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ORDER SHEET
AP/611/2022
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

THE INCODA
VS
THE GENERAL MANAGER, METRO RAILWAY AND ANR.

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date: 16th July, 2024.

Appearance:
Mr. Sanjib Kumar Mal, Adv.
Mr. Atanu Raychaudhuri, Adv.
Mr. Pushan Majumdar, Adv.
…for petitioner.

Mr. Swatarup Banerjee, Adv.
Mr. Rivu Dutta, Adv.
Mr. Rhitam Chatterjee, Adv.
…for respondent./ Metro Railway.

The Court:- The present application has been filed for appointment of an Arbitrator in view of absence of consensus between the parties.

Learned Counsel appearing for the petitioner places reliance on Clause 64.(1)(i) of the General Conditions of Contract (GCC) between the parties which contains the arbitration clause.

It is argued that in terms of the preceding clause, that is Clause 63.1, a reference of the dispute was made to the General Manager of the respondent Railways. Initially there was delay on the part of the General Manager to decide on the same, upon which a writ petition was preferred, in which direction was

passed on the General Manager to decide on the disputes and to pass a reasoned order. Accordingly, the General Manager (GM) took a decision on June 20, 2021.

The petitioner contends that thereafter the petitioner also issued a reminder on February 22, 2022 and finally invoked the arbitration clause by a notice under Section 21 of the Arbitration and Conciliation Act, 1996 dated June 22, 2022.

Learned Counsel appearing for the respondents submits that the application is premature, the petitioner having not complied with Clause 63.1 of the GCC.

The first limb of the submission of the respondents is that Clause 63.1 contemplates that the General Manager of the respondent Railway Authority was to take a call upon reference being made by the petitioner, as to whether the disputes fell within the exception clauses of the contract. Thereafter, a final claim was to be made by the petitioner within the contemplation of Clause 64.(1)(i).

As per the said clause, the contractor had to demand in writing that the dispute or difference be referred to arbitration within a period of 120-180 days from presentation of his final claim on the disputed matter. In the present case, it is argued, the petitioner never made any such final claim after the decision of the General Manager and as such, the petitioner has not exhausted the pre-arbitration remedy as stipulated in the arbitration clause.

That apart, even if the final claim was deemed to have been made by the petitioner, the invocation was made much after 180 days, which is the stipulated outer limit for making such claims; hence the respondents submit that the application ought to be dismissed.

In the present case, previously an objection was taken as to prior conciliatory proceedings having not been undertaken by the parties which, however, was turned down by a coordinate Bench.

To be fair, the respondents now do not urge the self-same issue but take objection under a different provision.

With regard to the first limb of the objection, the same cannot be accepted. Clause 63.1 does not contemplate a decision by the General Manager only on the issue as to whether the disputes raised fall within the exception clauses. The language of Clause 63.1 is very clear, providing that 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.

Thus, the reference covers all the aspects of disputes and differences as mentioned therein and are not restricted to the exception clauses' applicability. Thereafter, as per Clause 63.1, the GM, within 120 days of receipt of the representation, is to make and notify decisions on all matters referred to by the contractor in writing, which also refers to all the components of dispute and not merely to the exception clauses.

In the present case, the petitioner did exhaust Clause 63.1 by referring the disputes in an exhaustive letter to the General Manager. Since the General Manager initially delayed in deciding the same, the petitioner obtained an order from the writ court, pursuant to which the General Manager decided against the petitioner on several components of the disputes in writing on June 20, 2021.

Hence, there cannot be any doubt that Clause 63.1 was complied with.

The question arises, thus, is whether clause 64.(1)(i) was duly adhered to by the petitioner before invoking the arbitration clause, which was the precursor of the present application.

The said clause is set out below;

> *"64.(1)(i) : 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 Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63.1 of these Conditions, the Contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration."*

As per the said clause, there are disjunctive situations in which the dispute or difference can be referred to arbitration.

One of such situations is an event of dispute or difference between the parties as to the respective rights and liabilities of the parties on any matter in question, including disputes or differences on any account.

The conspectus of such expression is broad enough to include the disputes at present raised by the petitioner.

After the said disjunctive situations, the arbitration clause proceeds to provide that in any such case of dispute, of course, excepting the "excepted matters" referred to in Clause 63.1, the contractor, after 120 days, but within 180 days of his presenting the final claim on the disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

In the present case, the reference to arbitration in terms of the last limb of the said arbitration clause was dated June 22, 2022, which was much beyond the period of 180 days after the final decision of the General Manager.

Since the petitioner, at different points of time, had reiterated its claims, it cannot be crystallized as to when the claim of the petitioner became "final". For example, in the "reminder" dated February 22, 2022, annexed at page 11 onwards of the affidavit in reply of the petitioner, the petitioner quoted its entire claim and reiterated the same afresh. If the same is constituted to be the final claim on point of time, the invocation dated June 22, 2022 was within the outer stipulated limit of 180 days.

On a wider premise, even if the invocation was beyond 180 days of the final claim, the position would not be such that the intention of the parties to refer disputes to arbitration would be frustrated.

The outer limit of 180 days stipulated in the arbitration clause, if failed by the claimant, does not constitute a waiver or a deliberate relinquishment of the claim by the claimant.

Moreover, the said outer limit of 180 days was not couched in negative language in the arbitration clause so as to make it mandatory, creating such a situation that if the same was not adhered to, the claim itself would be defeated altogether.

Further, it has to be kept in mind that no additional limitation than that provided in law can be construed or read into the arbitration clause simply because the claim, as per the arbitration clause, was to be made within 180 days. No negative sanction being provided in the contract between the parties if

the said outer limit was exceeded by the claimant, it cannot be said that the same was an absolute bar to the reference to arbitration.

It is well-settled that if the parties intend to refer the disputes arising between them to arbitration, the same has to be honoured. The emphasis of the 1996 Act is in favour of alternative dispute resolution by adopting the mode of arbitration. Any interpretation of the arbitration clause contrary thereto should not be adopted by the Court while taking up an application under Section 11 of the 1996 Act.

Thus, upon a careful perusal of the arbitration clause and the documents annexed on record, this Court is of the opinion that there is no *ex facie* bar to the matter being referred to arbitration. Since the dispute otherwise comes within the ambit of the arbitration clause and is inherently arbitrable, it would only be appropriate if the matter is referred to arbitration.

Accordingly, AP 611 of 2022 is allowed on contest, thereby appointing Justice Prasenjit Mandal (retired) as the sole Arbitrator to resolve the disputes between the parties, subject to obtaining a disclosure under Section 12 of the Arbitration and Conciliation Act, 1996 from the said learned Arbitrator. The learned Arbitrator shall fix his remuneration on consultation with the parties in terms of the provisions of the 1996 Act read with Schedule - IV thereof.

(SABYASACHI BHATTACHARYYA, J.)

SP/SK