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

Pronounced on: 20.12.2023

+ **ARB.P. 655/2023**

SURYA ALLOY INDUSTRIES LTD

..... Petitioner

Through: Mr. Pukhrambam Ramesh Kumar,
Adv.

versus

UNION OF INDIA AND ANR.

..... Respondents

Through: Ms. Richa Dhawan, Sr. Panel
Counsel, alongwith Mr. Anuj
Chaturvedi, Adv. (through VC) and
Ms. Shreya Manjari, Adv

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the 'A&C Act') has been filed seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.
2. The disputes between the parties have arisen in a tender process initiated by the respondents for "*Manufacturing and Supply of Metal liner for wider sleeper*". The bid submitted by the petitioner was accepted by the respondents vide communication/letter of counter offer dated 07.08.2019. It was mentioned in the said communication that upon acceptance of the counter offer, the said letter of counter offer will automatically become a formal letter of acceptance, which shall constitute a binding and concluded



contract between the parties. The petitioner vide communication dated 12.08.2019 accepted the said counter offer.

3. Thereafter, the petitioner as per contractual provisions has submitted two FDRs amounting to Rs.27,44,600/- towards Security Deposit to the respondents. Subsequently, the respondents have issued two formal purchase orders on the petitioner.

4. It is averred in the petition that although the petitioner has completed the supplies and has even submitted "No Claim Certificate", the respondents have not released and/or returned the FDRs.

5. The applicable 'Indian Railways Standard Conditions' of the Contract contains an arbitration agreement between the parties in the following terms:

"2900 Settlement of Disputes

2901 Conciliation of disputes

All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the currency of the contract or after its completion and whether before or after the determination of the contract, shall be referred by any of the parties to the concerned "Chief Materials Manager (CMM) " or "Divisional Railway Manager" or "Executive Director" through "Notice of Dispute". CMM or Divisional Railway Manager or Executive Director shall, within 30 days after receipt of "Notice of Dispute", notify the name of sole conciliator to the parties,

The Conciliator shall assist the parties to reach an amicable settlement in an independent and impartial manner within the terms of contract.

If the parties reach agreement on settlement of the dispute, they shall draw up a written settlement agreement duly signed by parties and conciliator. When the parties sign the settlement agreement, it shall be final and binding on the parties.

The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of dispute that is the subject matter of the conciliation proceedings.



The conciliation proceedings shall be terminated:

- 1) By the signing of the settlement agreement, on the date of agreement: or*
- 2) By written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of declaration: or*
- 3) By a written declaration of any party to the conciliator to the effect that the conciliation proceedings are terminated, on the date of declaration:*

2902 *Matters Finally Determined by the Railway: All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the currency of the contract or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the General Manager (for the purpose of para 2900 the term General Manager shall imply Additional General Managers of Zonal Railways , General Managers for Production Units, Additional Member (Railway Stores), Member of the Railway Board, Head of the Organisation in case of contracts entered into by other organizations under the Ministry of Railways) and the General manager shall, within 120 days after receipt of the representation, make and notify decisions on all matters referred to by the Contractor in writing. Provided that matters for which provision has been made in any Clause of the Special or General Conditions of the Contract shall be deemed as 'excepted matters' matters not arbitrable) and decisions of the Railway authority, thereon shall be final and binding on the Contractor; provided further that "excepted matters' shall stand specifically excluded from the purview of the Arbitration Clause.*

Provided further that where Railways has raised the dispute, para 2902 shall not apply.

“2903 Demand for Arbitration:

- 1) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account, or if the Railway fails to make a decision within 120 days (as referred in 2902), then and in any such case, but except in any of the “excepted matters” referred to in Clause 2902 of these Conditions, parties to the*



contract, after 120 days but within 180 days of their presenting their final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration. Provided that where the claim is raised by Railways para 2903(1) shall not apply.

2) (a) 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 item-wise. Only such dispute or difference in respect of which the demand has been made, together with counter claims or set off, shall be referred to arbitration and other matters shall not be included in the reference.

(b) The parties may waive off the applicability of Sub-Section 12(5) of Arbitration and Conciliation Act 1996 (as amended), if they agree for such waiver in writing, after dispute having arisen between them.

3) (a) The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.

(b) The claimant shall submit his claims stating the facts supporting the claims along with all the 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) Respondent shall submit its defence statement and counter claims(s), if any, within a period of 60 days of receipt of copy of claims from Tribunal, unless otherwise extension has been granted by Arbitral Tribunal.

(d) Place of Arbitration: The place of arbitration would be within the geographical limits of the Division of the Railway where the cause of action arose or the Headquarters of the concerned Railway or any other place with the written consent of both the parties.

(4) 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.

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2905(b)

Appointment of Arbitrator where applicability of Section 12(5) of Arbitration and Conciliation Act has not been waived off:

i. In cases where the total value of all claims in question added together does not exceed Rs.50,00,000/- (Rupees Fifty Lakh only), the Arbitral Tribunal shall consist of a Retired Railway Officer, retired not below the rank of Senior Administrative Grade Officer, as the arbitrator. For this purpose, the Railway will send a panel of at least four (4) names of retired Railway Officer(s)



empanelled to work as Railway Arbitrator duly indicating their retirement dates to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the General Manager.

Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as arbitrator within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the arbitrator.

ii. In cases where the total value of all claims in question added together exceeds Rs.50,00,000/- Rupees fifty Lakh only), the Arbitral Tribunal shall consist of three (3) retired Railway Officers (retired not below the rank of Senior Administrative Grade Officer). For this purpose, the Railway will send a panel of at least four (4) names of retired Railway Officer(s) empanelled to work as Railway Arbitrators duly indicating their retirement date to the Contractor within 60 days from the day when a written and valid demand for arbitration is received by the General Manager.

Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as Contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the Contractor's 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. General Manager shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of Contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has served in the Accounts Department."

6. Disputes having arisen between the parties on account of non-return/release of security deposit, the petitioner in the first instance submitted a grievance in the CPGRAMS Portal of Government of India on 22.10.2022. The respondents vide their communication dated 24.11.2022 informed the petitioner that supplies made by the petitioner is subject to a vigilance check and the report of the vigilance is awaited. Thereafter, the petitioner vide legal notice dated 05.12.2022 again requested the



respondents to release and return the FDRs. However, there was no response to the said letter.

7. Thereafter, the petitioner vide letter dated 25.03.2023 invoked the arbitration agreement between the parties. The respondents in reply dated 05.04.2023 requested the petitioner for waiver as contemplated in Section 12(5) of A&C Act. The petitioner vide letter dated 10.04.2023 rejected the said request of the respondents.

8. The present petition is opposed by the learned counsel for the respondents on the ground that vide letter dated 16.05.2023, the Vigilance Department of the Northern Railway submitted the findings of the vigilance check; and thereby informed that the samples of the metal liners taken for the check had failed to pass the checks for quality. It is submitted that till date the petitioner has failed to discharge its contractual obligations to replace the failed metal liners, and therefore, the security deposit cannot be released to the petitioner. It is further submitted that the present petition is pre-mature since as per clause 2900 of the said contract the petitioner has to first approach General Manager/Northern Railway for settlement of all disputes in terms of IRS Conditions of Contract.

9. Having perused the record and having heard learned counsel for the parties, no merit is found in the objections raised by the respondents.

10. The contentions of the respondents pertain mainly to the merit of the disputes between the parties. The same are required to be adjudicated by an arbitral tribunal.

11. There is also no merit in the contention of the respondents that the pre-requisite for invoking arbitration agreement has not been followed by



the petitioner. In *N.K. Sharma v. General Manager*¹, this court has held that once a party has agreed to constitute an Arbitral Tribunal, it cannot later seek to resist arbitration by seeking to rely upon the terms of the contract dealing with pre-arbitral procedures/requirements. The relevant extracts of the said judgment are as under:

“17. The respondent vide its letter dated 17.06.2022, in response to the invocation letter dated 01.06.2022 sent by the petitioner, had agreed for constitution of the Arbitral Tribunal, albeit seeking a waiver of Section 12(5) of the A&C Act from the petitioner. On the petitioner refusing to the requirements of waive Section 12(5) of the A&C Act, the respondent vide its letter dated 14.07.2022, shared a panel of four retired Railway Officers with the petitioner and requested the petitioner to suggest at least two names out of the panel to be appointed as Co-Arbitrator. The respondent having agreed to constitute the Arbitral Tribunal cannot now seek to resist arbitration by seeking to reply upon Clause 63 of the GCC.

18. This Court has also perused the invocation letter dated 01.06.2022 and prima facie, none of the claims raised therein falls within ‘excepted matters’. However, this aspect would require an in-depth examination of the factual matrix which can be done by a duly constituted Arbitral Tribunal, as contemplated in the judgment of the Supreme Court in Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1.”

12. In the present case, the respondents have agreed to constitute the arbitral tribunal vide letter dated 05.04.2023. The said letter reads as under:

“This is in reference to your advocate letter referred above, in which you have requested to appoint a Sole arbitrator as per clause 2900 of IRS Conditions of contract for adjudication upon the matter. It is stated that for appointment of Sole Arbitrator/Arbitral Tribunal Consisting of Railway’s Gazetted Officer (JAG/SAG), waiver of clause 12(5) of Arbitration & Conciliation Act is required in the enclosed Performa (Annexure-XII).

You are requested to fill up the Annexure-XII (Including the brief of the claims) for waiver of clause 12(5) of Arbitration & Conciliation Act and send it back to this office for appointment of Sole Arbitrator/Arbitral Tribunal consisting of Railways Gazetted Officer against above contract.

¹2023 SCC OnLine Del 7576



Your reply is urgently required for early appointment of Arbitrator and should be submitted as early as possible.”

13. As noticed hereinabove, the petitioner in response to the said letter, has refused to waive applicability of Section 12(5) of the A&C Act. In terms of the arbitration agreement, the respondents were thereafter required to send a panel of arbitrators to the petitioner within 60 days from demand for arbitration. The same has not been done till date. As such, the respondents have failed to act as required under the arbitration agreement.

14. Further, it has been held in catena of cases that provision for conciliation, as postulated in clause 2091 of the Standard Conditions of Contract, is a voluntary process and once a party has opted out of conciliation, it cannot be said that the said party cannot take recourse to dispute resolution through arbitration. In this regard reference may be made to the following judgments: ***Ranjit Construction Co. v. Gujarat State Road & Building Department***, 2023 SCC OnLine Del 3905; ***Oasis Projects Ltd. v. National Highway & Infrastructure Development Corpn. Ltd.***, (2023) 1 HCC (Del) 525; ***Kunwar Narayana v. Ozone Overseas Pvt. Ltd.***, 2021 : DHC : 496; ***Demarara Distilleries Pvt. Ltd. v. Demerara Distilleries Ltd.***, (2015) 13 SCC 610; ***Ravindra Kumar Verma v. BPTP Ltd.***, 2014 SCC OnLine Del 6602; ***Subhash Infraengineers (P) Ltd. v. NTPC Ltd.***, 2023 SCC OnLine Del 2177; and ***Pele Khezhie v. National Highways & Infrastructure Development Corpn. Ltd.***, 2023 SCC OnLine Del 5320.

15. In the circumstances, there is no impediment in appointing an independent sole arbitrator to adjudicate the disputes between the parties as



contemplated in *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, (2020) 20 SCC 760.

16. Accordingly, Ms. Natasha Sood, Advocate (Mobile No. 9871048693) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

17. The respondents shall be entitled to raise preliminary objections as regards arbitrability/jurisdiction which shall be decided by the arbitrator, in accordance with law.

18. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A&C Act.

19. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule of the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

20. Parties shall share the arbitrator's fee and arbitral costs, equally.

21. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

22. Needless to say, nothing in this order shall be construed as an expression of this court on the merits of the case.

23. The present petition stands disposed of in the above terms.

SACHIN DATTA, J

DECEMBER 20, 2023

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