



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

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Date of decision: 11th October, 2022

+ ARB.P. 997/2021

M/S SINGH ASSOCIATES

..... Petitioner

Through: Mr. S.W. Haider and
Ms. Pooja Dua, Advs.

versus

UNION OF INDIA

..... Respondent

Through: Mr. J. K. Singh and
Mr. Rudresh Tripathi, Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. The instant petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of an independent Arbitrator to adjudicate the claims of the petitioner.
2. The petitioner, a Partnership Firm which is engaged in the business of construction and undertakes Railway contracts, was awarded the work of 'providing Road Under Bridge ('RUB', for short) of internal size of 5.50m x 3.60m in lieu of level crossing No. D-14 at km 17/5-6 on PTK-JAT section under ADEN-JAT' by the Northern Railways, i.e., the respondent department, *vide* letter dated September 25, 2013 for ₹ 2,55,13,333/- with the stipulated time of completion of work of six months, i.e., by March 24, 2014.



3. It is stated that the petitioner had made all the arrangements for execution of the work in right earnest but work could not be completed in the aforesaid scheduled period due to substantial increase in the scope of work, late decisions, non-approval of drawings and non-grant of permission for pushing and for other reasons attributable to the respondent department and consequently the work was extended finally up to June 30, 2018 and was successfully completed on June 28, 2018. Thereafter, despite the petitioner reminding the respondent department about the preparation and payment of the final bill, the respondent kept on evading on one pretext or the other. However after a considerable lapse of time, the petitioner, upon an enquiry, was told that unless it signs the final bill as well as other documents in advance without protest, the respondent department would not even release the security deposit and final bill amounts as prepared by the department. In these circumstances, the petitioner, under financial constraints, had to sign the documents desired by the respondent department.

4. Subsequently, the final bill, as prepared by the respondent was paid. However the same did not include payments against various items executed by the petitioner. Further, the PVC bill was also not released. Thereupon the petitioner made several requests to the concerned department of the respondent to consider making payments qua the items not included in the final bill and also of the PVC bill, but to no avail.

5. Consequently, the petitioner *vide* letter dated August 10, 2021, invoked the Arbitration Clause contained in Clause 64 of the Indian Railways Standard General Conditions of Contract (hereinafter referred to as 'GCC'), as applicable to the parties herein, calling upon the respondent to make payment of the claims of the petitioner. Clause 64 of the GCC reads as



under:-

“64(1)(i) Demand for Arbitration.- In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, of 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 itemwise. Only such dispute(s) or difference (s) in respect of which the demand has been made together with counterclaims or set off shall be referred to arbitration and other matters shall not be included in the reference.

64 (1) (ii) (a) the Arbitration proceeding shall be assumed to have commenced from the day, a written and valid demand for arbitrator is received by the Railway.

(b) The claimant shall submit his claim stating the facts supporting the claim alongwith all 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 claim from Tribunal thereafter unless otherwise extension has been granted by Tribunal.

64(1)(iii) - 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) (iv)- if the contractor(s) does / do not prefer his their specific and final claim 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 have deemed to waived their claim(s) and he railways shall be discharged and released of all liabilities under the contract in respect of these claims.

64(2) -- Obligation during pendency of arbitrations Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceeding, 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)(a)(i) - In cases where the total value of all claims in question added together does not exceed As 10, 00, 000/(Rupees ten lakh only), the Arbitral Tribunal consist of a sole arbitrator who shall be either the General Manager or a gazetted officer of Railway not below the grade of JA grade nominated by the General Manager in that behalf.

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

64(3)(a)(ii) - in cases not covered by clause 64 (3) (a) (1), the Arbitral Tribunal shall consist of a panel of three Gazetted Rly. officers not below JA grade, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Rly. Officers of one or more departments, of the Rly. to the contractor who will be asked to suggest to General Manager upto 2 names out of panel for appointment as contractors nominee. The General Manager shall appoint at least one out of them as the contractors 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. While nominating the arbitrators it will be necessary to ensure that one of them is from the 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 Railways for the purpose of appointment of arbitrators.

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 to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the 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 SubClause (i), (ii) & (iii) 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 proceedings 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 therefrom.

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 any 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 Railway Board from time to time and the fee shall be borne equally 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.

64(7) Subject to the provisions of the aforesaid Arbitration and Conciliation Act 1996 and the rules there under and any statutory modifications thereof shall apply to the arbitration proceedings under this Clause.”

6. Pursuant to the said invocation letter, respondent issued a reply dated August 24, 2021 wherein a request was made for waiver of the applicability of the provision contained in Section 12(5) of Arbitration and Conciliation Act, 1996. As the petitioner wants an independent Arbitrator to adjudicate the disputes, the petitioner did not accede to the said request. Thereafter, as disputes have arisen between the parties, the petitioner filed the present petition seeking appointment of an independent Arbitrator to adjudicate upon the claims of the petitioner.



7. A reply has been filed on behalf of the respondent department, wherein it is stated that the work was completed by the petitioner on June 28, 2018 and final bill was passed on September 21, 2018 for ₹29,22,912/- and the payment already made, i.e., ₹3,09,67,579/-. The learned counsel for the respondent submitted that in terms of Clause 43(2) of the GCC, the demand of the petitioner for arbitration is not admissible, as the petitioner has given a “No Claim Certificate” against the contract at the time of passing of the final bill for the work executed. The said clause 43 (2) is reproduced as under:-

“43.(2) Signing of “No Claim” Certificate: The Contractor shall not be entitled to make any claim whatsoever against the Railway under or by virtue of or arising out of this contract nor shall the Railway entertain or consider any such claim, if made by the Contractor after he shall have signed a “No Claim” Certificate in favour of the Railway in such form as shall be required by the Railway after the works are finally measured up. The Contractor shall be debarred from disputing the correctness of the items covered by “No Claim” Certificate or demanding a clearance to arbitration in respect thereof.”

8. As regards the non-payment of PVC bills, he has submitted that even though PVC was applicable, the petitioner had not submitted any PVC bill to the respondent. Moreover, the amounts of the final bill, Earnest Money, Security Money and Performance Guarantee were all released.

9. That apart, the petitioner has also signed a Supplementary Agreement whereby it has acknowledged the full and final settlement of all its claims



under the principal Agreement. As the petitioner has accepted the final bill with no claim, the principal Agreement stands duly discharged and all the terms and conditions therein, including the arbitration clause stand rescinded.

10. It is also stated that Clause 64 (1) (iv) of the GCC states that if the contractor does not prefer his 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, they will be deemed to have waived off their claims and the Railways shall be discharged of all liabilities under the contract. The said Clause 64 (1) (iv) is as follows:-

“If the contractor (s) does / do not prefer his / their specific and final claim 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.”

11. That apart, learned counsel for the respondent department has stated that Clause 64 of the GCC, i.e., the arbitration clause, does not contemplate appointment of an outsider as the Arbitrator. The submission of the petitioner that an independent Arbitrator has to be appointed has been contested, by placing reliance upon the judgment of the Supreme Court in the case of **Government of Haryana v. GF Toll Road Pvt. Ltd. and Ors., Civil Appeal No. 27/2019**, wherein it was held that a former employee of an organisation can be appointed as an Arbitrator. It is contended that the Arbitration and Conciliation Act, 1996, does not disqualify a former employee of an organisation from acting as an Arbitrator, provided there are



no justifiable doubts as to his independence and impartiality.

12. The learned counsel for the petitioner, in rejoinder submissions has stated that though the petitioner had completed the work on June 28, 2018, the admitted payments under the final bill were released only on December 17, 2018. He further submitted that the present contract is governed by the GCC of 2014 and clause 64 thereof provides for settlement of disputes through arbitration, irrespective of whether the respondent has obtained a No Claim Certificate or not. Further, it is stated that in the facts and circumstances of the present case, the petitioner had no choice but to issue the No Claim Certificate as desired by the respondent, as even the admitted amounts were not being released by the respondent till the petitioner issued the No Claims Certificate. However, the fact that the respondent had obtained No Claim Certificates in a routine manner on different occasions itself implies that any No Claim Certificate obtained by the respondent shall be of no material relevance for adjudication of the petitioner's claims.

13. As regards Clause 64 (1) (iv) of the GCC on which reliance has been placed by the respondent, it is stated that the same essentially means that the claimant is allowed to file final claims within 90 days of intimation by the respondent that the final bill is ready. This, according to the counsel for the petitioner is conclusive proof that the claims raised by the petitioner are arbitrable, irrespective of any No Claim Certificate. Insofar as the period of 90 days that have been provided in the said clause, it is stated that the same is opposed to Section 28 of the Indian Contract Act, 1872, as has been held by this Court in the case of ***Pandit Construction Company v. Delhi Development Authority and Ors., 2007 (3) ARBLR 205 Delhi***. In any case, the repeated demand of the respondent for issuance of No Claim Certificates



is itself against the law of equity and contracts, and also against the interest of justice, as unilateral and one-sided conditions are treated as null and void.

14. Reliance is placed on the judgment of the Supreme Court in the case of ***Duro Felguera SA v. Gangavaram Port Ltd., (2017) 9 SCC 764*** to contend that the role of courts in petitions under Section 11 of the Arbitration and Conciliation Act, 1996 is to *prima facie* examine the existence of a valid arbitration agreement. A reference is also made to the decision of this Court in the case of ***Picasso Digital Media (P) Ltd. v. Pick-A-Cent Consultancy Service (P) Ltd., 2016 SCC OnLine Del 5581*** wherein it is held that the court at the stage of appointment of an arbitrator cannot examine whether there is in fact a justifiable claim or not, as that would be a question that need to be looked into by the Arbitrator in arbitral proceedings.

15. As regards the issue of No Claims Certificate, reliance has been placed on the judgment of the Supreme Court in the case of ***NTPC v. M/s Reshmi Constructions. Civil Appeal No. 2754/2002*** wherein it was held as under:-

“.....where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a ‘No Demand Certificate’ is signed. Each case, therefore, is required to be considered on its own facts.”

16. The learned counsel for the petitioner has vehemently opposed the stand of the respondent that an outsider cannot be made an Arbitrator and



that there is no bar on a former employee of an organisation to act as an Arbitrator. It is his submission that after the amendment of the Arbitration and Conciliation Act, 1996, in the year 2015, the law is no more *res integra*, insofar as, an officer having an interest in the matter cannot be appointed as an Arbitrator.

17. That apart, he has also contested the execution of the Supplementary Agreement by stating that as per Clause 9.8 of the Agreement, the execution of the Agreement has to be with accord and satisfaction and that too after payment of the full and final amounts. However, even the admitted amounts that need to be paid were released much after the execution of the Supplementary Agreement, on December 17, 2021. Further, it is stated that a bare perusal of the Supplementary Agreement, a copy of which has been placed on record by the respondent would reveal that the same is undated and that the signatures of the petitioner were taken at the stage of tender, i.e., even before the commencement of the work. The same is apparent from the fact that the petitioner has affixed signatures as “*Tenderor*” and the respondent as “*Tender inviting authority*”. Therefore, the said document has no sanctity in law. He has submitted that therefore, the objection of the respondent on the ground of signing of the said document is devoid of any merit and needs to be dismissed.

ANALYSIS:-

18. Having heard the learned counsel for the parties and perused the record, the first and foremost issue which arises for consideration is, whether, in view of the stand of the respondent that the petitioner has submitted a No-Claim Certificate at the time of passing the final bill for the work executed, the dispute, if any, between the parties, can be referred to



arbitration. In support of the submission, the learned counsel for the respondent had relied upon Clause 43(2) which I have already reproduced in paragraph 7 above.

19. The aforesaid stand of the respondent was contested by the learned counsel for the petitioner by stating that the petitioner had no choice but to issue a No-Claim Certificate as desired by the respondent, as even the admitted amounts were not being released by the respondent till the petitioner issued the same. It was also the contention of the learned counsel for the petitioner that the No-Claim Certificate was obtained in a routine manner and the same has no relevance for adjudication of the petitioner's claim.

20. I have seen the so-called no-claim certificate. It is a hand-written note on the final bill given by the petitioner stating "..... accepted full and final with no claim". The legality of such a so-called no-claim certificate has been considered by the Supreme Court in various judgments including the decision in the case of **Mayavati Trading Pvt. Ltd. v. Pradyut Deb Burman, Civil Appeal No. 7023 of 2019**, wherein the Supreme Court, after considering its earlier decision in the case of **Garware Wall Ropes Ltd. v. Coastal Marine Constructions and Engineering Ltd., (2019) SCC OnLine SC 515**, has in paragraph 10, held as under:

"10) This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the



narrow sense as has been laid down in the judgment Duro Felguera, S.A. (supra) – see paras 48 & 59.”

21. Considering the above, the plea of the learned counsel for the petitioner that the issue of No-Claim Certificate obtained by the respondent shall be of no material relevance for adjudication of the present petition is appealing.

22. One of the submissions advanced by the learned counsel for the respondent is by relying upon clause 64(1) (iv) of the GCC as reproduced in paragraph 10 above, to contend that as the petitioner had not preferred his claims in writing within a period of 90 days of receiving the final bill, the petitioner is deemed to have waived off their claims and the respondent is discharged of all liabilities under the contract.

23. In the case in hand, the final bill was prepared on September 21, 2018. The same was paid by the respondent on November 20, 2018. This means that the final bill was paid much before the expiry of the period of 90 days. In that sense, the respondent had not given any opportunity to the petitioner to make any claim/ raise any dispute with regard to the final bill.

24. It is the case of the petitioner that the respondent did not include payments against various work/items executed by the petitioner in the final bill, and also did not release the PVC bill. Even the plea of the learned counsel for the petitioner that, the No-Claim Certificate was obtained by the respondent at the time of passing of the bills, and not after providing any time for the petitioner to raise any dispute with regard to the final bill, clearly implies that clause 64(1) (iv) which states that claims could be made within 90 days, has been made an empty formality.



25. One of the submissions of the learned counsel for the respondent is based on a Supplementary Agreement, said to have been executed by the parties whereby it was agreed that in consideration of the payment already made under the Agreement, the Principal Agreement shall stand finally discharged and rescinded and all the terms and conditions including arbitration clause would cease to exist, and as such, this petition for appointment of an Arbitrator is not maintainable as there is no arbitration clause which is in force.

26. This submission of the learned counsel for the respondent was contested by the learned counsel for petitioner on two grounds:-

(1) the signatures on the same were taken at the stage of tender, i.e., before commencement of the work, as is evident from the presence of the words '*signatures of tenderor*' i.e., the petitioner and '*signature of tender inviting authority*', i.e., the respondent. It is also his submission that the blanks which were left were filled subsequently, after the payment was received, and as such, the document has no sanctity in law.

(2) Even the admitted amounts that need to be paid were released much after the execution of the Supplementary Agreement, at variance with clause 9.8 of the Agreement which stipulates that the execution of the agreement is to be with accord and satisfaction of the petitioner, that too after the payment of the full and final amount.

27. The submission made by the counsel for the petitioner that, such a document would have no sanctity in law is appealing. Surely a document said to be a Supplementary Agreement on which signature of the petitioner



as a tenderor was taken, i.e. at the stage of submitting the tender, much before the work had commenced, that too without a date and with blanks, cannot be binding on the petitioner. Having said so, the Supreme Court in the case of ***Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1***, has, by referring to Section 11 (6A) of the Arbitration and Conciliation Act, 1996, held that at the stage of referral, the requirement is only to examine the existence of an arbitration clause and not the validity of the same. The law laid down by the Supreme Court in the case is as under:

“147. We would proceed to elaborate and give further reasons:

147.1. In Garware Wall Ropes Ltd. , this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to “existence” and “validity” of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing para 29 thereof : (SCC p. 238)

“29. This judgment in Hyundai Engg. case is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did “exist”, so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-contract would not “exist” as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with “existence”, as opposed to Section 8, Section 16 and Section 45, which deal with “validity” of an arbitration agreement is answered by this Court's understanding of the expression “existence” in Hyundai Engg. case , as followed by us.”



Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement.

147.2. The court at the reference stage exercises judicial powers. "Examination", as an ordinary expression in common parlance, refers to an act of looking or considering something carefully in order to discover something (as per Cambridge Dictionary). It requires the person to inspect closely, to test the condition of, or to inquire into carefully (as per Merriam-Webster Dictionary). It would be rather odd for the court to hold and say that the arbitration agreement exists, though ex facie and manifestly the arbitration agreement is invalid in law and the dispute in question is non-arbitrable. The court is not powerless and would not act beyond jurisdiction, if it rejects an application for reference, when the arbitration clause is admittedly or without doubt is with a minor, lunatic or the only claim seeks a probate of a will.

147.3. Most scholars and jurists accept and agree that the existence and validity of an arbitration agreement are the same. Even Stavros Brekoulakis accepts that validity, in terms of substantive and formal validity, are questions of contract and hence for the court to examine.

147.4. Most jurisdictions accept and require prima facie review by the court on nonarbitrability aspects at the referral stage.

147.5. Sections 8 and 11 of the Arbitration Act are complementary provisions as was held in Patel Engg. Ltd. The object and purpose behind the two provisions is identical to compel and force parties to abide by their contractual understanding. This being so, the two provisions should be read as laying down similar standard and not as laying down different and separate parameters. Section 11 does not prescribe any standard of judicial review by the court for determining whether an arbitration agreement is in existence. Section 8 states that the judicial review at the stage of reference is prima facie and not final. Prima facie standard equally applies when the power of judicial review is exercised by the court under Section 11 of the Arbitration Act. Therefore, we can read the mandate of valid arbitration agreement in Section 8 into mandate of Section 11, that is, "existence of an arbitration agreement".



147.6. Exercise of power of prima facie judicial review of existence as including validity is justified as a court is the first forum that examines and decides the request for the referral. Absolute “hands off” approach would be counterproductive and harm arbitration, as an alternative dispute resolution mechanism. Limited, yet effective intervention is acceptable as it does not obstruct but effectuates arbitration.

147.7. Exercise of the limited prima facie review does not in any way interfere with the principle of competence-competence and separation as to obstruct arbitration proceedings but ensures that vexatious and frivolous matters get over at the initial stage.

147.8. Exercise of prima facie power of judicial review as to the validity of the arbitration agreement would save costs and check harassment of objecting parties when there is clearly no justification and a good reason not to accept plea of non-arbitrability. In *Subrata Roy Sahara v. Union of India*, this Court has observed : (SCC p. 642, para 191)

“191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims. One needs to keep in mind that in the process of litigation, there is an innocent sufferer on the other side of every irresponsible and senseless claim. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him into defeat for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for what he has lost for no fault? The suggestion to the legislature is that a litigant who has succeeded must be compensated by the one who has lost. The suggestion to the legislature is to formulate a mechanism that anyone who initiates and continues a litigation senselessly pays for the same. It is suggested that the legislature should consider the introduction of a “Code of Compulsory Costs”.”



147.9. Even in *Duro Felguera* , Kurian Joseph, J., in para 52, had referred to Section 7 (5) and thereafter in para 53 referred to a judgment of this Court in *M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd.* to observe that the analysis in the said case supports the final conclusion that the memorandum of understanding in the said case did not incorporate an arbitration clause. Thereafter, reference was specifically made to *Patel Engg. Ltd. and Boghara Polyfab (P) Ltd.* to observe that the legislative policy is essential to minimise court's interference at the pre-arbitral stage and this was the intention of sub-section (6) to Section 11 of the Arbitration Act. Para 48 in *Duro Felguera* specifically states that the resolution has to exist in the arbitration agreement, and it is for the court to see if the agreement contains a clause which provides for arbitration of disputes which have arisen between the parties. Para 59 is more restrictive and requires the court to see whether an arbitration agreement exists — nothing more, nothing less.

Read with the other findings, it would be appropriate to read the two paragraphs as laying down the legal ratio that the court is required to see if the underlying contract contains an arbitration clause for arbitration of the disputes which have arisen between the parties — nothing more, nothing less. Reference to decisions in *Patel Engg. Ltd. and Boghara Polyfab (P) Ltd.* was to highlight that at the reference stage, post the amendments vide Act 3 of 2016, the court would not go into and finally decide different aspects that were highlighted in the two decisions.

147.10. In addition to *Garware Wall Ropes Ltd. case* , this Court in *Narbheram Power & Steel (P) Ltd. and Hyundai Engg. & Construction Co. Ltd.* , both decisions of three Judges, has rejected the application for reference in the insurance contracts holding that the claim was beyond and not covered by the arbitration agreement. The Court felt that the legal position was beyond doubt as the scope of the arbitration clause was fully covered by the dictum in *Vulcan Insurance Co. Ltd.* Similarly, in *PSA Mumbai Investments Pte. Ltd.* , this Court at the referral stage came to the conclusion that the arbitration clause would not be applicable and govern the disputes. Accordingly, the reference to the Arbitral Tribunal was set aside leaving the respondent to pursue its claim before an appropriate forum.



147.11. The interpretation appropriately balances the allocation of the decision-making authority between the court at the referral stage and the arbitrators' primary jurisdiction to decide disputes on merits. The court as the judicial forum of the first instance can exercise prima facie test jurisdiction to screen and knock down ex facie meritless, frivolous and dishonest litigation. Limited jurisdiction of the courts ensures expeditious, alacritous and efficient disposal when required at the referral stage."

28. Further, the Court in paragraph 244.4 has held as under:-

"244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer"."

29. It is pertinent to state that the conclusion in the above paragraph 147 has been referred to a large bench by the Supreme Court, in the case of ***M/s.N.N. Global Mercantile Pvt. Ltd. v. M/s. Indo Unique Flame Ltd. & Ors., (2021) 4 SCC 379***, decided on January 11, 2021, by holding as under:-

"34. We doubt the correctness of the view taken in paras 146 and 147 of the three-Judge Bench in Vidya Drolia. We consider it appropriate to refer the findings in paras 22 and 29 of Garware Wall Ropes Limited., which has been affirmed in paras 146 and 147 of Vidya Drolia, to a Constitution Bench of five Judges."

The matter is still pending adjudication. However, there is no stay of the judgment.

30. In the case in hand, the respondent does not deny the existence of an arbitration clause. Their only objection is with regard to the validity of that arbitration agreement in the given facts. However, such an argument is also *prima facie* not sustainable as the respondent, *vide* letter dated August 8, 2021 had stated that the request of the petitioner for appointment of an arbitrator is under process. In fact, they had sought consent of the petitioner



for waiving off the applicability of Section 12 (5) of the Arbitration and Conciliation Act, 1996, which means they agree that disputes have arisen which need to be referred to arbitration in terms of the arbitration clause. Having said that, in view of the law laid down by the Supreme Court in ***Vidya Drolia (supra)***, it is not for this Court to come to a conclusion that with execution of the Supplementary Agreement, the arbitration clause stood rescinded. In other words, this issue need to be decided by the Arbitrator.

31. Another submission of the learned counsel for the respondent is that it is within its right to appoint a retired employee/officer of the respondent as an arbitrator. The said submission was contested by the learned counsel for the petitioner by stating that an officer/employee having an interest in the matter cannot be appointed as an arbitrator.

32. I must state this issue has been considered by the Supreme Court in the case of ***Government of Haryana (supra)*** on which reliance has been placed by the counsel for the respondent, wherein it is held that the first entry to the Fifth Schedule of the Arbitration and Conciliation Act, 1996 which reads as under, cannot be read to indicate a relationship other than an employee / consultant or an advisor.

“

THE FIFTH SCHEDULE

[See section 12(1)(b)]

The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.....”

33. A reading of the above would show that a retired employee has not been barred from being appointed as an arbitrator. The said Judgment was



followed by the Supreme Court in its subsequent opinion in the case of ***Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV), Civil Appeal Nos. 9486-9487 of 2019***, wherein the Supreme Court in clear terms has held that, there is no bar under Section 12 (5) of the Arbitration and Conciliation Act, 1996 for the appointment of a retired employee to act as an arbitrator. It is to be noted that the Judgment of the Supreme Court in ***Central Organisation for Railway Electrification (supra)*** has been referred to a larger Bench in the case of ***Union of India v. Tania Constructions Ltd., 2021 SCC OnLine 271***, relevant part whereof reads as under:

“1. Having heard Mr. K.M. Nataraj, learned ASG for sometime, it is clear that on the facts of this case, the judgment of the High Court cannot be faulted with. Accordingly, the Special Leave petition is dismissed. However, reliance has been placed upon a recent three-Judge Bench decision of this Court delivered on 17.12.2019 in Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company, 2019 SCC OnLine SC 1635. We have perused the aforesaid judgment and prima facie disagree with it for the basic reason that once the appointing authority itself is incapacitated from referring the matter to arbitration, it does not then follow that notwithstanding this yet appointments may be valid depending on the facts of the case.

2. We therefore request the Hon’ble Chief Justice to constitute a larger Bench to look into the correctness of this judgment.”

However it is seen that the matter is still pending adjudication and in the absence of a stay, ***Central Organisation for Railway Electrification (supra)*** still holds the field.



34. No doubt, the respondent has stated in their reply that it can appoint a retired employee, but they have not placed before this Court, any names/panel prepared by them in terms of the Judgment of the Supreme Court in the case of ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Ltd., Arbitration Petition (Civil) No. 50 of 2016***, wherein it is held that a party cannot, on their own, appoint a retired employee to be an arbitrator without giving a choice of more than one retired employee to enable the other party to agree to one name from amongst the panel, who can act as an arbitrator. Regard must be had to the direction of the Supreme Court in ***Voestalpine Schienen GMBH (supra)***, wherein it is held as under:

“28. Some comments are also needed on the clause 9.2(a) of the GCC/SCC, as per which the DMRC prepares the panel of 'serving or retired engineers of government departments or public sector undertakings'. It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broad based. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy etc. Therefore, it would also be appropriate to include persons from this field as well.”

35. In the absence of any submission/stand that such a panel has been prepared which *inter alia* includes retired employees of the respondent, this



Court has no other alternative but to allow the present petition seeking appointment of an Arbitrator.

36. Accordingly, I appoint, Justice R.K. Gauba, a retired Judge of this Court (Mobile No.9650411919) as a Sole Arbitrator who shall adjudicate the disputes between the parties through claims and counter-claims, if any. The fee of the learned Arbitrator shall be in terms of Fourth Schedule of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall give disclosure in terms of Section 12 of the Act. All the pleas of the parties, both on facts and in law are left open to be decided by the learned Arbitrator.

37. Petition stands disposed of.

V. KAMESWAR RAO, J

OCTOBER 11, 2022/aky/jg

