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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 22nd October, 2018

+ ARB.P. 583/2018

ABB INDIA LIMITED

..... Petitioner

Through: Ms.Mohna M.Lal, Ms.Geetali
Talukdar, Advs.

versus

THE INDURE PRIVATE LIMITED

..... Respondent

Through: Ms.Vasundhra Bhardwaj, Adv.

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 seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Letter of Award for Design & Engineering, Manufacture, Inspection, Supply, Transportation of the entire material of Electrical System for RRVUN-Suratgarh on FOR Site basis and in relation to Letter of Award for Receipt/Unloading at site, Movement within site to its location, Complete Fabrication, Erection, Testing & Commissioning including painting and Performance

Guarantee Test of the complete Electrical System Package for RRVUN-Suratgarh, both dated 01.03.2007.

2. The said Letter(s) of Award contain Arbitration Agreements in form of Clause 19 of the first Letter of Award and Clause 20 of the second Letter of Award, which are in identical terms and are reproduced hereinunder:-

“19.0 SETTLEMENT OF DISPUTES

This will be settled as per Clause No.46 & 47 of General Terms and Conditions for supply

xxxx

20.0 SETTLEMENT OF DISPUTES

This will be settled as per Clause No.46 & 47 of General Terms and Conditions for ETC.”

3. Clause 46 and Clause 47 of the General Terms and Conditions referred to in the above clauses are reproduced hereinunder:-

“46.00 SETTLEMENT OF DISPUTES

46.1 Any dispute(s) or differences arising out of or in connection with the contract shall, to the extent possible, be settled amicably between the parties.

46.2 All unsettled dispute(s) or difference(s) arising out of or in connection with the contract shall be decided by, the Engineer whose decision shall be final and binding on the parties.

xxxx

46.3 Prior to the initiation of any/or arbitration proceedings permitted by this contract to resolve disputes between them, in the event a dispute arises between the Purchaser and the contractor regarding the application or Interpretation of this contract (a

"Dispute"), the Purchaser's Project Incharge and the contractor's representative shall use their best efforts in good faith to reach a reasonable and equitable resolution of the matter. If the Purchaser's Project Incharge and the contractor's representative are unable to resolve the matter within 30 days, either party by written notice may refer the matter for resolution by good faith negotiation between their respective senior officers with decision making power and who shall not have had substantive involvement in the matters involved in the dispute, unless the parties otherwise agree.

47.00 ARBITRATION

Where any dispute is not resolved as provided for in the clause 46 then the following provisions shall apply:

- a) The dispute shall be referred to arbitration at the request of either party upon written notice to that effect to the other party (a "Notice of Reference") in accordance with the Arbitration Rules of Indian Arbitration and Conciliation Act, 1996 in force at the date of the agreement. Where the rules do not deal with any issue arising in connection with the conduct and/or procedure of the arbitration such issue shall be resolved in accordance with the law of the place in which the arbitration is held and GTC clause 48 shall be construed accordingly.*
- b) Performance of the contract shall continue during any arbitration proceedings pursuant to above clause unless the Purchaser shall order the suspension thereof pursuant to GTC clause 44.*
- c) Upon every or any such reference, the cost of and incidental to the reference and award respectively shall be on the direction of the Sole Arbitrator so appointed who may determine the amount thereof or direct the*

same as between party & parties by whom and in what manner the same is to be borne and paid .

- d) The place of arbitration shall be Delhi and the language of the arbitration shall be English.*
- e) The parties agree that any arbitration award shall be final and binding upon the parties (to the fullest extent permitted by applicable law) and the parties waive their right to any form of appeal or other similar recourse to a court or law.*

The arbitration will take place before a Sole arbitrator who shall be nominated by the Chairman of Desein Private Limited, Desein House, Greater Kailash-II, New Delhi 110048 and acceptable to the Contractor/ Seller.”

4. Disputes having arisen between the parties, the petitioner invoked the Arbitration Agreements with respect to both the Letter(s) of Award vide a common letter dated 12.01.2018.

5. The respondent vide reply dated 13.02.2018 proposed the name of the Arbitrator, which was not acceptable to the petitioner as communicated by it to the respondent vide its letter dated 19.02.2018. In this manner, the parties could not agree on the appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties.

6. Though the respondent has not filed its reply in spite of opportunity being granted, the learned counsel for the respondent submits that the present petition is not maintainable as the petitioner has not followed the procedure prescribed in Clause 46 of the General Terms and Conditions before seeking the appointment of an Arbitrator. She further submits that in terms of Clause 47 of the

General Terms and Conditions of the contract, the Arbitrator had to be appointed by the Chairman of Desein Pvt. Ltd., to whom no notice seeking such appointment had been given and therefore, the petition is not maintainable. She submits that the petition seeks appointment of an Arbitrator with respect to two Letters of Award and such common petition is not maintainable. In any case, the petitioner has not filed authorization of the person who has filed the petition on its behalf. She further submits that the claims of the petitioner shall be barred by law of limitation.

7. I have considered the objections raised by the learned counsel for the respondent, however, find no merit in the same. The respondent itself having suggested an Arbitrator cannot now be heard to contend that the procedure mentioned in Clause 46 of the General Terms and Conditions was not followed by the petitioner. In any case, the letter dated 27.03.2018 from the respondent to the petitioner and the letter dated 16.04.2018 from the petitioner to the respondent would suggest that such conciliation meetings did happen between the parties, however, they did not bear any fruit and did not result in an amicable settlement between them.

8. As far as the failure of the petitioner to give a notice to the Chairman, Desein Pvt.Ltd, who was the appointing authority for an Arbitrator is concerned, I may note that in response to the notice invoking arbitration, which was in terms of the Clause 47(a) of the General Terms and Conditions, the respondent itself had suggested the name of the proposed Arbitrator. Presumably this was so because

the respondent and Desein Pvt. Ltd are claimed to be sister companies forming part of same group of companies.

9. The objection of the respondent regarding non filing of authorization of the person filing the petition on behalf of the petitioner, is also stated to be rejected. As noted above, in spite of opportunity being granted, the respondent has failed to file its reply to the petition. It cannot, therefore, orally challenge the authorization of the person filing the present petition on behalf of the petitioner. The petitioner has annexed alongwith the petition the authorization in favour of Mr.Kshitish Raj, who has filed the petition on behalf of the petitioner.

10. The submission of the respondent that the claim of the petitioner would be barred by the law of limitation, cannot be considered at this stage while exercising the jurisdiction under Section 11 of the Act. Section 11(6A) of the Act confines scrutiny of this Court while exercising its power under Section 11 of the Act to the existence of an Arbitration Agreement. The existence of the Arbitration Agreement has not been denied by the respondent. Whether the claim filed by the petitioner before the said Arbitral Tribunal would be barred by the law of limitation or not is a question to be considered by the Arbitral Tribunal, may be as a preliminary issue. The same cannot, however, be a ground for this Court to refuse the appointment of an Arbitrator.

11. As far as the submission of the respondent that the petitioner seeks appointment of an Arbitrator with respect to two distinct Letter(s) of Award is concerned, I find merit in the same.

12. Counsel for the petitioner submits that as the Letter of Invocation was common and even the response to the same was common from the respondent, a common petition was filed.

13. In my view, as the invocation of the Arbitration Agreement is not denied by the respondent, its objection can be answered by appointing a common Arbitrator who shall consider the disputes with respect to the two Letter(s) of Award as distinct references. It shall however, be open for the Arbitrator to conduct the two proceedings simultaneously depending upon the nature of the claims, defence and counter claims raised by the parties. This process was followed by the Supreme Court in *Duro Felguera, S.A. v. Gangavaram Port Limited*, (2017) 9 SCC 729.

14. I therefore, see no impediment in appointing a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the abovementioned Letter(s) of Award. I appoint Justice **Ms.Pratibha Rani**, former Judge of this Court (8-B, Lodhi Estate, New Delhi-110003 Mob.: 9910384626) as a Sole Arbitrator for adjudicating such disputes.

15. The Arbitrator shall give disclosure in terms of Section 12 of the Act before proceeding with the reference.

16. The Arbitrator would treat this to be two separate references with respect to the two distinct Letter(s) of Award mentioned hereinabove.

17. With the consent of the parties, it is directed that the arbitration shall be conducted under the aegis of the Delhi International Arbitration Centre (DIAC). The parties shall appear before DIAC on

26.11.2018 at 2.00 p.m. The arbitration proceedings and fee shall be in accordance with the DIAC Rules.

18. The petition is allowed in the above terms, with no order as to cost.

NAVIN CHAWLA, J

OCTOBER 22, 2018
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