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

+ **ARB.P. 705/2016**

KRIBHCO INFRASTRUCTURE LIMITED Petitioner

Through: Ms Surekha Raman, Advocate.

versus

**TEXMACO RAIL & ENGINEERING
LIMITED**

..... Respondent

Through: Mr Dhruv Dewan, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **10.11.2016**

IA Nos. 13926-13927/2016

1. Exemptions are allowed, subject to all just exceptions.
2. The applications are disposed of.

IA No. 13928/2016

3. For the reasons stated in the application, the delay of 15 days in re-filing the application is condoned.
4. The application is disposed of.

ARB.P. 705/2016

5. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that a Sole Arbitrator be appointed for adjudicating the disputes that have arisen between the parties in respect of the agreements dated

11.08.2010 (two in number) which were made pursuant to Letter of Intent (LOIs) dated 15.04.2010.

6. Both the aforesaid agreements – except for the scope of supplies to be made – are similar in all material aspects. The said agreements also include a similarly worded arbitration clause, which is set out below:-

“4.25 ARBITRATION

- i Any dispute or differences whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the provisions of the Arbitration & Conciliation Act, 1996 and the award made in pursuance thereof shall be binding on the parties.
- ii The performance under this contract shall not stop for any reason whatsoever during the said dispute/proceedings, unless the contractor/SUPPLIER is specifically directed by OWNER/buyer to desist from working in this behalf.
- iii. The venue of arbitration shall be New Delhi.
- iv. The language of proceedings shall be English.
- v. The Law governing the substantive issues between the parties shall be the Laws of India.”

7. Mr Dewan, the learned counsel appearing for the respondent does not dispute the existence of the aforesaid agreements or the existence of the arbitration clause. He, however, opposes the present petition on two grounds.

8. First, he submits that the respondent has already preferred a winding

up petition being Company Petition No. 620/2015 in respect of the amounts due from the petitioner to the respondent. He states that the respondent had made a claim for sum of ₹3,89,14,971/- in the said petition as being amounts which according to the respondents are admittedly due and payable by the petitioner to the respondent. He submits that since the amount is not in dispute, there would be no question of appointing an arbitrator to examine the issues. He further submits that even if the petitioner disputes the aforesaid sum, the disputes have to be decided by the Winding Up Court.

9. Second, he submits that there are two agreements, both dated 11.08.2010 and the scope of supplies in the two agreements are also different. He, therefore, contends that single petition in respect of the two agreements cannot be entertained.

10. Ms Surekha Raman, learned counsel appearing for the petitioner stoutly disputes the aforesaid contentions. She submits that the scope of examination under Section 11(6A) of the Act is now only limited to examining the existence of an arbitration agreement. And, that is not disputed in this case. She further referred to the petitioner's notice dated 22.04.2016 invoking the arbitration clause and submitted that the said notice pertained to both the agreements in question. Further, the respondent also responded to the aforesaid notice by a letter dated 17.05.2016 and no distinction was made in the said response to the two agreements. Furthermore, the subject matter of the respondent's claim before the Company Court also pertains to both the agreements.

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

12. Insofar as the respondent's first submission is concerned, the fact that respondent's petition regarding its claim is pending before the Company Court, would not preclude the petitioner from initiating action for what it claims to be its legitimate dues. The contention that the disputes regarding the claim in question would be decided by the Company Court is also misconceived. It is trite law that a company court, while considering a petition to wind up a company on account of the company's inability to pay its debt, does not decide rival claims of parties; the only question relevant in those proceedings is whether the company in question is unable to pay its debts. In the event, the winding up court finds that there is a *bonafide* dispute as to the amount allegedly claimed as due and payable by the company, the petition for winding up of the company on account of inability to pay debts must fail. Thus it, obviously, follows that a company opposing a Winding up petition on the ground that there are *bonafide* disputes regarding the amount claim cannot be restrained for initiating action for resolution of those disputes.

13. The initiation of arbitration proceedings does not in any manner preclude the winding up court from taking an independent view as to whether the company in question has failed and neglected, despite the receipt statutory notice, to pay an amount which is due and payable to the petitioner.

14. I also find much merit in the petitioner's contention that with the introduction of Section 11(6A) of the Act by virtue of the Arbitration and Conciliation (Amendment) Act, 2015, the scope of examination under Section 11 of the Act is now limited to examining the existence of the

arbitration clause. And, in this case, the existence of the arbitration agreement is not disputed.

15. The second submission that a singular petition has been filed in respect of two agreements is also inconsiderable. In the present case, the agreements are identically worded and the notice invoking the arbitration also pertains to both the agreements. The respondent itself has also not made any distinction in responding to the said notice. Admittedly, despite the notice invoking the arbitration, the Arbitrator has not been appointed in respect of both the agreements. In the given facts, the objection raised by the respondent is only a technical objection and relegating the petitioner to file a separate petition would in the facts of the present case not be appropriate.

16. In view of the fact that there is no dispute that the petitioner has invoked the arbitration clause and the parties are unable to mutually agree for appointment of an arbitrator, a sole Arbitrator is required to be appointed for adjudication of the disputes relating to the two agreements.

17. Accordingly, it is directed that an Arbitrator be appointed under the Rules of the Delhi International Arbitration Centre (DIAC) to adjudicate the disputes in connection of the two agreements.

18. The parties shall file separate pleadings in respect of the two agreements and the Arbitrator shall pass separate awards. This is, of course, subject to the parties agreeing to the contrary.

19. The representatives of the parties shall appear before the Co-

ordinator, DIAC on 29.11.2016 at 11:00 AM. The arbitration shall be conducted under the aegis of DIAC and in accordance with its Rules. The parties are at liberty to file separate pleadings.

20. The petition is disposed of.

VIBHU BAKHRU, J

NOVEMBER 10, 2016
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