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

% **Reserved on: September 07, 2021**

Pronounced on: October 01, 2021

+ **ARB.P. 408/2021**

M/S SANJAY IRON AND STEEL LIMITED Petitioner

Through: Mr. Bhavneet Singh, Advocate

Versus

STEEL AUTHORITY OF INDIA Respondent

Through: Mr. Ashish Rana, Advocate

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T

1. Petitioner – M/s Sanjay Iron & Steel Ltd. claims to be doing business of trading of iron and steel. According to petitioner, respondent - Steel Authority of India Limited is a Government Company, who had invited online tenders for operating as Distributor involving purchasing, transportation, handling and storage, processing and sales to dealers of TMT/ TMT Coils/ at Panchkula Cluster in the State of Haryana. The petitioner claims to have submitted its tender on 08.08.2019, which was accepted by respondent vide letter of intent/acceptance bearing No. Tender No. SAIL/ NR/ Distributor/ 19-20/01A, dated 25.06.2019. Petitioner further

claims to have deposited full security amount of Rs.5,00,000/- and bank guarantees to the tune of Rs.1,28,00,000/-, prepared by Union Bank of India in favour of respondent vide letter dated 23.10.2019 and complied with all the terms as per online tender terms vide reference No. CMO/ REC/ BS/CHA/Distributor- Panchkula/ 19-20 dated 30.09.2019. Petitioner had entered into an agreement dated 7.11.2019 with respondent for operating as Distributor.

2. According to petitioner, respondent in clear breach of terms of the agreement started executing the orders directly below 50 tones to the small consumers/ dealers whereas, it had agreed not to entertain the direct orders from small consumers / dealers below 50 tones and therefore, vide its email dated 26.10.2020, petitioner communicated its unwillingness to extend the bank guarantees and continue with the distributorship. Thereafter, petitioner requested the respondent to release the bank guarantee and credit the balance lying in their account in the form of commission, credit note, discount, EMD and excess amount lying in their account by cancelling petitioner's orders on 22.10.2020. Besides, petitioner also raised grievance by showing difference in the rates supplied to petitioner and other dealer.

3. Petitioner has averred that it had invested huge amount of capital in

terms of land, building development, purchase of machine as infrastructure for SAIL, employee the area sales officer as distributor and also took loan for the said purpose, consequently it had become difficult to survive, as respondent was directly feeding the customers of small quantities below the prices of petitioner. Further averred that the said respondent did not pay attention to petitioner's request vide letter dated 03.12.2020 to rectify the breaches and also vide letter dated 19.05.2020 to give relaxation in distribution policy due to covid pandemic but to no avail.

4. At the hearing, learned counsel for petitioner pointed out that petitioner has a huge claim of Rs.3,26,85,940/- approximately against respondent i.e. bank guarantee of Rs.1,28,00,000/-; credit notes of various dealers for a value of Rs.50,00,000/- approximately; and security deposit of Rs.5,00,000/- and to the contrary, respondent issued the termination notice dated 07.11.2020 to the petitioner to rectify the alleged defaults and breaches, which were in fact never committed by the petitioner. Further submitted that within 15 days of issuance of termination notice dated 07.11.2020, respondent directed the bank to encash the said bank guarantee of Rs.1,28,00,000/-, which is against the spirit of respondent's termination notice of dated 7.11.2020 and encashment of the bank guarantee by the said

respondent is arbitrary and against the principles of natural justice.

5. Learned counsel for petitioner next submitted that in terms of Clause-10.2 of the contract, if any dispute and difference between the parties is not resolved through conciliation, the aggrieved party may refer the dispute to Arbitration under the Scope Forum of Conciliation & Arbitration (SFCA) New Delhi. Further, any dispute relating to construction, interpretation, application, meaning, scope, operation or effect of contract or the validity or the breach thereof, shall be settled through arbitration in accordance with the rules of arbitration of SCOPE forum.

6. Learned counsel for petitioner also submitted that petitioner invoked Clause 10.0/10.1 of the contract in its reply dated 28.11.2020 to the show cause notice and requested the said respondent for appointment of a Conciliator in accordance with rules of SCOPE Forum of Conciliation & Arbitration (SPCA) and under Arbitration & Conciliation Act 1996, within 30 days. Respondent vide its reply dated 08.12.2020 consented to the conciliation while raising disputes qua the agreement in question.

7. Further claimed by petitioner that after invocation of conciliation vide letter dated 28.11.2020 to SCOPE, an email dated 05.02.2021 was received from SCOPE that since the disputes *inter se* parties is of more than Rs.05

Crores, the parties were required to pay amount of Rs.10,75,000/- towards conciliation, which was to be equally shared by both the sides. According to learned counsel for petitioner, due to exorbitant fee quoted by SCOPE towards fee of Conciliator, the conciliation has not started. Learned counsel submitted that the enormous amount of Rs.5,00,000/- approximately would be an extra financial burden for petitioner and petitioner cannot afford to pay once for Conciliator and thereafter, for Arbitrator, therefore, petitioner has invoked Clause-10.2 of the agreement in question and jurisdiction of this Court for appointment of sole Arbitrator under the provisions of Section 11(6) of the Arbitration and Conciliation Act, 1996.

8. During the course of hearing, learned counsel appearing on behalf of petitioner also submitted that petitioner is not shying away from getting the disputes settled through conciliation and it is only the exorbitant fee of the Conciliator at SCOPE that is haunting the mind of petitioner. Learned counsel submitted that if respondent is willing to resolve the disputes, an earnest effort can be made to settle through Delhi High Court Mediation and Conciliation Centre, which shall be to the beneficial to both the sides.

9. The aforesaid proposal is not supported by learned counsel appearing on behalf of respondent, who submits that the terms of Agreement between

the parties are required to be adhered to by the parties in letter and spirit and any deviation therefrom is against the law of natural justice. Further submitted that vide its letter/reply to show cause dated 28.11.2020, petitioner has invoked Clause 10.1 and 10.2 of the Agreement to refer the dispute for conciliation within the rules of SCOPE, to which respondent had consented vide its letter dated 18.12.2020 and thereby, filing of the present petition without undergoing conciliation is violation / bye passing of the procedure prescribed under the agreed Clause-10 of the agreement. Attention of this Court is drawn to Section 11(2) of the Act, whereunder liberty has been given to the parties to agree on a procedure for invoking arbitration. Also submitted that petitioner has raised exorbitant claims against the respondent, however, respondent is willing to proceed with conciliation under the rules of SCOPE Forum of Conciliation and Arbitration (SFCA) New Delhi. On the plea that petitioner shall be overburdened with the fee of Conciliator, learned counsel for respondent submitted that the fee of the Conciliator before SCOPE has to be equally shared by both the sides and respondent is willing and ready to oblige its part towards the fee and it is only petitioner, who is not ready to fulfil its part of obligations.

10. Learned counsel for respondent also drew attention of this Court to Section 62 of the Act, which provides for commencement of conciliation proceedings; Sections 76 and 79(3) which provides for declaration of termination of proceedings in the absence of payment of fees, to submit that under the statute, a procedure is prescribed even to commence and conclude the conciliation proceedings. It was submitted that since conciliation proceedings have still not been terminated, seeking appointment of an Arbitrator amidst pendency of conciliation proceedings, is bad in law. Moreover, Section 11(6) (c) of the Act provides that the right to apply to court only accrues when the parties have approached the institution and the institution has failed to perform its function, whereas in the present case, petitioner has not approached SCOPE for conciliation and, therefore, no right accrues in favour of petitioner under the provisions of Section 11(6) (c) of the Arbitration and Conciliation Act, 1996.

11. It was next contended by learned counsel that the agreed procedure in an Agreement is required to be followed and as per Clause-10.1 of the Agreement, invocation of arbitration without any outcome of conciliation, the present petition is premature and liable to be dismissed. In support of above submission, reliance is placed upon decision of Rajasthan High Court

in *Simpark Infrastructure Vs. Jaipur Municipal Corporation*, 2012 SCC OnLine Raj 3833.

12. Another objection raised by learned counsel is on the ground that petitioner with its eyes open had agreed to the dispute resolution clause and therefore, cannot now claim that the fee for conciliation proceedings is too high. In this regard, reliance is placed upon decision of Hon'ble Supreme Court in *S. K. Jain vs. State of Haryana* (2009) 4 SCC 357.

13. Learned counsel further submitted that vide letter dated 18.11.2020, petitioner has only invoked the conciliation and not arbitration and since, no notice under Section 21 of the Act has been issued to the respondent, on this count also the present petition is premature and deserves to be rejected. Reliance is placed upon decision in *Alupro Building Systems Vs. Ozone Overseas* (2017) SCC OnLine Del 7228 in this regard.

14. In rebuttal, learned counsel for petitioner submitted that the procedure to make an effort through conciliation or mutual discussion is directory and not mandatory in view of Section 77 of the Act. On this aspect, reliance is placed upon Hon'ble Supreme Court decisions in *Visa International Limited Vs. Continental Resources (USA) Limited* (2009) 2 SCC 55 and *Swiss Timing Limited Vs. Common Wealth Gamesh 2010 Organizing*

Committee (2014) 6 SCC 677. Reliance is also placed upon decisions of this Court in *Ravinder Kumar Verma Vs. BPTP Limited (2014) SCC OnLine Del 6602* & *Siemens Limited Vs. Jindal India Thermal Power Limited (2018) SCC OnLine Del 7158*.

15. Reliance is also placed upon a decision of Calcutta High Court in *TATA Projects Limited Vs. Steel Authority of India (AP No. 12/2017 dated 17.09.2018)* to submit that since parties have not been able to resolve their disputes mutually, therefore, reference of disputes to SCOPE to have recourse for conciliation under SCFA, would serve no purpose and the said decision has attained finality, as the Hon'ble Supreme Court declined to interfere in an appeal filed against the said order.

16. Learned counsel placed reliance upon decision of Hon'ble Supreme Court in *Demerara Distilleries Private Limited Vs. Demerara Distillers Limited (2015) 13 SCC 610* to submit that in the said case parties had agreed to resolve differences through mutual discussion followed by mediation and thereafter through arbitration, it was held that the communication between the parties reflected that recourse to conciliation or mediation shall be an empty formality and so, application seeking appointment of arbitrator was allowed in the said case. Lastly, learned

counsel for petitioner submitted that vide its letter dated 22.09.2019 petitioner had invoked arbitration clause and requested the respondent to give consent to appointment of Arbitrator nominated by the petitioner, but the respondent refused to give consent and thereby, the present petition be allowed and this Court may appoint an Arbitrator to adjudicate the disputes between the parties.

17. In essence, this Court is required to determine in the present petition is as to whether prayer of petitioner seeking appointment of Arbitrator under the provisions of Section 11 of the Arbitration and Conciliation Act, 1996 is maintainable in view of Clause-10.1 of the Agreement entered between the parties, which stipulates that in the event of failure of parties to mutually resolve their disputes, they shall refer their disputes to SCOPE for resolution under the rules of SCOPE Forum of Conciliation and Arbitration (SFCA) New Delhi, which has not been resorted to by the petitioner?

18. To find an answer, this Court heard the learned counsel representing both the sides at length and has gone through the averments made by the parties in petition, reply, written submissions, decisions relied upon as well as other material placed on record.

19. Pertinently, against respondent's Online Tender No.

SAIL/NR/Distributor/19-20/01A, dated 25.06.2019, petitioner's bid was accepted by respondent and Agreement was entered into between the parties on even date. Clause-10 of the aforesaid Agreement dated 25.06.2019 mentions the manner in which parties shall resolve their disputes, which reads as under:-

“10.0 Resolution of Disputes. Conciliations and Arbitrations:-

RESOLUTION OF DISPUTES

In the event of any dispute/difference whatsoever arising between the parties relating to or arising out of the tender, the parties shall endeavor to resolve such dispute through the SCOPE Forum of Conciliation & Arbitration (SFCA) New Delhi (as amended from time to time).

10.1 Conciliation

Any dispute or difference whatsoever arising between the parties relating to or arising out of contract, may be settled by the Rules of conciliation in accordance with the Rules of SCOPE Forum of Conciliation & Arbitration (SFCA) and the settlement so rendered between the parties in pursuance thereof shall be final and binding on the parties. If the dispute is not settled by conciliation within 30 days of the initiation of conciliation or such further period as the parties shall agree in writing, the dispute shall be referred to and finally resolved by Arbitration, in accordance with the Rules of Arbitration of SCOPE Forum of Conciliation and Arbitration.

10.2 Arbitration

In the event the dispute/ difference is not resolved through conciliation as per the above provisions, the aggrieved party may refer the dispute to Arbitration under the SCOPE Forum of Conciliation & Arbitration (SFCA) "New Delhi. Any dispute or difference whatsoever arising between the parties relating to construction, interpretation, application, meaning, scope, operation or effect of this contract or the validity or the breach thereof: shall be settled by arbitration in accordance with the Rules of Arbitration of the "SCOPE" Forum and the award made in pursuance thereof shall be

final and binding on the parties.

The venue of the Conciliation shall be at New Delhi.”

20. A bare perusal of aforesaid Clause makes it manifestly clear that parties have agreed to a specific mechanism to be adopted for resolution of disputes. However, by approaching this Court seeking appointment of Arbitrator, petitioner is eventually trying to by-pass or skip the preceding condition of adopting recourse to conciliation, thereby making an attempt to dodge Clause-10.1 of the Agreement. It is not the only case of petitioner that it is unable to pay the gigantic amount of fee quoted for Conciliator before the SCOPE but also that the Agreement in question also stands vitiated on many counts. Similarly, respondent has disputed the various claims put-forth by the petitioner. Nevertheless, the disputes so raised by both the sides can be adjudicated upon either in conciliation or in arbitration proceedings and this Court is not required to go into the details thereof.

21. This Court has gone through the various decisions of Hon'ble Supreme Court, this Court as well as other High Courts in support of their submissions.

22. Reliance placed by learned counsel for respondent upon Hon'ble Supreme Court decision in ***S. K. Jain (Supra)*** is distinguishable on facts as in the said case, the Hon'ble Supreme Court dealt with the issue whether

arbitration can be invoked by a private contract against Government on the basis of a contract only after security deposit is furnished and is hence, not applicable to the case in hand. Further, reliance placed by respondent upon decision of this Court in ***Alupro Building Systems (Supra)*** to submit that invocation of arbitration without issuing notice under Section 21 of the Act, is bad in law. However, in the present case, petitioner claims to have sent a letter dated 22.09.2019 to respondent invoking arbitration and nominating Arbitrator and having asked for respondent's consent thereon. Hence, this decision also is of no help to the case of respondent.

23. A coordinate Bench of this Court in ***Ravinder Kumar Verma (Supra)***, dealt with the proposition of law laid down by another Bench of this Court in ***M/s Haldiram Manufacturing Company Pvt. Ltd. Vs. M/s DLF Commercial Complexes Limited 193 (2012) DLT 410***, wherein it was held that if no mutual discussion takes place prior to filing of the application under Section 8 of the Act, then the arbitration clause cannot be invoked and held as under:-

“11. Whereas the existence of conciliation or mutual discussion should not be a bar in seeking to file proceedings for reference of the matter to arbitration and which is necessary for preserving rights as envisaged by Section 77 of the Act, however, since in many contracts there is an effective need of conciliation etc. in terms of the agreed

procedure provided by the contract, the best course of action to be adopted is that existence of conciliation or mutual discussion procedure or similar other procedure though should not be held as a bar for dismissing of a petition which is filed under Sections 11 or 8 of the Act or for any legal proceeding required to be filed for preserving rights of the parties, however before formally starting effective arbitration proceedings parties should be directed to take up the agreed procedure for conciliation as provided in the agreed clause for mutual discussion/conciliation in a time bound reasonable period, and which if they fail the parties can thereafter be held entitled to proceed with the arbitration proceedings to determine their claims/rights etc.”

24. The aforesaid observations in ***Ravinder Kumar Verma (Supra)*** though has observed that conciliation procedure may not be a bar for referring the matter to arbitration but has also made it clear that before taking resort to arbitration, the parties are required to follow the due procedure for conciliation as provided in the agreed clause.

25. Another Coordinate Bench of this Court in ***Siemens Limited (Supra)***, while dealing a somewhat similar case examined the agreement between the parties, which stipulated that the parties shall endeavour to resolve all disputes amicably within a period of 30 days, however, no further procedure was prescribed. Further observed that since petitioner had been continuously writing to the respondent to release its pending dues and settle the claims

arising out of the contract and because parties had met two-three times to resolve the disputes and also that respondent therein did not respond to the notice invoking arbitration, therefore, the petition was allowed and Arbitrator was appointed by the Court.

26. In the case in hand, Clause-10 of the Agreement in question makes it manifestly clear that at the first instance parties shall endeavour to resolve such dispute through the SCOPE Forum of Conciliation & Arbitration and if the dispute is not settled by conciliation within 30 days of the conciliation, then the aggrieved party may refer to arbitration, which again shall be governed in accordance with the Rules of Arbitration of the “SCOPE”. In fact, respondent vide its letter dated 08.12.2020 also tendered its consent to invocation of conciliation proceedings through SCOPE. However, despite invocation of conciliation, the proceedings before the Conciliator did not commence due to non-payment of fees.

27. The Hon’ble Supreme Court in *Visa International Limited (Supra)* had appointed Arbitrator keeping in view that various exchange of correspondence between the parties showed that there was no scope for conciliation. Similar was the view taken by the Hon’ble Supreme Court in *Demerar Distilleries (Supra)* while appointing the Arbitrator in the said

case. In the case in hand, though a few communications have been exchanged between the parties raising grievance and replies thereto, however, both sides did not at all sit together to resolve the disputes. Hence, these decisions do not come to the rescue of petitioner.

28. In view of afore-noted narration, this Court is of the opinion that the very purpose of keeping a conciliation clause in any Agreement is to shorten the path for settlement of disputes between the parties. Therefore, parties in the present petition are directed to first explore possibility of resolution of disputes through Conciliation in terms spelt out in Clause- 10 of the Agreement. Further directed that parties shall strictly adhere to the time line and shall conclude the conciliation proceedings within 30 days of initiation of conciliation proceedings, as agreed in Clause 10.1 of the Agreement and thereafter only disputes, if any, shall be referred to arbitration.

29. With directions as aforesaid, the present petition is accordingly disposed of.

(SURESH KUMAR KAIT)
JUDGE

OCTOBER 01, 2021

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