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

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Date of decision: 13.01.2022

+ ARB.P. 1247/2021

AMR-BBB CONSORTIUM

..... Petitioner

Through Mr.Rajeeve Mehra, Sr. Adv. with
Mr.Keshav Sehgal, Adv.

versus

BHARAT COKING COAL LTD.

..... Respondent

Through Mr.Amit Sharma, Adv.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT (oral)

The hearing has been conducted through video conferencing.

1. The present petition has been filed under Section 11(6) read with Section 10(2) of the Arbitration and Conciliation Act, 1996 seeking appointment of sole Arbitrator to adjudicate the disputes inter se the parties.

2. Petitioner is a Consortium comprising of two companies i.e. AMR India Limited, a company registered under the Companies Act, 1956 {AMR Construction Limited} and Building Business Bridges UK Limited {BBB} and the Consortium Agreement was entered into between AMR and BBB on 16.09.2011 and 12.12.2012 for participating in the tender process and

development, mining and extraction of the Kapuria Block. As per clause 5 & 6 of the agreement dated 16.09.2011, AMR was the lead partner of the petitioner consortium.

3. According to the petitioner, respondent is a public sector undertaking and a subsidiary of Coal India Limited and engaged in the business of mining of cooking coal and operating the Jharia and Raniganj coalfields in the State of Jharkhand and produces bulk of cooking coal mined in the country.

4. As per the averments made in the present petition, vide letter of acceptance dated 10.09.2011 by the respondent, petitioner was awarded to undertake the work under Contract for the "Development of Kapuria Block & extraction of coal by mass production technology package for a minimum guaranteed production of 2.0 million ton per Year on turnkey basis", for the amount of Rs. 798.82 crores as capital cost for development phase-I, and Rs. 1427.25 crores as Revenue cost for phase-II. Accordingly, in terms of Clause 4.1.l(xxxiii) of the Contract, the scope of Work included preparation of a Detailed Project Report ("DPR") & EMP by the Petitioner for the development and extraction of coal from the mine for commercial production period of nine (9) years (APP). The Geological Reports were

provided by the respondent to the petitioner for preparation of DPR as per scope of work and in return, petitioner prepared a comprehensive DPR and submitted to the respondent for approval. The aforementioned DPR was examined over a period of 8 months and communicated to the petitioner vide letter dated 11.07.2013 with the directions to start the work as per this approved DPR after getting the Environmental clearance and other statutory approvals. Consequent to the approved DPR, petitioner furnished a Performance Bank Guarantee ("PBG") equivalent to 1 % of the Contract Value, in terms of Clause 4.1.4 of the Agreement dated 18.04.2012 amounting to Rs. 12,78,49,970/- drawn on Oriental Bank of Commerce; prepared the Mining Plan for extraction of coal reserves; and conducted an Environmental Impact Assessment and the Environmental Management Plan and submitted to the respondents through various communications. Moreover, the Petitioner sought approvals including but not limited to mining plans, Environmental Clearance, shaft sinking plans and also furnished Bank guarantees for import of Plant and Machinery, which are as follows:

- i. Bank Guarantee dated 25.09.2014 for Rs. 6,40,75,203/- issued by ICICI bank

- ii. Bank Guarantee dated 29.09.2014 for Rs. 20,00,00,000/- issued by SBI Bank;
- iii. Bank Guarantee dated 30.09.2014 for Rs. 14,79,00,000/- issued by Bank of Baroda.

5. However, respondent failed to establish letters of credit in favour of petitioner to import plant and machinery for the purpose of extraction of coal and also failed to clear the payments under different invoices. Many other disputes arose between the parties and in order to resolve the issues, various communications took place between the parties, but those were of no avail. Thereafter, petitioner vide letter dated 10.11.2020 invoked arbitration in terms of clause 4.1.31.2 of the Contract.

6. Learned counsel further submits that petitioner approached International Chambers of Commerce, Paris on 18.12.2020 to appoint an arbitrator in accordance with the contract but the institution has also failed to act in accordance with Clause 4.1.43 .2 of the Contract. ICC *vide* payment request dated 02.09.2021 demanded to deposit \$ 78,000 from all parties i.e., Petitioner as well as Respondent and the additional parties. Since there was no compliance, therefore the ICC, on 14.09.2021 treated the claims as withdrawn and eventually petitioner also withdrew its claims. However,

petitioner made another attempt to amicably resolve the disputes and called upon the respondent to join in the appointment of Arbitrator by its letter dated 29.09.2021, which was not responded to by the Respondent. Hence, the present petition has been filed.

7. On the other hand learned counsel for respondent has opposed the present petition submitting that petitioner- Consortium has deliberately and *mala fide*ly suppressed certain material and relevant facts from this Court. Learned counsel has pointed out that the Notice dated 10.07.2020 for cancellation of the Contract was sent to petitioner, as it had prepared DPR based on limited data available and had not taken up additional exploration work and rather granted 15 days' time to come up with its submissions, failing which the contract shall be cancelled. In response to the aforesaid, petitioner vide letter dated 23.07.2020, sought settlement of the disputes through 'Conciliation'. Thereafter, vide communication dated 10.11.2020, respondent asked the petitioner to submit specific disputes, questions, differences upon which conciliation was intended. However, instead of replying to said communication, petitioner invoked arbitration. According to learned counsel for respondent, even after a chain of communications, petitioner did not come forward for conciliation. In the meantime,

respondent was informed by the Secretariat of the International Court of Arbitration of the International Chamber of Commerce (ICC) that on 18.12.2020 it had received a request from petitioner for arbitration. However, due to default of payment to ICC International Court of Arbitration by the petitioner despite repeated communications, ICC sought the parties to pay the balance amount. However, again petitioner gained time from ICC to make payment. Lately, respondent received a communication dated 29.09.2021 from the petitioner wherein it was informed that petitioner had withdrawn request for arbitration before the ICC and now, petitioner has filed the present petition seeking appointment of Arbitrator. Learned counsel submitted that having approached the ICC, petitioner has already exhausted its arbitral remedy and therefore, the present petition deserves to be rejected.

8. On the asking of this Court, learned counsel for respondent fairly submitted that disputes are arbitrable and it has no objection if this Court appoints an Arbitrator.

9. In view of above, the present petition is allowed. Accordingly, **Mr. Justice (Retd.) T.S. Thakur, former Chief Justice of India (Mobile: 8800309969)** is appointed sole Arbitrator to adjudicate the dispute between the parties.

10. The learned Arbitrator shall ensure compliance of Section 12 of Arbitration and Conciliation Act, 1996 before commencing the arbitration. The learned Arbitrator shall decide the fee after consulting with the parties.
11. The present petition stands disposed of accordingly.
12. A copy of this order be sent to the learned Arbitrator for information.

JANUARY 13, 2022/ab



**(SURESH KUMAR KAIT)
JUDGE**