

**Court No. - 21**

**Case :-** ARBITRATION AND CONCILI. APPL.U/S11(4) No. - 42 of 2023  
straightaway

**Applicant :-** M/S Neelkanth Construction

**Opposite Party :-** Union Of India And 3 Others

**Counsel for Applicant :-** Chandra Shekhar Singh

**Counsel for Opposite Party :-** A.S.G.I.,A.K.Saxena,Awadhesh Kumar Saxena

**Hon'ble Manoj Kumar Gupta,Acting Chief Justice**

1. Heard Sri Chandra Shekhar Singh, learned counsel for the applicant and Sri Abhijeet Saxena, Advocate holding brief of Sri Awadhesh Kumar Saxena, for the opposite parties.

2. The instant application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') has been filed by the applicant for appointment of an Arbitrator in terms of Clauses 63 & 64 of the General Conditions of Contract 2014, Indian Railways, in respect of disputes and differences arising out of the contract dated 07.08.2017.

3. The letter of acceptance dated 03.04.2017, accepting the proposal of the applicant stipulated that General Conditions of Contract 2014 and Indian Railways Unified Standard Specification (materials and works) (Vol. I & II) 2010 Rules, up to date special conditions attached shall apply to the contract.

4. It is not in dispute between the parties that Clause 64.(3) regulates the appointment of Arbitrator and the same is extracted below: -

**"64.(3) : Appointment of Arbitrator:**

**64.(3)(a)(i):** In cases where the total value of all claims in question added together does not exceed ₹ 25,00,000/- (Rupees twenty five lakh only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. The sole arbitrator shall be

appointed within 60 days from the day when a written and valid demand for arbitration is received by GM.

**64.(3)(a)(ii):** In cases not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than three names of Gazetted Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the Contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM.

Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as Contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the Contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of Contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA Grade of other departments of the Railway for the purpose of appointment of arbitrator.

5. Clause 63, which is also relevant, is as follows:-

**"63. 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) to (xiii)(B) of Standard General Conditions of Contract or in any Clause 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."

6. The main objection of opposite parties is that the contract was determined under Clause 61.1 and since the matter is not referable to Arbitrator being 'excepted matter', therefore, the application deserves to be rejected.

7. Clause 61.(1) is as follows:

*"61.(1) Right Of Railway To Determine The Contract : The Railway shall be entitled to determine and terminate the contract at any time should, in the Railway's opinion, the cessation of work becomes necessary owing to paucity of funds or from any other cause whatever, in which case the value of approved materials at site and of work done to date by the Contractor will be paid for in full at the rate specified in the contract. Notice in writing from the Railway of such determination and the reasons therefor shall be conclusive evidence thereof."*

8. Along with the counter affidavit, the opposite parties have brought on record a letter dated 30.09.2020 issued by Assistant Divisional Engineer, Chhapra. The subject matter of the letter is the letter of Principal Chief Engineer, Eastern Railways dated 17.08.2020. It states that the site at which the applicant was given contract for construction of limited height subway (LHSW), the water table is high, therefore, it was not possible to execute the work. Therefore, the applicant was called upon to stop the work. It is also mentioned that he may submit his final bill as per the contract so that the claim can be disposed of.

9. It is contended on the basis of the aforesaid communication that there was determination of contract under Clause 61.(1).

10. Learned counsel for the applicant submitted that under the contract, the power to determine the contract was with Divisional Railway Manager and not with the Assistant Divisional Engineer Chhapra, who had issued the communication. It is also submitted that after the said communication, the opposite parties themselves required the applicant to complete the

work of launching by 09.06.2022 and 14.06.2022 and therefore, it amounts to waiver of the notice. In support of his statement, he has placed reliance on a communication dated 19.09.2022 by Senior Divisional Manager-II, Varanasi addressed to the applicant.

11. Learned counsel for the opposite parties submitted that firstly the said communication does not amount to waiver of notice as the applicant was repeatedly asked to stop the work. Alternatively, it is submitted that the applicant had not laid claim before the General Manager in terms of the conditions of the contract and had straightway invoked the arbitration clause, therefore, the application deserves to be rejected.

12. On the other hand, learned counsel for the applicant submits that the claim was duly made before the Chief General Manager vide notice dated 04.07.2022 but the same was rejected by the opposite parties by communication dated 23.09.2022. They also declined to refer the matter to the arbitrator on the ground that it was 'excepted matter' under Paragraph 64.(1).

13. Learned counsel for the applicant submitted that the respondents themselves waived the notice under Clause 61.(1), inasmuch as, they not only extended the period for completion of work, but also issued specific directions to the applicant to undertake various works under the contract on specified dates. In this regard, it is submitted that by letter dated 17.9.2021, the contract was extended from 1.4.2021 to 31.12.2021. By letter dated 6.4.2021, the Senior Section Engineer (Works), North Eastern Railway, Chapra, directed the applicant to get soil testing done. By letter dated 19.9.2022, the applicant was directed to undertake the launching work which was one of the important stages of construction of LHSW. It is urged that the aforesaid act of the respondents clearly amounts to waiver of notice under Clause 61.(1).

14. I have considered the rival submissions and perused the material on record.

15. It is clear from the rival contentions that the main dispute between the parties is – whether the claim of the applicant is arbitrable or not; whether it would fall under the ‘excepted matter’ as notice under Clause 61 was duly given or the said notice having been waived, the bar relating to non-arbitrability of certain matters under Clause 63 would not apply.

16. It is not disputed that the respondents served the applicant with notice dated 30.9.2020. Although it does not specifically refer to Clause 61.(1), but its tenor would definitely bring it within the ambit of Clause 61.(1). The respondents, however, have not disputed that after service of the said notice, they themselves extended the period for completion of work from 1.4.2021 to 31.12.2021 by letter dated 17.9.2021. It is also not disputed that by letter dated 6.4.2021, the Senior Section Engineer (Works), North Eastern Railway, Chapra required the applicant to get the soil tested. The specific case of the applicant is that the opposite parties themselves kept on issuing directions from time to time to the applicant to execute various works under the contract. On 5.5.2022, the opposite parties informed the applicant that he can carry out launching work at the site on 9.6.2022 and 14.6.2022. This fact is admitted to the respondents in their letter dated 19.9.2022. The opposite parties also asked for evidence from the applicant to prove payment of any money for mobilizing machinery and workmen for the said purpose to consider his claim in this behalf. The opposite parties at the same time, have also taken a stand that despite their repeated reminders to the applicant not to carry on further work at the site, the applicant himself insisted on doing the work.

17. The rival contentions regarding arbitrability, in my view, cannot be decided in the instant proceedings. Its adjudication requires appreciation of evidence. The scope of judicial review in deciding issue of arbitrability is very limited. The position of law in this regard has been succinctly laid

down by Supreme Court in **Vidya Drolia and Others vs. Gujarat Informatics Limited**<sup>1</sup>. The principles laid down therein are as follows: -

*"153. Accordingly, we hold that the expression "existence of an arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the Court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the Court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.*

*154. Discussion under the heading "Who Decides Arbitrability?" can be crystallised as under:*

*154.1. Ratio of the decision in Patel Engg. Ltd. on the scope of judicial review by the Court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.*

*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 non-existent, 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*

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<sup>1</sup> (2021) 2 SCC 1

*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."*

*(emphasis in original and supplied)*

18. In the said judgment, it has been observed that while deciding issue of arbitrability, the Court under Section 11(6) has a very limited power, confined to cases where there is not even a vestige of doubt that the claim is non-arbitrable<sup>2</sup>.

19. In the instant case, having regard to the nature of rival contentions and the evidence before me, it cannot be said that the claim is outrightly non-arbitrable. In my view, it cannot be decided at this stage, as it involves deciding debatable questions of fact, therefore, the issue should be left open to be decided by the arbitrator.

20. One more contention of the opposite parties is that the applicant has not invoked the mechanism provided under the agreement and had straightaway sought appointment of arbitrator. Therefore, the application deserves to be rejected.

21. The record reveals that the applicant had given notice on 4.7.2022 to the opposite parties, specifying each claim and requesting the respondents to honour the same and release not only the payment for the loss and damages suffered by the applicant, but also release performance guarantee, EMD, security deposits, etc. It was further prayed that an arbitrator be appointed at the earliest to consider the claims without delay.

22. The said notice was replied to by the opposite parties on 23.09.2022 wherein they have referred to all the claims made by the applicant and

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<sup>2</sup> BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738, para 47 : (2021) 3 SCC (Civ) 352

thereafter observed that the aforesaid claims are not sustainable in view of the fact that the contract was cancelled under Clause 61.(1).

23. It is clear from the stand of the respondents that the opposite parties had flatly refused to refer the dispute to the arbitrator as in their view, the claim fell under the 'excepted matter'. Once that was the stand of the opposite parties, the prayer of the applicant for appointment of arbitrator by this Court cannot be rejected on the ground that the applicant has not followed the procedure prescribed for invoking the arbitration clause.

24. Accordingly, the application is **allowed**.

25. This Court proposes the name of Sri Shashi Kant Gupta, retired Judge of this Court, for being appointed as Arbitrator. His address is 9, Elgin Road (in front of Heart Line Hospital), Civil Lines, Prayagraj (U.P.), Mobile No. 9415216833.

26. Let the consent of Sri Shashi Kant Gupta be obtained by the office in terms of the provisions contained in Section 11(8), read with Section 12(1) of the Act by sending a letter to him.

27. In case, the proposed arbitrator does not give his consent or makes disclosures in terms of sub-section (1) of Section 12, the application will be listed before the Court for the limited purpose of proposing name of alternate arbitrator.

28. The arbitrator shall be entitled to fees and expenses as per IV Schedule of the Act.

**(Manoj Kumar Gupta, ACJ.)**

**Order Date :- 19.1.2024**  
SK/Jaideep