

RAJASTHAN HIGH COURT

सत्यमेव जयते

HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Arbitration Application No. 63/2023

M/s Terrace Pharmaceuticals Private Limited having its H.O. At E-141, Phase-VII, S.A.S. Nagar- 160 055, through its authorized signatory Mr. Praveen Kumar S/o Shri Surrender Kumar.

-----**Applicant**

Versus

1. Rajasthan Medical Services Corporation Limited through its Managing Director, RMSCL, Sawasthya Bhawan, Tilak Marg, Jaipur 302005
2. Rajasthan Medical Services Corporation Limited, through its Executive Director, (Proc.), RMSCL, Sawasthya Bhawan Tilak Marg, Jaipur- 302005

-----**Respondents**

For Petitioner(s)	:	Mr. Tarun Kumar Mishra
For Respondent(s)	:	Mr. Nikhil Simlote, Mr. Divyansh Mathur

HON'BLE MR. JUSTICE SUDESH BANSAL

Order

29/11/2024

1. Applicant has filed this arbitration application under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (for short "A&C Act, 1996"), for appointment of a sole arbitrator to resolve the dispute arrived at between the parties pursuant to the bid Reference No. F.02(304)/RMSCL/PROCUREMENT/DRUG/NIB-27/2020/1847 dated 14.10.2020 for Rate Contract Cum Supply and Empanelment of Drugs and Medicines (Rate Contract Ending on 30.09.2022).

2. Heard learned counsel for both parties and perused the pleadings and documents available on record.

3. The facts which are undisputed between the parties are that the applicant, a private limited company, was declared as successful bidder by the respondents, a government owned corporation under bid NIB-27 dated 14.10.2020 for supply of empaneled drugs and medicines. The Letters of Acceptance dated 31.05.2021 and 23.07.2021 were issued in favour of applicant-company and applicant company had furnished performance security amount, to complete the purchase orders pursuant to the Letters of Acceptance by way of two Bank Guarantees, to the tune of Rs.25,00,000+89,800/-. Later on, on account of not honoring the supply of medical drugs as per purchase orders of the respondents, the applicant company was held negligent and liable to breach the performance of the contract. Therefore, respondents referred the matter to their disciplinary committee under Clause 13 (15) of the Contract. Finally, the applicant-company was debarred for a period of one year for supply of Amoxicillin Cap IP 500mg (code No.72) as also debarred for two years for supply of Cephalexin Cap IP 500mg (code No.97) and debarred for one year for supply of Cephalexin Cap IP 250mg (code No.96), from the date of issuance of order i.e. 17.06.2022. In addition to punishing the applicant-company with debarment for the above stated period, respondents also penalized the applicant company monetary terms for the same cause of action by imposing 15% penalty of short supply, amounting to Rs.1,35,39,471/- and recovery notice of such amount dated 27.01.2023 was issued against the applicantcompany. The terms

and conditions of NIB dated 14.10.2020, Letters of Acceptance dated 31.05.2021 and 23.07.2021, photo copies of the bank guarantees furnished by the applicant company and order of debarment dated 17.06.2022, as also the recovery notice dated 27.01.2023 issued against the applicant-company, are available on record.

4. The applicant-company has raised a dispute that purchase orders for supply of medical drugs, for which applicant company has been penalized, were issued after December, 2021 which have no reference to the NIB-27/2020 and further respondents illegally clubbed one more contract in the recovery notice connected with NIB-03/2019, which is illegal. The applicant company submits that at the most the company could have been penalized with forfeiture of the performance security deposited for the orders pursuance to NIB-27/2020 and out of the penalty amount, the respondents corporation have recovered the sum of Rs.33,22,054/- from the applicant-company in coercive manner yet started to pressurize the applicant company to deposit the penalty of sum of Rs.1,02,41,717/- against NIB-27/2020. It is the case of applicant company that the proposed penalty is arbitrary as also against the provision of Section 73 and 74 of the Indian Contract Act, 1872 and further in order to realize such an arbitrary penalty amount, respondent-corporation proceeded to encash the bank guarantees of the applicant-company, which was not only submitted for NIB-27, but other bank guarantees also which were submitted for other contracts i.e. NIB-03/2019, NIB-10/2020 etc.

In addition, it is also the case of applicant-company that the Letters of Acceptance were issued during the Covid Period and

peak of Pandemic Covid-19. The market of medicine during that period was quite unstable because the Government of India had stopped import of many drugs which were used as raw materials. Therefore, due to change of the Government policy, a condition of *force majeure* was created and thereby, applicant-company informed the respondent corporation by sending various letters from 16.12.2021 to 30.05.2022, not to issue further purchase orders because of non-availability of raw materials but the respondent-corporation did not reply to the letters, rather kept mum and later on, on account of non-supply/ short supply of the medical drugs, applicant-company was held guilty for breach of conditions of the contract and negligent in not honoring the purchase orders whereas indeed non-supply/ short supply was beyond the control of applicant-company due to the preventing condition of Pandemic Covid-19 and change of policy of Government of India, hence, the exception clause of the contract comes into play to protect the interest of applicant-company -supplier and punishment orders passed against the applicant-company are arbitrary and irrational.

5. Applicant-company submits that Clause 22 (2) of the Contract/ NIB, which has become part of contract of terms and condition between the parties after acceptances of bid, provides an arbitration clause for the applicant, hence, such dispute deserves to be resolved through arbitration but since in the Clause 22 (2), no mechanism is provided for appointment of Arbitrator, the instant arbitration application has been filed by the applicant-company for appointment of an independent and neutral Arbitrator

to resolve such dispute. For ready reference, the arbitration clause 22 (2) reads as under:-

"If the approved bidder suffers by any decision or act or interpretation of procuring entity, applicant may request for appointment of a sole arbitrator to decide the issue. Fees and other charges shall be borne by both parties equally."

6. It has been contended by learned counsel for the applicant-company that prior to filing the present arbitration application, an application under Section 9 of the A&C Act, 1996, relying upon the same arbitration clause contained in Clause 22 (2) of the NIB, was filed against the respondents before the Commercial Court No.1, Jaipur, for seeking interim relief whereupon the restrained order was passed against the respondent corporation and the bank from encashing the bank guarantees, which are not connected with the contract in question. Further, the applicant-company states to served one legal notice dated 06.03.2023 upon the respondents invoking the arbitration clause but respondents neither replied the legal notice nor disputed the arbitration clause in the proceedings under Section 9 of the A&C Act, 1996.

7. Thus, the prayer of counsel for the applicant company is that in the above facts and circumstances and accrual of dispute referred hereinabove, the Arbitrator may be appointed in furtherance to the arbitration clause, referred hereinabove, to resolve/ settle the dispute between the parties.

8. The respondents have resisted the arbitration application and have filed reply, denying the case of applicant-company on merits and justifying the orders of debarment of applicant-company for

supply of respective medical drugs for one and two years, relying on the tender condition No.13 (15), as also imposing penalty and issuing recovery notice for realizing the due penalty amount against the applicant-company, relying on the tender condition No.13 (18).

9. In the reply to arbitration application, the inability expressed by the applicant company to honor the purchase orders during Covid Period, taking resort to a condition of *force Majeure*, has been denied by respondent-Corporation stating *inter alia* that same is not falling under exceptional clauses of the contract and it has been contended that it is the responsibility of the supplier/successful bidder for any shortage/ damages occurred at the designated places.

10. The legal objection of the counsel for the respondents is that the arbitration clause contained in Clause 22 (2) of the NIB, on which the applicant-company has placed reliance for appointment of Arbitrator, does not meet the essential elements of an arbitration agreement, since it is not indicated in the arbitration clause that decision of Arbitrator shall be final and binding upon the parties which is one of the essential attribute of an arbitration agreement. In support, reliance on the decision of Coordinate Bench of Rajasthan High in case of **M/s Mohammad Arif Contractor vs State Of Rajasthan & Anr.:[2015 (4) WLC (Raj.)32]** has been made and it has been prayed that the arbitration application be dismissed.

11. Having pondered over the rival contentions, pleadings and documents of the parties, it has transpired that the applicant-company was declared as a successful bidder pursuant to NIB-

27/2020 dated 14.10.2020 of the respondents and the empaneled medical drugs was agreed to be supplied by the applicant-company to the respondent corporation for which the Letters of Acceptance dated 31.05.2021 and 23.07.2021 were issued by the respondent-corporation. It appears that the applicant has furnished security deposit by way of two bank guarantees of Rs.25,00,000/- and 89,800/- respectively. It appears that the respondent corporation, observed that the applicant-company had been negligent in honoring the purchase supply orders, therefore, the matter was referred to the disciplinary committee in terms of Clause 13 (15) of the Contract and the disciplinary authority not only debarred the applicant company for supply of the drugs for one or two years but also penalized the applicant company with huge monetary penalty of Rs.1,35,39,471/-. It appears that some of the penalty amount has been recovered and for remaining, respondent-corporation is inclined to encash the bank guarantees of applicant-company, not only furnished for the present contract under NIB-27/2020 but furnished by applicant-company for other contracts as well, like NIB-03/2019 and 10/2020 etc. The applicant-company has sought to take a resort of the unprecedented situation of Covid Pandemic, claiming it to be a situation of *force majeure* to take the benefit of exceptional clauses of Contract for non-supply/ short supply of medical drugs but respondents have disputed that the case of applicant-company does not fall in exceptional clause, rather has justified the orders of debarment as also imposition of penalty, alleging the negligence of the applicant-company for non/ short supply of the medical drugs pursuant to the purchase orders. Thus, in such

backdrop of facts, certainly a dispute has arisen between the parties which requires to be resolved.

12. As far as resolution of such dispute through arbitration is concerned, it is undisputed between the parties that Clause 22 (2) of the NIB provides a remedy to the applicant company to refer the dispute for arbitration. It is noteworthy that parties are not at quarrel about existence and validity of the Clause 22 (2) of the NIB, extracted hereinabove and same being a part of the contract between the parties.

13. The objection of the counsel for the respondents is that clause for referring the dispute to Arbitrator, provides remedy only to the supplier and further, the clause nowhere whispers that the decision of Arbitrator shall be final and binding upon the parties, hence, the same does not fulfill all the requisite essentials for being a valid arbitration agreement.

14. In order to deal with the objection of the counsel for the respondents, it would be apposite to refer the celebrated judgment of Apex Court delivered in case of **Jagdish Chander Vs. Ramesh Chander & Ors: [(2007) 5 SCC 719]**, wherein the Apex Court carved out certain principles with regard to the attributes of an arbitration agreement. In this judgment, Apex Court considered the various other decisions delivered in case of **K. K. Modi Vs. K N Modi [(1998)3 SCC 573]**, in case of **Bharat Bhushan Bansal Vs. U.P. Small Industries Corporation: [(1999)2 SCC 166]** and **State Of Orissa & Anr. Vs. Damodar Das: [(1996)2 SCC 216]**. In para 8 (iii) of the judgment, the Apex Court clearly observed as under:-

"where the clause provides that in the event of dispute arising between the parties, the dispute shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement.....".

It was further observed in this judgment that if the clause relating to settlement of disputes, specifically excludes any of the attributes of an arbitration agreement, then it will not be treated as an arbitration agreement.

15. Applying the *ratio decidendi* of the judgment of Apex Court in case of **Jagdish Chander** (*supra*) to the facts of case at hand, Clause 22 (2) of the NIB explicitly refers to the intention of parties having an agreement that if the approved bidders suffers by any decision or act or interpretation of procuring entity, the applicant may request for appointment of a sole Arbitrator to decide the issue. The parties also agreed that fees and other charges shall be borne by both parties equally. The language used in the clause clearly reflects the intention of parties too having an agreement to refer the dispute to the Arbitrator for decision on behest of the approved bidder. Here the approved bidder is aggrieved party by the adverse orders passed by the respondent-corporation and bent upon to realize penalty from the other Bank Guarantees of applicant company, hence, the applicant/ approved bidder is seeking appointment of Arbitrator in view of such clause.

16. It is well established principle of law that if there is any contractual stipulation between the parties which under-mines the scope of arbitration clause, the same will be given an

interpretation in the manner which gives full effect to the arbitration agreement between the parties. In case of **Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. Ors. [(2013)1 SCC 641]**, the Hon'ble Supreme Court held and observed in para 96 as under:-

"96. Examined from the point of view of the legislative object and the intent of the framers of the statute i.e. the necessity to encourage arbitration, the Court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious causes of action, parties and prayers."

17. In case of **Mahanagar Telephone Nigam Limited Vs. Canara Bank & Ors:[(2020)12 SCC 767]**, the Hon'ble Supreme Court held and observed as under:-

"9.5. A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An "arbitration agreement" is a commercial document inter parties, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities."

18. In the opinion of this Court, *prima facie* it reveals from bare perusal of Clause 22 (2) of the NIB that same clearly reflects the intention of parties to refer the dispute to the arbitration for its decision and further the clause does not exclude the attributes of an arbitration agreement that the decision of Arbitrator shall not be final and would not be binding on the parties. Therefore, following the *ratio decidendi* of above referred judgments of Hon'ble Supreme Court, this Court would support the case of

applicant company to refer the dispute to the arbitration for decision, instead of rejecting the arbitration application on the ground that all essential elements of the arbitration agreement are absent in Clause 22 (2). In case of **M/s Mohammad Arif Contractor** (*supra*), on which the learned counsel for the respondents has relied upon, the Coordinate Bench of this Court too relied upon to the judgment of Apex Court in case of **Jagdish Chander** (*supra*) but since the facts of that case were different, hence the *ratio decidendi* laid down in **M/s Mohammad Arif Contractor** (*supra*), would not be applicable to the facts of the present case. In that case, while interpreting Clause 23 of the Contract read with Clause 51, the Hon'ble Court observed that both the parties to the contract had no intention to be bound by the decision of the committee and further, Clause 51 attribute to Clause 23 clearly transpires that it was kept open for both the parties to approach the competent Court having jurisdiction for settling the disputes. Thus, at one hand where the intention of parties to get the dispute resolved through arbitration was not found explicit on the other hand, the decision of Arbitrator was not treated to be final & binding, therefore, Clause 23 r/w Clause 51 of the Contract was not held to be an arbitration agreement but the factual position in the case at hand is different altogether already discussed hereinabove. For such reasons, the objection of counsel for the respondents does not find any support from the judgment, passed by the Coordinate Bench in case of **M/s Mohammad Arif Contractor** (*supra*) and the objection deserves to be turned down.

19. In addition to above, it would not be out of place to refer the provision of Section 16 of the A&C Act, 1996 which provides competence of the arbitral tribunal to rule on its own jurisdiction. For ready reference, Section 16 (1) may be extracted hereunder:-

"16 (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,
(a).....
(b)....."

20. The Court additionally finds that the issue of validity of arbitration agreement more particularly in respect of having essential elements of the arbitration agreement, can better be considered and decided on merits by the arbitration tribunal because before the arbitration tribunal, both parties would have ample opportunity to produce the other material and evidences to show their intention and object to entered into arbitration agreement. Therefore, it is hereby observed that it shall be open for the respondents to raise the objection about validity of the arbitration agreement before the arbitration tribunal itself and if any such objection is raised, the arbitration tribunal shall obviously deal with such an objection in accordance with law, without being influenced by the *prima facie* opinion, expressed by this Court, since the opinion of this Court is only *prima facie*, just expressed in order to entertain and decide this arbitration application and same is not final.

21. The High Court being a referral Court while exercising its jurisdiction, dealing with an application under Section 11 of A&C Act, 1996 for appointment of Arbitrator, exercises a limited

jurisdiction which is provided under Section 11 (6A) of the A&C Act, 1996. The provision of Section 11 (6A) of the A&C Act, reads as under:—

“(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.”

22. This Court is aware that in a recent judgment of Hon'ble Supreme Court in case of **SBI General Insurance Co.Ltd. Vs.Krish Spinning: [Civil Appeal No.7821/2024 arising out of SLP (C) No.3792/2024]** delivered on 18th July, 2024, in respect of scope of the High Court while dealing with the arbitration application in context of Section 11 (6A) of the A&C Act, 1996, it has been held and observed by Hon'ble Supreme Court in following paras as under:-

"110. The scope of examination under Section 11(6-A) is confined to the existence of an arbitration agreement on the basis of Section 7. The examination of validity of the arbitration agreement is also limited to the requirement of formal validity such as the requirement that the agreement should be in writing.

111. The use of the term 'examination' under Section 11(6-A) as distinguished from the use of the term 'rule' under Section 16 implies that the scope of enquiry under section 11(6-A) is limited to a *prima facie* scrutiny of the existence of the arbitration agreement, and does not include a contested or laborious enquiry, which is left for the arbitral tribunal to 'rule' under Section 16. The prima facie view on existence of the arbitration agreement taken by the referral court does not bind either the arbitral tribunal or the court enforcing the arbitral award.

112. The aforesaid approach serves a two-fold purpose - firstly, it allows the referral court to weed out non-existent arbitration agreements, and secondly, it protects the jurisdictional competence of the arbitral tribunal to rule on the issue of existence of the arbitration agreement in depth.

113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in **In Re: Interplay** (*supra*) that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a *prima facie* arbitration agreement and not any other issues. The relevant observations are extracted hereinbelow:

"209. The above extract indicates that **the Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a *prima facie* arbitration agreement and not other issues". These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings.** Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a timebound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators.[...]"

(Emphasis supplied)

114. In view of the observations made by this Court in **In Re: Interplay** (*supra*), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of *prima facie* existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in **Vidya Drolia** (*supra*) and adopted in **NTPC v. SPML** (*supra*) that the jurisdiction of the referral court when dealing with the

issue of "accord and satisfaction" under Section 11 extends to weeding out *ex-facie* non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in **In Re: Interplay** (*supra*)."
(emphasis supplied)

23. The judgment relied upon by learned counsel for respondents delivered by the Constitutional Bench of Hon'ble Supreme Court **In Re: Interplay Between Arbitration Agreements Under The Arbitration and Conciliation Act 1996 And the Indian Stamp Act, 1989 [AIR 2024 SC 1]**, do not propose any contrary principle of law on this point but also suggests to rely on the provision of Section 11 (6A) of the A&C Act, 1996, while dealing with the arbitration application since such provision has been observed to be alive.

Accordingly, the plea in respect of invalidity of arbitration agreement due to absence of all requisite attributes raised by counsel for the respondents is hereby decided in the aforesaid terms.

24. For aforesaid discussions and reasons made hereinabove, this Courts finds that the present arbitration application deserves to be allowed.

25. As a final result, the instant arbitration application is allowed and this Court appoints Hon'ble Mr. Justice Deepak Maheshwari (Former Judge), Mob.No.9414285054, E-mail:- dmrhjs2007@rediffmail.com; Address:- Villa No.4, Manglam Arpan, Rampura Road, Muhana Mandi, Jaipur, as a sole Arbitrator in both the arbitration applications to adjudicate the dispute

between parties in accordance with provisions of the Arbitration and Conciliation Act, 1996.

26. The appointment of the Sole Arbitrator is subject to the declarations being made under Section 12 of the Arbitration & Conciliation Act, 1996 with respect to independence and impartiality, and the ability to devote sufficient time to complete the arbitration within the prescribed period.

27. The arbitration fee of the Sole Arbitrator shall be payable in accordance with the provisions contained in the Manual of Procedure for Alternative Dispute Resolution, 2009 as amended by the Manual of Procedure for Alternative Dispute Resolution (Amendment), 2017 vide notification dated 23.03.2017 read with 4th Schedule appended to the Act of 1996 or as determined by the Arbitrator with consensus of parties.

28. The Registry is directed to intimate Arbitrator Hon'ble Mr. Justice Deepak Maheshwari (Former Judge), for his approval and consent to act as Arbitrator.

29. All other issues may be raised by the parties before the Arbitrator, which shall be considered in accordance with law.

30. Since as per Section 29A of the Arbitration and Conciliation Act, 1996, the arbitration proceedings are required to be concluded within scheduled time as stipulated therein, it is expected from the parties to appear before the Arbitrator on 20.12.2024 or any other date as informed by the Arbitrator to parties or agreed between parties with the consent of Arbitrator, and further parties shall provide their respective E-mail/ Contact Number/ Mobile Number as also of their authorized

representatives/lawyers, appearing on their behalf before the Arbitration Tribunal, in order to facilitate the Arbitrator to send information to the parties, whenever required. The information send by the Arbitrator, on such address/ E-mail/ cellphone of the parties/ their authorized representatives/lawyers, shall be treated as sufficient unless same is not changed.

31. The Arbitration Application stands disposed of accordingly.

(SUDESH BANSAL),J

TN/7