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**(2013) 09 DEL CK 0568**

**In the Delhi High Court**

**Case No : Arbitration Petition 127 of 2011**

M/s. Jivnas Marketing

APPELLANT

Vs

Container Corporation of India

RESPONDENT

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**Date of Decision :** 09-09-2013

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 11

**Citation :** (2013) 10 AD 55 : (2013) 4 ARBLR 193 : (2013) 138 DRJ 252

**Hon'ble Judges :** Rajiv Shakdher, J

**Bench :** Single Bench

**Advocate :** Sachin Sood and Ms. Yeshi Rinchhen, for the Appellant; D.D. Singh, for the Respondent

**Final Decision :** Disposed Off

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## **Judgement**

Rajiv Shakdher, J.—This is a petition filed u/s 11 of the Arbitration & Conciliation Act, 1996 (in short 1996 Act) for appointment of an arbitrator. While the respondent does not dispute the existence of an arbitration agreement obtaining between the parties, it resists the appointment of an arbitrator on the limited ground that no dispute subsists between the parties. The respondent, in other words, pleads accord and satisfaction. That being the limited issue, I propose to advert to facts which are relevant for adjudicating upon the said issue. The petitioner submitted its bid against a tender floated by the respondent for provision of 30M Flood Light Mast, Luminaries, and LT Cabling work at ICD/Dadri, Gautam Budh Nagar (hereinafter referred to as the works). Both the technical and financial bid submitted by the petitioner were found suitable, and accordingly, a Letter of Intent (LOI) dated 11.12.2003 was issued in its favour.

1.1 The total value of the works in issue was pegged at Rs. 83,51,005/- as per the rates quoted in the petitioner's offer.

1.2 The tenure of the works was five (5) months, commencing from 04.12.2003. Thus, the works were required to be completed by 03.05.2004.

1.3 The earnest money deposited by the petitioner, equivalent to Rs. 94,000/-, was retained as a part of the initial security deposit. The petitioner was required to submit the balance security deposit equivalent to Rs. 7,41,101/- alongwith the acceptance letter. In other words, the total security deposit was required to be enhanced to 10% of the value of the contract, which would include the earnest money deposited by the petitioner.

1.4 The petitioner, vide letter dated 24.12.2003, conveyed to the respondent that the security deposit equivalent to 10% of the contract value should be made up by adjusting 10% of the running bills submitted by the petitioner.

1.5 A formal contract was executed between the parties. It is averred by the petitioner and not disputed by the respondent that the general conditions of the contract (GCC) and special conditions of the contract (SCC), which were applicable to the parties, were those, which were provided for by Northern Railway Engineering Department. Under the contract, RITES Ltd. (RITES) was appointed as the consultant engineer.

1.6 The petitioner, however, completed the works by 19.07.2004. It is not disputed before me by the parties that as per the LOI the security deposit, in whichever form given, was required to be retained by the respondent for the period covering the completion period in addition to the maintenance period, equivalent to 12 months. The security deposit, unless forfeited in whole or in part, according to the terms and conditions agreed to between the parties, was to be refunded on receipt of certificate from the engineer to the effect that the works had been completed satisfactorily and maintained in all respects for the periods specified in the contract.

1.7 As per the aforementioned term, the petitioner avers that the security deposit became due for refund on 19.07.2005, when the period of 12 months, from the date of completion, expired.

1.8 On 05.06.2005, the petitioner issued a communication to the consultant of the respondent, i.e., RITES, that since it had completed the works, its final bill be processed.

1.9 It is not in dispute that the petitioner had submitted three running bills, being: RA-1, RA-2 and RA-3 which were dated 15.04.2004, 01.05.2004 and 20.07.2004 respectively. The total value of the three RA bills, was a sum of Rs. 82,30,040/-. Against these running bills, the respondent had paid a sum of Rs. 68,76,774/-. This aspect is reflected in the respondent's document dated 11.10.2006, which the petitioner has filed. As per this document, adjustments were made with regard to security deposit amounting to Rs. 8,23,004/-; tax deducted at source amounting to Rs. 1,81,061/-; works contract tax amounting to Rs. 3,29,201/-; and other deductions amounting to Rs. 1,33,550/-. The break-up of the deductions and the explanations with regard to the same were also set out in the said document. The amounts were withheld for two reasons: (i) towards insurance policy and (ii) towards labour license. At this stage, there were

no other recoveries made.

2. In the interregnum, i.e., between June, 2005 and September, 2006, apparently, several letters were written by the petitioner for return of earnest money, security deposit and payment of the remaining amount as per the final bill. The letters written in this behalf are letters dated 30.11.2005, 12.12.2005, 26.12.2005, 07.02.2006, 24/27.03.2006, 04.04.2006 and 20.09.2006. These letters have been written by the petitioner either to the respondent or to RITES.

2.1 On 10.11.2006, RITES wrote to the petitioner that its final bill had been forwarded to the respondent for "processing and payment". In this very letter, quite crucially, RITES also required the petitioner's proprietor to report to the concerned officer of the respondent, in connection with, acceptance of the proposed recovery under the subject contract. The exact language used in the letter being relevant is extracted hereinbelow for the sake of convenience:

...You are requested to report to Manager/Elec./CONCOR in connection with acceptance of the proposed recovery under the subject contract...

2.2 The reason for this advice, if one may put it that way, was that, the vigilance department of the respondent had inspected the works in issue on 02.11.2004, prior to the completion of the defect liability period, and found that the petitioner had provided lamps of ELTON make, while it was required to provide flood light fittings of 400 watts HPSV Lamps of GE Philips make.

2.3 The petitioner, evidently, pursuant to RITES's communication of 10.11.2006, wrote to the respondent vide letter dated 15.11.2006 that it should release its outstanding payments against the final bill alongwith Earnest Money Deposit (EMD) and security deposit as it was in dire need of money, which was required to set off its outstanding liabilities and interest accruing thereon. Importantly, the petitioner also conveyed that it was agreeable to the proposed recoveries, which the respondent had in mind. Once again for the sake of convenience the relevant extract from the communication dated 15.11.2006 is set out hereinbelow:

....Kindly release our outstanding payments against final bills along with our EMD and the security deposit, as we are in dire (sic dire) necessity of the money to set off our outstanding liabilities and the interest accruing on the said liabilities.....

2.4 The issue regarding balance payments against final bill, security deposit and recoveries did not move forward between October, 2006 and March, 2008.

3. On 19.03.2008, the respondent issued a show cause notice to the petitioner. In the said show cause notice, a reference was made to the inspection by its vigilance department and the fact that it was found that the petitioner had not installed lamps of the agreed make; an aspect which I have indicated above. It was specifically put to the petitioner that the said default resulted in a vast cost variation and, therefore, the works executed by it was sub-standard. The petitioner was called upon to show cause as to why for these reasons, it should

not be debarred, from participating in tenders floated by the respondent, for the next three years.

3.1 The petitioner filed a reply dated 07.04.2008 to the said show cause notice. Various aspects were adverted to by the petitioner in defence of its stand, including the fact that there was no requirement to supply lamps of a particular make; the requirement, if any, was with regard to the fixtures. Pertinently, the petitioner adverted to the fact that the works in issue were completed and handed over to the respondent on 19.07.2005 and, therefore, as on that date it was entitled to receipt of the security deposit, the earnest money (which as indicated above, had formed part of the security deposit), and other receivables. Since the same was not paid, the petitioner averred that it would be entitled to interest calculated at the commercial rate of interest, in addition to the amount withheld. For calculation of the receivables the payment schedule was appended to the reply. A demand was made that the show cause notice be withdrawn and the monies be paid with interest and damages etc. within a period of 15 days, failing which the reply was to be treated as a demand for arbitration. The total receivables shown in the annexure appended to the reply were pegged at Rs. 19,26,199.29/-.

3.2. Admittedly, thereafter the petitioner received certain payments towards final bill and security deposit. The details with regard to the dates and the amount received are as follows: on 12.05.2008 a sum of Rs. 1,20,232/- was received; on 15.05.2008 two payments were received.; the first payment was in the sum of Rs. 4692/- towards final bill and the second payment was in the sum of Rs. 8,23,004/- towards security deposit.

3.3 The adjustment of the aforesaid payments against the amount outstanding (as shown in the annexure appended to the reply dated 07.04.2008), would demonstrate that by May 2008, receivables had been brought down to 9,78,271.29/-. The petitioner, of course, claimed entitlement to interest with respect to the final bill w.e.f. 19.07.2004, while with respect to security deposit etc. w.e.f. 19.07.2005.

3.4 The respondent, however, vide communication dated 26.05.2008 informed the petitioner that its reply had not been found to be satisfactory and, accordingly, it had been debarred from participating in tenders floated by the respondent for a period of three years. The request for appointment of an arbitrator was also declined on the ground that the petitioner had submitted a no-claim certificate.

3.5 The petitioner replied to the said communication of the respondent vide its letter dated 23.06.2008, wherein it, inter alia, stated the following with regard to the no-claim certificate:

....As far as the no claim certificate as mentioned in your letter dated, 26/05/08 is concerned, it is clarified that the same is recorded on our entire work done for which obviously the payment has not been made....

3.6 The petitioner reiterated its demand for payment of the balance amount with interest, or in the alternative for appointment of an arbitrator. This led to the respondent issuing a letter dated 10/11.07.2008, wherein it indicated that since all payments including the security deposit had been released, and given the fact that, the petitioner had issued a no-claim certificate and accepted the recoveries, vide its letter dated 15.11.2006, its request for appointment of the arbitrator could not be accepted.

4. The petitioner filed a writ petition bearing no. 6929/2008 in this court to impugn the decision of the respondent to debar it for a period of three years. The show cause notice dated 19.03.2008 and letter dated 26.05.2008 were assailed in the said writ petition.

4.1 On 30.11.2009 a Single Judge of this court disposed of the writ petition with a direction to the respondent that it should accord hearing to the petitioner and pass a speaking order within one month of its order, uninfluenced by the respondent's earlier order. Liberty was granted to the petitioner to ventilate his grievance, if any, with regard to the order passed by the competent authority of the respondent, if necessary, in accordance with the law.

4.2 Accordingly, a representation was made by the petitioner on 21.12.2009. In the said representation a prayer was made for withdrawal of the show cause notice and appointment of an arbitrator to adjudicate upon the dispute.

4.3 By order dated 18.01.2010, the Managing Director of the respondent, after hearing the petitioner, declined both prayers. In regard to debarment, it was indicated that the petitioner could be considered against tenders floated by the respondent only after 25.05.2011 when the period of ban would get over, and as regards appointment of an arbitrator, it was indicated that request could not be acceded to, in view of the fact that, the petitioner, had furnished a no-claim certificate and accepted recoveries prior to closure of the contract on payment of final bills.

5. It is in this background that the petitioner has approached this court by way of the instant petition. The petition was filed on 05.04.2011, whereupon it was moved in court for the first time on 03.05.2011, after removal of defects. Upon issuance of notice, respondent filed its reply, followed by a rejoinder by the petitioner. Counsels for the parties have also filed written submissions. The arguments of the counsels have proceeded in line with the pleadings and the submissions filed by them.

#### Submissions of Counsels

6. Mr. Sachin Sood, learned counsel for the petitioner, has briefly submitted that there is a dispute obtaining between the parties with regard to the amounts claimed by the petitioner. According to the learned counsel for the petitioner, amounts against the final bill became due on completion of works on 19.07.2004, while the security deposit was payable on the completion of the

defect liability period, i.e., 19.07.2005. The illegal actions of the respondent in withholding these amounts, had entitled the petitioner to interest, in respect of which a demand was made by the petitioner vide its reply dated 07.04.2008. In addition to the said receivables, a dispute obtained between the parties also with regard to illegal recoveries made by the respondent on the alleged ground that lamps of the requisite make had not been provided by the petitioner; a charge which ultimately led to the petitioner's debarment for a period of three years from 26.05.2008 to 25.05.2011.

6.1 It was submitted that the letter dated 15.11.2006, was issued by the petitioner under coercion and duress, in as much as, four days prior to the said letter, RITES vide its letter dated 10.11.2006, had called upon the petitioner to report to the respondent with regard to the subject of acceptance of proposed recoveries. The letter dated 15.11.2006 was not issued by the petitioner out of free volition and therefore could not be held against it. The no-claim certificate on the final bill was issued in the context of clause 43(2) of the GCC which required issuance of such no-claim certificate for the bills of the contractor to be processed. In sum and substance, the counsel for the petitioner contended that there was no accord and satisfaction, as contended by the respondent and that an arbitrator ought to be appointed to adjudicate upon the disputes raised by the petitioner. In support of his contention counsel for the petitioner relied upon the following judgments:

Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors, Ambica Construction Vs. Union of India (UOI), National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., ; R.L. Kalathia and Co. Vs. State of Gujarat, and Hilltop Travels Vs. Convergys India Services Pvt. Ltd.

7. Mr. D.D. Singh, learned counsel for the respondent, on the other hand, submitted that there was complete accord and satisfaction. In this regard, he relied upon the communication dated 05.06.2005, to which I have made a reference above, whereby the petitioner itself forwarded the final bill for being processed by the respondent. Mr. Singh also relied upon the letter dated 15.11.2006 issued by the petitioner to buttress his submission that the petitioner had agreed to the recoveries being made against the final bill. Mr. Singh submitted that in view of the fact that a no-claim certificate was issued at the time when the final bill was submitted, and the recoveries thereafter had also been made pursuant to the petitioner accepting the same, there were no disputes outstanding, which required adjudication. Mr. Singh, in support of his contentions, relied upon the following judgments:

Indian Railway Construction Co. Ltd. vs. Moghul India 2007 (Suppl) Arb. LR 595(SC); S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, and Chairman & M.D., NTPC Ltd. vs. Reshmi Constructions, Builders and Contractors case.

7.1 Mr. Singh further submitted that the claim referred to by the petitioner fell within the category of "excepted matters", and therefore, the alleged disputes

could not be referred to an arbitrator. In this connection he relied upon the judgment of the Supreme Court in the case of General Manager Northern Railways and Another Vs. Sarvesh Chopra,

## REASONS

8. Having heard the learned counsel for the parties, and perused the record, what clearly emerges is that:

(i) The petitioner apparently completed the works in issue by 19.07.2004.

(ii) As per the terms of the LOI, the security deposit, which included the component of earnest money, was to be retained by the respondent during the period of completion and for a period of 12 months thereafter.

(iii) A surprise check was apparently carried out by the vigilance department of the respondent on 02.11.2004, when it was found that the lamps installed by the petitioner were not of the make stipulated under the contract obtaining between the parties.

(iv) The petitioner was paid a total sum of Rs. 68,76,774/- by October, 2006 as is reflected in the document dated 11.10.2006. The respondent retained monies towards security deposit and other recoveries.

(v) The recoveries to the tune of Rs. 4,44,836/- were made, which is reflected in the respondent's document dated 12.05.2008. The fact that some payments were released in May, 2008, which included the security deposit, is also not in dispute; the exact dates with respect to which are referred to hereinabove.

(vi) The petitioner demanded the release of payments which included the balance amounts against the final bill, with interest, in its reply dated 07.04.2008.

(vii) In respect of payments released in May, 2008, no interest has been paid, which includes the security deposit.

(viii). The petitioner's letter of 15.11.2006 had a background to it, which is, that on 10.11.2006, RITES clearly indicated the petitioner to report to the concerned officer of the respondent with regard to acceptance of the proposed recovery under the subject contract.

(ix) Though the exact wordings of the no-claim certificate has not been produced before me, I would assume that the same was submitted with the final bill of the petitioner on 15.11.2006.

9. From the facts, as set out above, what emerges is that at the time that the no-claim certificate was issued by the petitioner, it was not perhaps aware that recoveries were being made. A clue to this effect is available on a conjoint reading of letters dated 5.6.2005 and 11.10.2006. A subtle suggestion was made to the petitioner to accept the proposed recoveries by RITES vide its letter dated 10.11.2006, therefore, the letter dated 15.11.2006 would have to be seen in the background of the said letter. The petitioner perhaps had no choice as not only

some portion of the final bill had been retained but also security deposit which according to it ought to have been released on completion of the defect liability period, remained blocked with the respondent. The difficulty, in which the petitioner was put, can well be imagined, from the fact that even after the petitioner had issued the letter dated 15.11.2006, a part of the payments came to be released only in May, 2008. The petitioner has claimed interest qua delay in release of payments, as also refund of recoveries made by the respondent.

10. Several judgments have been cited by both sides. The principle enunciated by the judgments is not in dispute. The Supreme Court in the case of National Insurance Company Ltd. vs. Boghara Polyfab Pvt. Ltd. has, after examining all previous precedents divided the situations arising in a Section 11 petition into three categories. The issues which fall in category 1, with regard to the existence of an arbitration agreement and whether or not the petitioner before the court is a party to the arbitration agreement, are required to be decided by the court in a Section 11 petition before the matter can be referred to arbitration. Category 2 comprises of those disputes, which the court may choose to decide or leave it for decision by the arbitral tribunal. These are issues as to whether a claim is time barred or whether the contract has been brought to an end by accord and satisfaction. The 3rd category comprises of cases, which are required to be left exclusively to the discretion of the arbitral tribunal. These are issues which relate to: as to whether a particular claim falls within the four corners of an arbitration clause. In other words, decision with regard to whether or not the claim is "excepted" or excluded from arbitration. Where the court comes to a conclusion that there is accord and satisfaction, then of course, the request for appointment of an arbitrator has to be declined. Where, however, the court comes to the conclusion that there is no accord and satisfaction, the court would appoint an arbitrator for a decision on merits; in the event there is no dispute with regard to the existence of an arbitration agreement and the aggrieved being party to the same.

10.1 There are, however, cases which fall between the two extremities referred to above. In other words where there is some material on record, which would demonstrate that parties had not reached accord and satisfaction. These are cases which the court could call upon the arbitrator as it may require parties to lead evidence for greater clarity.

10.2. This is one such case. The material on record, as discussed above, would show that the letter dated 15.11.2006 was not issued by the petitioner out of free volition. Therefore, in my opinion, it would have to be left to the arbitrator for an appropriate decision on the issue.

11. As regards Mr. D.D. Singh's argument that the claims made relate to excepted matters, is also an issue best left to the arbitrator in terms of the ratio of the judgment of the Supreme Court in National Insurance Company Ltd. vs. Boghara Polyfab Pvt. Ltd. Mr. D.D. Singh's reliance on Sarvesh Chopra's case will not help his cause as that was a case which pertained to the Arbitration Act,

1940(1940 Act) The Scheme of 1996 Act is different from that of the 1940 Act.

12. In view of the above, I am of the view that the petition would have to be allowed. It is ordered accordingly. Mr. Lal Singh, a retired Additional District Judge (Mob: 9910384617) is appointed as an arbitrator. The learned arbitrator will, however, first determine as to whether there is accord and satisfaction by allowing parties to lead evidence, if necessary. If the arbitrator comes to the conclusion that there is accord and satisfaction; in that event, quite logically, he would terminate the proceedings at that stage. In case the learned arbitrator comes to a contrary conclusion he would then proceed to decide the matter on merits. The arbitration proceedings would be governed by the rules and fee schedule prescribed by the Delhi International Arbitration Centre (DIAC). The parties will be free to prefer their claims and counter-claims, if any, before the learned arbitrator, which shall be decided in accordance with the law. For this purpose, the parties and their counsels shall appear before the DIAC on 20.09.2013 at 3.00 p.m. The petition is, accordingly, disposed of.