

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: January 07, 2011
Judgment Pronounced on: January 10, 2011

+ **CS(OS) No. 2340/2008 & I.A. No. 15811/2008**

M/S. SAIPEM TRIUNE ENGINEERING PVT. LTD
....Plaintiff

- versus -

INDIAN OIL PETRONAS PVT. LTD. Defendant

Advocates who appeared in this case:

For the Plaintiff: Ms. Malvika Rajkotia, Adv.

For the Defendant: Mr. Diggaj Pathak

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

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

V.K. JAIN, J

1. This is an application under Section 5 & 8 of Arbitration and Conciliation Act, 1996, in a suit for recovery of Rs.1,79,92,366/-. On 26.09.2005, the defendant/applicant had issued a notice inviting tender for Project Management Consultancy Services, for design and

engineering, carrying out investigation work, basic engineering with cost estimate, statutory approvals, procurement assistance etc. and preparation of project completion documents for implementation of LPG/Propane/Butane Import/Export Terminal at Ennore(Tamil Nadu), on a lump sum turnkey basis. The bid documents consisted of two volumes. The first volume contained instructions to bidders; forms of bid, bank guarantee and conditions of contract, etc. whereas the second volume consisted of scope of work and other project requirements. On 1.9.2006, the defendant/applicant issued a Letter of Intent to the plaintiff with respect to the aforesaid tender. Pursuant thereto, a work order dated 3.10.2006 was issued to M/s.Triune Projects Pvt. Ltd., which was substituted by amended work order dated 25.1.2007 in the name of the plaintiff which had acquired the business of M/s.Triune Project Pvt. Ltd. Other terms and conditions of the work order dated 3.10.2006, however, remained unchanged.

2. The work order, inter alia, provided as under:-

“All the tender documents including N.I.T., your quotation, payment terms, special terms and conditions of the

tender, general description of the works, subsequent negotiations and all other correspondences connected with the tender, shall form a part of this contract agreement.”

3. The case of the applicant/defendant is that the documents referred in the work order as forming part of the contract included the Format for Agreement of Project Management Service, Article 31 of which provided as under:-

“ARTICLE 31 : ARBITRATION

The arbitration proceedings shall be in accordance with OM No.3/5/93-PMA dated 30/6/93, Govt. of India, Department of Public Enterprises, which reads as follows:-

“In the event of any dispute or difference relating to the interpretation and applications 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 Department of Public Enterprises to be nominated by the Secretary to Government of India, incharge of Bureau of Public Enterprises. The Arbitration Act, 1940 shall not be applicable to the arbitration under this clause, 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, Department of Legal Affairs, Ministry of Law and 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 in the dispute will share equally the cost of Arbitration as intimated by the Arbitrator.”

4. The contract was terminated by the defendant/applicant vide its letter dated 12.8.2008 on the allegations of various breaches on the part of the plaintiff and claims are stated to have been raised by it against the plaintiff in this regard.

5. The case of the plaintiff is that the work was completed by it by December, 2006 except for soil testing which took another five months as clear site was not made available by the defendant. It is also claimed that the investigation works could start only in April, 2007 and report was submitted to the defendant on 25.2.2007. It is further alleged that vide letter dated 8.9.2007, the defendant issued instructions to the plaintiff to resume the work on part-II of the project and extended the project completion schedule to April, 2009. Pursuant to that letter, the plaintiff commenced work on part-II. However, on 9.6.2008, the defendant asked the plaintiff to cancel the tender giving high cost estimate and non-incorporation of

some of its comments as the reason for cancellation. The plaintiff, however, continued with the work till August, 2008 when the PMC contract was terminated by the defendant on 12.8.2008. According to the plaintiff, it had submitted invoice amounting to Rs.2,15,17,485/- for the work performed till May, 2008 but the defendant released only a sum of Rs.37,60,119/- leaving a balance of Rs.77,57,366. It is also alleged that a bank guarantee of Rs.52,35,000/- which the plaintiff had submitted to the defendant was also encashed. The plaintiff has now claimed a sum of Rs.1,79,92,366/- which comprises the balance amount payable to it, the amount of bank guarantee and an amount of Rs.50 lakhs as nominal damages.

6. The case of the defendant/applicant in this application is that since the suit pertains to subject matter of an arbitration agreement between the parties, the matter is required to be referred to arbitration.

7. It is stated in the reply that there are three different clauses pertaining to arbitration, i.e. (a) 9.0.0.0 of C 154 – C – G -102 (sheet no.76 of 89 at page 105). (b) Article 31 of C 154-C-G 109 (sheet no.23 of 24 at page no.188 to 189). (c) Article 34 of the draft contract agreement

and all the clauses are at variance. It is alleged that since all the clauses are at variance and had not attained finality, in the absence of a valid arbitration clause, the dispute cannot be referred to arbitration.

8. In ***Eastern Coalfields Limited vs. Sanjay Transport Agency and Another***, (2009) 7 SCC 345, the agreement between the parties contained the following clause:-

“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 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 by the arbitrator.”

Relying upon the above-referred clause, the High Court referred the dispute which had arisen between the parties to the sole arbitration of a retired judge of the High Court. Setting aside the order of the High Court, Supreme Court, *inter alia*, held as under:-

“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.

9. Since Article 31 of the Format for Agreement of Project Management Service is absolutely identical to clause 14 of the agreement between the parties in the case of ***Eastern Coalfields*** (supra), it must necessarily be held that since one of the parties to the agreement is a private company, it can have no application to the agreement between them and, therefore, no reliance can be placed on the aforesaid clause for referring the disputes between the parties to arbitration.

It was pointed out by the learned counsel for the defendant/applicant that in the case of ***Eastern Coal fields*** (supra), the heading of the arbitration clause indicated that it applied to disputes between the Public Sector Enterprises *inter se* and the Public Sector Enterprises and the Government Departments, but, no such heading has been given to clause 31 of the Format for Agreement of Project Management Service. In my view, the contention is misconceived for two reasons. Firstly, the heading to Article 31 of the Format for Agreement of Project Management Service indicates that the arbitration shall be in accordance with OM No.3/5/93-PMA dated 30.6.1993, Government of

India, Department of Public Enterprises and that OM, undisputedly, refers only to arbitration between Public Sector Enterprises *inter se* and the Public Sector Enterprises and Government of India. Secondly and more importantly, the arbitration clause in that case being absolutely identical to the arbitration clause contained in Article 31, the heading of the arbitration clause would not be a material factor.

10. However, clause 9.0.1.0 of the general conditions of contract for Project Management Consultancy Services, which form part of the tender document, also provides for arbitration and reads as under:-

9.0.1.0 *Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.0.2.0 hereof, any dispute arising out of a Notified Claim of the CONSULTANT included in the Final Bill of lie CONSULTANT in accordance with the provisions of Clause 6.6.3.0 hereof, if the CONSULTANT has not opted for the Alternative Dispute Resolution Machinery referred to in Clause 9.1.1.0 hereof, and any dispute arising out of any Claim(s) of the OWNER against the CONSULTANT shall be referred to the arbitration of a Sole Arbitrator selected in accordance with the provisions of Clause 9.0.1.1 hereof. It is specifically agreed that the OWNER may prefer its Claim(s) against the CONSULTANT as counterclaim(s) if a Notified Claim of the*

CONSULTANT has been referred to arbitration. The CONSULTANT shall not, however, be entitled to raise as a set off defence or counterclaim any claim which is not a Notified Claim included in the CONSULTANT's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.

9.0.1.1 *The Sole Arbitrator referred to in Clause 9.0.1.0 hereof shall be selected by the CONSULTANT out of a panel of 3 (three) persons nominated by the OWNER for the purpose of such selection, and should the CONSULTANT fail to select an arbitrator within 30 (thirty) days of the panel of names of such nominees being furnished by the OWNER for the purpose, the Sole Arbitrator shall be selected by the OWNER out of the said panel.*

11. Since the work order issued by the defendant company specifically stipulated that all the tender documents including general terms and conditions of the tender shall form part of the contract agreement, it cannot be disputed that the above-referred general terms and conditions of contract, including the arbitration clause referred-above, form part of the contract between the parties. Thus, there is an agreement clause between the parties and in terms of that clause, any dispute arising out of a notified claim of the plaintiff included in the final bill of the plaintiff as also any dispute arising out of any claim of

the defendants against the plaintiff as required to be referred to the arbitration of a sole Arbitrator to be selected in accordance with the provisions of clause 9.0.1.1 since admittedly the plaintiff has not opted for the alternative dispute resolution machinery referred to in clause 9.0.1.0 and the provisions of clause 6.7.1.0, 6.7.2.0 and 9.0.2.0 also do not apply to the claim of the plaintiff.

12. An analysis of Section 8 of Arbitration & Conciliation Act would show that the following conditions are required to be satisfied before the Court can exercise its powers under this provision: (1) there should be an arbitration agreement; (2) a party to the agreement should bring an action in the court against the other party; (3) subject-matter of the action should be the same as the subject-matter of the arbitration agreement; (4) the other party should move the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute. In my view, clause 9.0.1.0 constitutes an arbitration agreement between the parties. The plaintiff before this Court is a party to the arbitration agreement; the defendant which is the other party to the arbitration agreement has moved the Court for referring the

disputes between the parties to arbitration, before submitting its first statement on the substance of the dispute and *prima facie* subject matter of the suit is the same as the subject matter of the arbitration agreement. Therefore, all the conditions required for exercise of powers by the Court under Section 8 of the Act stand fulfilled in this case.

13. It was contended by the learned counsel for the plaintiff that since the disputes subject matter of this suit, do not arise out of a notified claim of the plaintiff included in the final bill submitted by it, the arbitration clause referred-above does not apply to the suit claim. As noted earlier, the case of the plaintiff is that it had submitted invoices amounting to Rs.2,15,17,485/- for the work performed till May, 2008 and a sum of Rs.77,57,366/- out of that amount is still due to it from the defendant. It is difficult to accept that the claim with respect to this amount is not covered under the above-referred arbitration clause. Admittedly, the defendant has also raised claims against the plaintiff and presumably the amount of the bank guarantee of Rs.52,35,000/- has been encashed towards satisfaction of those claims of the defendant. In any case, it will be very

much open to the arbitrator to take a view on this aspect of the matter and decide whether any or all the claims forming subject matter of this suit are covered under the arbitration clause or not. Section 16 of the Arbitration & Conciliation Act, 1996 specifically confers power upon the arbitral tribunal to rule on its jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement. Therefore, it will only be appropriate if this aspect of the matter is left to the arbitrator to determine.

14. In ***Hindustan Petroleum Corporation Ltd. v. M/s Pinkcity Midway Petroleums***, AIR 2003 SC 2881 the appellant before the Supreme Court filed an application under Section 8 read with Section 5 of the Arbitration and Conciliation Act, 1996 in a civil suit filed by the respondent seeking a decree of declaration. The learned Civil Judge dismissed the application holding that the disputes between the parties were not covered by the arbitration agreement. The revision filed by the appellant against that order was dismissed by the High Court. Setting aside the decision of the High Court, the supreme Court referred to the decision of its Constitutional Bench in ***Konkan Railway***

Corporation Ltd. v. Rani Construction Pvt. Ltd., AIR 2002 SC 778 and held that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the concerned arbitral tribunal and, therefore, the Courts below ought not to have proceeded to examine the applicability of the arbitration clause to the facts of the case in hand but ought to have left that issue to be determined by that arbitral tribunal. Referring to its earlier decision in the case of **P. Anand Gajapathi Raju v. P.V.G. Raju, (2000) 4 SCC 539**, the Supreme Court was of the view that in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. The Supreme Court was of the view that once the arbitration clause was admitted, considering the mandatory language of Section 8 of the Arbitration Act, the Court below ought to have referred the dispute to arbitration.

15. Dealing with the question as to what would be the role of Civil Court when an argument is raised that such

arbitration clause does not apply to the case in hand, the Supreme Court noted that Section 16 of the Act had empowered the arbitral tribunal to rule on its own jurisdiction, including the rule on any objection with respect to the existence or validity of the arbitration agreement. The Supreme Court was of the view that the arbitral tribunal's authority under Section 16 of the Act was not confined to the width of its jurisdiction but goes to the very root of its jurisdiction and, therefore, there would be no impediment in contending before the arbitral tribunal that it had been wrongly constituted and, therefore, it had no jurisdiction.

16. As observed by Supreme Court in ***P.Anand Gajapathi Raju And Others vs. P.V.G. Raju (Dead) And Others***, (2000) 4 SCC 539, the language of Section 8 of Arbitration & Conciliation Act is preemptory and, therefore, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and in such a case, nothing remains to be decided in the original action. Similar view was taken by the Supreme Court in ***Branch Manager, Magma Leasing and Finance Ltd. and another v. Potluri Madhavalata and another***, (2009) 10 SCC 103.

For the reasons given in the preceding paragraphs, the application is allowed and the disputes between the parties which are subject matter of this suit are referred to arbitration. The respondent is directed to nominate a panel of three persons in terms of clause 9.0.1.1. The plaintiff will be entitled to select any one out of those three persons to act as Arbitrator, within thirty days of the name of the panelist being forwarded to it by the defendant, failing which the arbitrator will be selected by the defendant out of the panel forwarded by it to the plaintiff. The defendant will also be entitled to prefer counter-claims against the plaintiff in terms of clause 9.0.1.0 to the arbitrator.

The suit as well as the IA stand disposed of in terms of this order.

(V.K. JAIN)
JUDGE

JANUARY 10, 2011
‘sn’/’vk’