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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 24th November, 2021

+ **ARB.P. 933/2021**

MILLENNIUM CITY EXPRESSWAYS PRIVATE LIMITED

..... Petitioner

Through: Mr. Rajiv Nayar and Mr. Arun Kathpalia, Senior Advocates with Mr. Pradyuman Dubey, Mr. A. Robin Frey and Ms. Jasmin Sokhi, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA & ANR.

..... Respondents

Through: Mr. Sandeep Sethi, Senior Advocate with Ms. Padma Priya and Ms. Shreya Sethi, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA HYBRID MODE]

SANJEEV NARULA, J. (Oral):

1. By way of the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 [*hereinafter*, “***the Act*”**], the Petitioner – Millennium City Expressways Private Limited [*hereinafter*, “***Millennium*”**] seeks appointment of an Arbitrator on behalf of Respondent No. 1 – National Highways Authority of India [*hereinafter*, “***NHAI*”**] – in terms of the arbitration agreement, or in the alternative, issuance of direction(s) to

Respondent No. 2 – Indian Council for Arbitration [*hereinafter*, “ICA”] to appoint an arbitrator on behalf of NHAI, as well as the presiding arbitrator, for constituting the three-member Arbitral Tribunal.

2. The existence of the Arbitration Agreement is not in dispute between the parties. NHAI’s primary objection is regarding the maintainability of the present petition. Before dealing with this issue, it is apposite to note the facts in brief.

FACTS

3. The genesis of the dispute arises from a ‘Concession Agreement’ dated 18th April, 2002 [*hereinafter*, “**Agreement**”], and a ‘Memorandum of Understanding’ dated 18th September, 2012 [*hereinafter*, “**MoU**”] – executed between NHAI and Jaypee DSC Ventures Limited [*hereinafter*, “**Concessionaire**”].

4. The afore-noted concessionaire was substituted with Millennium pursuant to a ‘Amendments to the Concession Agreement’ dated 19th May, 2014.

5. Subsequently, owing to certain disputes, NHAI issued notice dated 30th May, 2018 addressed to IDFC Bank Limited (the lead banker of the Consortium of the senior lenders) and Punjab National Bank (the bank holding the escrow account) notifying its intention to terminate the Agreement on the ground of breaches of obligations under Agreement and the MoU [*hereinafter*, “**Substitution Notice**”]. Millennium responded to the said notice by refuting the allegations set-out therein.

6. Millennium filed O.M.P.(I)(Comm.) 297/2018, impugning the Substitution Notice seeking *inter alia* restraint against NHAI from taking

precipitative steps in relation thereto. Another petition viz. O.M.P.(I)(Comm.) 298/2018 was also filed by the senior lenders of Millennium.

7. The afore-said petitions are pending consideration. However, it is pertinent to note that in the said proceedings, this Court *vide* Order dated 18th September, 2018 directed the Chairman of NHAI to convene a conciliation meeting with the parties.

8. Millennium perceived threat of termination of the Agreement and invoked arbitration of subsisting disputes *vide* notice dated 11th October, 2018 [*hereinafter*, “**Arbitration Notice**”] as set forth therein, in accordance with Clause 39.2 of the Agreement and nominated Hon’ble Mr. Justice (Retd.) Badar Durrez Ahmed, former Chief Justice of the Hon’ble High Court of Jammu & Kashmir – as its nominee arbitrator and called upon NHAI to nominate its arbitrator. Since conciliation proceedings were in progress, Millennium requested ICA to keep the arbitration notice in abeyance.

9. Later, on 1st November, 2018, during conciliation, parties arrived at a ‘Joint Action Plan’.

10. Disputes however were not resolved and Millennium then sent reminder to NHAI to nominate their Arbitrator under the ICA Rules and also filed Statement of Claim before ICA. The 30-day stipulated period accorded to NHAI to nominate its Arbitrator as per the ICA Rules expired. On 14th September, 2021, Millennium requested ICA to nominate an Arbitrator on behalf of NHAI.

11. In the circumstances noted above, Millennium has approached this Court by way of the instant petition.

ARGUMENTS ADVANCED

I. BY NHAI

12. Ms. Padma Priya, counsel for NHAI, submits that the present petition is premature, since Millennium has not followed the pre-arbitration mechanism as provided under Article 39.1 of the Agreement. There is no request made by Millennium for any amicable settlement/ conciliation of the alleged claims, which are sought to be referred to arbitration through ICA.

13. She further submits that the meeting held between the parties under the aegis of the Chairman of NHAI on 26th October, 2018 – was limited to the disputes that NHAI had raised in its Substitution Notice. The minutes of meeting bear witness to this fact. During the said meeting, the Chairman of NHAI directed the Project Director and Independent Consultant to prepare an implementable action plan in order to discuss the outstanding issues. The details for an action plan for implementation were crystallized between the parties in a subsequent meeting dated 1st November, 2018 – which came to be referred to as a ‘Joint Action Plan’.

14. NHAI was called upon to nominate their Arbitrator for resolution of only those disputes and claims that were set out in the Arbitration Notice *i.e.*, disputes for which no conciliation has taken place as per Clause 39.1 of the Agreement.

15. The present petition is clearly outside the purview of Section 11 and is an attempt on the part of Millennium to cover-up its defaults and fraudulent acts by presenting the same as disputes pending adjudication. A perusal of letters issued by them clearly establishes that Millennium is periodically amending the list of disputes, as per its own convenience.

16. Millennium has failed to demonstrate that it has followed the procedure under Clause 39.1 of the Agreement, and hence, the issue agitated by it cannot be said to be a 'dispute' within the meaning given under the Agreement. The Arbitration Notice has been issued by superseding Clause 39.1 of the Agreement. The same is also not in conformity with the 'Dispute Resolution Mechanism' as specified under Clause 7.11 of the Substitution Agreement. Hence, the Arbitration Notice is *non-est*.

17. Any attempt to bypass such a mandatory provision shall be to the detriment of both the contracting parties and any such attempt ought to be discouraged.

II. BY MILLENNIUM

18. Controverting the objections made by the counsel for NHAI, Mr. Rajiv Nayar and Mr. Arun Kathpalia, Senior Counsels appearing on behalf of Millennium, submit that the pre-arbitration mechanism provided under the Agreement, has been followed in letter and spirit. Millennium had duly notified their claims in reply to the Substitution Notice. Millennium has invoked the mechanism for amicable resolution of all disputes by conciliation provided under Clauses 39.1 (a) and (b) of the Agreement. The disputes notified in the response to the Substitution Notice included the disputes arising out of the Substitution Notice, as well as other disputes, in relation to the claims of Millennium against NHAI, which were duly specified therein. Further, when Millennium filed a petition under Section 9 of the Act against the Substitution notice, the Court referred the parties to conciliation before the Chairman of NHAI. At that stage as well, NHAI were aware of the claims of Millennium.

19. Meeting did take place before the Chairman of the NHAI, but unfortunately, conciliation before the Chairman did not succeed. The disputes were notified to NHAI. However, if there are any disputes in respect of which conciliation has not taken place under Clause 39 of the Agreement, then such failure of conciliation is solely attributable to NHAI – as it did not even respond to the Millennium’s notice of dispute and conciliation. Now, Millennium has no other remedy but to approach this Court under Section 11(6)(c) of the Act, as ICA has failed to perform the function entrusted to it in terms of its procedure – by appointing the nominee arbitrator on behalf of NHAI.

ANALYSIS

20. The Court has considered the contentions of the parties. The dispute resolution mechanism between the parties as provided under the Agreement reads as follows:

“39.1 Amicable Resolution

- (a) Save where expressly stated to the contrary in this Agreement, any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to this Agreement including non-completion of the Project Highway between the Parties and so notified in writing by either Party to the other (the "Dispute") in the first instance shall be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 39. 1 (b) provided further that the Party claiming dispute resolution shall issue a notice in writing of at least thirty (30) days to the other Party informing it of its intention of initiating dispute resolution procedure.*
- (b) In the event of any Dispute between the Parties, either Party may call upon the Independent Consultant to mediate and assist the Parties arriving at an amicable settlement thereof. Failing mediation by the independent Consultant or without the intervention of the Independent Consultant, either Party may require such Dispute to be referred to the Chairman of NHAI and the Chairman of the Board or Directors of the Concessionaire, for the time being for amicable settlement. Upon such reference, the said two Chairmen shall meet not later than 7 (seven) days*

of the date of such request to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the said period or the Dispute is not amicably settled within 15 (fifteen) days of such meeting between the said two Chairmen, either Party may refer the dispute to arbitration in accordance with the provisions of Clause 39.2.

- (c) *If the Dispute is not resolved as evidenced by the signing of the written terms of settlement within 30 (thirty) working days of the aforesaid notice in writing or such longer period as may be mutually agreed by the Parties then the provisions of Clause 39.2 shall apply.*

39.2 Arbitration

39.2.1 Any Dispute, which is not resolved amicably as provided in Clause 39.1 shall be finally decided by reference to arbitration by a Board of Arbitrators, appointed pursuant to Clause 39.2.2 below. Such arbitration shall be held in accordance with the Rules of Arbitration of the Indian Council of Arbitration and shall be subject to the provisions of the Indian Arbitration and Conciliation Act, 1996 and any amendments thereto.

39.2.2 There shall be a Board of three arbitrators of whom each party shall select one and the third arbitrator shall be appointed in accordance with the Rules of Arbitration of the Indian Council of Arbitration.

39.2.3 The arbitrators shall issue a reasoned Award.

39.2.4 The venue of such arbitration shall be New Delhi, India.

39.2.5 The Concessionaire and NHAI undertake to carry out any decision or award of the arbitrators (the "Award") without delay. Awards relating to any Dispute shall be final and binding on the Parties as from the date they are made.

39.2.6 The Concessionaire and NHAI agreed that an Award may be enforced against the Concessionaire and/ or NHAI as the case may be and their respective assets wherever situated.

39.2.7 This Agreement and rights and obligations of the Parties shall remain in full force and effect pending the Award in any arbitration proceeding hereunder."

21. The documents and the correspondences which has been shown to the Court, clearly demonstrate that Millennium has complied with the afore-noted procedure by expressing their desire to have amicable resolution of their disputes through conciliation before the Chairperson. Regardless, such an attempt was also made pursuant to the order dated 18th September, 2018 passed by this Court which reads as follows:

“2. Mr. Nayyar’s grievance, which is, that despite requesting for a conciliation meeting with the respondent/NHAI, the Chairperson of respondent/NHAI has not convened a meeting in that behalf.

3. Mr. Sethi, learned senior counsel, who appears for respondent/NHAI says that the Chairperson of respondent/NHAI would have no difficulty in convening such a meeting.

4. Accordingly, the Chairperson of the respondent/NHAI will convene a Conciliation meeting at his office.”

22. The conciliation efforts, however, as noted above, did not succeed and disputes could not be resolved before the Chairman.

23. Millennium had notified their claims in their reply dated 19th July 2018 to the Substitution Notice, which amounts to compliance with the requirement of notifying the disputes in writing as envisaged under Clause 39.1(a) of the Agreement. On receipt of the said reply, it became incumbent upon NHAI to refer the claims notified by Millennium for conciliation in accordance with the mechanism under Clause 39.1 of the Agreement. Besides, an opportunity to conciliate also arose when this Court directed the Chairman to convene a meeting in terms of the order referred above. This direction was not restricted to include the disputes raised in reply to the Substitution Notice. The Chairman had the occasion to resolve all the dispute by conciliation. If the claims of Millennium were not taken up in conciliatory meetings, they cannot be held responsible. Clause 39.1(c) of the Agreement provides for arbitration upon failure of execution of a written settlement agreement resolving the dispute within 30 working days of the notification in writing of a dispute by one party to another. In the instant case, it is a matter of record, that no written settlement was executed within 30 working days of reply issued by Millennium. In these circumstances, by virtue of Clause 39.1(c), Millennium became entitled to refer the claims and disputes notified by it in the reply dated 19th July, 2018 to arbitration, in

accordance with Clause 39.2 of the Agreement. Millennium has followed the procedure as stipulated under the Agreement, and therefore, it cannot be held that the petition is premature.

24. The import of Clause 39.1 is not to allow a party to defeat the reference of arbitration by refusing to conciliate for an interminable period but, to provide for referral of the dispute(s) to arbitration – in the event there is no amicable resolution within 30 working days of the notice of dispute(s). The object of having a multi-tier conciliation mechanism, at the highest level, is to encourage the parties to make an attempt at expeditious and cost-effective resolution of disputes. This attempt has surely been made in the instant case, but, without success. The Joint Action Plan which culminated as an effort of the conciliation process, has not led to a conclusive and comprehensive resolution of disputes. There are serious allegations of breaches *inter se* parties. At this juncture, when three years have lapsed since the disputes arose, and one attempt for conciliation has failed, the Court does not see any useful purpose being served by referring the parties to conciliation, yet again.

25. In view of the above, the present petition is allowed. Hon'ble Mr. Justice Badar Durrez Ahmed (Retd.), former Chief Justice of Jammu and Kashmir [Contact No. +91-9910615334] is appointed as Millennium's nominee Arbitrator. Hon'ble Ms. Justice Gita Mittal (Retd.), former Chief Justice of High Court of Jammu and Kashmir [Contact No.+919818000220] is appointed as the nominee Arbitrator for NHAI.

26. Direction is issued to ICA to appoint the third Arbitrator in accordance with Rule 23 of the ICA Rules, within a period of ten days from today.

27. The parties are directed to appear before the arbitral tribunal, as and when notified. This is subject to the Arbitrators making necessary disclosures under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

28. It is clarified that the Court has not examined any of the claims of the parties and all the rights and contentions of the parties on merits are left open. Both the parties shall be free to raise their claims/ counter-claims before the Arbitrator in accordance with law.

29. The present petition is allowed and stands disposed of.

NOVEMBER 24, 2021

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(corrected and released on 27th November, 2021)

SANJEEV NARULA, J