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

+ ARB.P. 524/2018

INSPIRA MARTIFER SOLAR LIMITED Petitioner
Through: Mr.Sahil Narang, Adv.

versus

ALEX GREEN ENERGY PRIVATE LIMITED Respondent
Through: Mr.Surjit Kumar, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER
% **04.10.2018**

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 seeking appointment of a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Agreement dated 23.07.2013 read with the following Contracts, all dated 23.07.2013:

- a) Contracts for Civil and Structural works dated 23 July 2013;*
- b) Contracts for Erection and Commissioning services dated 23 July 2013;*
- c) Contract for Offshore supply dated 23 July 2013;*
- d) Contract for Onshore supply dated 23 July 2013.*

2. Admittedly there is an Arbitration Agreement between the parties in terms of Clause 4 of the main Agreement and Clause 29 of the General Commercial Conditions applicable to subsidiary Contracts.

3. The petitioner invoked the Arbitration Agreement by way of its notice

dated 20.04.2018. The respondent vide its reply dated 09.05.2018 *inter-alia* observing that the claim of the petitioner would be barred by limitation as also being otherwise untenable, did not accept the nomination of any person named in the said notice as the Arbitrator. The petitioner, therefore filed the present petition.

4. Learned counsel for the respondent has handed over a copy of the reply that he proposes to file to the present petition. In the reply apart from again denying the claims of the petitioner, it is asserted that the claim of the petitioner would be barred by the law of limitation and it is further asserted that on the allegation of the petitioner, the dispute would not be arbitral in nature inasmuch as the respondent has allegedly committed fraud against the petitioner and such allegations of fraud cannot be made subject matter of arbitration.

5. In my view, the plea of limitation cannot be considered by this Court while exercising its jurisdiction under Section 11 of the Act. The same has to be necessarily considered by the Arbitrator, may be as a preliminary issue.

6. As far as the allegation of fraud is concerned, I find that the same is in relation to the performance of the obligation under the contract and is not in the nature which can be said to be a criminal offence. In **A.Ayyasamy v. A.Paramasivam and Ors.**, (2016) 10 SCC 386, the Supreme Court has explained if and when the allegations of fraud are non-arbitrable in nature and held as under:

“25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simpliciter may not be a

ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the court has to be on the question as to whether jurisdiction of the court has been ousted instead of focusing on the issue as to whether the court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of non-arbitrable subjects are carved out by the courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, courts i.e. public fora, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect viz. whether the nature

of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject-matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected.”

7. In view of the above and as the existence of the Arbitration Agreement and due invocation thereof by the petitioner are not denied by the respondent, I see no impediment in appointing a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the abovementioned Agreements/Contracts.

8. I appoint **Justice D.Murugesan**, Former Chief Justice of this Court (13 Mother Teresa Marg, New Delhi, Mob. No.8823253366) as a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the abovementioned Agreements/Contracts. The Arbitrator shall give his disclosure in terms of Section 12 of the Act before proceeding with the reference.

9. The petition is allowed in the above terms, with no order as to costs.

NAVIN CHAWLA, J

OCTOBER 04, 2018/Arya