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

Date of Decision: 15th September, 2021

+ **ARB.P. 632/2020 & I.As. 10850/2020, 1517/2021.**

MANISHA KULKARNI

PROPRIETOR OF M/S MANI ENGINEERS PUNE Petitioner

Through: Mr. Jay Savla, Senior Advocate with
Mr. Jasdeep Singh Dhillon, Advocate.

versus

NCC LIMITED

..... Respondent

Through: Ms. Priya Kumar, Mr. Tejas Chhabra
and Mr. Utkarsh Pratik, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. The present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking appointment of a Sole Arbitrator for adjudication of disputes between the parties.

2. The case of the Petitioner is that the Respondent – on behalf of its principal employer NBCC, floated a tender in respect of an NBCC project at Kidwai Nagar, New Delhi. On acceptance of Petitioner's bid, they were appointed as the contractor for the afore-noted project on a 'back-to-back

basis' with respect to work stipulated under three identically worded Letter of Intent [*hereinafter referred to as the 'LOI'*], details whereof are as under:

- (i) NCCL/KIDWAI-II/LOI/15-16/020 dated 15th October 2015, for "*Plumbing works of Social Infra complex*" for a value of Rs 3.22 crore. [*hereinafter referred to as '1st LOI'*]
- (ii) NCCL/KIDWAI-II/LOI.15-16/011 dated 08th September 2015, for "*Firefighting works of Tower VI and VII*" for a value of Rs 2.90 crore. [*hereinafter referred to as '2nd LOI'*]
- (iii) NCCL/KIDWAI-II/LOI. 16-17/001 dated 14th April 2016, for "*Plumbing works for Tower VI and VII (166 flats)*" for a value of Rs. 8.51 crore. [*hereinafter referred to as '3rd LOI'*]

3. Subsequently, Respondent issued two Work Orders in respect of the 1st and 2nd LOI – *being* W.O. No. NCCL/KIDWAI-II/HO/W.O./15-16/021 in respect of the 1st LOI [*hereinafter referred to as '1st W.O.'*], and W.O. No. NCCL/KIDWAI-II/ W.O./16- 17/001 in respect of the 2nd LOI [*hereinafter referred to as '2nd W.O.'*]. No Work Order was issued for the 3rd LOI, however, the Petitioner claims that upon written instructions from the Respondent, it has carried out the plumbing works under the said LOI for the Kidwai Nagar project. According to the Petitioner, despite having completed the work, there continues to be an outstanding amount, payable by the Respondent, which has been disputed by them on allegedly frivolous grounds.

4. The 1st and 2nd W.O. contained an arbitration clause, which reads as follows:

"ARBITRATION"

"to prevent disputes and litigation, it shall be accepted as an inseparable part of the Work Order that in the matter regarding

workmanship, interpretation of contract, mode or procedure for carrying out the work, the decision of NCC Limited shall be binding on the contractor and if any technical/contractual dispute which may arise touching the contract the matter shall be referred to Sr. Technical Executive of NCC Limited of the rank of Regional Head or above. If the disputes arising are not resolved at the rank of the Regional Head then the same shall be referred to the Director of NCC Limited whose decision in the matter shall be final and binding.

The contractor shall not raise any objection that the sole arbitrator is or was an employee of NCC Limited and the contractor hereby waives any such right. However, the sole arbitrator must not have been looking after the execution of the work under this contract.

Notwithstanding anything contained in any other Agreement, contract or other document entered into or executed whether prior to or subsequent to this ORDER, the courts in the city of Delhi shall alone has jurisdiction to try any dispute or difference between the parties to this ORDER with regard to the interpretation of the terms of ORDER or any other matter relating to or arising out of this Order and this shall be treated as a separate contract...” [sic]

5. In these circumstances, as the Petitioner's outstanding dues were not discharged, they invoked arbitration in respect of the 1st and 2nd W.O. on 10th January 2020. The Respondent failed to agree upon the appointment of an arbitrator, and accordingly, the present petition has been filed.

RESPONDENT'S CONTENTIONS

6. Ms. Priya Kumar, counsel for the Respondent, does not dispute the existence of the arbitration agreement in respect of the 1st and 2nd W.O. mentioned above, however, she objects to the appointment of the arbitrator, on the following grounds:

6.1. The amount claimed by the Petitioner – which forms the subject matter of the proposed arbitration proceedings – is under the 1st and 2nd W.O. and the 3rd LOI. However, there is no arbitration agreement in respect of 3rd LOI. Thus, this Court does have the jurisdiction to appoint an

arbitrator *qua* such disputes. The notice of invocation dated 10th January 2020 also makes no reference to the 3rd LOI. The Petitioner cannot seek a composite reference, and should have segregated its claims with respect to each LOI, which has not been done.

6.2. The Petitioner cannot club disputes under the 1st and 2nd W.O. containing separate arbitration agreements by issuing a single notice invoking arbitration. There is neither any principal nor any mother agreement which makes a reference to work awarded under different contracts issued by NCC to the Petitioner. In support of this contention, reliance is placed upon the case of ***Duro Felguera, S.A v. Gangavaram Port Ltd.***¹

6.3. Petitioner's claims are time barred. One notice of invocation dated 20th November, 2017 was issued under the Insolvency and Bankruptcy Code, 2016 demanding payment of the alleged dues under the three LOIs. In the said notice, the Petitioner had clearly stated that the principal amount of Rs. 2,50,27,213/- fell due on 14th April, 2016. The amount now claimed under the notice invoking arbitration dated 10th January, 2020 is Rs. 2,08,19,685.86/- plus interest. Therefore, as per Petitioner's own averment, invocation has been done in January, 2020 for the amount which fell due in April, 2016. Therefore, the claim is time barred on the face of it and such dispute should not be referred to arbitration. Reliance is placed upon the judgment of the Supreme Court in ***Bharat Sanchar Nigam Limited v. Nortel Networks India Pvt.***²

¹ (2017) 9 SCC 729.

² (2021) 5 SCC 738.

PETITIONER'S CONTENTIONS

7. Mr. Jay Savla, Senior Counsel for the Petitioner submits that the objections of the Respondent are frivolous and makes the following submissions:

- 7.1. The jurisdiction of this Court under Section 11(6A) of the Act is confined to examination of the existence of arbitration agreement. The arbitration agreement in the instant case is undisputed. The Respondent was awarded the entire work of Kidwai Nagar Project by NBCC under a single agreement. The Respondent has further sub-contracted the same to the Petitioner on back-to-back basis. Therefore, all the LOIs/W.O. are to be interpreted under a single agreement. Therefore, the reference should be made *qua* all the three LOIs.
- 7.2. The three LOIs are identically-worded and were issued for the Kidwai Nagar project awarded to the Respondent by NBCC. The W.O. provide that the Petitioner was responsible for all scope, responsibilities and contractual conditions and specifications in all respects which the Respondent had with NBCC for this project.
- 7.3. For the work carried out against the afore-noted W.O. and LOIs, the Petitioner raised monthly Running Account Bills [*hereinafter referred to as 'R.A. Bill'*] from time to time. These R.A. bills were common, composite and without any segregation for the W.O. as well as the LOIs. Further the R.A. bills were certified by the officials of the Respondent before the Certificate of Payment was issued. This clearly shows that a running account was maintained between

the parties and a common payment was made without segregating on the basis of W.O. or LOI. This can be substantiated with reference to R.A. Bill No. 6/M006 which is a cumulative one and the payment certificate against the same, is also without any segregation.

- 7.4. All disputes and references between the parties arising out of the W.O./ LOIs were jointly taken up as reflected in the minutes of meeting between the parties reflect this. The works are inseparable, integrated, and interlinked, as they are in respect of the same commercial project at Kidwai Nagar. In support of his submission, reliance is placed upon the judgment of the Supreme Court in ***Ameet Lalchand Shah and Others v. Rishabh Enterprises and Anr.***³
- 7.5. The ratio of the judgment in ***Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. and Ors.***,⁴ is also attracted, wherein it has been held that a composite reference was well within the comprehension of the parties to various agreements which were executed on the same day and for the same purpose.
- 7.6. As regards objection of limitation, it was pointed out that the minutes of meeting dated 22nd March, 2017 clearly record that the Respondent was in the process of certifying the final bill of the Petitioner, and thereafter, payment shall be made, upon receipt from NBCC on back-to-back basis. Therefore, the issue of claim being time barred does not arise at all.

³ 2018 (15) SCC 678.

⁴ (2013) 1 SCC 641.

7.7. The issue of limitation is a jurisdictional issue – a mix question of fact and law, and cannot be gone into in the present proceedings under Section 11 of the Act. In this regard, reliance was placed on ***Uttarakhand Purv Sainik Kalyan Nigam Ltd v. Northern Coal Fields Ltd.***⁵

ANALYSIS AND FINDINGS

8. The Court has considered the contentions of the counsels. Before dealing with the question as to whether a reference has to be made *qua* all the three LOIs, it would be apposite to first deal with the question of limitation.

Whether reference is time barred.

9. On this aspect, there cannot be any doubt that the jurisdiction of this Court to reject a petition on the ground of limitation can only be exercised in a limited category of cases, where there is not even a vestige of a doubt that the claim is *ex facie* time barred. If there is even a slightest of doubt, the rule is to refer to arbitration. [See: ***Nortel Networks*** (*supra*)].

10. Applying the afore-noted principles to the facts of the case, it is noted that the parties were involved in meetings as late as 22nd March, 2017. It was recorded in the Minutes of Meetings that the Respondent is in the process of certifying the final bill of the Petitioner, and thereafter the payment would be made to the Petitioner upon receipt from NBCC on back-to-back basis. Thus, at this stage, the Court cannot conclude that the claims are barred by the limitation. Even otherwise, the issue of limitation in the instant case, indeed

⁵ (2020) 2 SCC 455.

being a mix question of fact and law, cannot be examined under Section 11(6A) and the same would have to be agitated before the Arbitral Tribunal. Thus, this objection of the Respondent is without merit and is accordingly rejected.

Whether the agreements are inter-connected.

11. In the opinion of the court, on a *prima facie* glance, the LOIs are not *inter se* connected. It appears that all the LOIs were issued for different works, at different times, and had to be carried out independently. No material has been placed on record to show that the LOIs were to be executed in an inter-connected manner. Each LOI is separate and distinct. Merely because the Petitioner had been issuing running bills and making common payment without segregation, would not imply that the LOIs are inter-connected. Commonality of subject matter, too, does not make the LOIs intertwined or inter-connected so as to compel the Respondent to join arbitration in respect of an LOI which does not contain an arbitration clause. Thus, in the instant facts, the existence of arbitration agreement and invocation thereof has to be examined *qua* each LOI independently.

12. The Petitioner is relying upon the doctrine of inter-connected and inter-related agreements to seek appointment of arbitrator in respect of an agreement where there is no arbitration agreement. To make out a case it has been argued that all the LOIs have been issued for the same project and that the parties have integrated accounting. This commonality cannot be the sole determining factor. In order to apply the test of a composite and inter-connected transaction one would have to conclude that the rights and obligations

of the parties flowing from one agreement, are inextricably with other agreements, that adjudication of one is not possible or feasible without a reference to the other agreement.

13. It must also be remembered that the Petitioner is applying the test of intertwined/inter-connected LOIs not with respect to a non-signatory, but between the same parties. It must be emphasised that the same parties manifestly chose to provide for arbitration mechanism, by way of issuance of two W.O., only with respect to two LOIs, but not the third one. As the same parties, while executing separate agreements under a project, have elected to not provide for arbitration in respect of the 3rd LOI, the discretion exercised by them cannot be disregarded, but rather, should be given effect to. The mutual intent shown by the parties to not go for arbitration with respect to the 3rd LOI cannot be clearer, and to this effect, the Court agrees with the stand of the Respondent.

14. Reliance placed by the Respondent on the judgment in *Ameet Lalchand* (*supra*) is also misplaced. Therein, the Supreme Court, while referring to *Chloro Controls* (*supra*), on examination of facts found that the four agreements which were the subject matter of consideration, were inter-connected. The court found that there was a single commercial project and all the agreements contained references to each other and were executed for the same objective. Thus. The said judgment is distinguishable on facts and does not support the case advanced by the Respondent.

Whether reference can be made with respect to each LOI.

15. Having regard to the existence of arbitration agreement *qua* the 1st and 2nd LOI, the Court has no hesitancy in making reference of disputes arising thereunder to arbitration.

16. However, as far as the question of reference with respect to disputes pertaining to the 3rd LOI is concerned, the Court finds that there is no arbitration agreement between the parties in respect thereof.

17. For the 3rd LOI, admittedly, no W.O. was issued, and thus, there is no arbitration clause. This indicates that the parties have consciously chosen not to resolve the disputes pertaining to the 3rd LOI by way of arbitration. The fundamental feature of an arbitration is that there must be an understanding between the parties to adopt an alternate mechanism for adjudication of future disputes that may arise between them. Parties must be *ad idem* to the existence of an arbitration agreement, as this is the essential requirement for the court to exercise jurisdiction under Section 11 of the Act. Thus, the intention of parties, the most significant aspect, must be demonstrated before court for establishing an arbitration agreement. Under exceptional circumstances, the courts have applied the ‘group of companies’ doctrine to bind non-signatories to arbitration. However, that is also on the touchstone of intention of parties, in cases where an implied consent is discernible on the basis of the nature of transaction. Here, except for the above-noted facts relied upon by the Petitioner, there is no material for the court to conclude that the parties intended to resort to arbitration in respect of the 3rd LOI.

18. This observation is aided by the contents of the notice invoking arbitration dated 10th January, 2020, wherein, the Petitioner itself has sought

reference only with respect to the two W.O. issued under the 1st and 2nd LOI, and pointed out that there is no arbitration agreement with respect to the 3rd LOI. Relevant portion of the notice reads as under:

“10. In the premises, our client hereby invoke arbitration and call upon NCC Ltd to nominate Arbitrator to adjudicate the dispute that have arisen between the parties. Kindly note that arbitration clause is only with respect to NCCL/KIDWAI-II/LOI.15-16/020 dated 15.10.15 and NCCL/KIDWAI- II/LOI/15-16/011 dated 8.09.15 and therefore Arbitration Notice is issued only qua said Letters of Intents.

11. Our client's is advised to file separate legal proceedings with regard to the third Letter of Intent No. NCCL/KIDWAI-II/LOI/16-17/001 dated 14.4.16 wherein work order was never issued and no arbitration mechanism is provided” [Emphasis supplied]

19. Thus, the intention of the parties at the time of invocation is expressly clear. Curiously, the Petitioner, having taken one stance in its notice of invocation, is now pleading a completely contrary case in the present arguments. Regardless, once the Petitioner has acknowledged the lack of arbitration agreement and has itself not sought reference *qua* the 3rd LOI, the invocation requirement for the same, too, remains unfulfilled.

20. In light of the foregoing, no reference can be made by this Court with regards the 3rd LOI.

Can the invocation be composite?

21. However, having said that, it is also felt that the Respondent's objections regarding a composite invocation notice and filing of a common petition, are hyper-technical and devoid of merit. The reference for each agreement will be independent, although the same can be adjudicated by a common arbitral tribunal.

Conclusion

22. In view of the above, the present petition is allowed to the extent that a Common Sole Arbitrator is appointed for adjudication of disputes between the parties in respect of:

- (i) NCCL/KIDWAI-II/LOI/15-16/020 dated 15th October 2015, and the Work Order No. NCCL/KIDWAI-II/HO/W.O./15-16/021,
- (ii) NCCL/KIDWAI-II/LOI.15-16/011 dated 08th September 2015, and the Work Order No. NCCL/KIDWAI-II/ W.O./16- 17/001.

23. The afore-said reference would be before a Common Sole Arbitration but would be treated an independent reference for each LOI.

24. Accordingly, Mr. Justice R.K Gauba, former Judge of this Court, [Contact No.: 9650411919] is appointed as the Sole Arbitrator to adjudicate upon the disputes that have arisen between the parties.

25. The parties are directed to appear before the Arbitrator as and when notified. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

26. The Arbitrator shall be entitled to charge his fees in terms of the Fourth Schedule appended to the Act.

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

28. In view of the above, the present petition, along with the pending applications, is allowed and disposed of.

SANJEEV NARULA, J

SEPTEMBER 15, 2021

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(corrected and released on 18th October, 2021)

