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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 25.05.2023
Judgment pronounced on: 03.07.2023

+ **ARB.P. 1068/2022**

M/S WAVE GEO-SERVICES PVT LTD Petitioner
 Through: Mr. Shashank Deo Sudhi, Adv.

versus

M/S DEVI ENGINEERING AND CONSTRUCTION PVT LTD Respondent
 Through: Ms. Mumtaz J. Shaikh, Mr. Nishant Singh and Mr. Sanjay Kumar, Advs.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

SACHIN DATTA, J.

IA No.10357/2023 (delay)

1. This is an application filed on behalf of the respondent for condonation of delay of 29 days in filing of reply.
2. In view of the averments made in the application, the same is allowed and the delay is condoned. The reply is taken on record.
3. The application stands disposed of.

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4. The present petition under Section 11 (2) and (6) of the Arbitration



and Conciliation Act, 1996 (hereinafter referred to as 'A&C' Act) has been filed seeking appointment of an independent Sole Arbitrator to adjudicate the disputes between the parties. The disputes between the parties have arisen in the context of a bilateral agreement dated 22.05.2019 to which the petitioner and the respondent are parties.

5. The respondent is stated to be an entity in the business of construction and providing services of Seismic Job Services and Shot Hole Drilling for Oil & Gas Exploration in India and other countries.

6. On the other hand, the petitioner claims to be a well-established Oil & Gas Project Management and Consultancy Company, providing services to oil exploration companies in India, Myanmar, Indonesia and Egypt.

7. The respondent was desirous of participating in a tender floated by M/s Oil India Ltd. along with a technical collaborator. The petitioner represented to the respondent that it has a technically qualified seismic company in its portfolio, which could participate/collaborate with the respondent as a technical collaborator. An agreement dated 22.05.2019 was consequently entered into between the parties which envisages that a technical collaborator would be provided by the petitioner which would jointly participate in the bid process along with the respondent on the basis of its technical experience, as per bid qualification requirement in the tender floated by M/s Oil India Ltd.

8. The scope of work of the petitioner was that it would provide support and would be the principal coordinator for the project in question on behalf of the technical collaborator.

9. The agreement further provides that the petitioner would assist the respondent in bid preparation and submission and would also represent the



technical collaborator in all the client meetings and the project meetings.

10. For its services under the agreement, it was provided that the respondent would pay to the petitioner service charges equivalent to 1% of the total executed contract value (excluding taxes). Apart from the same, it was contemplated that the respondent would pay technical fees of 1.25% of the total executed contract value (excluding taxes) to the technical collaborator.

11. The bilateral agreement between the petitioner and the respondent itself contemplates that a separate agreement would be signed between the respondent and the technical collaborator governing payment terms and conditions for the technical collaborator. The salient terms of the bilateral agreement between the petitioner and the respondent are reproduced as under:

“2. It has been further agreed that in the bidding process, WGS will provide support, and will be the Principal Coordinator for the said PROJECT on behalf of the TECHNICAL COLLABORATOR.

3. Both parties shall make their best efforts to obtain the intended PROJECT.

4. WGS, without undertaking any financial or contractual commitment to DEC/CLIENT, will assist DEC in bid preparation and submission. For this purpose of bid submission, WGS is an Authorized Representative on behalf of TECHNICAL COLLABORATOR. WGS would represent Technical Collaborator in all the client meetings and project meetings.

5. In case of PROJECT is awarded to DEC from CLIENT, through any arrangements either JV or MOU or Consortium Agreement or Technical Collaboration or any other agreement, which is supported by WGS and by its technical Collaborator, DEC will pay the Service Charges equivalent to 1% of the total executed contract value [Excluding Taxes) to WGS. Also, DEC will pay the technical fees of 1.25% of the total executed contract value (Excluding Taxes) to the TECHNICAL COLLABORATOR. A Specific Agreement shall be signed between DEC and TECHNICAL COLLABORATOR before the bid submission to regulate all the other matters that are not regulated in this Agreement including payment Terms & Conditions for Technical Collaborator. Service Charges would be paid to WGS by DEC on monthly basis from each monthly invoiced amount of the total project value within five (5) working days after receiving the payment



from Client.

6. In case WGS bring any equipment or any services which is not the responsibility of WGS as per the Appendix-I, WGS would be paid extra by DEC at mutually agreed prices during the project execution.

7. This Agreement is exclusive for both the parties for this PROJECT and shall be valid from the date of signing of this agreement and up to successful completion of the PROJECT in all respect and release of Performance Bank Guarantee & issue of completion certificate by Client or by its Main Contractor. The agreement is either wise terminated in the event that "DEC" is not being declared the lowest bidder and not being awarded the contract. Post termination of this agreement both the parties "DEC" and "WGS" shall not have liability or obligations whatsoever under this Agreement.

8. It is specifically agreed by DEC and WGS that neither DEC nor WGS shall cancel/rescind this Agreement during the bidding process and also in the event of award of PROJECT to DEC.

9. This Agreement can be amended at any time through mutual understanding in writing. Such amendments, once agreed by the parties, will become part of this Agreement.

10. The Parties agree that during the tenure and subsistence of this Agreement, they shall not enter into similar AGREEMENT with other parties for the same PROJECT.

11. This AGREEMENT shall be governed by and construed in accordance with the laws of India where the work is supposed to be executed."

12. The aforesaid bilateral agreement dated 22.05.2019, between the parties contains a separate section titled "Dispute Settlement". The same reads as under:

"DISPUTE SETTLEMENT

1. In the event of any dispute arising in the course of the bidding process and subsequent execution of project for which the AGREEMENT has been agreed, the dispute shall be resolved through mutual consultation in 30 days and if not settled through mutual negotiation and consultation process, then by way of Arbitration proceedings as per the law applicable in India.

2. The costs and expenses of the arbitrator, including without limitation, the fees of the arbitration and the Arbitrator/Arbitration Board, shall be borne equally by such Party.

3. Neither party shall commence any proceedings in any court of law in relation to any dispute arising in connection with this Agreement(s) entered into between the parties, until it has attempted to settle the dispute by use of procedure set out herein above.

4. This agreement shall be governed by the law of India, and all the arbitration rules of India shall be applicable. The Venue of arbitration shall



be at New Delhi or Hyderabad, India.

5. Court of Jurisdiction: If any dispute, controversy or difference arises between the parties, the same shall be resolved amicably. In case, such dispute cannot be resolved by the parties discussing in good faith to reach an amicable solution, the same shall be finally settled by arbitrator in accordance with the Arbitration and Conciliation Act, 1996 as amended from time to time. The arbitral award shall be final and binding all the parties. Jurisdiction for such arbitration or any other dispute will be New Delhi or Hyderabad, India.”

13. It is undisputed that there exists an arbitration agreement between the parties. There is also no controversy as regards stamping of the concerned agreement.

14. Disputes having arisen between the parties, a notice dated 25.07.2022 was sent by the petitioner to the respondent captioned as ‘legal notice for invocation of arbitration’. In the said notice, the gist of disputes that have arisen between the parties was set out and the petitioner clearly indicated its intention to have the said disputes resolved through arbitration. It was stated therein that a sum of Rs.1,73,66,981.82 (Rupees One Crore Seventy-Three Lakh Sixty-Six Thousand Nine Hundred Eighty-One and Eighty-Two Paisa) and Rs.54,49,767/- (Rupees Fifty-Four Lakhs Forty-Nine Thousand Seven Hundred Sixty-Seven only) is payable by the respondent to the petitioner along with interest @ 24% per annum as per the invoice(s) issued by the petitioner.

15. In the present petition, it has been clearly averred as under:

“11. That the cause of action for filing the present application has arisen within the territorial jurisdiction of this Hon'ble Court as the registered office of the Petitioner is situated within the jurisdiction of this Hon'ble Court, however the agreement had been executed in the office of the Respondent. Moreover, the parties had undertaken and mutually agreed in the franchise agreement that the Courts at New Delhi as well as Hyderabad shall have exclusive jurisdiction as mentioned in the clause dispute settlement at para 1 of the agreement dated 22.05.2019. It is further submitted that the cause of



action further arose when the legal notice invoking arbitration was sent to the respondent on 25.07.2022. However, the said legal notices have been returned undelivered with remarks no such address. Thus, the said legal notices have been further served to the respondents through their emails.”

16. In the reply, filed on behalf of the respondent, only one objection has been raised by the respondent. It is stated by the respondent that it has entered into two agreements, one with its technical collaborator dated 20.05.2019 and another with the petitioner dated 22.05.2019. The technical collaborator is stated to be a foreign entity named M/s Atyrau Geo Control LLP. It is contended that on a conjoint reading of both the agreements, the business arrangement between the parties is that the technical collaborator would provide technical assistance for the purpose of submission of the bid to M/s Oil India Ltd. and further provide technical management services for executing such project, if and when awarded, whereas the petitioner would provide ground technical assistance to the technical collaborator in connection with the project. The submission of the respondent is that, the purport of both the agreements was to bring about a tripartite understanding/agreement between the parties and therefore, it is not permissible for the petitioner to initiate/invoke Arbitration without making the technical collaborator a party.

17. The respondent has also contended that no attempt has been made to amicably resolve the *inter se* disputes between the parties, as contemplated in the dispute resolution clause in the agreement.

18. It is further contended that since the technical collaborator is a foreign entity and is a necessary and proper party to the proposed arbitral proceedings, the present case should be construed as an “international commercial arbitration” as defined in section 2(1)(f) of the A&C Act and, as



such, this court has no jurisdiction to decide the issue. It is urged, relying upon section 11 (12) of the A & C Act that jurisdiction in matters pertaining to international commercial arbitration vests only in the Supreme Court, therefore this Court lacks jurisdiction to entertain the present petition.

19. I am unable to agree with the contentions raised by learned counsel for the respondent. It is evident that the agreement between the petitioner and the respondent is a bilateral one. The technical collaborator i.e. M/s Atyrau Geo Control LLP is not a party to the said agreement. The petitioner has taken a clear stand that his claims against the respondent do not fall under, or impacted by the agreement dated 20.05.2019 between the respondent and its technical collaborator. It has been clearly stated by the petitioner in his rejoinder as under:

"12. That in reply to para no. 7 of the reply filed by the Respondent, it is submitted that the Respondent is trying to manipulate and mislead this Hon'ble Court by suppressing the actual facts and the contents of the paragraph is denied in totality except the recitals of the Agreement dated 22.05.2019 referred herein. In this respect, it is pertinent to refer Recital 3 of the Agreement dated 22.05.2019 "3. WGS (Petitioner) has a technically qualified seismic company in its portfolio and that company will participate in the PROJECT as a Technical Collaborator with DEC (Respondent)." It is further submitted that the original parties to the Agreement is Petitioner and the Respondent only wherein there is reference of M/s Oil India Ltd. and M/s Atyrau Geo Control LLP(AGC). It is pertinent to mention herein that the present agreement is exclusive agreement for the Petitioner and the Respondent which is evident from the Recital 7 of the Agreement dated 22.05.2023:

"7. This Agreement is exclusive for both the parties for this PROJECT and shall be valid from the date of signing of this agreement and up to successful completion of the PROJECT in all respect and release of Performance Bank Guarantee & issue of completion certificate by Client or by its Main Contractor. The agreement is either wise terminated in the event that "DEC" is not being declared the lowest bidder and not being awarded the contract. Post termination of this agreement both the parties "DEC" and "WGS" shall not have liability or obligations whatsoever under this Agreement.



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14. That in reply to para no.9 of the reply filed by the Respondent, it is submitted that the contents of the paragraph are vague, manipulated and frivolous which are denied in totality. It is submitted that the counsel has misinterpreted referred clause of Agreement dated 20.05.2019 and committed an error in understanding the clause which provides for the mechanism of dispute settlement and provides that AGC can appoint its authorized agent to represent them for the arbitration. In this respect it is submitted that referred agreement is between the exclusive parties i.e. Respondent and AGC. It is further submitted that AGC has never at any point of time appointed the Petitioner to represent them for the Arbitration. In this respect it further submitted that the Respondent be put to strict proof to prove his contention.”

20. It is, thus, evident that the petitioner has sought to pursue its claims against the respondent on the strength of its bilateral agreement alone. The said agreement admittedly contains an arbitration agreement. The respondent's plea that the petitioner's claim cannot stand in the absence of the technical collaborator, is an aspect touching upon the maintainability of the claim(s) sought to be raised, which can be urged before a duly constituted Arbitration Tribunal. However, the same cannot preclude the petitioner from seeking/invoking Arbitration in terms of the arbitration agreement between the parties.

21. *Prima facie*, there is also merit in the contention of the petitioner that the purport of Clause-7 of the bilateral agreement is that the *inter se* rights and obligations of the parties would be exclusively determined on the basis of the stipulations in the bilateral agreement between the petitioner and the respondent.

22. Since the bilateral agreement between the parties admittedly contains an arbitration clause and since neither of the parties are foreign entities, this court has jurisdiction to appoint an arbitrator.



23. As regards the contention that the present petition is not maintainable since the parties have not made any attempt to resolve their disputes through “mutual negotiation and consultation process”, it has been held in **Subhash Infraengineers (P) Ltd. v. NTPC Ltd.**,¹ as under:

“21. In this regard, it is relevant to note that in terms of Section 62(3) of the Act, it is open for a party to reject the invitation to conciliate. Further, in terms of Section 76 of the Act, the conciliation proceedings can be terminated by a written declaration of a party and there is no legal bar in this regard. In the present case, Clause 7.2.5 of the GCC expressly provides that “parties are free to terminate Conciliation proceedings at any stage as provided under the Arbitration and Conciliation Act, 1996.”

*22. In the context of a pari materia arbitration clause, it has been held by a Coordinate Bench of this Court in the case of **Abhi Engg. Corporation Pvt. Ltd. v. NTPC Ltd.**, as under:—*

“11. It has been rightly argued on behalf of the learned counsel for the petitioner that the process of “conciliation” could be resorted to only if both the parties agreed. Since the petitioner was not agreeable to resolution through conciliation, the Invocation of Arbitration cannot be held to be in non-compliance of mechanism agreed between the parties.

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*13. In the present case, it is not as if there was a detailed multiple-tier procedure given before the hierarchy of officers for addressing the grievances in regard to execution of the Contract of the petitioner. The first two tiers are mutual consultation and conciliation. As already nominated above, conciliation can take place only if both the parties consent. Rather, it is a case of abandonment of the Contract by the respondent due to inability to delay in issuance of NOC by the Pollution Control Board. Moreover, the first tier of dispute resolution was only to see if the parties could agree at any mutual settlement. As has been rightly argued on behalf of the petitioner, the nature of disputes which had arisen between the parties was not of the kind which may see any fruitful result through mutual consultation. In this case, a reference may be made to the Judgment of Supreme Court in **Demarara Distilleries Pvt. Ltd. v. Demerara Distillers Ltd.** (2015) 13 SCC 610, wherein it was opined that the relegation of the parties to the avenue of amicable resolution, when the an application under Section 11(6) of A&C Act,*

¹2023 SCC OnLine Del 2177



1996 has been filed, would be unjustified as in case, where such relegation would be merely in the nature of an empty formality.

14. A reference has also been made to the decision of this Court in *Kunwar Narayan v. Ms. Ozone Overseas Pvt. Ltd.* in ARB.P. 538/2020 decided on 10th February, 2021, wherein a similar mechanism for resolution of disputes was provided. Reliance has also been place on *Demarara Distilleries Pvt. Ltd. v. Demerara Distillers Ltd.* (supra) and *Ravindra Kumar Verma v. BPTP Ltd.* 2014 SCC OnLine Del 6602, wherein it was observed that nothing worthwhile would be achieved by relegating the parties to explore any avenue of amicable resolution. Besides, the appointment of an Arbitrator by this Court would not act as an impediment to the parties to resolve their disputes amicably should it be possible at any point of time.

15. In the present case, considering the nature of dispute, it may be an empty formality as observed above, to relegate the parties to first explore the possibility of mutual consultation. Moreover, this cannot be considered as a ground to dismiss the present petition under Section 11(6) of A&C Act, 1996.

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28. In the present case, the clause/pre arbitral mechanism contemplates mutual consultation followed by conciliation. As noticed in *Abhi Engg. and Oasis Projects*, conciliation is a voluntary process and once a party has opted out of conciliation, it cannot be said that the said party cannot take recourse to dispute resolution through arbitration.”

24. In *Kunwar Narayana vs. M/s Ozone Overseas Pvt. Ltd. & Anr.*², this Court relied upon the judgment of the Supreme Court in *Demarara Distilleries Pvt. Ltd. vs. Demerara Distilleries Ltd.*³ and the judgment of this Court in *Ravindra Kumar Verma vs. BPTP Ltd.*⁴ and has held as under:

“5. Ms. Pahwa, learned Counsel for the respondents submitted that her only objection, to the petition, was that the petitioner has not exhausted the avenue of amicable resolution, contemplated by Clause 12 of the Share Buyback Agreement. I am not inclined to agree with this submission. The recital of facts, as set out in the petition, indicate that efforts at trying to resolve the disputes, amicably were made, but did not succeed. Even otherwise, the Supreme Court

² 2021:DHC:496

³ (2015) 13 SCC 610

⁴ MANU/DE/3028/2014



in Demarara Distilleries Pvt. Ltd. v. Demerara Distilleries Ltd. and this Court, in its judgment in Ravindra Kumar Verma v. BPTP Ltd., opined that relegation of the parties to the avenue of amicable resolution, when the Court is moved under Section 11(6) of the 1996 Act, would be unjustified, where such relegation would merely be in the nature of an empty formality. The arbitration clause in the present case does not envisage any formal regimen or protocol for amicable resolution, such as issuance of a notice in that regard and completion of any stipulated time period thereafter, before which arbitral proceedings could be invoked. In the absence of any such stipulation, I am of the opinion, following the law laid down in Demarara Distilleries Pvt. Ltd. and Ravindra Kumar Verma v. BPTP Ltd. nothing worthwhile would be achieved, by relegating the parties to explore any avenue of amicable resolution. Besides, the appointment of an arbitrator by this Court would not act as an impediment in the parties resolving their disputes amicably, should it be possible at any point of time.”

25. In ***Oasis Projects Ltd. v. National Highway & Infrastructure Development Corpn. Ltd.***,⁵ this Court, has held as under:

“12. The primary issue to be decided in the present petition is, therefore, as to whether it was mandatory for the petitioner to resort to the Conciliation process by the Committee before invoking arbitration. Though Article 26.2 clearly states that before resorting to arbitration, the parties agree to explore Conciliation by the Committee, in my opinion, the same cannot be held to be mandatory in nature. It needs no emphasis that Conciliation as a Dispute Resolution Mechanism must be encouraged and should be one of the first endeavours of the parties when a dispute arises between them. However, having said that, Conciliation expresses a broad notion of a voluntary process, controlled by the parties and conducted with the assistance of a neutral third person or persons. It can be terminated by the parties at any time as per their free will. Therefore, while interpreting Article 26.2, the basic concept of Conciliation would have to be kept in mind.”

26. In the circumstances, there is no impediment in constituting an Arbitral Tribunal to adjudicate the disputes between the parties. Accordingly, Ms. Justice (Retd.) Ms. Deepa Sharma, Former Judge, Delhi High Court, (Mobile No.-9910384631) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

⁵ (2023) 1 HCC (Del) 525



27. Needless to say, it would be open for the respondent to raise appropriate preliminary objections, if any before the Ld. Sole Arbitrator as to maintainability/jurisdiction and/or objection as to the locus of the petitioner to initiate the arbitration proceedings without making a technical collaborator party thereto. All rights and contentions of the respondent in this regard are expressly reserved and shall be considered by the Ld. Sole Arbitrator. It is made clear that the observations made hereinabove are based on a *prime facie* consideration of the matter for the purpose of deciding the present petition under Section 11 of the A & C Act.

28. The learned Sole Arbitrator may proceed with the arbitral proceedings subject to furnishing to the parties requisite disclosures as required under section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.

29. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

30. Parties shall share the arbitrator's fee and arbitral costs, equally.

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

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

JULY 03, 2023/cl

SACHIN DATTA, J