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

+ **ARB.P. 562/2024**

CONTINUUM POWER TRADING (TN) PRIVATE LIMITED

..... Petitioner

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr.
Samrow Borkataky, Mr. Ikshvaaku
Marwh, Ms. Sanskrit Shrimali, Advs.

versus

SOLAR ENERGY CORPORATION OF INDIA LIMITED

..... Respondent

Through: Mr. Sumer Dev Seth, Ms. Riya
Kumar, Advs

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

ORDER

% **17.05.2024**

I.A. 9876/2024(exemption)

Exemption is allowed subject to all just exceptions.

Application stands disposed of.

ARB.P. 562/2024

1. The present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (herein referred to as '*the A&C Act*') seeking the appointment of the arbitral Tribunal for adjudication of the disputes *inter se* the parties.
2. Briefly stated, it is not disputed that the parties entered into a Power Purchase Agreement (PPA) dated 04.09.2018. Clause 60 of the agreement contains the arbitration clause. Article 16 for the purpose of completeness, is reproduced as under:



“ARTICLE 16: GOVERNING LAW AND DISPUTE RESOLUTION

16.1 Governing Law

16.1.1 This Agreement shall be governed by and construed in accordance with the Laws of India. Any legal proceedings in respect of any matters, claims or disputes under this Agreement shall be under the jurisdiction of appropriate courts in Delhi.

16.2 Amicable Settlement and Dispute Resolution

16.2.1 Amicable Settlement

1. Either Party is entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement ("Dispute") by giving a written notice (Dispute Notice) to the other Party, which shall contain:

(a) a description of the Dispute;

(b) the grounds for such Dispute; and

(c) all written material in support of its claim.

ii. The other Party shall, within thirty (30) days of issue of Dispute Notice issued under Article 16.2.1 (i), furnish:

(a) counter-claim and defences, if any, regarding the Dispute; and

(b) all written material in support of its defences and counter-claim.

iii. Within thirty (30) days of issue of Dispute Notice by any Party pursuant to Article 16

(i) if the other Party does not furnish any counter claim or defence under Article 16

(ii) or thirty (30) days from the date of furnishing counter claims or defence by the other Party, both the Parties to the Dispute shall meet to settle such Dispute amicably. If the Parties fail to resolve the Dispute amicably within thirty (30) days from the later of the dates mentioned in this Article 16.2.1

(iii), the Dispute shall be referred for dispute resolution in accordance with Article 16.3.

16.3 Dispute Resolution

16.3.1 Dispute Resolution by the Appropriate Commission



i) Where any Dispute (a) arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, or (b) relates to any matter agreed to be referred to appropriate Commission, such Dispute shall be submitted to adjudication by the appropriate Commission Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 250 3, as amended from time to time.

ii) Buyer shall be entitled to co-opt the Buying Entity(ies) as a supporting party in such proceedings before the Appropriate Commission.

16.3.2 Dispute Resolution through Arbitration

If the Dispute arising as per Article 16.2.1 is not amicably resolved & such dispute is not covered in Article 16.3.l(i), such Dispute shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996 as provided below:

i) The Arbitration Tribunal shall consist of three (3) Arbitrators. Each party shall appoint one Arbitrator within 30 days of the receipt of request for settlement of dispute by Arbitration. The two appointed Arbitrators shall within 30 days of their appointment, appoint a third Arbitrator who shall act as presiding Arbitrator. In case the party fails to appoint an Arbitrator within 30 days from the date of receipt of request or the two appointed Arbitrator fails to agree on third Arbitrator within 30 days of their appointment, the appointment of Arbitrator, as the case may be, shall be made in accordance with the Indian Arbitration and Conciliation Act, 1996

ii) The place of arbitration shall be Delhi. The language of the arbitration shall be English.

iii) The Arbitration Tribunal's award shall be substantiated in writing. The Arbitration Tribunal shall also decide on the costs of the arbitration proceedings and the allocation thereof.



iv) The provisions of this Article shall survive the termination of this PPA for any reason whatsoever.

v) The award shall be of majority decision.

vi) Buyer shall be entitled to co-opt Buying Entity(ies) as a supporting party in such arbitration proceedings.

16.4 Parties to Perform Obligations

16.4.1 Notwithstanding the existence of any Dispute and difference referred to the Appropriate Commission or the Arbitration Tribunal as provided in Article 16.3 and save as the Appropriate Commission or the Arbitration Tribunal may otherwise direct by a final or interim order, the Parties hereto shall continue to perform their respective obligations which are not in dispute) under this Agreement.”

3. The arbitration has been invoked by the petitioner vide notice dated 04.03.2024, the objection raised by the respondent is that the present petition is premature as the petitioner has not followed the procedure as laid down in Article 16.1.
4. Learned counsel for the respondent submits that the notice was issued on 04.10.2023 and on the same date, the petitioner filed a petition under Section 9 bearing O.M.P.(I) (COMM.) 325/2023. Learned counsel submits that therefore, the procedure as prescribed in the PPA has not been followed by the petitioner. Learned counsel further submits that the respondent is a government company and has to comply with the protocol procedures at all levels. Learned counsel submits that since the procedure as prescribed in the agreement is not followed, the petition is liable to be rejected.
5. Mr. Sandeep Sethi, learned senior counsel for the petitioner submits that there is no dispute as to the fact that dispute notice was served to the respondent on 04.10.2023, learned senior counsel submits that as



per clause 16.2.1, the notice dated 04.10.2023 contains the description of the dispute-grounds. Learned senior counsel also submits that the written material in support of its claim was also part of said notice. Learned senior counsel also submits that the respondent in pursuance to Clause 16.2.1(ii) did not respond within 30 days. It has been submitted that the respondent neither made any counterclaim and any defenses, if any, regarding the dispute nor furnished any written material in support of its defenses or counterclaim.

6. Learned senior counsel further submits that since the respondent failed to furnish any counterclaim or defense under Article 16 and therefore there was no other option but to invoke the arbitration. Learned senior counsel further submits that even in the notice dated 04.03.2024 whereby, the arbitration was invoked, it was specifically recapitulated that on 29.11.2023, the representative of the petitioner visited the respondent for an amicable resolution. Learned senior counsel further submits that as far as the Section 9 petition is concerned bearing O.M.P.(I) (COMM.) 325/2023 there was an urgency in filing the petition as the respondents were threatening to encash bank guarantee.
7. The scope of the jurisdiction for the Court under Section 11 of the Act is very limited. This has been repeatedly held in ***Vidya Drolia and Others v. Durga Trading Corporation***; (2021) 2 SCC 1, wherein it was *inter-alia* held as under:

“154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the



legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”

(Emphasis Supplied)

8. The law that can be summed up are at this stage the Court is only required to see whether there is an arbitration agreement between the parties that contains the arbitration clause and whether there exists an arbitrable dispute between the parties. Another condition prescribed may be the service of notice under Section 21 for the commencement



of the arbitration proceedings. The question herein is whether the reference can be denied only on the ground that the petitioner filed a petition under Section 9 of the Act on the same date when the dispute notice dated 04.10.2023 was served. The Court is of the considered view, if this interpretation is taken it would defeat the basic purpose of the entire framework of the act. The petition under Section 9 can be filed before, after, or during the arbitration proceedings. The procedure as agreed upon between the parties cannot restrain either of the parties from invoking the jurisdiction of the Court under Section 9 of the Act.

9. The agreement between the parties is meant to ensure that the parties make an effort for the amicable resolution of the disputes before straightway invoking the arbitration. The parties in their wisdom can enter into an agreement for such mechanism. However, these mechanisms cannot be read as to prevent the parties from invoking the arbitration, if the parties have sincerely tried to resolve the disputes amicably. The literal compliance of such provisions may be counter protective. The Court has to follow the dictum as laid down in ***DLF Home Developers Limited Vs. Rajapura Homes Private Limited & Anr.*** 2021 SCCOnline SC 781, that whenever there is a doubt in making the reference to the arbitration, the Court should refer the matter to the arbitration. In the present case, the petitioner had already nominated the name of the Arbitrator i.e., Hon'ble Justice Bada Durrez Ahmed, Former Chief Justice of the Hon'ble High Court of Jammu and Kashmir however the respondent has failed to nominate the name of the arbitrator.



10. In these circumstances, the court appoints Mr. R. K. Gauba, Former Judge, High Court of Delhi (Mob. No.9650411919) as the second Arbitrator. Both the learned arbitrators may appoint the third arbitrator.

11. In view of the above, the present petition stands disposed of.

DINESH KUMAR SHARMA, J

MAY 17, 2024

Pallavi