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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: September 10, 2009

Date of Order: September 22, 2009

+Arb.P. 217/2008

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M/s. Harjee Engineering Works (P) Ltd.

Through: Mr. P.K. Srivastava, Advocate

22.09.2009

...Petitioner

Versus

**M/s Hindustan Steel Works Construction
Ltd. & Ors.**

Through: Mr. Amol Chitale, Ms. Sonia Dube, Mr. S.K. Dhingra and Ms. Shefali Mitra, Advocates

...Respondents

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

1. The petitioner has moved this petition under Section 11 of the Arbitration & Conciliation Act, 1996 ("the Act", for short) with a prayer that this Court should appoint an arbitrator in terms of the contract to adjudicate the disputes between the parties. The petitioner in the petition/ application narrated the facts giving rise to disputes inter se parties.

2. Respondent in response to this petition has taken an objection that there was no arbitration agreement between the parties and the present petition was not maintainable. It is submitted that the petitioner has not filed the alleged arbitration agreement between the parties. The petitioner has relied upon clause 56 of General Conditions of Contract for Civil Work. If it was presumed that this clause was the arbitration agreement, then the

petitioner has not followed the procedure as contained in the clause before approaching this Court. Neither it is alleged by petitioner that he had followed the procedure laid down before approaching this Court.

3. The facts of the present case in nutshell are that respondent no.1 in this case was awarded a contract for Khalgaon Super Thermal Power Project, Stage-III by respondent no.2. Respondent no.1 gave a sub contract of a part of the work to the petitioner concerning fabrication and erection of steel structures in HE Area civil work vide letter dated 3rd March 2004. This sub contract was awarded on the basis of tender invitation. Clause 4 of the letter dated 3rd March, 2004 awarding the sub contract, reads as under:

“4. The terms and conditions governing the work shall be as per HSCL’s LOA No.CS-4030-323-9-CS-LOA-4230 dated 31st July, 2003 enclosed as Annexure-B as applicable for Structural works.

4. Based on above clause 4, it is stated by petitioner that there was an arbitration agreement between the parties by inference. The petitioner placed reliance on *State of West Bengal and others v Haripada Santra AIR 1990 Calcutta 83; Girdhari Lal Bansal v The Chairman Bhakra Beas Management Board, Chandigarh & Ors, AIR 1985 Punjab & Haryana 219; Mrs. Sushila Seth and others v The State of Madhya Pradesh AIR 1980 Delhi 244*. In all the above judgments relied upon by petitioner, there was a clause stating that in the eventuality of disputes, the decision of Superintendent Engineer of the Circle shall be final. The Court held that though the expression ‘award’ or ‘arbitration’ was not appearing in the clause but this was in fact an arbitration clause, since dispute or disputes appearing in the clause shows that there has

to be an existence of dispute and decision of the Engineer has to be arrived at for resolving the disputes after hearing the parties and therefore the clause was in effect an arbitration clause although the word 'arbitration' or 'award' has not been used. Petitioner also placed reliance on *Alimenta S.A. v. National Agriculture Cooperative & Marketing Federation of India Ltd. and another*, AIR 1987 SC 643 wherein the Supreme Court observed that the arbitration clause of an earlier contract can by reference be read into the later contract provided its terms and conditions are not repugnant to or inconsistent with the terms of the contract wherein it is incorporated.

5. Respondent has also relied upon *Aliementa S.A. (supra)* to plead that the arbitration clause referred to by the petitioner was repugnant to and inconsistent with the terms of the contract between the parties. The arbitration clause in the contract between NTPC and respondent no.1 was a clause peculiar to the public enterprises wherein disputes are to be referred to the sole arbitration of General Manger of NTPC. He submitted that NTPC has nothing to do with the contract between respondent no.1 and the petitioner therefore General Manager of NTPC cannot act as arbitrator neither the Chairman of NTPC would have authority to appoint an arbitrator in case of disputes between petitioner and respondent no.1. It is further stated that in the arbitration clause relied upon by petitioner, contained in the contract between respondent no.1 and respondent no.2, it is specifically provides that if for any reason it was not possible to refer the matter to the General Manager of NTPC or there was an inability to act on the part of Chairman and Managing Director of NTPC or in appointing another arbitrator, no other person can act as the Arbitrator and if it was not possible, the matter is not to be referred to the arbitration at all. It is submitted that in view of this specific

provision, the matter could not be referred to the arbitration and the arbitration clause between respondent no.1 and respondent no.2 cannot be invoked by the petitioner even by inference. Respondent also relied upon *Eastern Coalfields Ltd. v Sanjay Transport Agency & Anr.* 2009(8) Scale 720 wherein the Supreme Court observed:

2. The parties entered into an excavation contract whereby the respondents undertook to carry out certain works on behalf of the appellant herein. In the contract signed by the parties there is a clause being clause No. 14 with the caption "Settlement of Disputes/Arbitration". Part of the said clause which is relevant to the context of this case is reproduced hereunder:

".....It is incumbent upon the contractor to avoid litigations and disputes during the course of execution. However, if such disputes take place between the contractor and the department, effort shall be made first to settle the disputes through committees at different levels made for this purpose by the company."

3. The aforesaid clause 14 in the Agreement, however, was scored out and the same was replaced by another clause being clause No. 14. When the parties entered into the agreement and signed the agreement what remains in the agreement was clause No. 14 with the caption "Arbitration with regard to the commercial disputes between the Public Sector Enterprises inter se and Public Sector Enterprises and Government Departments." It reads as follows :

*"ARBITRATION WITH REGARD TO THE
COMMERCIAL DISPUTES BETWEEN THE PUBLIC
SECTOR ENTERPRISES INTER SE AND BETWEEN THE*

**PUBLIC SECTOR ENTERPRISES AND
GOVERNMENT DEPARTMENTS."**

"In the event of any dispute of difference relating to the interpretation and application of the provisions of the commercial terms of the contract such dispute or difference shall be referred by either party to the arbitration, to one of the arbitrators in the Department of Public Enterprises, to be nominated by the Secretary to the Government of India incharge of the BUREAU OF PUBLIC ENTERPRISES. The Arbitration Act, 1940 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 further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law & Justice, Government of India. Upon such reference, the dispute shall be decided by the Law Secretary or the Special Secretary/Additional Secretary when so authorized 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 by the arbitrator."

4. The aforesaid clause No. 14 relates to disputes of commercial nature arising between the Public Sector Enterprises inter se and between the Public Sector Enterprises and Government Departments. The text that follows also makes the said position clear which provides that after the award is given by the arbitrator in the department of public sector enterprises, reference for setting aside or revision of the award is to be made to the Law Secretary, Department of Legal Affairs, Ministry of

Law & Justice, Government of India. The said clause, therefore, concerns the commercial disputes arising between the Public Sector Enterprises inter se and between such enterprises and Government Departments. The said clause will have no application to an agreement which is entered into between the appellant and the respondents, one of whom is a private party. Since that arbitration clause is not applicable to the case in hand, therefore, the appointment of the arbitrator by the Calcutta High Court exercising jurisdiction under Section 11 (6) of the Act was improper.

6. This Court while deciding OMP No.326/08 under Section 9 of the Act made by this very petitioner against respondent observed on 6.5.09 as under:

“4. A perusal of the entire petition of the petitioner would show that the petitioner has not pleaded the existence of an arbitration agreement in the petition. Nor it is pleaded as to when the written arbitration agreement was signed between the parties. A copy of the arbitration agreement has also not been attached with the instant petition. Neither a copy of the contract entered into between petitioner and respondent No.1 has also been attached with the petition. What has been attached with the petition is awarding of contract by NTPC to respondent No.1 i.e. Hindustan Steel Works Construction Limited. This contract is not between the petitioner and respondent No.1 and even if an arbitration clause is there in the contract between NTPC and Respondent No.1, the same does not bind the petitioner and respondent No.1. Respondents No.2 and 3 in this case are unnecessary parties as it is not even the case of the petitioner that he had any contract with respondent No.2 and the arbitration clause with respondent No.2 and 3. The Bank Guarantee contract between the bank and respondent No.1 is an

independent contract. The dispute resolution provision given in the contract between respondent No.1 and 2 reads as under:

“22.1.0 It is specifically agreed that all disputes or differences whatsoever, arising out of this Contract between the parties whether during the progress of the work or after its completion, shall be settled in accordance with the stipulations of Memorandum No.3/5/93-PMA dated 30/06/93 of Govt. of India, Ministry of Industry, Deptt. Of Public Enterprises”

5. Obviously, this provision of dispute resolution between the Government enterprises in accordance with the stipulations of Ministry of Industry regarding public enterprises cannot govern the disputes of petitioner with respondent No.1.”

7. I consider that present petition filed by the petitioner is not maintainable. The arbitration clause relied upon by petitioner viz. general clause 56 of the tender document floated by respondent no.2 would not be applicable in the case of petitioner. There was no privity of contract between petitioner and respondent no.2. The contract between petitioner and respondent no.1 was an independent contract. This contract did not contain an arbitration clause. Merely because there was a reference to the superior contract in relation to the specifications and conditions of work, would not mean that the arbitration clause can be imported into the contract between the petitioner and respondent no1.

8. In view of my foregoing discussion, I find no force in this petition. The

petition is hereby dismissed. The petitioner, however, would be at liberty to raise the disputes before the Civil Court. No orders as to costs.

September 22, 2009
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SHIV NARAYAN DHINGRA J.