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

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Date of Decision: 13.8.2019

+ **ARB.P. 505/2019**

INFRA COOL PRIVATE LIMITED

..... Petitioner

Through: Mr. Gautam Dhamija, Adv.

versus

ASSAM INDUSTRIAL DEVELOPMENT
CORPORATION LTD

..... Respondent

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

JUSTICE RAJIV SHAKDHER (ORAL):

I.A. No.11045/2019

1. Allowed, subject to just exceptions.

ARB.P. No.505/2019

2. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996. The petition has been filed in the background of the following broad facts:

3. A Notice Inviting Tender (NIT) was issued on 25.6.2012 for turnkey supply, installation and commissioning of Cold Rooms, Ginger Washing Line, Material Handling and Allied Equipments etc. for Ginger Collection Centre at IID Center, Naltali in the District of Nagaon, Assam (in short "the subject works").

4. On 3.8.2012, the petitioner made an offer. The petitioner's offer was accepted. Accordingly, a work order was issued to the petitioner on

7.12.2012. The total contract value was pegged at Rs.1,55,31,750/-. The petitioner issued a Letter of Acceptance (LOA) on 17.12.2012. The LOA, however, was issued by the petitioner subject to certain terms and conditions being accepted by the respondent.

4.1 In particular, the petitioner had indicated that the respondent should release advance payment for execution of the subject works.

5. Thereafter, on 12.1.2013, the petitioner addressed a letter to the respondent to fix a date to discuss issues related to the mutual acceptance of the work order. In other words, the petitioner wanted the respondent to accept the conditions contained in the LOA before a formal agreement could be signed.

5.1 As a result of this, the respondent vide its letter dated 24.1.2013 fixed a meeting for this purpose on 28.1.2013.

6. The petitioner claims that on 18.2.2013, it communicated to the respondent that it was ready and willing to enter into a formal agreement. In this communication, the petitioner also reiterated its earlier request for release of advance payment before it commenced the work envisaged under the aforementioned work order.

7. On 3.4.2013, the petitioner wrote to the respondent seeking a refund of Earnest Money Deposit (EMD) amounting to Rs.3,26,500/-. This request was reiterated by the petitioner vide letters dated 29.7.2013 and 6.12.2013.

8. On 16.6.2014, the petitioner wrote to the respondent that it had come to know that the subject works had been farmed out to another entity.

9. Given this situation, the petitioner once again reiterated its demand for refund of the EMD. This request was put to the respondent once again vide communication dated 25.6.2014.

10. On 10.9.2014, the respondent apparently informed the petitioner that the works order had been cancelled via its earlier communication dated 8.2.2013.

11. In view of the above, the petitioner reiterated its request for refund of EMD vide a communication dated 7.10.2014.

12. Furthermore, on 31.10.2014, the petitioner responded to the respondent's letter dated 10.9.2014. Via this communication, the petitioner denied having violated terms and conditions of the tender.

13. Consequent thereto, upon a notice being served by the petitioner on the respondent, to which, a reply was sent by the respondent, a civil suit for recovery was filed in the District Court at Rohini, Delhi. The suit was numbered as CS No. 578950 of 2016. This suit was filed in and about September 2016.

13.1 In the suit the respondent moved an application under Section 8 of the 1996 Act. The concerned court vide order dated 1.9.2018 allowed the prayer made by the respondent in its Section 8 application.

14. Pertinently, while allowing the respondent's application under Section 8 of the 1996 Act, the learned judge accepted the stand of the respondent that an arbitration agreement existed between the parties, which was captured in Clause 68 of the General Directions and Condition of the Contract (in short "GDCC") obtaining between the parties.

14.1 For the sake of convenience, the same is extracted hereafter:

"68. Settlement of disputes.

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instruction hereinbefore mentioned and as to the quality of workmanship or materials used on the work,

or as to any other question, claim right, matter or thing whatsoever in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the work of the execution, or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof or otherwise shall, within one month of the arising of such question or dispute, be referred to the sole arbitration of the Director-in-charge of and if the Director-in-charge is unable or unwilling to act, to the sole arbitration of some other person appointed by the Director-in-charge willing to act as such arbitrator. There will be no objection if the Arbitration so appointed is an employee of and that he had to deal with the matters to which this Agreement relates and that in the course of his duties as such he had expressed views on all or any matters in dispute or difference. The award of the Arbitrator so appointed shall be final, conclusive and binding on all parties to this contract. The Arbitrator may, from time to time, with the consent of the parties, enlarge the time, for making and publishing the award.”

15. Continuing with the narration, the petitioner thereupon, after a gap of nearly eight (8) months, issued a notice dated 27.5.2019 triggering the arbitration. Notably, in this notice, the petitioner referred not only to Clause 68 of the GDCC but also to another clause i.e. clause 17, which according to it, is contained in the tender documents. Concededly, this was not the stand, which the petitioner took before the learned District Judge who passed the order dated 1.9.2018.

15.1 Pertinently, the petitioner sought to appoint its nominee under Clause 17 of the tender document.

16. Admittedly, the petitioner accepted the judgment dated 1.9.2018 which records that Clause 68 of the GDCC is the arbitration agreement

obtaining between the parties. Therefore, to my mind, the petitioner cannot now rely upon Clause 17 which obtains in the tender documents filed by it along with the instant petition.

17. That apart, it is not disputed by the counsel for the petitioner that the respondent is located within the State of Assam. The only reason the petitioner approaches this Court by way of Section 11 petition is that, had the contract between the parties been concluded, which the counsel for the petitioner unreservedly emphasizes was not concluded, the payments would have been received in Delhi and therefore furnishes cause to institute the instant Petition in Delhi.

18. To my mind, that cannot be the test for triggering the instant petition in this Court.

19. Mr. Gautam Dhamija, who appears for the petitioner, relies upon the judgment of a single Judge in the matter of *OK Play Auto Pvt. Ltd. vs. Indian Commerce & Industries Co. Pvt. Ltd.* 2018 SCC OnLine Del 8525, to support his contention that this Court has jurisdiction to entertain this petition. I find nothing in the judgment which would support such a plea. The facts that obtain in the said case are clearly distinguishable from those which obtain in the present case.

20. Clause 68 of the GDCC unlike Clause 17 of the tender documents does not even remotely indicate that the seat of arbitration will be Delhi.

21. In these circumstances, the captioned petition is returned. The petitioner, however, will be at liberty to approach the appropriate forum *albeit* as per law.

RAJIV SHAKDHER, J

AUGUST 13, 2019/pmc