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

+ **ARB.P. 831/2017**

PERFECT MECHANICAL INDUSTRIES Petitioner

Through: Mr Sougat Sinha, Advocate.

versus

**DELHI JAL BOARD, GOVT OF NCT OF
DELHI**

.....Respondent

Through: Ms Sangeeta Bharti, Addl.
Standing Counsel with Mr
Krishanu Adhikary and Mr
Rameezudin Raja, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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14.03.2018

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an arbitrator be appointed to adjudicate the disputes that are stated to have arisen between the parties in connection with the 'Contract Agreement' dated 12.01.2016 (hereafter 'the Agreement').

2. The question to be addressed in the present petition is whether an arbitration agreement exists between the parties.

3. The learned counsel appearing for the petitioner contends that

Clause 18.1.1 of the Agreement embodies an arbitration agreement and clearly indicates the intention of the parties to refer their inter se disputes to arbitration. He also contends that even if there is an ambiguity in the relevant clause, the same must, by applying the Rule of Contra Proferentem, be read against the respondent as the Agreement drawn up by the respondent and the petitioner had no say in the matter.

4. The learned counsel appearing for the respondent stoutly disputes the aforesaid contentions. She states that the respondent had deleted Clause 18.1.2, which was the arbitration clause and, thus, clearly evincing the intention to not refer any disputes to arbitration in the event the parties are unable to resolve the disputes amicably.

5. Clause 18.1.1 of the Agreement, which is at the centre of the controversy involved in this petition, reads as under:-

“18.1.1 Amicable Resolution

- (i) Save where expressly stated to the contrary in this Contract, any dispute, difference or controversy of whatever nature between the Parties, howsoever arising under, out of or in relation to this Contract (the “Dispute”) shall in the first instance be attempted to be resolved amicably with the Employer.
- (ii) In case of failure to amicably resolve the dispute the procedure set forth in clause (iii) below can be followed. The provision is only applicable in

contracts with Contract Price greater than Rs. 100 Cr.

- (iii) Either Parties may require such Dispute be referred to a 3-member Board consisting of one member each from the Employer and the Contractor and the third member will be selected by both Parties after mutual agreement (the “Dispute Adjudication Board” or “DAB”), for the time being, for amicable settlement. Upon such reference, both the Parties shall meet at the earliest mutual convenience and in any event within 15 (fifteen) days of such reference to discuss and attempt to amicably resolve the Dispute. If the Dispute is not amicably settled within (fifteen) days of such meeting between the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 18.1.2 below.”

6. There is no clause, which is numbered as 18.1.2 and there is no other clause which has any reference to arbitration.

7. It is clear from the plain language of sub-clause (ii) of Clause 18.1.1 that the provisions of sub-clause (iii) of clause 18.1.1 are applicable only in the case where the Contract Price is greater than ₹100 crores. In the present case, it is admitted that the Contract Price is below the said amount. Thus, on a plain reading of sub-clause (ii), sub-clause (iii) of Clause 18.1.1 of the Agreement would be inapplicable.

8. The contention that the last sentence of sub-clause (iii) of

Clause 18.1.1 indicates a clear intention of the parties to arbitrate is unmerited. First of all, as stated above, sub-clause (iii) of Clause 18.1.1 is inapplicable to the contract in question as the contract value is below ₹100 crores. Secondly, even if it is accepted that sub-clause (iii) of Clause 18.1.1 is applicable, the same only refers to arbitration in terms of Clause 18.1.2 of the Agreement, which does not exist.

9. The learned counsel appearing for the petitioner had referred to the decision of the Supreme Court in ***Enercon (India) Ltd. and Ors. v. Enercon GMBH and Anr.: (2014) 5 SCC 1*** and had drawn the attention of this Court to paragraph 83 of the said decision, wherein the Supreme Court had held that the Courts must adopt a pragmatic and not a pedantic or technical approach while interpreting or constructing an arbitration agreement or an arbitration clause. Thus, when faced with a seemingly unworkable arbitration clause, it would be the duty of the Courts to make the same workable within the permissible limits of law.

10. The said decision must be read in the context of the controversy involved in that case. In that case, there was no dispute that the parties had agreed to refer the disputes to arbitration. It was also specifically provided that the dispute would be referred to an Arbitral Tribunal consisting of three arbitrators. The controversy had stemmed from the fact that the arbitration clause also provided that one arbitrator would be appointed by one party (referred to as the Licensor) and the other arbitrator would be appointed by the other party (referred as the Licensee). It was further provided that the arbitrator appointed by the

Licensor would also act as the presiding arbitrator. There is no cavil that once the intention of the parties to refer the disputes to arbitration is clear and embodied in an agreement in writing, any ambiguity as to the mechanism for making the reference can be resolved – within the permissible limits of law – in favour of making the arbitration workable.

11. In the present case, this Court is unable to accept that there was any consensus between the parties to refer the disputes to arbitration. No such intention is discernable from the language of Clause 18.1.1 of the Agreement.

12. This Court is informed that Clause 18.1.2 was the standard arbitration clause, which is included in other agreements entered into by the respondent with other contractors in the past. And, it has been specifically omitted from the Agreement. The said standard clause has not been placed on record. This Court is not required to speculate as to what Clause 18.1.2 is. However, it is clear that the Agreement does not contain an arbitration clause and this Court is unable to accept that an arbitration agreement exists between the parties.

13. The petition is, accordingly, dismissed.

VIBHU BAKHRU, J

MARCH 14, 2018
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