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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 19th December, 2017
Pronounced on: 03rd January, 2018**

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ARB.P. 482/2017

**JPC INFRASTRUCTURE AND
CONSTRUCTION PVT. LTD.**

..... Petitioner

Through : Mr.Chandan Kumar and
Ms.Kanika Hooda, Advs.

versus

ALSTOM SYSTEMS INDIA PVT. LTD.

..... Respondent

Through : Mr.Milanka Chaudhary and
Ms.Abhilasha Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. The facts are not in dispute. The parties admittedly have entered into a contract having a clause for settlement of disputes and the same is as under :

***“29.APPLICABLE LAW-SETTLEMENT
OF DISPUTES***

29.1 This Subcontract Agreement shall be governed by the laws of (India) with courts at (Delhi) having exclusive jurisdiction to adjudicate on all disputes/ matters arising out of this Sub-Contract.

29.2 Reference to Mediation

29.2.1 In the event of any dispute or difference between the Contractor and the Subcontractor whether arising during the execution or after the completion or abandonment of the Subcontract Works or after the determination of the employment of the Subcontractor under this Subcontract (whether by breach or in any other manner) in regard to any matter or thing of whatsoever nature arising out of this Subcontract or in connection therewith, then either Party shall give to the other notice in writing of such dispute or difference and such dispute or difference shall be and is hereby referred to mediation. A Party who receives a notice for mediation from the other Party shall consent and participate in the mediation process and shall make all reasonable efforts to resolve the same through mediation in accordance with the mediation rules of the International Chamber of Commerce-Alternate Dispute Resolution-ICC ADR.

29.2.2 Notwithstanding anything in this Subcontract, in the event of any dispute or difference arising out of or relating to this Subcontract, or breach thereof, no Party shall proceed to arbitration UNLESS the Parties have made reasonable efforts to resolve the same through mediation as provided in Clause 29.2.1 above.

29.3 Reference to Arbitration

29.3.1 In the event that mediation is unsuccessful the dispute or difference between the Parties shall be finally settled in **accordance with the Rules of Arbitration of the International Chamber of Commerce** by three arbitrators appointed in accordance with said Rules. The place of

arbitration shall be New Delhi and the language of the proceedings shall be in English.

29.3.2 The commencement of any arbitration proceedings shall in no way affect the continuous performance of the obligations of the Subcontractor under this Subcontract.”

2. The learned counsel for the petitioner says the petitioner has served a notice dated 01.04.2017 upon the respondent for sending the dispute to mediation but there was no response. Later a notice dated 09.06.2017 was sent by the petitioner invoking the arbitration but yet again there was no response, hence this petition was filed on 24.07.2017. However after the filing of the petition the respondent sent a letter dated 01.08.2017 calling upon the petitioner to apply for mediation and arbitration *in accordance with rules of arbitration of the International Chambers of Commerce.*

3. The learned counsel for the petitioner submits the parties are resident of India, hence Part 1 of the Arbitration Act is applicable upon them and calling upon the parties to go beyond the limits of India and to make them bound to the laws of any other country would be against the public policy. He refers to Section 2(6) and Section 28 of the Act and it read as under:-

“Section 2(6) Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise

any person including an institution, to determine that issue.

Section 28. *Rules applicable to substance of dispute.—*

(1) Where the place of arbitration is situate in India,—

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

(b) in international commercial arbitration,—

(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

(iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

4. It is argued that in *TDM Infrastructure Private Limited vs. UE Development India Private Limited* 2008 (8) Scale 576 the Court held:

“20. Section 28 of the 1996 Act is imperative in character in view of Section 2(6) thereof, which excludes the same from those provisions which parties derogate from (if so provided by the Act). The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country.”

5. Further in *Bharat Aluminium Company and Ors. Etc. vs. Kaiser Aluminium Technical Service, Inc. and Ors. Etc.* 2012 (8) Scale 333 the court held:

“123. It was submitted by the learned counsel for the appellants that Section 28 is another indication of the intention of the Parliament that Part I of the Arbitration Act, 1996 was not confined to arbitrations which take place in India. We are unable to accept the submissions made by the learned counsel for the parties. As the heading of the Section 28 indicates, its only purpose is to identify the rules that would be applicable to “substance of dispute”. In other words, it deals with the applicable conflict of law rules. This section makes a distinction between purely domestic arbitrations and international commercial arbitrations, with a seat in India. Section 28(1)(a) makes it clear that in an arbitration under Part I to which Section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide “the dispute” by applying the Indian

“substantive law applicable to the contract”. This is clearly to ensure that two or more Indian parties do not circumvent the substantive Indian law, by resorting to arbitrations. The provision would have an overriding effect over any other contrary provision in such contract.”

6. Hence it is submitted that since the respondents have ignored the offer for mediation or the arbitration hence now in its reply cannot ask the petitioner to go to Paris for getting the arbitration done as it would per se be violative of Section 2(6) and Section 28 of the Act and to the law referred to above. It is argued since there exists an arbitration clause in the contract, an arbitrator be appointed by this Court.

7. The learned counsel for the respondent on the other hand says even if the offer of mediation is held to be ignored yet the petitioner ought to have given an offer to refer the disputes to arbitration, *as per rules of Arbitration of International Chambers of Commerce* and since the petitioner has not made a request in the manner set out in clause 29 above, this petition is pre-mature.

8. Section 2(1) (a) of the Act defines arbitration and it means any arbitration whether or not administered by permanent arbitral institution; Section 2(2) says this part shall apply where the place of arbitration is in India; Section 2 (7) says an arbitral award made under this part shall be considered as a domestic award and Section 2(8) says where this part refers to an agreement, the agreement shall include any arbitration rules referred to in that agreement.

Hence as the agreement between the parties refer to the rules of International Chambers of Commerce per clause 29 above, so the request needs to be made to the Secretariat of International Chambers of Commerce in Paris, though the arbitration proceedings shall be conducted in Delhi observing the domestic laws and it would never be subject to the laws of Paris or any other country.

9. Further, sub Section 11 (2) of the Act gives a choice to the parties to agree upon a procedure for appointing an arbitrator or arbitrators and sub section 11 (6) (c) says where, under the appointment procedure agreed upon the parties, a person, including an institution, fails to perform any function entrusted to him or it under that procedure only then a party may request to take necessary measures for securing appointment.

10. Thus, the petition is pre mature as no request has been made by the petitioner to the institution per clause 29 (supra) nor the International Chamber of Commerce has failed to perform function entrusted to it. Admittedly petitioner never sent any letter to the International Chambers of Commerce and did not avail of the procedure under clause 29.3.1 above.

11. In *Standard Corrosion Controls Private Limited vs. Sarku Engineering Services SDN BHD* (2009) 1 SCC 303 the Court held:

“ 10. As per the Rules of Arbitration of ICC, the party who wishes to have recourse to arbitration under the said Rules is required

to request for arbitration to the ICC Secretariat. The respondent submitted that the applicant has not followed that procedure for appointment of an Arbitrator because it has not submitted any request to the ICC Secretariat. Instead, the applicant has rushed to this Court without following the procedure mentioned in Article X of the Arbitration Agreement.

11. Annexed to the counter-affidavit is the Rules of the ICC and I have perused the same. Admittedly, the applicant has not made any request for arbitration to the ICC Secretariat. Hence, in my opinion, this application is not maintainable at all.

12. There is no dispute that the applicant had, with open eyes, signed the contract dated 21.2.2006, which contains Article X, quoted above.

13. Learned counsel for the applicant submitted that the Arbitration Rules of the ICC cannot prevail over the Parliamentary law, which is the Arbitration and Conciliation Act, 1996. In my opinion, it is true that a statute overrides the contract, but it has to be noticed that Section 11(2) of the Act states that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Admittedly, the conditions mentioned in sub-section (6) of Section 11 are not attracted in this case. Hence, the procedure to appoint an arbitrator agreed upon by the parties will be applicable.

14. As already stated above, the parties had agreed that any dispute between them shall be settled as far as possible by mutual consultation and consent, failing which by arbitration to be held at Mumbai applying

the Arbitration Rules of the ICC. In my opinion, the applicant has to apply to the Secretariat of the ICC, as mentioned in the Arbitration Rules of the ICC, and it cannot approach this Court for appointment of an Arbitrator. No doubt, the arbitration will have to be held at Mumbai, but the entire procedure of appointment of the Arbitrator has to be in accordance with the Arbitration Rules of the ICC, which requires that first a request has to be made to the Secretariat of the ICC. Admittedly, the applicant has not approached the ICC Secretariat. Hence, in my opinion, the application filed by the applicant herein, is not maintainable at all. This Court in a series of decisions has held that such an application/petition without approaching the authority nominated and agreed upon by the parties is not maintainable vide Iron & Steel Co. Ltd. vs. Tiwari Road Lines 2007(5) SCC 703, Rite Approach Group Ltd. vs. Rosoboron export 2006(1) SCC 206 etc.

15. The scheme of the Act is that under Section 11(2), the parties are free to agree on a procedure for appointing an Arbitrator subject to the provisions of Section 11(6). A petition under Section 11(5) of the Act would not lie if there is any agreement between the parties providing for the procedure for appointment of an arbitrator. In the present case there is Article X of the agreement (quoted above).”

12. The law above relates to the facts of this case hence considering the facts narrated above the petition is certainly premature, as the petitioner had not applied for appointment of

arbitrator to the secretariat of the International Chambers of Commerce, per procedure agreed upon. The petitioner has chosen to sign the contract containing of clause 29 (supra) and now can't disclaim the same. The petition is thus dismissed.

13. No order as to costs.

YOGESH KHANNA, J

JANUARY 03, 2018

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