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

+ **ARB.P. 356/2020 & I.A. 7824/2020**

STERNA INDIA OIL AND GAS PRIVATE LTD..... Petitioner

**Through: Mr. Kamal Mehta and Mr.
Abhishek Chauhan, Advs.**

versus

NANDINI IMPEX PRIVATE LIMITED Respondent

**Through: Mr.Aseem Chaturvedi and Mr.
Karan Gupta, Advs.**

+ **ARB.P. 358/2020 & I.A. 7826/2020**

STERNA INDIA OIL AND GAS PRIVATE LTD. ... Petitioner

**Through: Mr. Kamal Mehta and Mr.
Abhishek Chauhan, Advs.**

versus

NANDINI IMPEX PRIVATE LIMITED Respondent

**Through: Mr.Aseem Chaturvedi and Mr.
Karan Gupta, Advs.**

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGEMENT (ORAL)

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08.09.2020

(Video-Conferencing)

I.A. 7824/2020 in ARB.P. 356/2020 &

I.A. 7826/2020 in ARB.P. 358/2020

1. Exemptions allowed, subject to all just exceptions.

2. The applications stand disposed of.

ARB.P. 356/2020 &
ARB.P. 358/2020

1. These are petitions under Section 11(6) of the Arbitration & Conciliation Act, 1996, for appointment of arbitrators.
2. Issue notice. Mr Aseem Chaturvedi accepts notice on behalf of the respondent.
3. With consent of parties, the matter has been heard finally.
4. The relationship between the petitioner and the respondent is governed by a Memorandum of Understanding (MoU), as well as by two sub-contracts, all of which are dated 22nd August, 2019.
5. The MoU, between the petitioner and the respondent, was a fallout of bids, submitted by the respondent, for certain projects relating to City Gas Distribution (CGD) network for various customers.
6. The petitioner and the respondent came to an understanding, formalised in the shape of the aforesaid MoU, dated 22nd August, 2019, to the effect that, in the case of projects awarded to the respondent, the petitioner would be the nominated sub-contractor for execution of part of the works related thereto.
7. Clause 1(ii)(a) of the MoU may, in this regard, be reproduced, thus:

“(ii). Projects already awarded in favour of NIPL

(a) In case of the projects which have already been awarded to NIPL as on the date of this MoU, Sterna shall be the nominated subcontractor for execution of part of works of the projects. NIPL shall subcontract the works or part of the works on the same schedule of rates as per the main contract executed by it with the respective client.”

8. Sub-clauses (iv) & (v) of clause (1) of the MOU also merit reproduction, thus:

“(iv). The Parties will decide on the submission of bank guarantees for the Agreed Projects on case to case basis. In the event Sterna agrees to provide performance bank guarantees for any Agreed Project as per the terms of the respective tender/ the contract, the costs incurred by Sterna in issuance, maintenance or renewal of the said performance bank guarantees will be reimbursed by NIPL if agreed mutually, on case to case basis. Further, in the event bank guarantees submitted by Sterna are invoked by the Client, NIPL shall keep Sterna fully indemnified against any loss or damage that may be caused to Sterna so long as the encashment was not directly due to a sole breach of the contract terms or non-performance on the part of Sterna.

(v). The Parties will execute with respect to each Agreed Project, a detailed separate agreement for allocation of scope of work, responsibilities, price and risk sharing as well as for establishing mechanism for execution of the Project (s), resolution of disputes etc., based on the terms of this MoU, prior to submission of proposal for each Agreed Project. Specific agreement executed between the Parties for Patiala GA Project forms part of this MoU as Annexure- 2.”

9. The petitioner asserts that at the request of the respondent, two bank guarantees were submitted by the petitioner in favour of the respondent’s client, namely, Torrent Gas Pvt. Ltd.

10. As contemplated by clause 1(v) of the MoU, extracted hereinabove, two sub-contracts were executed, between the petitioner and the respondent, on the date of the MoU, i.e. 22nd August, 2019, relating to the work to be done for the areas of Patiala, Punjab and Karikal, Puducherry.

11. The disputes arose between the parties, consequent on the petitioner asserting that the respondent had defaulted in its obligation under the MoU and the sub-contracts, and the respondent levelling parallel allegations against the petitioner.

12. It appears that, the petitioner and the respondent exchanged communications, terminating the MoU and the sub-contracts.

13. The disputes between the parties related to alleged liabilities, by one towards the other, under the MoU/sub-contracts.

14. The arbitration clauses, in the MoU and the two sub-contracts, are alike and identical. Clause 6, in the MoU, reads thus:

“6. Governing law& Dispute Resolution

(i) This MoU and the rights and obligations of the Parties hereunder shall be governed and construed in accordance with the laws of India. The courts at New Delhi, India, shall have exclusive jurisdiction to settle any matter.

(ii) If a dispute, claim or controversy arises out of or in connection with this Agreement, the Parties shall negotiate in good faith in an attempt to reach an amicable settlement. If the disputed matter is not settled amicably between the Parties within thirty (30)

days, such disputed matter shall be finally settled in arbitration as set out herein below.

(iii) Any dispute arising between the Parties with relation to this MoU shall be referred to arbitration comprising of a sole arbitrator to be appointed mutually by the Parties. Any orders/directions/award of the sole arbitrator shall be final and binding on the Parties. The arbitration proceedings shall be held in English language in accordance with the Arbitration and Conciliation Act, 1996 and the rules made thereunder, or any statutory modification(s) or re-enactment(s) thereto for the time being in force. The venue and seat of arbitration shall be at New Delhi, India.”

15. Parallely, Article 10 of the sub-contracts reads thus:

**“Article 10
Governing law& Dispute Resolution**

10.1 This Agreement and the rights and obligations of the Parties hereunder shall be governed and construed in accordance with the laws of India and shall be under the exclusive jurisdiction of the courts at New Delhi.

10.2 If a dispute, claim or controversy arises out of or in connection with this Agreement, the Parties shall negotiate in good faith in an attempt to reach an amicable settlement. If the disputed matter is not settled amicably between the Parties within 30 (thirty) days, such disputed matter shall be finally settled in arbitration as set out herein below.

10.3 Any dispute arising between the Parties with relation to this Agreement shall be referred to Arbitration comprising of a sole arbitrator to be appointed mutually by the Parties. Any orders/ directions/award of the sole arbitrator shall be final and binding on the Parties. The arbitration proceedings shall be held in English language in accordance with the Arbitration and Conciliation Act, 1996 and the Rules made thereunder, or any statutory modification (s) or re-enactment(s) thereto for the time being in force. The venue of Arbitration shall be at New Delhi. The cost of the arbitration proceedings shall be first borne equally by the Parties and the

arbitrator shall be requested to rule on the division of these costs between the Parties along with his principle decree.”

16. Consequent to the aforesaid disputes having arisen between the parties, on 27th March, 2020, the petitioner addressed a notice, to the respondent, setting out its claim and proposing settlement of the disputes by arbitration. The petitioner also proposed the name of retired learned District Judge as the arbitrator to arbitrate on the disputes.

17. The respondent replied, on 21st April, 2020, acceding to the request of the petitioner for settlement of the disputes by arbitration. However, the respondent did not consent to arbitration by the learned arbitrator named by the petitioner, but suggested, instead, a learned retired Judge of this Court as the sole arbitrator.

18. The said proposal is not acceptable to the petitioner.

19. As such, the parties have not been able to arrive at a consensus on the identity of the person who would arbitrate on the disputes between them.

20. It is in these circumstances, that the petitioner has moved this Court, by the present petitions under Section 11(6) of the Arbitration & Conciliation Act, 1996, seeking that the matter may be referred to the Delhi International Arbitration Centre (hereinafter referred to as “the DIAC”) to appoint an arbitrator from the panel of arbitrators maintained by the DIAC.

21. Mr. Aseem Chaturvedi, learned counsel appearing for the respondent, has no objection.

22. Mr. Kamal Mehta, learned counsel appearing for the petitioner, had advanced a suggestion that the proceedings could be consolidated and arbitrated in a single arbitral proceeding, so as to save time and money.

23. However, Mr. Aseem Chaturvedi, relying on the judgment of the Supreme Court in *Duro Felguera S.A v. Gangavaram Port Limited*¹, submitted that consolidation of the disputes was not permissible as they relate to two independent sub-contracts, though they were fall outs of one umbrella MoU. Mr. Chaturvedi also points out, in this regard, that the notice dated 27th March, 2020, addressed by the petitioner, to the respondent, invoked the arbitration clauses contained in the sub-contracts, and not the arbitration clause in the MoU.

24. To this submission, Mr. Mehta responds, stating that in its response dated 21st April, 2020, the respondent had relied on the arbitration clause in the MoU.

25. Be that as it may, the learned counsel have stated, fairly, that as a provision for consolidation of proceedings, albeit by consent of parties, exists in Rule 6 of the Delhi International Arbitration Centre

¹ 2017 (9) SCC 729

(DIAC) (Arbitration Proceedings) Rules, 2018, the parties could raise the issue of consolidation of proceedings before the DIAC, which could consider the request for consolidation of the proceedings, in accordance with the provisions contained in the said Rules.

26. In view thereof, I am not entering into the issue of consolidation of the proceedings in this order, and referring the disputes to the DIAC, tentatively, as two separate arbitral proceedings.

27. Should consolidation of the proceedings be legally permissible in accordance with the Delhi International Arbitration Centre (DIAC) (Arbitration Proceedings) Rules, 2018, the DIAC would be at liberty to do so, before, or at the stage of, referring the disputes to arbitration.

28. Accordingly, and subject to the above, these petitions are disposed of, referring the petitioner and the respondent to the DIAC, for appointment of an arbitrator, to arbitrate on the disputes between the petitioner and the respondent.

29. Pending applications, if any, do not survive for adjudication and stand disposed of accordingly.

C. HARI SHANKAR, J.

SEPTEMBER 8, 2020

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