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

\+ ARB.P. 311/2024

CENTAURUS GREEN ENERGY PRIVATE LIMITED .....Petitioner

Through: Mr. Tushar Kumar, Ms. Varnika Bajaj, Ms. Sonal Gupta & Mr. Junaid Qureshi, Advocates

versus

RAJSHREE EDUCATIONAL TRUST .....Respondent

Through: Mr. Asad Alvi &Mr. Aishwarya Pathak, Advocates

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

O R D E R

% 05.11.2024

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (‘A&C Act') has been filed by the Petitioner seeking appointment of an independent sole arbitrator to adjudicate the disputes between the parties.

2. It is stated that the Petitioner herein entered into a Power Purchase Agreement dated 14.10.2017 with the Respondent herein for Design, Manufacturing, Supply, Erection, Testing and Commissioning Including Operation and Maintenance of 1000KW Rooftop solar Photovoltaic Power System for 25 years in PDM University, Sector 3A, Bahadurgarh, Haryana. It is stated that disputes have arisen between the parties regarding payment of dues. It is stated that the Petitioner herein invoked Clause 17.7(c) of the Power Purchase Agreement dated 14.10.2017 which provides for arbitration

for adjudication of the disputes between the parties. The said Clause reads as under:

> "(*c) Arbitration Procedure*:
>
> *(i) In case of any dispute arising out of this Agreement or otherwise, between the parties hereto, PDM Religious & Educational Association manual dispute resolution methodology will be used. A period of not more than 15 days will be allotted at each stage of resolution. Upon failure to resolve the said dispute through conciliation the dispute shall be referred to arbitration and the Chief Engineer PDM Religious & Educational Association may appoint an arbitrator from the panel of arbitrators of PDM Religious & Educational Association. The arbitrator(s) shall be appointed within a period of 30 days from the date of receipt of written notice / demand of appointment of arbitrator form either Party. The cost of the arbitration will be shared equally by Power. Producer and the Purchaser.*
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> *(ii) The venue of such arbitration shall be Delhi / New Delhi. The arbitral award shall be binding on both Parties. The arbitration proceedings shall be governed by the Indian Arbitration and Conciliation Act, 1996, as amended from time to time including provisions in force at the time the reference is made."*

3. It is stated that the Petitioner herein sent a notice dated 12.07.2023 to the Respondent invoking the Arbitration Clause. Since no reply has been given by the Respondent to the letter of the Petitioner, the Petitioner has approached this Court by filing the present Petition.

4. Learned Counsel for the Respondent raises objection to the present Petition. He states that Clause 17.7.(c)(i) of the Power Purchase Agreement clearly specify that for any disputes, claims etc. arising out of the

Agreement, these disputes shall first be attempted to be resolved through conciliation. The Petitioner has not requested any such conciliation proceedings nor has it made any effort to resolve the so-called disputes/claims. He, therefore, states that the present Petition is not maintainable.

5. The issue as to whether Arbitration proceedings can be invoked if the Agreement provides for conciliation proceedings has been dealt with by a co-ordinate bench of this Court in Ravindra Kumar Verma v. BPTP Ltd., **2014 SCC OnLine Del 6602,** wherein it has held as under:

> "*7. The issue is that is the arbitration clause not capable of being invoked if a prior requirement contained in the arbitration clause is not complied with. This issue as to whether requirement of a particular procedure to be followed before the arbitration clause can be invoked is directory or mandatory has been decided in the judgment of a learned Single Judge of this Court in the case of Saraswati Construction Co. v. Cooperative Group Housing Society Ltd. 1995 (57) DLT 343 : 1994 RLR 458. In the case of Saraswati Construction Co. (supra) as per the arbitration clause the same could only be invoked in a particular manner by calling upon the architect to refer the disputes to arbitration and since notice was not given through the architect, it was argued that the arbitration clause could not be invoked. The learned Single Judge of this Court in the case of Saraswati Construction Co. (supra) held that the prior requirement as stated for invoking arbitration even if not complied with, the same cannot prevent reference to arbitration, because, the procedure/pre-condition has to be only taken as a directory and not a mandatory requirement. The learned Single Judge in the case of Saraswati Construction Co. (supra) relied upon the earlier judgment of a learned Single Judge of*

this Court in the case of Sikand Construction Co. v. State Bank of India ILR (1979) I Delhi 364. Paras 2 to 5 of the judgment in the case of Saraswati Construction Co. (supra) are relevant and the same read as under : -

> *"2. There has been a contract between the parties which contains an arbitration clause to the following effect.*
>
> *"All disputes and differences of any kind whatever arising out of or in connection with the conduct of the carrying out of the works (whether during the progress of the works or after their completion, and whether before or after the determination, abandonment or breach of the contract) shall be referred to and settled by the architects who shall state their decision in writing. Such decision may be in the form of a final certificate or otherwise. The decision of the Architect with respect to any of the excepted matters shall be final and without Appeal as stated in Clause No. 33. But if either the Employer or the Contractor be dissatisfied with the decision of the Architect or any matter, question or the dispute of any kind (except any of the excepted matters) or as to the withholding by the Architect of any certificate to which the contractors may claim to be entitled, then and in any such case either party (the Employer or the Contractors) may within 28 days after receiving notice to such decision give a written notice to the other party through the Architects requiring that such matters in dispute be arbitrated upon. Such written notice shall specify the matters which are in dispute and such dispute or difference of which such written notice has been given and no other shall be and is hereby referred to the arbitration and final decision of a single arbitrator being a Fellow of the Indian Institute of Architects to be*

agreed upon and appointed by both the parties or in case of disagreement to the appointment of a single arbitrator, to the arbitration of two Arbitrators being both Fellow of the Indian Institute of Engineers of equivalent one to be appointed by each party, which arbitrators shall before taking themselves the burden of reference appoint an Umpire."

3. This petition is contested by the respondent on the sole ground that the petitioner has not invoked the arbitration clause in accordance with the terms of the said clause and thus the petition is not maintainable. It is pointed out that the arbitration clause contemplates that petitioner has to give a notice in writing in which the disputes sought to be raised for arbitration were to be detailed out and such a notice was to be given through the architect to the respondent and this step has not been taken by the petitioner, thus the arbitration clause cannot be invoked by filing a petition under Section 20.

4. Similar arbitration clause came up for consideration before this Court in the case of Sikand Construction Co. v. State Bank of India, 2nd (1979) I Delhi 364. The Court held that writing a letter to the architect is directory provision in an arbitration clause and in the said case despite no such letter being written by the party for invoking the arbitration clause in the manner contemplated in the arbitration clause, still the Court held that in view of the provisions of Section 20 of the Arbitration Act what the Court has to consider is whether the parties have entered into an arbitration agreement and if so, whether there is any sufficient ground for not referring the matter for arbitration and if it is

proved that there is an agreement for arbitration then the Court has to direct the filing of the arbitration agreement and appoint the arbitrator in accordance with the arbitration clause.

5. In that case also the directions were given to the parties to appoint an arbitrator in consonance with the arbitration clause. In the present case, admittedly, the contract out of which the disputes arise contains the arbitration clause and thus I hold that the matter is liable for reference in accordance with the arbitration clause. In the present case, the petitioner had on his own appointed his arbitrator and had sent a communication to the respondent to appoint his arbitrator. the arbitration clause did not contemplate that in the very first instance, the petitioner could appoint his own arbitrator. As was required by the arbitration clause that parties have to agree for appointment of a single arbitrator who is Fellow of the Indian Institute of Architects failing which each party was to nominate its arbitrator who was also to be a Fellow of the Indian Institute of Architects and those two arbitrators were then to appoint an Umpire."

8*(i) In my opinion, there are two other reasons, and which are in addition to the reasoning given in the case of Saraswati Construction Co. (supra), for holding that a prior requirement to be complied with before seeking reference of disputes to the arbitration is only directory and not mandatory.*

(ii) The first reason is that if the arbitration clause is read in a mandatory manner with respect to prior requirement to be complied with before invoking arbitration, the same can result in serious and grave

prejudice to a party who is seeking to invoke arbitration because the time consumed in conciliation proceedings before seeking invocation of arbitration is not exempted from limitation under any of the provisions of the Limitation Act, 1963 including its Section 14. Once there is no provision to exclude the period spent in conciliation proceedings, it is perfectly possible that if conciliation proceedings continue when the limitation period expires the same will result in nullifying the arbitration clause on account of the same not capable of being invoked on account of bar of limitation i.e when proceedings for reference to arbitration are filed in court, the right to seek arbitration may end up being beyond three years of arising of the disputes and hence the petition for reference may be barred by limitation. Another example would make this position clear that suppose on the last date of limitation period of three years a party wants to invoke an arbitration clause but the arbitration clause contains the requirement of invoking the precondition of 'mutual discussion'. Surely, on the last date if a notice has to be given for invoking mutual discussion, no mutual discussion or conciliation can take place on the same date of the notice itself i.e no mutual discussion can take place before expiry of the period of limitation which expires on that very day on which the notice for mutual discussion is given. Therefore, if the pre-condition of mutual discussion is treated as mandatory, valuable rights of getting disputes decided by arbitration will get extinguished and which is not a position which should be acceptable in law. 9(i) Any doubt on this aspect as to whether conciliation proceedings as required by an arbitration clause are directory or mandatory is removed when we refer to Section 77 of the Act, and which is the second reason that the pre-condition of mutual discussion is only a directory requirement and not a mandatory one. Section 77 of the Act states that in spite of conciliation

proceedings going on, the existence of the same will not prevent any of the parties to exercise its rights in accordance with law. Section 77 of the Act reads as under : -

> *"Section 77. Resort to arbitral or judicial proceedings.- The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights." (underlining added)*
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> *(ii) Section 77 of the Act specifically uses the expression proceedings which are necessary for preserving rights and therefore if rights are to be preserved on account of limitation expiring, because after expiry of the period of limitation arbitration clause cannot be invoked either by filing of a petition under Section 8 of the Act or under Section 11 of the Act, therefore, existence of conciliation proceedings or mutual discussion should not be a bar for enforcing rights to arbitration either by filing a petition under Section 11 of the Act or by seeking to get the suit dismissed by filing an application under Section 8 of the Act because such proceedings are necessary to preserve rights of getting the disputes decided by arbitration.*

***10**. It may be noted that the judgment of the learned Single Judge of this Court in the case of Haldiram Manufacturing Company Pvt. Ltd. (supra) does not refer to the binding provision of Section 77 of the Act which provides that existence of conciliation proceedings would not be a bar for filing of*

proceedings to preserve rights. It has been held by the Supreme Court in the judgment in the case of N. Bhargavan Pillai (dead) by LRs v. State of Kerala (2004) 13 SCC 217 that a judgment of a court rendered without taking note of the relevant provision of a statute is per incuriam and also the settled law is that an earlier judgment in the case of Saraswati Construction Co. (supra) will prevail either and the later judgment in the case of Haldiram Manufacturing Company Pvt. Ltd. (supra). However, in my opinion, the conflict can be resolved by taking the middle path approach and which is stated hereinafter.

11. Whereas the existence of conciliation or mutual discussion should not be a bar in seeking to file proceedings for reference of the matter to arbitration and which is necessary for preserving rights as envisaged by Section 77 of the Act, however, since in many contracts there is an effective need of conciliation etc. in terms of the agreed procedure provided by the contract, the best course of action to be adopted is that existence of conciliation or mutual discussion procedure or similar other procedure though should not be held as a bar for dismissing of a petition which is filed under Sections 11 or 8 of the Act or for any legal proceeding required to be filed for preserving rights of the parties, however before formally starting effective arbitration proceedings parties should be directed to take up the agreed procedure for conciliation as provided in the agreed clause for mutual discussion/conciliation in a time bound reasonable period, and which if they fail the parties can thereafter be held entitled to proceed with the arbitration proceedings to determine their claims/rights etc.*"*** (emphasis supplied)

6. Applying the dictum of the co-ordinate Bench of this Court to the present case, it is open for the parties to conciliate before the Arbitration

Proceedings commence.

7. The second objection is that the Arbitration Clause is ambiguous. This Court is of the opinion that there is no ambiguity in the Arbitration Clause. In any event, even if there is any ambiguity, a co-ordinate Bench of this Court in SK Engineering and Construction Company India v. Bharat Heavy Electricals Ltd., **2023 SCC OnLine Del 7575** has held that while construing an arbitration agreement, the Court must lean in favour of giving effect to the arbitration agreement between the parties as the legislative object and intent of the framers of the Statute is to encourage arbitration. In Intercontinental Hotels Group (India) (P) Ltd. v. Waterline Hotels (P) Ltd., **(2022) 7 SCC 662**, the Apex Court has also held that "*when in doubt, do refer*" and has observed as under:

> "***19**. At the outset, we need to state that this Court's jurisdiction to adjudicate issues at the pre-appointment stage has been the subject-matter of numerous cases before this Court as well as the High Courts. The initial interpretation provided by this Court to examine issues extensively, was recognised as being against the pro-arbitration stance envisaged by the 1996 Act. Case by case, Courts restricted themselves in occupying the space provided for the arbitrators, in line with party autonomy that has been reiterated by this Court in Vidya Drolia v. Durga Trading Corpn. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , which clearly expounds that Courts had very limited jurisdiction under Section 11(6) of the Act. Courts are to take a "prima facie" view, as explained therein, on issues relating to existence of the arbitration agreement. Usually, issues of arbitrability/validity are matters to be adjudicated upon by arbitrators. The only narrow exception carved out was that Courts could adjudicate to "cut the*

deadwood". Ultimately the Court held that the watchword for the Courts is "when in doubt, do refer". This Court concluded as under: (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC pp. 156-57, para 225)

> *"225. From a study of the above precedents, the following conclusion, with respect to adjudication of subject-matter arbitrability under Section 8 or 11 of the Act, are pertinent:*
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> *225.1. In line with the categories laid down by the earlier judgment of Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] the Courts were examining "subject-matter arbitrability" at the pre-arbitral stage, prior to the 2015 Amendment.*
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> *225.2. Post the 2015 Amendment, judicial interference at the reference stage has been substantially curtailed.*
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> *225.3. Although subject-matter arbitrability and public policy objections are provided separately under Section 34 of the Act, the Courts herein have understood the same to be interchangeable under the Act. Further, subject-matter arbitrability is interlinked with in rem rights.*
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> *225.4. There are special classes of rights and privileges, which enure to the benefit of a citizen, by virtue of constitutional or legislative instrument, which may affect the arbitrability of a subject-matter."*

***20**. Following is the opinion of one of us (N.V.*

Ramana, J., as his Lordship then was): (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 162, para 244)

"244. Before we part, the conclusions reached, with respect to Question 1, are:

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.

244.3. The Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

244.4. The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. 'when in doubt, do refer'.

244.5. The scope of the Court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1. Whether the arbitration agreement was in writing? or

244.5.2. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?

244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?""

8. In view of the above, this Court is inclined to appoint an Arbitrator to adjudicate upon the disputes between the Parties.

9. Accordingly, Mr. Sunil Ambwani, Former Chief Justice of Rajasthan High Court, (Mobile No.9415238954) is appointed as a Sole Arbitrator to adjudicate upon the disputes between the parties.

10. The arbitration would take place under the aegis of the Delhi International Arbitration Centre (DIAC) and would abide by its rules and regulations. The learned arbitrator shall be entitled to fees as per the Schedule of Fees maintained by the DIAC.

11. The learned arbitrator is also requested to file the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on reference.

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

13. Needless to say, nothing in this order shall be construed as an expression of this Court on the merits of the contentions of the parties.

14. The present petition stands disposed of in the above terms.

15. It is always open for the Respondent to raise objections regarding arbitrability and the existence of arbitration clause before the sole Arbitrator.

SUBRAMONIUM PRASAD, J

NOVEMBER 05, 2024/*Rahul*