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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 9th February, 2018

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ARB. P. 463/2017

ABW INFRASTRUCTURE LTD. & ANR. Petitioners

Through: Mr.T.N.Durga Prasad, Mr.A.Garg,
Mr.Rachit Aggarwal, Advs.

versus

RAIL LAND DEVELOPMENT AUTHORITY Respondent

Through: None

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 to adjudicate the disputes that have arisen due to non-signing of the 'Development Agreement' by the respondent pursuant to the Letter of Acceptance dated 19.05.2008 issued by the respondent in favour of the petitioners.

2. Admittedly, the Letter of Acceptance does not contain any arbitration agreement between the parties.

3. Learned counsel for the petitioner submits that the arbitration

agreement between the parties is contained in the ‘Development Agreement’ that was to be signed between the parties pursuant to the Letter of Acceptance. He submits that such arbitration agreement would get incorporated by reference into the Letter of Acceptance and, therefore, the arbitration agreement is in existence between the parties even though the Development Agreement may not have been signed by them. For this purpose, he places reliance on clauses 5 and 8 of the Letter of Acceptance which are reproduced herein below:

“(5) Till such time that the Development Agreement is executed between your Consortium and RLDA, this Letter of Acceptance (LOA) will constitute the contract between us. The Letter of Acceptance shall also constitute part and parcel of the subsequent Development agreement to be entered between us.

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(8) This LOA shall be read in conjunction with the RFP document including clarifications and amendments issued from to time to the bidders, Development Agreement and RFQ documents (including clarifications and amendments).”

4. In my view, the contention of petitioner cannot be accepted. Clause 5 of the Letter of Acceptance states that, till such time that the Development Agreement is executed between the parties, the Letter of Acceptance shall be considered as part and parcel of the Development Agreement that would be executed subsequently. This in fact, would mean that the terms of the Letter of Acceptance will get incorporated into a subsequently executed Development Agreement

and not *vice-versa*.

5. As far as clause 8 is concerned, it merely states that the Letter of Acceptance is to be read in conjunction with the RFP document, including clarifications and amendments issued from time to time to the bidders and the Development Agreement. It, however, in my opinion cannot be read as incorporating the terms of the Development Agreement into the Letter of Acceptance. If this was the intent, then there was no need to sign a Development Agreement at a later date. Admittedly, signing of the Development Agreement was an important step in the award of the work under the Request for the Proposal (RFP) and therefore, it cannot be said that even in case of non execution of the same, the terms thereof would get somehow incorporated into the Letter of Acceptance itself.

6. Counsel for the petitioner has placed reliance on the judgment of the Supreme Court in ***M.R.Engineers & Contractors Pvt. Ltd. vs. Som Datt Builders Ltd. (2009) 7 SCC 696*** to submit that the arbitration agreement as contained in the Development Agreement would get incorporated due to the above clauses in the Letter of Acceptance. I am unable to agree with the said submission. In ***M.R. Engineers (supra)***, the Supreme Court made a distinction in cases where the contract refers to the documents with the intent that the said document shall form a part and parcel of the contract as opposed to cases where a Contract only makes a reference to a document in a particular context. In the second case, the arbitration agreement as contained in the document so referred will not get incorporated into the main contract so as to bring into existence an arbitration

agreement between the parties in terms of Section 7 of the Act. The present is the case falling in the second category.

7. Learned counsel for the petitioner has also placed reliance on the judgment of the Supreme Court in *Inox Wind Ltd. vs. Thermocables Ltd. 2018 (1) JT 131*. In the said case, the Purchase Order that had been issued categorically mentioned that the supply would be as per the terms mentioned therein and in the attached standard terms and conditions. It was in that circumstance that the Supreme Court held that the Arbitration Agreement contained in the standard terms and conditions attached with the contract would form a part of the main Purchase Order. In the present case, however, mere reference to the Development Agreement while expressly stating that the same has to be signed subsequently, cannot make an arbitration clause in that agreement, become a part of the Letter of Acceptance by incorporation.

8. In the present case, apart from the above legal hurdle, it is also relevant to note that after issuance of the Letter of Acceptance by the respondent, certain disputes arose between the parties leading to the filing of a writ petition by the petitioner before this court being W.P.(C) No. 4320/2008.

9. The said Writ Petition was disposed of by this court vide its order dated 12.08.2008. Thereafter various correspondences were exchanged between the parties, however, admittedly, the Development Agreement was not signed between them. The petitioner thereafter filed another petition being W.P.(C) No. 13590/2009 before this court seeking a *writ of mandamus* to the

respondent to agree to the suggestion and amendments proposed by them to the draft agreement.

10. This petition was disposed of by this court vide its order dated 10.12.2009 *inter alia* holding as under:

“16. It is not possible for this Court to issue Mandamus and compel the respondent RLDA to accept new terms and conditions proposed by the petitioners. The respondent RLDA are entitled to take care of their own commercial and economic interest. The petitioners wanted to renegotiate the terms of the contract, which was considered by the respondent RLDA and a draft agreement was circulated. The petitioners wanted change in the draft agreement, which was not accepted by the respondent RLDA. It may be noted that renegotiations of the terms was between the petitioners and the respondent RLDA and no third party or other contractors were involved.

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18. In Purvankara Projects Ltd. V Hotel Venus International (2007) 10 SCC 33, the Supreme Court noticed the distinction between administrative and contractual law decisions. It observed that the concept of administrative law should not be mixed up with fair or unfair terms of the contract. The doctrine of fairness cannot be invoked to amend, alter or vary the expressed terms of the contract between the parties. Reference was also made to its earlier decision Air India Limited versus Cochin International Airport Limited, (2000) 2 SCC 617 in which it has been observed that the State can choose its own method to arrive at a decision and can fix its own terms, of invitation to tender which are normally not to be interfered with. Reference was also made to Monarch Infrastructure Private Limited versus Commissioner, Ulhasnagar Municipal Corporation (2000) 5 SCC 287 where it was held that terms and conditions in the tender are prescribed by the Government bearing in mind the nature of the contract and in such matters the authority concerned is the best judge to prescribe the terms

and conditions and it is not for the Court to prescribe conditions which they consider were better than the ones prescribed in the tender.”

11. The petitioner challenged the above order by way of SLP(C) No.30927/2017 which was also dismissed by the Supreme Court vide its order dated 29.10.2010. The petitioner thereafter filed a curative petition before the Supreme Court being Curative Petition (C) No. 23/2011, which was also dismissed vide order dated 03.03.2011.

12. The petitioner finally made a request for appointment of an Arbitrator to the respondent vide its letter dated 31.01.2012. The same was rejected by the respondent vide its letter dated 24.04.2012 on the ground that there is no arbitration agreement in existence between the parties. The petitioner did not file any petition under Section 11 of the Act at that stage, however, chose to re-represent to the respondent on this issue, which the respondent rejected vide its letters dated 06.07.2015, 09.10.2015 and 29.11.2015. It is only thereafter that the present petition was filed by the petitioner before this court on 20.07.2017.

13. I have given the above history of this litigation only to highlight that in spite of the repeated and categorical stand of the respondent that there is no arbitration agreement in existence, the petitioner has still chosen to file this petition after a period of almost 5 years from the date of first rejection and also that the dispute between the parties arose out of request made by the petitioner seeking modification and amendment to the Agreement on which reliance is now being placed to show existence of the Arbitration Agreement.

14. In view of the above, the present petition is dismissed with no order as to costs.

FEBRUARY 09, 2018
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NAVIN CHAWLA, J