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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 152/2023, I.A. 2650/2023

M/S DPS CONTRACTORS PVT. LTD.

..... Petitioner

Through: Mr. Parivesh Singh, Mr. Prem
Parkash, Mr. Abhay Singh Chauhan,
Advs.

versus

HINDUSTAN URVARAK AND RASAYAN LTD..... Respondent

Through: Mr. Adarsh Tripathy, Mr. Vikram
Singh Baid, Mr. Ajitesh Garg, Advs.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

12.03.2024

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1. This is a petition seeking appointment of an arbitrator.
2. The arbitration clause is contained as Clause 35.4 of the General Conditions of Contract ("GCC"), which reads as under:

"35.4 ARBITRATION

a. Any dispute or difference whatsoever arising between the parties out of relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the provisions of the Arbitration & Conciliation Act, 1996 and any amendments thereafter, and the award made in pursuance thereof shall be binding on the parties.



b. The performance under this contract shall not stop for any reason whatsoever during the said dispute/proceedings, unless the contractor/supplier is specifically directed by Owner/Buyer to desist from working in this behalf.

c. The Jurisdiction Venue of all arbitration shall be at Delhi only.

d. The language of proceedings shall be English.

e. The Law governing the substantive issues between the parties shall be the Laws of India.”

3. Since the parties had a dispute, the petitioner invoked the arbitration *vide* legal notice dated 24.09.2021.
4. It is stated by Mr. Tripathy, learned counsel for the respondent that pursuant to the notice, the parties entered into negotiations and thereafter, the petitioner issued letter of indemnity on the respondent making the payments to the petitioner.
5. The letter of indemnity dated 11.05.2022 is reproduced herein below:



LETTER OF INDEMNITY

To,
Hindustan Urvarak & Rasayan Ltd., Gorakhpur,
Administrative Building, HURL Campus, Fertilizer,
Gorakhpur - 273007, Uttar Pradesh, India

Dear Sirs,

Subject: Letter of Indemnity in lieu of Settlement between DPS Contractors Pvt. Ltd. and Hindustan Urvarak & Rasayan Ltd., Gorakhpur.

I/We Brijesh Pratap Singh, Managing Director of DPS Contractors Pvt. Ltd. having its registered office at 521 Civil Lines, Raebareilly-UP, hereby inform you that DPS Contractors Pvt. Ltd. (hereinafter referred to as "DPS"), was awarded the contract for Demolition, Land Development, Retaining Wall & Boundary Wall Repair Works package at HURL Gorakhpur, by Hindustan Urvarak & Rasayan Ltd. (hereinafter referred to as "HURL").

The said Contract came up with a dispute in regard to the GST. Upon much discussions, and consequent to Notice of Arbitration and subsequent request for mutual settlement from DPS in line with Cl. 35.1 of GCS, a meeting with HURL was conducted on 28.04.2022 wherein considering the Contractual Clauses, it was reiterated by DPS that GST is included in the quoted price. Further in view of ITB Clause no.19.2, DPS reassured that it takes the full responsibility in respect of depositing GST at applicable rates.

In view of the foregoing, it was decided that HURL would release the differential payment of Rs. 3,96,90,433/- (Rupees Three Crore Ninety Six lakhs Ninety Thousand Four Hundred Thirty Three) held on account of GST. In view of this, the present Letter of Indemnity in lieu of the instant settlement is being executed.

In consideration therefore of the parties herein having agreed to the aforesaid settlement of GST dispute, I/we hereby jointly and severally agree and undertake to indemnify and keep indemnified, saved, defended, harmless HURL's and its successors and assigns for all time hereafter against all losses, costs, claims, actions, demands, risks, charges, expenses, damages etc., whatsoever in lieu of the settlement arrived at between the parties and I/We further indemnify that no further claim arising out of or ancillary to the present GST dispute shall be raised by DPS against HURL, now or in the future, before any Court/Tribunal/For a of Law or by way of any Mediation, Conciliation or Arbitration. Further it is confirmed that DPS shall have no right, in contract or otherwise, to raise any claim of any nature whatsoever against HURL/PDIL.

This Letter of Indemnification is unconditional, and is being issued without any undue pressure, influence or coercion.

IN WITNESS WHEREOF THE said Brijesh Singh [name(s) of applicant(s)] have here unto set their respective hands and seals this 11 day of May of 2022.

Signed, sealed and delivered by the said applicant(s)

Signed, sealed and delivered by the said applicant(s)
Brijesh Singh
Managing Director
DPS Contractors Pvt. Ltd.
521 Civil Lines, Raebareilly-UP



Signature(s) of applicant(s)
Director



SURETY

I the undersigned certify that the above facts are true to the best of my knowledge and bind myself as surety to make good all claims, charges, costs, damages, demands, expenses and losses which the HURL or its successors and assigns may sustain, incur or be liable for in consequence of complying with the request contained above of the applicant(s) herein and HURL and its successors, assigns will be entitled to claim and realise all claims, charges, costs, damages, demands, expenses and losses from DPS, as the case may be.

For DPS ~~2001~~ Pvt. Ltd.

Signature of Surety

Name : Brijesh Pratap Singh

Address: 521, Civil Lines, Raebareilly



(Signature of Magistrate/Notary)

Full Name and

Address of

Magistrate/

Notary:

Pin

Regd. No.

Use space below to affix:

Notarial/Court Fee Stamp	Official Seal of Magistrate/Notary
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Note: This indemnity is to be executed in the presence of a first class judicial or stipendiary Magistrate/Public notary.



Sworn And Verified
Before Me

SATYA PRakash SRIVASTAVA
Notary
Lucknow, India



6. Hence, Mr. Tripathy states that there can be no arbitrable disputes between the parties and relies upon the judgment of the Hon'ble Supreme Court in ***NTPC LTD. vs. SPML INFRA LTD.***, (2023) 9 SCC 385 and more particularly paragraphs 1, 9, 10 and 43 to 46, which read as under:

"1. The present appeal arises out of a decision of the High Court of Delhi, allowing the respondent's application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act") for the constitution of an Arbitral Tribunal. It is the case of appellant NTPC that there were no subsisting disputes between the parties in view of the settlement agreement dated 27-5-2020 and that the application for arbitration is an afterthought and abuse of the process.

....

9. Following the settlement agreement, the bank guarantees were released by NTPC on 30-6-2020. SPML withdrew the writ petition, as recorded in the order of the Delhi High Court dated 21-09-2020.

10. After the aforesaid settlement of the disputes, followed by its implementation, SPML repudiated the settlement agreement and filed the present application under Section 11(6) of the Act in the Delhi High Court on 10-10-2020. In this arbitration petition, SPML alleged coercion and economic duress in the execution of the settlement agreement. The allegation was that the retention of the bank guarantees compelled SPML to accept the terms of settlement agreement. SPML also averred that NTPC had failed to appoint an arbitrator in spite of repeated requests, and therefore the High Court must constitute an Arbitral Tribunal, in exercise of its jurisdiction under the Act.

....

43. In its reply to the arbitration petition, NTPC specifically pointed out that SPML never raised any claims with respect to the dues amounting to Rs 72,01,53,899 during the pendency of the contract, and that the allegations of coercion and economic duress are



completely false. NTPC alleged that the arbitration petition lacked bona fide.

44. A simple narration of the bare facts, as indicated above, leads us to conclude that the allegations of coercion and economic duress are not bona fide, and that there were no pending claims between the parties for submission to arbitration. The respondent's claim fits in the description of an attempt to initiate "ex facie meritless, frivolous and dishonest litigation". We will endeavour to give reasons for our conclusion.

45. The whole dispute revolves around the solitary act of the appellant, NTPC, in not returning the bank guarantees despite the successful completion of work. This continued even after SPML issued the no-demand certificate and NTPC released the final payment. These undisputed facts led to the institution of the writ petition before the Delhi High Court. There were no allegations of coercion or economic duress compelling SPML to withdraw any pending claims under the subject contract as a condition for the return of the bank guarantees. On the contrary, the only allegation by SPML was with respect to NTPC's "illegal" action of interlinking the release of the bank guarantees with some other contracts. This was precisely the argument before the High Court, and, in fact, this submission is recorded by the High Court while issuing notice and injuncting NTPC. This fact clearly indicates that the plea of coercion and economic duress leading to the settlement agreement is an afterthought.

46. We will now examine whether the allegations of coercion and economic duress in the execution of the settlement agreement are bona fide or not. This inquiry has a direct bearing on the arbitrability of the dispute. It was during the subsistence of the writ petition and the High Court's interim order, when SPML had complete protection of the Court, that the parties entered into the settlement agreement. This agreement was comprehensive. It inter alia provided for: (i) the release of bank guarantees by NTPC, (ii) the withdrawal of SPML's writ petition, (iii) restraining NTPC from filing contempt proceedings against SPML for letting the bank guarantees expire, and finally, (iv) restraining SPML from initiating any proceedings under the 9 subject contract, including



arbitration. The settlement agreement also recorded that there were no subsisting issues pending between the parties.”

7. He further states that in the present case, the agreement was entered into between the petitioner and M/s PDIL and in the present petition, M/s PDIL is not a party.

8. I have heard learned counsel for the parties.

9. As regards the first objection is concerned, the notice invoking arbitration refers to the disputes as under:

<i>Sr. No.</i>	<i>Particulars</i>	<i>Amount</i>
1.	<i>Release of withhold amount from RA Bill dated 06.06.2019.</i>	<i>13,80,60,851.64</i>
2.	<i>Release of GST amount</i>	<i>4,40,42,201.00 (Rs. 2,85,39,459.51+ Rs. 1,55,02,742.22)</i>
3.	<i>Claim on account of Escalation</i>	<i>1,35,30,338.00</i>
4.	<i>Loss of account of idling of resources</i>	<i>5,50,19,880.00</i>
5.	<i>Loss of profit</i>	<i>1,40,00,000.00</i>
6.	<i>Release of Performance Bank Guarantees</i>	<i>2,57,67,873.00</i>
7.	<i>Finance Charges spent on Performance Bank Guarantee and other guarantees/Policies during the prolonged period.</i>	<i>Expenses as incurred, details shall be submitted with claim statement.</i>
8.	<i>Interest @15% on above from due dates</i>	
<i>Total (Rupees)</i>		<i>26,46,53,270.64+release of BG + Interest</i>

10. Serial No. 2 relates to the release of GST amount of about Rs. 4.4 crores.

11. The letter of indemnity clearly seems to suggest that the dispute with regard to GST only has been settled and the other disputes are still pending.

12. The eye of the needle test shows that there is an arbitration agreement



between the parties and as per the petitioner, the dispute only with regard to the GST has been settled.

13. As regards the next objection of M/s PDIL being a party is concerned, a perusal of the contract shows that M/s PDIL was only acting for and on behalf the respondent.

14. The arbitration clause also shows that disputes between the contractor i.e. the petitioner and the owner i.e. the respondent, or the consultant i.e. M/s PDIL can be referred to arbitration. In the present case, the dispute is not with M/s PDIL but with the respondent and hence the petitioner has only made the respondent a party.

15. The findings above are only *prima facie* for deciding the present petition and the issue with regard to there being no dispute to be referred to arbitration may be raised by the respondent before the Arbitral Tribunal, who will decided the same in accordance with law.

16. For the said reasons, the petition is allowed and disposed of with the following directions:

- i) With the consent of parties, instead of three arbitrators, Justice R.S. Endlaw (Retd.) (Mob. No. 9717495002) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.
- ii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.
- iii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.



- iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
- v) The parties shall approach the learned Arbitrator within two weeks from today.

JASMEET SINGH, J

MARCH 12, 2024/DM

Click here to check corrigendum, if any