
(2014) 06 CAL CK 0045
In the Calcutta High Court
Case No : A.P. No. 493 of 2014

Rashmi Metaliks Limited

APPELLANT

Vs

West Bengal Minerals Development and Trading Corporation
Limited

RESPONDENT

Date of Decision : 17-06-2014

Acts Referred:

Arbitration Act, 1940 — Section 35

Arbitration and Conciliation Act, 1996 — Section 11, 16, 34, 5, 8

Citation : (2014) 2 CALLT 635 : (2014) 5 CHN 219 : (2015) 2 WBLR 245

Hon'ble Judges : S. Banerjee, J

Bench : Single Bench

Advocate : S.N. Mookherjee, Sr. Adv., Sabyasachi Chowdhury, Bhaskar Mukherjee and Debjani Ghosh, Advocate for the Appellant; Ashoke Banerjee, Sr. Adv., Soumya Dutta, Pinaki Brata Ghosh and R.S. De, Advocate for the Respondent

Final Decision : Allowed

Judgement

Sanjib Banerjee, J.—This request u/s 11 of Arbitration and Conciliation Act, 1996 has been carried to the Chief Justice or his designate upon the petitioner's invitation for the constitution of an arbitral tribunal being rejected by the first respondent. The second respondent was duly served the letter of invocation of January 16, 2014, but it did not respond thereto. The second respondent has been served the papers pertaining to the present proceedings and has chosen not to file any affidavit. Since learned government pleader represents the first respondent, it may be presumed that the objections raised on behalf of the first respondent have been adopted by the second respondent government company.

2. On February 5, 2008 an agreement was executed between the petitioner on the one hand and the second and first respondents on the other, for the petitioner setting up an integrated steel and power plant in this State. Such agreement envisaged that the petitioner would develop, construct, commission and operate a steel plant with ferro alloy and a power plant. Clause 3 of the

development agreement of March 5, 2008 provides as follows:

"The Coal supply requirement for RML is envisaged to be of the order of 4.40 Million t.p.a. of Non-coking coal of superior grade & 0.80 Million t.p.a. of Coking Coal for steel production through Sponge Iron as well as the Blast Furnace route for a 30 year period. Endeavour will be made for an appropriate long term arrangement for this supply either through JV with WBMDTC or RML will apply to Government of India for allotment of a Captive Block. WBMDTC will endeavour to extend all possible help for allocation of the Coal Block or the coal will be made available by WBMDTC from any other source."

3. The second respondent's obligation under the agreement was, inter alia, to liaise with the State government to constitute a senior-level committee to review and monitor the implementation of the project and to act as a single-window authority for all state-level clearances and commissions as required for the project.

4. Clause 16 of the agreement provides for arbitration on the following terms:

"16. GOVERNING LAW AND DISPUTE SETTLEMENT

This Agreement shall be governed by and construed in accordance with laws of India.

In the event of any dispute arising between the Parties in relation to or under this agreement, the same shall be settled by arbitration conducted in accordance with the Arbitration and Conciliation Act, 1996 (or any other enactment which replaces the said Act) by an arbitral tribunal consisting of three arbitrators, one to be appointed jointly by WBIDC/WBMDTC and one by RML and the third arbitrator being appointed by the two arbitrators so appointed. The decision of the arbitration tribunal shall be final and binding. The venue for the arbitration shall be Kolkata. The costs of the arbitral tribunal shall be equally borne by both the Parties. Each party shall bear its own cost of the arbitration provided however, the parties can claim costs as part of the relief sought from the arbitration tribunal.

In case any dispute is referred to arbitration the parties shall continue to perform their duties and obligations under this Agreement."

5. The petitioner has also referred to a second agreement, a document of March 1, 2011 entitled as a memorandum of understanding. Such agreement was executed between the petitioner and the first respondent. In the third recital to the subsequent agreement, the development agreement of February 5, 2008 for setting up an integrated steel and power plant in the State has been referred to. The principal provision in the agreement of March 1, 2011, that the petitioner has stressed on, requires the first respondent to sell 20% of the coal raised from the Sitarampur coal block to the petitioner at the petitioner's plant near Kharagpur. The relevant clause also envisages a formal coal supply agreement to be executed. The clause placed by the petitioner must be noticed in its entirety:

"b. "WBMDTC will sell the 20% coal raised from Sitarampur Coal Block to "RML" for its Steel along with Ferro Alloy and associated Captive Power Plant at Kharagpur under a Coal Supply Agreement to be subsequently drawn up by "WBMDTC and "RML". To accommodate various activities with this obligation, "WBMDTC" will claim a reasonable service and overhead cost as Consideration money to be settled in the Coal Supply Agreement. The Parties hereby agree to enter into a formal Coal Supply Agreement in due course of time."

The subsequent agreement or memorandum of understanding of March 1, 2011 also contains a clause indicating the manner in which disputes between the parties arising thereunder would be decided:

"g. Attempts will be made to resolve all disputes between the parties amicably through negotiation. In the event of failure to amicably resolve any dispute within 60 days, the matter will be referred to the Additional Chief Secretary/ Principal Secretary/Secretary to the Govt. of West Bengal in Commerce & Industries Department, whose decision shall be final and binding upon both the parties."

6. It is the petitioner's case that the respondents are obliged to supply coking coal of specified quantum and non-coking coal of specified quantum to the petitioner company for a 30-year period in terms of the development agreement of February 5, 2008. The petitioner claims that the subsequent document of March 1, 2011 is limited in its operation and only provides for a particular grade of coal being supplied by the first respondent to the petitioner from the Sitarampur coal block.

7. In the letter of invocation issued by the petitioner, it alleged, inter alia, that the respondents had discriminated against the petitioner in not ensuring supply of coal though the respondents had treated the promoters of some failed units more favourably. The petitioner referred to the memorandum of March 1, 2011 and spoke of the respondents' failure to supply coking coal from the Sitarampur coal block in accordance therewith. The petitioner referred to the arbitration clause in the development agreement of February 5, 2008 in its letter of invocation, indicated its nominee on the arbitral tribunal and called upon the respondents to take appropriate steps.

8. The second respondent chose to ignore the letter despite due receipt thereof. The first respondent replied on March 3, 2014, claiming, inter alia, that the petitioner's demand for allocation of a coal block or a part thereof was impossible to achieve and there was no commitment in the development agreement "that a specific coal block would be made available to (the petitioner) for either floating a joint venture company with us or for engaging (the petitioner) as Mine Developer & Operator." The first respondent also asserted that the "contingent responsibility arising out of the Development Agreement cannot be fulfilled by both the parties." The first respondent maintained in its reply of March 3, 2014 that the grievances reflected in the petitioner's letter of

invocation "does not arise from the Development Agreement". The invitation for arbitration was thus spurned.

9. The petitioner submits that neither have the respondents questioned the execution of the development agreement nor have they cast any doubt on the existence of the arbitration clause therein. Indeed, in the first respondent's response to the letter of invocation, the development agreement has been copiously referred to and the arbitration clause contained therein tacitly acknowledged and admitted. The petitioner suggests that the first respondent's reply to the letter of invocation makes out a twin defence of there being no failure on the part of the respondents to discharge their obligations "under the development agreement and that the grievances raised by the petitioner were covered by the subsequent memorandum. The petitioner insists that since the petitioner does not accept either contention as evident from the first respondent's response to the letter of invocation, an adjudication on such issues is called for. The petitioner adds that once the arbitration agreement which is invoked is admitted and questions are raised as to the efficacy of the arbitration agreement to accommodate any claims raised thereunder, it is no longer the brief of the Chief Justice or his designate in seisin of the consequential request u/s 11 of the 1996 Act to pronounce thereon.

10. The petitioner climbs down a notch or two to suggest that, at any rate, if the party carrying a request to a Chief Justice or his designate can, prima facie, demonstrate that the arbitration agreement invoked by such party may accommodate its claims, that would suffice for the purpose of the consideration relevant u/s 11 of the 1996 Act. The petitioner claims that the development agreement obliges the respondents to ensure the supply of specified quantities of non-coking coal of superior grade and coking coal to the petitioner. The petitioner says that it has asserted in its letter of invocation that the respondents have failed to discharge such obligation. The rights and obligations of the parties under the development agreement, according to the petitioner, have to be adjudicated upon in accordance with the dispute-resolution mechanism envisaged thereunder. To boot, the petitioner emphasises that the subsequent memorandum of March 1, 2011 is restricted to the supply of coking coal and had nothing to do with the supply of non-coking coal that is provided for in the original, and more comprehensive, development agreement.

11. The petitioner refers to an unreported order of this court passed on July 3, 2013 in A.P. No. 559 of 2013 (Shyam Sel and Power Ltd. v. W.B. Minerals Development and Trading Corporation Ltd.) where an identical arbitration clause contained in the original agreement was invoked and it was resisted by the same respondents herein on the ground that the original agreement had been given a go-by upon the parties entering into two subsequent memoranda of understanding which contained an identical clause as to dispute resolution as the one in the document of March 1, 2011 in this case.

12. In the order of July 3, 2013, after referring to paragraph 39 of the

Constitution Bench opinion in the judgment reported at S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, the following view was expressed:

"It is evident on a meaningful reading of the above passage that if it is possible for a Chief Justice or his designate to assess, on the basis of the material before him, as to whether there are live disputes to be carried to an arbitral reference or not, such assessment would be made. However, just as in most cases of limitation when disputed questions of fact and law arise, the question of limitation may not be possible to be decided except by taking evidence, the authority of the arbitrator as recognised in section 16 of the said Act, read with the provision for limited interference by Court as mandated by section 5 thereof, would prompt the Chief Justice or his designate to yield to the arbitral tribunal's authority under the said Act of 1996 and not adjudicate on disputed questions in a request u/s 11 of the said Act.

"The task at hand is simpler since nothing has been cited to suggest why the claims raised by the petitioner are barred by limitation. The order that can be made herein, since the petitioner pursues the arbitration agreement contained in the matrix contract of February 4, 2008, is only for a reference to be conducted in accordance therewith. As a corollary, only the disputes that are covered by such arbitration clause can be carried to the arbitral reference. The disputes which pertain exclusively to the subsequent memoranda of understanding and are not covered by the arbitration clause in the initial agreement of February 4, 2008, may not be carried to the arbitral reference in pursuance of any order that may be made herein. But again, it will be for the arbitral tribunal to decide on the issue."

13. The petitioner has also carried a judgment reported at Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others, where different arbitration clauses in two related agreements had been harmonised by the court. In that case, under three main agreements the appellant agreed to sell three lots of apartments at a proposed building in Mumbai to the respondents. The arbitration clause in each of the principal agreements was of wide import and provided that "disputes or differences ... under or by virtue of this agreement or otherwise as to any other matter in any way connected with" such principal agreement would be referred to the arbitration of a single arbitrator if agreed upon by the parties or to the arbitration of two arbitrators to be appointed by the parties. Subsequent interior design agreements were executed by the parties for renovation, interior design and decoration of the respective flats. These subsequent agreements contained arbitration clauses naming specified arbitrators.

14. Upon the respondents in that case enquiring of the appellant as to when possession of the flats would be made over to the purchasers, the appellant cited default in payment and gave notice of termination of the three agreements. Following such disputes arising between the parties, the respondents invoked the arbitration clauses contained in the original agreements. The appellant ignored

the notices, resulting in requests being carried u/s 11 of the 1996 Act before the relevant Chief Justice, who appointed a sole arbitrator in each case. The appellant protested in course of the references, but the arbitrator proceeded to pronounce awards. The petitions for annulment of the awards were dismissed and the orders of dismissal affirmed in appeal. The appellate orders were carried to the Supreme Court by way of special leave petitions.

15. One of the questions raised before the Supreme Court was whether the arbitration under the main agreement did not permit the arbitrator to deal with the disputes relating to the interior design agreement, which contained a different arbitration clause. The Supreme Court observed that any objection as to the arbitrator's jurisdiction ought to have been canvassed before the arbitrator u/s 16 of the 1996 Act, but proceeded to decide the question of jurisdiction on the assumption that the appellant was not precluded from raising the question at the time of applying for the award to be set aside. In course of the relevant discussion, the court noticed the words "connected with" in the arbitration clause in the parent agreement and opined that the presence of such expression gave the arbitration agreement wide amplitude and content and held that the arbitration clause in the main agreement "was to apply to situations when there were disputes arising under both agreements and the (arbitration clause in the subsequent agreement) was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the Interior Design Agreement."

16. The first respondent has referred to its stand in the letter of March 3, 2014 as amplified in its affidavit filed in the present proceedings. The first respondent seeks to impress that there was neither any firm commitment under the development agreement to supply any form of coal to the petitioner nor could the first respondent be expected to honour the subsequent memorandum since the relevant coal block was not made available to the State. The first respondent suggests that in view of the impossibility to perform the subsequent memorandum and the obligations of the respondents under the original agreement having been whittled down by the subsequent memorandum, there is no live dispute to be carried to an arbitral reference. The first respondent submits "that as to whether there is any failure on its part to discharge its perceived obligations under the subsequent memorandum or as to whether the subsequent memorandum has become impossible to be performed, are questions that are covered by the arbitration clause in the subsequent memorandum. The first respondent says that though the arbitration clause in the subsequent memorandum has not been invoked, the first respondent stands by its assertion in its letter of March 3, 2014 that it would be agreeable to have the disputes under the subsequent memorandum adjudicated upon in accordance with the arbitration agreement contained in the subsequent memorandum.

17. The authority available to a Chief Justice or his designate u/s 11 of the 1996 Act scarcely permits an adjudication on the merits of the substantive disputes

between the parties, except where a defence is raised of there being no live dispute to be carried to a reference or it is urged that the arbitration agreement is incapable of the claims being entertained thereunder. It must first be kept in mind that the ethos of arbitration law has undergone a sea-change and the old order under the Arbitration Act, 1940 has not merely yielded to the new Act of 1996, but the metamorphosis is more of substance than of form. The philosophies of the two enactments are so disparate that they may well have been in different languages for the most parts. Except for the rudimentary canons in assessing whether an agreement amounts to an arbitration agreement and the like, the approach to arbitration law is substantially altered by the 1996 Act. For a start, the understanding under the 1940 Act that the court exercises superintendence over a domestic arbitral reference to the extent not excluded by statute, is anathema under the new Act; which mandates that the court interferes only to the extent permitted by statute. In the arbitral tribunal being given authority to decide on its competence and jurisdiction and in the present statute not retaining either Section 35 of the 1940 Act or the principle embodied therein, there is a paradigm shift.

18. It is in such light that the extent of authority exercised by a Chief Justice or his designate u/s 11 of the 1996 Act has to be perceived. Again, qualitatively, the assessment made by a Chief Justice or his designate u/s 11 of the 1996 Act is different from that made by a judicial authority u/s 8 of the Act. There is sound jurisprudence for such distinction. In the one case, the institution of the court representing the sovereign does not finally close its doors on either party to an agreement perceived to be governed by an arbitration clause; an opinion in course of a petition u/s 16 of the 1996 Act by the arbitral tribunal set up by a Chief Justice or his designate may send the disputes back to the general cesspool of civil courts if the issue on which the reference is declined is not conclusively covered by the order of appointment. In the other case, the judicial authority banishes the suitor before it upon satisfaction that the subject-matter of the dispute is covered by an arbitration agreement. When an action is instituted in derogation of an arbitration agreement and, on a petition u/s 8 of the 1996 Act, the matter is referred to arbitration, the issue is closed.

19. It is necessary, in the context of the present discussion, to refer to the distinction between the extent of authority exercised u/s 8 of the 1996 Act and u/s 11 thereof. The assessment as to the efficacy of the arbitration agreement u/s 8 of the 1996 Act, has, per force, to be more comprehensive; while it is permissible for a Chief Justice or his designate to take a more tentative view on a request u/s 11 of the Act and leave the arbitral tribunal to conclusively decide the issue in view of its exclusive authority in such regard u/s 16 of the Act.

20. In the subsequent memorandum of March 3, 2011 acknowledging the development agreement of February 5, 2008 in its third clause of the preamble and in such document accepting in the fifth clause of the preamble that the Government of West Bengal recognised in the development agreement that "the

supply of coal under an appropriate long term arrangement" to the petitioner was "critical for the long term sustainability of the Project", there appears, prima facie, to be an indication of the source under which the memorandum of March 1, 2011 was executed. In the subsequent memorandum neither expressly nor by necessary implication obliterating the development agreement or the perceived rights or obligations of the parties thereunder, there is no room to presume at this stage, on the basis of the material brought by the first respondent, that all the commercial terms of the development agreement were telescoped into the subsequent memorandum for the arbitration clause covering the development agreement to be rendered meaningless upon the execution of the subsequent memorandum. It is equally possible that the respondents may bring other material or witnesses to establish that the commercial terms of the development agreement did not outlive the execution of the subsequent memorandum. The question is whether such issue ought to be conclusively pronounced upon at this stage.

21. Once the physical existence of an arbitration agreement is admitted and there is no conclusive evidence before the Chief Justice or his designate in course of a request u/s 11 of the 1996 Act that the admitted arbitration agreement stands extinguished, any question as to the efficacy of the arbitration agreement to entertain a claim or a dispute must be recognised to fall within the exclusive domain of the arbitral tribunal in view of section 16 of the 1996 Act. Assuming, for a moment, that the arbitration clause in the development agreement is no longer effective, no prejudice would then be suffered by the respondents in a reference being directed at this stage; for, the arbitral tribunal would render such finding upon the respondents satisfying it on such score. The petitioner will then have to fall back on the second agreement and the mechanism for dispute resolution, if any, governing the same. No harm would have been done to the respondents except some time and resources being expended which, in the Indian context, does not count for much.

22. On the other hand, if this petitioner were to be denied the request that it has carried to the Chief Justice or his designate, it has to be conclusively held that the obligations under the development agreement lost all meaning upon the execution of the subsequent memorandum. Apart from the fact that such conclusive finding cannot be rendered on the material now available, it would also be improper so to do; since the parties admit that they had entered into an arbitration agreement for "any dispute ... in relation to or under" the development agreement to be settled by arbitration.

23. An arbitration agreement indicates the primacy of the arbitral tribunal to adjudicate upon the disputes between the parties; the court or the Chief Justice or his designate or any judicial authority discharges incidental functions in aid of the arbitration. The 1996 Act has to be regarded as pro-arbitration and against judicial intervention except to the extent expressly mandated by statute. When the existence of an arbitration agreement is not in dispute, no court or Chief

Justice or his designate ought to rob an admitted arbitration agreement of its substance and arrogate unto themselves the authority to decide on the merits of the disputes, without allowing the issue of arbitrability to be adjudicated upon by an arbitral tribunal constituted in terms of the arbitration agreement. At the end of the day, the issue of arbitrability, which is a jurisdictional question, can be tested at the stage of a petition for annulment of the arbitral award u/s 34 of the Act. Since an element of judicial review is exercised after the arbitral award, it would be unbecoming of the Chief Justice or his designate to expend any more time than necessary for forming a tentative view on such aspect at the pre-reference stage.

24. Section 5 of the 1996 Act limits the extent of judicial intervention in matters pertaining to arbitration as it mandates that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I of the 1996 Act, no judicial authority shall intervene except where so provided in the Part. The Constitution Bench in *SBP & Co.* has settled the legal position that the authority exercised by a Chief Justice or his designate u/s 11 of the Act is judicial in nature and not purely administrative. While it may be possible for the Chief Justice or his designate to conclusively answer questions as to the arbitrability of the claims or disputes, the Chief Justice or his designate has to be mindful of the jurisdiction of the arbitral tribunal as conferred by section 16 of the Act; and, unless it is an open and shut case in the sense that the claims or the disputes appear, *ex facie*, to not be arbitrable or irretrievably stale, the Chief Justice or his designate should honour the unanimity of the parties as embodied in the arbitration agreement to have the substance of their disputes adjudicated in the consensual forum of arbitration. Section 5 of the Act speaks of judicial intervention in its heading and uses the expression "no judicial authority shall intervene except where so provided", which implies that an element of restraint has to be exercised by a judicial authority, be he a Chief Justice or his designate in seisin of a request u/s 11 of the Act or a judicial authority in seisin of an action which is said to be covered by an arbitration agreement. Section 11 of the Act is concerned only with the Chief Justice or his designate constituting an arbitral tribunal upon the mechanism therefore in the arbitration agreement failing or upon the parties to the arbitration agreement not concurring in the manner of constitution of the arbitral tribunal. Though some incidental issues need to be decided by the Chief Justice or his designate in course of a request u/s 11 of the Act - like the jurisdiction to receive the request and the physical existence of the arbitration agreement, which have to be conclusively adjudicated upon - if there are any doubts pertaining to any other connected issues, such other issues ought to be left for the arbitral tribunal to adjudicate upon. The extent of the authority of a Chief Justice or his designate for the purpose of the relevant expression in section 5 of the Act has to be seen in the context of section 8(3) thereof where, notwithstanding an application for a reference of the action to arbitration pending before a judicial authority before whom an action is initiated in derogation of an arbitration agreement, the statute authorises an arbitral reference to be

commenced or continued and even an arbitral award to be made prior to the final opinion being rendered by the judicial authority in seisin of the action as to whether the subject-matter thereof is covered by an arbitration agreement.

25. Ordinarily, when a pre-reference request u/s 11 of the 1996 Act is carried to a Chief Justice or his designate, there would neither be a statement of claim nor a counter-statement or a counterclaim. Section 11 of the Act does not mandate a party making a request thereunder to enumerate the disputes that have arisen or to list its claims; though an indication in either regard has to be given for even a tentative view to be formed as to whether the disputes or the claims are permissible under the arbitration agreement. At such pre-reference stage when pleadings are not filed and the issues on the substantive disputes not crystallised, it would be presumptuous on the part of the Chief Justice or his designate to anticipate the entire gamut of the claims and counter-claims and the likely issues for a conclusive pronouncement to be made against the arbitrability of the disputes under the arbitration agreement. The situation is somewhat different in a petition for reference of the matter to arbitration when an action is said to have been instituted before a judicial authority in derogation of the arbitration agreement covering the same. The judicial authority has, at least, the claim before it; and, even though the petition for a reference has to be made before the applicant files its first statement on the substance of the disputes, it is possible for the judicial authority to gauge the likely issues from the statement of claim itself. The judicial authority has a definite claim and the assessment necessary is whether the arbitration agreement that is asserted can accommodate the entirety of the claim. Since a Chief Justice or his designate does not have such benefit of a statement of claim being available in course of a request u/s 11 of the Act, he has to tend to send the parties to a reference upon discovering the physical existence of the arbitration agreement, unless the likely claims or the possible disputes appear, *ex facie*, to be dead or stale or not covered by the arbitration agreement.

26. In the light of the respondents' refusal to nominate their arbitrator in accordance with the arbitration clause contained in the development agreement which was duly invoked by the petitioner, Mr. Suman Dutt, Advocate, is named as the respondents' nominee on the arbitral tribunal. Though in *Shyam Sel and Power Ltd.* the third arbitrator on the panel of three was not named, in view of a yet unreported Supreme Court judgment rendered on May 28, 2014 in Arbitration Petition No. 34 of 2013 [*Swiss Timing Ltd. v. Organising Committee, Commonwealth Games, 2010, Delhi*], where the designate of the Chief Justice of India thought it fit not only to name the respondent's nominee but also to appoint the third member of the arbitral tribunal, Mr. S.K. Kapur, Senior Advocate, is named as the presiding arbitrator.

27. Commensurate remuneration of the nominee of the respondents and of the presiding arbitrator will be decided by such persons at the first sitting of the arbitration, preferably on a consolidated basis rather than per sitting. The

respondents will be obliged to pay the remuneration and bear the expenses of its nominee named herein. Both sets of parties will pay the remuneration and bear the expenses of the presiding arbitrator in equal share.

28. A.P. No. 493 of 2014 is allowed as above and by leaving the respondents free to urge all objections before the arbitral tribunal in accordance with law.

29. The respondents will pay costs of the present proceedings assessed at 5,000 GM. Certified website copies of this judgment, if applied for, be urgently made available to the parties, subject to compliance with all requisite formalities.