IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
(Commercial Division)
ORIGINAL SIDE

Present: Hon'ble Justice Shampa Sarkar

AP/COM- 63 of 2025

M/S. SAURYAJYOTI RENEWABLES PVT.LTD.
VS
VSL RE POWER PRIVATE LIMITED

For the petitioner: :Mr. Soumya Ray, Adv.
Mr. Aditya Sen, Adv.
Ms. Anwesha Saha, Adv.

For the respondent : : Mr. Arif Ali, Adv.
Mr. Prabhat Kr. Srivastava, Adv.

Hearing concluded on: 06.02.2025
Judgment on: 27.03.2025

**<u>Shampa Sarkar, J.:-</u>**

**1.** This is an application for appointment of a learned arbitrator, to adjudicate upon the disputes which arose out of purchase orders and service orders, some of them are as follows:-

> "PURCHASE ORDER 2800000063 dated 18.11.2023, PURCHASE ORDER 2800000078 dated 22.12.2023, SERVICE ORDER 2900000088 dated 22.12.2023, SERVICE ORDER 2900000067 dated 18.11.2023 and PURCHASE ORDER 2800000121 dated 30.04.2024."

**2.** The petitioner was engaged as an agent-cum-sub-contractor by the respondent, for procurement, setting-up, erection, commissioning and maintenance of solar power installations for projects, at various designated sites. Several purchase orders and service orders were issued by the respondent. The purchase orders and the service orders were almost identical. The terms and conditions were similar and the dispute resolution clause was also similarly worded.

**3.** The petitioner's case was that the respondent issued the purchase orders and service orders for supply of BOS materials under a complete package of installation and commissioning with BOS supply, design and drawing. Each of these purchase orders and service orders were accompanied by general terms and conditions for purchase. The said terms and conditions provided for resolution of dispute by arbitration in accordance with the Arbitration and Conciliation Act, 1996. The arbitral tribunal would consist of three arbitrators with both the buyer and the vendor appointing their nominees and the arbitrators appointed by the parties were to appoint the third arbitrator as the presiding arbitrator. The venue of such arbitration was Kolkata and the language was English. The governing laws of India and the courts at Kolkata would have sole jurisdiction over all matters arising out of the said conditions of purchase, as per the agreement.

**4.** Clause 19 of such terms and conditions contains the dispute resolution clause. The same is set out below:-

> "19. Dispute Resolution:
>
> All disputes shall be referred for arbitration. Arbitration shall be in accordance with Arbitration and Conciliation Act, 1996, as amended. The arbitral tribunal shall consist of three arbitrators, with both BUYER and Vendor appointing its nominee arbitrator and both the arbitrators appointing the third and presiding arbitrator. The venue of such arbitration shall be Kolkata and the language shall be English."

**5.** According to the petitioner, six out of nine projects awarded by the respondent, had been completed. Serious harassment was caused to the petitioner on account of failure of the respondent to make timely payments.In respect of the dues arising out of the projects of Greenply Pvt. Ltd. and SIKA India Pvt. Ltd., the respondent chose to remain silent to the communications via email, WhatsApp, etc., made by the petitioner, for release of payments.

**6.** According to the petitioner, majority of the supply work was complete. The petitioner had always provided the updates with regard to the completion of the projects to the respondent. However, the respondent failed to make payment of the dues, totaling to Rs.33,26,231/-. On and from December 2023, till the date of the filing of the application, the petitioner complained of unpaid dues. While the petitioner continued to make representations through email, on and from March11, 2024, to June 10, 2024, the respondent paid no heed to the same and suddenly issued a termination notice on June 14, 2024, thereby, terminating all the purchase orders and service orders by a single notice.

**7.** Allegations were that the respondent failed and neglected to pay the legitimate demand of the petitioner and illegally terminated the purchase and service orders, which gave rise to a dispute between the parties.

**8.** All the purchase orders and service orders contained a similar dispute resolution clause and the payments were made in a consolidated manner by the respondent. The petitioner issued a notice on July 1, 2024, under Section 21 of the Arbitration Conciliation Act, 1996, via email and also via speed post. The email was delivered on the same day, that is, July 1, 2024, and the notice by speed post was delivered in the office of the respondent on

2nd July, 2024. The petitioner nominated a learned Advocate as its arbitrator.

**9.** By a supplementary affidavit, the petitioner enclosed the reply of the learned Advocate for the respondent, to the notice invoking arbitration. By a letter dated July 30, 2024, the learned Advocate for the respondent replied to the notice invoking arbitration and denied the claims of the petitioner. According to the respondent, the claims were false, frivolous, concocted and unsubstantiated by documents. It was further contended that the respondent had tried to initiate a process of settlement in an amicable manner, but the rigid approach of the petitioner resulted in failure of such reconciliation.

**10.** The disputes, summarized in the notice invoking arbitration, were non-payment of dues, losses suffered on account of illegal termination, breaches committed by the respondent in not indemnifying the petitioner upon termination of the agreement and, getting the work completed by some other contractor.

**11.** According to the respondent, the petitioner failed to comply with the contractual obligations in a timely and efficient manner, arm twisted the respondent, tried to extort money on false pretext of hike in prices of materials and labour charges. Under the risk purchase clause in the terms and conditions, the respondent was entitled to get the work completed by some other agency. Due to early termination of the contract, the petitioner was not entitled to any compensation or dues. The process of reconciling the statement of accounts with the petitioner had failed, on account of the misbehaviour and non-cooperation of the petitioner's staff. The proposal for appointment of the arbitrator was also not acceded to and was negated on various grounds, including the bar under Section 12 of the Arbitration and Conciliation Act, 1996. Moreover, an objection was raised with regard to the independence and impartiality of the petitioner's nominee.

**12.** Learned Advocate for the petitioner submitted that, as the petitioner is a registered Micro, Small and Medium Enterprises (MSME), an application was filed before the Facilitation Council for reconciliation under the provisions of the Section 18 of the Micro, Small and Medium Enterprises Act, 2006, but, subsequently, the said application was withdrawn on the ground that the same had been wrongly filed. The agreement between the parties contained an arbitration clause and the petitioner was entitled to proceed before this court for appointment of a learned arbitrator and pray for a consolidated reference. The Facilitation Council had accordingly rejected the application which was filed without initiating any conciliation process at all.

**13.** According to the learned advocate, the Hon'ble Apex Court held that, disputes with regard to works contracts, which included procurement of machines, installations and commissioning thereof, could not be decided under the provisions of the MSME Act. Thus, it was submitted that the dispute must be referred to arbitration.

**14.** On such score, the learned Advocate for the petitioner relied on the following decisions :-

i. ***Kone Elevator India Private Limited., vs. State of Tamil Nadu,*** reported in ***(2014) 7 SCC 1.***

ii. ***Tata Power Company Ltd., vs. Genesis Engineering Company,*** reported in ***2023 SCC OnLine Del 2366***.

iii. **Gujarat State Civil Supplies Corpn. Ltd. vs. Mahakali Food Private Limited (Unit 2) and anr.,** reported in ***(2023) 6 SCC 401.***

**15.** It was next contended by the learned Advocate for the petitioner that, although the purchase and service orders were in respect of projects in two different sites but, the said transactions were always treated as a part of a single transaction. Payments were also made in a consolidated manner. Invoices to that effect had been relied upon by the petitioner. The termination notice issued by the respondent would also indicate that the respondent had treated all the purchase orders and service orders to be a part of the same business transaction.

**16.** Thus, although the projects were separate and distinct, the conduct of the parties displayed that the parties had all along treated the transactions arising therefrom to be interconnected and interlinked.

**17.** The further contention of the learned Advocate for the petitioner was that, the email which was sent on July 1st 2024, was delivered to the respondent on July 1, 2024. It was inconsequential whether the postal article containing the notice invoking arbitration had reached on July 2, 2024, inasmuch as, communication by email was a valid communication. The respondent had also responded to such notice invoking arbitration on

July 30, 2024. The application before this court was filed on August 1, 2024, which was after the period of 30 days from receipt of the notice via email, had expired and after the response to the notice was received from the respondent.

**18.** Under such circumstances, the petitioner prayed that the dispute must be referred to arbitration, in terms of the dispute resolution clauses contained in the terms and conditions which were made applicable to each and every purchase order and service order.

**19.** The learned Advocate for the respondent submitted that composite reference was not permissible in law. It was further submitted that the petitioner was forum shopping, by once approaching the MSME Facilitation Council and then approaching the High Court. It was submitted that the purchase orders and service orders were distinct and separate. The question of clubbing the issues and disputes arising therefrom by a composite notice invoking arbitration was contrary to law. Moreover, the notice was received on July 2, 2024, via speed post. The application before the court was premature.

**20.** On the merits, it was submitted that the petitioner was not entitled to any payment. Compensation on account of alleged termination was inadmissible. Breach of the obligations arising out of the service orders and purchase orders had been committed by the petitioner. Time and again, the parties had tried to resolve the dispute and consolidate the accounts. On account of non-cooperation of the petitioner, the accounts could not be consolidated. The petitioner and his men and agents misbehaved with the respondent at the site. The projects were left incomplete. The quality of materials were inferior. The delay was caused by the petitioner and the demands of the petitioner were totally baseless and unfounded.

**21.** Heard learned Advocates for the respective parties.

**22.** Admittedly, the purchase orders and the service orders were accompanied by terms and conditions, which contained a dispute resolution clause. All the dispute resolution clauses accompanying the purchase orders and service orders were similarly worded and the parties had agreed to settle all their disputes by arbitration under the provisions of the Arbitration and Conciliation Act, 1996. The arbitral tribunal was to comprise of three persons. Each of the parties could appoint their nominee and thereafter, the nominees of the parties were to appoint the third arbitrator, as the presiding arbitrator. The fact that the notice of invocation of the arbitration clause was received by respondent via email on July 1, 2024, is not in dispute. The notice was received by speed post on July 2, 2024. The respondent also replied to the notice invoking arbitration on July 30, 2024, and refused to refer the dispute to arbitration and denied the claims. The application before this court was filed on August 1, 2024. The respondent disputed the claims of the petitioner and made the petitioner liable for breach and consequences thereof, but did not deny the existence of the arbitration clause. The respondent also raised objection with regard to the impartiality of the nominee of the petitioner.

**23.** The petitioner, being an MSME, had approached the Council for reconciliation, but had withdrawn the proceeding from the Council before its registration in view of the nature of the work and also in view of the arbitration clause. It was the specific contention of the petitioner that, the same had been filed under wrong advice. Upon realizing that works contract would not be covered by the proceedings under the MSME Act, had withdrawn the application. The factum of withdrawal is available from the supplementary affidavit filed before this court. The arbitration clause is not in dispute and the parties had agreed to settle the disputes by arbitration.

**24.** It is also a settled proposition of law that the learned arbitral tribunal can rule on its own jurisdiction. With regard to the prayer for composite reference and objection raised by the respondent, this court, prima facie, finds that often, composite bills were raised by the petitioner. Composite notices were issued by the petitioner for payment of the outstanding.

**25.** It appears that the parties also agreed for a joint inspection in respect of these projects. The allegations and counter allegations with regard to the projects were made in a composite manner. Series of communications indicate that in the process of resolution of the dispute amongst the parties, the issues arising out of the projects and the subject agreements were taken up and discussed together. Finally, by one notice of termination dated June 14, 2024, the respondent terminated all the purchase orders and service orders.

**26.** The relevant portions of the notice are quoted below :-

> "
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> Notice of Termination
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> Date: 14.06.2024
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> To,

Suryajyoti Renewables Pvt. Ltd..
996, Ibrahimpur Road, Jadavpur,
Kolkata, PIN Code: 700032

Kind attention: Mr. Debajyoti Sen

Subject: Termination of Purchase Orders and Service Orders for the site of Greenply, Sika, and Patton.

Reference:

(A) Purchase Order No. 2800000095, Dated 19.02.2024
B) Purchase Order No. 2800000063, Dated 18.11.2023
C) Service Order No. 2900000067, Dated 18.11.2023
D) Purchase Order No. 2800000121, Dated 30.04.2024
E) Purchase Order No. 2800000078, Dated 22.12.2023
F) Purchase Order No. 2800000078, Dated 22.12.2023
G) Service Order No. 2900000088, Dated 22.12.2023

Dear Sir,

This letter serves as formal notice of termination of the above-mentioned Purchase orders and Service orders (collectively referred to as Orders), regarding supply of materials and Installation of Solar Power Plants at different sites of several of our clients, effective immediately.

We regret to inform you that despite our repeated attempts to address concerns regarding your performance and adherence to the terms of the orders, you have consistently and considerably failed to fulfil your obligations as outlined in the Orders. A brief outline of your actions, which has forced us to terminate the Orders. are as follows:

1. GREENPLY

....

2. SIKA

....

3. PATTON

...

Along with the above-mentioned defaults and breaches from your part, you have on several occasions pressurised our employees and representatives via emails and calls, demanding payments as per the terms which is in contradiction to the terms of the Orders in an unreasonable manner and stopped the work of other projects on a frivolous ground stating that since we have failed to make payment against one project you have stopped the work of other Projects. This is not only unprofessional and unethical but against established norms of business as you do not have any right to make a set off of the payments of one project against other projects.

Additionally we have attempted to resolve the issues via discussion at our office on 10.05.2024. Nevertheless, to our utter surprise you have utterly misbehaved, disgraced and threatened to use force, with us and our employees. Further, the next day you have personally reached out to our clients, misbehaved with them as well as, have made false complaints against us, and have threatened to stop works at the Sites.

As a result of these repeated failures and breaches of Orders and misconducts your part, we have suffered great harm to our reputation in the market and loss of business and we have no choice but to terminate the Orders along with your services immediately for the best interests of the Company and its stakeholders. Any further services or deliverables provided by you will not be accepted or compensated for. Also, you (including but not limited to your employees, representatives, assigns, and agents) are hereby directed to refrain from visiting any of our sites or contacting any of our client or employees. We further direct you not to indulge or refer our name in any future work in which you may be associated with, directly or indirectly. We also would like to inform you that we, by invocation of the risk purchase clause laid down in the Orders, are getting the pending works across all the sites done by a third party vendor at your risk and expense.

We will have a final reconciliation on the outstanding invoices only after the pending works under the Orders are completed and shall settle the outstanding mount, if any after settlement of invoices raised by such 3rd Party vendors shall be paid to you. Please arrange for the return of any company property or materials in your possession related to the orders within a period of 7 days from the date of this notice.

All records of documents, emails and other communications are preserved for future references. Nothing contained in this notice shall prejudice our rights available under law and equity and shall act as our preclusion to take further legal recourses before the court of law."

**27.** Thus, this court is satisfied that a composite arbitration will be beneficial for both the parties as the issues are interlinked and interconnected. Parties have treated the same as such. A composite reference will also prevent wastage of time, save multiplicity of proceedings and will also be cost effective.

**28.** The decision in ***Ajay Kumar Saha vs. Ashok Leyland Finance Limited*** decided in ***APOT No. 635 of 2002, GA NO.3475 of 2002; AP NO.210 of 2002***, does not apply in the facts of this case, in view of the discussions above. Here, the parties had all along dealt with the issues in respect of the projects, in a consolidated manner.

**29.** A composite invocation under Section 21 of the 1996 Act, pertaining to the consolidated claim of the petitioner in respect of the purchase orders and service orders and the challenge to the termination of the purchase and service orders, cannot be held to be invalid. The invocation notice clearly indicates the details of the purchase orders and the service orders and the nature of the disputes. The communications via email, with regard to the issues raised by the petitioner also indicate that, all along the parties had treated the purchase and service orders as a part of the same business relationship.

**30.** Under such circumstance, the application is allowed.

**31.** All the questions relating to arbitrability, jurisdiction of the arbitrator, admissibility of the claims etc. shall be raised before the learned Arbitral Tribunal.

**32.** This court refers the dispute to a tribunal consisting of three members. Mr. Abhidipto Tarafdar, learned Advocate, Bar Library Club, will act as the petitioner's nominee, Mr. Shubrojyoti Mukherjee, learned Advocate, Bar Library Club, will act as the respondent's nominee and Mr.

Rishabh Karnani, learned Advocate, Bar Library Club, will act as the third and the presiding arbitrator.

**33.** There shall be no order as to costs.

**(Shampa Sarkar, J.)**