRI

MOHINDER PAL GARG

..... Petitioner

Through: Mr. Sanjay Bansal, Advocate

versus

CONTAINER CORPORATION OF

INDIA LTD. (CONCOR)

..... Respondent

Through: Mr. C.P. Rajwar, Mr. Kamal Kumar,
Mr. Aasheesh Gupta, Advocates

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

1. The present petition has been filed under Section 11 of the Arbitration & Conciliation Act, 1996 ('Act') seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties relating to an agreement dated 08.08.2014.
2. The dispute relates to release of Rs. 79,67,474/- towards Service Tax in favour of the petitioner. The stand of the petitioner is that the respondent had adopted GCC of Northern Railway as per the tender condition read with ERRATA Corrigendum. This contains an Arbitration Clause which provides that the CMD will adjudicate the dispute or appoint an independent Arbitrator. The Arbitration Clause is reproduced as under:

"63. Matters finally determined by the. Railway :- All disputes and difference of any kind whatsoever arising out of or in

connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract shall be referred by the Contractor to the Railway and the Railway shall within 120 days after receipt of the Contractor's representation make and notify decision on all matters for which provision has been made in clauses 8(a), 18, 22(5), 39, 43(2), 45(a) 55. 55-A(S), 57, 57A. 61(1), 61(2) and 62(1)(b) of General Conditions of the contract or in any clause of the special conditions of the contract shall be deemed as 'excepted matters' shall stand specifically excluded from the purview of the arbitration clause and not referred to arbitration.

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.

(ii)- The demand for arbitration shall specify the matters which are in question or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute(s) or difference(s) in respect of which the demand has been made, together with counterclaims or set or shall be referred to arbitration and other matters shall not be included in the reference.

(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.

64 (3) (a) (i)- In cases where the total value of all claims in question added together does not exceed Rs. 10,00,000/- (Rupees ten lakhs only), the Arbitral Tribunal consist of a Sole Arbitrator who shall be either the Geheral-Manager or a Gazetted Officer of railway not below the Grade of J.A Grade nominated by the General Manager in that behalf. The Sole Arbitrator shall be appointed within 60 days from the day - when a written and valid demand for Arbitration is received by Railway.

(iii) - In cases not covered by clause 64(3) (a) (i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below J.A Grade, as the Arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more Departments of the Railway to the Contractor who will be asked to suggest to General Manager upto 2 names out of the panel for appointment as Contractor's nominee. The General Manager shall appoint at least one out of them as the Contractor'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 till be necessary to ensure that one of them is from Accounts Deptt. An Officer of Selection grade of the Accounts Deptt. 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.

(iv) - In one or more of the Arbitrators appointed as above refuses to act as Arbitrator, withdraws from his office as Arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as Arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new Arbitrator/Arbitrators to act in his/their place in the same manner in which the earlier Arbitrator/Arbitrators had been appointed. Such reconstituted

Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous Arbitrator(s).

(vi) - While appointing arbitrators under sub-clause (i), (ii) & (iii) above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or to who in the course of his/their duties as Railway servant(s) expressed views on all or any of the matters under dispute or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will however, not be invalid merely for the reason that one more Arbitrator had in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

64 (6) The cost of arbitration shall be borne by the respective parties. The cost shall inter alia include fee of the arbitrator(s) as per the, rates fixed by the Railway Administration from time to time.

64 (7) Subject to the provisions of the aforesaid Arbitration and Conciliation Act' 1996 and the rules there under and any statutory modifications thereof shall apply to the arbitration proceedings under this clause."

3. Learned counsel submits that in accordance with the said clause, a notice of invocation dated 05.02.2019 was sent to the respondent requesting the CMD to appoint an Arbitrator, but the respondent has failed to do so.
4. Respondent has filed reply to the said petition. The main objection raised in the petition is that the petitioner had earlier filed Arbitration Petition No. 337/2019 and a Coordinate Bench of this Court had dismissed the same as the petitioner was unable to show any clause in

the agreement between the parties which contains a provision whereby clauses 63 and 64 of the GCC of the Railways had been adopted by the respondent.

5. Learned counsel for the respondent submits that even today the petitioner is unable to show that the GCC of the Northern Railway have been adopted and there is an Arbitration Clause governing the parties.
6. Learned counsel for the petitioner in the rejoinder submits that it is incorrect to state that the Court had dismissed the petition filed earlier by the petitioner. A perusal of the order passed by the Court on 15.05.2019 would show that at that time, the counsel had been unable to point out the Arbitration clause. However, while disposing of the petition, liberty was granted to the petitioner to again approach this Court, if he could produce documents which sustained his contention.
7. Learned counsel for the petitioner has also drawn the attention of the Court to the agreement dated 08.09.2014 between the parties, more particularly page 6 of the documents, wherein certain sections of the tender conditions are mentioned and Section V clearly reads as under:

*“Section V – Addendum / Corrigendum & Errata to GCC
Northern Railway”*

8. Learned counsel submits that the detailed chapter under Section V is at pages 7 to 10 of the paper book and at page 8, there is a clear reference to clauses 63 and 64 which deals with reference of disputes to Arbitration. Relevant portion reads as under:-

63. Matters Finally Determined By The Railway : All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the

work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the Railway and the Railway shall, within 120 days after receipt of the contractor's representation, make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in Clauses 8, 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57A, 61(1), 61(2) and 62(l)(b) of General Conditions of Contract or in any Clause of the Special Conditions of the Contract shall be deemed as 'excepted matters' and shall stand specifically excluded from the purview of the Arbitration Clause and not referred to Arbitration.

64.(1) Demand For Arbitration:

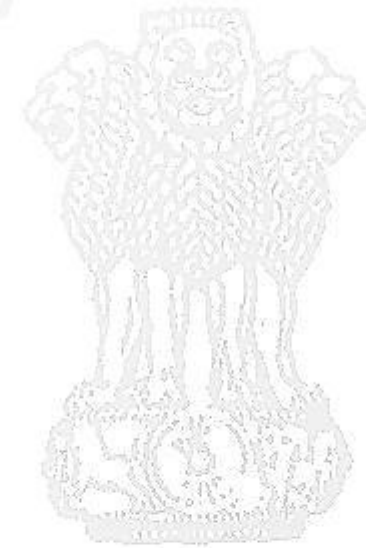
64.(1) (i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any 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 "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 the dispute or difference be referred to arbitration."

9. Faced with this, learned counsel for the respondent fairly concedes that the petitioner has been able to make out a case that the parties are governed by the GCC of Northern Railway which contains the Arbitration Clause between the parties. The learned counsel submits that the Arbitrator be appointed to adjudicate the disputes between the parties but the arbitration should be conducted under the aegis of the Delhi International Arbitration Centre (DIAC).

10. With the consent of the parties, the parties are referred to the DIAC where they shall appear on 15.10.2019 at 2 p.m. DIAC shall appoint a Sole Arbitrator for adjudicating the disputes between the parties.
11. The procedure of arbitration shall be governed by the Rules of the DIAC. Fee of the Arbitrator will be as per Fourth Schedule of the Act.
12. The Arbitrator will give a disclosure under Section 12 of the Act.
13. With the above directions, the petition is allowed.
14. Copy of the order be sent to the DIAC.

SEPTEMBER 26, 2019
pkb/rd/

JYOTI SINGH, J



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