



2024:DHC:9069



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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision: 22.11.2024+ ARB.P. 1569/2024

PUNIA CONSTRUCTION

.....Petitioner

Through: Mr. Himanssu Upadhyay and Ms.
Ruby Sharma, Advs.

versus

UNION OF INDIA/NORTHERN RAILWAY

.....Respondent

Through: Ms. Irammajid, CGSC and Mohd
Suboor, Advs.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (ORAL)

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 parties.
2. The disputes between the parties have arisen in the context of an agreement dated 31.03.2021 for "*Construction of 2 lane Road Over Bridge 1x52.926 metre centre to centre of bearing (overall length 55.834 metre) with steel composite girder at skew angle 65 12'00" including construction of approaches using reinforced earthwall, roads, retaining / boundary wall, diversion of road and other allied works at km 68.110 on crossing Hansi-Tosham Road (SH-12) on Rohtak-Meham-Hansi New Line.*"
3. The above work was awarded to the petitioner *vide* agreement dated 31.03.2021. It is the case of the petitioner that it faced considerable



challenges/hindrances during the execution of the work, as a result of which losses were occasioned and the work which was to be completed by May 2021 got completed on 20.09.2023.

4. The following claims were sought to be raised by the petitioner -
- (i) Rent of the machinery unused during the period of Extension of work.
 - (ii) Claim for payment of Engg., Staff etc. during the period of Extension of work.
 - (iii) U shape relating wall with height ranging from 13.5 to 12.9 meters having a total length of 105 mtr.
 - (iv) Claim of Head office Expenses.
 - (v) Claim of Expenses incurred on Additional-Alteration of Design and Expenses of Amount for Drawing (RE Wall).
 - (vi) Claim of GST Neutralization.
 - (vii) Any other claim in accordance with Contract.
5. Admittedly, the contract between the parties contains an arbitration clause which reads as under:-

“Settlement of Dispute-Indian Railway Arbitration Rules

64. (1) (i): Demand for Arbitration – 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 Railways fails to make a decision within 120 days, then and in any such case, but except in any of the “expected 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 dispute 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



2024:DHC:9069



of claim item-wise. Only such dispute or difference, 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) (ii)-(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 along with 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) 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) (iii)- 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) (iv)- 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 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) (a) (i)- In cases where the total value of all claims in question added together does not exceed Rs.10,00,000/- (Rupees Ten lakhs only), the Arbitral Tribunal shall consist of a sole arbitrator who shall be a



2024:DHC:9069



gazetted officer of Railway not below JA Grade, nominated by the General Manager-. The sole arbitrator shall be appointed within 50 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 Rly. 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 Rly. Officers of one or more departments of the Rly. 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 or 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/officers 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 matter 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 all 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 there from.

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 free of the arbitrator(s), as per the rates fixed by the Railway Board from the 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 there under the any statutory modifications thereof shall apply to the arbitration proceedings under this clause.

The written and Arbitration valid demand proceedings for shall arbitration be is assumed received to by have the Railway,

64. (1) (ii) (b)

The parties may waive of the applicability of sub-section 12 (5) of the Arbitration and Conciliation (Amendment) Act, 2015, if they agree for such waiver, in writing, after dispute having arisen between them, in the format given under Annexure XII of these conditions.”

6. The present petition has been filed by the petitioner seeking that an independent Sole Arbitrator be appointed to adjudicate the disputes between the parties.

7. Learned counsel for the respondent has raised the following objections to oppose the appointment of an independent sole arbitrator to adjudicate the disputes between the parties -

(i) It is contended that the petitioner has not complied with the pre-conditions prior to seeking arbitration. In particular, it is contended that the petitioner has not adhered to the procedure set out in clause 63.1 and has also not adhered the timelines referred to in clause 64.1(i) of the General Conditions of Contract (GCC).

(ii) It is submitted that while invoking arbitration, the petitioner has not given the amount sought to be claimed under each claim.

(iii) It is contended that given the technical nature of the disputes between the parties, only the arbitration empanelled with the Railways have the necessary expertise to adjudicate the same.

8. Each of the aforesaid contention is untenable.



2024:DHC:9069



9. It has been held in a catena of judgments that contractual prescriptions mandating exhaustion of pre-arbitral mechanisms such as mediation/conciliation as a pre-condition for taking recourse to arbitration, are directory and not mandatory. In this regard reference may be made to *Oasis Projects Ltd. v. National Highway & Infrastructure Development Corporation Limited* 2023/DHC/000828 *Kunwar Narayana v. Ozone Overseas Pvt. Ltd* 2021:DHC:496 and *Jhajharia Nirman Ltd. v. South Western Railways* 2024:DHC:7801.

10. Non-adherence to timelines prescribed in the dispute resolution clause would not extinguish the claim/s sought to be raised¹. In any event, this is an aspect that can be considered by a duly constituted arbitral tribunal.

11. It is submitted that numerous letters have been addressed by the petitioner to the respondent raising grievance as regards alleged difficulties being faced by it during the course of execution of the work. Considering the same it cannot be said that there are no disputes between the parties.

12. In the case of *In Re: Interplay between Arbitration Agreement under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899* bearing the Curative Petition (C) No. 44/2023 decided on 14.12.2023 and *SBI General Insurance Co. Ltd. v. Krish Spinning*, 2024 INSC 532, it has been held that the scope of the present proceeding is restricted to ascertain whether there exists an arbitration agreement between the parties. In *Interplay* (Supra), it has been observed us under –

“G. The doctrine of competence-competence

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¹ Sagar Construction through Subhash Chand Saini v. Govt. of NCT of Delhi 2021 SCC OnLine Delhi 4648 and Shanti Prasad Goenka vs. Mahanagar Telephone Nigam Ltd. 2016 SCC OnLine Delhi 5256



162. The legislature confined the scope of reference under Section 11(6A) to the examination of the existence of an arbitration agreement. The use of the term “examination” in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of “existence” of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In *Duro Felguera (supra)*, this Court held that the referral courts only need to consider one aspect to determine the existence of an arbitration agreement - whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by arbitral tribunal under Section 16. We accordingly clarify the position of law laid down in *Vidya Drolia (supra)* in the context of Section 8 and Section 11 of the Arbitration Act.

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 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.”

13. In ***SBI General Insurance Co.*** (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 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.”

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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.”

14. Further, in ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Company***, 2024 SCC OnLine SC 3219 it has been conclusively held that the appointment procedure envisaged



2024:DHC:9069



in Clause 64 of the conditions of contract, which contemplates appointment from a panel maintained by the Railways, is no longer a valid appointment procedure and it is incumbent on this Court to appoint an independent arbitral tribunal.

15. Moreover, the fact that the dispute between the parties is technical in nature and requires a particular domain expertise cannot lead to the inference that the choice of arbitrators must be restricted to the panel maintained by the Railways, or to serving officers of the Railways.

16. It is also noticed that an identical arbitration clause has been construed by this Court in *M/s. M.V. Omni Projects (India) Ltd v. Union of India, Through DY. Chief Engineer/Const.-II/Northern Railway* 2024:DHC:7874 and in the said case, this Court has appointed an independent sole arbitrator to adjudicate the disputes between the parties.

17. Accordingly, since the arbitration agreement is not disputed, Mr. R. K. Aggarwal, Retd. Spl. DG, CPWD (Mob. No.: +91 7542030167) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

18. It shall be open to the respondent to raise appropriate objections as regard jurisdictional/arbitrability including objections on account of non-adherence to pre-arbitral procedures. It shall be duly considered/ adjudicated by the arbitrator in accordance with law.

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

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



2024:DHC:9069



between the parties and the learned Sole Arbitrator.

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

22. Nothing in this order shall be construed as an expression of opinion of this Court on the merits of this case.

23. The present petition stands disposed of.

SACHIN DATTA, J

NOVEMBER 22, 2024/at/sv