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

+ ARB.P. 57/2017

VIVEK CONTRACTS PVT. LTD.

..... Petitioner

Through: Mr Parvez Bashista and Mr Mukesh
Kumar, Advocates.

Versus

GAIL (INDIA) LTD.

..... Respondent

Through: Mr Anurag Kishore, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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12.04.2017

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation, 1996 (hereafter 'the Act'), *inter alia*, praying that an arbitrator be appointed to adjudicate the disputes that have arisen between the parties in relation to an agreement dated 26.12.2011. Indisputably, the General Conditions of the Contract (GCC) includes an arbitration clause, which is set out below:-

“107 Arbitration:

107.1 Unless otherwise specified, the matters where decision of the Engineer-in-Charge is deemed to be final and binding as provided in the Agreement and the issues/disputes which cannot be mutually resolved within a reasonable time, all disputes shall be referred to arbitration by Sole Arbitrator. The

Employer [GAIL (India) Ltd.] shall suggest a panel of three independent and distinguished persons to the bidder/contractor/supplier/buyer (as the case may be) to select any one among them to act as the Sole Arbitrator. In the event of failure of the other parties to select the Sole Arbitrator within 30 days from the receipt of the communication suggesting the panel of arbitrators, the right of selection of the sole arbitrator by the other party shall stand forfeited and the EMPLOYER (GAIL) shall have discretion to proceed with the appointment of the Sole Arbitrator. The decision of Employer on the appointment of the sole arbitrator shall be final and binding on the parties. The award of sole arbitrator shall be final and binding on the parties and unless directed/awarded otherwise by the sole arbitrator, the cost of arbitration proceedings shall be shared equally by the parties. The Arbitration proceedings shall be in English language and venue shall be New Delhi, India. Subject to the above, the provisions of (Indian) Arbitration & Conciliation Act, 1996 and the Rules framed there under shall be applicable. All matter relating to this contract are subject to the exclusive jurisdiction of the court situated in the state of Delhi Bidders/suppliers/contractors may please note that the Arbitration & Conciliation Act, 1996 was enacted by the Indian Parliament and is based on United Nations Commission on International Trade Law (UNCITRAL model law), which were prepared after extensive consultation with Arbitral institutions and centers of International Commercial Arbitration. The United Nations General Assembly vide resolution 31/98 adopted the UNCITRAL Arbitration rules on 15 December, 1976.

107.2 FOR THE SETTLEMENT OF DISPTUES

BETWEEN GOVERNMENT DEPARTMENT
AND ANOTHER AND ONE GOVERNMENT
DEPARTMENT AND PUBLIC ENTERPRISE
AND ONE PUBLIC ENTERPRISE AND
ANOTHER THE ARBITRATION SHALL BE AS
FOLLOWS:

“In the event of any dispute or difference between the parties hereto, such dispute or difference shall be resolved amicably by mutual consultation or through the good offices of empowered agencies of the Government. If such resolution is not possible, then, the unresolved dispute or difference shall be referred to arbitration of an arbitrator to be nominated by Secretary, Department of Legal Affairs (“Law Secretary”) in terms of the Office Memorandum No.55/3/1/75-CF, dated the 19th December, 1975 issued by the Cabinet Secretariat (Department of Cabinet Affairs), as modified from time to time. The Arbitration Act, 1940 (10 of 1940) shall not be applicable to the arbitration under this clause. The award of the Arbitrator shall be binding upon parties to the dispute. Provided, however, any party aggrieved by such award may make a further reference for setting aside or revision of the award to Law Secretary whose decision shall bind the parties finally and conclusively.

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- 107.4 Any dispute {s)/difference{s)/issue{s) of any kind whatsoever between/amongst the parties arising under/out/of/in connection with this contract shall be settled in accordance with the afore said rules.
- 107.5 In case of any dispute(s)/difference(s)/issue(s), a party shall notify the other party(ies) in writing

about such a disputes(s)/difference(s) issue(s) between/amongst the parties and that such a party wishes to refer the disputes(s)/difference(s)/issues(s) to conciliation. Such invitation for conciliation shall contain sufficient information as to the dispute(s) difference(s)/issue(s) to enable the other party(ies) to be fully informed as to the nature of the dispute(s)/difference(s)/issue(s), the amount of monetary claim, if any, and apparent causes(s) of action.

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107.8 Where invitation for conciliation has been furnished, the parties shall attempt to settle such dispute(s) amicably under part-III of the Indian Arbitration and Conciliation Act, 1996 and GAIL (India) Limited Conciliation Rules, 2010. It would be only after exhausting the option of conciliation as an Alternate Dispute Resolution Mechanism that the parties here to shall go for Arbitration. For the purpose of this clause, the option of ‘Conciliation’ shall be deemed to have been exhausted, even in case of rejection of Conciliation by any of the parties.”

2. According to the petitioner, certain disputes have arisen between the parties in relation to the said agreement and, accordingly, the petitioner invoked the arbitration clause by its letter dated 24.10.2016. The respondent responded to the aforesaid clause by its letter dated 02.12.2016 suggesting three names and calling upon the petitioner to select any one of those names to be appointed as an arbitrator. The petitioner rejected the said suggestion citing various reasons including that the respondent had delayed in the

appointment of the arbitrator.

3. The learned counsel for the respondent has opposed the present petition principally on the ground that there are no disputes between the parties. It is stated that the petitioner issued a 'no claim certificate', *inter alia*, confirming that their entitlement as per the final bill dated 10.08.2015, was for a sum of ₹1,71,45,365/-. It is earnestly contended on behalf of the respondent that in view of the said 'no claim certificate', the arbitration clause also stood discharged.

4. It is also contended that if an arbitrator is appointed, he should be out of one of the three names as suggested by the respondent.

5. The learned counsel for the petitioner countered the submission made on behalf of the respondent. He also drew the attention of this Court to clause 15 (c) of the contract, which is set out below:-

“(C) **No Dues Certificate**

The contractor shall submit No Dues Certificate (NDC) for the net payment as finalized in the final bill before release of payment. The final bill shall be paid only on submission of NDC, otherwise final bill will be paid only after one year of submission of the same, as per GAIL's policy and no claim of contractor shall be entertained thereafter.”

6. He has submitted that in terms of the above quoted clause, a 'no claim certificate' has to be furnished before the final bill payment is made. And, in terms of the said clause, the petitioner submitted a 'no claim certificate' specifying the amount due under the final bill, however, the respondent

failed to pay the same. He further submitted that the respondent cannot insist on appointing the arbitrator as suggested by the respondent as the respondent had taken no steps to appoint the arbitrator prior to the petitioner moving this Court.

7. The contention that the arbitration agreement stood discharged by the submission of the 'no claim certificate' is, unsustainable given that such certificate had to be issued prior to payment of the final bill and the disputes also involve the question whether such payments were made. A plain reading of the 'no claim certificate' also indicates that it is furnished in anticipation of the receipt of the payment and is not an acknowledgment thereof. It is also necessary to observe that the petitioner's request for arbitration was not declined by the respondent for the reason that it had received a 'no dues certificate'; on the contrary, the respondent had suggested three persons, any one of whom could be appointed as a arbitrator.

8. The learned counsel for the petitioner has further asserted that out of the sum of ₹1,71,45,365/-, which was stated to be the amount due and payable, the respondent has withheld a sum of ₹1,19,58,488/-. In other words, the petitioner's claim includes the amount withheld from the final amount as indicated in the 'no claim certificate'. Thus, it cannot be accepted that the arbitration clause stood discharged by the 'no claim certificate'.

9. The respondent's contention that an arbitrator be appointed only out of the names as suggested by the respondent is also unpersuasive. In terms of the decision of the Supreme Court in **Datar Switchgears Ltd v. Tata**

Finance Ltd and Anr. : (2000) 8 SCC 151, if the respondent fails to appoint an arbitrator prior to the petitioner moving the Court, the respondent would forfeit its right to appoint an arbitrator. In the present case, the arbitration clause enables the respondent to appoint an arbitrator in the event there was a default on the part of the petitioner in selecting one of the names as suggested by the respondent. And, in view of the petitioner rejecting the three names as suggested by the respondent, the respondent was entitled to proceed to appoint the arbitrator. However, it is not disputed that the respondent had taken no steps to appoint an arbitrator prior to the petitioner moving this Court.

10. In view of the above, an arbitrator is required to be appointed. Accordingly, Justice Sunita Gupta (Retired), a former Judge of this Court (Mobile No.9910384628) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act. The Arbitrator's fee shall be fixed in consultation with the counsel for the parties. The parties are at liberty to approach the Arbitrator for eliciting the necessary disclosure and for further proceedings.

11. The petition is disposed of.

VIBHU BAKHRU, J

APRIL 12, 2017
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