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

+ **ARB.P. 157/2016**

**PATNA WATER SUPPLY DISTRIBUTION
NETWORKS PRIVATE LIMITED**

..... Petitioner

Through: Mr Rajiv Bansal, Mr Prashant, Ms
Charu Ambwani, Mr Anurag Tripathi
and Ms Tanya Jolly, Advocates.

versus

**BIHAR URBAN INFRASTRUCTURE
DEVELOPMENT CORPORATION
LIMITED & ANR.**

..... Respondents

Through: Mr Shivam Singh and Mr A. Awasthi,
Advocates for R-1.
Mr Rudreshwar Singh, Advocate for
R-2.

**CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU**

**ORDER
25.10.2016**

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VIBHU BAKHRU, J

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 appointed for adjudicating the disputes that have arisen between the Petitioner and Respondent no.1 (hereafter 'BUIDCo') in relation to a tripartite agreement dated 24.09.2012.

2. BUIDCo issued a notice inviting tender for the work of Design, Construction, Installation, Commissioning of Water Treatment Plant (WTP) and Water Supply distribution network in Patna. On 07.12.2011 bid

documents were issued for Design, Construction, Installation, Commissioning, Management, Operation and Maintenance of Intake, Raw Water Pump House (RWPH), 220 MLD Water Treatment Plant and Water Supply Distribution Network in Patna, Bihar. In terms of the Bid Document, the bid for the said contract could also be submitted by a consortium of bidders. However, if they were successful, the consortium members were required to incorporate a Special Purpose Vehicle ('SPV').

3. In terms of the bid document, Gammon India Limited and Geo Miller Co. Private Limited submitted a bid as a consortium (Gammon-Geo Miller Consortium). The bid submitted by Gammon-Geo Miller Consortium was found to be the lowest and on 27.02.2012, BUIDCo issued a Letter of Acceptance (LOA) accepting the said bid.

4. Thereafter on 28.03.2012, a Tripartite Agreement was entered into between the Gammon-Geo Miller Consortium, BUIDCo and Respondent no.2. The said contract was essentially between the Gammon-Geo Miller Consortium and BUIDCo and respondent No.2 was described as the "beneficiary" of the contract.

5. The aforesaid contract was for performance of the contract pending incorporation of a Special Purpose Vehicle (SPV). Thereafter, on 21.05.2012, in terms of the bid documents, the consortium members incorporated the petitioner (as the SPV).

6. Thereafter the Tripartite agreement dated 24.09.2012 was entered into between the petitioner, BUIDCo and respondent No.2 for performance of the contract bid by the Gammon-Geo Miller Consortium.

7. It is stated that certain disputes have arisen between the parties in relation to the said Tripartite Agreement. The Conditions of Contract between the parties contained a disputes resolution mechanism. The relevant clauses of the said Conditions of Contract are set out below:-

"20.2 Dispute Resolution

- a) Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Counter (including its interpretation) between the Parties and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the procedure set forth in sub-Clause 20.3 hereunder.
- b) The parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Contract promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

20.3 Conciliation by Expert Committee

- a) In the event of any Dispute between the Parties, either Party may call upon their Senior representative to mediate and assist the Parties in arriving at an amicable settlement thereof. The Senior representatives shall, within a period of 28 days from the day on which the notice of dispute has been sent by one Party to the other, meet in Patna, India as and when necessary from time to time and attempt in good faith and use their best endeavours at all times to resolve the dispute and produce written terms of settlement.
- b) Failing mediation by the Senior Representatives of the Parties within 56 (fifty six) days after the receipt of the notice as provided above or without the intervention of the

Senior representatives, either party may decide to refer the dispute to a 3 - member committee of independent experts (the 'Expert Committee') possessing adequate experience in the design, construction, operation and maintenance of water treatment Et distribution facilities and/ or finances, accounting, costing and valuation practices, as the case warrants. Each of the Parties shall nominate one member (independent of the Party Et not connected to implementation of the Project) to the Expert Committee, who shall then appoint the third member. The expert Committee shall stand constituted within a maximum period of 28 (twenty eight) days from the date of referral of a Dispute to Expert Committee.

- c) If such meeting does not take place within the 7 (seven) days period of constitution of the Expert Committee or the Dispute is not amicably settled within 21 (twenty one) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 28 (twenty eight) days of the meeting or such Longer period as may be mutually agreed by the Parties. Either party may refer the Dispute to arbitration in accordance with the provisions of clause 20. 6.
- d) The party referring the Dispute to Expert Committee will provide the Expert Committee with written submission of the nature of the Dispute and the claim of the other Party along with supporting documents which may be supplemented with additional information, if so called upon by the Expert Committee for resolution of the Dispute.
- e) The costs of the engagement of the Expert Committee shall be shared equally by the Parties."

"20.4 Arbitration

- a) Any dispute which is not resolved amicably by

conciliation of the Expert Committee, as provided in Clause 20.3 shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with this Clause 20.4. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules") or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Patna, Bihar (India) and the language of arbitration proceedings shall be English.

- b) There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.
- c) The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 20.4 shall be final and binding on the Parties as from the date it is made, and the Contractor and the Employer agree and undertake to carry out such Award without delay.
- d) The Contractor and the Employer agree that an Award may be enforced against the Contractor and/or the Employer, as the case may be and their respective assets wherever situated.
- e) This Contract and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder. "

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CLAUSE 24 - MISCELLANEOUS CONDITIONS

24. 1 Governing law and jurisdiction

This Contract shall be construed and interpreted in accordance with and governed by the laws of India, and the courts at Delhi shall have jurisdiction over matters arising out of or relating to this Contract."

8. It is stated that the petitioner sent communications for an amicable resolution of the disputes by Senior Representatives however the disputes remained unresolved. It is averred that the petitioner appointed Mr B.J. Vasvda as an expert by a letter dated 04.12.2014 and called upon BUIDCo to appoint an expert in terms of Clause 20.3(b) of the Conditions of Contract. However, BUIDCo did not appoint any expert as required. Thereafter, the petitioner sent a letter dated 18.02.2015 nominating Mr B.J. Vasavada as its arbitrator on the Board of Arbitrators and called upon BUIDCo to appoint its arbitrator on the Board of Arbitrators. Admittedly, BUIDCo has not appointed any person as an arbitrator and therefore, the arbitral tribunal has not been constituted.

9. Mr Rajiv Bansal, learned counsel appearing for the petitioner submitted at the outset that this Court would have jurisdiction to entertain the present petition as, in terms of clause 24 of the Conditions of Contract, the parties have agreed that the courts at Delhi would have jurisdiction over matters arising out of the Contract. He further submits that the parties have also agreed that the Rules of Arbitration of the International Centre for Alternative Disputes Resolution would be applicable. He further submitted that the said issue had been conclusively decided against BUIDCo by this Court in a Petition filed under Section 9 of the Act (being order dated

27.02.2015 in OMP No. 1247/2014). It is stated that the said decision was apparently accepted and BUIDCo has not appealed against the same.

10. The learned counsel appearing for BUIDCo did not dispute the existence of the Tripartite Agreement dated 24.09.2012 or the arbitration clause. He, however, opposed the present petition on four grounds. First of all, he submitted that the present petition is barred by the principles of *res judicata* as the petitioner had preferred a “similar petition” before the High Court of Patna. Secondly, he submits that the agreement in question is a tripartite agreement and therefore, it was incumbent upon the petitioner to serve a notice of arbitration on respondent No.2 as well. He contends that since no such notice was served on respondent No.2, the present petition is liable to be rejected. Thirdly, he submits that the arbitration clause is unworkable as the contract in question is a tripartite agreement and, therefore, BUIDCo and respondent No.2 cannot be called upon to appoint a single arbitrator. Fourthly, he submitted that the disputes between the parties are to be referred to arbitration as per Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008 (hereafter the ‘Bihar Act’).

11. Learned counsel appearing for respondent No.2 submitted that respondent No.2 is not involved in the disputes between the petitioner and BUIDCo.

12. I have heard learned counsel for the parties.

13. At the outset, it is relevant to note that although BUIDCo in its reply has contended that this Court does not have jurisdiction to entertain the present petition, but no such ground was pressed on its behalf. The

submissions made on behalf of the petitioner in this regard were not countered.

14. BUIDCo's contention that the present petition is barred by *res judicata* is in my view unmerited as admittedly, the petitioner has not filed any application under Section 11 of the Act before the Patna High Court. BUIDCo has filed status of case No. CWJC-5826/2016 to indicate that the petitioner had filed a similar application, however, it is apparent from the case number that the petition referred to by BUIDCo is a writ petition and Mr Bansal confirms that no prayer for referring the disputes to arbitration was made in the said petition.

15. Admittedly, no court has considered or rendered any decision on the issue whether an arbitral tribunal is to be constituted, which is the only controversy involved in this petition. Thus, the question of present petition being barred by principles of *res judicata* does not arise.

16. The second contention that the present petition is premature as no notice of arbitration has been served on respondent No.2 is also bereft of any merit. Although, the agreement in question is a tripartite agreement, the covenants are essentially between the 'employer' and the 'contractor', that is, between the petitioner and BUIDCo. This is clear from the opening paragraph of the said agreement which reads as under:

“NOW THEREFORE, in consideration of the mutual covenants, terms and conditions and undertakings set- forth in this Contract and other good valuable consideration (the receipt and adequacy of which are hereby acknowledged), the Employer and the Contractor with the intent to be legally bound, hereby agree as follows:-”

17. BUIDCo is referred to as an 'employer' in the Tripartite Agreement and the petitioner is referred to as a 'contractor'. Respondent No.2 is only a beneficiary of the Tripartite Agreement in question and its role is only to assist/facilitate BUIDCo as is apparent from clause 5 of the Tripartite Agreement in question which reads as under:-

"5. Patna Nagar Nigam undertakes to assist/ facilitate BUIDCo in the execution of the project and shall inform to BUIDCo for remedy of defects occurred during defects liability period and to take over the constructed facility from BUIDCo for further operation and maintenance after the Defect Liability Period."

18. It is also relevant to note that the arbitration clause is only for reference of the disputes between the parties. The term "party" is defined under the Conditions of the Contract as under:-

"1.1.2.1 "Party" means the Employer or the Contractor, as the context requires."

19. Learned counsel for the respondent has also submitted that it has no role to play in the disputes and therefore, should be deleted from the array of parties.

20. The third contention that the arbitration clause is not workable is also not sustainable. First of all, the arbitration clause is for resolution of the disputes between the petitioner and BUIDCo, as stated above and therefore, there is no necessity for respondent no. 2 to be a party to the appointment of the arbitrator. Even if it is assumed that respondent No.2 is a necessary party, it is well settled that nomination of arbitrators is on the basis of identity of interests and therefore, merely because two parties having similar

interests have to jointly nominate an arbitrator would not render an arbitration clause unworkable as is sought to be contended on behalf of the petitioner. In any case, the said question does not arise in the present case as the arbitration is only in respect of the disputes between the petitioner and BUIDCo.

21. Lastly, it is submitted that disputes have to be referred to the Tribunal constituted under the Bihar Act. Section 8 of the Bihar Act clearly provides that the provisions of the Bihar Act are in addition to and supplemental to the Act. In the present case, the parties have expressly agreed for resolution of the disputes under the Arbitration and Conciliation Act, 1996 and therefore, there is no scope of a reference being made to the Tribunal constituted under the Bihar Act. Section 8 of the Bihar Act is set out below:

"8. Act to be in addition to Arbitration & Conciliation Act, 1996 - Notwithstanding anything contained in this Act, any of the provisions shall be in addition to and supplemental to Arbitration and Conciliation Act, 1996 and in case any of the provision contained herein is construed to be in conflict with Arbitration Act, then the latter Act shall prevail to the extent of conflict."

22. The aforesaid question was also considered by the Patna High Court in **M/s Nilkamal Ltd., Patna vs The State of Bihar & Ors.: Request Case NO. 1 of 2014 decided on 17.10.2014.** In that case, the Court rejected the objection raised as to the maintainability of a petition under Section 11 of the Act and observed as under:-

"This Court is of the view that if the agreement is silent or

if there is specific stipulation about the resolution of dispute through the State Tribunal in that circumstances the parties will have a forum of Tribunal under the Act for resolution of the dispute."

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"In view of the judgments aforesaid it is apparently clear from the State Act and Central Act both are supplemental to each other and State Act is no derogation to the Central Act. In this situation it is very difficult to arrive to the conclusion of excluding the jurisdiction of this Court in entertaining the application for appointment of arbitrator when the agreement provides that the dispute will be resolved through Arbitration Act, 1996. "

23. I respectfully concur with the aforesaid view and the question of referring the disputes under the Bihar Act would arise only in cases where the parties had expressly agreed for resolution of their disputes under the Act and the disputes fall within the scope of disputes as contemplated under Section 2 (e) of the Bihar Act.

24. The learned counsel for the BUIDCo also stated that to its knowledge there was no case other than *Nilkamal* (Supra) where the issue had been considered.

25. Therefore it is necessary that an arbitrator to be nominated by BUIDCo be appointed by this Court. However the learned counsel for the petitioner submits that instead of appointing an arbitrator which was to be nominated by BUIDCo, this Court may constitute a Tribunal of three arbitrators. This suggestion is not opposed by the learned counsel for the

BUIDCo. Accordingly, Mr S.M. Aggarwal, ADJ (Retd) (Mobile No.9891983608) and Mr Inder Pal Singh Anand, IRTS (Retd) (Mobile No.9811841411) are appointed as Arbitrators and Justice R. C. Jain, (Retd), former Judge of this Court, (Mobile No.9818000380) is appointed as the Presiding Arbitrator. The Registry is directed to communicate a copy of this order to the said arbitrators. The parties are also at liberty to approach the arbitrators. It is clarified that this is subject to the necessary disclosures under section 12 (1) of the Act and subject to provisions of Section 12 (5) of the Act.

26. The petition is disposed of.

OCTOBER 25, 2016
RK/pkv

VIBHU BAKHRU, J