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

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Date of Decision: 06.12.2022

+ **ARB.P. 406/2022 and I.A. No. 16533/2022 (for directions)**

TEWATIA CONSTRUCTION PVT LTD. Petitioner
Through: Mr. Navneet Dugar and Mr. Manoj
Kumar, Advocates.
versus

UNION OF INDIA & ANR. Respondents
Through: Mr. Vikram Jetly, CGSC with
Ms.Shreya Jetly, Advocate.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT (ORAL)

SACHIN DATTA, J.

1. This is a petition filed by the petitioner under Section 11(6) (c) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) seeking that the petitioner’s Claim nos. 2 and 3, as preferred, be also referred for the arbitration, alongwith the other claims, which have already been referred to the arbitration on the basis of the arbitration clause contained in the contract entered into between the parties.

2. The background of the matter is that the petitioner was awarded a contract for “Construction of Married Accommodation for DSC and NCs (E) at AF Station, Hindan” vide agreement bearing no.142/EE/GCD/2015-2016. The stipulated period for completion of the said work was twelve months. The petitioner submits that it started execution of the work pursuant to the said agreement, but there was lapse on the part of the respondents on various counts such as providing/furnishing the requisite

drawings, taking timely decision, providing hindrance free site, etc. As such, the work came to be completed beyond the scheduled date of completion. Consequently, certain disputes are stated to have arisen between the parties and certain claims were raised by the petitioner. A request for appointment of an arbitrator, under the relevant arbitration clause, is stated to have been made by the petitioner vide communication dated 04.06.2021 wherein it was requested as under:-

“This has a reference to above mentioned letter of the Chairman, DRC in the said matter wherein decision of the DRC has been conveyed. Copy of said decision is enclosed for your kind reference. The DRC has held its meeting on 05.02.2021. We feel totally dissatisfied with the decision of DRC.

Under the above circumstances, we have no other choice then to request your goodself for invoking arbitration clause 25 of the said agreement. Therefore, we request your good self for appointment of sole arbitrator for entering into reference and to adjudicate upon the matter/dispute in terms of clause 25 of the agreement. Duly filled in “Appendix XV” is enclosed herewith for reference and further action in the matter. We also hereby reserve right to amend, add or delete our claims as and when warranted. We assure our best cooperation at all time.”

3. The claims that were sought to be referred to the arbitration vide the above communication, were as under:-

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S. No.	Amount of claim	Brief description of claim
Claim No. 1	Rs.21,47,903/-	Matter formed over a claim of sum of Rs.21,47,903/- due to unpaid interest under provision of clause 9 of the contract for delay in payment of Bill and belated release of withheld amount.
Claim No. 2	Declaratory award	Matter formed over issue of breach of contract committed by authority, so the action of determination of extension of time under clause of the contract is arbitrary & unlawful and action taken under clause 2 of contract is contractually invalid.
Claim No. 3	Rs.18,89,789/-	Matter formed over a sum of Rs.18,89,289/- towards refund of the amount on account of

		contractually invalid action and illegally recovered under clause 2 of the agreement.
Claim No. 4	Rs.43,36,870/-	Matter formed over a sum of Rs.43,36,870/- on account of loss of profit and overhead due to prolongation of contract caused by the department.
Claim No. 5	Rs.4,52,906/-	Matter formed over a sum of Rs.4,52,906/- for losses suffered on account of increase in rates due to prolongation of contract.
Claim No. 6	To be calculated	Matter formed over applicability of GST on payments received after coming in to force of GST.
Claim No. 7	To be calculated	Matter formed over compensation by way of interest @12% with annual rests (pendentelite and post reference)
Claim No. 8	Rs.5,00,000/-	Matter formed over claim of Rs.5,00,000/- towards cost of arbitration
Total	Rs.93,27,465/- plus GST & interest	

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4. In the context of the aforesaid invocation, the respondents vide communication dated 11.06.2021 appointed Sh. Dinesh Kumar, Arbitrator, Ministry of Housing and Urban Affairs, as an arbitrator to adjudicate the disputes between the parties; however, the said communication excluded the aforesaid Claim nos. 2 and 3 from the scope of reference to the arbitration.

5. Mr. Vikram Jetly, learned standing counsel appearing on behalf of the respondents submits that the aforesaid Claim nos. 2 and 3 could not be referred to arbitration since the same fell within the scope of “excepted matter”. He draws the attention to the relevant arbitration clause and Clause 2 of the General Condition of Contract, which reads as under:-

“ Clause 2 - Compensation for Delay

If the contractor fails to maintain the required progress in terms of clause 5 or to complete the work and clear the site on or before the contract or extended date of completion, he shall, without prejudice to any other right or remedy available under the law to the Government on account of such breach, pay as agreed

compensation the amount calculated at the rates stipulated below as the authority specified in schedule 'F' (whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day/month (as applicable) that the progress remains below that specified in Clause 5 or that the work remains incomplete.

This will also apply to items or group of items for which a separate period of completion has been specified.

(i) Compensation @ 1.5% per month of delay
for delay of work to be computed on per day basis

Provided always that the total amount of compensation for delay to be paid under this Condition shall not exceed 10% of the Tendered Value of work or of the Tendered Value of the item or group of items of work for which a separate period of completion is originally given.

The amount of compensation may be adjusted or set-off against any sum payable to the Contractor under this or any other contract with the Government. In case, the contractor does not achieve a particular milestone mentioned in schedule F, or the re-scheduled milestone(s) in terms of Clause. 5.4 the amount shown against that milestone shall be withheld, to be adjusted against the compensation levied at the final grant of Extension of Time. With-holding of this amount on failure to achieve a milestone, shall be automatic without any notice to the contractor. However, if the contractor catches up with the progress of work on the subsequent milestone(s), the withheld amount shall be released. In case the contractor fails to make up for the delay in subsequent milestone(s), amount mentioned against each milestone missed subsequently also shall be withheld. However, no interest, whatsoever, shall be payable on such withheld amount.

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Clause 25 – Settlement of Disputes & Arbitration

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

(i) *If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes and drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the*

Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with the decision of the Chief Engineer, the contractor may within 30 days from the receipt of the Chief Engineer decision, appeal before the Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'. If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer for appointment of arbitrator on prescribed proforma as per Appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

It is a term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.

- (ii) *Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Special Director General or the Director General, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to*

proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or Additional Director General or Special Director General or Director General, CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment, thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the

discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.”

(emphasis supplied)

6. Learned standing counsel for the respondents submits that reference could be made to arbitration, on the basis of the aforesaid arbitration clause, only in respect of those claims which did not fall within the scope of any “excepted matter”. For this purpose he relies upon the expression used in the opening part of the arbitration clause “*except where otherwise provided in the contract*”. He submits that the determination under Clause 2, as regards the amount of compensation which is to be levied on the petitioner/contractor for delay was expressly rendered final and binding in terms of the said clause and hence the same falls within the scope of “excepted matter”, and therefore, there can be no reference to arbitration in respect of the aforesaid Claim nos. 2 and 3. The said claims essentially seek to impugn the decision taken by the respondents under Clause 2 of the GCC.

7. In support of his contentions, learned standing counsel for the respondents has relied upon the following judgments:-

- i. *R.K. Goyal vs. UOI, 1999 III AD (Delhi) 712;*
- ii. *DDA Vs. Sudhir Brothers, 57 (1995) DLT 474 (DB);*
- iii. *Harsha Construction Vs. UOI & Ors. AIR 2015 SC 270;*
- iv. *J.G. Engineers Pvt Ltd. Vs. UOI, (2011) 5 SCC 758;*
- v. *Mitra Guha Builders (India) Co. v. ONGC, (2020) 3 SCC 222;*
and
- vi. *Ssangyong Engg. & Construction Co. Ltd. v. NHAI, AIR 2019 SC 5041.*

8. A perusal of the aforesaid judgments reveal that all the aforesaid decisions were rendered at the post award stage. The authorities relied upon by the respondents do not deal with the situation where reference to

arbitration is sought to be prevented on the basis of a determination made under Clause 2.

9. In the aforesaid decisions, it was only at the post award stage the Court found that the relevant claims were unsustainable in the light of the relevant contractual stipulations.

10. In the present case, we are concerned with the issue as to whether there can be reference of the petitioner's Claim nos. 2 and 3 to an Arbitral Tribunal which is already duly constituted in terms of the relevant arbitration agreement between the parties.

11. It has been argued by learned counsel for the petitioner that what is rendered final in Clause 2 (supra) is the calculation of compensation as per the formula contained in the aforesaid clause. However, no finality is attached with regard to the issue as to whether the contractor/petitioner has failed to maintain the required progress of work. It is contended that this is an issue that is necessarily to be decided by a duly constituted arbitral tribunal. In this regard, learned counsel for the petitioner relies upon the judgment of this Court in the case titled as *DSI IDC Vs. H.R. Builders, 2021 SCC OnLine Del 3997*. The said judgment also relies upon the judgment of the Supreme Court in *J.G. Engineers Pvt Ltd. Vs. UOI, (2011) 5 SCC 758* wherein the Supreme Court in the context of identical/similarly worded clause has affirmed that what is made final and binding by Clause 2 is not the decision of any authority on the issue whether the contractor was responsible for the delay or not; what is made final is the decision on consequential issues relating to quantification, if there is no dispute as to who committed breach.

12. Thus, only if the contractor admits that he is in breach or if the

arbitrator finds that the contractor is in breach for the delay responsible, the decision of the Superintendent Engineer is rendered final qua the question of compensation. It is strenuously contended by learned counsel for the petitioner that even in the present case, the petitioner has not accepted any culpability as regards failure to maintain the requisite progress which is a pre-condition for levy of compensation under Clause 2 (supra).

13. *Prima facie*, reliance placed by the petitioner on the aforesaid judgment of this Court in **DSI IDC** (supra) and the judgment of the Supreme Court in the case titled as **J.G. Engineers Pvt. Ltd.** (supra) appears to be well founded. This is an aspect which requires further examination/adjudication.

14. However, it is evident that Claim Nos. 2 and 3 are not demonstratively non-arbitrable and/or in the nature of “deadwood”, so as to deny reference of the said claims to Arbitration.

15. There cannot be any quarrel with the proposition that it would be open for the respondents to take objection as to the arbitrability of the said claims which would be adjudicated by the Arbitrator, as contemplated in Section 16 of the Act.

16. It has been affirmed by the Supreme Court that at the stage of considering whether a matter is to be referred to the arbitration under Section 11 of the Act, the Court will not embark into a detailed inquiry/further adjudication on the issue as to whether particular claim is maintainable or not. The maintainability of any particular claim, including the issue as to whether the same falls within the scope of any excepted matter or whether the same is barred by time, is to be considered by the concerned Arbitral Tribunal. This position has been affirmed by a 3-Judge

Bench of the Supreme Court in its judgment in the case titled as ***Vidya Drolia v. Durga Trading Corpn.***, (2021) 2 SCC 1. The legal position has been succinctly summarized therein by Sanjiv Khanna, J., as under:

“154. Discussion under the heading “Who Decides Arbitrability?” can be crystallised as under:

154.1 Ratio of the decision in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”

(emphasis supplied)

17. In the concerning opinion of N.V Ramana J., it has also been observed as under:

“225. From a study of the above precedents, the following conclusion, with respect to adjudication of subject-matter arbitrability under Section 8 or 11 of the Act, are pertinent:

225.1. In line with the categories laid down by the earlier judgment of Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] , the courts were examining “subject-matter arbitrability” at the pre-arbitral stage, prior to the 2015 Amendment.

225.2. Post the 2015 Amendment, judicial interference at the reference stage has been substantially curtailed.

225.3. Although subject-matter arbitrability and public policy objections are provided separately under Section 34 of the Act, the courts herein have understood the same to be interchangeable under the Act. Further, subject-matter arbitrability is interlinked with in rem rights.

225.4. There are special classes of rights and privileges, which enure to the benefit of a citizen, by virtue of constitutional or legislative instrument, which may affect the arbitrability of a subject-matter.

226. It may be noted that the Act itself does not exclude any category of disputes as being non-arbitrable. However, the courts have used the “public policy” reason to restrict arbitration with respect to certain subject-matters. In line with the aforesaid proposition, the courts have interfered with the subject-matter arbitrability at the pre-reference stage.

227. However, post the 2015 Amendment, the structure of the Act was changed to bring it in tune with the pro-arbitration approach. Under the amended provision, the court can only give prima facie opinion on the existence of a valid arbitration agreement. In line with the amended language and the statutory scheme, the examination of the subject-matter arbitrability may not be appropriate at the stage of reference under Section 8 of the Arbitration Act. It is more appropriate to be taken up by the court at the stage of enforcement under Section 34 of the Act. Having said so, in clear cases where the subject-matter arbitrability is clearly barred, the court can cut the deadwood to preserve the efficacy of the arbitral process.

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244. Before we part, the conclusions reached, with respect to Question 1, are:

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.

244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

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”.

244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1. Whether the arbitration agreement was in writing? Or

244.5.2. Whether the arbitration agreement was contained in exchange of letters,

telecommunication, etc.?

244.5.3. *Whether the core contractual ingredients qua the arbitration agreement were fulfilled?*

244.5.4. *On rare occasions, whether the subject-matter of dispute is arbitrable?"*
(emphasis supplied)

18. The present petition is, accordingly, allowed and the aforesaid Claim Nos. 2 and 3 raised by the petitioner are referred to Sh. Dinesh Kumar, Arbitrator, MoHUA, who has been already appointed by the respondents as a Sole Arbitrator and is seized of the other claims raised by the petitioner. The arbitrator shall consider the respondents' objections as to the maintainability and arbitrability of the claims in question, prior to adjudication thereof on merits, keeping in view the aforesaid contentions and judgments cited by learned standing counsel for the respondents.

19. The present petition, along with the pending application, is accordingly disposed of.

DECEMBER 6, 2022

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SACHIN DATTA, J

