

HONOURABLE SRI JUSTICE K. LAKSHMAN

ARBITRATION APPLICATION No.276 OF 2024

ORDER:

Heard Sri D.Narendra Reddy, learned counsel for the Applicant, and Sri P. Sri Harsha Reddy, learned counsel for the Respondents.

2. The present Arbitration Application is filed under Section 11 (5) and (6) of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act, 1996') for appointment of a sole arbitrator to adjudicate the disputes between the parties as contemplated under Clause 1.21 of the Firm Order dated 19.09.2016 issued by respondents in favour of the Applicant.

FACTS:-

3. 1st respondent is a company engaged in coal mining activities. Applicant is also a company engaged in mining contracts. 1st respondent has issued a tender vide Enquiry No. E121800072 dated 13.05.2016 for the work of selective extraction of 63.182 LBCM coal in Pit-III (Part-A) and Pit-I (Part-B) with Surface Miner Technology including loading, transportation and dumping at Koyagudem OC-II, Yellandu area to be completed in 36 months. The Applicant has participated in the process and was declared as successful bidder.

Thereafter, 1st respondent has issued Firm Order No. 7600006595 dated 19.09.2016. The total value of the work awarded to the Applicant was Rs.52,64,39,070.17 (exclusive of Service Tax). In terms of the Order dated 19.09.2016, the Applicant furnished the Performance Security in the form of the Bank Guarantee for Rs. 79.00 Lakhs. The Applicant completed execution of the work and signed various statements pertaining to the Final Bill No.70 (Oct-21), such as coal quantity, calculation of diesel price variation etc, Pursuant to which, 3rd respondent vide letter dated 11.03.2021 informed the Applicant that net payable amount under Final Bill No.70 after necessary deductions is arrived at Rs.89,83,833.69 and recommended for payment. In terms of the said Order, the Applicant submitted Tax Invoice for Rs.92,58,448.69, inclusive of GST to enable the respondents to release Final Bill amount to it.

4. Vide letter dated 19.04.2021, 3rd respondent informed the Applicant to submit GST Invoices as Rs. 14,48,509/- with respect to the Final Bill and confirmed the excess payment paid by SCCL of Rs. Rs.1,45,68,717/-, 2nd respondent also requested the Applicant to sign Final Bill and to submit invoices as per Telangana Goods and Services Act, 2017 (GST Act). 2nd respondent has also issued a revised

calculation vide letter dated 02.05.2021 revising the negative bill amount to Rs.1,41,81,824.73. The Applicant had submitted Tax Invoices dated 31.03.2021 for Rs.17,09,241.41 and a credit note dated 31.03.2021 for Rs.1,67,34,552/- and also a credit note for Rs.92,58,449/-. Vide letter dated 12.05.2021, Applicant requested the respondents to furnish a copy of letter dated 23.02.2021 which was referred in the letter dated 25.04.2021 to the respondent. Vide letters dated 20.04.2024 and 25.06.2024 of the respondents demanded an amount of Rs. 1,83,64,150/- for settlement of Final Bill from the Applicant. Respondents also informed the Applicant that if the Applicant fails to pay the said amount, it will invoke Bank Guarantee and recover the bills pertaining to other works executed by the Applicant. Respondents also demanded for extending validity of the Performance of Bank Guarantee. Vide letter dated 22.04.2024, the Applicant objected to the said claim made by the respondent No.2 made in the letter dated 20.04.2024.

5. Applicant has again demanded the respondents to furnish a copy of demand letter dated 23.02.2021. Vide letter dated 06.06.2024, 2nd respondent gave break up for Rs.1,83,64,150/- which shows that an amount of Rs.1,41,81,825/- is recoverable towards Final Bill

amount of Rs.25,52,728/- towards GST at the rate of 18% on Rs.1,41,81,825/- and Rs.32,78,390/- recoverable towards costs of explosives. Vide letter dated 08.06.2024, the Applicant objected claim of the respondents as being unjustified and contrary to the terms of NIT. 2nd respondent had issued a letter dated 19.06.2024 to the General Manager, Bellampally area of SCCL, without any reference to the letter dated 23.02.2021 of the Applicant and referring to the letter dated 23.02.2021, requested the General Manger, to recover an amount of Rs. 1,67,34,552/- from the running bills of the Applicant.

6. Vide letter dated 21.06.2024, the Applicant informed 2nd respondent as to its intention to pay the total amount due of Rs.1,1,50,54,281/- through Demand Draft or RTGS on receipt of revised letter accordingly and release Bank Guarantee. Vide letter dated 22.06.2024, the Applicant requested the General Manager, Bellampally Area of SCCL, not to recover the amount from its running bills of Khairagura Project. 3rd respondent has addressed a letter dated 23.06.2024 to the General Manager, Bellampally Area of SCCL requesting to recover an amount of Rs.1,83,64,150/- from the running bills of the Applicant and the amount of Rs.32,78,390/- which is shown as recovery against costs of explosives supplied by

SCCL during the period between 09.06.2019 to 30.06.2019. The Applicant submitted a representation dated 03.07.2024 to the Chairman and Managing Director, seeking his intervention by constituting a committee at Directors level for amicable resolution of the issue, but there was no response. Since there was threat of encashment of performance security furnished by the Applicant in the form of Bank Guarantee for Rs.79 lakhs, the Applicant had filed an application under Section 9 of the Act vide COP No.34 of 2024 to restrain respondents from encashing bank guarantee and from recovering other bills. Learned Commercial Court, Ranga Reddy District at L.B.Nagar granted interim injunction restraining the respondents from encashing bank guarantee. As there was no order restraining respondents from recovering other bills performing the other contracts, the Applicant made payments of entire amount of Rs.1,83,64,150/- to the respondent No.1 reserving its right to initiate arbitration for adjudication of disputes pertaining to the illegal recovery towards costs and explosives by the respondents, Thereafter, the Applicant withdraw the said COP No.34 of 2024.

7. It is further contended by the Applicant that there are disputes between the Applicant and respondents with regard to the

aforesaid purchase order dated 19.09.2016 and the same are arbitrable in nature. Therefore, invoking the arbitration clause of the said purchase order, the Applicant had issued notice dated 13.08.2024 nominating Sri Y.Govinda Reddy, Retired District Judge to act as sole arbitrator/its nominee Arbitrator to adjudicate the disputes between them in terms of Clause No.1.21 of the order dated 19.06.2016. Despite receiving and acknowledging the said notice, there was no response from the respondents. The Applicant had issued demand notice dated 19.09.2016 to the respondents. Vide letter dated 16.10.2024, 3rd respondent rejected to refer the dispute to arbitration for resolution on the ground that it has lapsed 120 days. Applicant filed the present application to appoint arbitrator to adjudicate the disputes between the Applicant and the respondents.

8. Respondents filed counter contending that the present application is filed by the Applicant is barred by limitation. The Applicant failed to follow the procedure laid down under Clause No.1.21 of the purchase order dated 19.09.2016. As per the said clause, in case any dispute/difference is not settled through negotiations, the respective parties can seek remedy by Arbitration by invoking the same within 120 days of dispute and the Applicant failed

to follow the same. Therefore, the present application is barred by limitation. The SCCL initiated contractor's representative through mail in March, 2021 to check and sign on the Final Bill dated 03.06.2021 arrived at Rs.1,83,64,150/-, but there was no response. The Applicant having paid disputed amount cannot seek appointment of arbitrator to adjudicate the disputes.

9. In the light of the aforesaid rival submissions, it is relevant to note that the Applicant is the successful bidder in the tender vide Enquiry dated 13.05.2016 issued by 1st respondent dated 13.05.2016. 1st respondent had issued purchase order/Firm Order (Service) dated 19.09.2016 in favour of the Applicant for execution of the said work. There is also no dispute that the Applicant had furnished Performance Bank Guarantee for Rs.79 Lakhs.

10. According to the Applicant, respondents are due and liable to pay an amount of Rs.32,78,390/-. As discussed supra, there is correspondence between the Applicant and respondents right from 11.03.2021 onwards. Respondents demanded an amount of Rs.1,83,64,150/- towards settlement of Final Bill vide letters dated 20.04.2024 and 25.06.2024. Vide letter dated 06.06.2024, 2nd respondent gave break up for Rs.1,83,64,150/-. According to the

Applicant, the said break up shows that Rs.32,78,390/- recoverable towards costs of explosives.

11. Thus, the dispute is with regard to costs of explosives for Rs.32,78,390/-.

12. The Applicant had paid the said amount of Rs.1,83,64,150/- to the respondents reserving its right to initiate arbitration proceedings for adjudication of the disputes pertaining to illegal recovery towards costs of explosives by respondents. The Applicant had filed an application under Section 9 of the Act vide COP No.34 of 2024 and learned Commercial Court granted interim order. Thereafter, the Applicant withdrew the said application. Thus, according to the Applicant, the respondent recovered an amount of Rs.32,78,390/- towards costs of explosives illegally and according to respondents, the Applicant is due and liable to pay the said amount towards costs of explosives. As discussed supra, respondents are opposing the present application contending that it is barred by limitation.

13. In the light of the same, it is relevant to note Clause No.1.21 of the said purchase order dated 19.09.2016 deals with the arbitration, the same is extracted :-

1.21 ARBITRATION:

Normally all disputes should be settled by negotiations between the Company and the concerned parties.

In case any dispute/difference is not settled through negotiations, the respective parties can seek remedy by Arbitration by invoking the same within 120 days of dispute.

(a) In case of any dispute Sole Arbitrator shall be appointed from the list of 3 judicial officers maintained by SCCL duly following the provisions of Arbitration and Conciliation Act, 1996 as amended from time to time. The list of such names shall be forwarded to the party as and when the party requests for resolving the dispute Such Judicial Officer as chosen by the party will be appointed by the Chairman & Managing Director to adjudicate the dispute as a Sole Arbitrator. The Arbitrator so appointed shall conduct the proceedings in accordance with the Arbitration & Conciliation Act, 1996 as amended from time to time and pass a reasoned award. Both the parties should bear the cost of the arbitration equally.

(b) If the Sole Arbitrator appointed by the Chairman & Managing Director of the Singareni Collieries Company Limited is unable to continue as an Arbitrator for any reasons to be recorded in writing and the Chairman& Managing Director of Singareni Collieries Company Limited thinks fit for appointment of a new Arbitrator in the place of existing Arbitrator, he is having a power to do so. Such new Arbitrator shall be appointed following the same procedure as contemplated in (a) above.

(c) As and when such new Arbitrator is appointed, he can either continue the arbitration proceedings from the stage where the earlier Arbitrator discontinued his proceedings or alternatively the new Arbitrator may start proceedings de novo if the circumstances warrant him to do so.

(d) Failing to invoke Arbitration Clause within 120 days of dispute, the matter is to be decided by Civil Courts at Khammam District in Telangana alone and not at any other place.

(e) Fee and expenses payable to the Sole Arbitrator shall be governed by the Arbitration & Conciliation Act, 1996 as amended from time to time and shall be borne equally by both parties to the dispute.

As per the said clause, in case of any dispute/difference is not settled through negotiations, parties can seek remedy by arbitration by invoking the same within 120 days of dispute.

14. As discussed supra, there is exchange of correspondence/letters between the Applicant and respondents in the manner stated supra, ultimately vide letter dated 06.06.2024, 2nd respondent gave break up for Rs.1,83,64,150/-. As per the said break up, according to the Applicant, respondents recovered an amount of Rs.32,78,390/- towards costs of explosives. The Applicant has filed an application under Section 9 of the Act vide COP No.34 of 2024. Thereafter, the same was withdrawn. The Applicant had paid the said amount of Rs.1,83,64,150/- including an amount of Rs.32,78,390/- towards cost of explosives without prejudice to its right to initiate arbitration proceedings.

15. It is also relevant to note that vide letter dated 03.07.2024, the Applicant requested the Chairman and Managing Director of SCCL to intervene in the matter to resolve the issue by forming a committee at Director level and also permit the Applicant to refer the issue to the Committee in order to resolve the same amicably. The Applicant also requested the Chairman and Managing Director of respondents to give instructions, to the General Manager, Bellampally area not to deduct unjustifiable amount from running bills of the Applicant and also give instructions to the General Manager, of Yellandu area not to revoke the Bank Guarantee till the decision comes from the Committee. Apart from the same, Applicant has also addressed letters to the General Managers of the both the areas. Thus, the Applicant has negotiated with the respondents for resolving the issue. Despite the said efforts, there was no resolution of the issue. Therefore, invoking the arbitration clause, the Applicant had issued notice dated 13.08.2024 nominating retired District Judge, as an arbitrator. The same was rejected by respondent No.3 vide letter dated 16.10.2024.

16. In the light of the aforesaid discussion, it is relevant to note that after amendment to the Act, vide Act No.3/2016 w.e.f.

23.10.2015 and in view of the principle laid down by the Apex Court in **Vidya Drolia v. Durga Trading Corpn.**¹, this Court being the referral Court under Section 11 of the Act, unless the dispute is manifestly non-arbitrable, this Court must refer the dispute to the arbitration. The limitation issue raised by the respondents requires a deeper factual inquiry, which should be left to the Arbitral Tribunal. This Court cannot conduct factual enquiry with regard to the limitation issue. In fact, it is for the Arbitrator to consider the said issue.

17. In **Aslam Ismail Khan Deshmukh vs. ASAP Fluids Pvt.Ltd.**², the Apex Court held that while determining the issue of limitation in the exercise of powers under Section 11(6) of the Act, 1996, the referral court must only conduct a limited enquiry for the purpose of examining whether the Section 11(6) application has been filed within the limitation period of three years or not. At this stage, it would not be proper for the referral court to indulge in an intricate evidentiary enquiry into the question of whether the claims raised by the petitioner are time barred. Such a determination must be left to the decision of the arbitrator. After all, in a scenario where the referral

¹(2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549

² 2025 (1) SCC 502

court is able to discern the frivolity in the litigation on the basis of bare minimum pleadings, it would be incorrect to assume or doubt that the arbitral tribunal would not be able to arrive at the same inference, especially when they are equipped with the power to undertake an extensive examination of the pleadings and evidence adduced before them.

18. In the light of the aforesaid principle, coming to the facts of the present case, as discussed supra, there was exchange of communication/letters between the Applicant and respondents. Vide letter dated 06.06.2024, 2nd respondent gave break up for Rs.1,53,64,150/-. Thereafter, also there is exchange of letters and there was threat of encashment of Bank Guarantee. Therefore, the Applicant has filed an application under Section 9 of the Act vide COP No.34 of 2024 wherein learned Commercial Court granted interim injunction. Thereafter, the Applicant withdrew the said application. It has paid the aforesaid amount of Rs.1,83,64,150/- reserving its right to refer the matter to the arbitrator. Thereafter, the Applicant has issued notice dated 13.08.2024 nominating retired District Judge as arbitrator and vide letter dated 16.10.2024 2nd respondent refused to refer the matter to the Arbitrator. While so,

respondents cannot contend that the present application is barred by limitation. However, it is for the arbitrator to consider the said aspect. This Court, being the referral Court under Section 11 of the limitation Act, has to consider with regard to existence of agreement and arbitration clause in it. This Court cannot conduct an intricate evidentiary enquiry into the question of as to whether the claims raised by the petitioner are time barred as held by the Apex Court in **Aslam Ismail Khan Deshmukh** (supra). In the light of the same, the contention of the respondents that the present application is barred by limitation, cannot be accepted.

19. With regard to the appointment of sole arbitrator by the Chairman and Managing Director as mentioned in Clause No.1.21 is concerned, it is contrary to the law laid down by the Apex Court in **Perkins Eastman Architects DPC vs. HSCC (India) Limited**³, wherein the Apex Court held that unilateral appointments were deemed invalid. Therefore, the appointment of an arbitrator in Clause No.1.21 by the Chairman and Managing Director of the respondent is not legally tenable. In the light of the same, the contention of the respondents with regard to Section 28(b) of the Indian Contract Act, is

³ (2019) SCC Online SC 1517

also untenable as the said Section clearly creates an exception to arbitration agreements as it since arbitration clauses are considered to be valid alternative dispute resolution and do not bar justice. The said exception is extracted below:-

Exception 2. - **Saving of contract to refer questions that have already arisen** - Nor shall this section render illegal any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

20. It is also relevant to note that the Applicant is continuing similar contracts with the respondents. The said fact is not in dispute. In fact, respondents tried to recover the aforesaid amount from the bills of other contracts being executed by the Applicant.

21. Sri P.Sri Harsha Reddy, learned counsel appearing for the respondents placed reliance on the principle laid down by three Judge Bench of the Apex Court in **Oriental Insurance Company Limited Vs. Narbheram Power and Steel Private Limited**⁴ and **Centrotrade Minerals and Metal Inc vs. Hindustan Copper Limited**⁵ wherein the Apex Court held that an arbitration clause is required to be strictly construed. Any expression in the clause must

⁴ 2018 6 SCC 534

⁵ 2017 (2) SCC 228

unequivocally express the intent of arbitration. It can also lay the postulate in which situations the arbitration clause cannot be given effect to. If a clause stipulates that under certain circumstances there can be no arbitration, and they are demonstrably clear then the controversy pertaining to the appointment of arbitrator has to be put to rest.

22. As discussed supra, in the present case, there are disputes between the Applicant and respondents with regard to excess claim of Rs.32,78,390/- towards costs of explosives. It is an arbitrable dispute to be adjudicated by the Arbitrator.

23. In the light of the aforesaid discussion, this Court is of the considered view that there are disputes between the Applicant and Respondents and the same are arbitrable disputes.

24. Accordingly, This Arbitration Application is allowed. **Sri Mangari Rajender, Retired District Judge**, is appointed as sole Arbitrator to adjudicate the disputes between the parties. The parties are at liberty to take all the defences before the learned sole Arbitrator.

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

JUSTICE K. LAKSHMAN

Date:02-05-2025

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