



2024:DHC:2110



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI*****Decided on: 14.03.2024***+ **ARB.P. 1263/2023****M/S MAKKER CONSTRUCTION**

..... Petitioner

Through: **Mr. Avinash Trivedi, Mr. Rhthem
Nagpal, Mr. Jatin Arora, Adv.**

versus

**DELHI TOURISM AND TRANSPORTATION
DEVELOPMENT CORPORATION LTD**

..... Respondent

Through: **Mr. Siddhant Nath, Mr. Bhavishya
Makhija, Adv.****CORAM:****HON'BLE MR. JUSTICE PRATEEK JALAN****PRATEEK JALAN, J. (ORAL)**

1. The petitioner has approached this Court under Section 11 of the Arbitration and Conciliation Act, 1996 ["the Act"], for appointment of an arbitrator, to adjudicate disputes between the parties under an Agreement bearing No. 01/EE(PB)/DTTDC/2019-20 ["Agreement"], entered into pursuant to a Letter of Award dated 31.05.2019.

2. By way of the aforesaid Agreement, the petitioner was engaged by the respondent for "*Construction of Integrated Election Complex at Bhakhtawar Pur, Delhi*". The Agreement contains an arbitration clause, being clause 25 of the General Conditions of Contract ["GCC"], which provides that all disputes with respect to the said Agreement shall be referred to arbitration, to be conducted in terms of the Act.



3. Disputes having arisen, the petitioner invoked arbitration by letter dated 15.06.2023. The respondent replied by a letter dated 09.08.2023, wherein it stated that it had paid the entire amount as per the final bill and the same had also been acknowledged by the petitioner. The respondent further relied on clause 9 of the GCC to assert that the petitioner was barred from raising any further claims after submission of the final bill.

4. In these circumstances, the petitioner has approached this Court for appointment of an arbitrator.

5. Mr. Siddhant Nath, learned counsel for the respondent, submits that the present case does not raise an arbitrable dispute as the petitioner had submitted an undertaking dated 16.12.2022 at the time of submission of the final bill. He also submits that clause 9 of the GCC mandates that no claim would be entertained after the submission of the final bill. He relies on the judgments of the Supreme Court in *Indian Oil Corpn. Ltd. vs. NCC Limited*¹ and *NTPC Limited v. SPML Infra Limited*² in support of his contention.

6. Mr. Avinash Trivedi, learned counsel for the petitioner, however, submits that the undertaking dated 16.12.2022 itself was given as a condition for release of payments under the final bill, and cannot be considered as evidence of accord and satisfaction. He submits that the respondent requires submission of such an undertaking in order to clear even the admitted amounts due in terms of its contracts. In support of this contention, Mr. Trivedi draws my attention to a document filed with the petitioner's rejoinder, which bears the signature of the petitioner dated

¹ (2023) 2 SCC 539

² (2023) 9 SCC 385.



16.12.2022, being a purported receipt of the amounts due, whereas the same document itself shows that payment was processed by the respondent only three months later, on 24.03.2023. He submits that, in a case of this nature, economic duress and compulsion to sign the undertaking are clearly made out. Mr. Trivedi submits that, in identical circumstances, involving the same respondent, this Court has negated similar contentions and appointed an arbitrator.³

7. Having heard learned counsel for the parties, I am of the view that it is not appropriate in the present case to decline reference on the ground of lack of arbitrability. At the very outset, it may be noted that the jurisdiction of the Court to decline reference, is to be exercised sparingly. The judgments of the Supreme Court *inter alia* in *Vidya Drolia v. Durga Trading Corpn.*⁴ and *NTPC Limited*⁵ [cited by Mr. Nath], make it clear that reference is to be made, except in cases where there is “*not a vestige of doubt*” as to the non-arbitrability of the dispute. The arbitral tribunal is generally regarded as the preferred forum for adjudication of disputes even with regard to arbitrability, with the limited caveat that an *ex facie* non-arbitrable dispute may not be referred.

8. In the present case, the “*undertaking*” referred to by the respondent in its reply, reads as follows:

“
Undertaking
Name of work:- Construction of Integrated Election Complex at
Bhakhtawarpur, Delhi. (SH: - Civil & Electrical Works)

³ *Thermal Engineers and Insulators Pvt. Ltd. v. Delhi Tourism and Transportation Development Corporation Ltd*, ARB.P. 1058/2021; and *Thermal Engineers and Insulators Pvt. Ltd. v. Delhi Tourism and Transportation Development Corporation Ltd*, ARB.P. 1033/2021.

⁴ (2021) 2 SCC 1.

⁵ *Supra* (Note 2).



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Received Rs. 1,31,72,336/-(Rupees One Crore, thirty One Lac, Seventy Two Thousand, Three Hundred, Thirty Six only) through cheque/RTGS towards full and final settlement of above noted work.”

9. It may be noted that the aforesaid undertaking is identical to the one furnished by the concerned party before the Coordinate Bench of this Court in *Thermal Engineers and Insulators Pvt. Ltd. v. Delhi Tourism and Transportation Development Corporation Ltd*⁶, in which the present respondent was also a party. Reference in that case was permitted.

10. Mr. Trivedi has also drawn my attention to another document signed by the petitioner on 16.12.2022, which purports to be a receipt of the amounts paid by the respondent.⁷ The document, however, on the face of it, shows that payment was made by the respondent only on 24.03.2023. This document shows, at the very least, that the receipts were executed by the petitioner before payment was made. In such a situation, it cannot be said that the petitioner's claims of economic duress and coercion are *ex facie* untenable. At the very least, the matter requires adjudication in arbitration.

11. Clause 9 of the GCC, relied upon by Mr. Nath, reads as follows:

“CLAUSE 9

*The final bill shall be submitted by the contractor in the same manner as specified in interim bills within three months of physical completion of the work or within one month of the date of the final certificate of completion furnished by the Engineer-in-Charge whichever is earlier. **No further claims shall be made by the contractor after submission of the final bill and these shall be***

⁶ *Thermal Engineers and Insulators Pvt. Ltd. v. Delhi Tourism and Transportation Development Corporation Ltd*, ARB.P. 1033/2021, Para 3.

⁷ Document entitled “Memorandum of Payments”, attached with the certified final bill [annexed as ‘Mark-A’ to the rejoinder filed by the petitioner].



deemed to have been waived and extinguished. Payments of those items of the bill in respect of which there is no dispute and of items in dispute, for quantities and rates as approved by Engineer-in-Charge, will, as far as possible be made within the period specified hereunder, the period being reckoned from the date of receipt of the bill by the Engineer-in-Charge or his authorized Asstt. Engineer, complete with account of materials issued by the Department and dismantled materials.

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|-------|--|----------|
| (i) | If the Tendered value of work is up to Rs. 45 lac: | 2 months |
| (ii) | If the Tendered value of work is more than Rs. 45 lac and up to Rs. 2.5 Crore: | 3 months |
| (iii) | If the Tendered value of work exceeds Rs. 2.5 Crore: | 6 months |

In case of delay in payment of final bills after prescribed time limit, a simple interest @ 7.5% per annum shall be paid to the contractor from the date of expiry of prescribed time limit which will be compounded on yearly basis, provided the final bill submitted by the contractor found to be in order.”⁸

12. I am of the view that this clause, at best, affords a defence to the respondent, which it may use to meet the petitioner’s claims. It does not render the claims themselves incapable of arbitral adjudication.

13. I am fortified in these conclusions by the decisions of coordinate benches of this Court dated 25.02.2022 and 21.09.2022, cited by Mr. Trivedi.⁹ The respondent was a party in both the decisions, and primarily relied on similar undertakings as furnished in the present case, to submit that the disputes raised by the petitioners therein were non-arbitrable on the ground of accord and satisfaction. In both cases, the Court held that the circumstances in which the undertakings were given, and the effect thereof, would require adjudication. It may also be noted that the judgment of the Supreme Court in *Indian Oil Corpn. Ltd. vs. NCC*

⁸ Emphasis supplied.

⁹ Supra (Note 3).



*Limited*¹⁰, cited by Mr. Nath in the present case, was also considered in one of the aforesaid decisions¹¹, and this Court held that the facts of the said judgment are distinguishable.

14. In the present case, Mr. Nath has also relied upon the decision of the Supreme Court in *NTPC Limited*¹², to submit that the Court in that case reversed the decision of this Court appointing an arbitrator, holding that the claims were barred by accord and satisfaction. While it is correct that the Court found against the proposed claimant in that case, this was based upon a factual appreciation that the claims of economic coercion and duress were *mala fide*. The Court held that the settlement agreement upon which the contention of accord and satisfaction was founded, was itself entered into during the subsistence of an injunction protecting the claimant from coercive proceedings. The factual situation in the present case does not lend itself to a categorical conclusion of this nature at this stage.

15. It may be noted that the principles laid down in *NTPC Limited*¹³ guide the Court to refuse reference only if the claim is found to be barred, upon exercise of jurisdiction “*through the eye of the needle*”¹⁴. I am not satisfied that the present case is one which satisfies the high threshold for the petitioner’s claim to be rejected without an opportunity for adjudication.

16. For the aforesaid reasons, the petition is allowed and the disputes

¹⁰ Supra (Note 1).

¹¹ *Thermal Engineers and Insulators Pvt. Ltd. v. Delhi Tourism and Transportation Development Corporation Ltd*, ARB.P. 1058/2021, Para 32.

¹² Supra (Note 2).

¹³ Ibid.

¹⁴ Supra (Note 2), Paras 27 and 28.



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between the parties, under the Agreement bearing No. 01/EE(PB)/DTTDC/2019-20, read with the Letter of Award dated 31.05.2019, are referred to arbitration of Hon'ble Ms. Justice Asha Menon, former Judge of this Court [Tel: 9910384664]. The arbitration will be held under the aegis of Delhi International Arbitration Centre ["DIAC"] and will be governed by the Rules of DIAC, including as to remuneration of the learned Arbitrator.

17. The learned Arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.

18. Needless to say, all rights and contentions of the parties, including on maintainability of the claims and on merits, are left open for adjudication by the learned Arbitrator.

19. The petition stands disposed of in these terms.

PRATEEK JALAN, J

MARCH 14, 2024
'A/pv'/