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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **ARB.P. 861/2019, I.A. 2967/2020**
ADANI LOGISTICS SERVICES PRIVATE LIMITED
(FORMERLY KNOWN AS INNOVATIVE B2B LOGISTICS
SOLUTION PRIVATE LIMITED)

..... Petitioner

Through: Mr. Sachhin Puri, Sr. Adv. with
Mr. Rahul Khosla, Mr. Kamil Khan,
Mr. Sarang Rastogi, Mr. Dhananjay
Grover and Mr. Sandeep Kumar,
Adv.

versus

CENTRAL WAREHOUSING CORPORATION

..... Respondent

Through: Mr. K.K. Tyagi, Adv.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

% **03.03.2020**

I.A. 2967/2020 (for delay)

This is an application filed by the respondent seeking condonation of 20 days delay in filing the reply.

For the reasons stated in the application, the delay of 20 days in filing the reply is condoned and the same is taken on record.

Application stands disposed of.

ARB.P. 861/2019

1. The present petition has been filed by the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act', for short) for

appointment of an Arbitrator.

2. The brief facts as noted from the petition are that on March 23, 2016 the petitioner and the respondent entered into an Agreement for Hiring of Wagons for Container Train Services ('Agreement', for short), with effect from October 04, 2015, whereby the respondent took on lease full trains (without containers) from the petitioner on monthly basis for the purpose of transportation of cargo on container trains. It is the case of the petitioner that during the term of the Agreement numerous breaches of the terms and conditions of the Agreement were committed by the respondent including but not limited to non-payment of the wagon / hire charges in accordance with the payment terms as envisaged in the Agreement.

3. The petitioner, on July 27, 2016, in pursuance to Article 7.1 of the Agreement issued notice for initiation of conciliation process and formation of Joint Committee for referring all outstanding disputes, differences and controversy between the petitioner and respondent in the manner provided in the Agreement. However, it is the case of the petitioner that the respondent in abeyance of the terms and conditions chose never to respond to the letters / reminders issued by the petitioner and kept delaying release of payments of the wagon / rake hires charges due and payable to the petitioner by the respondent under the Agreement.

4. It is the case of the petitioner that on December 28, 2016 the petitioner terminated the Agreement by giving a notice of six months as stipulated in Article 6.3 of the Agreement, vide its notice of termination dated December 28, 2016, w.e.f. June 27, 2017. It is averred that the respondent sent a letter giving assurance to the petitioner for completion of reconciliation of accounts shortly and owing to this specific assurance given

by the respondent to complete the reconciliation of accounts, the petitioner extended the Bank Guarantee then and thereafter time and again by incurring extra expenses for extension of such Bank Guarantee. It is the case of the petitioner that on July 04, 2019, it sent an email to put on record that as per its books of Account of the respondent itself, an amount of Rs.56,68,896/- was due and payable by the respondent to the petitioner and also the fact that respondent had to release / return the Bank Guarantee to the petitioner.

5. The petitioner had also sent another letter dated August 02, 2019 on similar lines. The respondent in response to the petitioner's letter dated August 02, 2019 sent an email duly acknowledging and accepting the petitioner's letter dated August 02, 2019. It is the case of the petitioner that the respondent categorically admitted vide the said reply that the office of respondent had already reconciled the entire amount payable to the petitioner and also assured that a letter had been sent to the Head Office of the respondent for getting the approval of refund of the amount payable to the petitioner and release the Bank Guarantee. It is transpired that contrary to the respondent's stand in its communication, the respondent on August 05, 2019 wrote an email to the Union Bank of India for encashment of Bank Guarantee in favour of the respondent in case the same is not extended by the petitioner. The respondent also vide letter dated August 26, 2019 called upon the petitioner to sign the Statement of Accounts prepared by them wherein it was stated that an amount of Rs.2,76,14,809/- was due and payable by the petitioner to the respondent. It also transpires that further communications were made by the petitioner. The petitioner vide its letter dated October 31, 2019 invoked the arbitration clause as per Article 7.2 of

the Agreement for the appointment of an Arbitrator and also highlighting various disputes that had arisen between the parties. It is the case of the petitioner that the respondent sent a letter dated November 14, 2019 wherein the respondent had not agreed for appointment of an Arbitrator for settlement of disputes between the parties. It is in this background the present petition has been filed.

6. It is the submission of Mr. Sachhin Puri, learned Senior Counsel appearing for the petitioner, that the dispute having arisen between the parties, the same needs to be adjudicated by appointing an Arbitrator. In this regard, he has drawn my attention to Article 7.2 of the Agreement which stipulates as under:

“7.2 ARBITRATION

In case the parties fail to arrive at any satisfactory resolution, all disputes and differences arising out of or in any way touching or concerning this agreement, whatsoever, shall be referred to the sole arbitration of any person appointed by the Managing Director, Central Warehousing Corporation. There will be no objection to any such appointment on the ground that the person so appointed is an employee of the Corporation, that he had to deal with the matter to which the agreement relates and that in the course of his duties as such employee of the Corporation, he had expressed views on all or any of the matters in dispute or difference. The award of such Arbitrator shall be final and binding on the parties to this agreement. The venue of arbitration shall be at such place as may be fixed by the sole Arbitrator in his sole discretion.

The work under the agreement shall, if reasonably possible, continue during the arbitration proceedings and no amount payable to cwc shall be withheld on such proceedings by the Lessor. The operating lease charges shall be determined based on the Gross Margin.

The costs of arbitration shall be borne by the parties as per the decision of the Arbitrator. Subject as aforesaid the Arbitration and Conciliation Act, 1996 shall apply to the arbitration proceedings under this clause.

EXPLANATION:-

For the purpose of this clause, the' expression MANAGING DIRECTOR' shall include any officer for the time being performing the duties of the Managing Director of the Central Warehousing Corporation, New Delhi."

He presses the prayer in the petition in that regard.

7. On the other hand, Mr. Tyagi, learned counsel for the respondent has raised an issue on the maintainability of the petition on the ground that the Article 7.1 of the Agreement stipulates a conciliation process by a Joint Committee, consisting of equal number of representatives of both parties, before the matter can be adjudicated by an Arbitrator. In fact, it is his submission that the respondent has already appointed three of its Officers as Members of the Joint Committee; the petitioner herein is required to nominate their representatives so that the Joint Committee may make an endeavour to resolve the disputes amicably.

8. In substance, it is his submission that the petition needs to be dismissed and the parties must be relegated to the process of Conciliation.

That part, it is his submission that the arbitration clause having been invoked by M/s. B2B Logistics Solution Private Limited and the petition being filed by Adani Logistics Services Private Limited, the same cannot be entertained.

9. That apart, it is his submission that the respondent is not liable to pay any amount to the petitioner, on the contrary the respondent is entitled to recover huge amount of money from the petitioner, in terms of the reconciliation carried out by the respondent and had demanded an amount of Rs.2,77,07,738/-, vide communication dated August 17, 2019 and subsequent reminders, which the petitioner had not paid. He states that the petitioner had another agreement dated February 28, 2008 with respondent in respect of CFS' Kalamboli under Mumbai Regional Office of the respondent. It is stated that the Central Railway Authority, vide their letter dated September 30, 2019, informed that an amount of Rs.1,23,18,916/- was recoverable by the Central Railway from the petitioner towards Land License Fee and Commercial Staff Fee respectively. He states that hence, the net recoverable amount from the petitioner is Rs.4,00,26,654/-.

10. Having heard the learned counsel for the parties, it is a conceded position that the dispute has arisen between the parties which needs to be adjudicated. The only objection taken by Mr. Tyagi is with regard to the fact that the petitioner has not invoked the conciliation process through a Joint Committee, to which the respondent has nominated its representatives. Hence, the petitioner is also required to nominate its representative to the Joint Committee and exhaust the procedure for conciliation as envisaged in Article 7.1 of the Agreement. This submission is not appealing for the reason that the respondent vide its communication dated August 26, 2019

has already decided the issue wherein it has claimed an amount of Rs.2,76,14,809/- from the petitioner. So, the process of conciliation shall be an empty formality.

11. That apart, it is a settled position of law in terms of the judgment of this Court in the case of ***Union of India v. Baga Brothers and Ors., MANU/DE/1880/2017***, wherein it was held that resorting to conciliation procedure for resolving disputes as per Contract / Agreement between the parties, prior to referring the same to arbitration, is only a directory provision and not a mandatory one and also the existence of conciliation procedure should not be held as a bar for dismissing a petition under Section 11 or Section 8 of the Act. Relevant paragraph reads as under:

“11. Whereas the existence of conciliation or mutual discussion should not be a bar in seeking to file proceedings for reference of the matter to arbitration and which is necessary for preserving rights as envisaged by Section 77 of the Act, however, since in many contracts there is an effective need of conciliation etc in terms of the agreed procedure provided by the contract, the best course of action to be adopted is that existence of conciliation or mutual discussion procedure or similar other procedure though should not be held as a bar for dismissing of a petition which is filed under Sections 11 or 8 of the Act or for any legal proceeding required to be filed for preserving rights of the parties, however before formally starting effective arbitration proceedings parties should be directed to take up the agreed procedure for conciliation as

provided in the agreed clause for mutual discussion/conciliation in a time bound reasonable period, and which if they fail the parties can thereafter be held entitled to proceed with the arbitration proceedings to determine their claims/rights etc.”

12. Hence, this plea is rejected. Insofar as the plea of Mr. Tyagi that M/s. Adani Logistics Services Private Limited had not invoked the arbitration clause and filing of the petition by the said company is not maintainable is concerned, Mr. Puri is justified in showing a corrigendum issued on November 25, 2019 wherein the petitioner has brought to the notice of the respondent that the name of M/s. B2B Innovative Logistics Solution Private Limited stood changed as M/s. Adani Logistics Services Private Limited. Hence, the invocation and filing of the petition by a same entity, with two different names cannot be said to be unjustified. This plea is also rejected.

13. As the dispute has arisen between the parties, accordingly this Court appoints Justice Abhay Manohar Sapre, a Former Judge of the Supreme Court as the Sole Arbitrator, who shall adjudicate the dispute and differences between the parties. The fee of the learned Arbitrator shall be governed by the Fourth Schedule to the Act. The parties shall be at liberty to appear before the learned Arbitrator after taking prior appointment on his mobile No.7042955488. Accordingly, the petition is disposed of.

14. A copy of this order be sent to Justice Abhay Manohar Sapre, a Former Judge of the Supreme Court on his address C-203, Second Floor, Sarvodaya Enclave, New Delhi-110017.

V. KAMESWAR RAO, J

MARCH 03, 2020/aky