



2024:DHC:8826



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

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Date of Decision: 14.11.2024

+ **ARB.P. 1535/2024**

(69) TECHNO GLOBAL SERVICES PRIVATE LIMITED.....Petitioner

Through: Mr. Anirudh Wadhwa, Mr. Hiren Choudhary, Mr. Kartik Gupta and Mr. Sarthak Bhardwaj, Advs.

versus

GAIL (INDIA) LIMITED

.....Respondent

Through: Mr. Sacchin Puri, Sr. Adv. along with Mr. Azmat H. Amanullam, Ms. Nitya Sharma, Ms. Aashna Bhola, Mr. Suman Raj and Mr. Sonu Kumar, Advs.

+ **O.M.P.(I) (COMM.) 250/2024**

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CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (Oral)

ARB.P. 1535/2024

1. The present petition filed under section 11(6) of the Arbitration and



2024:DHC:8826



Conciliation Act, 1996 (hereinafter referred as '*the A&C Act*') seeks appointment of a sole arbitrator to adjudicate the disputes between the parties.

2. The disputes between the parties have arisen in context of an e-tender awarded to the petitioner for the work of '*laying and construction of 12"8" and 4" NB underground steel pipeline network and associated works at Bhubaneswar GA (PH-II) (18 months ARC) for CGD project at six geographical areas (GAs)*'.

3. The work was awarded to the petitioner *vide* a Fax of Acceptance (hereinafter referred as "*FoA*") dated 05.08.2020 and Letter of Acceptance dated 18.09.2020 (hereinafter referred as "*LoA*"). The tender documents read with the LoA and FoA formed the agreement between the parties. The agreement was valid for a period of 18 months from the date of FoA and extendable up to 6 months thereafter at same rates, terms and conditions.

4. The applicable Instructions to Bidder (hereinafter referred as '*ITB*') contains an arbitration clause in the following terms:

44.0 DISPUTE RESOLUTION (ADDENDUM TO PROVISION REGARDING APPLICABLE LAWS AND SETTLEMENT OF DISPUTES OF GCC)

1. CONCILIATION

GAIL (India) Limited has framed the Conciliation Rules 2010 in conformity with Part - III of the Arbitration and Conciliation Act 1996 as amended from time to time for speedier, cost effective and amicable settlement of disputes through conciliation. All issue(s)/dispute(s) arising under the Contract, which cannot be mutually resolved within a reasonable time, may be referred for conciliation in accordance with GAIL Conciliation Rules 2010 as amended from time-to-time A copy of the said rules have been made available on GAIL's web site i.e www.gailonline.com.



2024:DHC:8826



Where invitation for Conciliation has been accepted by the other party, the Parties shall attempt to settle such dispute(s) amicably under Part-III of the Arbitration and Conciliation Act, 1996 and GAIL (India) Limited Conciliation Rules, 2010. It would be only after exhausting the option of Conciliation as an Alternate Dispute Resolution Mechanism that the Parties hereto shall invoke Arbitration Clause. For the purpose of this clause, the option of 'Conciliation' shall be deemed to have been exhausted, even in case of rejection of 'Conciliation' by any of the Parties.

2. ARBITRATION

All issue(s)/dispute(s) excluding the matters that have been specified as excepted matters and listed at clause no. 2.6 and which cannot be resolved through Conciliation, such issue(s)/dispute(s) shall be referred to arbitration for adjudication by Sole Arbitrator.

The party invoking the Arbitration shall have the option to either opt for Ad-hoc Arbitration as provided at Clause 2.1 below or Institutionalized Arbitration as provided at Clause 2.2 below, the remaining clauses from 2.3 to 2.7 shall apply to both Ad-hoc and Institutional Arbitration:-

2.1 On invocation of the Arbitration clause by either party, GAIL shall suggest a panel of three independent and distinguished persons (Retired Supreme Court & High Court Judges only) to the other party from the Panel of Arbitrators maintained by 'Delhi International Arbitration Centre (DIAC)' to select any one among them to act as the Sole Arbitrator. In the event of failure of the other party to select the Sole Arbitrator within 30 days from the receipt of the communication from GAIL suggesting the panel of arbitrators, the right of selection of the sole arbitrator by the other party shall stand forfeited and GAIL shall appoint the Sole Arbitrator from the suggested panel of three Arbitrators for adjudication of dispute(s). The decision of GAIL on the appointment of the sole arbitrator shall be final and binding on the other party. The fees payable to Sole Arbitrator shall be governed by the fee Schedule of 'Delhi International Arbitration Centre'.

or

2.2 If a dispute arises out of or in connection with this contract, the party invoking the Arbitration shall submit that dispute to any one of the Arbitral Institutions i.e. ICADR/ICA/DIAC/SFCA and that dispute shall be adjudicated in accordance with their respective Arbitration



2024:DHC:8826



Rules. The matter shall be adjudicated by a Sole Arbitrator who shall necessarily be a Retd Supreme Court/High Court Judge to be appointed/nominated by the respective institution. The cost/expenses pertaining to the said Arbitration shall also be governed in accordance with the Rules of the respective Arbitral Institution. The decision of the party invoking the Arbitration for reference of dispute to a specific Arbitral institution for adjudication of that dispute shall be final and binding on both the parties and shall not be subject to any change thereafter. The institution once selected at the time of invocation of dispute shall remain unchanged.

2.3 The cost of arbitration proceedings shall be shared equally by the parties.

2.4 The Arbitration proceedings shall be in English language and the seat, venue and place of Arbitration shall be New Delhi, India only.

2.5 Subject to the above, the provisions of Arbitration & Conciliation Act 1996 and any amendment thereof shall be applicable. All matter relating to this Contract and arising out of invocation of Arbitration clause are subject to the exclusive jurisdiction of the Courts situated at New Delhi.

2.6 List of Excepted matters:

a) Dispute(s)/issue(s) involving claims below Rs 25 lakhs and above Rs 25 crores.

b) Dispute(s)/issue(s) relating to indulgence of Contractor/Vendor/Bidder incorrupt/fraudulent/collusive/coercive practices and/or the same is under investigation by CBI or Vigilance or any other investigating agency or Government. Dispute(s)/issue(s) wherein the decision of Engineer-In-Charge/owner/GAIL has been made final and binding in terms of the contract.

2. 7. Disputes involving claims below Rs 25 Lakhs and above Rs. 25 crores: - Parties mutually agree that dispute(s)/issue(s) involving claims below Rs 25 Lakhs and above Rs 25 crores shall not be subject matter of Arbitration and are subject to the exclusive jurisdiction of the Court(s) situated at New Delhi has been made final and binding in terms of the Contract.

3. GOVERNING LAW AND JURISDICTION:

The Contract shall be governed by and construed in accordance with



2024:DHC:8826



the laws in force in India. The Parties hereby submit to the exclusive jurisdiction of the Courts situated at New Delhi for adjudication of disputes, injunctive reliefs, actions and proceedings, if any, arising out of this Contract.

5. It is averred that on 08.03.2024, the petitioner filed a complaint with the Corporate Vigilance Department (hereinafter referred as “CVD”) of the respondents followed by a complaint with the Economic Offences Wing, Bhubaneswar, *inter alia* on account of the petitioner allegedly suffering severe financial losses due to the failure of the respondents to clear the pending RA bills despite several communications/representations and reminders.

6. Thereafter, a Suspension Order cum Show Cause Notice dated 18.06.2024 was issued to the petitioner. The same was premised on the ground that the petitioner without taking prior approval from the respondents, sub-contracted the work to a third party i.e. M/s Maitri Enterprises, thereby violating Clause 37.1 of the General Conditions of Contract (GCC) and Clause A.2 and A.3 of the Annexure -III to ITB.

7. The petitioner *vide* letter dated 01.07.2024 responded to the aforesaid notice and protested against the action of the respondents and vehemently opposed the allegations/averments levied against them.

8. On 03.07.2024, another communication was issued by the respondents wherein it was *inter alia* stated as under:-

“During the period of suspension, M/s. Techno Global Services Pvt. Ltd., Noida shall be under suspension for any business dealing with GAIL for an initial period of Six (06) months effective from 18.06.2024 wherein no enquiry/ bid/ tender shall be entertained from M/s Techno Global Services Pvt. Ltd., Noida as long as the name of M/s. Techno Global Services Pvt. Ltd., Noida appears in the suspension list. Further, ARC No. 4100000539 dated 05.08.2020/ 18.09.2020 and all Release Orders (Ros) issued against



2024:DHC:8826



the said ARC and its payment is suspended with effect from 18.06.2024, i.e. the date of issue of the Suspension Order Cum Show Cause Notice.”

9. Subsequently, the petitioner sent a notice invoking arbitration stipulation contained in Clause 44 of the ITB *inter alia* stating as under: -

“11. We are issuing this notice in terms of Section 21 of the Arbitration and Conciliation Act, 1996. It is relevant to note that while Clause 44 of ITB provides for exhausting the process of conciliation prior to invocation of arbitration, it is settled law that conciliation as a dispute resolution mechanism is a voluntary process and can only be initiated by consent and no party can be mandated to participate in conciliation. In any case, conciliation can be terminated by any party at any time. In the present case, no meaningful purpose would be fulfilled by participating in any conciliation proceedings. We have made multiple attempts to amicably and mutually resolve the issues raised in this notice. These attempts have failed due to the non-cooperation of GAIL and its officials.

12. In view of the arbitrary, unreasonable and unlawful actions of the concerned officials of GAIL, there is no likelihood that the process of conciliation will bear any fruit. Accordingly, we expressly reject the conciliation process and seek reference of the above mentioned disputes to arbitration in terms of ITB Clause 44.

13. Sub-clause 2 of ITB Clause 44 provides the option of either ad-hoc or institutional arbitration. We opt for ad-hoc arbitration. As per applicable law laid down by the Hon'ble Supreme Court regarding independence and impartiality of the arbitral tribunal, you are hereby requested to participate in joint discussions to appoint a mutually agreeable independent and impartial sole arbitrator to decide our claims.

14. This notice is being issued without prejudice to our legal rights, all of which are reserved. We also reserve our right to add, delete, amend or modify all of the claims as stated above, all of which arise from the same dispute(s) as described above, at any stage during the dispute resolution process.”

10. Vide reply dated 10.09.2024, the respondents strongly refuted the request of the petitioner seeking arbitration on the ground that the claims sought to be raised by the petitioner were excluded from the ambit of the



2024:DHC:8826



arbitration clause and the present petition has been filed seeking constitution of an Arbitral Tribunal. In this regard it was specifically stated in paragraph 14 of the said communication as under:-

“Given that clause 38.3 of the ITB as also clause 38.3 of the ITB categorically excludes the application of the arbitration clause under the contractual documents to any consequential issue/ dispute arising from action taken in terms of the procedure for banning specified in Annexure III to the ITB, i.e., as has happened in the present case, your alleged claims related to / arising from the actions pertaining to banning, including the suspension notice stand excluded from the ambit of the arbitration clause and, as such cannot be adjudicated in an arbitration or proceedings ancillary thereto. Thus, the same are not arbitrable and cannot be referred to arbitration at all.”

11. Consequently, the present petition has been filed seeking constitution of an Arbitral Tribunal to adjudicate the disputes between the parties.

12. In the reply filed on behalf of the respondents, the respondents have again ascertained that the present petition is not maintainable since the subject matter of the arbitration is excluded from the ambit of the arbitration clause. It has been averred in the reply as under: -

“6. As such, the present petition under section 11 of the Arbitration and Conciliation Act, 1996 (“the Act”) is not maintainable since the arbitration clause has no application and stands expressly excluded from this subject matter. Thus, no reference can be made to an Arbitrator with respect to the suspension cum show cause notice for banning and any related/consequential issues.

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xxx

xxx

18. Given that clause 38.3 of the ITB⁵ and clause 44.2 of the ITB⁶ both separately and categorically exclude the application of the arbitration clause under the contractual documents to any consequential issue / dispute arising from action taken in terms of the procedure for banning specified in Annexure III to the ITB, i.e., as has happened in the present case, the present petition under section 11 of the Act is not at all maintainable as all the claims



2024:DHC:8826



alleged arise out of and/or are consequential to the issue of banning and payments have been suspended under the subject contract owing to the initiation of the banning process.

19. Thus, any issue or dispute related to the procedure for banning, including the alleged claims raised by the Petitioner's ostensible notice u/s 21 of the Act are expressly excluded from the ambit of the arbitration clause and, as such, cannot be adjudicated in an arbitration or proceedings ancillary thereto, and the subject matter cannot be referred to arbitration. Notably, an essential prerequisite for a petition under section 11 of the Act must be the existence of a valid arbitration clause where the subject matter has not been excepted."

13. The respondents have relied upon a Judgment of this Court in **AVM Oil Fields Services v. GAIL Gas Limited**, 2019 SCC OnLine Del 11231.

14. Having heard respective counsel for the parties at length, this Court does not find any merit in the contentions raised on behalf of the respondents.

15. In the invocation notice sent on behalf of the petitioner, the claim sought to be raised by the petitioner in the arbitral proceedings has been set out as under:-

10. We hereby invoke the dispute resolution mechanism to claim our pending payments and to challenge the validity of suspension orders passed by GAIL. Our monetary claims against GAIL exceed Rs. 7 Crores. A summary of our claims is provided below:

- a. Payment of amounts mentioned in Annexure A, tentatively quantified and subject to modification, supplementation, addition or deletion at the time of submission of statement of claim.*
- b. Interest on all amounts claimed @ 18% per annum from the date they became contractually due till date of actual payment.*
- c. Declaration that the Suspension Order cum Show Cause Notice dated 18.06.2024 and Suspension Order dated 03.07.2024 were issued without any factual or legal basis and treated as void ab initio.*
- d. Declaration that TGSPL has not breached provisions of GCC Clause 37 as alleged by GAIL.*
- e. Mandatory injunction directing GAIL to release our Bank Guarantees."*



2024:DHC:8826



16. It is noticed that the relief *qua* payment of outstanding amounts as referred to in the notice invoking arbitration and interest thereon cannot be said to be *ex facie* barred. Also, whether or not the other reliefs fall within the scope of “Excepted Matters” is an aspect which will require an interpretative exercise construing the relevant terms of the contract between the parties in juxtaposition with the relief sought to be claimed.

17. 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 regards, reference is apposite 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.

18. Importantly, in *SBI General Insurance Co. Ltd. v. Krish Spinning*, 2024 INSC 532, and *Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re*, 2023 SCC OnLine SC 1666 it has now been exclusively and authoritatively laid down that the scope of enquiry in the present proceedings is confined to ascertaining the existence of an Arbitration Agreement and “nothing else”.

19. *In re, Interplay* (supra) observes under: -

“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-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



2024:DHC:8826



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. AkshOptifibre Ltd.*”

20. In ***SBI General Insurance Co. Ltd*** (supra), it has been held 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



2024:DHC:8826



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 it Section 11 application is rejected."

21. In the circumstances, there is no impediment to constituting an Arbitral Tribunal to adjudicate the disputes between the parties. Moreover, in terms of the Judgment of the Supreme Court in **Central Organisation for Railway Electrification Vs. ECI SPIC SMO MCML (JV) A Joint Venture Company**, MANU/SC/1190/2024, an appointment procedure which contemplates appointment from a panel offered by one of the contracting parties to the other has held to be an invalid appointment procedure.
22. It is also relevant to note that upon receipt of the notice of invocation of arbitration, even the respondents have not followed the rigours/ appointment procedures envisaged in the arbitration clause.
23. As such, it is incumbent on this Court to appoint an independent Sole



2024:DHC:8826



Arbitrator to adjudicate the disputes between the parties.

24. Accordingly, Justice (retd.) J.R.Midha (+91 9717495003) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

25. The respondents shall be at liberty to raise preliminary objections as before the learned sole arbitrator regards arbitrability/jurisdiction, including the objection as to whether any of the claim/s falls within the scope of “excepted matter”. The learned sole arbitrator shall duly consider and decide the same in accordance with law.

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

27. It is agreed that the arbitration shall take place under the aegis of and as per the rules of the Delhi International Arbitration Centre (DIAC).

28. All rights and contentions of the parties in relation to the claims/counter claims are kept open, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.

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

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

O.M.P.(I) (COMM.) 250/2024

31. This petition under Section 9 of the A&C Act seeks urgent interim orders.

32. It is averred in the present petition, *inter-alia* that the respondents seek to render the petitioner remediless by seeking to take advantage of ITB Clause 38.3 which provides that once a banning order is passed, the



2024:DHC:8826



petitioner shall have no right to submit its claims to arbitration.

33. Since the Arbitral Tribunal has already been constituted to adjudicate the disputes between the parties, it would be apposite if the present petition under Section 9 of the A&C Act is treated as an application under Section 17 of the A&C Act and accordingly dealt with by the learned Sole Arbitrator. It is directed accordingly.

34. In view of the urgency emphasized by the learned counsel, the petitioner shall be at liberty to request the learned Sole Arbitrator for expeditious consideration of the application under Section 17 of the A&C Act.

35. The present petition is disposed of with the aforesaid directions. The pending applications are also disposed of.

SACHIN DATTA, J

NOVEMBER 14, 2024/sl/uk