

HON'BLE SRI JUSTICE K. LAKSHMAN

ARBITRATION APPLICATION No.266 OF 2024

ORDER:

Heard Mr. S. Ram Babu, learned counsel for the applicant and Ms. V. Uma Devi, learned counsel for the respondent.

2. This application is filed under Section - 11 (6) (c) of the Arbitration and Conciliation Act, 1996 (for short 'Act, 1996'), to appoint three (03) Arbitrators to adjudicate the disputes between the parties.

3. CONTENTIONS OF THE APPLICANT:

i) The applicant is a Company incorporated under the Companies Act, 1956. It is engaged in the design, engineering, and supply of steel plant equipment. It has entered into a Contract with respondent dated 28.04.2017 for setting up Single Stand Reversing 4-HI Wide Plate Hot Rolling Mill for Rolling of Plates (Phase-I) at the respondent premises in Hyderabad.

ii) The said contract was for design, supply and commissioning of various plant equipment and technological structures. It is the specific contention of the applicant that as per the terms of the contract, the applicant has agreed to undertake design, engineering,

manufacture and supply of plant and equipment, technological structures, supply of refractory's, civil and structural consultancy work, intermediate storage, insurance and handling, erection work, testing, start-up ,commissioning and demonstration of performance guarantee parameters of the facilities. Time is the essence of the contract. Adhering to the stipulated timeline, the applicant invested substantial funds and allocated significant resources for the execution of the contract.

iii) In terms of Clause - 4 of the Special Conditions of the Contract, site delivery of plant, machinery and equipment shall start from 15th month and shall be completed by 24th month from the effective date i.e. 28.04.2017. Erection, start up and putting into commissioning (Provisional Acceptance) shall start from the 18th month and shall be completed by 30th month from 28.04.2017 and scheduled to be completed by 28.10.2019.

iv) It is the specific contention of the applicant that project completion was delayed by 26 months due to various reasons attributable to the respondent, such as Civil and Structural works delay, utilities and cranes readiness delays, equipment delivery and

unavailability of slab, for which the applicant incurred additional costs due to project prolongation.

v) A meeting was held between the parties, wherein it was agreed that delay on the part of the respondent in handing over the site for erection, the PAC (Provisional Acceptance Certificate) dates originally targeted for 28.04.2019 for Phase-II and 28.10.2019 for Phase-I needed to be arranged. It was also proposed that PAC for both the phases were to be conducted by 28.08.2020 based on the anticipated availability of civil front for erection by July, 2019 and make the project economically efficient for the respondent by utilizing the plates produced from Phase I in Phase II instead of procuring the same separately.

vi) There was an exchange of letters between the applicant and the respondent. The schedule was extended due to several factors, including delays in civil and structural works, readiness of utilities & cranes, equipment delivery issues, slab unavailability, dengue pandemic, impact of the COVID-19 pandemic, flooding in the cellars, and fire damage. The said reasons were explained to the respondent *vide* letter dated 27.02.2020.

vii) On 12.03.2020, the respondent sent a letter to the applicant extending the time for completion of the contract from August, 2020 to 31.03.2021. The respondent in contrary to the agreement, and by exercising its dominant position, reserved its right to impose Liquidated Damages, even though the said extension was provided due to the reset of the 'erection start date' due to failure of the respondent to release the completed civil and structural work as per contractual timelines. The respondent, for the reasons attributable to it, requested the applicant to defer the works due to the absence of erection fronts for erection, and the relevant constructions was yet to be completed.

viii) The applicant has also sent invoices from time to time against the furnace for heating supply of plant, machinery, and equipment of the contract. *Vide* letter dated 02.06.2021, the respondent extended time for completion of the contract from 31.03.2021 to 31.08.2021. The same was again extended to 30.09.2021. *Vide* letter dated 04.08.2021, the applicant informed the respondent that the consolidated outstanding amount due as on the date is about Rs.61.00 Million which are pending from 29.07.2021 and, therefore, the applicant requested the respondent to release the

said outstanding payment immediately. Similar letters were addressed by the applicant dated 11.09.2021 and 28.12.2021.

ix) *Vide* letter dated 15.03.2022, the respondent extended timelines up to 31.12.2021 for completion of contract and amended the contract for erection, start up and putting into commissioning of the contract. *Vide* the said amendment, the respondent also stated that the liquidated damages deducted against commissioning to be reviewed at the end of the project as per the Contract Provisions in view of deferment in initial contractual site handover by the respondent and other relevant delays on both sides.

x) The respondent released only part payment. *Vide* letter dated 08.11.2022, the applicant requested the respondent to release due payments and to waive the liquidated damages as the delays are beyond the control of the applicant in spite of dedicated efforts etc. *Vide* letter dated 08.05.2023, the respondent floated the applicant's proprietary and confidential drawings, including drawings in the open market for procurement of work rolls and other associated parts in the tender. The respondent has issued a final acceptance certificate to the applicant *vide* letter dated 31.05.2023. On 11.07.2023, the respondent

sent an e-mail to the applicant informing that it would be imposing liquidated damages @ 10% due to the delayed commissioning of the contract.

xi) *Vide* letters dated 12.07.2023 and 14.07.2023, the applicant informed the respondent that it has imposed liquidated damages wrongfully. The applicant has also filed an application under Section - 9 of the Act, 1996 *vide* C.O.P. No.75 of 2023, and the learned Commercial Court initially granted an *injunction* and thereafter the same was dismissed. The applicant had filed Commercial Court Appeal *vide* C.C.A. No.39 of 2024 before this Court. A Division Bench of this Court disposed of the same *vide* order dated 03.01.2021.

xii) *Vide* letter dated 09.10.2023, the applicant sent a letter to the respondent with a request to release contractual payments towards PAC and Final Acceptance Certificate and outstanding progressive payments. On 08.11.2023, the applicant met the Delay Analysis Committee of the respondent and explained the delay and the reasons for the said delay, etc. The applicant had issued a notice dated 11.12.2023 invoking the Arbitration Clause under Article - 9 of the contract, read with Clause - 40 of the GCC to the International Centre

for Alternative Dispute Resolution (ICADR) and the respondent. There was no response from the respondent. Therefore, the applicant filed the present application.

4. CONTENTION OF THE RESPONDENT:

i) Whereas, the respondent has filed counter contending that there was delay in execution of the project by the applicant and that there was poor planning and mismanagement by the applicant. There was also delay in submission of civil and structural drawings. There was poor erection work leading to incidents, like furnace collapse and fire. There was a delay in supply of critical equipment. Therefore, the respondent has imposed liquidated damages in terms of the Contract. There is no error in it.

ii) It is further contended by the respondent that proprietary rights over Engineering drawings were submitted as part of the contract deliverable and, hence, the respondent has right to use them for procurement of spare parts. The present application is not maintainable since the applicant has to approach ICADR, and on exhausting alternative remedy, it has to file the present application.

The applicant did not do so. With the said contentions, the respondent sought to dismiss the present application.

ANALYSIS AND FINDINGS OF THE COURT:

5. In view of the aforesaid rival submissions, there is no dispute with regard to the execution of agreement dated 28.04.2017 by and between the applicant and the respondent on the specific terms and conditions mentioned therein. The same is for the purpose of setting up Single Stand Reversing 4-HI Wide Plate Hot Rolling Mill for Rolling of Plates (Phase-I) at the respondent premises in Hyderabad.

6. According to both the applicant and the respondent, there was a delay in the execution of the said project. On consideration of the reasons mentioned by the applicant for delay, the respondent has extended timelines from time to time. The applicant stated the aforesaid eight (08) reasons for the delay in execution of the project, i.e., delays in civil and structural works, readiness of utilities and cranes, equipment delivery issues, slab unavailability, dengue pandemic, impact of COVID-19 pandemic, flooding in the cellars and fire damage. But, according to the respondent, there was poor planning, mismanagement, delay in submission of civil and structural

drawings, poor erection work leading to incidents, like furnace collapse and fire, and delayed supply of critical equipment.

7. The aforesaid aspects are factual facts, arbitrable disputes which the Arbitrator has to consider. On the said grounds, the respondent cannot oppose the present application.

8. Article - 9 of the Contract Agreement, which is referred to Clause - 40 of the General Conditions of the Contract, deals with ‘arbitration’ and the same is extracted as under:

“40.0 ARBITRATION

40.1 Any dispute(s) or difference(s) whatsoever arises under or out of or in connection with this Contract, or in respect of any defined legal relationship associated therewith or derived therefrom, the parties agree resolve/settle the same by submitting that dispute to arbitration in accordance with the International Centre for Alternative Dispute Resolution (ICADR) Arbitration Rules 1996.

The authority to appoint the arbitrator(s) shall be the International Centre for Alternative Dispute Resolution (ICADR).

The internationalcenter for alternative dispute resolution will provide administrative services in accordance with ICADR Arbitration Rules 1996

The language of the arbitration proceeding shall be English

The place of arbitration proceedings shall be Telangana, India.

Note: In respect of PSUs/Government organizations, the DPE guidelines shall be applicable.

Work under the contract shall be continued by the contractor during the arbitration proceedings, unless otherwise directed in writing by the Purchaser or unless the matter is such that the work cannot possibly be continued until the decision of the arbitrators is obtained, and save as those which are otherwise expressly provided in the Contract, no payment due or payable by the purchaser shall be withheld on account of such arbitration proceedings, unless it is the subject matter or one of the subject matter thereof.

40.2 Work under the Contract shall be continued by the Contractor during the arbitration proceeding, unless otherwise directed in writing by the Purchaser or unless the matter is such that the work cannot possibly be continued until the decision of the arbitrators is obtained, and save as those which are otherwise expressly provided in the Contract, no payment due or payable by the Purchaser shall be withheld on account of such arbitration proceedings, unless it is the subject matter or one of the subject matters thereof.”

9. Article - 8 of the Contract Agreement deals with 'Liquidated Damages' and the same is extracted as under:

"8.1 Liquidated Damages due to Delay in Completion of Facilities"

Liquidated damages shall be levied against JD in case of unsatisfactory or delay in supplies and execution of the Joint development Project Contract beyond the scheduled date of PAC. LD shall be leviable @ 1% per week or part thereof subject to a maximum of 10% of Joint development Project Contract price with Taxes, Duties, levies, cess etc.

The Purchaser may, without prejudice to any other method of recovery, deduct the amount of such damages from any amounts in his hands due to the JD. The payment or deduction of such damages shall not relieve the JD from his obligations to complete the work or from any other of his obligations and liabilities under the Joint development Project Contract. Being Joint Development, delays beyond control in Joint Development need to be resolved mutually.

NOTE:

1. If there is delay in supply of equipment but issue of PAC is within due date as per Contract, no LD shall be levied for delayed supply. Only, the date of issue of "Provisional Acceptance Certificate (PAC)" shall be considered for application of LD.

2. If the Project is delayed due to delay in submission of civil & Structural Drawings by JD as per approved Drawing submission schedule, the same shall be reckoned for levy of LD at the end of the project.”

10. It is also relevant to note that the applicant has filed an application under Section - 9 of the Act, 1996 *vide* COP No.75 of 2023 against the respondent restraining it and its employees from any further disclosure or misuse of dissemination of proprietary and confidential information of the applicant to any third party in any manner. The said application was dismissed by the Commercial Court *vide* order dated 14.08.2024 holding that there was no infringement by the respondent. Feeling aggrieved and dissatisfied with the said order, the applicant preferred an appeal *vide* Commercial Court Appeal No.39 of 2024 before this Court. *Vide* judgment dated 03.01.2025, a Division Bench of this Court disposed of the said appeal, set aside the order of the Commercial Court and permitted the respondent to use the confidential drawings including Work Roll Drawings only for the purpose of operation and maintenance of the project and for procuring spares and replacement of parts by inviting the tender. The respondent is not entitled to use the same for any other purpose. The

Division Bench also restrained the respondent from sharing the confidential drawings of the applicant to any third parties other than the aforesaid purpose.

11. Thus, there are disputes between the applicant and the respondent with regard to execution of the said project, and also the delay and imposition of liquidated damages. There is also a dispute with regard to the use of the said confidential drawings of the applicant and sharing of the same by the respondent with third parties. The same are arbitrable in nature. Therefore, invoking Article - 9 of the Contract Agreement read with Clause - 40 of the General Conditions of the Contract, the applicant has issued notice dated 11.12.2023 to the respondent. Despite receiving and acknowledging the said notice, there was no response from the respondent.

12. With regard to the contention of the respondent that the applicant has to approach ICADR and thereafter it has to file the present application, it is the specific contention of the applicant that ICADR is defunct. The applicant has sent a notice to the ICADR. Due to the aforesaid reason, there was no response from ICADR. Therefore, the applicant filed the present application. Thus, there is no error in it.

13. It is relevant to note that the institution of ICADR has now been taken over by the India International Arbitration Centre under the aegis of the Central Government. Reference may be made to the preamble of the India International Arbitration Centre Act, 2019:

“An Act to provide for the establishment and incorporation of the 1 [India International Arbitration Centre for the purpose of creating an independent and autonomous regime for institutionalized arbitration and for acquisition and transfer of the undertakings of the International Centre for Alternative Dispute Resolution and to vest such undertakings in the India International Arbitration Centre for the better management of arbitration so as to make it a hub for institutional arbitration and to declare the India International Arbitration Centre to be an institution of national importance and for matters connected therewith or incidental thereto.

WHEREAS dispute resolution process has a huge impact on the Indian economy and global perception on doing business in our country and it has become necessary to inspire confidence and credibility among the litigants of commercial disputes;

AND WHEREAS rapidly changing economic activity demands expeditious settlement of

disputes and creation and establishment of institutional arbitration;

AND WHEREAS the International Centre for Alternative Dispute Resolution was set up in the year 1995, under the aegis of the Central Government and registered under the Societies Registration Act, 1860 (21 of 1860), with the objective of promoting alternative dispute resolution mechanism and providing facilities for the same;

AND WHEREAS the International Centre for Alternative Dispute Resolution has received land and substantial funding by way of grants and other benefits from the Central Government for constructing infrastructure and making other facilities;

AND WHEREAS the International Centre for Alternative Dispute Resolution has not been able to actively engage and embrace developments in the arbitration ecosystem and to create a reputation par excellence keeping pace with the dynamic nature of arbitration over more than two decades;

AND WHEREAS studies conducted by the High Level Committee appointed by the Central Government indicate that the International Centre for Alternative Dispute Resolution has failed to address the growing needs of the institutional arbitration and also to bear optimum caseload and

to become better choice to the parties for arbitration;

AND WHEREAS it has become expedient to take over the undertakings of the International Centre for Alternative Dispute Resolution including its regional offices without interfering with its activities and without adversely affecting its character as a Society but to utilise its existing infrastructure and other facilities which have been set up by using the public funds provided by the Government and to incorporate a robust institution for domestic and international arbitration to be known as the India International Arbitration Centre;

AND WHEREAS it is considered necessary to declare the India International Arbitration Centre as an institution of national importance for its overall development as a major arbitration hub by promoting quick and efficient dispute resolution mechanism.”

14. From the above preamble, it is clear that the arbitral institution designated by the parties i.e., ICADR has now become defunct and no longer exists. This raises a question whether the arbitration clause in the present case i.e., Clause 40 becomes unworkable and whether no arbitrator can be appointed by this Court under Section 11. According to this Court, when the intention to

arbitrate is clear from the terms of the agreement, the Courts shall give effect to such an intention. In case, an arbitration clause becomes unworkable either by reason of drafting errors or due to the death of a named arbitrator or by reason of the designated arbitral institution not existing, the intention to arbitrate shall be given effect to by exercising powers under Section 11 of the Act, 1996.

15. In this regard, the following paragraphs of the Supreme Court's decision in **Enercon (India) Ltd. v. Enercon GmbH**¹, may be referred to:

“88. In our opinion, the courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause. Therefore, when faced with a seemingly unworkable arbitration clause, it would be the duty of the court to make the same workable within the permissible limits of the law, without stretching it beyond the boundaries of recognition. In other words, a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate. In such a case, the court ought to adopt the attitude of a reasonable business person, having business common sense as well as being equipped with the knowledge that may be peculiar to the

¹ (2014) 5 SCC 1

business venture. The arbitration clause cannot be construed with a purely legalistic mindset, as if one is construing a provision in a statute. We may just add here the words of Lord Diplock in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985 AC 191 : (1984) 3 WLR 592 : (1984) 3 All ER 229 (HL)] , which are as follows: (AC p. 201 E)

“... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”

We entirely agree with the aforesaid observation.

89. This view of ours is also supported by the following judgments which were relied upon by Dr Singhvi:

89.1. In *Visa International Ltd.* [*Visa International Ltd. v. Continental Resources (USA) Ltd.*, (2009) 2 SCC 55 : (2009) 1 SCC (Civ) 379] , it was inter alia held that: (SCC pp. 64-65, paras 25-26)

“25. ... No party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and material on record including surrounding circumstances.

26. What is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties and the evidence such as exchange of correspondence between the parties.”

89.2. Similar position of law was reiterated in *Nandan Biomatrix Ltd.* [*Nandan Biomatrix Ltd. v. D1 Oils Ltd.*, (2009) 4 SCC 495 : (2009) 2 SCC (Civ) 227] , wherein this Court observed inter alia as under: (SCC pp. 501-02, paras 28-30)

“28. This Court in *Rukmanibai Gupta v. Collector* [(1980) 4 SCC 556] has held (at SCC p. 560, para 6) that what is required to be ascertained while construing a clause is

‘whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement’.

29. In *M. Dayanand Reddy v. A.P. Industrial Infrastructure Corpn. Ltd.* [(1993) 3 SCC 137] this Court has held that: (SCC p. 142, para 8)

‘8. ... *an arbitration clause is not required to be stated in any particular form.* If the intention of the parties to refer the dispute to arbitration can be clearly ascertained from the terms of the agreement, it is immaterial whether or not the expression arbitration or “arbitrator” or “arbitrators” has been used in the agreement.’

30. The Court is required, therefore, to decide whether the existence of an agreement to refer the dispute to arbitration can be clearly ascertained in the facts and circumstances of the case. This, in turn, may depend upon the intention of the parties to be gathered from the correspondence exchanged between the parties,

the agreement in question and the surrounding circumstances. What is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration. What is required to be decided in an application under Section 11 of the 1996 Act is: whether there is an arbitration agreement as defined in the said Act.”

(emphasis in original)

16. Reference may also be made to **ACC Ltd. v. Global Cements Ltd.**². In the said case, arbitrators were named to decide the disputes under the agreement. Disputes arose after the death of the named arbitrators. The question before the Court was whether a new arbitrator could be appointed. The Court answered in the affirmative and appointed an arbitrator. It was held that unless a contrary intention appears, restraining appointment of a new arbitrator in the place of the deceased named arbitrator, a new arbitrator can be appointed. The relevant paragraphs are extracted below:

“28. The incident of the death of the named arbitrators has no nexus or linkage with the expression “at any time” used in Clause 21 of the agreement. The time factor mentioned therein is the time within which the question or dispute or difference between the parties is resolved as per the agreement. The arbitration clause would have life so long as

². (2012) 7 SCC 71

any question or dispute or difference between the parties exists unless the language of the clause clearly expresses an intention to the contrary.

“29. The question may also arise in a given case that the named arbitrators may refuse to arbitrate disputes; in such a situation also, it is possible for the parties to appoint a substitute arbitrator unless the clause provides to the contrary. Objection can be raised by the parties only if there is a clear prohibition or debarment in resolving the question or dispute or difference between the parties in case of death of the named arbitrator or their non-availability, by a substitute arbitrator.

30. We are of the view that Clause 21 does not prohibit or debar the parties in appointing a substitute arbitrator in place of the named arbitrators and, in the absence of any prohibition or debarment, parties can persuade the court for appointment of an arbitrator under Clause 21 of the agreement.

31. The High Court in our view was justified in entertaining such an application and appointing a former Judge of this Court as a sole arbitrator under the Arbitration and Conciliation Act, 1996 to adjudicate the dispute and difference between the parties.”

17. The decision of **ACC (supra)** can be extended to the facts of the present case. Merely because the designated arbitral institution no longer exists, the intention to arbitrate cannot be left unenforced. Therefore, this Court deems it appropriate to exercise its powers under Section 11 of the Act, 1996.

18. It is clear from the contentions of the parties that disputes have arisen between the applicant and the respondent under the Contract Agreement dated 28.04.2017. The same are arbitrable in nature and have to be adjudicated by an Arbitrator.

CONCLUSION:

19. Therefore, the present arbitration application is allowed.

20. The Applicant seeks the appointment of a tribunal consisting of three arbitrators. However, the arbitration clause does not contemplate a tribunal with three arbitrators. Therefore, this Court appoints Sri Justice L. Nageswara Rao, Former Judge, Supreme Court of India, 304, Sector-15-A, Noida 201 301, Uttar Pradesh State (Mobile # 9810559984), as the sole arbitrator to adjudicate the disputes between the applicant and the respondent. In the circumstances of the case, there shall be no order as to costs.

As a sequel thereto, miscellaneous applications, if any, pending in the Arbitration Application shall stand closed.

2nd May, 2025
Mgr

K. LAKSHMAN, J