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

Date of Decision: 11.01.2023

+ **ARB.P. 878/2022**

AMBEY MINING PVT LTD

..... Petitioner

Through: Mr.Ashish Choudhury and
Mr.Anand Kamal, Advs.

versus

NTPC LTD

..... Respondent

Through: Mr.Puneet Taneja & Ms.Laxmi
Kumari, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Contract Agreement dated 17.12.2019 executed between the parties regarding the "Engagement Of An Agency For Tipper Loading, Wagon Loading & Transportation Of Coal From Any Designated Mines To Any Designated Railway Siding For NTPC BARH-II (2X660 MW) Through RCR Mode".

2. The Arbitration Agreement between the parties is contained in Clause 7.3 of the General Conditions of the Contract (in short, the 'GCC').

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ARB.P. 878/2022

3. The petitioner, before invoking the Arbitration Agreement, vide letter dated 05.09.2020, called upon the respondent to hold a joint discussion so that suitable course of action with regard to recommencement/reinstatement of work may be worked out mutually between the parties. In response, the respondent vide letter dated 04.12.2020, however, stated that the claim of the petitioner is not tenable. The petitioner, thereafter, by its letter dated 07.01.2021, while reiterating its claims, again called upon the respondent to hold a joint meeting to amicably resolve the existing issues. As no response to this notice was received, the petitioner invoked the Arbitration Agreement vide notice dated 19.02.2021.

4. The learned counsel for respondent submits that the present petition is not maintainable inasmuch as the petitioner has failed to comply with the mandatory procedure prescribed to be followed prior to seeking appointment of an Arbitrator. Referring to Clause 7.2 of the GCC, he submits that prior to invoking arbitration, the petitioner was to seek conciliation through an Expert Settlement Council (in short, 'ESC'). He submits that the petitioner failed to do so and, therefore, the present petition is premature. Referring the judgment of this Court in *Sushil Kumar Bhardwaj v. Union of India*, 2009 SCC OnLine Del 4355, he submits that for maintainability of the petition under Section 11(6) of the Act, the petitioner has to necessarily show that the procedure prescribed in the Arbitration Agreement has been duly followed. In the present case, as the petitioner has admittedly not invoked the conciliation process, the present petition is not maintainable. He submits that, in fact, Conciliation, as a process of

dispute resolution, is to be encouraged and is even statutorily mandated in terms of Section 62 of the Act.

5. The learned counsel for the respondent further submits that the notice dated 19.02.2021 is also not in terms of Clause 7.3.1 of the GCC inasmuch as it does not give the details of the claims, including the heads/sub-heads of the claims. He submits that the Arbitration Agreement is restricted in nature inasmuch as arbitration can be invoked only where the total amount of claim, excluding claim of interest, does not exceed Rs.25 Crore.

6. I have considered the submissions made by the learned counsels for the parties.

7. Clause 7.1 of the GCC provides for the parties to attempt resolution of their disputes through mutual consultation. Admittedly, the petitioner made attempts of such settlement and invoked the said process by its notices dated 05.09.2020 and 07.01.2021.

8. Clause 7.2 of the GCC reads as under:-

“7.2 Resolution of Dispute through Expert Settlement Council

If the parties fail to resolve such a dispute or difference by mutual consultation, the dispute if the parties agree, may be referred to Conciliation in cases involving disputed amount up to Rs 250 crores, which is to be arrived at considering the claim and counter claim of the parties to the dispute.”

(Emphasis supplied)

9. A reading of the above Clause of the GCC would show that upon failure of the parties to arrive at an amicable settlement through mutual consultation, a further forum has been created for exploring the

possibility of an amicable settlement through a conciliation process to be undertaken through the ESC. The same, however, is at the discretion of the parties inasmuch as the Clause itself states that it is only where the parties agree that the disputes may be referred to conciliation. This is not a mandatory procedure.

10. This is also evident from the reading of Clause 7.3.1 of the GCC, which is the Arbitration Agreement between the parties. It provides that if the process of mutual consultation and/or the ESC fails to arrive at a settlement between the parties, the parties may invoke arbitration. The use of the word “and/or” itself indicates that the process of the ESC is not a mandatory pre-condition for invoking arbitration, however, where the process of conciliation through ESC is initiated with the consent of the parties, the invocation of the Arbitration Agreement shall be after the failure of such conciliation process. Clause 7.3.1 is reproduced hereinunder:-

“7.3.1. If the process of mutual consultation and/or ESC fails to arrive at a settlement between the parties as mentioned at GCC Sub-Clauses 7.1 & 7.2 above, Employer or the Contractor may, within Thirty (30) days of such failure, give notice to the other party, with a copy for information to the ESC (as applicable), of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given. The mechanism of settling the disputes through arbitration shall be applicable only in cases where the disputed amount (i.e. total amount of Claims excluding claims of interest) does not exceed Rs. 25 crores. In case the disputed amount exceeds Rs. 25 Crores, the parties shall be within their rights to take recourse to remedies as may be

available to them under the applicable laws other than Arbitration after prior intimation to the other party. There shall be no arbitration where the claim amount is only up to Rs. 5 lakhs.

The parties at the time of invocation of arbitration shall submit all the details of the claims and the counter-claims including the Heads/Sub-heads of the Claims/Counter-Claims and the documents relied upon by the parties for their respective claims and counter-claims. The parties shall not file any documents/details of the claims and counter-claims thereafter.

The claims and the counter claims raised by the parties at the time of invocation of the arbitration shall be final and binding on the parties and no further change shall be allowed in the same at any stage during arbitration under any circumstances whatsoever.

The parties to the contract shall invoke arbitration within Six months from the date of completion of the execution of work under the contract or the termination of the contract as the case may be and the parties shall not invoke arbitration later on after expiry of the said period of six months.

The parties shall not invoke arbitration other than in the case of completion of execution of work or the termination of the contract as mentioned above.

Notwithstanding the above, in case of disputes with Indian Contractor who is a Central Government Department /Enterprise /organisation or a State Level Public Enterprise (SLPE), the aforesaid limit of Rs 25 crores shall not be applicable and arbitration proceeding may be commenced irrespective of the amount involved in dispute if the dispute

*could not be resolved through Conciliation as brought out at GCC Sub Clause 7.2 above.”
(Emphasis supplied)*

11. Section 62 of the Act also states that it is only where the parties agree to the conciliation process that they shall be so referred to the said process. Clause 7.2 of the GCC is in the same spirit. It is not in a mandatory form. The judgment of this Court in **Sushil Kumar Bhardwaj** (*supra*), therefore, would not apply to the facts of the present case.

12. As far as the second objection of the learned counsel for the respondent on the invocation Notice dated 19.02.2021 not mentioning the details of claims is concerned, though on first blush, the same appears attractive, also cannot be accepted for denying the relief of arbitration to the petitioner. As noted hereinabove, prior to invoking arbitration, the petitioner had invoked the process of mutual consultation through Notices dated 05.09.2020 and 07.01.2021. The Arbitration Agreement was invoked with the notice dated 19.02.2021, to which the respondent did not give any response, nor called upon the petitioner to state its claim as required in Clause 7.3.1 of the GCC. The present petition was filed by the petitioner only around 06.07.2022, that is, more than fourteen months after the issuance of the invocation notice. The respondent, in its reply to the petition, has not taken an objection that the notice invoking arbitration was defective on account of it not spelling out the claims of the petitioner.

13. Be that as it may, the petitioner in the present petition, has now given details of its claims as under: -

“21. The petitioner claims a sum of Rs.32,55,12,079/- as per details as set out hereunder: -

<i>Particulars</i>	<i>Amount (Rs.)</i>
<i>a) Fixed Cost Claim</i>	<i>93,252,913/-</i>
<i>b) Operating Cost Claim</i>	<i>28,015,095/-</i>
<i>c) Opportunity Loss Claim/Interest/Fixed Cost claim</i>	<i>20,42,44,070/-</i>

Total 32,55,23,079/-”

14. There is a typographical error in the above table as adding the amounts of the above claims, the total claim shall be Rs.32,55,12,078/-. In the affidavit dated 05.08.2022, the petitioner states that out of the above claim, the interest component will be Rs.7,55,13,000/-. The claim of the petitioner is, therefore, below Rs.25 Crore and the Arbitration Agreement would operate and bind the parties. The petitioner shall remain bound by the statement now made in the petition and the affidavit.

15. The learned counsel for the respondent has further submitted that even after the invocation of the Arbitration Agreement, the parties tried to amicably settle their disputes and in this regard, drew reference to the Minutes of Meeting dated 05.05.2022. He, however, fairly submits that even this process could not result in an amicable settlement, though, in his submission, for fault of the petitioner.

16. In any event, the parties can still continue with their discussions and attempts to mutually settle the disputes, however, this cannot be a reason to deny relief to the petitioner, if it is otherwise made out. In

fact, the parties may, in spite of this order, make an attempt to mutually settle their *inter se* disputes and this order shall not act as an impediment to such a process.

17. In view of the above, I find that the petitioner has made out a case for appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the abovementioned Agreement.

18. I accordingly appoint Ms. Justice Gita Mittal (Retd. Chief Justice, Jammu & Kashmir High Court) (Add: E-327, GK-I, New Delhi, Mobile: 9469792573) as a Sole Arbitrator to adjudicate the disputes between the parties. The learned Sole Arbitrator shall give a disclosure under Section 12 of the Act before proceeding with the reference. The fee of the learned Sole Arbitrator shall be governed by Schedule IV of the Act.

19. The learned counsel for the respondent, at this stage, submits that according to Clause 7.3.3(d) of the GCC, the fee structure of the learned Sole Arbitrator has been provided. He submits that the learned Sole Arbitrator be bound by the said fee structure.

20. I am unable to agree with the submission made by the learned counsel for the respondent. As the learned Sole Arbitrator has been appointed under Section 11 of the Act, this Court would also have to determine the fee of the learned Sole Arbitrator. In ***Oil and Natural Gas Corporation v. Afcons Gunanusa JV***, 2022 SCC OnLine SC 1122, the Supreme Court has held that Schedule IV of the Act is a fair determination of the fee payable to the Arbitrator. I may quote paragraphs 124 and 125 of the judgment as under:-

“124. We believe that the directives proposed by the amicus curiae, with suitable modifications, would be useful in structuring how these preliminary hearings are to be conducted. Exercising our powers conferred under Article 142 of the Constitution, we direct the adoption of the following guidelines for the conduct of ad hoc arbitrations in India:

“1. Upon the constitution of the arbitral tribunal, the parties and the arbitral tribunal shall hold preliminary hearings with a maximum cap of four hearings amongst themselves to finalise the terms of reference (the “Terms of Reference”) of the arbitral tribunal. The arbitral tribunal must set out the components of its fee in the Terms of Reference which would serve as a tripartite agreement between the parties and the arbitral tribunal.

2. In cases where the arbitrator(s) are appointed by parties in the manner set out in the arbitration agreement, the fees payable to the arbitrators would be in accordance with the arbitration agreement. However, if the arbitral tribunal considers that the fee stipulated in the arbitration agreement is unacceptable, the fee proposed by the arbitral tribunal must be indicated with clarity in the course of the preliminary hearings in accordance with these directives. In the preliminary hearings, if all the parties and the arbitral tribunal agree to a revised fee, then that fee would be payable to the arbitrator(s). However, if any of the parties raises an objection to the fee proposed by the arbitrator(s) and no consensus can be arrived at between such a party and the tribunal or a member of the tribunal, then the tribunal or the member of the tribunal should decline the assignment.

3. Once the Terms of Reference have been finalised and issued, it would not be open for the arbitral

tribunal to vary either the fee fixed or the heads under which the fee may be charged.

4. The parties and the arbitral tribunal may make a carve out in the Terms of Reference during the preliminary hearings that the fee fixed therein may be revised upon completion of a specific number of sittings. The quantum of revision and the stage at which such revision would take place must be clearly specified. The parties and the arbitral tribunal may hold another meeting at the stage specified for revision to ascertain the additional number of sittings that maybe required for the final adjudication of the dispute which number may then be incorporated in the Terms of Reference as an additional term.

5. In cases where the arbitrator(s) are appointed by the Court, the order of the Court should expressly stipulate the fee that arbitral tribunal would be entitled to charge. However, where the Court leaves this determination to the arbitral tribunal in its appointment order, the arbitral tribunal and the parties should agree upon the Terms of Reference as specified in the manner set out in draft practice direction (1) above.

6. There can be no unilateral deviation from the Terms of Reference. The Terms of Reference being a tripartite agreement between the parties and the arbitral tribunal, any amendments, revisions, additions or modifications may only be made to them with the consent of the parties.

7. All High Courts shall frame the rules governing arbitrators' fees for the purposes of Section 11(14) of the Arbitration and Conciliation Act, 1996.

8. The Fourth Schedule was lastly revised in the year 2016. The fee structure contained in the Fourth Schedule cannot be static and deserves to be revised periodically. We, therefore, direct the Union of India to suitably modify the fee structure

contained in the Fourth Schedule and continue to do so at least once in a period of three years.”

125. Conscious and aware as we are that (i) Arbitration proceedings must be conducted expeditiously; (ii) Court interference should be minimal; and (iii) Some litigants would object to even a just and fair arbitration fee, we would like to effectuate the object and purpose behind enacting the model fee schedule. When one or both parties, or the parties and the arbitral tribunal are unable to reach a consensus, it is open to the arbitral tribunal to charge the fee as stipulated in the Fourth Schedule, which we would observe is the model fee schedule and can be treated as binding on all. Consequently, when an arbitral tribunal fixes the fee in terms of the Fourth Schedule, the parties should not be permitted to object the fee fixation. It is the default fee, which can be changed by mutual consensus and not otherwise.”

21. In view of the above, the petition is allowed in the above terms.

JANUARY 11, 2023/rv

NAVIN CHAWLA, J

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ARB.P. 878/2022