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

Date of Decision:- 05.02.2020

+ **ARB.P. 838/2019**

ICCG INDIA PVT. LTD. Petitioner

Through **Ms. Tanu Priya Gupta, Adv.**

versus

PLANT LIPIDS PVT. LTD. Respondent

Through **Mr. A. Karthik, with Mr. Sarveshwar K., Adv.**

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act) seeking appointment of an Arbitrator to adjudicate the differences and disputes which have arisen between the parties in respect of the Master Service Agreement (MSA) dated 28.02.2018 and the Scope Of Work (SOW) dated 04.05.2018.

2. The Petitioner which is engaged in the business of providing consultancy service for Business Systems, process and cloud support, entered into a Master Service Agreement dated 28.02.2018 with the Respondent. In terms of the said agreement, which was followed by a SOW executed on 04.05.2018, the tentative project implementation cost was fixed on the assumption that 500 man-days will be required for the

implementation of the software. The Agreement also included a clause for providing additional man power which was to be chargeable at the rate of Rs 12,500/- per man-day.

3. It is the Petitioner's case that keeping in view the nature of the project, the size and scope of the work substantially increased from time to time and the Petitioner was assured by the Respondent that it will be duly compensated for the additional effort and man power. However, despite the Petitioner raising invoices for the additional man days, the Respondent did not clear the bills, compelling the Petitioner to invoke the arbitration clause by way of notice dated 01.10.2019 wherein it also proposed the name of Mr. Manoj Kumar Srivastava to be appointed as the sole arbitrator. In response, the Respondent vide its reply dated 23.10.2019, while claiming that the dispute raised by the Petitioner was not an arbitrable issue in accordance with Clause 13(ii) of the MSA, rejected the name of the Arbitrator proposed by the petitioner and instead suggested that institutional arbitration be invoked under the aegis of the Delhi International Arbitration Centre(DIAC). The Petitioner thereafter sent a reply dated 19.11.2019, wherein it reiterated that its claim was not for any admitted amount towards fee but for reimbursement of man hours and for costs and expenses incurred, and, therefore, the claim was not excluded under the arbitration clause. As the petitioner received no response from the respondent, the present petition seeking appointment of an arbitrator came to be filed.

4. Upon notice being issued, the respondent filed a reply reiterating the same pleas as were taken in its reply dated 23.10.2019. Learned counsel for the respondent vehemently opposes the petition and submits that the

claim of the petitioner for additional manpower would qualify as a claim for fees which according to clause 13(ii) of MSA was specifically excluded from the scope of arbitration. He therefore, urges that the present petition is liable to be rejected as it does not raise any arbitrable claim.

5. Having heard the rival contentions of the parties, I find that the entire case of the Respondent is based on clause 13(ii) of the MSA which according to the Respondent clearly states that a dispute related to non-payment of fees due is non-arbitrable, while the learned counsel for the petitioner has urged otherwise and also relied on clause 4 of the MSA.

6. As the entire fulcrum of the submissions of the parties are based on clause 4 and 13 (ii) of the MSA, it would be apposite to note the same at the outset -

4. Payments

- *Company agrees to pay Service Provider in accordance with the milestones or invoicing amount set forth in the applicable SOW. Service Provider will provide invoices to Company as milestones are completed. **All undisputed fees are payable to Service Provider within fifteen (15) days from the date of receipt of invoice or expense report unless otherwise specifically set forth in the SOW Company may raise any dispute regarding invoice within 2 business days from the date of receipt of invoice, failing which the invoice will be deemed approved.***
- *All expenses are to be reimbursed as listed in Exhibit A, unless otherwise agreed in the SOW.*
- *Further, Service Provider shall bear all hardware and software costs required for providing the Services, except specific licensed third party software or specialized hardware for specific needs of the project. Hardware and software costs for staging and production environments shall be borne by Company. Cost of all*

additional hardware or software required for the project shall be pre-approved and reimbursed by the Company.

- *The rates stated in the SOW are exclusive of all applicable taxes. Company shall be responsible for the payment of all applicable taxes, except taxes on Service Provider net income and Taxes related to Service Provider employees.*

- *In the event there is a delay in payment for more than 10 days from the due date, the Company shall be liable to pay an interest of 1.5% per month or maximum permitted by applicable law, whichever is less, on the delayed payments from the due date of payment. Service Provider shall be relieved of its obligations under this Agreement in the event of nonpayment of the Fees or expenses due and shall retain the rights in the Services for which the amount is outstanding.*

13(ii) Governing Law and Dispute Resolution; This Agreement shall be construed and governed by the laws of India and the parties consent to the jurisdiction of the competent courts in Delhi with respect to any matters arising under or with regard to this Agreement. Unless otherwise provided by local law without the possibility of contractual waiver or limitation, any legal or other action related to a breach of this Agreement must be commenced no later than two (2) years from the date on which the cause of action arose.

The parties agree to negotiate in good faith to resolve any dispute between them regarding this Agreement. If the negotiations do not resolve the dispute to the reasonable satisfaction of parties, then each party's CEO or their designee ("Representatives") shall, within thirty (30) days of a written request by either party to call such a meeting, meet either in person or through any other media and alone (except for one assistant for each party) and shall attempt in good faith to resolve the dispute.

If the disputes (except in case of dispute related to any non-payment of fees due) cannot be resolved by such Representatives in such meeting, the parties shall

conduct arbitration at Delhi in English language, in accordance with the rules of the [International Chamber of Commerce/Arbitration and Conciliation Act, 1996] ("Rules"). The parties agree that the dispute shall be settled by a sole arbitrator appointed in accordance with the said Rules, and the sole arbitrator so appointed shall be referred to herein as an "Arbitrator". Following the appointment of the Arbitrator, the Arbitrator shall set forth the schedule and timing of the arbitration proceedings in accordance with the applicable provisions of the Rules. The Arbitrator shall be empowered to issue injunctive or other equitable relief.

Nothing in this Section shall prevent, or be construed as preventing, a party from seeking injunctive or other equitable relief in a court of appropriate jurisdiction."

7. As noted above, the only ground taken by the respondent for opposing the appointment of an Arbitrator is that the claim of the petitioner being in the nature of fees falls within the exclusion clause. However, having considered the effect of clause 13(ii) especially when read with clause 4, I am unable to agree with the respondent's contention. A bare perusal of Clause 13 (ii) shows that it is only when there is no dispute regarding the amount of fees payable that there is no requirement for the matter being referred to arbitration. This, however, cannot imply that even when the respondent denies the claim of the petitioner for additional fees or costs by way of reimbursement for the additional work done, the petitioner cannot invoke arbitration. The clause cannot be construed to exclude a claim from the ambit of arbitration, even when the parties are not ad idem as to whether any amount is payable to the claimant. I also find merit in the submission of the petitioner that the claim of the petitioner is not for any admitted amount of fees but is towards costs, expenses and

charges for man-days, which the respondent claims is not due and therefore the exclusion clause would not be applicable in the facts of the present case.

8. At this stage, it may also be relevant to notice the stand taken by the respondent in its letter dated 23.10.2019, wherein the respondent suggested that institutional arbitration be invoked through DIAC. It is thus evident that the respondent despite having undertaken in writing that it was agreeable for institutional arbitration, has now taken a u-turn and is opposing the present petition vehemently, on wholly misplaced grounds.

9. The petition is accordingly allowed. Mr. Abhishek Singh, Advocate (Mob: 99102-91290) is appointed as the Sole Arbitrator to adjudicate the disputes and differences which have arisen between the parties in reference to the MSA dated 28.02.2018 and SOW dated 04.05.2018.

10. Needless to state that this Court has not examined the merits of the petitioner's claim and it will therefore be open for the parties to take all permissible pleas before the Arbitrator. It is further made clear that the observations made hereinabove are only prima facie and for the purpose of adjudication of the present petition.

11. The arbitration shall be conducted under the aegis of Delhi International Arbitration Centre (DIAC). The fees of the learned arbitrator shall be in accordance with the Schedule of fees prescribed under the Delhi High Court Arbitration Centre (Administrative Costs and Arbitrators' Fees) Rules. Before commencing arbitration proceedings, the Arbitrator will ensure compliance of Section 12 of the

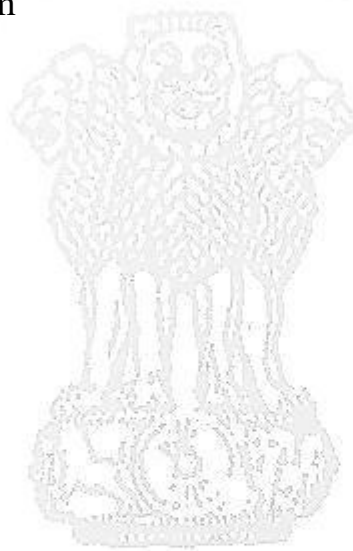
Arbitration and Conciliation Act, 1996.

12. A copy of this order be sent to Delhi International Arbitration Centre (DIAC) as also to the learned Arbitrator.

REKHA PALLI, J.

FEBRUARY 04, 2020

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