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

+ **ARB. P. 592/2017**

Date of decision: 12th December, 2017

M/S NAKSHATHRA CONSTRUCTION, THR. ITS
PROPRIETOR Petitioner

Through Ms.Tatini Basu, Adv.

versus

M/S INTERGEN ENERGY LIMITED Respondent

Through Mr.Prashant Mehta, ms.Neha
Tanwar, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) has been filed by the petitioner M/s Nakshathra Construction seeking appointment of an Arbitrator for adjudication of the disputes that have arisen between the petitioner and the respondent namely M/s Intergen Energy Ltd.

2. It is the case of the petitioner that one M/s Bollareddy Satyanarayan Reddy (hereinafter referred to as Bollareddy) had been awarded work for construction of Guard Pond for respondent's 1.5 MLD CETP Project at Atchutapuram SEZ, Vizag. The Work Order dated 15th September, 2015 had been

executed between the respondent and Bollareddy. Clause-8 of the Work Order contains the Arbitration Agreement between the respondent and Bollareddy. The same is reproduced herein below:-

“8) Arbitration

If any disputes or difference of any kind whatsoever shall arise between the parties in connection with or arising out of the obligations under this order (and whether before or after the termination on breach of this order) parties hereto shall promptly and in good faith negotiate with a view to its amicable resolution and settlement. In the event no amicable resolution or settlement is reached within a period of 30 (Thirty) days from the date on which the dispute or difference arose, such dispute or difference shall be: done as per law and in the venue of the Arbitration should be at New Delhi.”

3. The Work Order was amended vide amendment dated 5th October, 2015, terms wherein are not relevant for the purpose of the present petition.

4. It is submitted by the counsel for the petitioner that the work order allowed Bollareddy to employee sub-contractors and in exercise of such power, Bollareddy appointed the petitioner as a sub-contractor under ‘Sub-Contract Agreement’ dated 5th October, 2015 executed between the petitioner and Bollareddy. Admittedly, the said agreement does not contain an arbitration clause and the respondent is not a signatory to the same.

5. Bollareddy also executed a Special Power of Attorney dated 15th September, 2016 appointing Mr.Boddu Hari Krishna as its lawful Attorney, including amongst other things ‘to carry out any Settlement Agreement with the employer’. The ‘employer’ here means the ‘respondent’. Counsel for the petitioner submits that Mr.Boddu Hari Krishana is the Sole proprietor of the petitioner.

6. Counsel for the petitioner further submits that a Settlement Agreement was arrived at between the parties on 17th September, 2016 whereunder the respondent had agreed to pay a total sum of Rs.2.10 crores to the petitioner against the petitioner’s claim of Rs.3.7 crores. At this stage itself, I may note that this agreement is between Bollareddy and the respondent, though Bollareddy was being represented by Mr.Boddu Hari Krishna.

7. The petitioner claims to have invoked the Arbitration Agreement vide its notice dated 10th July, 2017. The respondent, in its reply dated 14th August, 2017, while denying the claim of the petitioner, did not dispute the existence of an Arbitration Agreement but only refused to give their concurrence to the proposed Arbitrator.

8. In the above facts, the petitioner has filed the present petition seeking the appointment of a Sole Arbitrator.

9. Counsel for the respondent submits that there is no Arbitration Agreement between the parties. The Arbitration Agreement was between the respondent and Bollareddy. Bollareddy is not a party in this petition and, therefore, the petition is not maintainable. It is further submitted that upon execution of the Settlement Agreement, the Arbitration Agreement between Bollareddy and the respondent would also cease to exist and, therefore, no Arbitrator can be appointed for there exists, no dispute under Work Order dated 15th September, 2015 as amended on 5th October, 2015.

10. Counsel for the petitioner has placed reliance on the judgment of *M.R.Engineers & Contractors Pvt. Ltd. vs. Som Datt Builders Ltd.* (2009) 7 SCC 696 to contend that the Arbitration Agreement between Bollareddy and the respondent would get incorporated by reference in the sub-contract agreement dated 5th October, 2015 executed between Bollareddy and the petitioner. This may be correct, however, that would not bring into existence an Arbitration Agreement between the petitioner and the respondent. It is re-emphasized that there is no agreement executed between the petitioner and the respondent herein; the 'Sub-Contract Agreement' was executed between the petitioner and Bollareddy and the respondent is not a party to the same.

11. Section 2(1) (h) of the Act defines 'party' to mean a party to an Arbitration Agreement. Section 7(1) of the Act defines an

“Arbitration Agreement” to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them. In terms of Section 7(3) of the Act, such agreement has to be in writing. Such agreement can also be inferred from exchange of letters, telegrams or other means of telecommunications, or as provided in Section 7(5) of the Act, by way of reference in a contract to a document containing an arbitration clause, where such reference is to make that arbitration clause part of the contract. However, the pre-condition is that such contract must be between the parties. As the respondent is not a party to the ‘Sub-Contract Agreement’ and admittedly there is no contract between the petitioner and the respondent executed, there cannot be said to be an Arbitration Agreement in existence between the parties.

12. Counsel for the petitioner has placed reliance on the judgment dated 31st July, 2015 of the Punjab and Haryana High Court in ***Vikram Walia vs. S.D.College Educational Society, Barnala & Ors. in*** Arbitration Case no.202/2014. In that case, the only question was whether an Arbitration Agreement contained in one of the agreement executed between the parties can be said to have been incorporated in the other agreement by reference. The Court held that once the second agreement stated that all terms and conditions of the first agreement will get incorporated in the second agreement, this would also include the Arbitration Agreement. As discussed above, in the

present case, the question is not whether the ‘Sub-Contract Agreement’ would have an Arbitration Agreement incorporated into the same by reference or not, but whether the respondent, not being a party to the same, can be said to be a party to an Arbitration Agreement with the petitioner.

13. Counsel for the petitioner then refers to the judgment of the Orissa High Court in *Indiana Conveyors Ltd. vs. Indian Rare Earths Limited* AIR 2007 ORISSA 162. The said case is on interpretation of a clause in the agreement and holds that a contract that provides for arbitration is a commercial agreement interparty and has to be interpreted in such a manner as to give an efficacy to the agreement rather than to invalidate. However, in my opinion, the said judgment cannot be read to mean that even when there is no Arbitration Agreement between the parties, the Court must or may presume one to be in existence.

14. Counsel for the petitioner has also placed reliance on the judgment of the Supreme Court in *M/s Larsen & Toubro Ltd. vs. M/s Mohan Lal Harbans Lal Bhayana* (2015) 2 SCC 461, wherein again the question was whether the sub-contract executed between the Contractor and the sub-Contractor would also contain the Arbitration Agreement as contained in agreement between the Contractor and the Principal Employer. In the said judgment, the Supreme Court, in fact, clearly held that where the Contractor does not dispute the final bill with the Principal Employer, the sub-Contractor being dissatisfied with

the same, can only raise a claim against the Contractor and that too under the Arbitration Agreement contained in the sub-contract. I may only reproduce para 21 of the said judgment as under:-

“21) Accordingly while allowing this appeal and setting aside the order of the High Court, we would like to give the following directions, in order to balance the equities:

(1) It shall be ensured by the appellant that final bill is settled by SCOPE within two months from the date of receiving the copy of this order. For this purpose, this order shall be brought to the notice of SCOPE as well so that SCOPE acts swiftly for settling the bill.

(2) In case there are certain claims of the respondent which are not agreed to while passing the final bill and disputes remain, those will be taken up by the appellant with SCOPE immediately thereafter by invoking arbitration between the appellant and SCOPE as per the Arbitration Agreement between the appellant and SCOPE. In raising such disputes the appellant and the respondent shall act in unison as per the understanding arrived at between them vide supplementary agreements. In that event, arbitral tribunal shall be constituted within 2 months thereof.

(3) In case the appellant is satisfied with the final bill and choose not to raise the claims with SCOPE but the respondent feels that their claims are legitimate then it would be treated as dispute between the appellant and the respondent. In that event, arbitral tribunal shall be constituted as per Clause 25 of the agreement dated

3.3.1998 between the parties within a period of two months of that event.

(4) In either of the aforesaid arbitrations, the arbitral tribunal shall endeavour to render its award within six months from the date of the constitution of the arbitral tribunal.”
(emphasis supplied)

15. In the present case, as noted above, Bollareddy is not a party to the present petition and it is not known whether Bollareddy has any claim against the respondent or not. The dispute, if any, would therefore, be one between the petitioner and Bollareddy if it arises in relation to the Sub-Contract and in case it arises out of the Work Orders dated 15th September, 2015 and 5th October, 2015, it would be between Bollareddy and the respondent and not the petitioner and the respondent.

16. As far as the plea of Settlement Agreement dated 17th September, 2016 making the Arbitration Agreement between Bollareddy and the respondent as having worked itself out, I need not, in this petition, give any finding on the same as Bollareddy is not a party to these proceedings and any observation that may be made by this Court while deciding the said issue may cause prejudice to any claim that Bollareddy may have against the respondent.

17. In view of the above, I find no merit in the present petition, the same is accordingly dismissed with no order as to costs.

NAVIN CHAWLA, J

DECEMBER 12, 2017

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