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

+ **ARB.P. 1086/2023**

**CHHOTAGOVINDPUR AND BAGBERA DRINKING WATER  
SUPPLY PROJECT LIMITED** ..... Petitioner

Through: Mr. T Srinivasa Murthy, Mr. Piyush  
Joshi, Ms. Meghna Sengupta, Ms. Devyani Prasad,  
Advs.

versus

**DRINKING WATER AND SANITATION DEPARTMENT**

..... Respondent

Through: Mr. Arunabh Chowdhary, Sr. Adv.  
with Ms. Pallavi Langar, Mr. Karma Dorjee, Mr.  
Abhishek Roy, Advs.

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+ **O.M.P.(I) (COMM.) 329/2022**

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**CORAM:**

**HON'BLE MR. JUSTICE JASMEET SINGH**

**ORDER**

**13.02.2024**

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1. This is a petition filed by the petitioner under Section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of a Sole Arbitrator.
2. The parties entered into a contract on 25.05.2015, whereby the petitioner was declared a successful bidder in a tender floated by the



respondent for Design, Build, Operate, Maintain and Transfer (DBOMT) Contract for Chhotagovindpur and Bagbera Water Supply Scheme Under World Bank assisted under Neer Nirmal Pariyojana (RWSSP-LIS) being contract No. Chhotagovindpur/ Bagbera/ ICB/ Agreement/ 2015-16-1.

3. Since there were disputes between the parties, the petitioner invoked the arbitration Clause on 29.10.2022. The respondent duly replied to the said notice on 03.01.2023.
4. Prior to that, the petitioner also filed an application under Section 9 on 01.11.2022 seeking interim protection.
5. Mr. Chowdhary, learned senior counsel for the respondent states that the invocation of arbitration is faulty and not according to the contract. He draws my attention to Clause 1.6 of the General Conditions of Contract which reads as under:-

***“1.6 Settlement of Disputes***

***1.6.1 Adjudicator***

*(1) If any dispute of any kind whatsoever arises between the Owner and the Operator in connection with or arising out of the Contract including,*

*(a) any question regarding the existence, validity or termination of the Contract; and*

*(b) any matter related to the performance of the Services,*

***the Parties shall seek to resolve any such dispute or difference by mutual consultation. If the Parties fail to resolve such a dispute or difference by mutual consultation, the dispute shall be referred in writing, by either the Operator or the Owner, to the Adjudicator with a copy to the other Party or Parties.***

*(2) GC Section 1.6.1(1) shall apply,*



*(a) during the execution of the Services and after the completion of the Services; and*

*(b) before and after the termination, abandonment or breach of the Contract.*

*(3) The Adjudicator shall give its decision in writing to both Parties no later than 30 days after the referral of a dispute. If the Adjudicator has rendered its decision within the 30 day time limit, and no notice of intention to commence arbitration has been given by either the Owner or the Operator prior to the expiration of 60 days after the reference of the dispute to the Adjudicator, the Adjudicator's decision shall become final and binding upon the Owner and the Operator. Any decision that has become final and binding shall be implemented by the Parties forthwith.*

*(4) The Adjudicator shall be paid a fee at the rate specified in the SCC plus reasonable expenditures incurred in the execution of its duties as Adjudicator, and these costs shall be divided equally between the Owner and the Operator.*

*(5) If the Adjudicator resigns or dies, or the Owner and the Operator agree that the Adjudicator is not fulfilling its functions in accordance with the provisions of the Contract, a new Adjudicator shall be jointly appointed by the Owner and the Operator. If the Owner and the Operator cannot agree on a new Adjudicator within 30 days after the resignation, death or removal of the existing Adjudicator, the new Adjudicator shall be appointed at the request of either Party by the Appointing Authority specified in the SCC.”*

6. Thereafter, he also refers to Clause 1.6.2 being the arbitration Clause which reads as under:-

*“1.6.2 Arbitration*



*(1) If either the Owner or the Operator is dissatisfied with the Adjudicator's decision, or if the Adjudicator fails to give a decision within 30 days after a dispute being referred to it, then either the Owner or the Operator may, within 60 days after such reference, give notice to the other Party, with a copy for information to the Adjudicator, of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given.*

*(2) Any dispute in respect of which a notice of intention to commence arbitration has been given, in accordance with GC Section 1.6.2(1), shall be finally settled by arbitration.*

*(3) Arbitration proceedings shall be conducted in accordance with the rules of procedure designated in the SCC*

#### *1.6.3 Obligations During Arbitration*

***Notwithstanding any reference to the Adjudicator or arbitration herein,***

*(a) the Parties shall continue to perform their respective obligations under the Contract unless they otherwise agree; and*

*(b) the Owner shall pay the Operator any monies due to the Operator.”*

7. It is stated by Mr. Chowdhary, learned senior counsel for the respondent that in the present case, the parties were required to go to the adjudicator and the adjudicator was required to adjudicate upon the disputes and only thereafter, if the party was dissatisfied, the petitioner could have invoked the arbitration Clause.
8. He states, admittedly, that in the present case, the petitioner has not approached the adjudicator.
9. Hence, the petition is liable to be dismissed.



10. Mr. Murthy, learned counsel for the petitioner states that the issues have been settled by the judgment of Hon'ble Supreme Court in *“Bharat Sanchar Nigam Limited and Another vs. Nortel Networks India Private Limited”* [(2021) 5 SCC 738]. In addition, he also states that the arbitration Clause is contained in the Special Conditions of Contract and the same will have precedence over General Conditions of Contract.
11. Lastly, he states that the communication exchanged between the parties would show that going to the adjudicator would be an empty formality and no fruitful purpose would be served. For that proposition, he relies upon *“Visa International Limited vs. Continental Resources (USA) Limited”* [(2009) 2 SCC 55] and *“Demerara Distilleries Private Limited and Another vs. Demerara Distilleries Limited”* [(2015) 13 SCC 610].
12. I have heard learned counsels for the parties.
13. Admittedly, the petitioner has not approached the adjudicator.
14. The Hon'ble Supreme Court in *“Bharat Sanchar Nigam Limited and Another”* (supra) has categorically stated that the issue with regard to breach of pre-arbitration requirement is a procedural requirement and does not relate to jurisdictional issue and hence, can be left for adjudication to the Arbitrator. Paragraphs 38 and 39 of the said judgment read as under:-

*“38. Limitation is normally a mixed question of fact and law, and would lie within the domain of the Arbitral Tribunal. There is, however, a distinction between jurisdictional and admissibility issues. An issue of “jurisdiction” pertains to the power and authority of the arbitrators to hear and decide a*



*case. Jurisdictional issues include objections to the competence of the arbitrator or tribunal to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. Issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, since these issues pertain to the jurisdiction of the tribunal.*

**39.** *Admissibility issues however relate to procedural requirements, such as a breach of pre-arbitration requirements, for instance, a mandatory requirement for mediation before the commencement of arbitration, or a challenge to a claim or a part of the claim being either time-barred, or prohibited, until some precondition has been fulfilled. Admissibility relates to the nature of the claim or the circumstances connected therewith. An admissibility issue is not a challenge to the jurisdiction of the arbitrator to decide the claim.”*

15. The Special Conditions of Contract contained in Appendix-1 contains Clause 10 which is the arbitration Clause and reads as under:-

***“10. Rules of Procedure for Arbitration Proceedings (GC Section 1.6.2(3))***

*All disputes arising in connection with the Contract shall be finally settled under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) by one or more arbitrators appointed in accordance with the Rules. The venue will be as follows:*

*(i) Indian contractors: New Delhi*

*(ii) Foreign contractors: Neutral Venue (Example Singapore)”*



16. The tender document itself states Clause 1.1 and 1.2 which read as under:-

***1.1 Contract Documents***

*This Contract to Design, Build and Operate a Rural pipe water supply scheme between the Owner and the Operator (the "Contract") consists of the following documents (collectively, the "Contract Documents"), and each of the following shall be read and construed as an integral part of the Contract:*

- (a) Form of Contract;*
- (b) Minutes of Pre bid conference dated 31.03.2014*
- (c) Appendix I to the General Conditions of Contract: Special Conditions of Contract Appendix*
- (d) General Conditions of Contract*
- (e) Appendix 2 to the General Conditions of Contract: Terms and Procedures of Payment Appendix*
- (f) Appendix 3 to the General Conditions of Contract: Technical Specifications Appendix*
  - 3A: Design-Build, Operations & Maintenance and Transfer Services Appendix*
  - 3B: Operations & Maintenance Contract Appendix*
  - 3C: Indicative Bill of Quantities Appendix*
- (g) Appendix 4 to the General Conditions of Contract: Detailed Project Report (DPR)*
- (h) Appendix 5 to the General Conditions of Contract:*



### *Contract Price Adjustment Appendix*

*(i) Appendix 6 to the General Conditions of Contract: Subsidiary Tripartite Agreement Appendix*

*(j) Appendix 7: Corrigenda to the bidding documents Nos. PR No- 110915 (Drinking Water and Sanitation) 2014-15 & PR No-111566 (Drinking Water and Sanitation) 14-15*

*(k) Appendix 8: Bidding Document*

*(l) Appendix 9: Operators Bid*

### ***1.2 Order of Precedence***

*(1) In the event of any ambiguity or conflict between the Contract Documents listed in Section 1.1 of this Form of Contract, the order of precedence shall be the order in which the Contract Documents are listed in Section 1.1 of this Form of Contract.*

*(2) Notwithstanding Section 1.2(I) of this Form of Contract and any other term or condition in the Contract Documents, if any statement or provision in Appendix 9 - Operator's Bid of the General Conditions of Contract is not consistent with or conflicts with any other term or condition in the remainder of the Contract Documents, the remainder of the Contract Documents shall govern.”*

17. A perusal of the same clearly shows that in the order of precedence, the Special Conditions of Contract takes precedence over General Conditions of Contract. Clause 10 of the Special Conditions of Contract does not require the pre-condition of going to the adjudicator before invoking arbitration. Clause 1.6 quoted above are the General Conditions of Contract.



18. Even otherwise, the documents exchanged between the parties clearly show that the requirement of going to the adjudicator would be an empty formality on account of the hostile disagreements between the parties.
19. The exchange of letters also shows that both the parties have been trying to terminate the contract and in fact both have terminated.
20. For the said reasons, I am of the view that going to an adjudicator would be an empty formality.
21. The observations in “***Visa International Limited***” (supra) are relevant and paragraph 38 of the same reads as under:-

*“38. It was contended that the pre-condition for amicable settlement of the dispute between the parties has not been exhausted and therefore the application seeking appointment of arbitrator is premature. From the correspondence exchanged between the parties at pp. 54-77 of the paper book, it is clear that there was no scope for amicable settlement, for both the parties have taken rigid stand making allegations against each other. In this regard a reference may be made to the letter dated 15-9-2006 from the respondent herein in which it is inter alia stated “... since February 2005 after the execution of the agreements, various meetings/discussions have taken place between both the parties for furtherance of the objective and purpose with which the agreement and the MoU were signed between the parties. Several correspondences have been made by CRL to VISA to help and support its endeavour for achieving the goal for which the abovementioned agreements were executed”. In the same letter it is alleged that in spite of repeated requests the petitioner has not provided any funding schedules for their portion of equity along with supporting documents to help in*



*convincing OMC of financial capabilities of the parties and ultimately to obtain financial closure of the project. The exchange of letters between the parties undoubtedly discloses that attempts were made for an amicable settlement but without any result leaving no option but to invoke the arbitration clause.”*

22. Similarly, the observations in “**Demerara Distilleries Private Limited and Another**” (supra) are relevant and paragraph 5 of the same reads as under:-

*“5. Of the various contentions advanced by the respondent Company to resist the prayer for appointment of an arbitrator under Section 11(6) of the Act, the objections with regard the application being premature; the disputes not being arbitrable, and the proceedings pending before the Company Law Board, would not merit any serious consideration. The elaborate correspondence by and between the parties, as brought on record of the present proceeding, would indicate that any attempt, at this stage, to resolve the disputes by mutual discussions and mediation would be an empty formality. The proceedings before the Company Law Board at the instance of the present respondent and the prayer of the petitioners therein for reference to arbitration cannot logically and reasonably be construed to be a bar to the entertainment of the present application. Admittedly, a dispute has occurred with regard to the commitments of the respondent Company as regards equity participation and dissemination of technology as visualised under the Agreement. It would, therefore, be difficult to hold that the same would not be arbitrable, if otherwise, the arbitration clause can be legitimately invoked. Therefore, it is the objection of the respondent Company that the present petition is not maintainable at the instance of the*



*petitioners which alone would require an in-depth consideration.”*

23. For the said reasons, the petition under Section 11 of the Arbitration and Conciliation Act, 1996 is allowed and the following directions are issued:-

- i) Mr. Justice (Retd.) (Supreme Court of India) Kurian Joseph (Mob. No. 9999775444) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.
- ii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the ‘DIAC’). The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.
- iii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
- iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
- v) The parties shall approach the learned Arbitrator within two weeks from today.



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24. This is a petition filed by the petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 seeking interim reliefs.
25. Mr. Murthy, learned counsel for the petitioner states that he may be granted liberty to raise the prayers made in this petition before the learned Arbitrator.
26. Granting the said liberty, the present petition is disposed of.

**JASMEET SINGH, J**

**FEBRUARY 13, 2024 / (MS)**

*Click here to check corrigendum, if any*