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

Date of Decision: 20th January, 2023

+ **W.P.(C) 731/2023 and CM APPL. 2800/2023**

PINK CITY EXPRESSWAYS PRIVATE LIMITED Petitioner

Through: Mr. Sidhant Dwibedi & Mr. Aaron Shaw, Advocates. (M:9437180157)

versus

AARON SECURITY AND SERVICES PVT Respondent

Through: None.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

1. This hearing has been done through hybrid mode.
2. The Petitioner Company- Pink City Expressways Private Limited has filed the petition challenging the orders dated 6th December, 2022 passed by the Id. Sole Arbitrator appointed under the aegis of the Delhi International Arbitration Centre (DIAC).
3. The Respondent- Aaron Security and Services Pvt. Ltd. had filed an *Arbitration Petition 1162/2021* titled '*M/S Aaron Security and Services Pvt. Ltd v. M/s Pink City Expressway Pvt. Ltd. & Ors.*' under Section 11 of the Arbitration and Conciliation Act, 1996 (*hereinafter 'the Act'*) seeking appointment of an Arbitrator for adjudication of the disputes between the parties in the said arbitration petition.
4. Vide order dated 2nd February, 2022, in the Arbitration Petition, the Id. Single Judge had appointed a Sole Arbitrator in the following terms:

"3. The present petition under Section 11 of the

Arbitration and Conciliation Act, 1996 [hereinafter "the Act"] seeks appointment of a Sole Arbitrator for adjudication of disputes that are stated to have arisen between the parties pertaining to: (i) 'CONTRACT AGREEMENT FOR ROUTE OPERATION SERVICES FROM KM. 42.700 TO 156.000' dated 30th December, 2010 and (ii) AGREEMENT dated 19th February, 2011 [hereinafter collectively referred to as "Agreements"] Both the afore-noted Agreements, contain an arbitration clause.

4. Since there is no appearance on behalf of the Respondent despite service; there is no contest in the present petition and the same deserved to be allowed. Accordingly, Hon'ble Mr. Justice Vinod Goel (Retd.), former Judge of this Court [Contact No.: +91 9910384637] is appointed as the common Sole Arbitrator to adjudicate the disputes pertaining to the afore-noted Agreements dated 30th December, 2010 and 19th February, 2011.

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

6. The learned Arbitrator will be entitled to charge his fee in terms of the provisions of the Fourth Schedule appended to the Act.

7. The learned Arbitrator shall conduct the arbitration proceedings under the aegis of Delhi International Arbitration Centre [hereinafter "DIAC"] and in accordance with the DIAC Rules."

5. The matter was referred to the DIAC and Justice Vinod Goel, Former Judge of the Delhi High Court was appointed as the Sole Arbitrator.

6. On 21st May, 2022, the Id. Sole Arbitrator gave time to the Petitioner in the present petition, to file a statement of defence and counter affidavit, if any, within six weeks as requested by the Id. Counsel for the Petitioner. The

said order is extracted below:

1. The arbitral proceedings were conducted by virtual mode to maintain social distancing norms on account of the COVID-19 Pandemic.

2. Pursuant to the notice issued by the DIAC, on filing of the statement of claim (SOC) by the claimant, Mr. Pavan N. Prasad, GM (F&A) had joined these proceedings on behalf of the respondents.

2. Mr. Vashisht stated that two agreements were executed between the parties, one for Route Operation Service and another for Ambulance Services and both the agreements are inter- connected and they have raised the bills under both the agreements upon the respondents simultaneously. He submitted that for this reason he had filed a single SOC arising out of both these agreements. He requested that a single case be registered. As requested, the DIAC is directed to de-register case no. 3900.

3. Mr. Pavan sought six weeks' time to file their statement of defence (SOD) and the counter- claim (CC). He stated that they had engaged Sh. D. K. Dwibedi, Advocate, (M: 9437020157) (email id: dkdwibedi.associates@gmail.com) as their counsel to defend them in these proceedings. The SOD and CC, if any, shall be filed by the respondents within six weeks in PDF format. The copy thereof be marked to the Id. counsel for the claimant. Hard copies be submitted at the office of the undersigned at B-10, 2nd Floor, Jangpura Extension, New Delhi-110014.

4. Mr. Vineet Pandey Dy. Counsel for DIAC informed that the claimant had deposited its share of arbitral fee and expenses. Let the respondent deposit their share of arbitral fees and expenses with the DIAC within a week and share the details thereof with them. The Arbitral Tribunal shall now assemble for further proceedings/directions on 16.07.2022 at 2.00 P.M. by virtual mode.

7. Thereafter, the Petitioner herein moved an application dated 29th July, 2022 under Section 16 of the Act challenging the jurisdiction of Id. Arbitrator. By this application the Petitioner sought recall of the order dated 21st May, 2022 as also the return of the Statement of Claims filed by the Respondent, for fresh presentation in the light of its dues under each reference. This particular application was taken up on 4th August, 2022 and on the said date, the following order was passed:

“1. The arbitral proceedings were conducted by virtual mode on WebEx with the consent of the parties to maintain social distancing norms on account of the Covid-19 pandemic.

2. An application dated 29th July, 2022 under section 16 (3) of the Arbitration and Conciliation Act, 1996 was filed by email on behalf of the respondents for recall of order dated 21 May, 2022 and to return the SOC filed by the claimant for fresh presentation in in line of its dues under each reference. The respondents/applicants have not filed the original copy of the application and Vakalatnama. Let the original application, Vakalatnama, Board Resolution etc., be filed in the office of the undersigned within a week.

4. The Ld. Counsel for the parties made their respective preliminary submissions on the application and the Ld. Counsel for the claimant stated that he intends to file detail reply to the application. Let the reply to the application be filed within two weeks.

5. Mr. Dwibedi stated that the respondents shall deposit their share of Arbitral fee and expenses with the DIAC within a week. The respondents are directed to share the details of the deposit of fee with the DIAC by email immediately after deposit.

6. The application shall be taken up for consideration on 6th September, 2022 at 4.30 P.M. by virtual mode.”

8. The said application under Section 16 of the Act has been decided by

the Id. Arbitrator on 6th December, 2022. In addition, by a separate order on the same date i.e. 6th December, 2022 the Id. Arbitrator has closed the right of the Petitioner to file the statement of defense. It is also recorded by the Id. Arbitrator that the Petitioner has not deposited the arbitral fee. The Id. Arbitrator has then proceeded to frame the issues for determination in the matter and has listed the matter today i.e., 20th January, 2023 for evidence of the claimant.

9. The operative portion of the decision dated 6th December 2022, on the application under Section 16 of the Act is set out below:

“16. Therefore, Quippo Construction's case helps the claimant as the respondents did not object to the filing of a composite claim. As per Bharat Sanchar Nigam Ltd.'s case, the objection should have been taken by the respondents at the earliest available opportunity which they failed to avail of. Moreover, the Id. counsel for the respondents did not dispute the argument of the learned counsel for the claimant that the respondents used to make composite payment to the claimant under both the agreements. Mr. Dwibedi the Id. counsel for the respondents failed to demonstrate as to how respondents shall be prejudiced by filing a composite SOC.

17. It is also pertinent to mention here that this application has been filed under section 16 of the Act which gives power to an arbitral tribunal to rule on its own jurisdiction.

Section 16 reads as under:

"16. Competence of arbitral tribunal to rule on its jurisdiction: -

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose: -

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

18. Admittedly, the present application does not challenge the jurisdiction of this Tribunal to adjudicate the present disputes but only seeks to set aside the said

order dated 21.05.2022 of this Tribunal. Ld. Counsel for the Applicants/Respondents has also not been able to point out any provision in the Act or in Section 16 which allows the Tribunal to review/recall its orders. In view of the discussion, I do not find any merit in the application and the same is dismissed with no order as to cost.”

10. The operative portion of the second order dated 6th December 2022, whereby the Id. Arbitrator closed the right of the Petitioner to file the statement of defense is set out below:

“7. On 21.05.2022, this Tribunal on the request of the respondents gave them six weeks' time to file the SOD and Counter-Claim (CC), if any. On the next date, i.e. 16.07.2022, on the request of the Id. counsel for the respondents, the Tribunal granted a last opportunity to the respondents to file its SOD, Documents, affidavit of admission and denial and application u/s 16, if any, on or before 27.07.2022. Despite the last opportunity, the respondents failed to file its SOD. The outer limit to complete the pleadings within six months from 02.03.2022 was already over and the time period within which the SOD and CC are to be filed as per Rule 17.1 of the DIAC Rules, 2018 has also expired and hence, the respondents' right to file its SOD stands forfeited in view of rule 17.2 and section 25 (b) of the Act.

8. It is informed by the DIAC that the respondents have not deposited their share of arbitral fee and expenses. The Id. counsel for the respondent stated that since their application s/s 16 has been dismissed, they will avail of the other remedies. Let the respondent deposit with the DIAC their share of the arbitral fee and expenses within 7 days and share the details with the DIAC and Id. counsel for the claimant. In case the respondent fails to deposit the same within the time granted, the claimant shall deposit the same with the

DIAC within seven days thereafter.

8. After hearing the Ld. Counsel for the parties, the following issues are hereby framed for determination of the subject arbitration: -

i). Whether the Claimant is entitled to recover Rs. 1,93,27,664/with interest as claimed against the Respondents? OPC

ii). Relief.

9. Let the Claimant file its list of witness within 2 weeks. The Claimant shall also file the evidence affidavits of all its witnesses within four weeks. The Claimant's evidence shall be recorded on 20th January, 2023 at 2.00 p.m. (Hybrid Mode)."

11. The submission of Id. Counsel for the Petitioner herein is that the Id. Arbitrator could not have passed the order dated 21st May, 2022 in the manner so as to merge the claims under both the agreements since the agreements are distinct and different. It is his submission that separate claims would have to be called for and, thereafter, the matter has to proceed. Thus, according to the Id. Counsel the application for recall filed by the Petitioner ought to have been considered first and in any case, an opportunity ought to have been granted to the Petitioner to file the statement of defence after the decision on the application Section 16 of the Act.

12. A perusal of the order of reference dated 2nd February, 2022 shows that the Id. Single Judge noticed that there are two separate agreements. However, the Court appointed a Sole Arbitrator as a ***common Sole Arbitrator*** to adjudicate the disputes arising from both the aforementioned agreements.

13. The first agreement dated 30th December, 2010, entered into by both the parties was for '*Route Service Provider for availing Route Operation*

Services’ (hereinafter ‘first agreement’). Thereafter the parties executed a second agreement dated 19th February, 2011 for *‘Ambulance services to accident victims’ (hereinafter ‘second agreement’).*

14. According to the Petitioner these agreements are separate agreements.

15. However, upon perusal of the record and the two agreements, the Court observes that the two agreements are closely interlinked agreements and the Respondent has filed a common claim petition. It is observed that both of these agreements are for the same section of NH-8, referred to as project stretch. The said project stretch in both of the agreements is from Kms 42.7 to 156 of the Gurgaon-Kotpuli-Jaipur section of NH-8. Effectively, the services which the Respondent was providing in both these agreements were connected services.

16. In the first agreement, the Respondent had undertaken the task of managing the operations in the project stretch and in the second agreement the Respondent undertook the responsibility of providing medical services including ambulance services. It is clear from nature of these two services, that they are connected to each other. The allied nature of the two contracts is clear especially in light of the two agreements being for the same project stretch i.e., Kms 42.7 to 156 of the Gurgaon-Kotpuli-Jaipur section of NH-8. The Arbitration Clause in both the first agreement and the second agreement is identical, with the same pre-conditions and jurisdiction.

17. The arbitration clause in the first agreement reads as under:

“All claims, dispute and or difference (including a dispute regarding the existence, validity or termination of this Agreement) arising out of, or relating to this contract including interpretation of its terms will be resolved through joint discussion of the Authorized

Representatives of the concerned parties. However, if the disputes are not resolved by the discussions then the matter will be referred for adjudication to the arbitration of a Sole Arbitrator appointed by the company in accordance with the Arbitration and Conciliation Act 1996 including any modification, amendment thereto. The Route Service Provider shall not raise any objection to the appointment of the Arbitrator by the Company. If for any reason the Sole Arbitrator appointed by the company is not available for conducting the arbitration proceeding, the subsequent Sole Arbitrator shall also be appointed by the Company. The venue for the Arbitration will be Delhi and the decision of the arbitrator shall be final and binding on the parties. The proceeding of Arbitration shall be held in English language.

2. Route Service Provider acknowledges that the nature of services required by the Company are such that any disruption in such services shall cause substantial loss and damage to the Company therefore it is agreed by the Route Service Provider that notwithstanding the disputes between the parties and efforts taken by them for their resolution in terms of clause 1 above, the Route Service Provider shall continue to provide services under this Agreement unless this Agreement is terminated by the Company.

3. This Contract is governed by the laws of India and shall be subject to the exclusive jurisdiction of the courts in Delhi.”

18. The Arbitration Clause of the second agreement reads as under:

“18. GOVERNING LAWS AND SETTLEMENT OF DISPUTE

“18.1 All claims, dispute and or difference (including a dispute regarding the existence, validity or termination of this Agreement) arising out of, or relating to this contract including interpretation of its terms will be resolved

through joint discussion of the Authorized Representatives of the concerned parties. However, if the disputes are not resolved by the discussions then the matter will be referred for adjudication to the arbitration of a Sole Arbitrator appointed by PCEPL in accordance with the Arbitration and Conciliation Act 1996 including any modification, amendment thereto. The ASS shall not raise any objection to the appointment of the arbitrator by the PCEPL, if for any reason the Sole Arbitrator appointed by the PCEPL is not available for conducting the arbitration proceeding, the subsequent Sole Arbitrator shall also be appointed by the PCEPL. The venue for the Arbitration will be Delhi and the decision of the arbitrator shall be final and binding on the parties. The proceeding of Arbitration shall be held in English language.

18.2 ASS acknowledges that the nature of services required by the PCEPL are such that any disruption in such services shall cause substantial loss and damage to the PCEPL therefore it is agreed by the ASS that notwithstanding the dispute between the parties and efforts taken by them for their resolution in terms of clause 18.1 above, the ASS shall continue to provide service under this agreement unless this agreement is terminated by the PCEPL.

18.3 This Contract is governed by the laws of India and shall be subject to the exclusive jurisdiction of the courts in Delhi.”

19. Considering the nature of the agreements and the common conditions of the Arbitration Clauses, the filing of a common claim petition as also the reference to a common sole arbitrator cannot be faulted with.

20. The Supreme Court in ***Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors., (2013) 1 SCC 641*** held that composite references could be made for arbitration to a sole common arbitrator for multiple agreements which are for the same or connected purpose. In the

said judgement, the Supreme Court held that a composite reference can be made for even non-signatories and third parties. The operative portion of the said judgement on this issue reads as:

68. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

21. Moreover, even the reference was a common one. Under such circumstances, even if the Petitioner had filed an application seeking recall of the order dated 21st May, 2022, it could not have delayed the filing of the Statement of Defence inasmuch as non-filing of defence in terms of Rules of the DIAC as also the Arbitration Act results in delay in the arbitral proceedings. In effect the reference having been made on 2nd February 2022, even after almost one year has passed, still the matter has not proceeded further.

22. It is observed that repeated opportunities have also been given to the Petitioner to file the Statement of Defence. The record also shows that even

the arbitral fee has not been deposited.

23. In any event, in terms of the decision of this Court in **CM(M) 1272/2019** titled '**Surender Kumar Singhal & Ors. vs Arun Kumar Bhalotia & Ors.**', for the Court to interfere with the Arbitration Proceedings under Article 226/227, the case would need to fall under exceptional circumstances. The relevant portion of the said order is extracted as under:

24. A perusal of the above-mentioned decisions, shows that the following principles are well settled, in respect of the scope of interference under Article 226/227 in challenges to orders by an arbitral tribunal including orders passed under Section 16 of the Act.

(i) An arbitral tribunal is a tribunal against which a petition under Article 226/227 would be maintainable;

(ii) The non-obstante clause in section 5 of the Act does not apply in respect of exercise of powers under Article 227 which is a Constitutional provision;

(iii) For interference under Article 226/227, there have to be 'exceptional circumstances';

(iv) Though interference is permissible, unless and until the order is so perverse that it is patently lacking in inherent jurisdiction, the writ court would not interfere;

(v) Interference is permissible only if the order is completely perverse i.e., that the perversity must stare in the face;

(vi) High Courts ought to discourage litigation which necessarily interfere with the arbitral process;

(vii) Excessive judicial interference in the arbitral process is not encouraged;

(viii) It is prudent not to exercise jurisdiction under Article 226/227;

(ix) The power should be exercised in 'exceptional rarity' or if there is 'bad faith' which is shown;

(x) Efficiency of the arbitral process ought not to be allowed to diminish and hence interdicting the arbitral

process should be completely avoided.

24. The present case would not fall within the realm of '*exceptional circumstances*' for entertaining a Writ Petition under Article 226/227 of the Indian Constitution. Even the conduct of the Petitioner in the arbitral proceedings, does not warrant any interference. However, if the Petitioner wishes to seek any relief from the Id. Arbitrator it is free to do so in accordance with law.

25. With these observations, the present petition, along with all pending applications, are disposed of.

**PRATHIBA M. SINGH
JUDGE**

JANUARY 20, 2023
dj/am

