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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 568/2018

M/S DSC LIMITED

..... Petitioner

Through: Mr.Sandeep Sethi, Sr. Adv. with
Mr.Ashish Dholakia & Mr.Gautam
Bajaj, Advs. with Mr.Anirban Bagchi,
E.I.L., D.G.M.

versus

M/S VA TECH WABAG LIMITED

..... Respondent

Through: Mr.Ashish wad & Ms.Sukriti Jaggi,
Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

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15.11.2018

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 nominee Arbitrator on behalf of the respondent for adjudicating the disputes that have arisen between the parties in relation to the Work Order dated 26.12.2011 issued by DSCL-FENG SHUN-WABAG-CONSORTIUM (hereinafter referred to as the 'Consortium'), of which the petitioner is the lead member, and the respondent. The respondent is also a member of the Consortium.
2. The Arbitration Agreement between the parties is contained in Clause 21 of the Work Order and is reproduced hereinbelow:-

"21. Arbitration / Dispute Resolution:

In case of disputes or differences arising between

DFW and VTWL relating to any matter arising out of or connected with this agreement, such disputes or differences shall be first of all settled amicably. The party claiming and invoking disputes resolution must submit full details with supporting facts and claims along with all supporting details including vouchers, bills, receipts of actual payment made and other financial documents are considered responsible for purposes of amicable settlement.

The amicable settlement shall take place by authorizing two representatives after receipt of all details as above, one to be nominated by DFW and one by VTWL. Serious attempt must be made to resolve the disputes and differences amicably.

In the event, amicable resolution be ultimately not possible, then the unresolved disputes or differences only shall be referred for arbitration in accordance with the provisions of Arbitration and Conciliation Act 1996 by a panel of three arbitrators (one appointed by Wabag, one by DFW and the third or presiding arbitrator by the two arbitrators appointed by VTWL and DFW)."

3. Disputes having arisen between the parties, the Consortium invoked the Arbitration Agreement and nominated its Arbitrator vide letter dated 17.05.2018. As the respondent failed to nominate its Arbitrator, the present petition was filed.
4. The learned counsel for the respondent submits that the petitioner has no locus to file the present petition. The Work Order was issued by the Consortium in favour of the respondent and therefore, it is only the Consortium which can maintain the present petition.
5. On the other hand the learned senior counsel for the petitioner submits that the present petition has been filed for and on behalf of the

Consortium. Drawing reference to Clause 6 of the Consortium Agreement dated 02.02.2011, he submits that the petitioner had been appointed as the Lead Consortium Member by the three partners which form the Consortium, including the respondent herein. He further makes reference to the Power of Attorney dated 02.02.2011 whereby the petitioner had been authorised by the Consortium members to act on behalf of the Consortium in all its dealings with any person in connection with the project. The relevant extract of the Power of Attorney is as under:-

*“We **M/s DSC Limited** (having its registered office at E-9, 3rd Floor, South Extension Part – II, New Delhi), **M/s Feng Shun Construction Co. Ltd.** (having its registered office at 2F-1, No. 49, Sec. 3, Zhong Shan N. Rd., Zhong Shan District, Taipei City, Taiwan, 10461), and **M/s VA Tech Wabag Limited** (having its registered office at 11, Murray’s Gate Road, Alwarpet, Chennai 600018), have formed the Consortium in the name and style of **M/s DSC – Feng Shun – Wabag Consortium** (hereinafter shall be referred to as the “Consortium”) as per Consortium Agreement ref. DJB/DSC-FengShun-Wabag/100 dated 2nd February 2011, do hereby designate **M/s DSC limited**, being Leader of the Consortium, to do any or all acts, deeds and things necessary on behalf of the Consortium, necessary or incidental to Consortium Bid for the subject work, including submission of Pre-qualification Bid, participating in conferences, responding to queries, submission of information/documents, negotiations etc. and generally to represent the Consortium in all Its dealing with Engineers India Limited ("EIL"), any other government agency or any person in connection with the project during the bidding process, entering into the Contract Agreement with EIL in the event the said work or part of the work is awarded to the Consortium and subsequently during execution of the Contract.*

*Further, knowing by all men by these presents, the Consortium do hereby constitute, appoint and authorize **Mr. H S Chauhan** S/o Late Sh. H B Singh (R/o E 116, Sector 21, Jalvayu Vihar, Noida 201301) who is presently employed with M/s DSC Limited (Leader of Consortium) and holding the position of **Senior Vice President - Business Development** as our attorney, to do in our name and on our behalf, all such acts, deeds and things necessary in connection with or incidental to our Bid for the said work, including signing and submission of all documents and providing information/responses to EIL, representing us in all matters before EIL and generally dealing with EIL in all matters in connection with our Bid for the said work.”*
(emphasis supplied)

6. Though the learned counsel for the respondent submits that the above Power of Attorney had authorised the petitioner only up to the stage of bidding and the execution of the Contract with Engineers India Limited (EIL), I am unable to agree with the same. A reading of the first paragraph of the Power of Attorney quoted hereinabove clearly shows that the Power of Attorney extended to the dealings of the Consortium with any person in connection with the project and even for the period subsequent to the execution of the Contract with EIL and during the execution of the Contract work.
7. The learned counsel for the respondent has further contended that the letter of invocation of arbitration has been signed by one Mr.B.S. Narula as the Project Director. He submits that the Power of Attorney was in favour of Mr.H.S. Chauhan and therefore Mr.Narula had no authority to invoke the arbitration.
8. On the other hand learned senior counsel for the petitioner submits that Mr.Narula is an employee of the petitioner and therefore was duly

empowered to sign the invocation letter on behalf of the Consortium. He submits that the second paragraph of the Power of Attorney as quoted hereinabove would therefore, have no application to the present case.

9. In my opinion, the Power of Attorney referred above separately empowered the petitioner and Mr.H.S. Chauhan to act as attorney of the Consortium. The petitioner has acted on its authorisation and not on basis of authorisation given to Mr.Chauhan and therefore, there is no merit in the submission of the respondent.
- 10.The learned counsel for the respondent further submits that in any case, the Power of Attorney issued in favour of the petitioner has been withdrawn by the respondent vide its communication dated 02.04.2018. I may only note that in the present case the respondent is wearing two hats; one as a Consortium member and the other as a Contractor working under the Work Order. The dispute whether the Power of Attorney has been rightly or wrongly revoked by the respondent would be a dispute under the Consortium Agreement and would have to be separately dealt with. However, as far as the position of the respondent as a Contractor is concerned, it cannot challenge the invocation of the Arbitration Agreement by the Consortium through its lead member by withdrawing the Power of Attorney given under the Consortium Agreement. If that is allowed, the Arbitration Agreement would enure only where the respondent is to raise a claim on the petitioner / Consortium as when the Consortium is to raise a claim against respondent, as in the present case, the respondent would never give consent to invocation of

Arbitration Agreement. This position got manifested when the respondent filed a petition under Section 9 of the Act against the Consortium based on the same Arbitration Agreement, however, on being confronted, withdrew the same after having enjoyed an interim order.

11. In any case, the benefit of the litigation would enure for the Consortium as a whole and not only for the petitioner, which is suing for and on behalf of the Consortium.
12. In view of the above, I see no impediment in appointing an Arbitrator on behalf of the respondent for adjudicating the disputes that have arisen between the parties in relation to the Work Order dated 26.12.2011.
13. I appoint **Hon'ble Ms. Justice Indermeet Kaur**, (R/o 62, Lodhi Estate, New Delhi-110 003. Tel. No.: 011-21420264.), Retired Judge of this Court as a nominee Arbitrator for the respondent. The petitioner has already appointed its nominee Arbitrator. The two nominated Arbitrators shall give disclosure under Section 12 of the Act before proceeding with the reference. They shall further appoint a Presiding Arbitrator for the constitution of the Arbitral Tribunal.
14. The petition is allowed in the above terms, with no order as to cost.

NAVIN CHAWLA, J

NOVEMBER 15, 2018/rv