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

+ **ARB.P. 1030/2022**

MS BCH ELECTRIC LTD

.....Petitioner

Through: Ms. Ekta Choudhary, Mr. Divyank
Dutt Dwivedi & Ms. Aditi Sharma,
Advocates.

versus

**NTPC BHEL POWER PROJECTS
PVT LTD AND ANR**

.....Respondents

Through: Mr. Puneet Taneja, Mr. Manmohan
Singh Narula, Mr. Anil Kumar &
Mr. Amit Yadav, Advocates.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

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06.08.2024

1. The petitioner has filed this petition under Section 11 of the Arbitration and Conciliation Act, 1996 [“the Act”], seeking appointment of an arbitrator to adjudicate disputes between the parties under a purchase order dated 26.09.2012 and amended/supplementary purchase orders thereto, read with General Conditions of Contract (Procurement) dated 07.10.2010 [“GCC”], for works to be carried out at the respondents’ Tripura Gas Based Combine Cycle Power Plant at Monarchak, Tripura.

2. Clause 33 of the ‘general commercial terms & conditions’ in the GCC, provides for resolution of disputes by arbitration. New Delhi has



been designated as the venue of arbitration. Although the clause provides for the arbitrator to be appointed by the respondents, learned counsel for the parties accept that such unilateral appointment is impermissible in view of the decisions of the Supreme Court in *TRF Limited vs. Energo Engineering Projects Limited* [(2017) 8 SCC 377] and *Perkins Eastman Architects DPC vs. HSCC (India) Limited* [(2020) 20 SCC 760].

3. Disputes having arisen between the parties, the petitioner invoked arbitration by a legal notice dated 13.01.2022, to which it did not receive a response.

4. In the course of the present proceedings, the parties were referred to mediation, but have been unable to arrive at a settlement.

5. Mr. Puneet Taneja, learned counsel for the respondents, resists a reference to arbitration on the ground that the petitioner's claims are *ex facie* barred by limitation. He submits that the petitioner's cause of action arose in the year 2015 and the petitioner's pleadings themselves will show that no proceedings were commenced until issuance of the invocation notice on 13.01.2022.

6. While Ms. Ekta Choudhary, learned counsel for the petitioner, disputes this position, I am of the view that it is unnecessary for the referral Court to address this question in view of the recent judgment of the Supreme Court in *SBI General Insurance Co. Ltd. v. Krish Spinning* [2024 SCC OnLine SC 1754]. The Supreme Court has held that the limited jurisdiction exercised by the referral Court under Section 11 of the Act, in terms of several decisions of the Supreme Court, including *Vidya Drolia vs. Durga Trading Corporation* [(2021) 2 SCC 1], *Bharat*



Sanchar Nigam Limited vs. Nortel Networks India Private Limited [(2021) 5 SCC 738] and *NTPC Ltd. v. SPML Infra Ltd.* [(2023) 9 SCC 385], requires reconsideration in view of the judgment of the seven judge bench in *Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re* [(2024) 6 SCC 1]. The position, as explained by the Supreme Court, is that the jurisdiction of the referral Court is limited to a *prima facie* examination with regard to the existence of the arbitration agreement, and does not encompass any contentious issue of arbitrability or maintainability, including questions of limitation or accord and satisfaction. The Supreme Court held that such an enquiry falls wholly within the domain of the arbitral tribunal, consistent with the doctrine of *Kompetenz-Kompetenz*.

7. As no other issue has been raised by Mr. Taneja, I am of the view that the appropriate course is to refer the parties to arbitration, reserving the rights and contentions of the parties on all points, including limitation, for adjudication by the learned arbitrator.

8. The petition is consequently allowed and disputes between the parties, under the purchase order dated 26.09.2012 and amended/supplementary purchase orders thereto, are referred to arbitration of Mr. Rakesh Kumar Dudeja, Advocate [Tel: 9810147798]. The arbitration will be held under the aegis of Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi ["DIAC"], and will be governed by the Rules of DIAC, including as to remuneration of the learned arbitrator.

9. The learned arbitrator is requested to furnish a declaration under



Section 12 of the Act, prior to entering upon the reference.

10. It is made clear that all rights and contentions, including on the point of limitation are left for consideration by the learned arbitrator.

PRATEEK JALAN, J

AUGUST 6, 2024

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