



2024:DHC:9904



\$~84 and 85

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

%

Date of Decision : 20.12.2024

+ **ARB.P. 1799/2024**

(84) NELAKUDURU INFRA SRIGANESH JVPetitioner

Through: Mr. Mayank Sapre and Mr. Dheeraj
Kumar, Advocates.

versus

NORTHERN RAILWAY & ORS.Respondents

Through: Mr. Manisha Agarwal Narain, CGSC
along with Mr. Chandan Deep Singh
and Mr. Sandeep Singh Samaria,
Advocates.

Mr. Sumeet and Mr. Rishabh Jain,
Advocates for R4.

+ **O.M.P.(I) (COMM.) 82/2024**

(85) M/S NELAKUDURU INFRA SRIGANESH JVPetitioner

Through: Mr. Mayank Sapre and Mr. Dheeraj
Kumar, Advocates.

versus

NORTHERN RAILWAY ANR ORS.Respondents

Through: Mr. Manisha Agarwal Narain, CGSC
along with Mr. Chandan Deep Singh
and Mr. Sandeep Singh Samaria,
Advocates.

Mr. Sumeet and Mr. Rishabh Jain,
Advocates for R4.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (ORAL)

Signature Not Verified

Digitally Signed By:ROHIT
KUMAR PATEL
Signing Date:08.01.2025
13:22:13

ARB.P. 1799/2024 & O.M.P.(I) (COMM.) 82/2024

Page 1 of 13



1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter '*the A&C Act*') seeks constitution of an arbitral tribunal to adjudicate the disputes between the contracting parties.
2. The disputes between the parties have arisen in the background of a tender, floated by the respondent, bearing tender No. 457-Acs/ROB-61/KOHAND/CSB for the work of construction of a 04 Lane Road Over Bridge having single span 1 x 64.05 M (Bow String Steel girder) c/c of pier, along with Limited Height Subway including design and drawing of sub-structure and foundation in lieu of L-xing No. 61 at Km 99/23-25 near Kohand Railway Station on Delhi-Ambala section of Northern Railway.
3. The petitioner having fulfilled the requisite eligibility criteria, participated in the tender process by submitting its bid in compliance with the standard format issued by the respondent/Railways in 2018. Consequently, the petitioner submitted a security deposit and earnest money of Rs. 8,62,600/- on 21.01.2019 through online EMD and net banking.
4. The petitioner emerged as the successful bidder when the technical and financial bids were opened. The Deputy Chief Engineer/construction, *vide* its Letter of Acceptance (L.O.A) dated 27.05.2019, informed the petitioner that its tender for Works had been accepted for a contract price of Rs. 13,28,37,603.17/-. Certain performance bank guarantees/securities were also submitted by the petitioner pursuant thereto. On 28.09.2019, the formal contract agreement was executed.
5. The disputes between the parties have subsequently arisen on account of the petitioner's failure to perform its obligation in a timely manner for want of necessary technical instructions/approval of drawings and for want



of proper and timely payments against the bills/ invoices raised from time to time. Consequently, the cost of construction/execution of work is stated to have increased.

6. Eventually, a show cause notice dated 24.05.2022 was issued by the respondent/Railways whereby the petitioner was granted seven days time period to show progress of the work, failing which, the contract would be terminated.

7. A detailed response dated 27.05.2022 was sent by the petitioner. Eventually, the contract was terminated pursuant to a final termination notice dated 02.03.2024.

8. It is the case of the petitioner that the disputes in connection with the aforesaid contract are liable to be resolved in terms of the applicable arbitration agreement incorporated in the contract between the parties. Admittedly, the same is in the following terms:-

“64.(1) Demand For Arbitration :

64.(1) (i) 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 as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway

fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

64.(1) (ii) 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(s) or difference(s) in respect of which the demand has been made, together with counter claims or set off, given



by the Railway, shall be referred to arbitration and other matters shall not be included in the reference.

64.(1) (iii) (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 claim stating the facts supporting the claims alongwith 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) *The Railway shall submit its defence statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by 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.*

64.(1) (iv) *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.*

64.(1) (v) *If the contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.*

64.(2) *Obligation During Pendency Of Arbitration : Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should continue during arbitration proceedings.*

64.(3) *Appointment of Arbitrator ;*

64.(3) (a)(i) *In cases where the total value of all claims in question added*



together does not exceed Rs. 25,00,000 (Rupees twenty five lakh only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM.

64.(3) (a)(ii) In cases not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a Panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM. 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. GM 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 is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator.

64.(3) (a)(iii) If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator (s).

64.(3) (a)(iv) The Arbitral Tribunal shall have power to call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal shall



think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay. The Arbitral Tribunal should record day to-day proceedings. The proceedings shall normally be conducted on the basis of documents and written statements.

64.(3) (a)(v) While appointing arbitrator(s) under Sub-Clause (i), (ii) & (iii) above, due care shall be taken that he/they Is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servant(s) expressed views on all or any of the matters under dispute or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on or any of the matters under dispute.

64.(3) (b)(i) The arbitral award shall state item wise, the sum and reasons upon which it is based. The analysis and reasons shall be detailed enough so that the award could be inferred therefrom.

64.(3) (b)(ii) A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award of a Tribunal and interpretation of a specific point of award to Tribunal within 60 days of receipt of the award.

64.(3) (b)(iii) A party may apply to Tribunal within 60 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

64.(4) In case of the Tribunal, comprising of three Members, any ruling on award shall be made by a majority of Members of Tribunal. In the absence of such a majority, the views of the Presiding Arbitrator shall prevail.

64.(5) Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.

64.(6) The cost of arbitration shall be borne by the respective parties. The cost shall inter-alia include fee of the arbitrator(s), as per the rates fixed by Railway Board from time to time and the fee shall be borne equally by both the parties. Further, the fee payable to the arbitrator(s)



would be governed by the instructions issued on the subject by Railway Board from time to time irrespective of the fact whether the arbitrator(s) is/are appointed by the Railway Administration or by the court of law unless specifically directed by Hon'ble court otherwise on the matter.

64.(7) Subject to the provisions of the aforesaid Arbitration and Conciliation Act 1996 and the rules thereunder and any statutory modifications thereof shall apply to the arbitration proceedings under this Clause."

9. Disputes having arisen between the parties, a notice dated 18.04.2024 was sent by the petitioner; calling upon the respondent to appoint a sole conciliator for resolving the disputes between the parties. However, no response was received to the said notice.

10. Thereafter, a notice invoking arbitration dated 09.07.2024 was sent by the petitioner to the respondent whereby it was sought as under:-

"In view of the peculiar facts and circumstances as mentioned hereinabove, Northern Railway is called upon to provide consent for constitution of Arbitral Tribunal/ Sole Arbitrator through DIAC by mutual acceptance preferably within a period of 10 days from receipt of this notice. Failure to act by Northern Railway upon receipt of the notice shall constrain M/s. Nelakuduru Infra Sriganesh JV to proceed in accordance with law for constitution of Arbitral Tribunal by way of appropriate proceedings as contemplated under the law."

11. No response thereto is stated to have been sent by the respondent as well. Consequently, the present petition has come to be filed.

12. Learned counsel for the respondent while admitting the existence of the arbitration agreement, objects to the present petition on the ground that the claims sought to be raised by the petitioner fall within the scope of excepted matters and as such are not amenable to arbitration at all by virtue of Clause 63 of the relevant contract which reads as under:

"63. 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 progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the GM and the GM shall, within 120 days after receipt of the contractor's 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 Clauses 8, 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57A, 61(1), 61(2) and 62(1) to (xiii)(B) of Standard General Conditions of Contract or in any Clause of the Special 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."

He submits that in view thereof, the present petition is liable to be rejected.

He relies upon the judgment of the Supreme Court in the case of ***Emaar India Limited v. Tarun Aggarwal Projects LLP and Anr.***, (2023) 13 SCC 661.

13. This Court is not persuaded to accept the objection raised by the learned counsel for the respondent. It has been held in a number of cases that the decision as to whether, a particular claim falls within the scope of "Excepted Matters" is itself an aspect that is best left to be decided by a duly constituted Arbitral Tribunal. In this regard, reference may be placed to the judgments of this Court in ***N.K Sharma v. General Manager Northern Railway***, 2023 SCC OnLine Del 7576 and ***Braithwaite Burn and Jessop Construction Co. Ltd v. Northern Railway***, 2023 SCC OnLine Del 8176.

14. Furthermore, in ***In Re: Interplay between Arbitration Agreement under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899***, 2023 SCC OnLine SC 1666, it has been categorically held by the Supreme Court that the scope of examination in the present proceedings is



confined to ascertaining *prima facie*, the existence of an arbitration agreement. In this regard reliance may be placed on the following observations in *In re, Interplay* (supra):

“163. The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence, only prima facie proof of the existence of an arbitration agreement must be adduced before the referral court. The referral court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the arbitral tribunal. This position of law can also be gauged from the plain language of the statute.

*164. Section 11(6A) uses the expression “examination of the existence of an arbitration agreement.” The purport of using the word “examination” connotes that the legislature intends that the referral court has to inspect or scrutinize the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression “examination” does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provides that the arbitral tribunal can “rule” on its jurisdiction, including the existence and validity of an arbitration agreement. A “ruling” connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the referral court is only required to examine the existence of arbitration agreements, whereas the arbitral tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by this Court in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*”*

15. Again, in *SBI General Insurance Co. Ltd. v. Krish Spinning*, 2024 INSC 532, it has been observed as under:-

*“113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in *In Re: Interplay* (supra) that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a prima facie arbitration agreement and not any other issues. The relevant*



observations are extracted hereinbelow:

“209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall “examine the existence of a prima facie arbitration agreement and not other issues”. These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the “other issues” also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a timebound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. [...]”

(Emphasis supplied)

114. In view of the observations made by this Court in In Re. Interplay, it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in Vidya Drolia and adopted in NTPC v. SPML Infra Ltd. that the jurisdiction of the referral court when dealing with the issue of “accord and satisfaction” under Section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in In Re. Interplay.

* * *

123. The power available to the referral courts has to be construed in the light of the fact that no right to appeal is available against any order passed by the referral court under Section 11 for either appointing or refusing to appoint an arbitrator. Thus, by delving into the domain of the arbitral tribunal at the nascent stage of Section 11, the referral courts also run the risk of leaving the claimant in a situation wherein it does not have any forum to approach for the adjudication of its claims, if its Section 11 application is rejected.”

(emphasis supplied)

16. Since the existence of an arbitration agreement is not in doubt, there is no impediment to constituting an arbitral tribunal to adjudicate the disputes



2024:DHC:9904



between the parties. Further, the appointment procedure envisaged in the relevant arbitration clause in the present case is no longer valid in terms of the dicta laid down by the Supreme Court in ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Company***, MANU/SC/1190/2024.

17. Further, in terms of the judgments of the Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd*** (2020) 20 SCC 760, ***TRF Limited v. Energo Engineering Projects Ltd***, (2017) 8 SCC 377 and ***Bharat Broadband Network Limited v. United Telecoms Limited***, 2019 SCC OnLine SC 547 and ***M/s. M.V. Omni Projects (India) Ltd. v. Union of India, Through Dy. Chief Engineer/Const.-II/Northern Railway*** 2024:DHC:7874, it is incumbent on this Court to appoint an independent sole arbitrator to adjudicate the disputes between the parties.

18. Accordingly, Mr. Justice (Retd.) D.Y. Chandrachud, (Mob. No.: +91 9999029111), former Chief Justice of India, is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

19. Needless to say, any objections sought to be raised by the respondent as regards jurisdiction/arbitrability, including the objection that the claims sought to be raised are not arbitrable on account of falling within the scope of 'excepted matters', shall be duly considered by the learned Sole Arbitrator on merits and in accordance with law. The respondent is at liberty to move an application under Section 16 of the A&C Act for the aforesaid purpose.

20. The respondents are also at liberty to raise counter-claims, if any, which shall be dealt with and adjudicated by the learned Sole Arbitrator, in



accordance with law.

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

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

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

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

O.M.P.(I) (COMM.) 82/2024

25. This is a petition filed under Section 9 of the A&C Act seeking urgent interim orders.

26. It is averred in the petition that the emergent situation has been created on account of the petitioner's apprehension that its performance bank guarantee/s would be invoked/encashed by the respondents in the aftermath of the termination of the contract agreement.

27. Since an arbitral tribunal has already been constituted in the Arb.P. 1799/2024, it would be apposite if the present petition is treated as an application under Section 17 of the A&C Act and dealt with by the learned sole arbitrator. It is directed accordingly.

28. Subsisting interim order/s shall continue to operate till the disposal of the application under Section 17 of the A&C Act. It is clarified that the learned Arbitrator shall decide the said application without being influenced by any observations/orders passed in these proceedings.



2024:DHC:9904



29. All rights and contentions of the parties are reserved.
30. The present petition is disposed of in the above terms.

SACHIN DATTA, J

DECEMBER 20, 2024/at

Signature Not Verified

Digitally Signed By: ROHIT
KUMAR PATIL
Signing Date: 08.01.2025
13:22:13

ARB.P. 1799/2024 & O.M.P.(I) (COMM.) 82/2024

Page 13 of 13