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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ARB.P. 133/2012

CONTINENTAL CONSTRUCTION LTD Petitioner
Through: Mr Pawan Upadhyay & Ms Anisha
Upadhyay, Advs.

versus

NATIONAL THERMAL POWER
CORPORATION LTD Respondent
Through: Mr S.K. Taneja, Sr. Adv. with Mr
Puneet Taneja & Ms Shweta, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

% **19.09.2013**

1. This is a petition filed under Section 11 of the Arbitration & Conciliation Act, 1996 (in short the Act) with a prayer for appointment of an independent arbitrator to adjudicate upon disputes, which the petitioner claims have arisen between the parties herein. The petition is resisted by the respondent on several grounds. The principal ground being: that there is accord and satisfaction; pursuant to a Conciliation Agreement dated 27.11.2007 (in short the Conciliation Agreement) executed between the parties which, apparently covers the subject disputes raised herein. The petitioner, quite obviously, avers to the contrary.

2. In order to adjudicate upon this petition, following brief facts required to be noticed.

2.1 On 18.10.2002 the petitioner entered into an agreement preceded by a letter of award dated 29.06.2002 with the respondent for construction of Two Numbers Diversion Tunnel Package for Koldam Hydro Electric Power

Project (4 x 200 MW) on the river Satluj situate in Bilaspur District, Himachal Pradesh (in short Koldam Project). The total cost of the project was pegged at a sum of Rs. 1,66,64,55,600/-.

2.2 It appears that just prior to execution of the contract between the parties on 01.03.2002, the Government of India (GOI), had issued a notification of even date being notification no. 21. As per the petitioner, at serial no. 400 of the said notification, it was indicated that equipment(s)/ material(s) and spare part(s), which were imported for Koldam Project, were exempted from customs duty.

2.3 Undoubtedly, the exemption, if at all, could be granted on fulfilment of conditions provided therein. The common case of the parties is that in order to avail the exemption, an essentiality certificate had to be issued by the respondent.

2.4 It is not disputed that the petitioner imported construction equipment(s), certain material(s) and spare part(s), which were used in the execution of the Koldam project awarded to the petitioner. In respect of the construction equipment(s) imported by the petitioner, a sum of Rs. 3,84,42,735/- was paid as custom duty. Similarly, in respect of material(s) and spare part(s), the petitioner claims, a sum of Rs. 2,88,51,903/- was paid as custom duty. Thus the total amount paid by the petitioner towards custom duty was a sum of Rs. 6,72,94,638/-.

3. It appears that during the execution of the contract certain disputes arose between the parties herein, whereupon discussions were held between the representatives of the two sides under a regime of conciliation provided under clause 42.2 of the Special Conditions of the Contract (in short SCC), forming part of the contract obtaining between the parties. As per the

avermment of the petitioner, these discussions and deliberations translated into a Conciliation Agreement.

4. There are several aspects referred to in the Conciliation Agreement. I am presently concerned with clauses 23 and 24 of the Conciliation Agreement; as a matter of fact, more specifically, clause 24. The relevant clauses (i.e., clauses 23 and 24), are extracted hereinbelow:

“...23. Whereas the amount finally agreed by NTPC for payment to CCL works out to Rs. 801.64 lacs and the same has been duly agreed by CCL as full and final settlement against the contract under reference.

24. Whereas it was agreed between the parties in the meeting held on 22nd Nov, 2007 that NTPC would furnish essentiality certificate to M/s CCL, signed by the Competent Authority, in view of the Hon’ble Supreme Court of India Judgement (sic Judgment) dated 31.08.2006 for taking further action in the matter....”

5. It is not in dispute before me that, as agreed to between the parties, the petitioner was paid a sum of Rs. 801.64 lacs towards full and final settlement of all dues and payable to the petitioner.

6. The aspect with respect to which the petitioner, apparently, is aggrieved, is with regard to the issuance of essentiality certificate as provided in clause 24.

6.1 A close perusal of clause 24 of the Conciliation Agreement would show that parties had agreed that the respondent will issue to the petitioner, an essentiality certificate, signed by the competent authority, in view of the judgment delivered by the Supreme Court dated 31.08.2006.

6.2 Though the title of the said judgement is not set out, it is not disputed before me that the judgment of the Supreme Court referred to in clause 24 of

the Conciliation Agreement is: *Commissioner of Customs, Mumbai vs M/s Toyo Engineering India Ltd*; which is numbered as Civil Appeal No. 2532/2001.

6.3 The judgment of the Supreme Court concerned itself with the issue of classification, that is, whether the equipment(s) imported by the assessee in that case, fell within the heading 98.01 of the first schedule to the Customs Tariff Act, 1975 (in short the Tariff Act). The assessee's prayer in that case that the equipment imported be treated as a "facility of import project", under the Project Import Regulation, was thus dependant on the answer to aforementioned poser. The Supreme Court ruled in favour of the assessee. The relevant extracts from the said judgment are set out hereinbelow for the sake of convenience:

"....It is not disputed that construction equipments imported by the respondent were used in the initial setting up of the plant. The Assistant Collector and the appellate authority denied the facility of the project import as the ownership of the imported goods would not pass to the project authority and that the machinery imported could be utilized elsewhere in the setting up of any other plant. What is required under heading 98.01 Tariff Act is that the machinery imported should be required "for the initial setting up of a unit, or the substantial expansion of an existing unit". This heading specifically mentions and includes "auxiliary equipment". The "auxiliary equipment" has not been defined under the Tariff Act. As per Dictionary meaning, extracted above, it is an equipment which aids or helps. Any equipment which aids or helps in the setting up of an industrial plant would fall and be covered under heading 98.01 of the Tariff Act. The mere possibility of its (sic it) being used subsequently for other project would not debar the respondent from availing the facility of project import. If the contention of the Revenue is accepted, then resultant effect as put by the Tribunal would be:....

....In fact it was not disputed before the Tribunal or before us as

well that the construction equipments imported by the respondent were used in the initial setting up of the plant. The goods imported by the respondent such as hydle truck cranes, excavator, shovel loader, truck, forklift truck, power generators, diesel welder, welding rectifier, containers tools and tackles instruments, level Nako with tripod and theodolite nako with accessories & tripod would certainly be auxiliary equipments which would help in the initial setting up of the industrial plant. The facility of the project import was denied to the respondent because the ownership of the imported goods did not pass to the project authority. Since it is not disputed that the construction equipments imported by the respondent were used in the initial setting up of the plant, then, as per the provisions of heading 98.01 of the Tariff Act the respondent could not be denied the benefit of the project import....” (emphasis is mine)

7. In sum and substance, the Supreme Court under heading 98.01 of the Tariff Act was required to construe as to whether the construction equipment(s) imported by the assessee fell within the ambit and scope of “auxiliary equipment”. The relevant heading required that the machinery imported should be used for initial setting up of a unit or a substantial expansion of an existing unit. The Supreme Court came to the conclusion that the expression ‘auxiliary equipment’, meant an equipment which aided or helped in the initial setting up of an industrial plant. By this rationale, the Supreme Court came to the conclusion that since the construction equipment(s) used in that case by the assessee, was used in the initial setting up of the plant, it could not be denied the benefit of “project import”.

8. It is in this background, as indicated above, clause 24 was incorporated in the Conciliation Agreement. The respondent, accordingly, issued an essentiality certificate in favour of the petitioner, under the cover of its letter dated 18.06.2008.

8.1 Importantly, the said letter enclosed a list of construction equipments imported by the petitioner, under the contract. As required, the essentiality certificate was issued by the Chairman and Managing Director of the respondent.

8.2 What is significant though, is that, while enclosing a list of construction equipments imported for the Koldam Project, there was no mention of material(s) and spare part(s).

8.3 Furthermore, as required, a certificate was issued by the Joint Secretary to the Government of India.

9. It appears that by a letter dated 15.07.2008, the petitioner made a grievance that it had received an essentiality certificate, only with respect to four items of equipment(s) referred to therein, and that, it did not refer to other items, such as, swellex bolts, steel fibre, high pressure pumps and spare parts.

10. In the interregnum, the petitioner, evidently, approached the Customs Department with the essentiality certificate to claim refund of duty paid on the construction equipment(s) imported by it. Unfortunately for the petitioner, vide order dated 17.07.2008 the Assistant Commissioner of Customs rejected the petitioner's claim for refund. The central point, based on which, the application for refund was dismissed, appears to be that the petitioner did not challenge the assessment order by which duty was imposed in the first instance. In addition, the claim for refund, was also rejected on the ground of limitation.

11. I am informed that the petitioner has not carried the matter in appeal or otherwise, to any higher forum.

11.1 The respondent on its part, by a letter dated 20.04.2009,

communicated to the petitioner that, in so far as its obligation to issue essentiality certificate was concerned, it was confined to construction equipment(s). Reliance in this regard was placed on the judgment of the Supreme Court dated 31.08.2006, to which I have made a reference above. It is pertinent to note that letter dated 20.04.2009 was issued in continuation of an earlier letter dated 22.08.2008 sent by the respondent to the petitioner vis-a-vis the same subject. This letter, apparently, was issued in response to the letter dated 15.07.2008 wherein, for the first time, after execution of the Conciliation Agreement, a dispute with regard to issuance of essentiality certificate, qua material(s) and spare part(s), referred to in that letter, was raised by the petitioner.

12. Evidently, the petitioner sought to trigger the arbitration clause vide letter dated 20.04.2010. The respondent by a return communication dated 08.09.2010 rejected the petitioner's demand for arbitration on the ground that a full and final certificate was furnished by the petitioner on 24.03.2008, post the execution of the Conciliation Agreement whereby, the petitioner had waived all its rights qua the contract in issue.

12.1 The demand was reiterated by the petitioner vide letters dated 08.09.2010 and 30.11.2010. The respondent, on its part adhered to the position taken and communicated the same in its return communication dated 17.01.2011.

13. The petitioner, being aggrieved, approached this court by way of the captioned petition, which was filed on 22.03.2012. The petition was moved in court on 27.03.2012 when, notice was issued. Since then, respondent has filed its reply. As indicated above, the respondent pleaded accord and satisfaction. The respondent also submits that an essentiality certificate was

issued in favour of the petitioner, as required, under clause 24 of the Conciliation Agreement arrived at between the parties.

14. Mr Upadhyay, learned counsel for the petitioner, argues to the contrary. Mr Upadhyay submits that in terms of clause 24 of the Conciliation Agreement, read with judgment dated 31.08.2006 of the Supreme Court, the respondent was required to furnish an essentiality certificate vis-a-vis the construction equipment(s) as well as the material(s) and spare part(s) used in the execution of the Koldam Project.

14.1 It is, therefore, Mr Upadhyay's contention that respondent having failed to do so, disputes have arisen and, therefore, an arbitrator ought to be appointed by this court.

15. I have heard the learned counsels for the parties. The facts stated above are not in dispute. The only issue that the court needs to consider is as to whether the disputes raised in the present petition can be referred to an arbitrator. What has emerged from the discussion above, is that, inter se parties, there were several disputes. These disputes were subjected to conciliation under the mechanism provided in the contract. The said mechanism is provided in clause 42.2 of the SCC obtaining between the parties. That mechanism resulted in parties executing a Conciliation Agreement.

15.1 Clause 24 of the Conciliation Agreement clearly obliged the respondent to furnish an essentiality certificate in the light of the judgment of the Supreme Court dated 31.08.2006, to which I have made a reference above. Since it is Mr Upadhyay's contention that in terms of the judgment an essentiality certificate would include the material(s) and spare part(s), in my view, the course open to the petitioner, if at all, was to execute the

Conciliation Agreement. Under Section 74 of the Act, the Conciliation Agreement attained a status of an award and, therefore, perhaps that was the remedy available to the petitioner. A reference to this aspect is specifically made in clause 28 of the Conciliation Agreement. There is no provision for arbitration in the Conciliation Agreement. Consequently, with execution of the Conciliation Agreement, the earlier contract obtaining between the parties dated 18.10.2002 stood novated and hence discharged. Therefore, disputes if any, qua clause 24 of the Conciliation Agreement cannot be referred to arbitration, in the absence of an arbitration agreement. There is no submission made before me that the Conciliation Agreement was executed by the petitioner under coercion, undue influence or duress of any kind whatsoever. [See *National Insurance Company Limited vs Boghara Polyfab Private Limited (2009) 1 SCC 267*; *Union of India vs Master Construction Company (2011) 12 SCC 349* and *Union of India vs Hari Singh 2011 (1) RCR (Civil) 134*]

16. That apart, the grievance with regard to the action of the respondent in not providing an essentiality certificate, which made a reference to the material(s) and spare part(s) was raised by the petitioner vide letter dated 15.07.2008. The respondent refuted this contention, as indicated above, vide letters dated 22.08.2008 and 20.04.2009. The petitioner, instead of immediately asking for the matter to be referred to arbitration, delayed the invocation of the arbitration clause obtaining in the agreement dated 18.10.2002; assuming it could have been invoked in the first instance. As indicated above, it could not have invoked with the execution of the Conciliation Agreement.

16.1. Willy-nilly, the petitioner approached this court only on 22.03.2012, after nearly five (5) years of the Conciliation Agreement having been executed, and nearly three (3) years and seven (7) months after, respondent's refusal, in August, 2008. There is unexplained laches on the part of the petitioner. The respondent, as a matter of fact, based on its stated position, taken in August, 2008, declined, reference of disputes to arbitration, on 08.09.2010. What is inexplicable is that a dispute is raised even vis-a-vis that part of the essentiality certificate, which referred to construction equipment(s). The fact that the petitioner failed to get the necessary refund from the Customs Department cannot be the reason to find fault with the respondent.

17. Therefore, for the foregoing reasons, I find that there is no merit in the petition. The petition is, accordingly, dismissed, leaving parties to bear their own cost.

RAJIV SHAKDHER, J

SEPTEMBER 19, 2013

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