

ARBITRATION APPLICATION No.16 OF 2016

ORDER:

This is an application by M/s. Isgec Heavy Engineering Limited, seeking appointment of an Arbitrator under Sub-sections 5 and 6 of Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act').

2. The respondent, M/s. Turbomachinery Engineering Industries Limited has filed a counter-affidavit to this application contending that there is no privity of contract with M/s. Isgec Heavy Engineering Limited and its contractual relationship was with M/s. Isgec John Thompson. The other plea is that though there was exchange of communication, the awardee of the work, namely, M/s. Isgec Heavy Engineering Limited, did not ultimately respond to the final notice. The respondent had taken the stand that all monies due under the contract have been paid and nothing remains for further payment of consideration.

3. It is worthwhile to notice that even in the application, the applicant is described as “M/s. Isgec Heavy Engineering Limited (formerly known as Isgec John Thompson, a unit of The Saraswati Industrial Syndicate Limited), an existing company within the meaning of the Companies Act, 1956 having its Registered Office at Yamuna Nagar, Haryana-135001 and its Corporate Office at A-4, Sector-24, Noida-201301, Uttar Pradesh”. The said description stands explained through a reply to the counter-affidavit, which has been placed on record by the applicant in the form of an affidavit sworn to by the Vice President-Legal & Constituted Attorney of the applicant.

4. In the light of the aforesaid facts, the predominant thrust is to hold that the applicant is one, which has either stepped into the shoes of

the original contracting party or the original contracting party is a component of a larger institution, which is the applicant. It is clarified that this is not a final expression on that issue.

5. In the light of the assertions and denials, by way of affidavits, it is abundantly clear that there are disputes in relation to the contract in question. The existence of an arbitration agreement as part of the mother agreement is not in dispute. The arbitrability of any dispute is itself a matter for arbitration. The question whether there is privity of contract between the parties and M/s. Isgec Heavy Engineering Limited or whether there is no link to connect M/s. Isgec Heavy Engineering Limited and M/s. Isgec John Thompson, are all matters which could be left for consideration for arbitration since privity of contract and matters relating to the structuring of the applicant is itself a matter which may be a dispute in relation to the terms of the contract, which contains the arbitration agreement. Under such circumstances, this is a case where Arbitrators have to be appointed and all issues including privity of contract as between the parties as noticed above, would be available for the Arbitrators to decide in the event of the Arbitrators holding that they are arbitrable issues in terms of the agreement and the Act. The agreement prescribes the composition and procedure in relation to the arbitral Tribunal. The applicant is shown to have already appointed Mr. Rakesh Garg, retired Judge of Delhi Court as its Arbitrator. The respondent has through counsel mentioned that it appoints Sri Vilas V. Afzulpurkar, former Judge of this Court as Arbitrator. The appointment of the said learned Arbitrators is hereby recorded. They will follow the due procedure in terms of the Act, for appointment of the third Arbitrator and after composition of Arbitral Tribunal is completed, the arbitration proceedings may be held in accordance with law. The learned Arbitrators will be at liberty to determine their fee and amounts towards expenses.

6. In the result, this Arbitration Application is allowed

Miscellaneous applications, if any, pending in the Arbitration Application, shall stand closed. No order as to costs.

THOTTATHIL B. RADHAKRISHNAN, CJ

Date: 16th November, 2018

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