

(2023) 08 DEL CK 0230

Delhi High Court

Case No: Arbitration Petition No. 933 Of 2022, I.A. No. 5219 Of 2023

M/S BCC-Monalisha (JV)

APPELLANT

Vs

Container Corporation Of India
Limited

RESPONDENT

Date of Decision: Aug. 28, 2023

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 11(6)

Hon'ble Judges: Manoj Kumar Ohri, J

Bench: Single Bench

Advocate: Sidhant Dwibedi, R.K. Joshi, Ojusya Joshi

Final Decision: Dismissed

Judgement

Manoj Kumar Ohri, J

1. By way of present petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereafter, 'the A&C Act'), the Petitioner seeks appointment of an Arbitral Tribunal.

2. Brief facts of the case are as follows. Petitioner participated in the tender process floated by the Respondent for 'Earthwork, Construction of CC, Block Pavement Approach Road, P-Way Track Work, Boundary Wall Pre-Engineered Warehouses, Admin. Building and Other Allied works for development of MMLP At-Jaipur Road, Jaipur, Odisha', wherein it was declared as the 'lowest technically successful bidder'. Pursuant to the same, an agreement bearing No. CON/EP/MMLP Jaipur/Civil & Electrical Works/2018 (hereafter, 'the Agreement') dated 15.04.2019 was entered into between the parties. Besides the said agreement, the contract was governed by the General Conditions of Contract (hereafter, 'the 'GCC').

3. Arbitration Agreement between the parties is embodied in Clause 64 of the GCC, and the present petition has been filed for appointment of Arbitral Tribunal in terms

thereof.

4. The underlying dispute pertains to termination of Agreement by the Respondent through two letters dated 21.07.2021 and 03.08.2021. Petitioner felt aggrieved by the termination and issued a notice dated 06.09.2021, asking the Respondent to take mitigating steps in terms of Clause 63 of GCC for resolving the disputes within 120 days. On failure of the Respondent to rectify its decision, as alleged by the Petitioner, it issued notice of invocation of arbitration on 11.03.2022.

5. The Respondent has opposed the petition, inter-alia on the following grounds:-

(i) The notice invoking arbitration does not meet the mandatory conditions and requirements of Clause 63 and 64(1)(ii)(a) of the GCC. The latter required the Petitioner to give details of the disputed issues and item-wise quantification of the claim amount. Clause 64(1)(ii)(a) precluded the non-conforming disputes from being referred to arbitration

(ii) Under Clause 34.1 of the Special Conditions of the Contract (hereafter, the 'SCC'), disputes exceeding 20% of the contract value, are excluded from arbitration. The aggregate value of the claims raised by the Petitioner exceed 20% of the contract value, hence they are not arbitrable.

6. In *Srico Projects Pvt. Ltd. v. Indian Oil Foundation* MANU/DE/0050/2017 (the challenge by way of SLP (C) No. 14976/2017 was dismissed), a co-ordinate Bench of this Court held that pre-arbitral steps laid down in the contract are mandatorily to be followed. Claims that are referred to arbitration without following the pre-arbitral steps are non-arbitrable. In the present case, the Respondent has claimed that the Petitioner has failed to notify all the claims to the General Manager of Railway, in terms of Clause 63 of GCC, which reads as under:-

"SETTLEMENT OF DISPUTES - INDIAN RAILWAY ARBITRATION AND CONCILIATION RULES

63.1 Matters Finally Determined By The Railway: All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the Contractor to the GM and the GM shall, within 120 days after receipt of the contractor's representation, make and notify decisions on all matters referred to by the Contractor in writing provided that matters for which provision has been made in Clauses 8, 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57A, 61(1), 61 (2) and 62(1) of Standard General Conditions of Contract or in any Clause (stated as 'excepted matter') of the Special Conditions of the Contract, shall be deemed as 'excepted matters' (matters not arbitrable) and decisions of the Railway authority, thereon shall be final and binding on the Contractor; provided further that 'excepted matters' shall stand specifically excluded from the

purview of the Arbitration Clause.”

7. In *Vidya Drolia and Ors. v Durga Trading Corpn.* (2021) 2 SCC 1, concept of excepted matters is reiterated. It recognises the distinction between the class of matters that the parties may choose to be adjudicated by way of arbitration and another class, arising out of the same contract, that may be adjudicated by courts of law.

8. In *Indian Oil Corporation Ltd. v. NCC Ltd.* (2023) 2 SCC 539, it has been held that while exercising jurisdiction under Section 11, Courts are empowered to enquire into whether the disputes are arbitrable. On the same line is an earlier decision of Supreme Court in *Container Corp. of India Ltd. & Anr v. M/s Shivhare Road Lines* Civil Appeal No. 6029/2014 [arising out of SLP(C) No. 2012 of 2011]. Taking guidance from the aforesaid rulings, it is felt that an enquiry under Section 11 may be limited to the extent of determining the existence of the arbitration agreement between the parties, and other facts which might indicate as to whether the disputes are “dead on arrival” due to jurisdictional flaws like the claim being time barred or barred by any law. However, in case the enquiry requires a deep dive into the disputed facts of the case and questions of law, the courts would be better off to have the arbitrator adjudicate such questions. Arbitrators are empowered in law and better equipped to adjudicate such questions, with the benefit of evidence lead before it and comprehensive hearings that they can offer to the parties, unlike the limited jurisdiction of courts under Section 11.

9. However, in the present case, staying within the limited jurisdiction that the court has, from the facts pleaded in the petition and the Agreement filed along with the same, it is not difficult to come to the conclusion that the disputes raised by the Petitioner are not arbitrable as per the terms of the Agreement.

10. Clause 64(1)(ii)(a) of the GCC reads as under:-

“64(1)(ii)(a). The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount 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.”

11. The arbitration notice dated 11.03.2022 does not conform to the requirements of Clause 64 of the GCC, as it has failed to effectively provide for the item-wise claims and their quantification. Clause 64 clearly spells out the consequence of such omission, which is that such claims are not referable for arbitration. Arbitrators are creatures of the contract who draw their life and sustenance from the contract between the parties. In view of the clear embargo in Clause 64, the claims raised in the present petition are ‘non-notified’ claims and hence, non-arbitrable.

12. The rights of the parties to seek recourse to arbitration are also governed by Clause 34 of the SCC, which provides as under:-

“34.1 The provision of Clause 63 & 64 of General Conditions of contract will be applicable only for settlement of claims or disputes between the parties for value less than or equal to 20% of the value of the contract and when claim or disputes are of value more than 20% of the value of the contract, provision of clause 63 & 64 and other relevant clauses of the General Conditions of contract will not be applicable and arbitration will not be remedy for settlement of such disputes.”

13. As regards the embargo contained in Clause 34.1 of SCC, it is seen that in the notice invoking arbitration, following claims have been raised:-

“i) Declaratory claim that the termination of the contract was arbitrary and unlawful, or in the alternative to the benefit of CCIL.

ii) Refund of EMD of Rs.17,14,095/- and security deposits of Rs. 1,17,66,474/-.

iii) Refund of performance guarantee of Rs.1,08,00,000/-.

iv) Refund of any other withheld of Rs.10,00,000/-.

v) Refund of Rs.3,45,05,926/- being 18% of the value of work not executed.

vi) Overheads due to idling and prolongation of the project as per Hudsun formula.

vii) Compensation on account of loss of productivity of the plant and machinery.

viii) Escalation for the value of work executed beyond scheduled period of the contract.

ix) Interest on the above amount from the date of termination till the date of payment.

x) Refund of Royalty which has been deposited by contractor through Govt. K-Form Rs.3,32,511.70/-.”

14. In the present case, though the disputes have been specified, however the Petitioner has not specified the amount claimed against Claim Nos. (vi), (vii), (viii) and (ix). Indisputably, the contract value is Rs.28,07,02,142.37/-, which was later enhanced to Rs.33,34,28,470.54/-. A perusal of the notice of invocation would show that computation of the amounts claimed in Claim Nos. (ii), (iii), (iv), (v) and (x) comes out to be about Rs.6.01 crores, whereas the 20% of contract value comes out to be about Rs.6.66 crores. Pertinently, the Petitioner has not specified the amounts against Claim Nos. (vi), (vii), (viii) and (ix), to avoid the consequences laid down in clause 34.1 of the SCC.

15. Petitioner has not contested that the aggregate value of the claims would exceed 20% of the contract value. Petitioner's only submission, in this regard, is that the Arbitral Tribunal will determine whether the claims are non-arbitrable. As stated above, the court even in this limited jurisdiction under Section 11, could conduct a preliminary enquiry to find out if the claims are ex facie arbitrable. This court is not relegated to a post office to be completely oblivious to the obvious legal infirmities in the request for appointment of arbitrator. It is not enough for the Petitioner to say that let the arbitrator decide all the jurisdictional issues. The Petitioner must cross the minimum threshold that is required in law as stated above, before the court can act upon such request. Respondent, unless it concedes to such request, cannot be mechanically burdened with the arbitration proceedings, and the costs attached thereto, even for adjudication of jurisdictional issue, that is otherwise apparent at the stage of Section 11 enquiry itself.

16. In view of the above, the present petition is dismissed alongwith pending application(s). Parties are free to avail other judicial remedies for adjudication of their disputes.