

IBI CONSULTANCY INDIA PRIVATE LIMITED

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v.

DSC LIMITED

(Arbitration Case (C) No. 53 of 2016)

APRIL 16, 2018

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[R. K. AGRAWAL AND S. ABDUL NAZEER, JJ.]

Arbitration and Conciliation Act, 1996 – s.11(6) r/w s.11(9) – Appointment of arbitrator – The scope under s.11(6) read with s.11(9) is very limited to the extent of appointment of Arbitrator – The Court has to see whether there exists an Arbitration Agreement between the parties – While deciding the question of appointment of Arbitrator, court has not to touch the merits of the case as it may cause prejudice to the case of the parties – In the instant case, arbitration clause existed in the contract – Accordingly, sole arbitrator appointed to adjudicate the disputes.

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Disposing of interlocutory application and petitions, the Court

HELD: 1. The first and the foremost thing is the existence of an arbitration agreement between the parties to the petition under Section 11 of the Act and the existence of dispute(s) to be referred to Arbitrator is condition precedent for appointing an Arbitrator under Section 11 of the Act. While deciding the question of appointment of Arbitrator, court has not to touch the merits of the case as it may cause prejudice to the case of the parties. The scope under Section 11(6) read with Section 11(9) is very limited to the extent of appointment of Arbitrator. Perusal of contract showed that arbitration clause did exist in the Contract. [Paras 7, 9][1030-D-E; 1031-F, G]

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2. It is a cardinal principle of the Arbitration and Conciliation Act that the parties are free to decide the number of arbitrators, provided, it is an odd number, as well as the procedure for appointing them. However, if the parties are not able to agree on the said procedure, or constitute the Arbitral Tribunal to their mutual satisfaction, either of the party has an option to route to an appropriate remedy under Section 11 of the Act, which provides

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A **detailed machinery for appointment of Arbitrator through judicial intervention. Accordingly, Justice Amitava Roy, a former Judge of this Court, is appointed as the sole Arbitrator to adjudicate the disputes between the parties on such fees he may fix. The said appointment is subject to the necessary disclosure being made under Section 12 of the Act and the Arbitrator not being**
B **ineligible under Section 12(5) of the Act. [Paras 10-11][1031-G-H; 1032-A-B]**

CIVIL ORIGINAL JURISDICTION: Arbitration Case (C) No. 53 of 2016.

C Under Section 11(5), 11(6) (a) read with Sections 11(9) & 11(12) (a) of the Arbitration and Conciliation Act, 1996.

WITH

Arbitration Case (C) Nos. 63, 54 and 57 of 2016

D Rakesh Kumar, Ms. Preeti Kashyap, P. K. Sachdeva (For Shibashish Misra), Merusagar Samantaray, Advs. for the Petitioner.

Ms. Manali Singhal, Santosh Sachin, Ms. Vinita Sashidharan, Jatin Mongia, Abhijat P. Medh, Advs. for the Respondent.

The Judgment of the Court was delivered by

E **R. K.AGRAWAL J.** 1. The IBI Consultancy India Private Limited-the petitioner-Company is the Indian subsidiary of the IBI Group based in Canada. The above petitions, under Section 11(6) read with Section 11(9) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'), have been filed by the petitioner-Company as well as by the IBI Group for appointment of an Arbitrator to adjudicate the disputes that have arisen between the parties in connection with the
F contracts in question.

2. The petitioner-Company has filed two petitions for the appointment of Arbitrator and its parent company viz., IBI Group has also filed two petitions of the same nature. Since the point of consideration is same in all these four petitions, purpose would be served if we moot the case of either of the petition and would be disposed off by this common
G judgment.

Arbitration Case No. 53 of 2016

H 3. The petitioner-Company is a multi-disciplinary company engaged in the business of providing system integration and maintenance service

for Toll and Traffic Management Systems whereas the DSC Limited, the respondent-Company is a Company registered under the Companies Act, 1956 having two subsidiary companies. First subsidiary Company of the respondent-Company is the Lucknow Sitapur Expressway Limited (LSEL) which is a special purpose vehicle (SPV) of the respondent-Company and has signed a Concession Agreement with the National Highways Authority of India (NHAI) for developing Lucknow-Sitapur Highway Project (LSEL Project) for widening the existing 2-Lane Road to 4-Lane dual carriageway between Km 413.200 to Km 488.270 on NH-24 in the State of Uttar Pradesh. Second subsidiary Company of the respondent-Company is Raipur Expressway Limited (REL), which is also a special purpose vehicle (SPV) of the respondent-Company and has signed a Concession Agreement with the NHAI for developing the Raipur-Aurang Highway Project (REL Project) for widening the existing 2-lane Road to 4-Lane dual carriageway between Km 239 to Km 281 on NH-6 in the State of Chhattisgarh.

4. Vide e-mail dated 16.02.2010, the respondent-Company sent a Request for Proposal (RFP) to the petitioner-Company, inviting technical and commercial proposal for their LSEL and REL Projects. Vide letter dated 07.06.2010, the petitioner-Company had given a proposal to execute the contract for installation, erection and commissioning of the Toll Collection and Traffic Control Equipments at NH-24. The respondent-Company, vide letter dated 14.06.2010, accepted the said proposal. Pursuant thereto, a Contract Agreement dated 30.08.2010 was executed between the parties. The value of the Contract was mutually finalized at Rs. 1,55,20,700.00 in pursuance of the Contract Agreement. In total, the IBI group and the petitioner-Company had entered into 6 (six) separate contracts for the respective LSEL and REL Projects with the respondent-Company.

5. During completion of the projects, the respondent-Company defaulted in releasing the agreed payment to the petitioner-Company and the IBI Group. Though several verbal and written communication were exchanged between the parties to this effect, the respondent-Company could not release the outstanding payment. On 06.09.2012, a legal notice was sent to the respondent-Company by the IBI Group as well as by the petitioner-Company for the recovery of outstanding payment for all the contracts. Further, on 12.06.2013, a reminder for outstanding payment was sent to the respondent-Company.

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A 6. On 24.04.2014, a legal notice for invoking Arbitration Clause
and appointment of Arbitrators was sent to the respondent-Company
and the name of Mr. Debashish Moitra, Advocate was suggested as a
Sole Arbitrator, however, there was no reply from the other side. The
B IBI Group and the petitioner-herein filed petitions under Section 11 of
the Act before the High Court being Arbitration Petition Nos. 443, 448,
444 and 449 of 2014 before the High Court of Delhi at New Delhi.
Learned single Judge of the High Court, vide order dated 24.02.2015,
disposed of the petitions while holding that since one of the parties to the
petition is an entity incorporated outside India, therefore, the arbitration
of the dispute involving such an entity would be an ‘international
C commercial arbitration’ within the meaning of Section 2(1)(f) of the Act
and for seeking appointment of an Arbitrator in a dispute involving such
an entity, an application will have to be filed before the Supreme Court
under Section 11(9) of the Act. The petitioners herein have therefore
invoked the jurisdiction of this Court by filing the above petitions.

D 7. The first and the foremost thing is the existence of an arbitration
agreement between the parties to the petition under Section 11 of the
Act and the existence of dispute(s) to be referred to Arbitrator is condition
precedent for appointing an Arbitrator under Section 11 of the Act. It is
also a well settled law that while deciding the question of appointment of
Arbitrator, court has not to touch the merits of the case as it may cause
E prejudice to the case of the parties. The scope under Section 11(6) read
with Section 11(9) is very limited to the extent of appointment of Arbitrator.
This Court has to see whether there exists an Arbitration Agreement
between the parties and if the answer is affirmative then whether the
petitioner has made out a case for the appointment of Arbitrator.

F 8. It is worth mentioning that the position after the insertion of
sub-Section 6(A) of Section 11 of the Act dated 23.10.2015 has been
changed. The extent of examination is now confined only to the existence
of the Arbitration Agreement. At this juncture, it is pertinent to set out
Article-1 as well as Clause 3.14 of the Contract Agreement dated
G 30.08.2010 which are as under:-

“Article-1

Contract Documents

H The following document shall constitute the Contract between
the client and the contractor, and each shall be read and construed

as an integral part of the Contract; A

(i) This Contract Agreement and Appendices hereto

(ii) Letter or indent ref no. No LSEL/Tolling/IBI/HO-2 dated 14th June 2010.....”

“**Clause 3.14** B

Arbitration (as mentioned in ref. No LSEL/Tolling/IBI/HO-1 dated 14th June 2010)

1. In the event of any dispute or difference arising out or touching upon any of the terms and conditions of this contract and /or in relation to the implementation or interpretation hereof, the same shall be resolved initially by mutual discussion and conciliation but in the event of failure thereof, the same shall be referred to an independent arbitrator mutually agreed by the two parties. The decision of the arbitrator shall be final and binding upon the parties. The arbitration shall be in Delhi and the arbitrator shall give his award in accordance with “The Arbitration and conciliation Act, 1996”. C D

2. In the event of arbitrator dying, neglected or refusing to act or resigning or being unable to act for any reason or his award being set aside by the court for any reason the parties will mutually agree another to act as Arbitrator. E

(Emphasis supplied by us)”

9. On a careful perusal of Article-1 as well as Clause 3.14 of the Contract dated 30.08.2010 along with the Letter of Indent dated 14.06.2010, it is evident that the letter dated 14.06.2010 is a part of the Contract and it shall be read and construed as an integral part of the Contract. Therefore, the contention of the respondent-Company that there does not exist any arbitration agreement between the parties is not sustainable in the eyes of law. We are of the considered view that Arbitration clause exists in the Contract and we hold this point in favour of the petitioner-Company. F G

10. It is a cardinal principle of the Arbitration and Conciliation Act that the parties are free to decide the number of arbitrators, provided, it is an odd number, as well as the procedure for appointing them. However, if the parties are not able to agree on the said procedure, or constitute H

A the Arbitral Tribunal to their mutual satisfaction, either of the party has an option to route to an appropriate remedy under Section 11 of the Act, which provides detailed machinery for appointment of Arbitrator through judicial intervention.

B 11. Accordingly, Justice Amitava Roy, a former Judge of this Court, is appointed as the sole Arbitrator to adjudicate the disputes between the parties on such fees he may fix. Nevertheless to say, the said appointment is subject to the necessary disclosure being made under Section 12 of the Act and the Arbitrator not being ineligible under Section 12(5) of the Act.

C 12. The petitions as well as interlocutory application, if any, are disposed of accordingly.

Devika Gujral

Petitions disposed of.