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

\+ ARB.P. 1306/2022 & I.A. 6153/2024

M/S TALBROS SEALING MATERIALS PVT. LTD.

..... Petitioner

Through: Mr. Arjun Mahajan, Ms. Neha Rai, Mr. Rishabh Bhalla, Advs.

versus

M/S SLACH HYDRATECS EQUIPMENTS PVT. LTD.

..... Respondent

Through: Ms. Aanchal Budhraja, Ms. Sangeeta, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

O R D E R

% 06.05.2024

ARB.P. 1306/2022

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an arbitrator.

2. The facts of the present case are that the petitioner is an integrated sealing solution and gasket Company manufacturing products out of its various facilities such as cork rubber material, rubber molded gaskets, edge bonded gaskets, etc. whereas the Respondent is involved in manufacturing two roll mixing mills, calendars, extruders etc. The petitioner was interested in buying machinery from the respondent. The respondent issued a Commercial Offer dated 27.06.2020 which contained an arbitration clause as under:

> "*Clause 8* ***Arbitration Clause*** *- The order placed on us whether directly or through our branch offices shall in all*

respect be considered as an Indian Contract and all disputes and differences arising out of the contract or touching the same be referred to two arbitrators one to be appointed by each party for the decision. The venue of Arbitration shall be at Delhi and the award of the Arbitrators shall be filed in a competent court at Delhi. Provisions of Indian Arbitrators Act, 1940 shall govern the Contract. All disputes shall be subjected to Delhi Jurisdiction only."

3. It is stated by learned counsel for the petitioner that arbitration clause categorically states that any purchase order will be governed by the arbitration clause. Pursuant to the commercial offer which was accepted by the petitioner, the petitioner issued a purchase order No. 154 dated 02.07.2020 for machinery worth ₹25 lacs approximately. Thereafter, disputes arose between the parties and the petitioner invoked the arbitration *vide* legal notice dated 07.06.2022.

4. Learned counsel for the respondent opposes the petition. She states that the disputes arise out of purchase order dated 02.07.2020 which categorically states that, "*this order shall in respect be subjected to jurisdiction at Faridabad (Haryana).*" She further states that the petitioner as well as the respondent are situated in Faridabad, Haryana, and the machinery was also to be supplied at Faridabad, Haryana, and thus, in view of the exclusion clause, this Court would not have jurisdiction. She further states that Clause 8 of the Agreement is not a valid arbitration clause as it envisages reference of disputes to two arbitrators.

5. I have heard the learned counsels for the parties.

6. I am of the view that the purchase orders were being issued pursuant to a commercial understanding between the parties contained in offer and

acceptance dated 27.06.2020. In addition, the arbitration clause also envisaged disputes arising out of "*any orders*". Hence, the dispute arising out of purchase orders necessarily is covered by the arbitration clause. The arbitration clause contemplates the venue of arbitration to be in Delhi.

7. For the said reasons, this Court will have territorial jurisdiction to entertain and try the petition.

8. Another objection of learned counsel for the respondent is that the reference to two arbitrators is contrary to the provisions of Section 10 of the Arbitration and Conciliation Act, 1996 and hence, the same is not a valid arbitration clause.

9. My attention has been drawn to the judgment of the Hon'ble Supreme Court in ***Babanrao Rajaram Pund v. Samarth Builders & Developers and Another***, [(2022) 9 SCC 691], wherein the Hon'ble Supreme Court has stated that it is the intention of the parties which is to be inferred and the endeavour of the Courts should be to give meaning to the clear and true intention of the parties.

The operative part reads asunder:

> *"**23.** We are, therefore, of the firm opinion that the High Court fell in error in holding that the Appellant's application under section 11 was not maintainable for want of a valid arbitration clause. We find that Clause 18 luminously discloses the intention and obligation of the parties to be bound by the decision of the tribunal, even though the words "final and binding" are not expressly incorporated therein. It can be gleaned from other parts of the arbitration agreement that the intention of the parties was surely to refer the disputes to arbitration. In the absence of specific exclusion of any of the attributes of an arbitration agreement, the Respondents' plea of*

non-existence of a valid arbitration clause, is seemingly an afterthought.

24. *Even if we were to assume that the subject clause lacks certain essential characteristics of arbitration like "final and binding" nature of the award, the parties have evinced clear intention to refer the dispute to arbitration and abide by the decision of the tribunal. The party autonomy to this effect, therefore, deserves to be protected.*

25. *The deficiency of words in agreement which otherwise fortifies the intention of the parties to arbitrate their disputes, cannot legitimise the annulment of arbitration clause. …."*

10. A perusal of the arbitration clause shows that the parties intended that their disputes should be settled by arbitration. I am in agreement with the submissions of the respondent insofar as the number of arbitrators is concerned. The fact that the number of arbitrators have been mentioned as two, is contrary to Section 10 of the Arbitration and Conciliation Act, 1996, which reads asunder:

"10. Number of arbitrators. –

(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator."

11. However, with regard to the legality of the arbitration clause, my attention has been drawn to paragraph 9 of the judgment of ***M.M.T.C. Limited vs. Sterlite Industries (India) Ltd.***, [(1996) 6 SCC 716] which reads asunder:

"9. Sub-section (3) of Section 7 requires an arbitration agreement to be in writing and Sub-section (4) describes the

kind of that writing. There is nothing in Section 7 to indicate the requirement of the number of arbitrators as a part of the arbitration agreement. Thus the validity of an arbitration agreement does not depend on the number of arbitrators specified therein. The number of arbitrators is dealt with separately in Section 10 which is a part of machinery provision for the working of the arbitration agreement. It is, therefore, clear that an arbitration agreement specifying an even number of arbitrators cannot be a ground to render the arbitration agreement invalid under the New Act as contended by the learned Attorney General."

12. The judgments of ***Narayan Prasad Lohia vs. Nikunj Kumar Lohia and Others***, [(2002) 3 SCC 572] and ***Sara International Ltd. vs. Arab Shipping Co. (P) Ltd.***, [2009 SCC OnLine Del 122] also state that arbitration clause is not invalidated merely on the ground that the number of arbitrators, as per the arbitration clause, were an even number. Para 29 of ***Sara International Ltd.*** (supra) reads asunder:-

"29. The next question to be decided is whether a reference to two arbitrators in Clause 32 of the contract governing the parties vitiated the proceedings with the result such a condition is contrary to Section 10 of the Arbitration and Conciliation Act, 1996. This issue is no longer open to debate; the Supreme Court in its later decision in Narayan Prasad Lohia v. Nikunj Kumar Lohia, (2002) 3 SCC 572, held as follows:

"a conjoint reading of Sections 10 and 16 shows that an

objection to the composition of the Arbitral Tribunal is a matter which is derogable. It is derogable because a party is free not to object within the time prescribed in Section 16(2). If a party chooses not to so object there will be a deemed waiver under Section 4. Thus, we are unable to accept the submission that Section 10 is a non-derogable provision. In our view Section 10 has to be read along with Section 16 and is, therefore, a derogable provision.

17. We are also unable to accept Mr. Venugopal's argument that, as a matter of public policy, Section 10 should be held to be non-derogable. Even though the said Act is now an integrated law on the subject of arbitration, it cannot and does not provide for all contingencies. An arbitration being a creature of agreement between the parties, it would be impossible for the legislature to cover all aspects. Just by way of example Section 10 permits the parties to determine the number of arbitrators, provided that such number is not an even number. Section 11(2) permits parties to agree on a procedure for appointing the arbitrator or arbitrators. Section 11 then provides how arbitrators are to be appointed if the parties do not agree on a procedure or if there is failure of the agreed procedure. A reading of Section 11 would show that it only provides for appointments in cases where there is only one arbitrator or three arbitrators. By agreement parties may provide for appointment of 5 or 7 arbitrators. If they do not provide for a procedure for their appointment or there is failure of the agreed procedure, then Section 11 does not contain any provision for such a contingency. Can this be taken to mean that the agreement of the parties is invalid? The

answer obviously has to be in the negative. Undoubtedly the procedure provided in Section 11 will mutatis mutandis apply for appointment of 5 or 7 or more arbitrators. Similarly, even if parties provide for appointment of only two arbitrators, that does not mean that the agreement becomes invalid. Under Section 11(3) the two arbitrators should then appoint a third arbitrator who shall act as the presiding arbitrator. Such an appointment should preferably be made at the beginning. However, we see no reason, why the two arbitrators cannot appoint a third arbitrator at a later stage i.e. if and when they differ. This would ensure that on a difference of opinion the arbitration proceedings are not frustrated. But if the two arbitrators agree and give a common award there is no frustration of the proceedings.

Furthermore, the court is of opinion that the argument about the arbitration clause, in this case being contrary to public policy, as it provides for two arbitrators, cannot be pressed by the petitioner, whose primary grievance is that the arbitral tribunal was improperly constituted, since its nominee was not allowed to participate in the proceeding."

13. For the said reasons, Ms. Rai, learned counsel for the petitioner states that she is agreeable for reference of disputes to a sole arbitrator.
14. Ms. Budhraja, learned counsel for the respondent, without prejudice to her rights to agitate all issues including legal issues before the sole arbitrator, is also agreeable to appointment of a sole arbitrator.
15. For the said reasons, Ms. Monica Malhotra, Advocate (Mobile Number: 9810275950) is appointed as a sole arbitrator.

16. The petition is disposed of in the aforesaid terms.

JASMEET SINGH, J

MAY 6, 2024 / (MS)

Click here to check corrigendum, if any