

Neutral Citation Number: 2023/DHC/000700

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

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Date of Decision: 24.01.2023

+ **ARB.P. 846/2022**

ION EXCHANGE (INDIA) LTD

..... Petitioner

Through: **Mr. Aditya Vijay Kumar and Mr.
Mani Bhadra Jain, Advs.**

versus

DOOSAN POWER SYSTEMS INDIA PVT. LTD Respondent

Through: **Mr. Deepak Khurana and Mr.
Abhishek Bansal, Advs.**

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J (Oral)

1. The present petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties. The disputes between the parties have arisen in the context of:

(i) Contract bearing No.2017001268 for supply of material and equipment (hereinafter referred to as the “**Supply Contract**”) for a consideration of Rs.49,77,00,000/- (Rupees Forty Nine Crores Seventy Seven Lacs only) dated 26.12.2017.

(ii) Contract bearing No. 2017001269 for erection, commissioning, testing and performance guarantee test (hereinafter referred to as the “**ECOM Contract**”) for consideration of Rs.4,98,00,000/- (Rupees Four Crores Ninety Eight Lacs only) dated 26.12.2017.

2. The Arbitration Clause in the “**Supply Contract**” is in the following

terms:

“Article 19 DISPUTES AND ARBITRATION

19.1 Except as otherwise provided in the Contract, any dispute concerning a question of fact arising under the Contract shall be mutually agreed upon and amicably settled by the Parties. Any other disputes, disagreements, questions or breach besides a question of fact which shall arise as to the obligation of any Party under the Contract or the interpretation of any provision thereof, if not settled by mutual agreement, shall, at the option of the initiating Party and upon written notice to the other Party, be finally settled by arbitration.

19.2 The arbitration shall take place in New Delhi, India, and shall be conducted in accordance with the Indian Arbitration & Conciliation Act 1996 including amendments and under the Laws and regulations of India. In construing and interpreting the terms and conditions of this Contract, the arbitrators shall reach their decisions in accordance with the following;

19.2.1 The literal meaning of the wording of this Contract or if ambiguous.

19.2.2 The intent of Parties as revealed by this Contract as a whole or, if still ambiguous;

19.2.3 Each Party shall bear its own expenses with respect to any arbitration and the compensation and expenses of the arbitrators shall be borne in such a manner as may be specified in the decision of the arbitrators.

19.2.4 The laws and regulations of the India effect at the time of arbitration proceedings.

19.3 From the date the dispute, disagreement or difference arises up to the date of settlement of the matter in question by arbitration, Purchaser's good faith interpretation shall prevail: and Supplier shall comply with Purchaser's good faith interpretation and shall continue to fulfill its obligations under the Contract in good faith during the pendency of any arbitration and shall not be entitled to suspend or cease the fulfillment of its contractual obligations. The arbitration decision shall be final and irrevocable and the Parties hereto expressly and unreservedly agree to be bound thereby.”

3. The Arbitration Clause in **“ECOM contract”** is as under:

“33 DISPUTES AND ARBITRATION

33.1 Settlement of Disputes

All disputes, controversies, or differences, which may arise between the Contractor and the Sub-Contractor, out of or in relation to or in connection with the Contract, or for any breach thereof, shall be amicably settled by mutual conciliation between the parties hereto.

Should the parties hereto fail to settle such disputes, controversies, or differences ("Dispute") amicably within 30 (thirty) days, such Dispute shall be finally settled by arbitration in accordance with the following rule and place, the award of which shall be final and binding upon the parties hereto.

a) In case of an Indian Contractor, the arbitration proceedings shall be conducted in accordance with Indian Arbitration and Conciliation Act 1996. In case the Indian Contractor is an Indian Public Sector Enterprise/ Government Department (but not a State Govt. Undertaking or Joint Sector Undertaking which is not a subsidiary of Central Govt. Undertaking), the dispute arising between the Employer and the Contractor shall be referred for resolution to a Permanent Arbitration Machinery (PAM) of the Department of Public Enterprises, Government of India.
b) The Place for Arbitration shall be New Delhi, India."

4. Learned counsel for the petitioner submits that the disputes and differences that have arisen between the parties are broadly related to the following:

*"a. Non-payment of monies towards supply made by the Petitioner;
b. Levy of Liquidated Damages by the Respondent which is untenable on the face of the agreed terms between the parties
c. Failure to release retention monies which the Petitioner was entitled to;
d. The Respondent's persistence in requesting the Petitioner to extend the Performance Bank Guarantees for which the Petitioner has to pay Bank Guarantee extension charges;
e. Monies payable towards escalation, idling charges and other damages suffered by the Petitioner."*

5. It is evident that the Claims sought to be raised by the Claimant involve application and interpretation of the relevant contractual provisions, in the light of the factual background.

6. Learned counsel for the Petitioner accordingly submits that a Sole Arbitrator be appointed to adjudicate the said disputes.

7. On the other hand, learned counsel for the respondent has opposed the present petition on two grounds. Firstly, he submits that a single petition

seeking appointment of a Sole Arbitrator in respect of two separate contracts is not maintainable in law. Secondly, he submits that the Arbitration Clause in the “**Supply Contract**” is distinct from the clause in the “**ECOM contract**”. In this regard, it is submitted that the “**Supply Contract**” does not permit arbitration in respect of disputes arising in respect of “question of fact arising under the contract”.

8. As regards the first objection, there is no impediment for this court to appoint the same sole Arbitrator for each of the two contracts. During the course of hearing it has been agreed by the respective counsel of the parties that while appointing the same arbitrator for both the contracts, it should be clarified that reference to arbitration under each of the aforesaid contracts would be independent of each other.

9. The second contention raised by the learned counsel for the respondent to the effect that width of the arbitration clause in the “**Supply Contract**” is narrower, inasmuch as, disputes pertaining to the “question of fact” have been excluded from the purview thereof, is also misconceived and the same is belied by a bare reading of the relevant clause itself. Although, it is true that the first sentence of Clause 19.1 contemplates that any dispute concerning “question of fact” shall be mutually agreed upon and amicably settled by the parties, the following sentence provides as under:-

“... Any other disputes, disagreements, questions or breach besides a question of fact which shall arise as to the obligation of any Party under the Contract or the interpretation of any provision thereof, if not settled by mutual agreement, shall, at the option of the initiating Party and upon written notice to the other Party, be finally settled by arbitration.”

10. The aforesaid stipulation renders any ‘disputes, disagreements, questions or breach besides a question of fact,’ amenable to arbitration. The

use of expression “*besides*” is not in the exclusionary sense so as to circumscribe the width and amplitude of the expression “disputes/disagreements/questions of breach”.

11. In Black’s Law Dictionary (6th ed. 1990), the expression “*besides*” has been defined as under:-

“In addition to; moreover; also; likewise”

12. As such, it is incorrect for learned counsel for the respondent to contend that the arbitration clause in question purports to exclude any “question of fact” from the purview of Arbitration. Even otherwise, on a reading of Clause 19.1 as a whole, it is evident that the first part of the said clause serves to prescribe that in the first instance, the parties shall endeavor to resolve all factual issues amongst themselves. The second part of the clause, however, mandates arbitration in respect of “*disputes, disagreements, questions or breach besides a question of fact*”. It is inconceivable that any Arbitral Tribunal would adjudicate “disputes, disagreements, questions or breach” without examining / determining the underlying factual matrix.

13. The law is well settled that any contractual stipulation which undermines the scope of the arbitration clause, will be accorded an interpretation which gives full effect to the arbitration agreement between the parties. In this regard, it has been observed by the Supreme Court in the case of ***Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. and Others (2013) 1 SCC 641***, as under:-

“96. Examined from the point of view of the legislative object and the intent of the framers of the statute i.e. the necessity to encourage arbitration, the court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their

bargain of arbitration by bringing civil action involving multifarious causes of action, parties and prayers.”

14. Since, the existence of the arbitration agreement is not in dispute an Arbitral Tribunal is to be constituted in terms thereof. Any objection that the respondent may have as regards scope and/or applicability of the arbitration clause or as to any jurisdictional aspect, can be raised before the Arbitral Tribunal.

15. In the circumstances, Ms. Justice Rekha Sharma, Retired, (Mobile No. 9871300025) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties arising out of:

(i) Contract bearing No.2017001268 for supply of material and equipment (hereinafter referred to as the “**Supply Contract**”) for a consideration of Rs.49,77,00,000/- (Rupees Fourty Nine Crores Seventy Seven Lacs only) dated 26.12.2017.

(ii) Contract bearing No. 2017001269 for erection, commissioning, testing and performance guarantee test (hereinafter referred to as the “**ECOM Contract**”) for consideration of Rs.4,98,00,000/- (Rupess Four Crores Ninety Eight Lacs only) dated 26.12.2017.

16. It is clarified that the reference to arbitration under the aforesaid contracts shall be independent of each other and there shall be two separate arbitrations.

17. The respondent is at liberty to move an appropriate application before the Arbitrator, raising objections as regards jurisdiction/ admissibility/ maintainability of the claims sought to be raised by the petitioner, which shall be considered and decided by the Arbitrator in accordance with law.

18. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned arbitrator on their merits, in accordance with law.

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19. The present petition stands disposed of.

JANUARY 24, 2023/cl

SACHIN DATTA, J

