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

% Reserved on: March 8, 2022
Decided on: April 05, 2022

\+ **ARB.P. 560/2021**

M/S.ORISSA CONCRETE AND ALLIED INDUSTRIES LTD. ..... Petitioner

Represented by: Mr. Raman Kapur, Senior Advocate with Mr. Dhiraj Sachdeva, Advocate.

versus

UNION OF INDIA & ORS. ..... Respondents

Represented by: Mr. R.V. Sinha, Advocate with Mr. A.S.Singh, Mr. Amit Sinha & Mr. Sharmaya Sinha, Advocates.

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Versus

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CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. By these two petitions, the petitioner seeks appointment of a Sole Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act' in short) to arbitrate the disputes between the parties.

2. According to the petitioner, the respondent No. 1 awarded the work of manufacturing of sleepers to the petitioner vide letter dated 17th October 2013. The original delivery period for completing the supply against the subject contract was two years and thirty days and the total number of sleepers to be supplied were 1,40,750 at the rate of ₹1589/- each. Thus, the total value of the contract was ₹22,36,51,750/-. According to the petitioner, the sleepers were manufactured as per the specifications prescribed by the respondents. Further before the sleepers were dispatched the same were duly approved by the officials of the respondents. The officials of CBI visited the manufacturing unit of the petitioner at Kapa on 10th October 2014 followed by the termination of the contract by the respondents vide their letter dated 18th November 2014. The petitioner thus invoked arbitration in respect of the illegal termination of the contract and claim in respect of the sleepers already supplied to the respondent. The petitioner also sought reliefs under Sections 9 and 11 of the Act, wherein, vide order dated 11th August 2017, a Sole Arbitrator was appointed and the award was published on 3rd February 2019 declaring the termination of the contract as illegal. Further, the CBI also filed a closure report in respect of its case RC1242015A0001/2015 which was duly accepted by the learned Trial Court.

3. The claim of the petitioner in these two petitions is regarding the manufactured sleepers delivery whereof was not taken by the respondent No. 1 claiming that the same will have to be retested. In this regard, contention of learned counsel for the petitioner is that despite the various communications, officers of the respondents failed to retest the sleepers at the factory of the petitioner and failed to pay the requisite amount for the

manufacturing carried out by the petitioner, for the reason, the sleepers were manufactured as per the specifications of the respondents and could not used in any other activity.

4. Besides refuting the claim of the petitioner, the respondents have objected to the maintainability of the present petitions claiming that for the same contract, an Arbitrator had already been appointed who had already published an award dated 3rd February 2019 and thus, a fresh claim arising out of the same dispute cannot be entertained and therefore, the respondents rejected the request of the petitioner for appointment of an Arbitrator on 19th February 2020. Without prejudice, it is further stated that in any case, the claim now raised by the petitioner is time barred as also barred by the principle of *res judicata* and there being no subsisting contract between the parties as the contract in question was terminated on 18th November 2014, no Arbitrator can be appointed.

5. Learned counsel for the petitioner refuting the contentions of learned counsel for the respondents submits that in the earlier arbitration proceedings, the claim of the petitioner was to the illegal termination and amount unpaid for the sleepers' delivered by the petitioner to the respondents. As regards the sleepers manufactured and kept in the petitioner's premises are concerned, since the same was subject to retesting by the respondents, the cause of action to raise the claim for the said sleepers did not arise at that stage and hence, the present petitions seeking invocation of arbitration for the disputes now arising is maintainable. He further states that since the respondents failed to retest the sleepers lying in the premises of the petitioner, the claim of the petitioner cannot be held to be time barred.

6. Clause 2900 of the agreement between the parties which provides for arbitration reads as under:-

> *"Clause 2900 Arbitration-*
> *(a) In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by these or the Special conditions) the same shall be referred to the sole arbitration of a Gazetted Railway Officer appointed to be the arbitrator, by the General Manager in the case of contracts entered into by the Zonal Railways and Production Units; by the Member of the Railway Board, in the case of contracts entered into by the Railway Board and by the Head of the Organisation in respect of contracts entered into by the other Organisation under the Ministry of Railways. The Gazetted Railway Officer to be appointed as arbitrator however will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of their duties as railway servant have expressed views on all or any. of the matters under dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.*
> *(b) In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his award being set aside by the court for any reason, it shall be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.*
> *(c) It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitration at all.*
> *(d) The arbitrator may from time to time with the consent of all the parties to the contract enlarge the time for making the award.*
> *(e) Upon every and any such reference the assessment of the cost incidental to the reference and award respectively shall be in the discretion of the arbitrator.*

(f) Subject as aforesaid, the Arbitration and Conciliation Act, 1996 and the rules thereunder and any statutory modifications thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause.
(g) The venue of arbitration shall be the place from which the acceptance note is issued or such other place as the arbitrator at his discretion may determine.
(h) In this clause the authority to appoint the arbitrator includes, if there be no such authority, the officer who is for the time being discharging the functions of that authority, whether in addition to their functions or otherwise".

7. It is undisputed between the parties that the claim of the petitioner in the award dated 3rd February 2019 was regarding illegal termination of the contract dated 18th November 2014, the liquidated damages and the recovery of the payment towards the dispatched sleepers. Thus in the earlier arbitration proceedings, the petitioner had not claimed its payment and damages towards the sleepers lying at Bhanpuri unit in respect of tender CS-166 of 2013 and the Kapa unit, now raised in the two petitions respectively.

8. In respect of the claims now being raised in the present petitions, the petitioner wrote various letters to the department dated 30th July 2015, 7th October 2015, 11th May 2016, 25th May 2017 and 14th June 2017. In the letter dated 30th July 2015, the petitioner stated that the Dy. Chief Engineer has rejected all private sleepers lying at plant, whether tested or not, IC issued or not, on the ground that rejection rate is more than 2%. The petitioner pointed out that in terms of the Clause No. 5.3 of T-39, rejection rate of 2% was for testing the stabilization of manufacturing technique and not for determining rejection of the lot. Based on the representations of the petitioner, vide letter dated 7th October 2015, the Director Track (M)

Railway Board directed the Principal Chief Engineer, South East Central Railway advising to follow the clearly stipulated provisions of IRS-T-39 without making its own interpretations. Vide the letter dated 11th May 2016, Director Track (M) Railway Board also directed the Zonal Railways to follow the provisions in respect of the retesting. Since, despite directions of the Railway Board, no retesting was done, the petitioner issued notice invoking arbitration vide its letter dated 10th July 2019 seeking the repayment of amount followed by a letter dated 12th December 2019 seeking appointment of a Sole Arbitrator which was responded vide letter dated 19th February 2020 taking the plea that earlier award was challenged before the Court, thus the petitioner does not deserve any arbitration at this juncture.

9. Hon'ble Supreme Court in the decision reported as (2010) 3 SCC 267 *Dolphin Drilling Ltd. Vs. Oil and Natural Gas Corporation Ltd.* dealing with the fact that the dispute between the parties which arises subsequently can be proceeded in a separate arbitration, held as under:-

> *"8. The plea of the respondent is based on the words "all disputes" occurring in paragraph 28.3 of the agreement. Mr. Agrawal submitted that those two words must be understood to mean "all disputes under the agreement" that might arise between the parties throughout the period of its subsistence. However he had no answer as to what would happen to such disputes that might arise in the earlier period of the contract and get barred by limitation till the time comes to refer "all disputes" at the conclusion of the contract. The words "all disputes" in Clause 28.3 of the agreement can only mean "all disputes" that might be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other. In, its present form Clause 28 of the agreement cannot be said to be a one time measure and it cannot be held that once the arbitration clause is invoked the*

remedy of arbitration is no longer available in regard to other disputes that might arise in future".

10. As noted above, Clause 2900 of the agreement between the parties provides that any question, dispute or differences arising under these conditions or under the special conditions of contract or in connection with this contract shall be referred to Arbitration. Thus, there is no stipulation in the contract that once some disputes are referred to Arbitration, on further disputes arising the same cannot be decided by an Arbitrator. Hence the contention of learned counsel for the respondents that in view of the arbitration being invoked earlier, fresh arbitration cannot be invoked deserves to be rejected.

11. Hon'ble Supreme Court dealing with the scope of interference at the referral stage including whether the claim is time barred in the decision reported as (2021) 2 SCC *Vidya Drolia & Ors. vs. Durga Trading Corporation & Ors.* held:

"148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed "no-claim certificate" or defence on the plea of novation and "accord and satisfaction". As observed in Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)] , it is not to be

expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen."

12. Further, the Hon'ble Supreme Court in the decision reported as (2020) 2 SCC 455 *Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coal Field Limited* held as under:-

"7.10. In view of the legislative mandate contained in Section 11(6A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator Under Section 16, which enshrines the Kompetenz-Kompetenz principle.

7.11. The doctrine of "Kompetenz-Kompetenz", also referred to as "competence-competence", or "competence de la recognized", implies that the arbitral tribunal is empowered and has the competence to Rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimize judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties.

The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a 'mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified. If an arbitration agreement is not valid or non-existent, the arbitral tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration

agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

7.12. The legislative intent underlying the 1996 Act is party autonomy and minimal judicial intervention in the arbitral process. Under this regime, once the arbitrator is appointed, or the tribunal is constituted, all issues and objections are to be decided by the Arbitral Tribunal.

7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator…"

13. Dealing with the jurisdiction of this Court under Section 11 of the Act, the Hon'ble Supreme Court in the decision reported as 2021 SCC Online SC 781 *DLF Home Developers Limited Vs. Rajapura Homes Private Limited and Another* held as under:-

"18. The jurisdiction of this Court under Section 11 is primarily to find out whether there exists a written agreement between the parties for resolution of disputes through arbitration and whether the aggrieved party has made out a prima facie arbitrable case. The limited jurisdiction, however, does not denude this Court of its judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood. A three-judge bench in Vidya Drolia (Supra), has eloquently clarified that this Court, with a view to prevent wastage of public and private resources, may conduct 'prima facie review' at the stage of reference to weed out any frivolous or vexatious claims. In this context, the Court, speaking through Sanjiv Khanna, J. held that:

"154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is nonexistent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

19. N.V. Ramana, J. (as His Lordship then was) in his supplementary opinion further crystalised the position as follows:

"244. Before we part, the conclusions reached, with respect to Question 1, are:

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.
244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of nonexistence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.
244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer".
244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:
244.5.1. Whether the arbitration agreement was in writing? Or
244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?
244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?"

20. To say it differently, this Court or a High Court, as the case may be, are not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen Arbitrator. On the contrary, the Court(s) are obliged to apply their mind to the core preliminary issues, albeit, within the framework of Section 11(6-A) of the Act. Such a review, as already clarified by this Court, is not intended to usurp the jurisdiction of the Arbitral Tribunal but is aimed at streamlining the process of arbitration. Therefore, even when an arbitration agreement exists, it would not prevent the Court to decline a prayer for reference if the dispute in question does not correlate to the said agreement".

14. Since the claim of the petitioner in the earlier arbitration was different and there was no final decision by the respondents on the sleepers of the petitioner lying at its two premises i.e. Bhanpuri and Kapa, no cause of

action arose to the petitioner at that stage and thus prima facie, it can neither be held that the claim is time barred or that the same is barred by the principles of *res judicata* or *estoppels* or under Order II Rule 2 CPC.

15. Since prima facie, the contention raised by the respondents cannot be accepted and in detail, these issues have to be examined by the learned Arbitrator, this Court finds no merit in the contention of the respondents.

16. Therefore, the present petitions are required to be allowed appointing an Arbitrator under Section 11(6) of the Act to adjudicate the disputes arising between the parties as raised in the present petitions. Consequently, Justice Pradeep Nandrajog, a former Judge of this Court and Former Chief Justice of Rajasthan and Bombay High Courts is requested to arbitrate the disputes between the parties.

17. The learned Arbitrator would be entitled to charge fees as per the Schedule IV of the Act or as agreed by the learned Arbitrator with the consent of learned counsels for the parties.

18. The learned Arbitrator is requested to furnish the requisite disclosure under Section 12(2) of the Act within one week of entering into the reference.

19. The right of the respondents to file counter-claims and objections before the learned Arbitrator in accordance with law is reserved.

20. Petitions are disposed of.

21. Order be uploaded on the website of this Court.

(MUKTA GUPTA)
JUDGE

APRIL 05, 2022
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