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

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**Date of Decision : 22<sup>nd</sup> February, 2022**

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**CS(COMM) 123/2021**

**SADBHAV ENGINEERING LTD. .... Plaintiff**

Through: Mr. Satyendra Kumar and Ms.  
Archana Mishra, Advocates.

versus

**NATIONAL THERMAL POWER  
CORPORATION LTD. (NTPC)**

..... Defendant

Through: Mr. Puneet Taneja, Ms. Laxmi  
Kumari and Mr. Manmohan Singh  
Narula, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE AMIT BANSAL**

**JUDGMENT**

**AMIT BANSAL, J. (ORAL)**

**[VIA VIDEO CONFERENCING]**

**I.A. No. 6061/2021 (u/s 8 of Arbitration & Conciliation Act)**

1. This application has been filed on behalf of the applicant/defendant (hereinafter '*defendant*') under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter '*the Act*') claiming that there exists an arbitration clause between the parties and therefore, the plaint be rejected and the parties be referred to arbitration.

2. Brief facts relevant for the purposes of deciding the present



application are stated below:

- i. The defendant, for the development and operation of Dulanga Coal Block, Odisha, issued a Request For Proposal (hereinafter '*RFP*') dated 22<sup>nd</sup> January, 2016. The bid documents, *inter alia*, included Notice Inviting Tender, Instructions to Bidders (RFP documents) and Project Agreement.
  - ii. The RFP documents, (Instructions to Bidder) under Chapter-12 titled as "*Information To Bidders*", contains a Dispute Resolution Clause (Clause 12.16) in terms of which, any dispute between the parties has to be referred to arbitration. The said Clause 12.16 refers to the Dispute Resolution contained in the Project Agreement.
  - iii. The Project Agreement contains the elaborate Dispute Resolution Clause providing for arbitration.
  - iv. Pursuant to the aforesaid RFP, the non-applicant/plaintiff (hereinafter '*plaintiff*') participated in the bidding process.
3. It is the case of the defendant that the plaintiff in support of its bid enclosed a false/forged certificate of the plaintiff having executed a project on behalf of Bharat Coking Coal Ltd. The defendant conducted an investigation pursuant to which it came to light that the certificate was not issued by Bharat Coking Coal Ltd. Therefore, acting in terms of Clause 12.47 of "*Information to Bidders*", the defendant encashed the bid security of the plaintiff amounting to Rs.19,98,61,000/- vide invocation letter dated 8<sup>th</sup> May, 2017. Further, a Show Cause Notice dated 29<sup>th</sup> June, 2017 was issued to the plaintiff in terms of Clause 5.3 of the Banning Policy of the defendant, as to why the plaintiff should not be banned for a period of three



years.

4. After considering the reply of the plaintiff, the competent authority of the defendant vide order dated 24<sup>th</sup> January, 2018 suspended the issuance of bidding documents to the plaintiff and directed that no award shall be made to the plaintiff for any future tenders of the defendant and its subsidiaries for a period of three years from 24<sup>th</sup> January, 2018.

5. An appeal against the said decision was filed by the plaintiff, which was rejected vide order dated 18<sup>th</sup> October, 2018.

6. By way of the present suit, the plaintiff has challenged the encashment of its bid security as well as the banning order dated 24<sup>th</sup> January, 2018.

7. It has been contended on behalf of the defendant that (i) there is a valid arbitration agreement between the parties contained in Clause 12.16 of the RFP which by way of reference incorporates the Dispute Resolution Clause of the Project Agreement to be executed between the defendant and the successful bidder, which contains the arbitration clause; (ii) the RFP that was given to all bidders including the plaintiff, included the draft of the Project Agreement; and (iii) therefore, the present suit is not maintainable and the parties should be referred to arbitration in terms of Section 8 of the Act.

8. Counsel appearing on behalf of the plaintiff has contended that (i) the RFP does not constitute a contract between the parties; (ii) the RFP is a document seeking information on the technical and financial capacity of the interested bidders and gives details about the process of selection. In this regard, reliance is placed on Clause 1 of the RFP which is the Disclaimer Clause; (iii) Clause 3.1.37 of the RFP itself defines the Project Agreement to



be the agreement entered into between the defendant and the selected bidder and to be executed after issuance of Letter of Acceptance; and (iv) the RFP contains a clause, being Clause 3.3, with regard to applicable law and jurisdiction, which provides that Courts in Delhi alone shall have exclusive jurisdiction. Reliance has been placed on behalf of the plaintiff on the judgment of the Supreme Court in *National Highways and Infrastructure Development Corporation Limited. Vs. BSCPL Infrastructure Limited.*, (2019) 15 SCC 25 in support of its contentions.

9. In rejoinder, it is submitted on behalf of the defendant that (i) the aforesaid judgment would not be applicable in the facts and circumstances of the present case as in the said case there was no reference to an arbitration clause in the RFP; (ii) the reference to the jurisdiction of the Courts in the RFP in the present case is in the context of the said Court being a supervisory Court and not the Court to decide the status of the dispute; and (iii) once a bid has been submitted on behalf of the plaintiff, they have agreed to the terms and conditions of the RFP including the Dispute Resolution Clause, which contains an arbitration clause.

10. I have heard the counsels for the parties.

11. The RFP Documents (Instructions to Bidders) begins with a Disclaimer Clause which is contained in Clause 1, relevant clauses of which are reproduced hereinafter:

**" 1. – Disclaimer**

1.1- This Document is not an Agreement or an offer by NTPC to Bidders or any third party. The purpose of this Document is to provide interested parties with information to facilitate the formulation of their Proposal. "



xxx xxx xxx

1.8 - The RFP comprises of general guidelines and conditions for bidding but not an offer by NTPC to Bidders or any third party. The purpose of the RFP is to provide interested parties with information to facilitate the formulation of their Proposal to undertake this Project and to convey the terms on which the work shall be assigned by NTPC."

12. The aforesaid clauses categorically stipulate that the RFP is neither an agreement nor an offer being made by the defendant to the bidders or any third parties. It further states that the purpose of the RFP is only to provide information so that the prospective bidders/interested parties can formulate their proposal. Therefore, the RFP would have to be interpreted in terms of the aforesaid Disclaimer Clause. It is clear from the aforesaid clauses that the RFP cannot be taken to be an agreement between the defendant and any of the bidders, and that it only provides information pursuant to which, interested parties would decide whether to make a bid or not, and if so, the manner in which the said bid is to be submitted. The RFP is an invitation to make offer/bid. Merely because a person decides to make a bid would not mean that such a person has entered into a contract with the defendant. In fact, the bid would be in the nature of an offer and only upon acceptance of such a bid/offer by the defendant, would a valid enforceable contract come into force.

13. The RFP itself lays down the process by which the offer made by a bidder culminates into a contract. In this regard, reference may be made to Clauses 6.4.3 and 6.4.4 extracted below:

***"6.4.3 - Letter of Acceptance - NTPC shall, after determination of the Selected Bidder in accordance with Chapter 11, notify the***



*Selected Bidder in writing by registered letter or by tele fax, to be confirmed in writing by registered letter, that its Project Proposal has been accepted.*

*For the avoidance of doubt, it is clarified that upon issuance of the Letter of Acceptance the Project Agreement shall come into effect and force on the date of issuance of the Letter of Acceptance and shall constitute valid and binding obligations enforceable against either Party in accordance with and subject to its terms and conditions.*

**6.4.4 Execution of Project Agreement** - *At the same time as Owner notified the successful Bidder that its bid has been accepted Owner will send the Bidder the Project Agreement, incorporating all the Corrigendum (a) issued from time to time by Owner, along with all the documents specified at Clause 1.3 of Project Agreement.*

*With twenty eight (28) days of receipt of the Project Agreement, the successful Bidder shall sign and date the Project Agreement along with all the documents specified at Clause 1.3 of Project Agreement and return it to the Owner.”*

The aforesaid clauses provide that the defendant, after determination of the selected bidder, shall notify the selected bidder by way of a Letter of Acceptance that its project proposal has been accepted. The next stage would be of signing of the Project Agreement between the successful bidder and the defendant, which is provided under Clause 6.4.4 of the RFP. Admittedly, no Letter of Acceptance was issued in favour of the plaintiff by the defendant in the present case.

14. At this stage, it may be relevant to refer to Clause 12.16 relied upon by the defendant, which is set out below:



***“12.16 Dispute Resolution: Dispute resolution shall be as per the provisions of the Project Agreement.”***

Counsel for the defendant contends that the aforesaid clause would be binding on all bidders and if there is any dispute between the defendant and a bidder with regard to the terms and conditions of the RFP, the same would have to be referred to arbitration as provided in the Dispute Resolution Clause of the Project Agreement.

15. Reference may also be made to Clause 12.17 providing for Assignment and Clause 12.18 providing for Sub-contracting, reproduced hereinafter:

### ***12.17 Assignment***

*12.17.1 The Mine Operator shall not, without the express prior written consent of the Owner, assign to any Third Party the Agreement or any part thereof, or any right, benefit, obligation or interest therein or thereunder.*

*The Owner shall not, without the express prior written consent of the Mine Operator, assign to any Third Party the Agreement or any part thereof, or any right, benefit, obligation or interest therein or there under.*

*12.17.2 In case, Mine Operator is a single corporate entity, assignment of the contract to its existing or a new Subsidiary may be considered by NTPC within five years of award of contract subject to the following:....*

### ***12.18 Sub Contracting***

*a) In case Mine Operator would like to outsource/sub-contract the work as stipulated in Clause 12.3 of the Project Agreement then it shall submit details of experience of parties to whom it would like to sub-contract the work involved during*



*development stage and Operations stage, for approval of the owner based on the Sub QR for the Sub Contractors stipulated at Clause 12.3 of the Project Agreement.*

*Above information may be furnished in the formats enclosed at Appendix-17 in this Volume-I*

The very nature of Clauses 12.17 and 12.18 is such that they can only come into effect after a bid has been accepted and a contract comes into force between the defendant and the successful bidder. There cannot be assignment or sub-contracting of a contract before the contract is executed between the parties. Similarly, the Dispute Resolution Clause in Clause 12.16 is only for information purposes. The purpose of Clause 12.16 is to inform a prospective bidder that in the event a contract is executed with the successful bidder, if there arises a dispute, the same would be resolved as per the Dispute Resolution Clause contained in the said Project Agreement. The Dispute Resolution Clause is an important part of the ultimate contract to be executed between the successful bidder and the defendant and therefore, through Clause 12.16, the defendant seeks to notify all bidders about its existence. By no stretch of imagination can this clause be interpreted to constitute a Dispute Resolution Clause between the defendant and the prospective bidder. If that were to be the case, Clause 12.16 would have specifically provided that if there arises a dispute between the bidder and the defendant, that would be the subject matter of an arbitration clause as contained in the draft Project Agreement. On the other hand, Clause 3.3 in the RFP specifically provides that the RFP shall be governed by the law



of India and the courts at Delhi will have the exclusive jurisdiction over matters relating thereto.

16. At this stage, it may be relevant to refer to Clause 3.3 of the RFP. The said clause is extracted below:

***“3.3 Governing Law & Jurisdiction of Courts***

*The RFP shall be governed by and interpreted in accordance with laws in force in India and the Courts of Delhi, India shall have exclusive jurisdiction over matters relating thereto.”*

There is no doubt that the aforesaid clause would be the applicable clause in respect of disputes arising between the defendant and the prospective bidders like the plaintiff. It is in terms of the aforesaid clause that the plaintiff has filed the present suit before courts in Delhi. I do not agree with the submission made on behalf of the defendant that this clause is in the nature of a supervisory clause in respect of the arbitration clause as referred in Clause 12.16.

17. At this stage, reference may also be made to Section 7(5) of the Act which is reproduced below:

***“7 Arbitration agreement***

xxx xxx xxx

*(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.*

18. In terms of Section 7(5) of the Act, a reference in a contract can be made to arbitration clause contained in a separate document, provided that the contract wherein the reference is made is in writing. In view of my



finding that RFP does not constitute a contract between the parties, it cannot, by reference, incorporate the arbitration clause contained in the Project Agreement. Therefore, there is no merit in the submission of the defendant that submitting a bid in response to the RFP, would result in a contract coming into force between the defendant and the bidder.

19. Counsel for the plaintiff has placed reliance on the judgment of the Supreme Court in *BSCPL Infrastructure* (supra). In *BSCPL Infrastructure* (supra), the Supreme Court has followed its judgment in *PSA Mumbai Investments PTE Limited Vs. Board of Trustees Of The Jawaharlal Nehru Port Trust And Anr.*, (2018) 10 SCC 525. In *PSA Mumbai* (supra) also, there was an RFP issued by the respondent therein, which contained a similarly worded Disclaimer Clause clarifying that the said bid document was only to be construed as a document providing information to bidders and not as a binding contract between the parties. The RFP therein also contained clauses with respect to jurisdiction of any disputes arising out of the RFP being that of the courts in Mumbai. It was further provided in the RFP that post the bid process, the respondent would issue a letter of award to the successful bidder, who, upon embarking on two further steps contained therein would be bound by the Concession Agreement. In the above background, the Supreme Court observed that the acceptance as per Section 7 of the Contract Act, 1872 would become unqualified and absolute only after the Concession Agreement is entered into between the parties, upon which, the arbitration clause contained in the agreement would take force. It was further observed that that even at the stage of issuance of Letter of Award, there was no binding contract between the parties. Relevant observations of the Supreme Court in *PSA Mumbai* (supra) are set out



below:

*“12. On a conjoint reading of the aforesaid clauses, a few things become clear-*

*(i) first and foremost a disclaimer at the forefront of the RFP makes it clear that there is only a bid process that is going on between the parties and that there is no concluded contract between the same,*

*(ii) it is equally clear that such bid process would subsume a letter of award to be issued by Respondent 1 with two further steps under the schedule to be gone into before the draft concession agreement finally becomes an agreement between Respondent 1 and the special purpose vehicle that is constituted by the consortium for this purpose,*

*(iii) that through out the stage of the bid process, the forum for dispute resolution is exclusively with the courts at Mumbai, and*

*(iv) that right upto the stage of the entering into the concession agreement, the bid process may be annulled without giving any reason whatsoever by Respondent 1.*

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*14. Under Section 7 of the Contract Act, 1872 in order to convert a proposal into a promise, the acceptance must be absolute and unqualified. It is clear on the facts of this case that there is no absolute and unqualified acceptance by the letter of award- two or three very important steps have to be undergone before there could be said to be an agreement which would be enforceable in law as a contract between the parties.”*

20. Following the dicta in **PSA Mumbai** (supra), the Supreme Court in **BSCPL Infrastructure** (supra) observed as under:

*“15. What really puts paid to this agreement is the schedule of bidding process which is identical to the schedule of bidding process in PSA Mumbai Investment Pte. Ltd. case. This*



*schedule of bidding process begins with the last date of receiving queries and ends with the signing of concession agreement, LOA being Item 7 and part and parcel of this bidding process. The moment this is so, then what is clear is that under Clause 6.1, dispute resolution can only take place by the courts of Delhi.*

*16. It is not possible to say that a standard form arbitration clause contained in a draft agreement would then oust Clause 6.1 and disturb the entire scheme of the schedule of bidding process. This being the case, it is clear that even at the stage of acceptance of LOA, if disputes arise between the parties, they can only be resolved by the courts of Delhi and not by arbitration. This being the case, it is clear that PSA Mumbai Investments Pte. Ltd. judgment is, in fact, on all fours and would govern the facts of the present case.”*

21. The dicta of the aforesaid judgments would squarely be applicable to the present case. The counsel for the defendant has sought to distinguish **BSCPL Infrastructure** (supra) on the ground that in the said case there was no clause such as Clause 12.16 in the present case. In my view, that would not make any difference. Like in both the aforesaid cases, the RFP in the present case contains a similarly worded ‘Disclaimer Clause’ and a ‘Dispute Resolution Clause’ which conferred jurisdiction upon the competent courts in Delhi. Therefore, the arbitration clause contained in the standard form of the Project Agreement would not oust the Dispute Resolution Clause of the RFP, till the time the said Project Agreement is entered into by the parties. In the cases before the Supreme Court, a Letter of Acceptance/Award had already been issued in favour of the party, which is not the case in the present matter. Therefore, the case of the plaintiff herein is at an even higher footing.



22. Therefore, I am of the view that in the present case, there is no valid enforceable contract constituting an arbitration agreement between the parties and hence, the parties cannot be referred to arbitration in terms of Section 8 of the Act.

23. Accordingly, I do not find any merit in the present application and the same is dismissed.

**CS(COMM) 123/2021**

24. Written statement be filed within statutory period along with documents in support.

25. List before the Joint Registrar for completion of pleadings on 27<sup>th</sup> April, 2022.

**FEBRUARY 22, 2022**

*Sakshi R.*

**AMIT BANSAL, J**

मात्यमेव जयते