

\$~1

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

+ **ARB.P. 438/2018**

DSC LIMITED Petitioner

Through: **Mr.Vineet Tayal, Adv.**

versus

RAIL VIKAS NIGAM LTD Respondent

Through: **Mr.Anil Seth & Mr.Prateek, Adv.**

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

ORDER

%

05.02.2020

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act seeks appointment of an Arbitrator as the nominee Arbitrator, on behalf of the respondent, on the ground that despite request, the respondent has failed to appoint its nominee Arbitrator.

2. Learned counsel for the petitioner submits that, in terms of the arbitration clause contained in paragraph 67.4 of the Special Conditions of the Contract, the petitioner had served the respondent with a notice invoking the arbitration clause for adjudication of the disputes and differences which has arisen between the parties in respect of agreement dated 25.01.2006.

2. The respondent however, refused to appoint its nominee

arbitrator on the ground that the petitioner had already given a 'No Claim Certificate' and even otherwise the arbitration clause could not be invoked after the contract period had expired.

3. Upon the notice being issued, the respondent has filed a reply reiterating the same submissions. Learned counsel for the respondent submits that in terms of clause 67.1 to 67.4 the agreement between the parties, the arbitration clause could be invoked only after the parties had gone through the mechanism of Disputes Adjudication Board (DAB) which comprises of three Members one each to be appointed by the employer and the Contractor i.e. the respondent and the petitioner respectively. The Chairman of the Board was then to be appointed with the consent of the two nominees. He submits that once the petitioner itself failed to nominate any Member to the DAB, it could not circumvent the prescribed procedure and straight away invoke the arbitration clause.

4. On the other hand, learned counsel for the petitioner while not disputing the position that, in terms of the agreement, the parties had to first approach the DAB, contends that once the petitioner raised its claim, it was for the respondent's Managing Director to constitute the DAB which it failed to do and, therefore, it should be taken that the respondent had waived this pre-condition of the matter being referred to the DAB. However, after some arguments, he submits on instructions, that even though it is the respondent who is responsible for not having appointed the members of the DAB, the petitioner, in order to have an early resolution of its disputes is agreeable that the matter be referred to the DAB, but prays that the DAB be directed to

decide the same in an expeditious manner. Learned counsel for the respondent has no objection to the said suggestion.

5. Accordingly, with the consent of the parties, the petition is disposed of by directing both the petitioner and the respondent to nominate their respective members to the DAB within one week. The two Members nominated by each of the parties for the DAB will then within a further period of one week thereafter appoint the Chairman. The DAB will, as per the procedure laid down in the agreement, give its decision expeditiously and preferably within a period of two months.

6. It is made clear that in case any of the parties are not satisfied with the decision of the DAB, they will follow the process for amicable settlement as set out in paragraph 67.3 and thereafter, if the need so arises, the matter will be referred to arbitration without any objection from the respondent. It is directed that while determining as to whether the petitioner's claim is time barred as alleged by the respondent, the DAB as also the Arbitral Tribunal will take into account the period during which the present proceedings seeking appointment of an Arbitrator remained pending as also the date from which the invocation notice was issued by the petitioner.

7. Needless to state that this Court has not expressed any view qua the merits of the petitioner's claim and it will be open for the parties to raise all pleas as permissible in law before the DAB as also the Arbitral Tribunal.

8. The petition is accordingly disposed of in the aforesaid terms.

REKHA PALLI, J

FEBRUARY 05, 2020

gm