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

+ ARB.P. 419/2022 & I.A. 16764/2022

PSM ENERGY PVT. LTD.

.....Petitioner

Through: Mr. Murari Tiwari, Mr. Tripurari
Tiwari, Mr. Rahul Kumar,
Advocates.

versus

ZAM ENGINEERING AND
LOGISTICS PVT. LTD

.....Respondent

Through: Mr. D. Abhinav Rao, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

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12.08.2024

1. By way of this petition under Section 11 of the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner seeks appointment of an arbitrator to resolve disputes between the parties under an agreement dated 21.02.2020 entitled “*Agreement for functioning of PSME ZEAL JV for joint execution of projects on profit sharing basis*” [“the JVA”].

2. The JVA contains a dispute settlement provision (Clause 26), which provides for resolution of disputes by an arbitrator mutually appointed by the parties. Although it is stated that the arbitration would take place at Gurgaon, Haryana, Courts in New Delhi have been vested with exclusive jurisdiction.

3. Disputes having arisen between the parties, the petitioner invoked arbitration by a legal notice dated 27.01.2022. The respondent’s reply dated 10.02.2022 did not contest the existence of an arbitration clause in the JVA, but asserted that the disputes raised by the petitioner arose under different agreements between the parties, being an Operational Lease



Agreement dated 16.10.2019 ["OLA"] and Memorandum of Understanding dated 05.01.2020 ["MoU"]. This is also the ground of objection raised by Mr. D. Abhinav Rao, learned counsel for the respondent.

4. The parties first entered into the OLA, which provided for lease of thirty Volvo FMX 460 tippers by the petitioner from the respondent. The MoU was also entered into, pursuant to the OLA. It is the admitted position that neither of these documents contain an arbitration clause. The arbitration clause is contained only in the JVA, and there is no express reference to the OLA or the MoU in the JVA.

5. In the course of these proceedings, the Court made the following order on 21.03.2023: -

*"1. Having heard learned counsels for parties, **the Court notes that a reading of the arbitration notice of 27 January 2022 would clearly indicate that the dispute is raised in respect of a Lease Agreement which was executed between the parties and related to the lease of 30 X Volvo FMX 460 Tippers.** The aforesaid lease stood comprised in an Agreement dated 16 October 2019. The said Agreement of Lease thereafter came to be modified in certain respects and the modified terms stand embodied in a Memorandum of Understanding [MoU] dated 05 January 2020.*

*2. Parties thereafter appear to have entered into a separate Joint Execution of Projects on Profit Sharing Basis Agreement which is dated 21 February 2020. The arbitration clause stands comprised in this particular agreement only. **Presently, there appears to be no connect between the subject matter of the contract which formed part of the Operational Lease Agreement read with the MoU and the subsequent agreement noted above.** As would be evident from paragraph E of the petition as well as upon a reading of the arbitration notice which was issued, **it is manifest that the dispute in respect of which the petitioner seeks the constitution of an Arbitral Tribunal was again the leasing of the 30 x Volvo FMX 460 Tippers.***

3. The Court, additionally, notes that the respondent has in respect of the asserted dues payable by the petitioner flowing from the Operational Lease Agreement already instituted a commercial suit.



The petitioner here is stated to have filed a written statement therein. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 came to be filed thereafter.

4. Mr. Tiwari, learned counsel appearing for the petitioner prays for time to obtain instructions in light of the above.

5. Consequently, let the matter be called again on 12.05.2023.”

[Emphasis supplied.]

6. As noted in the order passed on the last date of hearing i.e., 07.08.2024, the application under Section 8 of the Act filed by the petitioner in a suit filed by the respondent has been rejected by the concerned Court being the Commercial Court, Hyderabad on 10.06.2024. A copy of the said order has been handed up in Court and is taken on record. The learned Commercial Court has found that the claims of the plaintiff (respondent herein) arise out of the OLA and the MoU, which does not contain an arbitration clause. The application filed by the petitioner herein under Order VII Rule 11 of the Code of Civil Procedure, 1908, read with Section 8 of the Act has, therefore, been rejected. Mr. Murari Tiwari, learned counsel for the petitioner, states that the petitioner is in appeal against the said order.

7. Be that as it may, Mr. Tiwari submits upon instructions, that the petitioner wishes to seek reference to arbitration, confined to claims which arise under the JVA.

8. Mr. Rao submits that the question of arbitrability of claims under the OLA and MoU, stands concluded between the parties by the order of the Commercial Court, Hyderabad. However, to the extent that the petitioner may have any claims arising out of the JVA alone, the existence of arbitration clause therein is not disputed. He further submits that the JVA was not acted upon, and disputes arose only out of the OLA



and MoU.

9. Having heard learned counsel for the parties, I am of the view that a reference to arbitration is warranted, to the extent that the petitioner may have any claims arising out of the JVA. On the point of existence of the arbitration clause in the OLA or MoU, the order of the Commercial Court, Hyderabad binds the parties, subject to any contrary decision in appeal. Order of this Court dated 21.03.2024 also recorded that there is “no connect” between the subject matter of the OLA read with MoU and the JVA.

10. However, as Mr. Tiwari submits that the petitioner seeks to recover certain claims under the JVA dated 21.02.2020 and relies upon the arbitration clause contained therein, the petition is allowed, and disputes between the parties are referred to arbitration, to be held under the aegis of Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi [“DIAC”]. DIAC is requested to nominate an arbitrator from its panel. The learned Arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.

11. The arbitration proceedings will be governed by the Rules of DIAC, including as to remuneration of the learned Arbitrator.

12. All rights and contentions available to the parties in law, are left open for consideration by the learned Arbitrator.

13. This petition, alongwith pending application, stands disposed of.

PRATEEK JALAN, J

AUGUST 12, 2024/‘Bhupi’/