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

+ **ARB.P.449/2017**

Date of decision : 24th October, 2017

NOIDA TOLL BRIDGE COMPANY LIMITED Petitioner

Through **Mr.Suhail Dutt, Sr. Adv. with**

Mr.Lynn Perera and

Mr.Chaitanya Kaushik, Advs.

versus

NEW OKHLA INDUSTRIAL DEVELOPMENT AUTHORITY

..... Respondent

Through **Mr.Ravindra Kumar, Adv.**

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

This is a petition under Section 11(4) of Arbitration and Conciliation Act, 1996 (hereinafter referred as the said Act) seeking direction for appointment of an arbitrator by New Okhla Industrial Development Authority, the respondents herein. The parties had entered into a Concession Agreement dated 12.11.1997 with respect to the Delhi-Noida Bridge Project. Clause 26.1 of the said agreement provides that in the event of any dispute, controversy or claim arising

between the parties in connection with the said agreement, the same shall be settled by a panel of arbitrators in accordance with the Indian Arbitration and Conciliation Act, 1996. The arbitration panel shall consist of three arbitrators, one each to be appointed by the parties to the agreement and the third to be appointed by the two such appointed arbitrators. Clause 26.1(a) specifically records that the arbitration proceedings shall take place in Delhi.

2. On a Public Interest Litigation i.e. PIL No. 60214/12, Noida Residents Welfare Association v. Noida Toll Bridge Company Limited, High Court of Allahabad vide its order dated 26.10.2016 held clause 13 of the Concession Agreement to be bad and inoperative in the eyes of law. It further held that the method of calculation of total project cost under Clause 14 of the Concession Agreement is also arbitrary and against the public policy. This order has been challenged by the petitioner before the Supreme Court by way of SLP (Civil) No. 33403/16 and the same is pending adjudication. There is no stay of the order passed by the Allahabad High Court.

3. The petitioner by way of notice dated 14.02.2017 invoke the arbitration clause in the Concession Agreement. It further, by notice dated 31.05.2017, appointed its nominee arbitrator and called upon the respondent to appoint its nominee arbitrator in terms of the arbitration agreement. As the respondent failed to appoint its nominee arbitrator, a further notice dated 03.07.2017 was sent by the petitioner to the respondent. The respondent vide its reply letter dated 18.07.2017 inter-alia observed that in view of pendency of the matter before the

Supreme Court, it would neither be proper nor possible for the respondent to accede the request of the petitioner for reference of the disputes to the arbitration or to consent to appoint its nominee arbitrator. This forced the petitioner to file the present petition before this Court.

4. Upon notice being issued to the respondent, respondent has filed its reply to the petition. It has been contended that this Court would lack territorial jurisdiction to entertain the present petition in as much as the cause of action, if any, has arisen in the State of Uttar Pradesh and the respondent is also having its office in the State of Uttar Pradesh and has no office within the territorial jurisdiction of this Court. I am afraid I cannot agree with the said submission. As noted above, clause 26.1(a) of the Concession Agreement records that the place of arbitration shall be Delhi. It has been repeatedly held that for purposes of jurisdiction under the said Act, it is the place of arbitration which shall prevail and not the subject matter of the suit or the place of residence of the defendant/respondent.

5. The learned Senior Counsel for the petitioner has relied upon the judgement of the Supreme Court in ***Bhart Aluminium Company v. Kaiser Aluminium Technical Services INC.*** (2012) 9 SCC 552 and ***Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd. and Ors.*** (2017) 7 SCC 678. In the latter judgment, the Supreme Court, in fact, holds and reiterates that once the seat of arbitration has been fixed, it would be in the nature of an exclusive jurisdiction clause as to the Courts which exercise supervisory power over the arbitration.

Reference has also been drawn to the judgment of this Court in ***Ion Exchange (India) Ltd. v. Panasonic Electric Works Co. Ltd.*** (2014) 4 High Court Cases (Del)1, wherein the Division Bench of this Court held that the Courts at the sitting or place of arbitration would have territorial jurisdiction to entertain an application under the said Act subject to the provisions of Section 42 thereof, irrespective of the fact that the cause of action arose elsewhere and/or the respondent resides elsewhere.

6. In view of the above, I find no merit in the objection raised by the respondent as far as territorial jurisdiction of this Court is concerned.

7. Though, the arbitration agreement itself is not denied by the respondent, learned counsel for the respondent submits that in view of the judgment of Allahabad High Court and the pendency of the appeal before the Supreme Court, the disputes raised by the petitioner are by themselves not arbitrable, at this stage at least. He submits that the petition is therefore, premature. I am afraid that even this submission of the learned counsel for the respondent cannot be sustained. Under Section 11(6A) of the Act, the examination of the Court on an application under Section 11 (4), 11(5) and 11(6) has been confined to the existence of an arbitration agreement. In *Picasso Digital Media Pvt. Ltd. v. Pick-A-Cent Consultancy Service Pvt. Ltd.* (Arbitration Petition 22/2016), this Court in its order dated 19.1.2016, relying on the said provision, held that the Court, at this stage, cannot examine whether the respondent has justified claim against the petitioner and

this question will have to be examined in the arbitration proceedings itself.

8. In view of the above, I find no impediment for appointment of an Arbitrator on behalf of the respondent in terms of Clause 26.1 (a) of the Concession Agreement dated 12.11.1997. Accordingly, Justice Satya Barta Sinha, (Retired) [Mob. No.9868219666] is appointed as a nominee Arbitrator on behalf of the respondent.

9. It is made clear that nothing in this order should be treated as an expression of opinion on the merits of the claim or the defence of either party.

The petition is accordingly disposed of.

NAVIN CHAWLA, J

OCTOBER 24, 2017/vp