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

+ **ARB.P. 588/2019**

UNION OF INDIA

..... Petitioner

Through: Mr. Rajesh Gogna, CGSC with Mr. Akshya,
Adv.

versus

SHAPOORJI PALLONJI & CO PVT LTD

..... Respondent

Through: Mr. Manik Dogra, Mr. Ravi Tyagi,
Mr. Animesh Sinha and Mr. Omung Gupta, Adv.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

ORDER

% **12.03.2020**

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 seeks appointment of an Arbitrator for adjudication of disputes and differences which have arisen between the parties in respect of the agreement dated 13.12.2007.

2. Learned counsel for the petitioner submits that though the work as awarded to the respondent stands completed, the same was not done within the agreed time frame and therefore, the petitioner is entitled to recover compensation from the respondent. He submits that since the respondent has disputed its liability to pay compensation the petitioner has invoked arbitration in terms of the Clause 25 of the agreement; The relevant extract whereof reads as under:-

“Clause 25

Except where otherwise provided in the contract, all questions and

disputes relating to the meaning of the specifications, design, drawings and instructions here-in-before mentioned and as to the quality of workmanship or materials used on the work or as to any other question claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or alter the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter. -----

3. Learned counsel for the respondent opposes the petition and submits that it was the petitioner's own stand that the respondent was not liable for the delay, if any, in completion of the project. He submits that the petitioner is now seeking compensation from the respondent only as per the stand taken by the Parliamentary Accounts Committee (PAC). Once the petitioner had itself communicated to the PAC that the respondent was not liable for any delay or to pay any compensation, the petitioner is estopped from raising any claim against the respondent. He further submits that in the ongoing arbitration proceedings initiated by the respondent for recovery of the balance amount under its final bill, the petition had raised a counter claim of only about Rs.1.62 crores and can therefore, not be permitted to raise any further claim qua the same agreement. He, thus, prays that the petition be dismissed.

4. Having considered the submissions of the learned counsel for the parties, the admitted position which emerges from the record is that the respondent is not disputing the existence of an Arbitral Clause in the agreement and is opposing the claim of the petitioner primarily on the ground that there is no existing dispute between the parties as the

petitioner has already taken a stand that the respondent is not liable to pay any compensation.

5. Even though there may be merit in the respondent's plea that the petitioner having supported the stand of the respondent before the PAC, ought not to now raise a claim against the respondent, in my view, once the existence of the arbitral clause is admitted this Court is not expected, at this stage, to examine the claims on merits or decline to refer the matter to arbitration merely because the respondent may have a good case on merits, to oppose the petitioner's claim for compensation.

6. In this regard, reference may be made to the decision of the Supreme Court in **M/s Mayavti Trading Pvt. Ltd. Vs. Pradyut Deb Burman 2019 (5) R.A.J 228 (SC)**, para 10 whereof reads as under:-

“10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11 (6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment Duro Felguera, S.A. (supra) –see paras 48 & 59.”

Reference may also be made to a recent the decision of the Supreme Court in **Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coal Field Ltd. (2020) 2 SCC 455**, para 7.11 whereof reads as under:-

“7.11. The doctrine of “kompetenz-kompetenz”, also referred to as “compétence-compétence”, or “compétence de la reconnized”,

implies that the Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties. The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified [Dresser Rand S.A. v. Bindal Agro Chem Ltd., (2006) 1 SCC 751. See also BSNL v. Telephone Cables Ltd., (2010) 5 SCC 213 : (2010) 2 SCC (Civ) 352. Refer to PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust, (2018) 10 SCC 525 : (2019) 1 SCC (Civ) 1] . If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement “is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”.

7. In the light of the arbitral clause as noted hereinabove, the existence whereof is not denied by the respondent, as also the fact that the respondent has specifically claimed that no compensation is payable to the petitioner, it is evident that there are existing disputes between the parties. The petition is therefore, entitled to succeed and is accordingly allowed. Justice G.S. Sistani (Retd.) (Mobile no- 9871300034), former Judge of this Court is appointed as an Arbitrator

for adjudication of disputes and differences which have arisen between the parties in respect of the agreement dated 13.12.2007. It is made clear that this Court has not examined the rival contentions of the parties on merits of the claims and it will therefore, be open for them to raise all pleas permissible in law before the learned Arbitrator.

8. Before commencing arbitration proceedings, the Arbitrator will ensure compliance of Section 12 of the Arbitration and Conciliation Act, 1996.

9. A copy of this order be sent to the learned Arbitrator.

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

REKHA PALLI, J.

MARCH 12, 2020

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