



\$~1

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

+ **ARB.P. 1130/2022**

RAKBRO INDUSTRIAL CORPORATION Petitioner
Through: **Mr. Shrey Kumar, Advocate.**

versus

**ESP/ ESP - 2 (ENGINEER STORES
PROCUREMENT) AND ANR.** Respondents
Through: **Ms. Gauri Goburdhun, Ms.
Muskaan Gupta, Mr. G. Singh
Narula, Advocates for Mr. Apoorv
Kurup, Advocate for R-1.
Mr. Yoginder Uniyal, Mr. Nitin
Darmora, Mr. Sanjay Sharma,
Advocates for R-2.**

**CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN**

ORDER

% **15.01.2024**

1. By way of this petition under Section 11 of the Arbitration and Conciliation Act, 1996, the petitioner seeks appointment of an arbitrator to adjudicate disputes which have arisen between it and the respondent No. 1 under a Supply Order dated 03.06.2015 [at page 74 of the petitioner's list of documents].
2. The Supply Order is issued with reference to a rate contract for a period of 17.12.2014 to 30.11.2015 issued by the Directorate General of Supplies and Disposals ["DGS&D"]. The said rate contract [page Nos. 58 to 73 of the petitioner's list of documents] was, in turn, issued pursuant to



a tender enquiry issued by the DGS&D [page Nos. 12 to 30 of the petitioner's list of documents], opened on 30.01.2014. The General Terms and Conditions refer to Form No. DGS&D-1001 [page Nos. 84 to 86 of the petitioner's list of documents] which contains a dispute resolution clause [Clause 23]. The clause provides for resolution of disputes by arbitration of a sole arbitrator being an officer in the Ministry of Law.

3. It appears from the documents placed on record that the petitioner, a small-scale industry, participated in the tender through National Small Industries Corporation Ltd. ["NSIC"], respondent No. 2 herein. The rate contract was also issued by the DGS&D to NSIC. The petitioner originally sought appointment of an arbitrator by a communication dated 14.11.2019 and was advised by respondent No. 1 to approach NSIC for further action. NSIC, by a letter dated 02.06.2020, addressed to the DGS&D, requested for appointment of an arbitrator to adjudicate the petitioner's claims. Despite considerable correspondence thereafter, the arbitrator has not yet been appointed. The correspondence rests with a letter dated 29.08.2022, issued by respondent No. 1, in response to the petitioner's legal notice dated 08.08.2022. By the said letter, respondent No. 1 claims to have awarded the petitioner's request to the NSIC, but not received any response from them.

4. By the order dated 23.11.2022, the statement of respondent No. 2 was recorded that it has no objection to the appointment of an arbitrator to adjudicate the disputes. However, respondent No. 1 was granted time to file a reply in view of its submission that the disputes between the parties arise under two separate contracts – one between Union of India and NSIC and the other between NSIC and the petitioner. Further time



for filing of reply was granted on 16.12.2022 and the matter has been adjourned from time to time thereafter. However, no reply has yet been filed by respondent No. 1.

5. Although a request for further time for filing reply has been made today on behalf of respondent No. 1, I am of the view that this is not appropriate, after the lapse of more than one year since respondent No. 1 was first granted time for filing of a reply. These proceedings are under Section 11 of the Act, and the Court is primarily required to examine the *prima facie* existence of an arbitration clause, with all other questions being left to the learned arbitrator to decide.

6. Learned counsel for respondent No. 1 submits that the disputes are *ex-facie* barred by limitation. She draws my attention to a communication dated 28.06.2017 directed by respondent No. 1 (at page 90 of the petitioner's list of documents), wherein respondent No. 1 stipulated levy of liquidated damages. It is submitted that the period of limitation commenced with the issuance of the said letter whereas the present petition has been filed only in September, 2022.

7. In this regard, it may be noted that the petitioner has placed on record several letters by which it requested the Union of India to appoint an arbitrator, commencing with a communication dated 14.11.2019 (page 94 of the petitioner's list of documents). Having regard to Section 21 of the Act which stipulates that arbitration proceedings commence on the date on which a request for reference to arbitration is received by the respondent, this is not a case where the petitioner's claims are *ex-facie* barred by limitation. Limitation being a mixed question of fact and law, I am of the view that it is appropriate to refer the case to arbitration leaving



all rights and contentions of the parties open for adjudication by the learned arbitrator.

8. The petition is, therefore, allowed and the disputes between the parties are referred to arbitration of a sole arbitrator. With the consent of learned counsel for the parties, it is directed that the proceedings will 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 arbitration proceedings will be governed by the Rules of DIAC, including as to remuneration of the learned Arbitrator. The learned Arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference

9. It is made clear that all rights and contentions of the parties including on the preliminary issues are left open for adjudication by the learned arbitrator.

10. The petition is disposed of with the aforesaid directions.

PRATEEK JALAN, J

JANUARY 15, 2024

‘Bhupi’/