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

% ***Date of decision: 09.09.2021***

+ **ARB.P. 191/2021**

VIVAAN SOLAR PVT. LTD. Petitioner
Through: Mr. Arun Doodawat, Advocate

Versus

NORTHERN CENTRAL RAILWAYS & ANR. Respondents
Through: Mr. Jagjit Singh, Senior Standing
Counsel, Mr. Preet Singh &
Mr. Vipin Chaudhary, Advocates

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT (oral)

The hearing has been conducted through video conferencing.

1. The present petition has been filed by petitioner seeking appointment of a Sole Arbitrator under the provisions of Section 11(6) of the Arbitration and Conciliation Act, 1996.

2. Petitioner, a private limited company, claims to have vast experience in development of Solar Power Park, Roof Top Plants and in generation of renewable source of energy in solar, having been registered under the Micro, Small and Medium Entrepreneurs Department and claims to be entitled to all the benefits and privileges available under the provisions of Micro, Small and Medium Entrepreneurs Act 2006. Petitioner had submitted a bid with

respondents towards a tender bearing No. No. NR/SPV/RFP/01/2015 to execute design, manufacture, supply, erection, testing and commissioning of 5 MWP of Solar Rooftop Project including operation and maintenance for a period of 25 years at Railway Stations of Northern Railways under PPP Model.

3. According to petitioner, vide letter dated 28.10.2016, respondents awarded the work in question to petitioner, which was accepted by petitioner vide letter dated 28.10.2016. A Power Purchase Agreement dated 16.11.2016 was entered into between the parties, wherein terms and conditions of work ancillary thereto, were recorded. The petitioner had concluded the work/project on 09.11.2017 and respondents after due satisfaction had issued completion certificate on 22.11.2017.

4. It is further averred that during execution of the work, several grievances were raised by petitioner, however, respondents failed to meet out the same such like regular generation loss, providing security of the equipment for rooftop solar plant, which was within the ambit of respondents, which resulted in regular thefts and ultimately causing loss to the petitioner and thereby, respondents failed to fulfil its part of contractual obligations in terms mentioned in Article-19.1.4 of the Power Purchase

Agreement in question.

5. At the hearing, learned counsel for petitioner has submitted that respondents has also failed to comply with the Article- -30.1 towards change of law in GST; 15.1.7 towards repairs of the roof of the premises; 16.5 toward supply of electricity besides other over heads e.g. module removal; shifting ACDB panel, cables and modules etc.

6. It is further averred in Para-21 of the petition that out of total CFAS amount of Rs.5.6175 crores, an amount of Rs.5.37 crores have already been paid by the respondents and amount of Rs.24,75,000/- is still unpaid towards CFA to petitioner, which is claimed with 15% interest from respondents. Petitioner has further claimed a termination payment of Rs.43,23,72,000/- vide Notice dated 24.08.2020 with a further letter dated 17.09.2020 to Chief Electrical General Engineer of the Northern Railways under the provisions of Article-33.2 of the Power Purchase Agreement. However, no steps have been taken by the respondents to resolve the grievances. Therefore, petitioner has invoked Article-33.4 of the Power Purchase Agreement invoking arbitration vide its communication dated 15.10.2020 and since no reply was received thereto, petitioner has filed the present petition seeking appointment of an Arbitrator to adjudicate the disputes between the parties.

7. On the contrary, the present petition is opposed by learned senior standing counsel appearing on behalf of respondents, who submits that in terms of Clause- 33.1 and 33.2 of the Power Purchase Agreement, the disputes can be amicably resolved under the aegis of Railway Arbitrator appointed by the General Manager and the petitioner without making an attempt to resolve the dispute amicably and following the due procedure, has approached this Court rather than fulfilling it's part of obligations.

8. Learned senior standing counsel for respondents further submits that respondents have already made the payments as per tariff of the Power Purchase Agreement in question. In addition, to submit that the appointment of Arbitrator at the behest of respondent is as per law, reliance is placed upon a decision of the Hon'ble Supreme Court in ***Central Organization for Railway Electrification vs. M/s. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company 2020(14) SCC 712*** wherein it has been held that Railways has an expressed power to constitute the arbitral tribunal. Further submits that in the case in hand, since the purported Notice dated 17.09.2020 has not been received by the respondents, they have a right to appoint the Arbitrator.

9. The aforesaid submission of learned senior standing counsel for

respondents is refuted by learned counsel for petitioner who submits that the decision in ***Central Organization for Railway Electrification (Supra)*** has been referred to the Larger Bench and is thus, not applicable to the present case.

10. This Court has heard learned counsel for the parties and has gone through the petition and written submissions filed on behalf of both the sides as well as decisions relied upon. During the course of hearing, learned senior standing counsel appearing on behalf of respondents has not disputed existence of the Power Purchase Agreement entered between the parties and arbitration clause mentioned therein.

11. Further, the submission of learned senior standing counsel for appearing on behalf of respondents that the respondents have a right to appoint the Arbitrator does not stand, as the Hon'ble Supreme Court in ***Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.*** 2019 SCC Online SC 1517 has categorically stated that “*in cases where one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator.*”

12. The afore-noted dictum of Hon'ble Supreme Court in *Perkins Eastman (Supra)*, has been followed by Coordinate Benches of this Court in *Proddatur Cable Tv Digi Services Vs. Siti Cable Network Limited 2020 SCC OnLine Del 350* and *VSK Technologies Private Limited and Others Vs. Delhi Jal Board 2021 SCC OnLine Del 3525* in unequivocal terms.

13. Concurring with the decisions as noted above, the present petition is allowed.

14. Accordingly, **Justice Ajit Prakash Shah, former Chief Justice of Delhi High Court (Mobile: 9910160007)** is appointed sole Arbitrator to adjudicate the dispute between the parties. The arbitration shall be conducted under the Delhi International Arbitration Centre (DIAC).

15. The fee of the Arbitrator shall be in accordance with the Schedule of Fees prescribed under the Delhi International Arbitration Centre (DIAC) (Administrative Cost and Arbitrators Fees) Rules, 2018.

16. A copy of this order be sent to the learned Arbitrator as well as Delhi International Arbitration Centre (DIAC) for information.

17. With aforesaid directions, the present petition is accordingly disposed of.

(SURESH KUMAR KAIT)
JUDGE

SEPTEMBER 09, 2021/r