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

% ***Decided on:20.09.2022***

\+ **ARB.P. 693/2020**

C AND S ELECTRIC LTD .....Petitioner

Through: Ms. Anchal Tiwari, Advocate.

versus

BRAHMAPUTRA CRACKERS AND POLYMERS LTD. .... Respondent

Through: Mr. N.L Ganapathi, Mr. Sidhant Garg, Advocates.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

NEENA BANSAL KRISHNA, J. (ORAL)

I.A. No.7721/2021 (application under Section 151 CPC for substitution of name of the petitioner)

1. The present application under Section 151 CPC has been filed by the applicant M/s Trimaster Pvt. Limited for substitution of its name as the petitioner. Since during the pendency of the present petition, M/s C & S Electric Limited, the erstwhile petitioner, has transferred its business Undertaking including its Project Division dealing with EPC projects including the project which is the subject matter of the present proceedings to M/s TrimasterPvt. Limited under a Business Transfer Agreement dated 18.02.2020 w.e.f. 01.02.2021. Subsequently the promoters of M/s C & S Electric Limited namely Khanna Family have exited the Company by sale and transfer of the entire shareholding in the Company to M/s Siemens Ltd. Resultantly, all the assets, liabilities and pending litigations of the said business Undertaking stand transferred to M/s Trimaster Pvt. Ltd. Pursuant

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to the said de-merger of the Undertaking and in terms of Business Transfer Agreement dated 18.02.2020, the present proceedings may be permitted to be continued by M/s Trimaster Pvt. Ltd. Therefore, present application has been filed for the substitution of the name of the petitioner by M/s Trimaster Pvt. Ltd.

2. **The respondent in its reply** has denied the alleged de-merger of Business of the petitioner to third party/applicant M/s Trimaster Pvt.Ltd under a Business Transfer Agreement. It is asserted that the copy of the Business Transfer Agreement dated 18.02.2020 has not been filed along with the documents and it is a fit case for rejection of the application.

3. **On merits**, it is submitted that the reference has been made for transfer of the entire shareholding of the promoters of the petitioner to M/s Siemens Ltd, but no details have been provided in this regard. According to the information available in public domain M/s Siemens Ltd, the flagship listed company of Siemens AG India, has acquired 99.22% shares of petitioner from its promoters for Rs 2100 crores. However, petitioner has not amalgamated with M/s Siemens Ltd. and continues to exist as an independent legal entity. A reasonable inference therefore, can be drawn that M/s Siemens Ltd. has taken over the business/management of petitioner M/s C & S Electric Limited and as such only M/s Siemens Ltd. can be termed as successor of the petitioner for the purpose of Contract/Arbitration Agreement in question between the petitioner and the respondent. The substitution of the name of the applicant would be tenable only if there was an amalgamation/merger of M/s Siemens Ltd. with M/s Trimaster Pvt. Ltd. as known under law. No such averment has been made in the application and therefore, the substitution cannot be allowed.

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4. It is asserted that the only document which has been filed in support of the Application is a Joint Declaration dated 24.02.2021 signed by Mr. Aditya Khanna, Director of M/s C & S Electric Limited and Mr. Anuj Khanna, Director of M/s Trimaster Pvt. Ltd. This document is not worthy of countenance as a master data of the third party. There can be no presumption of validity of business transfer by the petitioner in favour of the applicant solely on the Joint Declaration dated 24.02.2021.

5. It is thus submitted that the application is liable to be dismissed.

6. **Submission heard.**

7. Learned counsel on behalf of the Applicant has placed on record the Business Transfer Agreement as well as the Certificate of Incorporation in its name under the Companies (Incorporation) Rules, 2014. It has further been explained on behalf of the applicant that the original petitioner has de-merged and certain businesses as defined under the Business Transfer Agreement have been assigned/transferred to the applicant which is also borne out from the Business Transfer Agreement.

8. In the light of the documents, it is shown that erstwhile petitioner M/s C & S Electric Limited stands merged with the applicant. The application for substitution on behalf of the applicant is therefore, allowed. Amended memo of parties is taken on record.

ARB.P. 693/2020

1. A Petition **under Section 11 of Arbitration & Conciliation Act, 1996** has been filed for appointment of the arbitrator.

2. The facts in brief, are that the petitioner was awarded electrical works for LLDPE/HDPE & PP Unit (Job-1) respondent at Leotkala, Dibrugarh, Assam vide fax of acceptance bearing No.6907/SLP 6/17 dated 24.05.2011

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(*hereinafter referred to as the Agreement*). The work under the Agreement was to be completed within 18 months of date of fax of Acceptance. However, the petitioner has claimed that after the execution of the Agreement, petitioner was not provided with the working fronts due to which the work at the site could not be commenced. The first front was provided to the petitioner in January, 2012; therefore no work was carried out at the site for the first 7 months from the date of Agreement. The petitioner commenced the work at site as soon as the work fronts were made available and the work was finally completed on 15.07.2015.

3. The petitioner has submitted for the reasons beyond the control of the petitioner, the work could not be completed within the stipulated time despite it having put its best efforts to complete the works including the additional works awarded to it. The petitioner explained the facts and circumstances in detail vide its letter dated 23.11.2015 and requested for unconditional extension of time upto 31.11.2015.

4. The respondent in most illegal and arbitrary manner instead of granting of an extension of time upto 30.11.2015, levied liquidated damages to the tune of Rs.33,31,361 upon the petitioner vide e-mail dated 15.05.2016. Further, the respondent did not release the payments of the amounts claimed in the 17th RA bill of LLDP and PPU project; the amounts claimed in the previous RA Bills; and the payments have also been withheld in respect of the goods stolen from the site, etc.

5. The petitioner has asserted that in addition to illegal withholding of the aforesaid amounts, the respondent is contemplating to make recovery on account of alleged non-return of free issued material, non-submission of checklist points, documents, reports etc. This is due to the incomplete

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measurement that is being alleged and that free issued material have not been returned by the petitioner. The petitioner has explained that though the work was completed in the month of July, 2015 but the final measurement was carried out after 10 months, multiple cables were laid down under the floor level and it could not be measured as to how much cable had been laid. Furthermore, EIL had withdrawn its representative before closure of the contract, and even before commissioning of the plan, which was also a major reason for incomplete measurements of cables. Also, there were multiple light fixtures and cable trays that were damaged by other multiple agencies working at the site. On the request of the EIL, damaged light fixtures were replaced with new light fixtures but no payment has been made to the petitioner resulting in additional loss to the petitioner. The petitioner is therefore, entitled to claim a total sum of Rs.27,38,50,034/-. Moreover, four bank guarantees are lying with the respondent. The plaintiff is entitled to the release of these bank guarantees.

6. It is asserted that various disputes have arisen between the parties which are to be governed and adjudicated in terms of Arbitration Agreement between the parties. The petitioner gave Notice dated 17.04.2018 requesting the respondent for release of money and bank guarantees and also stated that in case of failure to do so, the Notice may be construed as Notice of Invocation of Arbitration in terms of Clause 107 of General Conditions of Contract *(hereinafter referred to as the* "GCC"*)*. The respondent has omitted to appoint the arbitrator within 30 days of the receipt of the Notice. Hence, the present petition has been filed for appointment of independent arbitrator.

7. **The respondent in its reply** has asserted that it is a Central Public

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Sector Enterprise (CPSE) under the administrative control of the Ministry of Petroleum and Natural Gas, Government of India. It is claimed that petitioner is suppressing material facts and documents. It is alleged that the claims are arising out of the Electrical Works Contract for the Contract for the Linear Low Density PolyEthylene ("LLDPE")/High Density PolyEthylene ("HDPE") and Poly Propylene (PP) Units awarded by the Respondent to the Petitioner in terms of Fax of Acceptance FOA No. 6907/SPL/B6/l7dated 24.05.2011 ("LLDPE/BDPE. &PP (Units) Contract).

8. The scope of Section 11(6) of the Act is narrow and the present arbitration petition is premature in so far as the Claims No. 1& 2 pertaining to RA/Final Bill and the previous RA Bills are concerned. Furthermore, the claims in respect of the incomplete measurement carried out at the site; idle manpower and other resources and the claims in respect of 9th RA Bill are not arbitrable dispute. Moreover, these claims are neither tenable nor sustainable on merits.

9. The respondent has further asserted that though a valid Arbitration Clause in the Contract exists , but in the peculiar facts of the present case , it is a fit case where the court must go beyond the limited enquiry contemplated under Section 11 (6) of the Act and examine the facts in the light of Clause 107.1 read with Serial No.1 of Modification to the GCC (Arbitration clause) and Clause 91.1 of the GCC (Notified Claims' clause) to decide whether the claims of the petitioner could be referred to arbitration.

10. It is asserted that the unambiguous word employed in Sub Clause 6, Serial No.1 of the Modification to GCC provides that it is only after exhausting the option of conciliation as an Alternate Dispute Resolution

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Mechanism that the parties hereto can go for arbitration. Conciliation, therefore is mandatory and a condition precedent for the petitioner to seek reference to arbitration.

11. The petitioner without making any request for reference of the disputes to conciliation, has directly invoked Arbitration Clause by referring to the unamended Clause 107.1 of GCC. The petitioner has also suppressed that the respondent had replied to the Arbitration Notice given by the petitioner vide its reply date 30.10.18 addressed to Advocate of the petitioner. The petitioner despite having received the reply, instead of complying with the mandated requirement of conciliation, has filed the present petition and has suppressed material facts. It is thus asserted that the mandated procedure provided in Clause 107.1 read with Serial No.1 of Modification to the GCC has not been followed.

13. It is further asserted that clause 91.1 of the GCC stipulates the procedure for notifying the Engineer-In-Chief/ EIL regarding the extra/additional payments since Engineer In Chief alone can verify the genuineness of the Notified Claim and either approve or reject it; neither the respondent nor any judicial or arbitral forum would be in a position to independently consider and decide New Claims of the petitioner without the same being notified to the Engineer-In Charge.

14. It is also asserted that petitioner had been awarded distinct and separate contracts for C2+ Recovery and GS Unit by FOA dated 21.7.2011 (GSU Contract) which is independent of the earlier contract. The petitioner has cleverly tried to club the disputes under the two contracts which cannot be permitted. The claim No.5 does not relate to or arise in respect of the earlier contract and does constitute an arbitrable dispute under the said

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contract.

15. The respondent has thus, denied that the claims made by the petitioner are due and payable to him but has asserted that the claims are all non-arbitrable , hence it is requested that the petition may be dismissed.

16. **Learned counsel on behalf of the petitioner has argued** that from the definition of ‘Assumed Liabilities’, ‘Business Contracts’ and ‘Business Undertaking’ as defined under Clause 1 of the Agreement , it is quite evident that the business of the petitioner stands assigned/transferred to the present petitioner Trimaster. The Engineering Procurement & Construction (EPC Contract) projects have all been transferred by the present petitioner and therefore the contract between the erstwhile petitioner and the respondent now stands assigned and assumed by the petitioner. The earlier contract between the erstwhile petitioner and the respondent has therefore, become binding on the present applicant which admittedly contains an Arbitration Clause which has been invoked in the present petition. Learned counsel on behalf of the petitioner has further argued that the definition of ‘Business Contract’ is an inclusive definition which has defined all the contracts taken over by the present petitioner and includes those which are listed in Part I of Schedule 6. This implies that even if the Present Contract is not specifically mentioned in Part I of Schedule 6, it is covered by the substantive definition of Business Contracts. The petitioner has therefore submitted that the present petition may be allowed and the sole arbitrator may be appointed.

17. **Learned counsel for the respondent has taken a preliminary objection** that a bare perusal of the Business Transfer Agreement dated 18.2.2020 would show that that the stamp duty paid on the document is Rs

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500. However, Clause 3.1 provides that the lump sum consideration payable by the purchaser to the seller for the purchase of the business undertaking on 'slump sale basis' shall be Rs 1,48,24,90,985 which may be revised prior to the completion date with the mutual agreement of the parties. This reflects the consideration amount is as reflected in the Clause but the document has not been executed in requisite stamp paper and therefore this document cannot be considered as a valid document for transfer of this business.

18. Learned counsel for the respondent has further taken an objection that from the definition of "Business Contract" as defined in Clause 1.1 of the Business Transfer Agreement, the "businesses" as defined included the contracts listed in Part I of Schedule 6. However, the contract which is the subject matter of the present proceeding, does not find mention in Part I of Schedule 6 and thus it cannot be said that there is an assignment of contract. There is nothing in the Business Transfer Agreement to show that there is any assignment of Arbitration Agreement to the present petitioner.

19. Learned counsel for the respondent has also referred to the Clause 37.1 of the GCC which clearly bars subletting of the works. Clause 37.1 specifically provides that no part of the contract or any interest or share therein shall in any manner be transferred, assigned or sublet by the contractor to any person , firm or corporation. The petitioner therefore, was under an obligation to seek the prior consent in writing from the respondent before assigning its business to the present petitioner. Furthermore, there cannot be any assignment of the Arbitration Clause without the express consent of the respondent. This is more so because respondent is the Public Undertaking dealing with public money and has huge public responsibility and cannot be made answerable for the acts done by the third party. It is

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therefore argued that there is no valid binding Arbitration Agreement and the petition is liable to be dismissed.

20. **Submissions heard.**

21. The first objection taken on behalf of the respondent is essentially that there is no binding Arbitration Agreement between the petitioner and the respondent. The petitioner has placed on record the Business Transfer Agreement dated 18.02.2020 showing that the business of earlier petitioner M/s C & S Electric Ltd. has been assigned/transferred to the present petitioner. It is a case of practically a Company being survived and succeeded by another Company. The status of certain businesses of the erstwhile company have been merged into the present petitioner and has stepped into the shoes and assumed all the liabilities and the entitlements by virtue of Business Transaction Agreement. It is prima facie shown that whatever contracts the erstwhile petitioner had entered into with various entities while doing their personal business, has now been taken over by the present petitioner who has now assumed the same status as the erstwhile petitioner.

22. This is further reinforced by the definition of "Business Contracts" as defined under Clause 1 of Business Transaction Agreement which reads as under:

> *1.1 "Business contracts:*
> *"Business Contracts means the contracts, offers, orders, underatkings, agreements, expression of interest or similar arrangements, including all rights and obligations pertaining thereto , relating exclusively to the Business Undertaking, including all the contracts listed in Part 1 of Schedule 6"*
>
> *Business Undertaking is defined as under:*

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"Business Undertaking" means the business of (i) manufacturing and distribution of the products described in Schedule 14; owning, maintaining and/or operating solar plants; and (iii) providing end to end solutions and services in relation to engineering , procurement and construction (EPC) for projects from design and engineering to project execution and maintenance; and compromising (a) the Assets; and (b) the Assumed Liabilities;"

23. Further "Assumed Liabilities" have been defined to as referred to in Clause (7) which reads as under:

"7. The parties hereby agree that with effect from the Completion Date the Purchaser shall pay, satisfy , discharge and fulfill all Liabilities (including Liabilities that may arise from any Pending Litigation, trade payables and other concurrent liabilities) relating to the carrying on of the Business Underatking , whether arising prior to, or after , the Completion Date ("Assumed Liabilities")"

24. From the conjoint reading of the various terms of the Business Transaction Agreement, it is evident that all the liabilities and the entitlements that have arisen from the contracts that had been entered into by the erstwhile petitioner, stand taken over by the present petitioner and even all the liabilities arising out of the contracts have been assumed by the present petitioner. It is not disputed that there exists a valid Arbitration Clause in the GCC Agreement which was part of the contract entered into between erstwhile petitioner and respondent which is now taken over by the present petitioner. It is shown that there exists a valid arbitration agreements between the parties.

25. The second limb of arguments of the learned counsel for the respondent is that Clause 37.1 of GCC clearly prohibited subletting,

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transferring or assigning of the work by the contractor. This Business Transaction Agreement is in violation of the Clause of subletting of works of the petitioner. Being in breach of the terms and conditions of the contracts cannot seek resolution of disputes through arbitration as it is an illegal assignee.

26. This argument on behalf of the respondent is not tenable for the simple reading of Clause 37.1 of GCC. It is evident that what is prevented or prohibited is the transfer or subletting of the works by the contractor. Here it is not a case where the works to be executed under the contract have been sublet or assigned, but it is a case where the legal character of the erstwhile petitioner has been assumed by the present petitioner. It is not a case of illegal subletting or assignment of the works by the erstwhile petitioner to a third party. The respondent has conceded that there is a valid Arbitration Agreement in the work contract that was originally entered into by the respondent and the erstwhile petitioner.

27. The petitioner has claimed various arbitrable disputes to have arisen, though the same have been denied and challenged by the respondent. However, whether the petitioner is entitled to the claims as made by him and whether these are arbitrable disputes amenable to the jurisdiction of the learned arbitrator may be agitated by the parties before the Ld Arbitrator as these are factual disputes beyond the scope of the present petition.

28. In the circumstances, the sole arbitrator Ms.R.Kiran Nath, District & Sessions Judge (Retd.) (Mobile No.9910385659) is hereby appointed as the Arbitrator to adjudicate the disputes between the parties.

29. This is subject to the learned Arbitrator making the necessary disclosure under Section 12(1) of the A&C Act, 1996 and not being

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ineligible under Section 12(5) of the A&C Act, 1996.

30. The remuneration of the learned Arbitrator will be computed in terms of the Schedule IV of the Act or as agreed by the parties and the arbitrator.

31. It is hereby clarified that all the observations made herein are not a reflection on the merits of the case are solely for the purpose of deciding this petition. The parties shall be at liberty to agitate these aspects before the learned arbitrator.

32. The petition is disposed of in the above terms.

(NEENA BANSAL KRISHNA)
JUDGE

SEPTEMBER 20, 2022/neelam

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