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

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Date of Decision: 20.03.2019

+ **ARB.P. 696/2017**

ASHOKA KUMAR SUREKA, PARTNER SUREKA
INTERNATIONAL KANPUR Petitioner

Through Mr. B.S. Mathur, Adv.

versus

UNION OF INDIA & ANR Respondents

Through Mr. Praveen Kumar Jain and Ms.
Rashmi Kumari, Advs. alongwith Mr.
Vinay Gupta, UDC in person.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER
RAJIV SHAKDHER, J. (ORAL)

1. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (for short '1996 Act') for appointment of an Arbitrator.
2. There is no dispute as to the existence of an arbitration agreement obtaining between the petitioner, which is a partnership firm, and respondent no.1 i.e. Union of India (UOI).
3. To be noted, respondent no.2 is the Director General, DGOS.
- 3.1 According to me, respondent no.2 is neither a proper nor a necessary party.
4. Accordingly, respondent no.2 is deleted from the array of parties.
5. The record shows that notice in the captioned petition was issued on 1.11.2017. On that date, the respondents (now, sole respondent) were represented by Mr. Praveen Kumar Jain.
6. Four (4) weeks were granted to the respondents, at that stage, to file a

reply to the captioned petition.

7. Concededly, till now, no reply has been filed on behalf of UOI.

8. The record shows that on 13.11.2018, based on oral submissions advanced by Mr. Jain on behalf of the respondent, the contours of the objection to the appointment of an Arbitrator were recorded by me.

8.1 For the sake of convenience, the said order is extracted herein.

"1. What has emerged, after some argument, is that the petitioner before this Court had, in the first instance, filed a writ petition against the cancellation of the contract, which was dismissed on the ground that either a suit should be instituted or recourse should be taken to an arbitral process. It appears that, thereafter, the petitioner filed a suit in the Civil Court at Kanpur, which was withdrawn by the petitioner on the ground that the petitioner would take recourse to the arbitral mechanism.

1.1 This aspect emerges upon perusal of the order dated 28.05.2018 passed by the Civil Judge (Sr. Division), Kanpur City.

2. It appears that the petitioner filed an affidavit in that behalf before the Suit Court.

2.1 Consequently, I queried learned counsel for the respondents as to whether withdrawal of the suit, by the petitioner, was opposed at any stage by the respondents.

2.2 Learned counsel for the respondents says that he will have to examine the suit record.

3. Accordingly, learned counsel for the parties are directed to file the complete suit record, which would include the orders of the Court. In case, the respondents are not able to give a clear answer as to whether or not withdrawal of the suit was opposed, the instant proceedings will continue, based on what is available on record.

4. Renotify the matter on 14.12.2018."

9. As would be evident, upon perusal of the order passed on 13.11.2018, the main objection of UOI to the appointment of the Arbitrator is that the petitioner had filed a suit in the Civil Court at Kanpur which was withdrawn

and, therefore, in a sense, it led to abandonment of the arbitration agreement.

10. This was not articulated in so many words by Mr. Jain. It is my sense that this is what Mr. Jain sought to convey on that date.

11. Mr. Jain, today, emphasises this very point though and says that the petition would not lie for appointment of an Arbitrator.

12. It may also be relevant to note that I had, in fact, directed the counsel for the parties to file the suit record including orders passed by the concerned court.

13. In particular, what I desired to know was whether or not the UOI had opposed the withdrawal of the suit by the petitioner.

14. Since then, I am told by the counsel for the petitioner that he has filed an application for filing additional documents in compliance with the order dated 9.5.2018 passed by my predecessor.

14.1 My predecessor has, in fact, said the same thing which I had elaborated upon on 13.11.2018.

15. Besides this, the petitioner, it appears, has also filed an application for condonation of delay along with the certain additional documents which suggests this filing was made in and around 5.7.2018, while the application for filing additional documents, to which I had made a reference above, was, evidently, filed in and around 21.12.2018.

16. Mr. Jain does not dispute the fact that he has been served with the two sets of filings made on behalf of the petitioner.

17. In view of the fact that these documents are not before me, though filed with the Registry I have been handed over the photocopies of the same.

17.1 Mr. Jain does not object to my examining the documents.

18. A perusal of the documents shows that a suit was filed by the

petitioner before the Civil Judge, Kanpur Nagar, Kanpur, in which the following substantive reliefs were sought:

“(a) A decree of permanent injunction be passed in favour of the Plaintiff as against the Defendants restraining the Defendants not to give effect to the illegal cancellation letter dated 30.6.2015.

(b) A decree of Mandatory injunction directing the defendants to refix the delivery period of the contract in respect of supply order no.A/59718/Shirt Khaki-CLO-1/Proc. Sec./2293 dated 04.11.2014.

(c) Cost of the suit be awarded in favour of Plaintiff as against the Defendants.”

19. Furthermore, a perusal of the plaint shows that the petitioner was awarded a tender for supplying men's shirts (i.e. Cellular Khaki Shirts).

20. The petitioner was required to supply 1,75,939 numbers of such shirts. It appears that this arrangement between the petitioner and UOI formed subject matter of a Contract Agreement dated 11.11.2014. This contract was, however, cancelled by UOI. The cancellation was ordered by UOI via communication dated 30.6.2015.

21 It is this grievance qua this aspect which the petitioner had made in the suit court.

22. The additional documents filed, also show that the petitioner had filed an application before the suit court backed by an affidavit, whereupon the concerned Court passed certain orders. The relevant orders read as follows:

“23.4.18

Plaintiff present

Fix 28.5.18 for ... (Illegible)

28.4.18

Application moved by the Plaintiff that they want to take the case to Arbitration therefore appeared for dismissing the matter . It is ordered that he may appear on date fixed

28.5.2018

Case called. Plaintiff present through Advocate . Plaintiff in support of his application no 44-K has filed an Affidavit saying that they want to take the present dispute to arbitration due to which they do not wish to press the present plaint . Therefore, since they do not wish to pursue it may be dismissed. An affidavit has been filed today in support this statement

Heard, considered

Plaintiff wants to take the dispute to arbitration and does not want to press at this stage through application no 44-K. Application 44-K is supported with an affidavit . Plaintiff does not wish to pursue his plaint at this stage. In view of above circumstances application no 44-K is worth accepting

ORDER

Application no 44-K is hereby accepted. In consideration of Plaintiff application no 44-K for not pursuing the matter further, same is dismissed. Records may be consigned to records for further action”

23. A perusal of these orders shows that the petitioner withdrew the suit action. The withdrawal application was supported by an affidavit in which the petitioner indicated that having confabulated with the counsel for the UOI the petitioner came to the conclusion that the best cause of action would be to withdraw the suit and proceed to take action under the arbitration agreement.

24. As would be evident, from the proceeding of 13.11.2018, to which I had made a reference above, the petitioner had also filed a writ which was dismissed. The writ court had indicated to the petitioner that he should either take recourse to a suit or an arbitral process.

25. It may be relevant to note that the petitioner may have, perhaps, moved the captioned petition while the suit was still pending before the

Civil Judge at Kanpur.

26. This is apparent from the fact that notice in the captioned petition was issued on 1.11.2017 whereas the orders to which I had made a reference above, were passed in the month of April and May, 2018. The suit was registered in 2015.

27. It is based on this that Mr. Jain says that the present petition would not lie as the suit has been withdrawn without liberty to prosecute with the captioned petition.

28. I may also indicate that the counsel for the petitioner had submitted that while in the suit reliefs had been sought with regard to the cancellation letter dated 30.6.2015, at this juncture, the petitioner seeks refund of its security deposit which is at present the only outstanding dispute which he seeks to agitate.

29. In other words, counsel for the petitioner says that the petitioner no longer seeks a direction that the *status quo ante* be maintained which obtained prior to the cancellation of the contract agreement dated 11.11.2014.

30. I have heard the learned counsel for the parties.

31. As noted above, there is no rebuttal on record filed by UOI. Therefore, in a sense, the averments made in the petition have to be accepted.

32. Having said so, to my mind, Mr. Jain does make a point, which is, that the suit was pending before the Civil Judge at Kanpur, when a parallel proceeding was initiated in this Court.

33. Mr. Jain is also right in saying that in paragraph N at page 15 of the petition, an assertion has been made that the suit stands already withdrawn.

While these aspects, which have been raised by Mr. Jain, may point in the direction that the petitioner did not make a full and complete disclosure, to my mind, it is possible that the petitioner was ill-advised. It is not unknown that at times litigants receive advice from inexperienced counsel which is legally untenable. Therefore, in my opinion, if I were to accept the objection raised by Mr. Jain, which is, that since the suit was withdrawn without liberty of the concerned Court to pursue this petition and, therefore, this petition should be dismissed, it would result in the petitioner being completely without a remedy. The orders passed by the Suit Court do show that the petitioner did disclose his intention to pursue the arbitration agreement obtaining between the parties and this stand was based on the petitioner's confabulation with the counsel for UOI. Nothing has been placed before me by the counsel for UOI that this assertion made on affidavit before the Suit Court was not correct. Therefore, if this stand is correct, then, surely UOI cannot encourage the petitioner to withdraw the suit to pursue the arbitration petition and at the same time object to the maintainability of the instant petition.

34. The petitioner has already, as noted above, taken recourse to a writ petition which was dismissed.

35. Thereafter, the petitioner took recourse to a suit which has been withdrawn, though while the captioned petition was pending.

36. Given the aforesaid circumstances, I am inclined to allow the petition and appoint an Arbitrator in the matter as there is no dispute obtaining between the parties as to the existence of the arbitration agreement.

37. I may also note an aspect to which I have adverted to above, which is, that the petitioner says that at the present juncture he only wishes to

adjudicate his claim *vis-a-vis* retention of security deposit by UOI and that he does not seek the restoration of the contract.

38. Thus, having regard to the foregoing, as indicated above, the prayer made in the petition is allowed.

39. Accordingly, Mr. Balwan Singh Chumbakh, Retd. ADJ, Delhi (Cell No.: 09717577008), is appointed as an Arbitrator.

(i) The learned Arbitrator will be paid his fee in terms of the provisions of the Fourth Schedule appended to the 1996 Act.

(ii) The learned Arbitrator, before entering upon reference, will file a declaration in terms of Section 12 and other attendant provisions of the 1996 Act.

40. The petition is disposed of in the aforesaid terms.

41. For the sake of good order and record, the Registry will scan and upload the copies of the documents and applications which were handed over to me in Court today.

RAJIV SHAKDHER, J

MARCH 20, 2019

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