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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 30.05.2023

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Judgment pronounced on: 03.07.2023

+ ARB.P. 1048/2022

MS GOYALA INFRA PROJECTS PVT LTD Petitioner

Through: Mr. Kushagra Bansal, Adv.

versus

THE ENGINEER IN CHIEF, MILITARY ENGINEERING
SERVICE Respondent

Through: Mr. Bhagvan Swarup Shukla,
CGSC alongwith Mr. Sarvan
Kumar (GP) and Mr. Sakasham
Sethi, Adv.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

SACHIN DATTA, J.

1. The present petition under Section 11 of the Arbitration and Conciliation Act 1996, (the "A & C Act") seeks appointment of an independent sole arbitrator to adjudicate the dispute between the parties.

2. At the outset, learned standing counsel for the respondent, relying upon of the judgment of the Constitution Bench of the Supreme Court in *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*, 2023 SCC OnLine SC 495, contends that the contract agreement in the present case is



liable to be impounded since the same is un-stamped. Learned counsel for the petitioner has relied on proviso (1) to Section 3 of the Indian Stamp Act, 1899 to contend that there is an exemption from stamping of the contract agreement in the present case since the same has been awarded to the petitioner “for and on behalf of the President of India”.

3. The fact that the contract was awarded to the petitioner “for and on behalf of the President of India” is not disputed by the respondent.

4. The proviso (1) to Section 3 of the Indian Stamp Act reads as under:

“3. Instruments chargeable with duty—

xx xx xx

Provided that no duty shall be chargeable in respect of—

(1) any instrument executed by, or on behalf of, or in favour of, the Government incases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument.”

5. *Ex-facie*, the contract agreement in the present is not chargeable to the payment of stamp duty and is exempted under proviso (1) to Section 3 of the Indian Stamp Act.

6. The disputes between the parties have arisen in the context of a tender process initiated by the respondent for “*Provision of Deficient Married Accommodation for Coast Guard Officers At Sector-52 Noida*”; pursuant to which vide letter dated 28.05.2013 the said work was awarded in favour of the petitioner. The stipulated date for completion of the said work was 18.12.2014. The petitioner submits that the work came to be completed beyond the scheduled date of completion since there was lapse on the part of the respondent on various counts including continuous amendments and deviations in the scope of work, delay in approvals etc. Consequently,



certain disputes have arisen between the parties and certain claims are raised by the petitioner.

7. The General Conditions of the Contract (GCC) applicable to the aforesaid contract agreement contains an arbitration agreement in the following terms:

“70. Arbitration – All disputes between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an Engineer Officer to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Work or termination or determination of the Contract under Condition Nos. 55. 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos. 52, 53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the the arbitration, exparte, if either party, inspite of a notice from the Arbitrator fails to take part in the proceedings.



The Arbitrator may, from time to time with the consent of the parties, enlarge, the time upto but not exceeding one year from the date of his entering on the reference, for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual item of dispute.

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The award of the Arbitrator shall be final and binding on both parties to the Contract.”

8. The petitioner invoked the aforesaid arbitration agreement vide letter dated 14.03.2022, whereby the petitioner requested the respondent to mutually appoint a sole arbitrator to adjudicate the disputes between the parties, since in view of the judgment of Supreme Court in **Perkins Eastman Architects DPC v. HSCC (India) Ltd.**, (2020) 20 SCC 760, it is impermissible for the respondent to unilaterally appoint an arbitrator. No reply thereto is stated to have been sent by the respondent.

9. The claims that are sought to be referred to the arbitration vide the above communication, are as under:

CLAIMS	AMOUNT (RUPEES)
Claim No.1 Payment/Release of arbitrarily withheld amount from Final bill	14,72,40,177/-
Claim No.2 On account of extra expenditure incurred by M/s Goyala Infra on account of risk and cost for sunken floor and other defects	11,50,000/-
Claim No.3 Loss of income for not providing completion Certificate in March, 2017	10,00,000/-



Claim No.4 Loss of income for idle labour charges from March, 2017 till June, 2017	5,00,000/-
Claim No.5 Interest @ 18% on part of payment of Rs. 62,50,000/- from the date of submission of final bill till date of payment	To be calculated
Claim No.6 Interest @ 18% P.A. on delayed payment till the date of realization.	As per actual
Claim No.7 Refund of Security Deposit as per Clause 68 of General Conditions of Contract for Lump-sum Contracts (I.A.F.W. -2249)	25,00,000/-
Claim No.8 Arbitration Cost and Legal Expenses	15,00,000/-

10. Learned standing counsel for the respondent does not dispute the existence of the arbitration agreement between the parties and applicability of the judgment in *Perkins* (supra). However, he submits that the petitioner has claimed non-contractual amounts in final bill such as escalation, etc. which were outside the scope of the contract agreement and the same has been disallowed by the respondent. He further submits that no hindrances have been created by the respondent during the currency of work and the delay in completion in work is not on account of the respondent. He also submits that in terms of Clause 11(c) of the GCC, it was agreed between the parties that no compensation claims of any kind can be made on account of delays in completing the work, even if the respondent granted extensions of time. He further submits that there was no delay on part of the respondent in providing the petitioner with completion certificate and the same was issued to the petitioner after the actual completion of the work. It is further submitted that no extra amount for repair of sunken floor and other defects



can be claimed by the petitioner since the same has been done as per the condition of contract agreement.

11. In response to the aforesaid contentions of Shri Shukla, learned standing counsel, the learned counsel for the petitioner relies upon the judgment of ***K.N. Sathyapalan v. State of Kerala***, (2007) 13 SCC 43, wherein it has been held as under:

“31. The question which we are called upon to answer in the instant appeal is whether in the absence of any price escalation clause in the original agreement and a specific prohibition to the contrary in the supplemental agreement, the appellant could have made any claim on account of escalation of costs and whether the arbitrator exceeded his jurisdiction in allowing such claims as had been found by the High Court.

32. Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and Alopi Parshad case [(1960) 2 SCR 793 : AIR 1960 SC 588] and also Patel Engg. case [(2004) 10 SCC 566] . As was pointed out by Mr Dave, the said principle was recognised by this Court in P.M. Paul [1989 Supp (1) SCC 368] where a reference was made to a retired Judge of this Court to fix responsibility for the delay in construction of the building and the repercussions of such delay. Based on the findings of the learned Judge, this Court gave its approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation clause. The said principle was reiterated by this Court in T.P. George case [(2001) 2 SCC 758]”

12. Having perused the record and having heard learned counsel for the parties, there is no controversy about existence of the arbitration agreement and consequently, there is no impediment in appointing an independent arbitrator to adjudicate the disputes(s) between the parties. The objections



raised by the respondent pertain mainly to the merits/maintainability of the disputes, which shall be decided by the arbitrator in accordance with law.

13. The Supreme Court in *NTPC Ltd. v. SPML Infra Ltd.*, 2023 SCC OnLine SC 389, has held as under:

“26. As a general rule and a principle, the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the referral court may reject claims which are manifestly and ex facie non-arbitrable. Explaining this position, flowing from the principles laid down in Vidya Drolia (supra), this Court in a subsequent decision in Nortel Networks (supra) held:

“45.1 ...While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere “only” when it is “manifest” that the claims are ex facie time-barred and dead, or there is no subsisting dispute...”

27. The standard of scrutiny to examine the non-arbitrability of a claim is only prima facie. Referral courts must not undertake a full review of the contested facts; they must only be confined to a primary first review and let facts speak for themselves. This also requires the courts to examine whether the assertion on arbitrability is bona fide or not. The prima facie scrutiny of the facts must lead to a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable. On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration”

14. In the present case, *prima facie*, the claims raised by the petitioner cannot be said to be not manifestly and *ex-facie* non-arbitrable or deadwood. Whether or not the claims sought to be raised are within the scope of, and/or permissible under the contract, requires a detailed factual analysis, for which the “preferred first authority” is the arbitral tribunal. It shall be open for the respondent to take suitable preliminary objection(s) with regard thereto, which shall be duly considered and pronounced upon by the arbitrator.



15. Accordingly, Mr. Justice (Retd.) Talwant Singh, Former Judge, Delhi High Court (Mobile No. 9910384653) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

16. As mentioned hereinabove, the respondent shall be entitled to raise preliminary objections as regards arbitrability/maintainability of the claims which shall be decided by the arbitrator, in accordance with law.

17. 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; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.

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

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

20. 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.

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

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

SACHIN DATTA, J

JULY 03, 2023/hg