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

\+ **ARB.P. 483/2019**

M/S RCCIVL-LITL(JOINT VENTURE) ..... Petitioner

Through: Ms. Puja Kalra, Advocate with Mr. Virendra Singh, Advocate.

versus

UNION OF INDIA ..... Respondent

Through: Mr. Praveen Kumar Jain, Advocate with Mr. Abhishek Varghese, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% 09.08.2019

1. The present petition under Section 11 of the Arbitration and Conciliation Act 1996 seeks appointment of the sole Arbitrator.

2. The Arbitration Clause is contained in Clause 60 of the General Conditions of the Contract which reads as under:-

> *"60. Arbitration*
> *All disputes, between the parties to the contract (other than those for which the decision of the DG(MAP) or any other person is by the contract expressed to be final and binding) shall, after which notice by either party to the Contract to the other of them be referred to the Sole arbitration of serving officer having degree in Engineering or equivalent or having passed Final/Direct/*

Examination of Sub Division II of Institution of Surveyors (India) recognized by the Govt of India be appointed by the Engineer-in-Chief or Director General of Works if specifically delegated in writing by Engineer-in-Chief, Army Headquarters, New Delhi whose decision shall be final, conclusive and binding. The Arbitration shall be governed by Arbitration and Conciliation Act, 1996.

Unless both parties agree in writing, such reference shall not take place until after the completion of alleged completion of the Works or termination or determination of the Contract under Condition Nos. 49 and 50 hereof.

Provided that in the event of abandonment of the works or cancellation of the Contract under Condition Nos. 46, 47 or 48 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the works completed by or through any other contractor or contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in condition 57 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever the authority appointing him may appoint a new Arbitrator to act in his place.
The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of case and pleading in defense.

The Arbitrator may proceed with the arbitration, exparte, if either party, in spite of a notice from the Arbitrator, fails to take part in the proceedings.

The Arbitrator shall give his reasoned award in writing on all

matters referred to him and shall indicate his findings, alongwith sums awarded, separately on each individual item of dispute.

The venue of arbitration shall be such place or places as may be fixed by the Arbitrator in his discretion.

The award of the Arbitrator shall be final and binding on both the parties to the Contract."

3. Learned counsel for the Respondent does not dispute the existence of the arbitration agreement or the invocation thereof. He, however, submits that there is no cause of action for filing the present petition as the Petitioner has not filed the proper bills which are necessary for the Respondent to process the payment.

4. Learned counsel for the Petitioner, however, controverts the aforesaid submission and contends that in terms of Condition No. 55 of GCC final bill was to be submitted within 3 months from date of completion, which in instant case is 28.02.2018. However, due to failure on part of the respondent in making available the inputs for compilation of final bill viz work orders, deviation orders for new affectional item of work and abstract of joint measurement, the completion of final bill got delayed. That final bill has been prepared, compiled and submitted as per available inputs vide letter bearing No. RCCIVL/LITL/ A&T /610 dated 04.10.2018. A true copy of the final bill bearing No. RCCIVL/LITL/ A&T /610 dated 04.10.2018 is annexed herewith the application and marked as DOCUMENT and the necessary bills have been raised.

5. Be that as it may, at this stage, while making appointment of the Arbitrator, the Court will not engage itself into the deciding the merits of the case. Since the existence of the Arbitration Agreement is not in dispute and there is certainly a dispute regarding the payment of the outstanding bills, which according to the the Petitioner have been raised in accordance of the Contract, I do not find any ground or reason to decline the prayer made the present application. In this regard, it would be apt to refer to the decision of Supreme Court in ***M/s Duro Felguera, S. A.*** **v.** ***M/s Gangavaram Port Limited,*** which held the following ratio:

> "That the scope of the power under Section 11 (6) of the 1996 Act was considerably wide in view of the decisions in ***SBP and Co. (supra) and Boghara Polygab, (2005) 8 SCC 618***. This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists – nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Courts intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected."

6. Since the Respondents have failed to make an appointment despite notice, they have lost the right to make an appointment in view of the decision of the Supreme court in ***Datar Switchgears Ltd v.Tata Finance Ltd (2000) 8 SCC 151;Union of India v. Bharat Battery Manufacturing Co.(P)Ltd. (2007) 7 SCC 684 and Punj Lloyd Ltd. v. Petronet MHB Ltd. (2006) 2 SCC 638.***

7**.** In view of the above, Hon'ble Mr. Justice Vikramajit Sen, Retired Supreme Court Judge, is appointed as Arbitrator to adjudicate the disputes

and differences, including claims and counter-claims between the parties to the present petition.

8. The parties are directed to appear before the Arbitrator as and when notified. Learned Arbitrator will issue a declaration under Section 12 read with the attendant provisions of the 1996 Act before entering upon reference.

9. The learned Arbitrator will be paid his fee in terms of the provisions of the Fourth Schedule appended to the Arbitration and Conciliation Act, 1996.

10. The Petition is allowed in the above terms. No order as to costs. The Registry will despatch a copy of this order to the learned Arbitrator.

SANJEEV NARULA, J

AUGUST 09, 2019
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