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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 113/2017

**PNC DELHI INDUSTRIALINFRA PRIVATE
LIMITED**

..... Petitioner

Through: Mr. Vikas Goel with Mr. Abhishek
Kumar, Mr. Vivek Gupta and Ms. Arushi Gupta,
Advocates.

versus

**DELHI STATE INDUSTRIAL & INFRASTRUCTURE
DEVELOPMENT CORPORATION**

..... Respondent

Through: Ms. Ansuya Salwan, Advocate.

CORAM: JUSTICE S.MURALIDHAR

ORDER

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03.02.2017

1. This is a petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 ('Act') filed by the Petitioner, PNC Delhi Industrial Infra Private Limited, seeking the appointment of an Arbitrator to adjudicate the disputes between the Petitioner and the Respondent, Delhi State Industrial & Infrastructure Development Corporation ('DSIIDC'), arising out of the Concession Agreement ('CA') dated 19th July, 2011.
2. Notice. Ms. Ansuya Salwan, learned counsel accepts notice on behalf of the Respondent.
3. With the consent of the parties, the petition is finally heard.

4. The Court finds that in respect of the disputes that have arisen the parties have been exchanging correspondence. For the purpose of this present petition, reference may be made to a letter dated 22nd November, 2016 written by the Petitioner to the Respondent with the subject matter: "Request under Section 19.1 of the Concession Agreement for Amicable Settlement." *Inter alia* it was pointed out therein that three annuity payments of Rs. 21.5 crores each was due and that the completion certificate had already been issued by the Engineer on 3rd March, 2014. It was further stated in the letter: "Please note that in terms of Section 19.3, the amicable settlement, if any, has to be arrived at within 30 days from the date of reference for amicable settlement, i.e., within 30 days of the date of this letter. You are accordingly requested to do the needful at the earliest."

5. As it transpires, no reply was sent to the above letter by the Respondent. Following the above letter, another letter was written by the Petitioner to the Respondent on 22nd December, 2016. This time the Petitioner invoked the arbitration clause under Section 19.3 of the CA and sought reference of disputes to the arbitration. The Petitioner pointed out that in terms of Section 19.3 (a) (i), the Respondent was to provide "a list of five (5) Arbitrators to enable us to choose three (3) of them so that one of the three (3) arbitrators chosen by us is appointed as a sole Arbitrator".

6. Ms. Salwan, learned counsel for the Respondent has handed over in Court a copy of the letter dated 27th January, 2017 written by the Respondent to the Petitioner where *inter alia* the Respondent has exercised its right to conduct an audit of the Petitioner's books of accounts in terms of Section 11.7 (c) of

the CA through an Auditor. It is further stated that the audited report that would be prepared by the Auditor appointed by the Respondent can be utilized in arriving at an amicable settlement. Ms. Salwan objects to the prayer in the present petition by pointing out that as suggested in its letter dated 27th January 2017, after the accounts of the Petitioner are audited, the parties should go before an 'Expert' in terms of Section 19.2 of the CA. It is urged that only after completion of the above steps can the stage of appointment of an Arbitrator be reached.

7. At this stage, it is necessary to refer to the relevant clauses in the CA which read as under:

“Section 19.1 Amicable Settlement

(a) If any dispute or difference or claims of any kind arises between the parties in connection with construction, interpretation or application of any terms and conditions or any matter or thing in any way connected with or in connection with or arising out of this Agreement, or the rights, duties or liabilities of any party under this Agreement, whether before or after the termination of this Agreement, then the Parties shall meet together promptly, at the request of any Party, in an effort to resolve such dispute, difference or claim by discussion between them.

Section 19.2 Assistance of Expert

(a) The Parties may, in appropriate cases agree to refer the matter to an Expert appointed by them with mutual consent. The Parties agree to abide by the decision/opinion of the Expert. The cost of obtaining the service of the Expert shall be shared equally between the Parties.

Section 19.3 Arbitration

(a) Arbitrators

In the event the dispute or difference or claim, as the case may be, is

not resolved, as evidenced by the signing of the written terms of settlement by the Parties, within 30 (thirty) days of reference for amicable settlement and/or settlement with the assistance of Expert, as the case may be, the same shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. The arbitration shall be by a sole arbitrator, appointed in accordance with the following:

(i) DSIIDC shall provide to the Concessionaire a list of five arbitrators to be the sole arbitrator under this Agreement (the “Sole Arbitrator”).

(ii) The Concessionaire shall select three arbitrators from the list provided by DSIIDC, and inform DSIIDC of its selection.

(iii) DSIIDC shall choose one arbitrator from amongst them, who will be appointed as the Sole Arbitrator.

(b) Place of Arbitration

The place of arbitration shall be Delhi.

(c) English Language

The request for arbitration, the answer to the request, the terms of reference, any written submissions, any orders and rulings shall be in English and, if oral hearings take place, English shall be the language to be used in the hearings.

(d) Procedure

The procedure to be followed within the arbitration, including appointment of arbitrator /arbitral-tribunal, the rules of evidence which are to apply shall be in accordance with the Arbitration and Conciliation Act, 1996.

(e) Enforcement of Award

Any decision or award resulting from arbitration shall be final and binding upon the Parties. The Parties hereto hereby waive, to the extent permitted by law, any rights to appeal or to review of such

award by any court or tribunal. The Parties hereto agree that the arbitral award may be enforced against the Parties to the arbitration proceeding or their assets wherever they may be found and that a judgement upon the arbitral award may be entered in any court having jurisdiction thereof.

(f) Fees and Expenses

Subject to determination by the arbitrators, DSITDC and the Concessionaire shall bear and pay in equal proportions the fees and expenses of the arbitrators and all other expenses of the arbitration (half by DSIIDC and half by the Concessionaire). The arbitrators may provide in the arbitral award for the reimbursement to the prevailing Party of its costs and expenses in bringing or defending the arbitration claim, including legal fees and expenses incurred by such Party.

(g) Performance during arbitration

Pending the submission of and/or decision on a dispute, difference or claim or until the arbitral award is published, the Parties shall continue to perform all of their obligations under this Agreement without prejudice to a final adjustment in accordance with such award.”

8. It is seen that the parties have agreed to a time-bound resolution of their disputes in three steps. The first is attempting an amicable settlement. The next is going before an Expert. However, in terms of Section 19.2, both the parties have agreed to refer the matter to an Expert “appointed by them with mutual consent.” The step envisaged in Sections 19.1 was initiated by the Petitioner by its letter dated 22nd November, 2016, but was not responded to within time by the Respondent for more than 30 thereafter. This led the Petitioner to trigger the process under Section 19.3 (a) of the CA. The pre-condition for such trigger was that the disputes were not resolved “within 30 days of reference for amiable settlement and/or settlement with the

assistance of Expert.” This pre-condition stood satisfied. since no reply was received by the Petitioner within 30 days from the date of the letter dated 22nd November, 2016. Therefore, the Petitioner was within its rights to invoke the arbitration clause.

9. Even as regards the Petitioner's letter dated 22nd December, 2016, no response was received by the Petitioner within 30 days thereafter. The reply of the Petitioner is dated 27th January, 2017. Mr. Vikas Goel, learned counsel for the Petitioner, points out that the said letter was delivered to the Petitioner only on 1st February, 2017 whereas the present petition was filed on 31st January 2017. Be that as it may, the said letter does not respond to the request for reference of the disputes to arbitration.

10. Having missed the bus as regards the request for an amicable settlement made by the letter dated 22nd November 2016, it was incumbent on the Respondent, in response to the Petitioner's invocation of the arbitration clause by its letter dated 22nd December 2016, to have forwarded to the Petitioner five names of the arbitrators from which the Petitioner would have chosen three names, and one amongst them one would have been appointed as sole Arbitrator. Upon the failure of the Respondent to adhere to the procedure outlined in the arbitration clause in the CA, the jurisdiction of this Court under Section 11 (6) of the Act is attracted. The Court, therefore, finds no impediment in the Court proceeding to appoint an Arbitrator to adjudicate the disputes between the parties.

11. Accordingly, the Court proposes that Mr. Justice Shiva Kirti Singh, a former Judge of the Supreme Court (Mobile No. 9899016327) shall be the

sole Arbitrator to adjudicate the disputes between the parties including their claims and counter-claims. In the first instance, the proposed Arbitrator will make a disclosure in terms of Section 11 (8) read with Section 12 (1) of the Act and, thereafter, enter upon reference. In the event the disclosure is not made within a reasonable time or such disclosure discloses the inability of the proposed Arbitrator to act as such, it will be open to the parties to apply to this Court for directions. The proposed Arbitrator shall fix his own terms and communicate them to the parties.

12. The parties are directed to appear before the proposed Arbitrator on 7th March, 2017 at 4:00 pm or such changed time and/or date that the proposed Arbitrator finds convenient which will be communicated to the parties at least ten days in advance. The venue for the first hearing will be arranged by the Petitioner and communicated to the proposed Arbitrator and the Respondent at least one week prior to the date fixed. The expenses for the hearing shall be equally shared by the parties.

13. The petition is disposed of in the above terms. Order be given *dasti*. A certified copy of this order be delivered to the proposed Arbitrator forthwith.

S.MURALIDHAR, J

FEBRUARY 03, 2017

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