
(2021) 12 CAL CK 0070
In the Calcutta High Court
Case No : Arbitration Petition No. 394 Of 2021

BTL EPC Limited

APPELLANT

Vs

Steel Authority Of India Limited

RESPONDENT

Date of Decision : 24-12-2021

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 2(1)(f), 11, 11(2), 11(5), 11(6)

Citation : (2021) 12 CAL CK 0070

Hon'ble Judges : Prakash Shrivastava, CJ

Bench : Single Bench

Final Decision : Dismissed

Judgement

Prakash Shrivastava, CJ

1. This application under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') has been filed by the petitioner BTL EPC Limited with the plea that the contract agreement dated 28th December, 2010 was entered into between the respondent Steel Authority of India Limited and a consortium comprising of the M/s. Bengal Tools Limited (Consortium Leader and Contractor) and one M/s. The Eastern Research and Development Institute of Coal Chemistry (Consortium Member and Contractor) for the work of Final Gas Cooling cum Naphthalene Scrubbing Unit and Benzol Absorption and Benzol Distillation Plant at Durgapur Steel Plant. Eastern Research and Development Institute of Coal Chemistry was a company incorporated under the Laws of Russian Federation (Russian entity) and the consortium agreement was entered into between the petitioner and the Russian entity on 25th of March, 2009. According to the petitioner the work was successfully completed on or about 19th of March, 2015 but while releasing the payment certain amount was wrongly deducted from the bills. As per the averments, the petitioner being the leader of the consortium was to get all the payments from the respondent and thereafter the same was to be released to the Russian entity for its scope of work. The attempts were made to resolve the dispute amicably. Thereafter, petitioner had sent the letter dated 9th

of November, 2019 invoking the arbitration clause and nominating a retired Judge as its member for arbitration and requesting the respondent to nominate its arbitrator and thereafter the petitioner has filed the present petition.

2. Learned Counsel for the respondent has raised objection and has opposed the prayer for appointment of arbitrator on the ground that this petition under Section 11 of the Act is not maintainable because in terms of the arbitration clause, petitioner is required to approach the ICC and that similar petition was filed before the Delhi High Court which was dismissed as withdrawn with liberty to approach the appropriate forum i.e. ICC, therefore, this fresh application under Section 11 of the Act is not maintainable and that the petition suffers from the defect of non-joinder of parties and even otherwise the conciliation proceedings are in progress, therefore, the issue of appointment of arbitrator does not arise.

3. Learned Counsel for the petitioner has supported the plea of plea for appointment and has submitted that in terms of the arbitration clause, petition under Section 11 is maintainable and the objection relating to non-joinder of parties is not sustainable and that the Russian partner has already sent the communication dated 31st August, 2021 annexure 'J' indicating that he does not want to be the party in the Court.

4. I heard learned Counsel for the parties and perused the record.

5. The Arbitration Agreement dated 28th December, 2010 is not in dispute which contains the following arbitration clause:

"9.1 Conciliation and Arbitration

Any disputes, differences, whatsoever, arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this Contract shall be settled between the Employer and the Contractor amicably. If however, the Employer and the Contractor are not able to resolve their disputes/differences amicably as aforesaid the said disputes/differences shall be settled by Conciliation, failing which, through Arbitration.

Conciliation shall be resorted to prior to invoking Arbitration. The Arbitration Clause is to be invoked by the parties to the Contract only on failure of conciliation proceedings to amicably settle the disputes.

The arbitration shall be governed in accordance with The Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") of India. The language of Arbitration shall be English.

Subject to the stipulations made hereinabove, Arbitration shall be governed by the Rules of Arbitration of International Chamber of Commerce (ICC), Paris. The venue of the arbitral proceedings shall be New Delhi.

During the pendency of the Conciliation or Arbitration proceedings both the parties (i.e. the Contractor and the Employer) shall continue to perform their

contractual obligations.

The arbitral tribunal shall give reasons for its award. The tribunal shall apportion the cost of arbitration between the parties, the award rendered in any arbitration hereunder shall be final and binding upon the parties, the parties agree that neither party shall have any right to commence or maintain any suit or legal proceeding concerning any dispute under this agreement until the dispute has been determined in accordance with the arbitration proceeding provided for herein and then only to enforce or facilitate the execution of an award rendered in such arbitration.

Unless otherwise mentioned, the Arbitration shall be held at Durgapur, West Bengal, India. The court of Durgapur, West Bengal, India shall have exclusive jurisdiction over all matters of dispute."

6. The arbitration clause provides that the arbitration will be governed by the Rules of Arbitration of International Chamber of Commerce (ICC), Paris. Article 4 Rule 1 of ICC Rules requires a party wishing to have recourse to arbitration under the Rules to submit its request for arbitration to the Secretariat. Hon'ble Supreme Court in the matter of Standard Corrosion Controls Private Limited vs. Sarku Engineering Services SDN BHD, reported in (2009) 1 SCC 303 in a case where the arbitration clause contained the provision about arbitration as per Rules of ICC has held that:

"9. Since the parties could not agree, the applicant applied to this Court under Section 11(5) of the Act for appointment of an arbitrator. A counter-affidavit has been filed by the respondent and I have perused the same. The respondent has relied on Article X of the agreement dated 21-2-2006 between the parties and has urged that the arbitration has to be held at Mumbai but by applying the Arbitration Rules of the ICC.

10. As per the Rules of Arbitration of ICC, the party who wishes to have recourse to arbitration under the said Rules is required to request for arbitration to the ICC Secretariat. The respondent submitted that the applicant has not followed that procedure for appointment of an arbitrator because it has not submitted any request to the ICC Secretariat. Instead, the applicant has rushed to this Court without following the procedure mentioned in Article X of the arbitration agreement.

11. Annexed to the counter-affidavit are the Rules of the ICC and I have perused the same. Admittedly, the applicant has not made any request for arbitration to the ICC Secretariat. Hence, in my opinion, this application is not maintainable at all.

12. There is no dispute that the applicant had, with open eyes, signed the contract dated 21-2-2006, which contains Article X, quoted above.

13. Learned counsel for the applicant submitted that the Arbitration Rules of the ICC cannot prevail over the parliamentary law, which is the Arbitration and

Conciliation Act, 1996. In my opinion, it is true that a statute overrides the contract, but it has to be noticed that Section 11(2) of the Act states that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Admittedly, the conditions mentioned in sub-section (6) of Section 11 are not attracted in this case. Hence, the procedure to appoint an arbitrator agreed upon by the parties will be applicable.

14. As already stated above, the parties had agreed that any dispute between them shall be settled as far as possible by mutual consultation and consent, failing which by arbitration to be held at Mumbai applying the Arbitration Rules of the ICC. In my opinion, the applicant has to apply to the Secretariat of the ICC, as mentioned in the Arbitration Rules of the ICC, and it cannot approach this Court for appointment of an arbitrator. No doubt, the arbitration will have to be held at Mumbai, but the entire procedure of appointment of the arbitrator has to be in accordance with the Arbitration Rules of the ICC, which requires that first a request has to be made to the Secretariat of the ICC. Admittedly, the applicant has not approached the ICC Secretariat. Hence, in my opinion, the application filed by the applicant herein, is not maintainable at all. This Court in a series of decisions has held that such an application/petition without approaching the authority nominated and agreed upon by the parties is not maintainable vide *Iron & Steel Co. Ltd. v. Tiwari Road Lines*, *Rite Approach Group Ltd. v. Rosoboronexport*, etc."

7. In the matter of *Standard Corrosion Controls Private Limited* (supra), the Hon'ble Supreme Court has taken the view that the applicant is required to approach the Secretariat of the ICC and cannot approach the Court for appointment of arbitrator. In the matter of *Antrix Corporation Limited vs. Devas Multimedia Private Limited* reported in (2014) 11 SCC 560 has taken the view that where the parties had agreed that procedure for arbitration will be governed by the ICC Rules, the same would necessarily include the appointment of an arbitral tribunal in terms of the arbitration agreement and the said Rules.

8. An argument has been advanced by the Counsel for the petitioner that the arbitration clause also provides that arbitration shall be governed by in accordance with the Arbitration and Conciliation Act, 1996 but the same will not come in the way of adopting the procedure for arbitration and conducting the arbitration in accordance with the ICC Rules.

9. In the present case, nothing has been pointed out to show that any request was made to the ICC Secretariat therefore, in terms of judgments noted above, application under Section 11 of the Act cannot be maintained.

10. It is worth mentioning that the petitioner had approached the Delhi High court by filing ARB.P. 5/2021 wherein an objection was taken by the respondent in its counter-affidavit regarding availability of remedy in terms of ICC Rules and Delhi High Court had dismissed the petition as withdrawn by passing the following order:

"1. Mr. Pradeep Gupta, learned Counsel for the petitioner, seeks leave to withdraw the petition with liberty to file a representation before the appropriate forum. Without expressing any opinion on the jurisdictional aspect, leave and liberty is granted, as prayed for.

2. The petition is dismissed as withdrawn."

11. The learned Counsel for the respondent is justified in making submission that by the above order liberty was granted for filing representation before the appropriate forum having regard to the objection about applicability of ICC Rules and there was no liberty to file a fresh application under Section 11 before this Court.

12. Counsel for the petitioner has placed reliance upon the judgment of the Supreme Court in the matter of Walter Bau AG, Legal Successor, of the Original Contractor, Dyckerhoff and Widmann A.G vs. Municipal Corporation of Greater Mumbai and Another, reported in (2015) 3 SCC 800 but that was a case of appointment of arbitration without compliance with the agreed procedure, hence the same will not be applicable in the facts of the present case.

13. That apart, it is also noticed that in the arbitration agreement M/s. The Eastern Research and Development Institute of Coal Chemistry, Russian partner is also a signatory as consortium member and contractor but it has not been impleaded as applicant, respondent or proforma respondent, therefore, the reliance of Counsel for the petitioner on his communication dated 31st August, 2021 annexure 'J' is of no consequence. Counsel for the petitioner has relied upon the judgment of the Hon'ble Supreme Court in the matter of Larsen and Toubro Limited Scomi Engineering BHD vs. Mumbai Metropolitan Region Development Authority, reported in (2019) 2 SCC 271 but in that case the application under Section 11 of the Arbitration Act was dismissed by the Hon'ble Supreme Court reaching to the conclusion that the lead member of the consortium was in India and the central management and control of consortium was to be exercised in India and not in any foreign nation, therefore, it was found that there was no international commercial arbitration in terms of Section 2(1)(f) of the Act, hence the said judgment is of no help to the petitioner. The petitioner has not impleaded the Russian consortium member who is also signatory to the agreement. Thus the application also suffers from the defect of non-joinder of necessary party.

14. The reply filed by the respondent also reveals that in terms of the agreement the conciliation procedures are in progress and the amicable discussions were held as recently on 03.09.2021 and pending the said discussions this application has been filed. The petitioner has not exhausted the procedure prescribed in the arbitration clause.

15. In the above circumstances, no case is made out for allowing the prayer for appointment of an arbitrator under Section 11 of the Act. Hence, A.P. No. 394 of 2021 is dismissed.