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

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Date of decision: 28.09.2021

+ ARB.P. 685/2021

PRAGATI CONSTRUCTION CONSULTANTS Petitioner

Through Mr.Sumit Bansal, Adv.

versus

UNION OF INDIA Respondent

Through Mr.J.K. Singh, Standing Counsel for
Railways with Mr.Amit Kumar, Adv.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (oral)

1. The relief sought in the present petition before this Court is to appoint sole Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 to adjudicate the disputes between the parties in accordance with clause 63 and 64 of the General Conditions of the Contract, 2014.

2. It is stated by the petitioner that respondent vide letter dated 03.05.2016 had awarded the work of extensive repairs and complete renovation of old washing line nos.3, 4 & 5 including assembling and linking of track and other allied works at Coach Care Centre, Hazrat Nizammuddin at New Delhi. The total cost of work at the accepted rates was

worked out at Rs.12,07,05,992.60/-. The stipulated date of completion of work was 15 months from the date of issuance of acceptance letter. Thus, in the present case, the stipulated date for completion of work was 02.08.2017.

3. It is contended by the petitioner that immediately upon the award of work, petitioner fully mobilized at the site and constructed the labour hutments which was duly confirmed vide letter dated 07.05.2016 issued to the respondent. During the execution of the work, respondent got various extra items executed at the site but failed to make complete payments towards the work done to the petitioner. Consequently, petitioner could not complete the work within the extended time period due to non-availability of funds by the respondent.

4. Learned counsel for the petitioner submits that on 05.11.2019, petitioner invoked arbitration in terms of clause 64 of the General Conditions of the Contract and requested the Chief Engineer/Construction of the respondent to consider the claim for arbitration and further on 30.07.2020 petitioner issued a letter regarding the losses/claims of the petitioner and requested for appointment of Arbitrator in terms of clause 64 of the General Conditions of Contract.

5. Respondent did not take any steps for a period of more than 4 months

and then for the very first time, on 19.01.2021 issued a letter to petitioner wherein it was stated that for the appointment of sole arbitrator/arbitral tribunal, Clause of Section 12(5) & 31(5) of the Arbitration and Conciliation Act, 1996 should be waived off but petitioner refused to waive off the same and again requested for appointment of the Arbitrator by the competent authority.

6. Vide letter dated 09.03.2021, respondent had nominated a panel of four retired railway officers, not below the rank of Senior Administrative Grade Officers to suggest at least two names out of the panel and thereafter, respondent shall appoint one out of them to act as the nominee of the Petitioner. Petitioner vide its letter dated 24.03.2021 had responded to the letter dated 09.03.2021, stating that appointment of the nominee by the respondent as co-arbitrator is bad in the eyes of law as it is contrary to the law laid down by the Hon'ble Supreme Court in the case of ***Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.: (2019) SCC OnLine SC 1517*** wherein it has been categorically stated that “*person who has interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator*” and further requested to refer the dispute to The Delhi International Arbitration Centre, New Delhi for the

appointment of sole and independent arbitrator.

7. However, respondent had again reiterated its contentions as stated in letter dated 09.03.2021 and sought consent of the petitioner for appointment of the Arbitrator as clause 64 of General Conditions of Contract does not contemplate for the appointment of an outside arbitrator.

8. At the hearing, learned counsel for petitioner submits that petitioner has already invoked arbitration vide notice dated 05.11.2019 and for claim of Rs.4,64,65,000/- (Rupees Four Crores Sixty Four Lacs Sixty Five Thousand), an Arbitrator is required to be appointed by this Court.

9. Respondent has filed a short counter affidavit to the petition wherein it has been stated that contractor has given “*no claim certificate*” against the contract at the time of passing of final bill for the work executed. As per Clause 43(2) of Indian Railways Standard General Conditions of Contract, 2018, if a contractor submits “*no claim certificate*” then the demand of arbitration shall not be considered. He has placed reliance upon the judgment of Hon’ble Supreme Court ***Union of India vs. Onkar Nath Bhalla & Sons: (2009) 7 SCC 350.***

10. In the case of ***Vidya Drolia vs. Durga Trading Corpn. (2021) 2 SCC 1***, it was 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 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.

11. Pertinently, allocation of work order vide respondent’s acceptance letter bearing No.74-W/4/1/WA/SE Rd dated 03.05.2016 and invocation of arbitration by petitioner vide notice dated 05.11.2019 is not disputed.

12. A coordinate bench of this Court in the case of ***M/s ABC EXPERTS AND ENGINEERS vs. UNION OF INDIA*** in ***ARB.P. 170/2021*** vide order dated **11.08.2021** has passed an order wherein the matter was referred to the Delhi International Arbitration Centre for adjudication of the disputes after considering the objections by both the parties.

13. Considering the facts of the present case and the decision taken by a

coordinate bench of this Court and Apex Court in the abovementioned cases, I am of the opinion that to resolve the disputes between the parties, an independent arbitrator is required to be appointed.

14. Accordingly, **Mr. Justice (Retd.) Satpal Garg (Mobile: 9910384627)** is appointed as sole Arbitrator to adjudicate the disputes between the parties.

15. The arbitration shall be conducted under the Delhi International Arbitration Centre (DIAC). The fee of the Arbitrator shall be in accordance with the schedule of fees prescribed under the Delhi International Arbitration Centre (DIAC) (Internal Management) Rules and Delhi International Arbitration Centre (Administrative Cost and Arbitrators' Fees) Rules, 2018.

16. The learned Arbitrator shall ensure compliance of Section 12 of Arbitration and Conciliation Act, 1996 before commencing the arbitration.

17. The present petition is accordingly disposed of.

18. A copy of this order be sent to the learned Arbitrator for information.

(SURESH KUMAR KAIT)
JUDGE

SEPTEMBER 28, 2021
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