

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

% *Judgment delivered on: January 21, 2013*

+ Arb. P. No. 184/2012

Indeen Bio Power Limited. Petitioner

Represented by: Mr.Hiroo Advani, Advocate
with Mr.apar Gupta, Mr.Madhooja
Mulay, & Mr. Aditya, Advocates.

versus

Dalkia India Pvt. Ltd. Respondent

Represented by: Mr. R. Vasanth, & Ms. Perna Kapoor,
Advocates.

**CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the applicant for appointment of retired Judge of Kerala High Court as the sole Arbitrator to adjudicate all the disputes between the parties in terms of clause 13.2 of the synchronization and co-ordination agreement dated 8th September, 2011.

2. It is averred in the petition that in or around February 2010, the petitioner in the process of developing an 8 MW mustard residue biomass plant at Chandi, Tehsil Devli, District Tonk, Rajasthan entered into a Project Development Agreement dated 2nd May, 2010 with the respondent which is a wholly owned subsidiary of Dalkia International S.A. located at 47, Avenue du Marechal de Lattre de Tassigny 59350 Saint Andre France.

Thereafter, the parties mutually agreed upon the terms of an Engineering Procurement Construction (EPC) contract for the project. The respondent asked the applicant to split the EPC contract into three contracts namely Supply contract, Works (Civil) contract and a Service Contract (hereinafter referred to as the “Contract Agreements”) dated 8th September, 2011 for availing certain tax benefits. As the responsibility under the three contracts was divided and different, the parties agreed to enter into a synchronization and co-ordination agreement in order to reflect that the respondent would be responsible for completing the entire contract as if, it were a single EPC contract. The said synchronization and co-ordination agreement also contained the Dispute Resolution clause 13.2 for resolution of all disputes resulting from the contract to be settled by arbitration.

3. It is further stated that around October, 2011 the petitioner came to know that the respondent was planning to cease its operations in India and move out. It is also stated that the petitioner was informed by the respondent’s Director himself that they were either selling the company to new owners or ceasing operations in India. Incase the respondent went ahead with their plan, the petitioner’s project will suffer. The petitioner, for the purpose of this project had approached several banks for loans and approvals for the same are at advanced stages which will get jeopardized if the respondent cease its operations and the petitioner will have to restart the entire process. A major equity company Praefinium, which has already sanctioned a sum of Rs. 9 crores join the project has indicated that they will not go ahead with the project incase the respondent herein opts out of the project. It is further stated that in case, the petitioner has to restart the entire process, then not only the time and effort of the petitioner would suffer, but the overall cost of the project will also increase. Therefore, the petitioner

invoked the Arbitration clause 13.2 of notice dated 28th November, 2012. Vide its reply dated 23rd April, 2012 the respondent rejected the invocation of the Arbitration Clause stating that there is no effective agreement between the parties.

4. Notice under Section 11 was issued by the petitioner calling upon the respondent to appoint his Arbitrator as in terms of agreement the petitioner also appointed their Arbitrator. In the notice, the petitioner also calculated losses. The petitioner also denied the stand taken by the respondent in view of synchronization and co-ordination agreement dated 8th September, 2011 under which the arbitration has been invoked. Further, it is stated that the 30 days period has already expired from the service of the notice invoking the arbitration. Therefore the petitioner has filed the present petition.

5. In the reply to the petition filed on behalf of the respondent it is stated that on 2nd May, 2010 the petitioner and respondent entered into a Project Development Agreement and as per clause 3.1 of the said agreement, the said Project Development Agreement was in force only till 2nd August, 2010 or till the execution of the EPC and O & M, or whichever was earlier. Since the EPC and O & M agreements have not been finalized till date, therefore, the PDA executed between the parties expired in terms of clause 3.1 of the said PDA on 2nd August, 2010. It is also stated that the synchronization and co-ordination agreement dated 8th September, 2011 has neither become effective nor commenced till date. Clauses 1.1, 1.2 and 3.1 would demonstrate that the synchronization and co-ordination agreement dated 8th September, 2011 has neither become effective nor commenced. The said clauses reads as under:

Clause 1.1 of SCA: Commencement date shall mean the date indicated by Indeen in the Notices to Proceed to be issued under the Contract agreements.

Clause 1.2 of SCA: Contract Agreements shall mean Works Contract Agreement, Service Contract Agreement and Supply Contract Agreement, proposed to be executed between Indeen and Dalkia in a mutually agreed form.

Clause 3.1 of SCA: On and from the Commencement Date, Dalkia shall be responsible for co-ordinating and monitoring all the activities specifically forming the part of the Contract Agreements.

6. The respondent states that a bare perusal of the above mentioned clauses establish that the said synchronization and co-ordination agreement was to become effective only on the date which would be mentioned in the “Notices to Proceed” to be issued under the contract agreements which have not been finalized and executed till date. Clause 3.1 further makes it clear that the responsibilities of the respondent under the synchronization and co-ordination agreement would commence only “on and from the Commencement Date”. Therefore, from a conjoint reading of these clauses demonstrates that the synchronization and co-ordination agreement dated 8th September, 2011 has not become effective and thus, none of the clauses including the dispute resolution clause can be enforced by any of the parties.

7. It is argued by the petitioner’s counsel that the parties had finalised the EPC agreement but, on the insistence of the respondent, it was split into three separate agreements namely Supply contract, Works (Civil) contract and a Service Contract to enable the respondent to avail certain tax benefits. The intention of the parties was clear and the split was done to reflect that the respondent would be responsible for completing the entire contract as if, it were a single EPC contract. In addition to these contracts, the parties further entered into a synchronization and co-ordination agreement. It is

submitted that the respondent is trying to escape from its obligations under the synchronization and co-ordination agreement when there exists a legally valid and binding arbitration agreement between the parties as per Section 7 of the Act. The petitioner has also filed an O.M.P. bearing No.447/2012 under Section 9 of the Act against the respondent and M/s Dalkia International SA, as the senior personnel of the respondent have started to resign or move out of India which clearly shows the respondent's intention to abandon the project.

8. It appears from the pleading of the petitioner and documents placed on record which indicate prima facie that compliance in terms of PDA was extended due to the conduct of the parties as even after 2nd August, 2010, the respondent had written the letter dated 27th January, 2011 to the State Bank of India clearly setting out the details of the project and showing their active participation in the project. Further, the draft of contract agreements had been finalized between the parties as per the case of the petitioner in view of terms and conditions of synchronization and co-ordination agreement. It is also evident from the material evidence on record that the parties were frequently exchanging status updates regarding the progress made in the project after the expiry of 2nd August, 2010.

9. It is settled law that where the existence or non-existence of arbitration agreement was not clear from correspondence or exchange of documents between parties, it was proper for arbitrator to decide such question under Section 16 rather the Court. It is because the power that is exercised by the Court under Section 11 is in the nature of an administrative order.

Section 16 adopts the important principle that it is initially and primarily for the Arbitral Tribunal itself, to determine whether it has

jurisdiction subject to ultimate control of the Court. Sub-section (1) of Section 16 grants the Arbitral Tribunal, the power to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. Under Section 16 arbitral tribunal can rule on any objection with respect to existence or validity of arbitration agreement. Arbitral Tribunal authority under Section 16 is not confined to width of its jurisdiction but goes also to the root of its jurisdiction.

10. In view of the settled law, there is a force in the submission of learned counsel for the petitioner. The prayer made in the petition is that in view of arbitration clause, the petitioner prayed that the retired Chief Justice of Kerala High Court be appointed to adjudicate all disputes between the parties arising out of Synchronization and Coordination dated 8th September, 2011.

11. Prior to filing of the petition, the petitioner served a legal notice for invocation of the arbitration under Clause 13.2 of the agreement dated 8th September, 2011. In the said notice, the respondent was called upon to appoint their arbitrator within a period of 30 days as required under the Act. However, the said prayer is not made in the petition. It is also true that 30 days period has already expired after the receipt of notice by the respondent. Clause 13.2 of the agreement is reproduced as under:

“13.2 Dispute Resolution: All disputes, controversies, claims or counter claims resulting from the Contract Agreement or relating to the Contract or to a breach of this Agreement, to its rescission or its invalidity, shall be settled by arbitration in accordance with the (Indian) Arbitration and Conciliation Act, 1996 as amended from time to time. There shall be three arbitrators. The seat of arbitration shall be New Delhi, India. The language used for the arbitration procedure shall be English. The

Contract Agreement shall be governed by the laws of India.”

12. The seat of arbitration is to be New Delhi and it provides that there shall be three arbitrators. The specific procedure for appointment of three arbitrators is not prescribed in Clause 13.2 of the Agreement. As it is mentioned that the seat of arbitration shall be New Delhi, and considering the overall facts and circumstances of the case and in order to save time and costs of the case, it would be appropriate that instead of three arbitrators a sole Arbitrator be appointed. Accordingly, Mr. Justice Anil Dev Singh (retired Judge of Delhi High Court), R/o B-442, New Friends Colony, New Delhi, (Mob.9810060203), is appointed as a sole Arbitrator to adjudicate the disputes including claims and the counter claims of respective parties arising out of the agreement. The learned Arbitrator shall also consider the objections of the respondent with regard to existence or non-existence of agreement as and when raised by the respondent. The fee of the learned Arbitrator shall be paid by the parties as per the schedule maintained by the Delhi High Court Arbitration Centre. The learned Arbitrator shall give prior notice before commencing the proceedings. The petition stands disposed of. A copy of the order be sent to the learned Arbitrator. Dasti.

(MANMOHAN SINGH)
JUDGE

JANUARY 21, 2013