

\$~34

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ARB.P. 147/2016

SHAPOORJI PALLONJI & CO. PRIVATE
LIMITED

..... Petitioner

Through: Mr Chandra Sekhar Jha, Mr Rahul
Ginodia and Md. Naved, Advocates.

versus

KORBA WEST POWER COMPANY LIMITED
& ANR

..... Respondents

Through: Mr D.K. Malhotra and Mr Rajesh
Kumar Malhotra, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **27.09.2016**

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an Arbitral Tribunal be constituted for resolution of the disputes that have arisen between the parties.

2. The petitioner states that sometime in the year 2009, the respondents had invited bids for Site and Infrastructure Works Package for its 1x600 MW Avantha Thermal Power plant at Raigarh, Chattisgarh which was being executed by respondent no.1 (hereafter 'KWPCCL'). The petitioner's bid was accepted and the respondents issued a letter of award (LOA) dated 28.10.2009. Subsequently, on 03.11.2009, an agreement for execution of the said works was also entered into between the petitioner and KWPCCL. The petitioner states that certain disputes have arisen in respect of the said

agreement and consequently the petitioner, by its letter dated 21.03.2015, invoked the arbitration clause; the petitioner nominated its Arbitrator and called upon respondent no.1 to nominate its Arbitrator. Since the respondent no.1 failed to nominate its Arbitrator, the petitioner has filed this petition.

3. The learned counsel appearing for the respondents states that he does not dispute the execution of the said agreement or the existence of the arbitration clause. He, however, submits that respondent no.2 is not a party to the arbitration agreement and, therefore, no arbitration proceedings can be commenced against respondent no.2. The learned counsel for the petitioner disputes the aforesaid position and contends that bids were invited by respondent no.2 and further all communications in connection with the award of the contract were also to respondent no.2. He submits that although the project was being executed by KWPCCL, but respondent no.2, being the holding company of KWPCCL had commenced the process for awarding the contract.

4. I have heard the learned counsel for the parties.

5. The agreement dated 29.01.2010 is between the petitioner and KWPCCL. The LOA was also issued by KWPCCL. In the circumstances, I am unable to accept that any arbitration agreement exists between the petitioner and respondent no.2.

6. The Arbitration clause under the agreement reads as under:

"If, any dispute or difference of any kind whatsoever arises between the client and the Contractor in connection with or arising out of the Contract or carrying

out of the works, it shall be first referred to and settled by the designative representatives of the owner and the Contractor.

In case of dispute cannot be mutually settled within 45 days from the date of resolution proceedings, then the same will be resolved by the Arbitration Tribunal of three arbitrators as per Arbitration & Conciliation Act 1996 and the latest amendments. Each party shall nominate one arbitrator on its behalf within a period of thirty days of the notice issued by aggrieved party and such two nominated arbitrators shall appoint presiding arbitrator. In case the arbitrators appointed by each party fails to come to an agreement on the choice of the presiding arbitrator then the matter will be referred to Indian Arbitration Counsel for selecting the presiding arbitrator from their panel which will be binding on both the parties. Award of such arbitration tribunal shall be final and binding on the parties. The seat of arbitration shall be New Delhi."

7. In view of the aforesaid, the Arbitral Tribunal is required to be constituted for resolving the disputes that have arisen between the petitioner and respondent no.2 in connection with the LOA dated 10.12.2009 and the agreement dated 29.01.2010.

8. At this stage, the learned counsels appearing for the parties request that instead of an Arbitral Tribunal of three members being constituted, a Sole Arbitrator be appointed for adjudication of the disputes.

9. In view of the aforesaid submissions, Justice Vikramajit Sen, (Retired), former Judge of the Supreme Court, is appointed as the Sole

Arbitrator to adjudicate the disputes between the parties. The fees of the Arbitrator shall be in terms of schedule IV to the Act.

10. The parties are at liberty to approach the Arbitrator for the preliminary hearing.

11. Needless to mention that both parties shall also be entitled to file their claims/counter claims before the Arbitrator in respect of the aforesaid agreement.

12. The petition is disposed of.

VIBHU BAKHRU, J

SEPTEMBER 27, 2016
RK