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

+ **ARB.P. 423/2020**

**M/S SHAWL ENGINEERS AND CONTRACTORS PVT.
LTD.**

..... Petitioner

Through: Mr. Vivekanand and Mr.
Abhishek Semwal, Advs.

versus

UNION OF INDIA

..... Respondent

Through: Mr. Ashok Singh, Adv.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

ORDER (ORAL)

08.03.2021

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1. Despite repeated opportunity, no reply is on record, filed by the respondent.
2. The right to place the reply on record, accordingly stands forfeited.
3. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking appointment of arbitrators, to arbitrate on the dispute/disputes between the parties.
4. The dispute arises out of a contract, dated 23rd November, 2013, between the petitioner and the respondent for “construction of two lane road over bridge in lieu of level crossing No. 507 at Km.

1542/26-28 near Dausni Railway station along with other allied works on Laksar-Saharanpur-Tender Opened on dated-06.03.2013”.

5. The contract being with the Ministry of Northern Railways, Clause 64 of the General Conditions of Contract governing contracts with the Railways would apply, which provides for arbitration as the mode of resolution of disputes and reads as under:

“64.(1) Demand For Arbitration:

64(1)(i)- In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on. any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

64(1)(ii)- The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute(s) or difference(s) in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference.

64(1)(iii)- (a) The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.

(b) The claimant shall submit his claim stating the facts supporting the claims along with all the relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.

(c) The Railway shall submit its defence statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by Tribunal.

(d) Place of Arbitration: The place of arbitration would be within the geographical limits of the Division of the Railway where the cause of action arose or the Headquarters of the concerned Railway or any other place with the written consent of both the parties.

64(1)(iv)- No new claim shall be added during proceedings by either party. However, a party may amend or supplement the original claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.

64(1)(v)- If the contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.

64.(2) Obligation During Pendency of Arbitration:

Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should continue during arbitration proceedings.

64.(3) Appointment of Arbitrator:

64.(3) (a)(i) In cases where the total value of all claims in question added together does not exceed Rs. 10,00,000 (Rupees ten lakh only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway noted below JA Grade, nominated by the General Manager.

The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM.

64.(3) (a)(ii)-In cases not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal consist of a Panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM. Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them is from Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA Grade of other departments of the Railway for the purpose of appointment of arbitrator.

64.(3)(a)(iii) -If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager, fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with reference from the stage at which it was left by the previous arbitrator(s).

64.(3)(a)(iv) -The Arbitral Tribunal shall have power to call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal shall think proper, and it shall be the duty of the parties, hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay. The Arbitral Tribunal should record day to-day proceedings. The proceedings shall normally be conducted on the basis of documents and written statements.

64.(3)(a)(v) -While appointing arbitrator(s) under Sub-Clause (i), (ii) & (hi) above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servant(s) expressed views on all or any of the matters under dispute or differences. The proceeding of the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

64.(3)(b)(i)- The arbitral award shall state item wise, the sum and reasons upon which it is based. The analysis and reasons shall be detailed enough so that the award could be inferred there from.

64.(3)(b)(ii)- A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award of a Tribunal and interpretation of a specific point of award to Tribunal within 60 days of receipt of the award.

64.(3)(b)(iii)- A party may apply to Tribunal within 60 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

64.(4) In case of the Tribunal, comprising of three Members, any ruling on award shall be made by a majority of Members of Tribunal. In the absence of such a majority, the views of the Presiding Arbitrator shall prevail.

64.(5) Where the arbitral award is for the payment of money,

no interest shall be payable on whole or any part of the money for the period till the date on which the award is made.

64.(6) The cost of arbitration shall be borne by the respective parties. The cost shall inter-alia include fee of the arbitrator(s), as per the rates fixed by both the parties. Further, the fee payable to the arbitrator(s) would be governed by the instructions issued on the subject by Railway Board from time to time, irrespective of the fact whether the arbitrator(s) is/are appointed by the Railway Administration or by the court of law unless specifically directed by Hon'ble court otherwise on the matter."

6. The nature of the disputes raised by the petitioner may be discerned from sub-paras (vi) to (xvii) of para 7 in the petition, which reads thus:

“vi. That with its letter dated 27/05/2013 the Applicant submitted performance bank guarantee of Rs. 28,42,290/- (Rupees Twenty Eight Lakhs Forty Two Thousand Two Hundred Ninety only).

vii. That immediately after the work was awarded, the Petitioner had started making all the arrangements for due execution and completion of the awarded work within the stipulated period of completion. However, the work was delayed and could not be completed within the stipulated period due to the delays and defaults attributable on the part of the Respondent such as delay in execution of formal agreement till 23/11/2013, delay in supply of GAD, delay in decision about design criteria and details, repeated changes suggested in design resulting into repeated submissions and delay in approval of designs, delay in supply of working drawings of foundation, delayed decision about change of Open foundation to pile foundation, delay in making site available, as part of the site, where the work was to be executed, was acquired after considerable delay, delay in approval of pile test results, delay, in processing NS/extra/substituted items and deviated items, non-payments, wrong payments and delayed payments, non-availability of fund for payment with the department and as such instructions to stop the work, as notified by the Applicants amongst others

vide its letters dated 28/09/2013, dated 05/10/2013, dated 14/14/2013, dated 06/12/2013, dated 12/05/2014, dated 22/05/2014, dated 04/07/2014, dated 07/07/2014, dated 12/08/2014, dated 14/08/2014, dated 16/09/2014, dated 20/10/2014, dated 20/10/2014, dated 22/10/2014, dated 17/11/2014, dated 04/12/2014, dated 21/01/2015, dated 22/01/2015, dated 28/01/2015, dated 16/02/2015, dated 02/03/2015, dated 10/03/2015, dated 31/03/2015, dated 06/04/2015, dated 05/05/2015, dated 08/05/2015, dated 25/06/2015, dated 23/07/2015, dated 23/10/2015, dated 17/11/2015, dated 26/11/2015, dated 04/01/2016, dated 28/02/2016, dated 16/06/2016, dated 06/08/2016, dated 05/10/2016, dated 06/10/2016, dated 19/01/2017.

viii. That apart from the delays on the part of the respondent, there were certain extra / NS items that were got executed from the Applicant. Thus the Applicant amongst others vide its letter dated 04/12/2014 requested the Respondent to prepare addendum & corrigendum for the extra / NS items which are in USSOR and to sanction NS item for other items and pay the same.

ix. That since the work was delayed due to the delays, failures and fundamental breaches of contractual obligations on the part of the Respondent, therefore EOT was asked without penalty and with P.V.C by the Petitioner and that extension of time was granted by the respondent without liquidated damages with P.V.C till actual date of completion.

x. That though the work was virtually completed by 28.02.2017, yet the respondent recoded the completion as on 06.04.2017. Due to delay in recording of completion the Applicant was also put to additional expenses on account of PBG extension charges as the Applicant was forced to extend PBG Rs. 28,42,290/- for a period of 06 (six) months as insisted by the respondent vide letter dated 28.05.2017. Consequently, due to these delays, the Petitioner had majorly suffered additional, staff, establishment and overhead expenses for prolonged period of three years/36 months which the Respondent is legally liable to make good and pay to the Petitioner. In view of abnormal and fundamental delays of the department/respondent, the clauses that barred claim had no applicability beyond the stipulated period and this was made clear to the respondent.

xi. That the Petitioner also submitted Bank Guarantee against security deposit bearing no. 003GT02170880031 issued by HDFC Bank Ltd. 10166-67, Padam Singh Road, Gurudwara Road, Karol Bagh, New Delhi-1 10005 dated 29/03/2017 for an amount of Rs. 24,80,000/- (Rupees Twenty Four Lacs Eighty Thousand Only) valid upto 28.03.2018 to the Respondent for release of security deposit as per clause 5 of the agreement.

xii. That after recording completion only the respondent started process of approval and sanction of NS/extra items.

xiii. That the defect liability period expired on 5.4.2018 when security deposit along with the final bill became due to the Applicant in terms of clause 5 of the tender condition. However due to delays on the part of the respondent in process of final bill, and reluctance on the part of Applicant to given no claim and reluctance to sign the proposed supplementary agreement, instead of releasing the security and paying final bill the respondent forced the Applicant to keep on extending performance Bank Guarantee of Rs.24,80,000/-, thereby putting the Applicant to losses by way of bank guarantee charges. This was protested by Applicant vide letter dated 08.06.2018. When the Applicant refused to extend the Bank Guarantee the respondent wrote to the Bank vide letter dated 11.03.2019 to encash the PBG, thereby coercing the Applicant to keep on extending PBG and incurring expenses.

xiv. That the Applicant vide letter dated 06.04.2019 made it clear to the respondent that apart from the NS/extra items the Applicant is entitled to losses by way of additional expenses beyond stipulated period and requested to release all claims and payments including all items /claims notified from time to time. The list of the NS items and claims were notified to the respondent vide letter dated 22.01.2020.

xv. That the respondent did not process and pay even the undisputed payment of about Rs.50 Lakh on account of final bill, security deposit and PVC unless the Applicant gives No claim and signs Blank format of supplementary agreement before finalizing the bill and payments thereof. As stated above initially for about two years the Applicant avoided it

but the respondent was adamant to not to release the final bill and PVC and security without signing such documents on dotted lines. Since the Applicant was hard pressed for money for investment in other works in hand which were likely to result in breach for want of funds, thus the Applicant was financially and economically forced and coerced into signing the prescribed blank formats of no claim and supplementary agreement on 4th November 2019 as a condition precedent to get even undisputed payments. This was accordingly informed by the Applicant to the respondent vide its letter dated 26.11.2019 also to the effect that no claim and supplementary agreement formats were signed by the Applicant under financial duress and coercion and undue influence. The Applicant submits that there had been no settlement of disputed items and claims in any manner whatsoever. Thus it is the submission of the Applicant that the no claim and supplementary agreement having been got signed by the respondent as a condition precedent for processing and paying even the undisputed payments by exercising economic coercion and pressure, the same are void under Section 15 of Indian Contract Act and are of no validity and consequences.

xvi. That undisputed payments by way final bill was paid on 24 December 2019, the security despite was released on 27.12.2019 and PVC released on 05.01.2020.

xvii. That immediately after receipt of last undisputed payments by way of PVC, the Applicant notified to the respondent the balance unsettled / unpaid claims/ items vide its letter dated 22.01.2020 to the respondent and requested them to process and pay the same also, within 30 days failing which the Applicant will invoke arbitration. However neither any reply to letter dated 22.01.2020 was given nor any further payment made.”

7. On 20th March, 2020, the petitioner addressed a notice, to the respondent, invoking the aforesaid Clause 64 of the GCC, seeking reference of the disputes, between them, to arbitration.

8. The respondent was requested to appoint an independent

arbitrator to arbitrate on the dispute.

9. Admittedly, the respondent did not reply to the said communication.

10. Mr. Ashok Singh, learned counsel appearing for the respondent, has no objection to the dispute between the parties being referred to the Arbitrator from panel of arbitrators under the aegis of the Delhi International Arbitration Centre

11. In view thereof, the aforesaid dispute, raised by the petitioner, is referred to the Delhi International Arbitration Centre, who would proceed to appoint a suitable Arbitrator to arbitrate on the dispute/disputes.

12. The respondent would also be entitled to prefer any counter-claim, as it may so choose, before the learned Arbitrator in accordance with law. The Arbitrator would arbitrate on the dispute in accordance with the rules and regulations of the Delhi International Arbitration Centre and the fees of the learned Arbitrator would also be fixed according to the Schedule of Fees of the Delhi International Arbitration Centre.

13. This petition stands disposed of in the aforesaid terms, with no orders as to costs.

C. HARI SHANKAR, J.

MARCH 8, 2021/dsn