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IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

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Date of decision:29.04.2024

M/S HIL LIMITED

...PETITIONER

VS.

M/S STURDY INDUSTRIES LIMITED

...RESPONDENT

CORAM: HON'BLE MR. JUSTICE SUVIR SEHGAL

Present: Mr. Rohit Khanna, Advocate,
Ms. Simran Sharma, Advocate &
Mr. Siddharth Kohli, Advocate for the petitioner.

Mr. Aashish Chopra, Senior Advocate
through video conferencing with
Ms. Rupa Pathania, Advocate and
Ms. Nitika Sharma, Advocate for the respondent.

SUVIR SEHGAL J.

1. By way of present petition filed under Section 11 of the Arbitration and Conciliation Act, 1996, (for short “the Act”), petitioner has approached this Court for appointment of an Arbitrator.

2. Counsel for the petitioner submits that under a lease deed dated 06.09.2010, Annexure P-1, executed between the petitioner and the respondent for a period of 10 years, petitioner took on lease the factory premises and its assets. He submits that Clause 13 of the lease deed provided for appointment of an Arbitrator to resolve the disputes between the parties. The lease was terminated by the respondent by

notice dated 04.07.2013, Annexure P-2, and as some disputes arose between the parties, on a petition filed by the respondent, this Court by order dated 11.07.2014, Annexure P-3, appointed Mr. Justice M. Jagannadha Rao, Retired Judge of the Supreme Court, as the sole Arbitrator. He submits that the learned Arbitrator passed an award dated 06.11.2019, Annexure P-4, and petitioner was found entitled to Rs.90,85,483/- alongwith interest. Counsel submits that respondent has filed objections under Section 34 of the Act and the petitioner has filed an execution petition, which is pending. He submits that in terms of the award, respondent took back the physical possession of the factory premises on 05.03.2020. Counsel submits that the petitioner had to bear the expenses for maintaining of the plant from the date of termination of the lease till its possession was taken over by the respondent. He submits that the expenses have been quantified at Rs.1,51,00,429/- and the petitioner issued legal notice dated 15.07.2020, Annexure P-11, invoking the arbitration clause, to which the respondent submitted a reply dated 19.08.2020, Annexure P-12, denying its liability to make any payment.

3. Upon notice, petition has been opposed by the respondent by filing a reply primarily on four grounds, which are discussed in the succeeding paragraphs.

4. I have heard counsel for the parties and considered their respective submissions.

5. The foremost objection raised by the respondent is that the petitioner has failed to resort to mutual consultation before invoking the arbitration clause. At this stage, it is necessary to notice the arbitration

clause, which is reproduced hereunder:-

“(13) Dispute Resolution:

The Parties shall make endeavors to settle by mutual consultation any claim, dispute, or controversy arising out of, or in relation or under this Agreement, interpretation of any Clause(s), performance of illegible (sic) hereunder or the breach or alleged breach of the Agreement or any part herein falling which the disputes would be resolved by means or (sic of) arbitration under the Arbitration and Conciliation Act, 1996. The arbitration proceedings shall be held in the English language and governed by the provisions of the Arbitration & Conciliation Act, 1996 and the place of arbitration shall be HYDERABAD. Further, the Courts in Chandigarh only will have jurisdiction to decide all disputes arising out of the present Lease Deed.”

6. From a perusal of the above reproduced clause, it is evident that it is not mandatory for the parties to attempt resolution of the dispute by mutual consultation as the clause provides that endeavour be made to settle the disputes, claims etc. by mutual consent. Resorting to mutual consent cannot be said to be a pre-condition before invoking arbitration. Consequently, the respondent cannot insist upon mutual consultation prior to the reference of the dispute to the Arbitrator.

7. Secondly, it has been contended on behalf of the respondent that the lease deed, Annexure P-1, was terminated by serving a notice dated 04.07.2013, Annexure P-2, and the contract cannot be said to be perpetuating. It is his argument that the arbitration clause, which is a part

of the terminated lease deed, cannot be invoked. This argument deserves to be noticed and rejected. The settled legal position is that arbitration clause, which forms part of a contract has to be treated as an agreement independent of the other terms of the contract and can be separately enforced. In **National Agricultural Co-operative Marketing Federation India Limited Vs. Gains Trading Limited (2007) 5 SCC 692**, Supreme Court has held that even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract.

8. Thirdly, by referring to issue No.3 framed by the learned Arbitral Tribunal, it has been argued on behalf of the respondent that on a counter claim raised by the petitioner, the Tribunal had framed the following issue:-

“Whether the respondent is entitled to reimbursement of all further expenses that may be incurred by the respondent till the factory is taken over by the claimant.”

9. Counsel for the respondent submits that on the basis of the material placed before the learned Arbitrator, the Tribunal did not award any amount to the petitioner for the expenditure allegedly incurred by it beyond November, 2015, as it failed to submit any documents. By placing reliance on **Tantia Construction Limited Versus Union of India 2021 SCC Online Crl. 2465**, he asserts that petitioner is re-agitating the claim, which is impermissible.

10. A perusal of the demand notice, Annexure P-11, served by the petitioner shows that he is claiming expenditure incurred on the maintenance of the factory premises from the date of termination till the date of taking of its possession by the respondent on 05.03.2020. Award, Annexure P-4, was passed by the Arbitrator on 06.11.2019, therefore, it cannot be said that the claim had arisen before passing of the award. Moreover, as has been held in **Gammon India Limited and another Versus National Highways Authority of India 2020 SCC Online Del 659**, that filing of different claims at different stages of a contract or project is permissible in law. As to whether there is a duplication of the claims and whether they can be adjudicated, would lie within the ambit of the Arbitrator. Therefore, this objection raised by the respondent cannot be sustained.

11. The judgment in **Tantia Construction Limited (supra)** would not be of any assistance to the respondent. The High Court had compared the claim adjudicated by the Arbitrator and the claims being freshly raised and came to the conclusion that there is no subsisting dispute which requires consideration. This is not the situation in the case in hand as part of the freshly raised claim has arisen after the previous reference and determination by the Arbitral Tribunal.

12. Lastly, respondents have submitted that the dispute does not fall within the realm of arbitration clause and is beyond the terms of the lease deed. The respondent is de-barred from raising this objection as a similar issue (issue No.3) was framed by the learned Arbitrator and determined by it by its award, Annexure P-4, without any objection by

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the respondent.

13. It will not be out of place to observe that on the previous occasion, reference to arbitration was sought by the respondent and accepted by this Court vide order, Annexure P-3. Now, when the petitioner is raising claim and seeking reference, respondent cannot *volte-face* and oppose the petition.

14. In view of the above discussion, all the objections raised by the respondents are liable to be and are rejected. Prayer made in the petition deserves to be acceded to.

15. Petition is allowed. Mr. Justice M. Jagannadha Rao, a former judge of the Supreme Court, H.No.3-6-281/B, 2nd Floor, Above State Bank of India, Opp. Old MLA Quarters, Himayatnagar, Hyderabad, 040-23224533, is requested to act as a sole Arbitrator to determine the dispute between the parties.

16. Parties are directed to appear before the learned Arbitrator on a day, time and place to be communicated by him.

17. It is clarified that it would be open to the parties to raise all the claims, counter claims, defences, pleas etc. before the learned Arbitrator and any observation made hereinabove shall not prejudice the arbitral proceedings.

18. Needless to mention that all the questions arising between the parties in this matter shall remain open for determination in the arbitral proceedings and any observation made hereinabove will not be binding on the learned Arbitrator.

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19. A request letter alongwith a copy of this order be sent to
Mr. Justice (Retd.) M. Jagannadha Rao.

29.04.2024
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(SUVIR SEHGAL)
JUDGE

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No