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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 31.10.2018

+ ARB.P. 724/2018 & IA 14999/2018

PARSVNATH DEVELOPERS LIMITED & ANR.

..... Petitioners

Through: Mr.Ciccu Mukopadhyay, Sr. Adv.
with Mr.Vijay Nair, Mr.Saurav Agrawal,
Mr.Shubham Paliwal, Mr.Kapil Rustogi,
Ms.Aakriti Dawar, Mr.Vibhu Anshuman,
Advs.

versus

RAIL LAND DEVELOPMENT AUTHORITY

..... Respondent

Through: Mr.Shaurya Sahay, Mr.Avijit
Mani Tripathi, Kumar Abhishek, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner seeking appointment of a nominee Arbitrator on behalf of the respondent for constitution of the Arbitral Tribunal to adjudicate the disputes that have arisen between the parties in relation to the Development Agreement

dated 31.05.2013 executed between the parties.

2. The Arbitration Agreement is contained in Clause 31.4.1 of the said Agreement.

3. The petitioner invoked the Arbitration Agreement vide its notice dated 30.5.2018 read with notice dated 18.7.2018 nominating its Arbitrator and calling upon the respondent to nominate its Arbitrator.

4. The respondent, however, vide its reply dated 07.8.2018 refused to appoint its nominee Arbitrator on the ground that the arbitral proceedings between the parties stood concluded by the Arbitral Award dated 25.11.2017 and therefore, there was no dispute to be adjudicated between the parties. It was further contended that the claims now sought to be raised by the petitioner would be barred by provisions of Order II Rule 2 of the Code of Civil Procedure(CPC) as also by principles of estoppel and *res judicata*.

5. Though the reply filed by the respondent to the present petition is not on record due to some office objections, similar plea has been taken by the respondent before me in the course of oral arguments.

6. On the other hand, counsel for the petitioner has drawn my attention to the Statement of Claim filed by the petitioner in the earlier arbitration proceedings and more particularly to paragraphs 103 to 108 thereof, to contend that the petitioner had expressly reserved its rights to claim the present claim by way of separate arbitration proceedings. He submits that the

earlier arbitration proceedings were confined to the applicability of Clauses 7.2.1 and 7.2.2 vis-a-vis Clause 29.8.2(b)(iii) of the Development Agreement so as to expedite the arbitration proceedings as a claim of a large sum of money of the petitioner of more than Rs.1034 thousand crores was denied by the respondent on the basis of Clause 29.8.2(b)(iii) the Agreement, instead of and in place of clause 7.2.2 of the same.

7. He further submits that the respondent in its reply denied the applicability of Order II Rule 2 of the CPC, however, the Arbitral Tribunal did not render any finding on the same and therefore, the arbitration proceedings continued on the basis of the pleadings between the parties, with the petitioner reserving its rights to claim further arbitration proceedings for the remaining claim.

8. I have considered the submissions made by the counsels for the parties. It cannot be denied that there was an Arbitration Agreement between the parties in the Development Agreement. It is also a matter of fact that the petitioners have invoked the said Arbitration Agreement on more than one occasion. It can also not be denied that the petitioners had pleaded for reservation of its rights to claim further amounts in the second arbitration proceedings which have resulted in the Arbitration Award dated 25.11.2017. The question whether the claims now sought to be raised by the petitioners would be barred by the principles of Order II Rule 2 of CPC or on the

ground of *res judicata* or estoppel, in my opinion, are questions on the merit of the claim of the petitioner and defence of the respondent. These questions are to be determined by the Arbitral Tribunal alone on the basis of the pleadings and/or evidence led by the parties on these issues.

9. Counsel for the petitioner has placed reliance on the judgment of the Supreme Court in ***SBP & CO. vs. Patel Engineering Ltd. & Anr.*** (2005) 8 SCC 618, to contend that the power exercised by this Court is a judicial power and, therefore, this Court must determine whether the Arbitration Agreement ceases to exist upon passing of the Award dated 25.11.2017.

10. In my opinion, the existence of the Arbitration Agreement itself is not in dispute. The dispute is whether the claim now sought to be raised by the petitioner would be barred by the principles of Order II Rule 2 of the CPC and/or principles of *res judicata* and/or estoppel. It cannot be denied that an Arbitration Agreement can be invoked a number of times and does not cease to exist only with the invocation for the first time. The Supreme Court in ***Dolphin Drilling Ltd. vs. Oil and Natural Gas Corporation Ltd.*** (2010) 3 SCC 267, has held as under:

“8. The plea of the respondent is based on the words “all disputes” occurring in Para 28.3 of the agreement. Mr. Aggrawal 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.”

11. The question whether the claim of the petitioner would be barred by the principles of *res judicata* or estoppel or by Order II Rule 2 of the CPC are not matters to be considered by this Court while exercising its jurisdiction under Section 11 of the Act. (***Indian Oil Corporation Ltd. vs. SPS Engineering Ltd.*** (2011) 3 SCC 507)).

12. The legislature by amending the Act by way of the Arbitration and Conciliation (Amendment Act) 2015 and the insertion of Section 11(6A) of the Act has also restricted the scrutiny of the Court at the stage of adjudicating an application under Section 11 of the Act only to the existence of the Arbitration Agreement.

13. In view of the above, I see no impediment in appointing a nominee Arbitrator for the respondent to adjudicate the disputes that are sought to be raised by the petitioners in

relation to the abovementioned Development Agreement. In such proceedings, all objections of the respondent shall remain open and it would be for the Arbitral Tribunal to decide the same, may be as primary issues.

14. As the earlier arbitral proceedings had been conducted by the Arbitral Tribunal which had Justice Vikramjit Sen, Retired Judge of the Supreme Court, as the nominee Arbitrator of the respondent, I appoint Justice Vikramajit Sen as the nominee Arbitrator of the respondent. The two Arbitrators shall now proceed to appoint the Presiding Arbitrator in accordance with the arbitral procedure agreed between the parties.

15. The Arbitrators shall give disclosure under Section 12 of the Act before proceeding with the reference. Merely because they had earlier adjudicated the disputes between the parties by way of arbitration resulting in the Award dated 25.11.2017, it will not be considered as a ground of bias or ineligibility of the Arbitrators.

16. There shall be no order as to costs.

17. All contentions of the parties shall remain open in such arbitration proceedings.

NAVIN CHAWLA, J

OCTOBER 31, 2018
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