

(2012) 03 BOM CK 0067

In the Bombay High Court

Case No : Misc. Civil Application No. 77 of 2012

Maharashtra State Power Generation Company Limited
Prakashgad

APPELLANT

Vs

Western Coalfields Limited

RESPONDENT

Date of Decision : 09-03-2012

Acts Referred:

Contract Act, 1872 — Section 23

Citation : (2012) 6 BomCR 205

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : Shyam Dewani, for the Appellant; Anil Kumar, for the Respondent

Judgement

B.P. Dharmadhikari, J

1. The matter was heard earlier on 2.3.2012 and came to be adjourned to today. Today, I have heard respective Counsel further. Admit. Taken up for final disposal with the consent of the learned Counsel for the rival parties.

2. The existence of provision for arbitration or its invocation as such is not in dispute. The question is about scope of proceedings to be taken up before Arbitrator and hence its availability.

3. Learned Counsel for the applicant has contended that arbitration clause contemplates dispute or difference relating to the interpretation and application of provisions of contracts to be referred to the Arbitrator. He points out that this is highlighted by using words such dispute or difference .He has relied upon the judgment of the Hon''ble Apex Court in the case of Shin Satellite Public Co. Ltd. Vs. Jain Studios Limited, to point out that parts unconscionable or in breach of Section 23 of the Indian Contract Act, 1872 can be ignored inappropriate circumstances. However, as six disputes on which arbitration is sought, do not pertain to interpretation and application of the provisions of agreement ,the arbitration clause itself is not applicable .He, therefore, contends that it is clause

15.2 of Coal Supply Agreement under NCDP, which is squarely attracted.

4. Without prejudice to this, he has relied upon the judgment of the Hon''ble Apex Court in the case of Electronics Corporation of India Ltd. Vs. Union of India (UOI) and Others, to urge that Office Memorandum dated 22.1.2004 referred to in clause 15.1 of Coal Supply Agreement under NCDP is already set aside by the Hon''ble Apex Court. According to him, thus quote from the said Office Memorandum in clause 15.1 is not applicable and as it is also cancelled ,the dispute needed to be referred to Arbitrator in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 and as that has not been done, the application as filed deserves to be allowed.

5. To explain how the clause needs to be understood ,he is taking support from the observations of the Hon''ble Apex Court in the case of Bharat Sewa Sansthan Vs. U.P. Electronics Corporation Limited, , particularly paragraph No. 23 thereof.

6. Learned Counsel for the respondent has contended that six disputes to which attention has been invited by the applicant, very much revolve round the interpretation and application of the provisions of the contracts. He further contends that the judgment of the Hon''ble Apex Court in Electronics Corporation of India Limited...Versus...Union of India and others (Supra) does not deal with Office Memorandum dated 22.1.2004. He points out that the said Office Memorandum is still in force and other disputes and arbitration proceedings are being prosecuted against the respondent in accordance with the said Office Memorandum. He, therefore, argues that recourse to clause 15.2 in this situation is premature .

7. He has invited attention of this Court to the above mentioned judgment of the Hon''ble Apex Court ,particularly paragraph No. 12 onwards to urge that the Committee looked into there was created only for seeking clearance before filing matters in the Court of law. Office Memorandum dated 22.1.2004creates permanent machinery for arbitrations. Only one part therein i.e. part XIII deals with clearance from the Committee on disputes and he fairly concedes that at the most, in a given case in the light of law as declared by the Hon''ble Apex Court, that part can be

ignored.

8. To substantiate that Committee looked into by the Hon''ble Apex Court was different, he has also invited attention of this Court to the Office Memorandum dated 31.12.1991 to show that there the Committee constituted for such clearance to file Court matters consisted of six persons, while Office Memorandum dated 22.1.2004 contemplated Secretary Incharge of the Department of Public Enterprises as sole Arbitrator .

9. The attention of respective Counsel was also invited by this Court to opening words used in clause 15.1. According to learned Counsel for the applicant, amicable settlement is possible of all differences or disputes .Only such disputes

or differences which remained unresolved and required exercise of interpretation and application of provisions of contracts for their resolution, might have been referred to arbitration under clause 15.1. He contends that clause 15.1 is no longer valid and as six disputes which arise in the present matter do not warrant that exercise, the said clause has no application and reference to arbitration has to be in terms of clause 15.2.

10. Perusal of the judgment of the Hon''ble Apex Court reported at Electronics Corporation of India Limited...Versus...Union of India and others (Supra) clearly shows that the Hon''ble Apex Court there was dealing with its earlier judgments, which resulted into creation of policy decision, necessitating clearance from the Committee before filing litigation. The judgment as such does not make express reference to Office Memorandum dated 22.1.2004. The Office Memorandum dated 31.12.1991, issued by the Cabinet Secretariate of Government of India reveals cognizance of earlier view of the Hon''ble Apex Court and constitutes a Committee consisting of six high officers and states that no litigation should be taken up in a Court or Tribunal without getting the matter first examined by the said Committee. Subsequent Office Memorandum dated 1.9.2011 takes cognizance of the above mentioned judgment of the Hon''ble Apex Court and therefore, withdraws that Office Memorandum by declaring that its stand superseded.

11. In this light, when Office Memorandum No .DPE/4(10)/2001-PMA-GLI, dated 22.1.2004 is looked into ,it is on subject of settlement of commercial dispute between Public Sector Enterprises inter se and Public Sector Enterprises and Government Departments and therefore a permanent machinery of arbitration in the department of Public Enterprises. Perusal of its various clauses show procedure for such arbitration. No doubt, part XIII therein deals with question of clearance from Committee on disputes but its purpose is to ensure that no litigation involving such arbitrable disputes are taken up in Court or Tribunal without the matter having been first examined and given permission/clearance by High Power Committee. Its not necessary for this Court to consider said part XIII or its scheme in the present dispute.

12. The Office Memorandum has been mentioned in clause 15 dealing with settlement of disputes in Coal Supply Agreement Under NCDP between respondent and the present applicant. The date of said agreement is 21.11.2009. Relevant part of the said clause 15 is reproduced below for ready reference.

15.0 SETTLEMENT OF DISPUTES:

15.1 All differences or disputes between the Parties shall be settled/resolved amicably in the first instance .If amicable settlement is not possible ,then the unresolved disputes or differences shall be settled through Arbitration in terms of Office Memorandum(OM) No. DPE/4(10)/2001-PMA-GLI dated 22nd January, 2004 Govt. of India, Ministry of Industry ,Department of Public Enterprises ,New Delhi as enforced from time to time. The Arbitration shall be conducted as per

the aforesaid Office Memorandum and the relevant provisions relating to Arbitration read as under :

In the event of any dispute or difference relating to the interpretation and application of the provisions of the contracts ,such dispute or difference shall be referred by either party to the Arbitration of one of the Arbitrators in the Dept. of Public Enterprises to be nominated by the Secretary to the Govt.of India, in charge of the Bureau of Public Enterprises. The Arbitration Act1940 shall not be applicable to the Arbitration under this clause. The award of the Arbitrator shall be binding upon the parties to the dispute, provided however ,any party aggrieved by such award may make a further reference for setting aside or revision of the award to the Law Secretary Dept. of Legal Affairs, Ministry of Law & Justice, Govt. of India .Upon such reference, the dispute shall be decided by the Law Secretary or by the Special Secretary/AdditionalSecretary when so authorised by the Law Secretary ,whose decision shall bind the parties finally and conclusively. The parties to the dispute will share equally the cost of Arbitration as intimated bythe Arbitrator?.

15.2 In the event the aforesaid OM is cancelled or otherwise becomes not applicable to both the Parties, any difference or dispute arising between the parties under this Agreement shall then be resolved by arbitration in accordance with the provisions set forth below :

(i) The arbitration proceedings shall be governed by the rules of the Indian Arbitration and Conciliation Act, 1996.

(ii) The arbitral tribunal shall consist of three (3) arbitratoRs.

(iii) The arbitration shall be conducted in Nagpur (to be indicated bythe Seller) and Indian laws shall govern the arbitration.?

(Emphasis added)

13. Bare perusal of these clauses show that if Office Memorandum dated 22.1.2004 is cancelled or then it otherwise becomes not applicable to both parties, the recourse to arbitration as provided therein is open .In that event, the arbitration is governed bythe Indian Arbitration and Conciliation Act, 1996,which has to be by three Arbitrators and conducted at Nagpur. The Office Memorandum dated 22.1.2004, issued by the Government of India is not cancelled by the above mentioned judgment of the Hon''ble Apex Court. It is not the contention of applicant that because of change in status, the Office Memorandum has ceased to be applicable to either both of the parties or to anyone of them. The question whether it has become otherwise not available because of limited scope(as alleged)of arbitration envisaged in clause 15.1.Though the judgments of the Hon''ble Apex Court reported at Shin Satellite Public Co. Ltd...Versus...M/s. Jain Studios Ltd. (Supra) and Bharat Sewa Sansthan...Versus...U.P. Electronic Corpn.Ltd. (Supra) are relied upon by the learned Counsel for the applicant in this matter, I do not find it necessary to refer to the same in this background.

14. Clause 15.1 speaks of all differences or disputes between the parties. It requires an attempt for amicable settlement at first instance. If such amicable settlement is not reached then the unresolved disputes or differences can be settled through arbitration in terms of Office Memorandum dated 22.1.2004. Thus, clause 15.1 as such is the arrangement agreed to by the parties. Portion of Office Memorandum dated 22.1.2004 quoted below substantive part of clause 15.1 is not the arbitration clause which governs relationship between the parties. The arbitration clause in Office Memorandum dated 22.1.2004 has been reproduced only for the purposes of convenience. All differences or disputes between the Parties can therefore be referred to arbitration as per Office Memorandum dated 22.1.2004. The qualification about nature of disputes i.e. interpretation and application of provisions of contracts are used in the Office Memorandum dated 22.1.2004 and therefore, the portion quoted, does not in any way derogate or dilute the opening words employed in clause 15.1. Those words of wide and liberal import need to be given their due meaning. Clause 15.2 is not a second arrangement for arbitration which operates simultaneously with clause 15.1. Only when arbitration under clause 15.1 does not remain open due to contingencies stipulated in clause 15.2, arbitration proceedings under it can proceed under clause 15.2. It is not that only limited disputes can be gone into under clause 15.1 while all other disputes are open under clause 15.2. Such an inference will be reading something new in clause 15.2 which does not exist there. When a controversy between parties is of complex nature i.e. requiring a finding on interpretation & application as also on facts, if arguments of applicant are to be accepted, it would lead to multiplicity and also uncertainty. Office Memorandum can be cancelled by authority issuing it and it cannot cease to apply to both parties because of some voluntary act. Words to both the parties", in clause 15.2 can not be ignored as non-applicability of Office Memorandum on any other ground is not envisaged under it. Clause 15.2 springs into life only when clause 15.1 procedure is not available. The nature of arbitrable disputes under clause 15.1 and clause 15.2 is same.

15. It is, therefore, obvious that all differences or disputes between the parties need to be referred to arbitration in terms of Office Memorandum dated 22.1.2004. Parties have agreed to this arrangement. In view of this finding, it is not necessary for this Court to find out whether six disputes referred to in the communication dated 7.12.2011 sent by the applicant to the respondent do not warrant interpretation or question of application of provisions of contract for their resolution.

16. The respondent has by its communication dated 9.12.2011 (at page 198 Annexure P-23) agreed to refer the disputes to Arbitrators accordingly. In view of this, the parties are free to proceed further in accordance with clause 15.1 and the communication at Annexure P-23 mentioned above. Recourse to clause 15.2 of Coal Supply Agreement under NCDP at this stage is not open. Misc. Civil Application is, therefore, rejected. No order as to costs.