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

+ **ARB.P. 170/2021**

M/S ABC EXPERTS AND ENGINEERS Petitioner
Through: Mr. S.W. Haider and Ms.Pooja
Dua, Advs.

versus

UNION OF INDIA Respondent
Through: Mr. J.K.Singh, Standing
Counsel-Railway with Mr. Amit Kumar,
Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

ORDER (O R A L)

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11.08.2021

(Video-Conferencing)

1. This matter was adjourned on the last date of hearing in view of a submission, by Mr. J.K. Singh, learned Counsel for the respondent, to the effect that, as the petitioner had given a no claim certificate and accepted the final payment made against the bill without notice, the claims of the petitioner stood discharged on the principles of accord and satisfaction and that, therefore, no subsisting arbitrable dispute survived.

2. He had, for the said purpose, relied on the judgment of the Supreme Court in *UOI v. Onkar Nath Bhalla & Sons*¹. The law has,

¹ (2009) 7 SCC 350

since, developed and a three Judge Bench of the Supreme Court has, in its judgment in *Vidya Drolia v. Durga Trading Corpn.*², held that even where there is a disputed no-claim certificate or a plea of discharge of the liability on the ground of novation or accord and satisfaction is raised, the matter should appropriately be referred to arbitration by the Arbitral Tribunal and that it is only where, “it is manifest that the claims are *ex facie* time barred and dead or there is no subsisting dispute” that the Court can, at the referral stage, refuse to refer the matter to arbitration. The judgment also states that the appropriate course to be followed by the Court in all cases would be to refer the matter to arbitration, even where a plea of non-arbitrability of the dispute is raised except where the dispute is manifestly in the nature of “deadwood”, meaning, thereby, that reference to arbitration would be a futile exercise. Para 148 of the report in *Vidya Drolia*², which has been cited, approvingly, by a subsequent judgment of the Supreme Court in *Secunderabad Cantonment Board v. B. Ramachandraiah & Sons*³, reads thus:

“Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. *The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed “no-claim certificate” or defence on the plea of novation and “accord and satisfaction”.* As observed in *Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd.*

² (2021) 2 SCC 1

³ MANU/SC/0185/2021 : AIR 2021 SC 1391

MANU/UKHL/0067/2007; 2007 UKHL 40 : 2007 Bus LR 1719 (HL), it is not to be expected that commercial men while entering transactions *inter se* would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.”

(Emphasis supplied)

3. Paras 3 to 9 of the present petition, which set out the dispute, as per the petitioner, may be reproduced thus:

“3. That the work pertaining to "Annual Zone for Maintenance of Track in the section of SSE/P.Way/GZB-I & SSE/P.Way/GZB-II under ADEN/GZB" was awarded to the petitioner vide Acceptance Letter dated 29.06.2015 for Rs. 1,61,70,701.00/- (Rupees One Crore Sixty One Lac Seventy Thousand Seven Hundred One Only) and the stipulated date of completion of work was 12 months i.e., the work awarded was to be completed by 28.06.2016.

4. That at this juncture, before we proceed further, it is pertinent to note that the respondent department, since the start of work, was not showing any seriousness towards it, so much so that not even the requisite instructions were issued/given to the petitioner for execution of work, despite several requests by the petitioner. Infact, the concerned department of the respondent, many a time did not even bother to respond to those requests of the petitioner.

5. That the petitioner had made all the arrangements for execution of the work in right earnest, but work could not be completed due to failures on the part of the respondent and consequently the work was extended from time to time lastly up to 30.06.2019.

6. That during the course of the execution of the aforesaid work, various claims, clarifications and disputes arose between the parties hereto which the petitioner brought to the notice of the concerned authority and upon which the

petitioner was advised to provide full attention on the progress of the work instead of making correspondences and was assured that the dues will be paid along with the final bill.

7. That despite several hindrances faced in the execution of work, the petitioner successfully completed the work on 27.06.2019.

8. That thereafter, the petitioner kept on following the respondent about the preparation and payment of final bill as well as final PVC bill but it kept on evading on one pretext or the other. Finally the petitioner upon an enquiry was told that unless it signs the final bill as well as other documents in advance without protest, it will not get anything and in the absence of the same, the respondent department would not even release the Performance Guarantee and Security Deposit and also the final bill amount as even prepared by them. Thus under the aforesaid circumstances, the petitioner, under immense financial pressure, had to sign the final bill and other documents as desired by the concerned department of the respondent.

9. That thereafter as anticipated by the petitioner, the final bill prepared by the concerned department of the respondent, did not include many of its claims against various items executed by the petitioner. The petitioner all throughout then kept on orally requesting the concerned department of the respondent to consider making payments qua the items executed which were not paid in final bill, however no fruitful purpose was attained.”

4. Needless to say, the reproduction of the aforesaid passages from the petition would not amount to any expression of opinion by this Court on the justifiability of the petitioner's claim. The respondent would be at liberty to contest the claims of the petitioner and all grounds available to the respondent in that regard would remain open to be urged before the Arbitral Tribunal.

5. Viewed in the light of the law laid down by the Supreme Court in *Vidya Drolia*², no occasion arises for this Court to refuse to refer the dispute to arbitration.

6. As such, the Court deems it appropriate to refer the matter to the Delhi International Arbitration Centre (DIAC) who would appoint an Arbitrator to arbitrate on the dispute. The arbitration would take place as per the rules and regulations of the DIAC and the Arbitrator would be entitled to charge fees in accordance with the schedule maintained by the DIAC in that regard. The arbitrator would also provide the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on reference.

7. This petition stands disposed of in the above terms.

AUGUST 11, 2021/kr

C. HARI SHANKAR, J