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

**Date of decision: 22nd August, 2022**

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ARB.P. 636/2021

M/S THERMAL ENGINEERS AND INSULATORS PVT. LTD.

..... Petitioner

Through: Mr. Shubham Jaiswal, Advocate.

versus

DELHI TOURISM AND TRANSPORTATION DEVELOPMENT  
CORPORATION LTD. .... Respondent

Through: Mr. Siddhant Nath with Mr. Abhay  
Singh, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI**

**J U D G M E N T**

**(Judgment released on 31.08.2022)**

**ANUP JAIRAM BHAMBHANI J.**

By way of the present petition under section 11(6) of the Arbitration & Conciliation Act 1996 ('A&C Act' for short), the petitioner seeks appointment of an arbitrator to adjudicate upon the disputes that are stated to have arisen with the respondent from Letter of Award dated 15.02.2016 ('Agreement' for short). The petition is premised on clause 25 of the General Conditions of Contract (GCCs) appended to the letter of award, which contemplates reference of disputes between the parties to arbitration under the A&C Act; and upon notice dated 26.02.2021 sent by the petitioner by which it invoked arbitration.



2. Pursuant to issuance of notice dated 19.07.2021, the respondent has filed a short reply dated 05.04.2022 raising the following principal objections:
- a. That upon completion of the work awarded by the respondent to the petitioner on 28.03.2017, the petitioner was paid a sum of Rs. 2,27,27,919/- as per the final bill raised, which payment was made on 18.05.2018 towards full-and-final settlement of such bill; whereafter the petitioner did not make any representation nor did the petitioner send any communication claiming any further sum until 30.05.2019. For this reason, there is no surviving dispute, since the petitioner has received the aforesaid sum of money in full-and-final settlement of all its dues and no claim survives thereafter which could be referred to arbitration;
  - b. That the petitioner has failed to invoke and follow the dispute resolution mechanism as contemplated under clause 25 of the GCCs which govern the agreement. The dispute resolution procedure agreed-to contemplates that if a contractor is dissatisfied with any decision or any dispute arises, the contractor shall, within 15 days, raise the matter with the Superintending Engineer in writing for instructions/decision thereon; and the Superintending Engineer shall give written instructions or decide the matter within 01 month from receipt of the contractor's letter. It is further contemplated in clause 25(i), that if the Superintending Engineer fails to act as



aforesaid, or if the contractor is dissatisfied with the instruction/decision of the Superintending Engineer, the contractor may, within 15 days thereafter, appeal to the Chief Engineer, who would afford to the contractor an opportunity of being heard and to adduce evidence and give a decision within 30 days of receiving such appeal. Furthermore, if a contractor is dissatisfied with the decision of the Chief Engineer, the contractor may, within 30 days thereafter, appeal to the Disputes Redressal Committee setting-out the disputes and the amounts claimed. It is the respondent's contention that the petitioner has failed to follow any of the aforesaid steps and therefore the prayer for reference of the disputes to arbitration is premature and deserves to be rejected. In support of this objection, the respondent has cited a decision of a Co-ordinate Bench of this court in order dated 22.02.2022 in Arb. P. No. 110/2022, where a petition under section 11 of the A&C Act was disposed of by permitting the petitioner to adopt the disputes redressal mechanism aforesaid, with liberty to apply afresh if the disputes were not settled in accordance therewith.

- c. That it is further the respondent's objection, that clause 25 (ii) of the GCCs stipulates that if the contractor does not make any demand for appointment of an arbitrator within 120 days of receiving intimation from the Engineer In-charge that final bills are ready for payment, the contractor's claim shall be deemed to have been waived and absolutely barred, and the respondent



shall be discharged and released of all liabilities therefor. It is argued that in the present case, the notice invoking arbitration under clause 25 of the GCCs was also sent by the petitioner *vide* communication dated 28.10.2020, which is beyond the 120-day period contemplated in clause 25(ii); by reason of which the petitioner's claims are deemed to have been waived.

- d. That reference to arbitration cannot be made in view of the decision of the Hon'ble Supreme Court in '***National Insurance Co. Ltd. vs. Boghara Polyfab Pvt. Ltd.***' reported as (2009) 1 SCC 267, in particular para 52 thereof, which holds that at the stage of reference under section 11 of the A&C act, once a contract is discharged by 'accord and satisfaction,' neither the contract nor any dispute survives for consideration and there cannot be any reference of disputes to arbitration. It is pointed-out that in the said decision the Hon'ble Supreme Court has also held that if the parties settle the claim and a party obtains a full-and-final discharge voucher, even if the claimant might have agreed to settlement due to financial and economic duress or commercial pressure, since the decision was his free choice, without threat, coercion or compulsion, the accord and satisfaction is valid and binding; and there cannot be any subsequent claim or reference to arbitration. In this behalf, it may be beneficial to extract the relevant portions of para 52 of *Boghara Polyfab* (surpa), to which attention has been drawn by the respondent:



*“52. Some illustrations (not exhaustive) as to when claims are arbitrable and when they are not, when discharge of contract by accord and satisfaction are disputed, to round up the discussion on this subject are:*

*(i) ...*

*(ii) A claimant makes several claims. The admitted or undisputed claims are paid. Thereafter negotiations are held for settlement of the disputed claims resulting in an agreement in writing settling all the pending claims and disputes. On such settlement, the amount agreed is paid and the contractor also issues a discharge voucher/no-claim certificate/full and final receipt. After the contract is discharged by such accord and satisfaction, neither the contract nor any dispute survives for consideration. There cannot be any reference of any dispute to arbitration thereafter.*

*(iii) ...*

*(iv)....*

*(v) A claimant makes a claim for a huge sum, by way of damages. The respondent disputes the claim. The claimant who is keen to have a settlement and avoid litigation, voluntarily reduces the claim and requests for settlement. The respondent agrees and settles the claim and obtains a full and final discharge voucher. Here even if the claimant might have agreed for settlement due to financial compulsions and commercial pressure or economic duress, the decision was his free choice. There was no threat, coercion or compulsion by the respondent. Therefore, the accord and satisfaction is binding and valid and there cannot be any subsequent claim or reference to arbitration.”*

- e. That in a recent verdict in ***Indian Oil Corporation vs. NCC Limited*** reported as 2022 SCC Online SC 896, the Hon’ble Supreme Court has observed that even at the stage of deciding the section 11 application the court may consider the aspect with regard to accord and satisfaction of the claims, observing as follows in para 89 of the judgment:



*“89. Having heard learned Counsel appearing for the respective parties and in the facts and circumstances of the case, the issue/aspect with regard to ‘accord and satisfaction’ of claims is seriously disputed and is debatable. Whether, in view of the acceptance of Rs. 4,53,04,021/- by the respondent NCCL which was released by IOCL on the offer/letter made by the respondent NCCL dated 02.11.2016 there is an instance of ‘accord and satisfaction’ of the claims is a good and reasonably arguable case. It cannot be said to be an open and shut case. Therefore, even when it is observed and held that such an aspect with regard to ‘accord and satisfaction’ of the claims may/can be considered by the Court at the stage of deciding Section 11 application, it is always advisable and appropriate that in cases of debatable and disputable facts, good reasonably arguable case, the same should be left to the Arbitral Tribunal. Similar view is expressed by this Court in the case of Vidya Drolia (supra). Therefore, in the facts and circumstances of the case, though it is specifically observed and held that aspects with regard to ‘accord and satisfaction’ of the claims can be considered by the Court at the stage of deciding Section 11(6) application, in the facts and circumstances of the case, the High Court has not committed any error in observing that aspects with regard to ‘accord and satisfaction’ of the claims or where there is a serious dispute will have to be left to the Arbitral Tribunal. However, at the same time, we do not agree with the conclusion arrived at by the High Court that after the insertion of Sub-Section (6-A) in Section 11 of the Arbitration Act, scope of inquiry by the Court in Section 11 petition is confined only to ascertain as to whether or not a binding arbitration agreement exists qua the parties before it, which is relatable to the disputes at hand. We are of the opinion that though the Arbitral Tribunal may have jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability, the same can also be considered by the Court at the stage of deciding Section 11 application if the facts are very clear and glaring and in view of the specific clauses in the agreement binding between the parties, whether the dispute is non-arbitrable and/or it falls within the excepted clause. Even at the stage of deciding Section 11 application, the Court may prima facie consider even the aspect with regard to ‘accord and satisfaction’ of the claims.”*

3. In response to the objections so raised, the petitioner has furnished the following answers:
  - a. That there has been no full or final payment, nor any accord and satisfaction, in relation to the claims sought to be raised by



the petitioner against the respondent; and it is for this reason that *no document evidencing such accord and satisfaction* has been brought on record by the respondent in relation to the payment of Rs. 2,27,27,919/- made by the respondent to the petitioner on 18.05.2018;

- b. That the petitioner has gone through all the steps, which the respondent cites are pre-conditions to seeking reference to arbitration, inasmuch as upon raising the disputes with the Chief Engineer, the said officer rejected the claims by written communication dated 12.01.2021, saying in essence and substance, that all payments have been made as per the provisions of the agreement and nothing further is due. Furthermore, the petitioner points-out that the matter was raised with the Dispute Redressal Committee *vide* written communication dated 18.01.2021; but no action ensued thereon; which is what compelled the petitioner to invoke arbitration *vide* its invocation notice dated 26.02.2021 under clause 25(ii) of the GCCs.
- c. That, in a dispute between the same parties arising from a different letter of award dated 11.05.2016, but governed by the same GCCs, which also contain clause 25 and the same pre-conditions to invocation of the arbitral mechanism, where the same objection of full-and-final payment was taken by the respondent; a Co-ordinate Bench of this court has allowed the



petition and appointed an arbitrator *vide* order dated 25.02.2022 in Arb. P. No. 1033/2021.

4. Upon a conspectus of the averments contained in the petition, the documents on record and the submissions made, the following inferences arise:
  - a. Clause 25 of the GCCs governing the contract contemplates settlement of disputes at various administrative levels of the respondent, going from the level of the Superintending Engineer to that of the Chief Engineer and thereafter to the Dispute Redressal Committee; which steps, the petitioner has successfully demonstrated, have been sufficiently adopted by the petitioner;
  - b. Having exhausted the resolution mechanism, clause 25(ii) contemplates reference of disputes between the parties to arbitration of a sole arbitrator in accordance with the A&C Act, providing that '*The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion*'. Obviously, at this stage, when reference is yet to be made, the occasion for an arbitrator to fix a venue has not arisen. That being said however, in the present case both parties to the contract are based in Delhi; the NIT in culmination of which the letter of award/agreement was made, was also issued from Delhi; and the work in question was also to be performed at Delhi. In this view of the matter, this court is of the view that it



has territorial jurisdiction to entertain and decide the present petition.

- c. Insofar as the respondent's objection that no dispute survives since the petitioner has received a certain sum of money, in what is stated to be full-and-final settlement of the amounts due, and accordingly, all claims were closed on the basis of 'accord and satisfaction' and the contract stands discharged, it is observed that the respondent has *not* placed on record any document to evidence such full-and-final settlement or 'accord and satisfaction'; and in fact Mr. Siddhant Nath, learned counsel for the respondent has very fairly clarified to the court, that as per his instructions, no such document was executed between the parties. There is accordingly no basis to hold that there is no surviving claim or dispute between the parties; or that the contract stands discharged by accord and satisfaction.
5. In fact, in *Indian Oil Corporation* (supra) cited by the respondent, it has been held that: *"Therefore, even when it is observed and held that such an aspect with regard to 'accord and satisfaction' of the claims may/can be considered by the Court at the stage of deciding Section 11 application, it is always advisable and appropriate that in cases of debatable and disputable facts, good reasonably arguable case, the same should be left to the Arbitral Tribunal."*

(emphasis supplied)

In the opinion of this court, in the present case, the issue of 'accord and satisfaction' is certainly debatable and the petitioner



definitely has a reasonably arguable case, which must be left to be considered by the arbitrator.

6. In view of the above, the present petition is allowed and Mr. Vivek. B. Saharya, Advocate (Cellphone No. : +91 9811156831) is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties.
7. The learned Sole Arbitrator may proceed with the arbitral proceedings subject to furnishing to the parties requisite disclosures as required under section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.
8. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.
9. Parties shall share the arbitrator's fee and arbitral costs, equally.
10. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.
11. Parties are directed to approach the learned Sole Arbitrator appointed within 10 days.
12. The petition stands disposed of in the above terms.
13. Other pending applications, if any, also stand disposed of.

**ANUP JAIRAM BHAMBHANI, J**

**AUGUST 22, 2022/ds**