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

\+ ARB.P. 1020/2024

DATA TECHNOSYS ENGINEERS PVT LTD .....Petitioner

Through: Mr. Love K. Gupta and Ms. Saumya Pandey, Advocates

versus

RAIL VIKAS NIGAM LIMITED .....Respondent

Through: Mr. Udit Seth, Mr. Anil Seth and Mr. Divyanshu, Advocates

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT (ORAL)

% **28.08.2024**

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996[1] for appointment of an Arbitrator to arbitrate on the disputes between the parties.

2. The dispute arises in the context of a Project Management Consultancy Agreement (PMCA) dated 8 April 2019, executed between the petitioner and the respondent. The General Conditions of Contract[2] envisage resolution of the disputes by arbitration and the relevant clause in that regard reads thus:

"Settlement of Disputes

Section 16.01 Amicable Settlement:

[1] "the 1996 Act", hereinafter
[2] "GCC", hereinafter

In case any dispute or difference between the Employer and the Consultant for which claim has already been made by the Consultant, remains unresolved, the Consultant shall then, give notice of dissatisfaction and intention to commence arbitration to the Employer duly specifying the subject of the dispute or differences as also the amount of claim item-wise. The parties shall make attempts to settle the dispute amicably before the commencement of arbitration. However, unless both parties agree otherwise, demand for arbitration may be made by the Consultant after 90 days from the day on which a notice of dissatisfaction and intention to commence arbitration was given, even if no attempt for, amicable settlement has been made.

Section 16.02: Arbitration

Any dispute in respect of which amicable settlement has not been reached arising between the Employer and the Consultant related to any matter arising out of or connected with this contract, then the consultant, after 90 days but within 150 days from the day of which a notice of disqualification and intention to commence arbitration was given under Clause 16.01, shall be entitled to demand in writing that the dispute or difference be referred to arbitration.

Only such dispute(s) or difference(s) in respect of which the demand had been made for amicable settlement under Clause 16.01 but could not be settled together with counter claims or set off, given by the Employer, shall be referred to arbitration and other matters shall not be included in the reference.

The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by Chairman and Managing Director, Rail Vikas Nigam Limited, New Delhi (CMD/ RVNL).

The disputes so referred to arbitration shall be settled in accordance with the Indian Arbitration & Conciliation Act, 1996 and any statutory modification or re-enactment thereof.

Further, it is agreed between the parties as under:

16.02.1 Number of Arbitrators: The Arbitral Tribunal shall consist of:

(i) Sole Arbitrator in cases where the total value of all claims in question added together does not exceed Rs. 2 Crores

(ii) 3 (Three) arbitrators in all other cases."

3. The petitioner addressed a Notice of Dissatisfaction to the respondent under Section 16.01 of the GCC on 20 December 2023. Between 2 January 2024 and 15 January 2024, multiple communications were exchanged between the petitioner and the respondent.

4. On having extended the pre-arbitral protocol envisaged in the GCC without any fruitful results, the petitioner in terms of Clause 16.02 of the GCC, addressed a notice to the respondent under Section 21 of the 1996 Act on 15 April 2024, seeking reference of the disputes between the parties to arbitration.

Rival Contentions and Analysis

5. The first contention raised by Mr. Seth is that the petitioner has not exhausted the pre-arbitral protocol envisaged by Section 16.01 of the PMCA.

6. Section 16.01 of the PMCA no doubt envisages a protocol being followed by a claimant before referring a dispute to arbitration. The claimant is required to give a notice of dissatisfaction and intention to commence arbitration to the employer, i.e. the respondent. The parties are thereafter required to attempt to settle the dispute amicably. The clause, however, permits the claimant to demand for the dispute to be referred to arbitration on the expiry of 90 days from the date of which the notice of dissatisfaction and intention to commence arbitration is served on the employer.

7. In the present case, the notice of dissatisfaction was issued by the petitioner to the respondent on 20 December 2023. Mr. Seth has drawn my attention to the following communications addressed by the respondent to the petitioner on 2 January 2024 and 22 March 2024;

Communication dated 2 January 2024

"No. 2012/RVNL/Elect/RE-MHU/192 January 02, 2024

Data Technosys (Engineers) Pvt. Ltd.
T.F-II, Asha Apartments-1,
19, Ram Mohan Rai Marg,
Lucknow-226001
Email: ho@datatechnosys.com

Sub: Notice of dissatisfaction under section 16.01 (Article XVI) of Contract agreement-Project Management Consultancy for "Design, Supply, Erection, Testing & Commissioning of 25 KV, 50Hz, Single Phase, Traction Over Head Equipment and other associated works of Sidings (43.15 TKM) in Rewari-Manheru Section in Bikaner Division of North Western Railway in the State of Haryana, India".

Ref: 1)-LOA letter no. 2012/RVNL/Elect/RE-MHU/172 Siding PMC dated 31-12-2018.

2)-Your office letter no.03/RVNL/Rewari-Manheru/2023 dated 20.12.2023.

Dear Sir,

The issue towards the payment for the services addressed vide your letter under reference (2) has been received in this office. RVNL is also open for discussion, negotiation, and deciding the matter through logical reasoning only to avoid arbitration. The claims received are under examination in this office and if find genuine will be processed further for necessary action.

(R.N. Rajpoot)

2/1/2024
GGM/Electrical/Expert"

Communication dated 22 March 2024

"No. 2013/RVNL/Elect/MHU-HSR/192Pt-IV Date: 22-03-2024

To,

M/s Data Technosys (Engineers) Pvt. Ltd.
T.F-II, Asha Apartments-1,
19, Ram Mohan Rail Marg,
Lucknow-226001
Email: ho@datatechnosys.com

Sub: Request to resolve our pending issues- Project Management Consultancy for "Design, Supply, Erection, Testing & Commissioning of 25 KV, 50Hz, Single Phase, Traction Overhead Equipment and other associated works of Sidings (43.15 TKM) in Rewari-Manheru Section in Bikaner Division of North Western Railway in the State of Haryana, India".

Ref: i) Your Letter no. 04/RVNL/Rewari-Manheru/2024-Dt/ 13/03/2024
ii) This office letter even no. Dt. 02.01.2024

In reference to above, it is already intimated that RVNL is open for discussion, negotiation, and deciding the matter through logical reasoning only to avoid arbitration.

The claims referred are under examination in this offer, if it will found genuine will be processed further for necessary action.

(T.B. Rai)
22/3/2024
DGM/E/CO/RVNL"

8. Thus, Mr. Seth submits that the respondent was always willing to amicably resolve the dispute but the petitioner was not forthcoming in that regard. Without attempting an amicable resolution, he submits that the petitioner could not have issued a Section 21 notice referring the disputes to arbitration.

9. Mr. Love Gupta, learned counsel for the petitioner, submits *per contra* that, apart from writing the aforesaid letters dated 2 January 2024 and 22 March 2024, no step was taken by the respondent towards amicably resolving the dispute. In fact, submits Mr. Gupta, the petitioner wrote to the respondent on 13 March 2024 thus:

> "No: 04/RVNL/ Rewari-Manheru/2024 Dated: 13-03-2024
>
> By Speed Post
>
> To,
>
> Group General Manager/E/Exp,
> Rail Vikas Nigam Limited,
> 1st Floor, August Kranti Bhawan,
> Bhikaji Cama Place,
> R K Puram, New Delhi-110066
>
> Sub: REQUEST TO RESOLVE OUR PENDING ISSUES - Project Management Consultancy for "Design, Supply, Erection, Testing & Commissioning of 25 KV, 50Hz, Single Phase, Traction Over Head Equipment and other associated works of Sidings (43.15 TKM) in Rewari-Manheru Section in Bikaner Division of North Western Railway in the State of Haryana, India".
>
> Ref: LOA letter No. 2012/RVNL/Elect/RE-MHU/172 Siding PMC dated 31-12-2018,
> Our letter no 03/RVNL/ Rewari-Manheru /2023 dated 20-12-2023,
> Your letter No. 2012/RVNL/Elect/RE-MHU/192 dated 02-01-2024
>
> Dear Sir,
>
> Kindly be informed that our Notice of Dissatisfaction pursuant to clause 16.01 was conveyed to you in our letter dated 20-12-2023. Your response dated 02-01-2024 indicated a willingness to seek an amicable resolution through negotiation, with a mutual understanding to safeguard the interests of all parties involved.
>
> Nevertheless, it has been over two months since then, and there has been no proposal for settlement presented from your side up to this date. It is worth noting that the contract stipulates a timeline under clause 16.01 of the Agreement, which requires the parties to engage in negotiation, if feasible, to achieve an amicable resolution

of the dispute before it is escalated to arbitration.

In compliance with the contractual terms and given the aforementioned circumstances, we are keenly awaiting your response regarding the amicable settlement of the dispute and the release of the payable-amount us.

Thank you in anticipation of your response.

Yours Sincerely,

Sd/-
(Devan Daljit Singh Chopra)
Director"

10. It is only after having thus waited for two months for the respondent to take some steps towards amicable resolution and finding that no such step was forthcoming, that the petitioner proceeded to issue a notice under Section 21 of the 1996 Act seeking reference of the disputes to arbitration. As such, Mr. Gupta submits that the petitioner cannot be said to be remiss in complying with the pre-arbitration protocol envisaged by the PMCA.

11. I am in agreement with Mr. Gupta.

12. In the first place, the communications dated 2 January 2024 and 22 March 2024 merely evince, at the best, a left handed intent to settle the dispute. The letter dated 2 January 2024 does not in fact make any reference to amicable resolution or settlement of the dispute. Rather, it is perilously adversarial in its tenor. It specifically states that the respondent was "*open for discussion, negotiation and deciding the matter through logical reasoning*". The letter further goes on to state that the claims were under examination in the respondent's *office and* *would be processed only if they were found genuine*. This letter cannot, therefore, be said to be in the nature of an offer for an amicable resolution of the dispute. Though Mr. Seth sought to submit that the expression "logical reasoning" should be analogised to amicable resolution, I do not know of any etymological principle which permits this.

13. The second letter dated 22 March 2024, while being less adversarial in its tenor, nonetheless again advises deciding the matter through "logical reasoning" and reiterates that, *if the claims were found genuine*, they would be processed further.

14. Neither of these communications, therefore, is in the nature of an offer for an amicable resolution of the dispute.

15. Moreover, there is substance in Mr. Gupta's contention that if the respondent was actually forthcoming for amicably resolving the dispute, the respondent ought to have taken some steps forward so that the petitioner could be sanguine in that regard. The letter dated 13 March 2024 from the petitioner clearly states that despite having two months having passed since 2 January 2024, there was no proposal for settlement extended by the respondent to the petitioner. The period of 90 days from the date of the notice of dissatisfaction expired on or around 20 March 2024. Even after the aforesaid communication dated 13 March 2024 from the petitioner to the respondent, the response dated 22 March 2024 from the respondent, to which allusion as already made hereinabove, again seeks resolution of the matter "through logical reasoning" and processing of the claims only "to the extent found genuine". The fact that this letter was a response to the petitioner's request for an amicable resolution of the dispute, sent on 13 March 2024, clearly indicates that the respondent was unwilling for an unconditional settlement, and wanted an amicable resolution only on merits, to the extent the petitioner's claims were genuine.

16. An offer to process claims only to the extent they are genuine, cannot, by any stretch of imagination be treated as an offer for amicable resolution of the disputes. Claims, if found, genuine, have in any case have to be processed. An offer for amicable resolution has, by its very nature, to be an olive branch.

17. In any event, it was only after 90 days had expired from the date of the notice of dissatisfaction that the petitioner invoked arbitration by way of a Section 21 notice issued on 15 April 2024. The Supreme Court has in ***Demerara Distilleries Pvt Ltd v Demerara Distillers Ltd***[3] and ***Visa International Ltd v Continental Resources USA Ltd***[4] and dealing with the clauses which envisaged a pre-arbitral protocol of amicable resolution, held that, where the exchange between the parties did not indicate that such an amicable resolution would serve any fruitful purpose, relegating the parties to that exercise would be an empty formality. Following this, this Court has, in ***Ravinder Kumar Verma v BPTP Ltd***[5], ***Satpal Sharma v UOI***[6], ***UOI v Baga Brothers***[7]

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[3] **(2015) 13 SCC 610**
[4] **(2009) 2 SCC 55**
[5] **(2015) 147 DRJ 175**
[6] **2015 SCC OnLine Del 10767**
[7] **2017 SCC OnLine Del 8989**

and ***Siemens Ltd v Jindal India Thermal Power Ltd***[8], has held such pre-arbitration conciliation clauses to be directory.

18. Of course, it may not be possible to hold, absolutely, that pre-arbitration conciliation clauses are directory in all cases, and the Court would have, on a case to case basis, take a view on whether any useful purpose would be served in relegating the parties to a conciliatory exercise. Where daggers are already drawn, and the parties are at issue on the claims, the Court may be well advised to proceed to appoint an arbitrator, rather than protract a resolution of the dispute by once again directing an attempt at conciliation.

19. In the present case, given the aforesaid facts, I am of the opinion that it would be futile to relegate the parties to any exercise of amicable resolution at this stage. This objection of Mr. Seth is therefore not sustainable and is accordingly rejected.

20. Mr. Seth subsequently submits that the dispute is not arbitrable as the total claims of the petitioner are in excess of 20% of the contract price.

21. This objection is also not tenable in law.

22. Mr. Seth candidly acknowledges that the PCMA does not define the expression "contract price". He seeks to place reliance on the letter of award dated 31 December 2018, which reads thus :

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[8] **2018 SCC OnLine Del 7158**

"Notification of Award

No. 2012/RVNL/Elect/RE-MHU/I 72 Sidings PMC
Dated: 31.12.2018

***M/s.* Data Technosys (Engineers) Pvt. Ltd.,**
T.F.-11, Asha Apartment-1,
19 Ram Mohan Rai Marg,
Lucknow (U.P.) – 226001

Sub: Project Management Consultancy for "Design, Supply, Erection, Testing & Commissioning of 25 KV 50Hz Single Phase Traction Over-Head Equipment and other Associated works of Sidings (43.15 TKM) in Rewari - Manheru Section in Bikaner Division of North Western Railway in the state of Haryana, India".

Ref: 1. RFP No. 2012/RVNL/Elect/RE-MHU/172 Sidings PMC dated 18/05/2018 along with Minutes of Pre-Bid Meeting dated 04.06.2018.

2. Your Technical Proposal in reference to above RFP opened on 27.6.2018.

3. Your Financial Proposal in reference to above RFP opened on 06.11.2018.

4. This office letter of even no. dated19.11.2018.

5. Your office letter no. 03/RVNL/NWR/ Haryana/Bikaner/Rewari-Manheru/2018 dated 26.11.2018

You are notified that your proposal against request for proposal referred above for the work of Project Management Consultancy for "Design, Supply, Erection, Testing & Commissioning of 25 KV 50Hz Single Phase Traction Over-Head Equipment and other Associated works of Sidings (43.15 TKM) in Rewari - Manheru Section in Bikaner Division of North Western Railway in the state of Haryana, India" has been accepted by competent authority at a total cost of Rs.89, 10,000/- (Rupees Eighty nine lakhs ten thousand only). The Item-wise accepted rates areas below:

S. No	Key Personnel	Qty	Unit	Accepted Rate/Amount Rate in (₹) / Amount (in Rs)	
	A. Key Personnel				
1.	Project Manager (PM/Elect)	12	Person Months	2,39,250.00	28,71,000.00
2.	Resident Engineer	12	Person	1,40,250.00	16,83,000.00

	(RE)/Elect. (OHE / TSS / SCADA/GS)		Months		
3.	Electrical Expert (OHE/TSS/SCADA)	12	Person Months	90,750.00	1,089,000.00
B.Supervisors					
1.	Supervisor – Elect. Engineering (OHE/TSS/GS/SCADA)	30	Person Months	69,200.00	20,76,000.00
C. Office Staff Team					
1.	Computer Operator cum Stenographer	12	Person Months	25,000.00	3,00,000.00
2.	Clerk cum Record cum Store keeper	15	Person Months	25,000.00	3,75,000.00
3.	Office Attendants/Chairman	18	Person Months	12,000.00	2,16,000.00
4.	Accountant	12	Person Months	25,000.00	3,00,000.00
TOTAL					89,10,000.00

The rates quoted above for **Office Attendant/ Chainman and Accountant should not be taken as LAR for estimates and tenders in future.**

1. In terms of clause 10, Section 2 of RFP, you are required to furnish performance security for an amount of Rs 8,91,000/-i.e. 10% of accepted contract amount, within 28 (Twenty Eight) days of issue of this notification of award, in shape of Bank Draft or unconditional Bank Guarantee, on format as in Form 7 provided in section 3 of RFP. The performance security should be valid for a period of **42** days beyond completion period, i.e. **09 months + 06Months (DLP) + 42 days.**

2. On receipt and verification of the performance security, notice to proceed will be issued and you will be sent the form of Contract provided in the RFP, incorporating all agreements between the parties, to you. In terms of clause 9 section 2 of RFP, you shall sign and date the contract through your authorized signatory and return it to the undersigned within 28 (Twenty Eight) days of the issue of the Contract Form. Till such time, a formal contract agreement is prepared and executed, this notification of award along with the documents mentioned under reference shall constitute a binding contract between you and RVNL.

3. Failure to submit the above mentioned performance security or to sign of the contract agreement within prescribed period as above, as per clause 9 or clause 10 of section 2 of RFP, shall constitute sufficient grounds for the annulment of the award and banning for future contracts.

4. Period of completion of contract is 09 months from the date

of commencement of works which will be within 15 calendar days after issue of notice to proceed with the services as per clause 44 of from of contract agreement given in 'A' of section 5 of RFP.

5. The taxes, duties, fees, levies and other impositions levied under the existing, amended or enacted laws during life of this contract by you. However, GST will be paid extra, as applicable, by the RVNL.

6. You shall furnish the Bonds, Guarantees, Undertakings, Warrantees and Insurance as stipulated in Bid Documents as per the contract forms.

7. DGM/Elect, Rail Vikas Nigam Limited, Charkhi Dadri will be the Project Director for this Project.

8. Herein after this 'Notification of Award' shall be called as 'Letter of Acceptance (LOA).

Please acknowledge receipt.

Yours faithfully,

Sd/-
(A.K.Tyagi)
GGM/E/P/RVNL"

23. As against this, Mr. Gupta, learned counsel for the petitioner, submits that the aforesaid figure of ₹ 89.1 lakhs, envisaged in the letter of award dated 31 December 2018, was not static. He submits that the said amount was worked out on a premise that the duration of the contract would be nine months. In fact, submits Mr. Gupta, the contract extended to 32 months and the respondent had actually paid to the petitioner over ₹ 2 crores towards the work executed in connection with the contract, which itself indicates that the contract price cannot be treated as, inflexibly, ₹ 89.1 Lakhs.

24. Mr. Seth placed reliance on the judgment of a coordinate Bench of this Court in ***BCC-Monalisha (JV) v Container Corporation of India Ltd***[9]. Clearly, the arbitration clause in that case was similar in its wording to the arbitration clause in the present case. The coordinate Bench has in para 15 of the said decision, observed and held thus:

> "15. Petitioner has not contested that the aggregate value of the claims would exceed 20% of the contract value. Petitioner's only submission, in this regard, is that the Arbitral Tribunal will determine whether the claims are non-arbitrable. As stated above, *the court even in this limited jurisdiction under Section 11, could conduct a preliminary enquiry to find out if the claims are ex facie arbitrable. This court is not relegated to a post office to be completely oblivious to the obvious legal infirmities in the request for appointment of arbitrator. It is not enough for the Petitioner to say that let the arbitrator decide all the jurisdictional issues. The Petitioner must cross the minimum threshold that is required in law as stated above, before the court can act upon such request. Respondent, unless it concedes to such request, cannot be mechanically burdened with the arbitration proceedings, and the costs attached thereto, even for adjudication of jurisdictional issue, that is otherwise apparent at the stage of Section 11 enquiry itself.*"
>
> (Emphasis supplied)

25. Significantly, the coordinate Bench has, in ***BCC-Monalisha***, noted the contention of the petitioner that the Arbitral Tribunal was required to determine the extent to which the petitioner's claims were arbitrable and that, therefore, it could not be said that the claim amount would invariably exceed 20% of the contract value. The coordinate Bench has observed that this Court was possessed of the jurisdiction, while dealing with an application under Section 11(6), to conduct a preliminary enquiry to find out if the claims were *ex facie* arbitrable and could, even at that stage, work out the extent of claims which could be referred to arbitration.

[9] **2023 SCC Online Del 5282**

26. That position, however, does not continue to hold good, in view of the recent decision of the Supreme Court in ***SBI General Insurance Co Ltd v. Krish Spinning***[10] in which the Supreme Court has clearly held that the Court exercising jurisdiction under Section 11(6) *cannot examine the ex facie arbitrability of the claims*. The Court can only examine whether there exists an arbitration agreement between the parties "and nothing else", to quote the exact words used in para 114 of the report.

27. The only other aspect which the Section 11(6) Court can look into, is whether the petition under Section 11(6) has been moved within three years of the notice issued under Section 21 of the 1996 Act.

28. The basic premise on which the coordinate Bench decided ***BCC-Monalisha***, which was that the Court, while exercising jurisdiction under Section 11(6), could examine the extent to which the claims of the petitioner were arbitrable is, therefore, no longer good law.

29. Further, in the present case, there is substance in Mr Gupta's contention that the "contract price" could not be regarded as fixed at ₹ 89.1 lakhs. There is, admittedly, no definition of "contract price" in the PMCA. It cannot, therefore, be said that there was any fixed amount envisaged by the PMCA as representing the "contract price", which could be taken into consideration while administering Section

[10] **2024 SCC OnLine SC 1754**

16.02 of the PMCA. Mr. Seth himself places reliance on the contract value envisaged in the LOA, which is a document executed even prior to the PMCA coming into existence. That, clearly, was the contract value as was envisioned at that point of time. Mr. Gupta has pointed out that, subsequently, the petitioner has been paid amounts far in excess of the figure of ₹89.1 Lakhs envisaged in the LOA dated 31 December 2018.

30. That being so, at the very least, this is a matter which would have to be relegated for consideration by the learned Arbitral Tribunal. The decision in ***SBI General Insurance Co Ltd*** clearly requires the Court to only take a *prima facie* view of whether the arbitration agreement exists or not. If the matter calls for a deeper consideration, even the question of whether there exists an arbitration agreement is required to be relegated to the Arbitral Tribunal.

31. In that view of the matter, it cannot be held by this Court at this stage, while exercising jurisdiction under Section 11(6) of the 1996 Act, that the claims of the petitioner stand excluded from the arbitration agreement under Section 16.02. However, this is an aspect which may be taken up before the learned Arbitral Tribunal, and the learned Arbitral Tribunal would take a view thereon. The views expressed hereinabove may not be regarded as determinative of the issue.

32. The third submission of Mr. Seth, which relates to the qualification of the Arbitrator to be appointed by the Court is predicated on Section 16.02.3 of the PMCA, which reads thus:

> "16.02.3 Qualification and Experience of Arbitrator (to be appointed as per sub-clause 16.02.2 above): The arbitrators to be appointed shall have minimum qualification and experience as under:
>
> Arbitrator shall be:
>
> A working/retired officer (not below E-9 grade and above in a PSU with which RVNL has no business relationship of any discipline of Engineering or Accounts/Finance department, having experience in Contract Management of construction contracts, or
>
> a retired officer (retired not below the HAG level in Railways) of any ·Engineering Services of Indian Railways or Indian Railway Accounts Service, having experience in Contract Management of construction contracts; or a retired officer who should have retired more than 3 years previously from the date of appointment as Arbitrator (retired not below E~9 grade in RVNL or a PSU with which RVNL has a business relationship) of any Engineering discipline or Accounts/Finance department, having experience in Contract Management of construction contracts.
>
> No person other than the persons appointed as per above procedure and having above qualification and experience shall act as Arbitrator."

33. Mr. Seth submits, relying on Section 11(8)[11] of the 1996 Act, that this Court should keep in mind the qualification and experience envisaged by Section 16.02.03 of the PMCA while appointing the Arbitrator.

34. I find myself unable to subscribe to this line of reasoning. All that Section 11(8) states is that the Court or arbitral institution, while

[11] (8) The arbitral institution referred to in sub-sections (4), (5) and (6)], before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of Section 12, and have due regard to –

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

appointing an Arbitrator under Section 11(6), should have *due regard* to the qualifications required for the Arbitrator by agreement between the parties. The words "have due regard" clearly indicate that some amount of play in the joints remains with the Court or the arbitral institution to decide on the Arbitrator to be appointed.

35. That apart, in order to apply this clause, one has to relate back to the contractual covenant which refers to the qualifications of the Arbitrator.

36. Clause 16.02.3 refers to the qualification and experience of the Arbitrator to be appointed as per Clause 16.02.2. Clause 16.02.2, in its turn, sets out a procedure for appointment of the Arbitrator and reads thus :

> "16.02.2 Procedure for appointment of Arbitrators: The arbitrators shall be appointed as per following procedure:
>
> (i) In case of Sole Arbitrator, CMD/RVNL shall appoint an arbitrator within 60 days from the day when a written and valid demand for arbitration is received by CMD/RVNL
>
> (ii) In case of 3 Arbitrators:
>
> (a) Within 60 days from the day when a written and valid demand for arbitration is received by CMD/RVNL, the Employer will forward a panel of 3 names to the consultant. The Consultant will then give his consent for any one name out of the panel to be appointed as one of the Arbitrators within 30 days of dispatch of the request by the Employer.
>
> (b) Employer will decide the second Arbitrator. CMD/RVNL shall appoint the two Arbitrators, including the name of one Arbitrator for whom consent was given by Consultant, within 30 days from the receipt of the consent for one name of the

Arbitrator from the Consultant. In case the Consultant fails to give his consent within 30 days of dispatch of the request of the Employer then CMD/VNL shall nominate both the Arbitrators from the panel.

(c) The third Arbitrator shall be chosen by the two Arbitrators so appointed by the parties and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators appointed by the parties to reach upon consensus within a period of 30 days from the appointment of the Arbitrators subsequently appointed, then, upon the request of either or both parties, the Presiding Arbitrator shall be appointed by the Chairman and Managing Director, Rail Vikas Nigam Limited, New Delhi.

(d) 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 CMD/RVNL fails to act without undue delay, the CMD/RVNL shall appoint new arbitrator to act in their place except in case of new Presiding Arbitrator who shall be chosen following the same procedure as mentioned in para (ii)(c) above. 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)."

37. Admittedly, no Arbitrator has been appointed under Clause 16.02.2. The question of applying Clause 16.02.3, therefore, cannot arise at all, where no Arbitrator has been appointed in terms of clause 16.02.2. I cannot agree with the proposition that the stipulation regarding the qualification of the Arbitrator, which is contractually specifically tailored to apply to a situation where the Arbitrator is appointed in accordance with Clause 16.02.2, should be extended to a situation where no arbitrator is appointed under Clause 16.02.2, and the Court proceeds to do so, under Section 11(6) of the 1996 Act.

38. The submission that the Arbitrator to be appointed by the Court must possess the requisite qualifications envisaged in clause 16.02.3 is also, therefore, found to be without substance and is accordingly rejected.

39. In view of the aforesaid, as there exists an arbitration agreement between the parties and as the parties have not been able to arrive at a consensus regarding arbitration, the Court has necessarily to step in.

40. The claims of the petitioners are stated to be in the region of ₹36 Lakhs.

41. In these circumstances, this Court requests Mr. Ram Chander Singh Bhadoria, Advocate (Tel. 9899451953) to arbitrate on the disputes between the parties.

42. The arbitration shall take place under the aegis of the Delhi International Arbitration Centre (DIAC) and would abide by its rules and regulations.

43. The learned arbitrator shall be entitled to charge fees as per schedule of fees maintained by the DIAC.

44. The learned arbitrator is also requested to file the requisite disclosure under Section 12(2) of the 1996 Act, within a week of entering on reference.

45. All questions of fact and law are left open for decision by the learned Arbitrator. This Court must not be treated as having expressed any opinion on any aspect of the matter one way or the other.

46. The petition stands allowed in the aforesaid terms.

C.HARI SHANKAR, J

AUGUST 28, 2024/yg

Click here to check corrigendum, if any