IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBP No.24 of 2022

AFR

M/s. Jhar Mining Infra Private Limited .... ***Petitioner***

-versus-

CMD, managing Coalfields Ltd. and Others .... ***Opposite Parties***

Advocates, appeared in this case:

For Petitioner : Mr. Gautam Misra, Sr. Advocate

For Opposite Parties : Mr. Debaraj Mohanty, Advocate

CORAM:
THE CHIEF JUSTICE

JUDGMENT
27.09.2022

1. The Petitioner, M/s. Jhar Mining Infra Private Limited has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('the Act') seeking the appointment of an arbitrator to adjudicate the disputes between the Petitioner and Opposite Party No.1 (Mahanadi Coalfields Ltd.) (MCL) arising out of a tender document.

2. The background facts are that the MCL published a notice inviting tender (NIT) dated 23rd March, 2018 and RFQ and RFP documents (hereafter 'Tender documents') for setting up of Hingula Washery at Hingula area, MCL on Build-Operate Maintain Basis. The Washery was to be set up with a proposed

throughput capacity of 10 MTPA of raw coal (Dry basis). The Petitioner submitted its bid on 2nd July, 2018 and deposited a bid amount of Rs.50 lakh. On 7th February, 2019 MCL issued a Letter of Intimation (LOI) to the Petitioner informing the Petitioner that it had been identified as the lowest bidder for the project. The Petitioner was requested to return the signed LoI as a mark of acceptance. The LoI stated that a letter of award (LoA) would be issued to the Petitioner after receipt of environmental clearance (EC) in accordance with the terms and conditions of the tender document. By its letter dated 8th February, 2019 the Petitioner accepted the LoI. The Petitioner states that it thereafter provided assistance/support to MCL for obtaining the EC and other statutory clearances.

3. With there being a delay in procuring the EC, MCL requested the Petitioner to extendthe validity of the bid amount on several occasions. It is stated that while the Petitioner kept extending the validity of the bid amount from time to time, all of a sudden MCL by letter dated 14th June, 2021 cancelled the tender and the LoI issued to the Petitioner. By a letter dated 14th July, 2021 the Petitioner disputed the cancellation and requested MCL to resolve the dispute in terms of Clause 4(A).37 of the tender document.

4. An exchange of correspondence with MCL ensued. The Petitioner issued a notice dated 30th December, 2021 to MCL invoking the arbitration in terms of the aforementioned clause to the tender document and setting out a panel of four names. MCL was asked to choose from among them one person to act as the

sole arbitrator. MCL by its letter dated 13th January, 2022 contended that the cancellation of the tender of the LoI was neither a dispute under Clause 4(A).37 of the tender document nor a subject to be settled under the provisions thereof. Thereafter the present petition has been filed.

5. This Court has heard the submission of Mr. Gautam Misra, learned Senior Counsel appearing for the Petitioner and Mr. Debaraj Mohanty, learned counsel appearing for the Opposite Parties (MCL).

6. In resisting the appointment of an arbitrator under the above clauses, the contention of Mr. Debaraj Mohanty, learned counsel for MCL is that there is no concluded contract between the parties and that the Petitioner cannot yet be considered 'a selected bidder'muchless the 'owner'. In other words, unless a formal contract, according to MCL, in the form of a LoA or an agreement is entered into, there is no contractual relationship between the parties. Further, it is submitted that Clause 4(A).37 of the general terms and conditions of the contract i.e. GTC states that "to avoid litigation in dispute during the course of execution", efforts should be made to first to settle the dispute at the 'company level'. All of these are only applicable to a successful bidder after execution of an agreement between the parties. It is further contended that there is no arbitration agreement in terms of Section 7 of the Act and, therefore, the Petitioner cannot invoke Section 11(6) of the Act seeking the appointment of an arbitrator.

7. Reliance is placed by Mr. Mohanty on the decision in ***Dresser Rand S.A. v. Bindal Agro Chem Ltd. (2006) 1 SCC 751; Bharat Sanchar Nigam Limited v. Telephone Cables Ltd. (2010) 5 SCC 213; South Eastern Coalfields Ltd. v. S. Kumar's Associates AKM (JV) (2021) 9 SCC 166*** and the decision dated 25th July, 2022 of the Supreme Court in Civil Appeal No.4914 of 2022 (***Mahanadi Coalfields Ltd. v. M/s. IVRCL AMR Joint Venture)*** and a decision of this Court dated 13th May, 2022 in ARBP No.69 of 2021 ***(Emcure Pharmaceuticals Ltd. v. The Managing Director, Odisha State Medical Corporation).***

8. On the other hand, Mr. Gautam Misra, learned Senior counsel for the Petitioner contends that the Petitioner is indeed a 'successful bidder' in terms of the tender documents and satisfies the definition of 'BOM Operator' or 'Contractor' in terms of Clause 1.3.2.5 of the tender document. It is submitted that only because the Petitioner was L1 bidder, it was 'selected' and the LoI was issued by MCL to it on 7th February, 2019 which was accepted by the Petitioner, thus constituting a binding contract. The subsequent correspondence is also referred to as indicating that MCL considered the Petitioner as 'selected bidder' by requiring it to facilitate and assist MCL in obtaining the EC and other statutory clearances in terms of Clause 1.3.2.5. of the tender document. Minutes of the Board meeting of MCL dated 28th January, 2019 is referred to contend that the Board had approved the proposal for 'issue of LoI' and award of work to the lowest bidder for setting up of Washery at Hingula. All these, according to Mr. Misra, indicated that by issuing the LoI, the parties

intended to create a binding contract. Finally, it is submitted that it is the arbitral Tribunal which is competent to decide its own jurisdiction and whether an arbitration agreement exists in terms of Section 16 of the Act. Therefore, the parties should be relegated to the Arbitrator.

9. Reference is made by Mr. Misra to the decision in ***Pravin Electrical Private Limited v. Galaxy Infra and Engineering Private Limited (2021) 5 SCC 671;*** the decision in ***M/s. Unissi (India) Pvt. Ltd. v. Post Graduate Institute of Medical Education and Research (2009) 1 SCC 107;*** the decisionof Delhi High Court in ***Progressive Constructions Ltd. v. Bharat Hydro Power Corporation Ltd. (1995) SCC Online Delhi 443; Picasso Digital Media Pvt. Ltd. v. Pick-a-Client Consultancy Service Pvt. Ltd. (2016) SCC Online Del 5581;*** decision dated 24th February, 2015 in ARBP No.616 of 2014 ***(Wadia Techno-Engineering Services Ltd. v. Director General, Married Accommodation Project, Ministry of Defence); and Mahindra Susten Pvt. Ltd. v. NHPC Ltd. 2021 SCC Online Delhi 3273.***

10. The above submissions have been considered. The relevant clauses of the tender documents are required to be noticed. Clause 33.0 of the tender documents, states that the E-Tender Notice shall be deemed to be part of the Contract Agreement. Further, the General Terms and Conditions, Additional Terms & Conditions, Special Terms and Conditions, Technical Specifications, drawings and other document uploaded on portal as per bid documents and

work item documents, also form an integral part of the bid document and also form a part of the contract agreement.

11. The expressions 'LoI', 'LoA', 'L1' 'preferred bidder' etc. have been defined in the tender documents thus:

> "**Letter of Acceptance/Letter of Award' (LoA)** of the Bid shall mean the official communication issued by the Owner notifying the Preferred Bidder about acceptance of its Bid & inviting for signing of Contract.
>
> **Letter of Intimation (LoI)** of the Bid shall mean the official communication issued by the Owner notifying the L1 Bidder about acceptance of its Bid & further necessary assistance to Owner.
>
> **'Lowest Bidder' i.e. L1** shall mean bidder decided online based on the lowest cost in terms of present value of overall cost."
>
> **'Preferred Bidder'** shall mean the eligible Bidder invited by the Owner (MCL) for entering into contract for execution of the subject work on BOM concept."

12. It must be noted at the outset, therefore, that by acknowledging that the Petitioner as the lowest bidder i.e. L1 and therefore, the 'Preferred Bidder', the LoI was issued by MCL to the Petitioner. There is prima facie merit in the contention of the Petitioner that by accepting the LoI a contractual relation came into existence between the parties.

13. Clause 1.3.2.5 of the tender documents, spells out what are the obligations of the selected bidder. It reads as under:

> "1.3.2.5. Environmental and other statutory & regulatory clearances
>
> The Selected Bidder shall be responsible for execution of coal washery from concept to commissioning which inter-alia includes planning, design & engineering, selection of necessary equipment & machinery, procurement, delivery, erection/installation along with all associated Civil & structural works, testing, successful commissioning as well as operating & maintaining the coal washing plant and all allied activities in compatible manner as per the norms laid down by Central/State Pollution Control Boards or any other agency as applicable. MCL shall be responsible for obtaining all such environmental and the other clearances from Central/State Pollution Control Boards or any other agency as applicable. However, the BOMO shall provide all necessary assistance/support in this regard as deemed necessary."

14. The request made by MCL to the Petitioner to assist it in obtaining EC and other statutory clearances was clearly pursuant to the above Clause 1.3.2.5.

15. Clause 4(A).37 reads as under:

> **"4(A).37 SETTLEMENT OF DISPUTES:**
>
> It is incumbent upon the BOM Operator to avoid litigation and disputes during the course of execution. However, if such dispute take place between the BOM Operator and the Owner, effort shall be made first to settle the disputes at the company level.
>
> The BOM Operator should make request in writing to the Engineer-in-Charge (EIC) for settlement of such disputes/claims within 30(thirty) days of

arising of the cause of dispute/claim failing which no disputes/claims of the BOM Operator shall be entertained by the company.

If differences still persist, the settlement of the dispute shall be resolved in the following manner:

a) Disputes relating to the commercial contracts with Central Public Sector Enterprises/Govt. Departments (except Railways, Income Tax, Customs& excise duties)/State Public Sector Enterprises shall be referred by either party for Arbitration to the PMA (Permanent Machinery of Arbitration) in the department of Public Enterprises.

(b) In case of parties other than Govt. Agencies, the redressal of the dispute may be sought through Arbitration (THE ARBITRATION AND CONCILIATION ACT, 1996 as amended by AMENDMENT ACT of 2015)"

16. The above clause has to be read with the definition of 'BOM Operator' in the tender document, which reads as under:

" 'BOM Operator' or 'BOMO' or 'Contractor' wherever occurs means the Selected Bidder and shall include legal representative of such individual or persons composing a firm or a company or the successors-in-interest and permitted assignees of such individual, firm or company, as the case may be."

17. The expression 'contract' has been defined as under:

"Contract shall mean the formal agreement executed between the Owner and Selected Bidder for setting up of the washery, operation & maintenance thereof with the terms and conditions mentioned therein including Bid notice, the Bid as accepted by the Owner, specifications, designs & drawings and those to be submitted during progress

> of work, scope of work, billing schedule/schedule of quantities with rates and amounts etc."

18. While therefore, there may not be a concluded formal contract,it would not be entirely correct for MCL to contend that there is no contractual relationship whatsoever between the parties. The reference in Clause 4(A).37 to the disputes arising"during the course of execution" has to be understood as disputes arising even prior to the actual execution of the contract, since clause 1.3.2.5 envisages obligations of the parties at a stage even prior to the formal execution of the contract.

19. Moreover, Clause 4(A).37 and Clause 4(A).37A have to be read in continuation and the failure of the 'successful bidder', [which is in this case would include the 'preferred bidder' and 'lowest bidder' which is the Petitioner] and MCL to resolve the dispute by the in-house mechanism, which would entitle either party to invoke the arbitration clause. It would also therefore not be correct for the MCL to contend that there is no arbitration agreement in terms of Section 7 of the Act.

20. In ***South Eastern Coalfields Ltd. v. S. Kumar's Associates AKM (JV)****(supra),*on the facts of that case, the Supreme Court noted that the bidder had failed to comply with the pre-conditions specified in the NIT and in the LoI and, therefore, a work order was not issued nor a contract was executed. In those circumstances, it was observed as under:

> "22.We would like to state the issue whether a concluded contract had been arrived at inter se the parties is in turn dependent on the terms and

> conditions of the NIT, the LoI and the conduct of the parties. The judicial views before us leave little doubt over the proposition that an LoI merely indicates a party's intention to enter into a contract with the other party in future.No binding relationship between the parties at this stage emerges and the totality of the circumstances have to be considered in each case. It is no doubt possible to construe a letter of intent as a binding contract if such an intention is evident from its terms. But then the intention to do so must be clear and unambiguous as it takes a deviation from how normally a letter of intent has to be understood. This Court did consider in *Dresser Rand S.A.* case that there are cases where a detailed contract is drawn up later on account of anxiety to start work on an urgent basis. In that case it was clearly stated that the contract will come into force upon receipt of letter by the supplier, and yet on a holistic analysis – it was held that the LoI could not be interpreted as a work order."

21. This was the purport of the decision in ***Dresser Rand S.A. v. Bindal Agro Chem Ltd****(supra)*which has been referred to in the aforementioned decision in ***South Eastern Coalfields Ltd. v. S. Kumar's Associates****(supra).*

22. Again, in ***Bharat Sanchar Nigam Limited v. Telephone Cables Ltd.****(supra),*on the facts of that case it was noted that unless a purchase order was placed, the GCT of the contract did not become part of the contract and the conditions in Section 3 of the GCT which included the arbitration agreement "would not at all come into existence or operation". In the present case, in view of the discussion hereinbefore, it cannot prima facie be said that the stage for invoking Clause 4.37(A) has not arisen at all.

23. Turning to the decision in ***Emcure Pharmaceuticals Ltd.****(supra)* on facts, it was found that unless the purchase order was issued, the bidder did not become a 'successful bidder' and, therefore, the arbitration clause would not apply. On the facts of that case, Opposite Party No.4 and not the Petitioner there was admittedly, the 'successful bidder'. Consequently, the Court is of the view that the aforementioned decisions relied upon by MCL donot assist its case.

24. On the other hand, in ***Pravin Electrical Private Limited****(supra),* after referring to the decision of the Supreme Court in ***Vidya Drolia v. Durga Trading Corporation (2021) 2 SCC 1,*** it was held by the Supreme Court that at that stage the Court was only expected to exercise "the power of prima facie judicial review". The observations in ***Vidya Drolia*** (*supra*) were that "a reasonable and just interpretation of "existence" requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement."

25. The decisions of Delhi High Court in ***Mahindra Susten Pvt. Ltd. v. NHPC Ltd.*** *(supra)*and ***Wadia Techno-Engineering Services Ltd.*** *(supra)*are also to the same effect.

26. The Court is therefore, satisfied, on a prima facie judicial review in the sense in which the expression is used in ***Vidya Drolia*** *(supra)* by the Supreme Court, that the Petitioner does

have an arguable case as regards the existence of an arbitration agreement between the parties and the conditions for its invocation of have prima facie been fulfilled. Nevertheless, in terms of the law explained in the above decisions, it would be still open for the MCL to apply to the Sole Arbitrator under Section 16 of the Act to invite a ruling on the existence of a valid arbitration agreement in terms of the aforementioned clauses referred to hereinbefore. If such an application is filed, it will be decided independent of the observations in this judgment.

27. For the aforementioned reasons this Court appoints Mr. Justice A.K. Patnaik, a former Judge of the Supreme Court of India, as the sole Arbitrator to adjudicate the disputes between the parties including their claims and counter claims. The learned Arbitrator is requested to fix his own terms.

28. The arbitration petition is disposed of accordingly.

(S. Muralidhar)
Chief Justice

S.K.Jena/Secy.