



2024:DHC:6010



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

+ **ARB.P. 1207/2023**

M/S K.S JAIN

.....Petitioner

Through: Mr. Himanshu Kaushik, Mr.
Akash Kasana, Ms. Deepika and Ms.
Barkha, Advocates

versus

**GENERAL MANAGER NORTHERN RAILWAY
& ANR.**

.....Respondents

Through: Mr. Akshay Amritanshu, Sr.
Panel Counsel with Mr. Samyak Jain, Ms.
Drishti Saraf and Ms. Pragya Upadhyay,
Advocates

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

ORDER (ORAL)

09.08.2024

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1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996¹ for referring the disputes between the parties to arbitration.

2. The disputes arise in the context of a Contract Agreement dated 23 March 2019 executed between the petitioner and the respondent, whereunder the respondent had contracted certain Railway works to the petitioner. The contract was governed by the General Conditions of Contract (GCC) applicable to Railway Contracts, which contained the following clause, envisaging resolution of disputes by arbitration:



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“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.”

3. On 15 April 2022, the petitioner addressed a communication to the respondent, alleging, *inter alia*, thus :

“..We during various meetings requested the administration for preparation of final Addendum & Corrigendum with whatever quantities/items administration feels payable subject to our rights so that our market, labour and bank commitments are honored. We have been chasing concerned officials for preparation of final A & C and final bill but were in discussions informed that we had to accept final bill without protest and tender 'No Claim Certificate' as provided in the contract agreement and in case these are not given and accepted without protest and in the manner desired by officials, department would not proceed to release security and final bill amounts. Under the compulsion of circumstances and facing immense financial duress as such we have signed the MB and other documents as desired by administration without protest, further we may also be compelled to sign the supplementary agreement. However signing of the MB and other documents, supplementary agreement signed without protest is to be treated to have been signed under protest..”

4. Thereafter, a supplementary agreement was executed between the petitioner and the respondent on 25 May 2022, by which the petitioner agreed that, in view of the amounts paid to the petitioner by the respondent, no further claim of the petitioner survived. The

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amounts paid were, therefore, stated to satisfy fully the claims of the respondent to the petitioner. The concluding two paragraphs of the Supplementary agreement read thus :

“It is further agreed and understood by and between the parties that in consideration of the payment already made, under the agreement, the said Principal Agreement shall stand finally discharged and rescinded all the terms and conditions including the arbitration clause.

It is further agreed and understood by and between the parties that the arbitration clause contained in the said principal agreement shall cease to have any effect and / or shall be deemed to be non-existent for all purposes.”

5. As disputes arose between the petitioner and the respondent, the petitioner invoked the afore-extracted arbitration clause in the GCC by way of notice dated 4 May 2023 issued to the respondent under Section 21 of the 1996 Act, whereby the petitioner sought reference of the disputes to arbitration.

6. The respondent issued the following cryptic response to the Section 21 notice issued by the petitioner:

“No. 74-W/4/1/Misc./WA/MB/KS/ Jain/Arb dated 10.08.2023

M/s. K.S. Jain,
29, Civil Lines,
Moradabad

Sub: Invocation of Arbitration clause for the work of “Construction of Misc. civil works like drain work, toe wall, development of circulating area, flooring, road work, water supply, finishing work, railing, fencing work, etc. and other allied works at various station between LRJ and HW section and other place in jurisdiction of Dy. CE/C/MB in c/w Haridwar-Laksar doubling of Moradabad division (Agmt. No.374-/Dy CE/C/MB dated 23.03.2019) (Agency:M/s. K.S. Jain, 29, Civil Lines, Moradabad.)

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Ref: Your letter dated 04.05.2023

Reference above, it is observed that you have not given consent for switching over above arbitration case as per provisions of Arbitration and Conciliation (Amendment) Act, 2015.

Therefore, a copy of Annexure-XV of modified clause 64 of GCC-2020 is sent herewith the request to submit the same duly filled therein. Thereafter, your case will be sent to the General Manager / Northern Railways, Baroda House, New Delhi for Appointment of independent Arbitrator accordingly for early finalization.

You are requested to give consent in the enclosed format (Annexure-XV) for switching over your subject arbitration case to the provisions of Arbitration and Conciliation (Amendment) Act, 2015 within 07 days from the receipt of this letter.

This may be treated as Most Urgent.

DA: Specimen of format (Annexure XV)

(Sanjeev Kumar Vij)"

7. Annexure XV annexed to the aforesaid response dated 10 August 2023 contained, *inter alia*, an agreement to waive the applicability of Section 12(5)² of the 1996 Act – wrongly referred to as the Arbitration and Conciliation (Amendment) Act, 2015. It appears, therefore, that the respondent was contemplating arbitration through its own official, which is why the petitioner was directed to submit a written waiver of Section 12(5), as envisaged by the proviso to that sub-Section.

8. The petitioner did not, however, obliged by tendering the agreement in terms of Annexure XV to the respondent's letter dated 10 August 2023.

² (5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.



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9. Following the execution of this agreement, the petitioner again wrote to the respondent on 31 March 2023 pointing out that its dues had yet not been cleared despite the petitioner having tendered a no claim settlement under duress and coercion. The specific passage from the said communication dated 31 March 2023 which so alleged read thus:

“The department took considerable time in releasing the payment as "No Claim Certificate" insisted by the Railways was not initially given by us, however after being coerced by the department and keeping in view financial constraints as huge amount of unpaid amount were at stake for months when since it became due, we were forced to accept final bill and signed the “No Claim Certificate”. Thereafter we informed the same to General Manager, Northern Railway vide letter dated 15.04.2022.”

10. As there has been no favourable response from the respondent regarding reference of the disputes to arbitration, the petitioner has approached this Court under Section 11(6) of the 1996 Act, requesting the Court to appoint an Arbitrator to arbitrate on the dispute.

11. Mr. Akshay Amritanshu, learned counsel for the respondent submits that the present petition is not maintainable as there is no subsisting arbitration agreement between the parties. According to him, the Supplementary Agreement dated 25 May 2022 superseded the original Contract Agreement dated 23 March 2019, and the concluding paragraph of the Supplementary Agreement specifically covenanted out of the pre-existing arbitration clause between the parties. He further pleads that the claim of the petitioner against the respondent stood discharged by accord and satisfaction as was apparent from the ‘no claim certificate’ and the recitals in the

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Supplementary Agreement dated 25 May 2022. Adverting to the recent decision of the Supreme Court in *SBI General Insurance Co Ltd v. Krish Spinning*³, Mr. Amritanshu submits that, even while considerably narrowing down the scope of examination by the Court exercising jurisdiction under Section 11(6) of the 1996 Act, the Supreme Court has, however, held that the Section 11(6) Court has nonetheless to satisfy itself that there is an arbitration agreement in existence between the parties.

12. Having heard Mr. Amritanshu, learned counsel for the respondent, I am in entire agreement with him that a Section 11(6) Court has to satisfy itself that an arbitration agreement exists between the parties.

13. In the present case, there is no dispute about the fact that the original contract between the petitioner and the respondent was subject to the GCC, Clause 64(1) of which envisaged resolution of disputes by arbitration. That, therefore, there existed an arbitration agreement to which the petitioner and the respondent were parties cannot be disputed.

14. The issue that survives, therefore, is whether the said arbitration agreement stood eviscerated by the Supplementary Agreement dated 25 May 2022. Had there been no allegation of duress or coercion raised by the petitioner, perhaps the Court might have had to examine whether the arbitration agreement did, or did not, survive. As things



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stand, however, the petitioner has, not once, but repeatedly, made pointed allegations of having had to issue the no claim certificate under economic duress and coercion. The relevant passages from the communications dated 15 April 2022 and 31 March 2023 issued by the petitioner to the respondent leave no manner of doubt that the petitioner was alleging duress and coercion against the respondent.

15. Once such an allegation is made, the issue of whether the Supplementary Agreement dated 25 May 2022 would continue to be enforceable, becomes an arguable issue which can only be decided by the Arbitral Tribunal. It merits mention that, in **SBI General Insurance**, the Supreme Court has, even while holding that the referral court under Section 11(6) of the 1996 Act can examine whether an arbitration agreement does, or does not, exist between the parties, it has proceeded to caution that the assessment has to be only *prima facie*, and cannot involve any detailed factual or legal analysis.

16. Though Mr. Amritanshu sought to submit that this Court would have to examine whether the allegations of duress or coercion was or was not justified, that, in the light of the decision in **SBI General Insurance**, is an exercise which cannot be undertaken by this Court, exercising jurisdiction under Section 11(6) of the 1996 Act. In arriving at any decision on the point, the Court would have to examine the veracity and acceptability of the allegations of duress and coercion levelled by the petitioner against the respondent which, in the present facts, is highly arguable.

17. The requisite *indicia* for appointment of an Arbitral Tribunal

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stand satisfied in the present case.

18. As the parties have not been able to come to an agreement regarding the Arbitrator to arbitrate on the disputes between the parties, this Court appoints Mr. Shashwat Panda, Adv. (Mob: 9899020290) as the Arbitrator.

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

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

21. 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.

22. This Court has expressed no opinion on any contention of either side, whether preliminary or on merits. All issues of fact and law remain open to be agitated in the arbitral proceedings.

23. The petition stands allowed in the aforesaid terms with no orders as to costs.

C.HARI SHANKAR, J

AUGUST 9, 2024/yg

Click here to check corrigendum, if any

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