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

% ***Order delivered on: 9th May, 2016***

\+ **Arb. P. No.343/2015**

TRADING ENGINEERS INTERNATIONAL LIMITED ..... Petitioner
Through Mr.Dhanesh Relan, Adv. with Ms.Akshita Manocha, Adv.

versuss

TRI MURTHY HITECH COMPANY PVT. LTD. ..... Respondent
Through Mr.Amarjit Singh, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J. (ORAL)

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') for appointment of an independent sole Arbitrator.

2. Brief facts of the petition are that on 6th May, 2013, the petitioner and the respondent (joint venture) were awarded a project by Southern Railways vide LOI No. E.320/CN/ERS/WC/OT/OHE/11 for which the petitioner and the respondent entered into an Memorandum of Understanding (MOU) as well as the Joint Venture dated 22nd May, 2013 wherein it was agreed that the respondent would quote electrical tenders, execute contracts and provide trained man force and infrastructure for projects whereas the petitioner would provide financial requirements such as Bank Guarantee or Tender Cost, approve vendors for galvanized steel structures, supply those structures on cost basis and arrange funds for execution of contract within 15 days from the date of awarding of the contract.

3. It is further stated in the petition that due to inability on the part of the petitioner to continue the work under the Joint Venture dated 22nd May, 2013, both the parties signed another MOU on 11th March, 2014, whereby the petitioner was allowed to exit the Joint Venture and the principal investment of the petitioner was to be refunded by the respondent.

4. However, the respondent failed to refund the same despite repeated requests and reminders by the petitioner. The petitioner, therefore, sent a legal/demand notice dated 15th December, 2014, whereby the respondent was requested to either make the payment of Rs.1,50,90,828.69 /- (principal amount including interest and bank charges payable by the respondent) or approve the appointment of Mr. Justice R.C. Jain, Retired Judge of this Court, in terms of the clause 3 of the General Terms of MOU dated 22nd May, 2013 and Section 11(6) of the Act. However, the respondent has failed to reply to the said notice nor made the refund of the aforesaid amount. Hence, the present petition has been filed by the petitioner.

5. Notice of the petition was issued to the respondent. Reply has been filed. In the reply, it is stated that this Court has no territorial jurisdiction to entertain and try the present petition as both the parties to the petition are not residing or working in Delhi. No commitment or work was done within the jurisdiction of this Court.

6. It is stated that the petition is not maintainable and the petitioner has no locus standi to file the petition and there is no arbitration clause in MOU dated 11th March, 2014. It is also stated

that as per last para of the said MOU, the amount will be refunded whenever the same will be returned by the Railway Department. Since the amount has not yet been returned by the railway department, therefore there is no dispute between the parties. Hence, the petition is without any cause of action and no necessary ingredients of Section 11 of the Act are pleaded or alleged in the petition.

7. The proposed arbitrator appointed by the petitioner is very close to the directors of the petitioner company who cannot adjudicate any dispute between the parties fairly and impartially.

8. Counsel for both the parties have made their submissions. Let me deal with the rival submissions of the parties. The respondent has not denied the fact of execution of MOU/agreement dated 22nd May, 2013 which contains the arbitration clause 3. The same reads as under:-

> "3. This MOU shall be governed by and construed in accordance with the laws of India any dispute or differences arising under the Agreement shall be referred to Arbitration by sole arbitrator in Delhi, India to be appointed with the mutual consent of the Both parties and such arbitration shall be held in accordance with the (Indian) Arbitration & Conciliation Act, 1996, and any re-enactment or modification thereof and judgement upon the award rendered may be entered in the High Court of Delhi or in any other court in India of competent jurisdiction. The arbitral award shall be treated as final and binding on the parties thereto. All proceedings shall be in the English language."

9. The respondent has also not denied the factum of execution of MOU dated 11th March, 2014. The relevant extract of same are reproduced here as under:-

"MEMORANDUM OF UNDERSTANDING

This MOU is made on DATE 11-03-2014 Between Trimurthi Hitech Company Pvt. Ltd Chennai herein Called the first party and Trading Engineers (Intl) Ltd. Gurgoan here in called the second party. Both the parties made a JV Dated 22 May 2013 to participate in Over Head Electrification work in various Indian Railway Departments.

As per JV a contract was awarded by Southern Railway vide LOI No. E.320/CN/ERS/WC/OT/OHE/11 Dated 06-05-2013. Now due to unavoidable circumstances party No.2 has expressed their inability to continue the work as per JV.

Now after mutual discussion it has been decided that party No.1 will exit the JV and there principal investment will be refunded the amount invested in this project is as under. Since the LC opened by second party has expired hence it will extended by them.

S.No.	Description	Amount in Rs.
1.	Payment and material supplied	85,21,630
2.	Purchase of material against LC	42,98,303.00
	Total	

The payment at serial No. 1 Will be made as under with bank interest @ 13% PA from the date of signing this understanding.

S.No.	Description	Amount in Rs.
1.	June 2014	10 Lacs
2.	July 2014	10 Lacs
3.	August 2014	20 Lacs

4.	September 2014	45,21,630
	Total	85,21,630.00

Payment at serial No.2 will be made at the time of LC maturity by the First party with all actual bank charges and interest.

All payments will be made by PDC cheques.

JV a contract Tender No. E.320 / CN / ERS / OT/ OHE - 12 was Quoted and the LOI for the same was also issued.

S.No.	Description	Amount in Rs.
1.	Payments	3,31,330.00

Now due to unavoidable circumstances party No.2 has expressed their inability to execute this tender. Ist Party is also not interested to execute the PO & will try to void forfeiting of EMD amount of Rs.3,31,330.00. 1st Party will return EMD amount, whenever if returned by Railway."

10. The respondent has admitted that no amount was paid to the petitioner as mentioned in the MOU dated 11th March, 2014. The only explanation is given that since no payment is received from employer therefore, the petitioner is not entitled to receive the said amount. The submission of the respondent is that the subsequent MOU dated 11th March, 2014 has no arbitration clause. The earlier agreement was novated by the agreement/MOU dated 11th March, 2014, which does not have arbitration clause, thus the petitioner has only the civil remedy to recover the amount.

11. As far as arbitration clause is concerned, prima facie I do not agree with the argument of the learned counsel for respondent after reading the MOU dated 11th March, 2014, rather it appears that the

subsequent agreement/MOU is in continuation of earlier agreement/MOU. Even otherwise, law in this regard is very clear. Reliance is placed on the decision of ***Mulheim Pipecoatings GMBH v. Welspun Fintrade Limited & Anr*** 2014 (3) ALLMR 838 which supports the arguments addressed on behalf of the petitioner. In the said judgment it was held as under:

> "31. We now formulate the essential features of the doctrine of separability. These are:
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> (i) The arbitration agreement constitutes a collateral term in the contract which relates to the resolution of disputes and not to the performance of the contract. Whereas the substantive terms of a contract define the rights and obligations of the parties, an arbitration agreement provides for modalities agreed upon by parties for the resolution of their disputes. Parties agree thereby to have their disputes resolved before an arbitral tribunal as distinct from the ordinary courts of law in the jurisdiction;
>
> (ii) Upon the termination of the main contract, the arbitration agreement does not *ipso facto* or necessarily come to an end;
>
> (iii) The issue as to whether the arbitration agreement survives or perishes along with the main contract would depend upon the nature of the controversy and its effect upon the existence or survival of the contract itself;
>
> (iv) If the nature of the controversy is such that the main contract would itself be treated as *non est* in the sense that it never came into existence or was void, the arbitration clause cannot operate, for along with the original contract, the arbitration agreement is also void. Similarly, though the contract was validly executed, parties may put an end to it as if it had never existed and substitute a new contract solely governing their rights and liabilities there under. Even in such a case, since the original contract is extinguished or

annihilated by another, the arbitration clause forming a part of the contract would perish with it;

(v) There may, however, be cases where it is the future performance of the contract that has come to an end. Such an eventuality may arise due to a number of circumstances, in which one or both the parties may be discharged from further performance. Termination of the contract by one party, repudiation of the contract by one party and its acceptance by the other and frustration of the contract are some of the circumstances. The controversy in such matters arises upon or in relation to or in connection with the contract. In all such cases, the contract is not put an end to for all purposes because there may be rights and obligations which had arisen earlier when it had not come to an end. The contract subsists for those purposes and the arbitration clause would operate for those purposes;

(vi) The doctrine of separability requires, for the arbitration agreement to be null and void, inoperative or incapable of performance, a direct impeachment of the arbitration agreement and not simply a parasitical impeachment based on a challenge to the validity or enforceability of the main agreement. In other words, arguments for impeaching the arbitration agreement must be based on facts which are specific to the arbitration agreement. There may, of course, be facts which are specific to both the main agreement and the arbitration agreement, but there may well be facts which are specific to the main agreement, but not to the arbitration agreement. In the former case, the arbitration clause would perish with the main contract while in the latter case, it would not. Another way of considering the matter is whether it is the further performance of the contract that is brought to an end or it is the existence of the contract which is brought to an end. In the former case, where the further performance of the contract has been brought to an end, the arbitration clause would survive whereas when the

> existence of the contract is itself brought to an end, the arbitration clause would not survive."

12. Therefore as appears the arbitration agreement is an independent agreement and continues to bind the parties to perform the contract in future.

13. With regard to the disputes raised by the respondent that the MOU executed between the parties on 22nd May, 2013 has become infructuous, inoperative and non-existent after the execution of subsequent MOU dated 11th March, 2014. The said disputes have to be decided by the Arbitral Tribunal.

14. In view of above, the prayer made in the petition is liable to be allowed. Accordingly, Mr. Dinesh Agnani, Senior Advocate (Chamber No. 265, Lawyers' Chambers, Delhi High Court, New Delhi, Mob. No. 9811082336), is appointed as sole Arbitrator to adjudicate the disputes between the parties as mentioned in the present petition.

15. Both the parties are also allowed to file their respective claims and counter-claims before the Arbitrator.

16. The learned Arbitrator is expected to decide the disputes within 12 months from today.

17. Both the parties shall pay the fee as per the schedule of the Arbitration and Conciliation (Amendment) Act, 2015. The Arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The arbitration proceedings shall take place in the High Court premises itself.

18. Copy of the order to be given dasti to both the parties and the learned Arbitrator shall be communicated by the Registry forthwith.

19. Parties to appear before the sole arbitrator on 27th May, 2016 at 4.30 pm for direction.

20. The petition is accordingly disposed of.

(MANMOHAN SINGH)
JUDGE

MAY 09, 2016