

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 21.08.2014

+ **W.P.(C) 7328/2012**

U.P. RAJYA VIDYUT UTPADAN NIGAM LTD. Petitioner

versus

UNION OF INDIA AND ORS. Respondents_

Advocates who appeared in this case:

For the Petitioner : Mr Daleep Dhayani & Mr Suraj Singh for
Mr Pradeep Misra.

For the Respondents : Mr Ruchir Mishra and Mr Mukesh Kr. Tiwari
for R-1.
Mr Manoj Kr. Das for R-2.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J (ORAL)

1. The petitioner, a Government company wholly owned by the State Government of Uttar Pradesh, has filed the present petition, *inter alia*, praying for quashing the arbitration proceedings, which are pending before respondent no.3 in respect of disputes with respondent no.2 (EPIL).

2. The controversy in the present petition involves the question whether the said arbitration proceedings, commenced before respondent no. 3 under the mechanism of Permanent Machinery of Arbitrators (hereinafter referred to as 'PMA') is valid and maintainable.

3. Briefly stated, the relevant facts are that Uttar Pradesh State Electricity Board (UPSEB) had invited tenders for supply, erection and

commissioning of coal handling system at its thermal power station at Anpara, Uttar Pradesh. EPIL, which is a company owned and controlled by the Government of India, submitted its tender for the said works. A letter of intent was issued on 04.09.1981 and, subsequently on 05.02.1982, a work order was also issued to EPIL. EPIL completed the works in December, 1988 and by a letter dated 06.05.1998, raised certain claims with respect to the said works. The claims raised by EPIL were disputed by UPSEB. Thereafter, EPIL by a letter dated 03.07.2001 requested the Secretary, Department of Public Enterprises, Ministry of Industries, Government of India to settle the dispute between the EPIL and UPSEB. In the meantime, by virtue of the Uttar Pradesh Electricity Reforms Act, 1999, UPSEB was unbundled and all thermal generating stations including the one at Anpara were vested with the petitioner.

4. The petitioner received an order dated 19.09.2011 from respondent no.3 which indicated that respondent no.3 had been nominated as the sole arbitrator to adjudicate the disputes between the petitioner and EPIL and had proceeded to act in terms of the scheme and procedure of PMA. The said order also called upon the parties (petitioner and EPIL) to complete their pleadings alongwith their documents within the specified time and the matter was scheduled for hearing on 02.02.2012.

5. In response to the said order, the petitioner sent a letter dated 30.01.2012 contending that since the disputes raised by EPIL were, essentially, between a Government company owned by the Central Government and a statutory entity controlled by the Government of Uttar Pradesh, the PMA set up by the Cabinet Secretariat, Government of India

would not be applicable for adjudication of disputes with EPIL. The petitioner further called upon respondent no.3 to inform the petitioner as to any specific orders or directions of any authority or court, by which PMA had been conferred the jurisdiction to decide the claims raised by EPIL. It is asserted by the petitioner that although the petitioner did not receive any response to its letter dated 30.01.2012, respondent no.3 continued to issue orders in aid of the arbitration proceedings commenced between EPIL and the petitioner.

6. It is contended by the petitioner that the said arbitration proceedings before respondent no.3 are wholly without jurisdiction. It is further contended that various Office Memoranda issued with respect to settlement of disputes between one Government Department and another and one government department or a public enterprise are no longer valid by virtue of the decision of the Supreme Court in the case of **Electronics Corporation of India v. Union of India**: (2011) 3 SCC 404. The learned counsel for the petitioner has drawn the attention of this Court to the Office Memorandum (OM) dated 31.12.1991 issued by the Cabinet Secretariat, Government of India whereby a Committee on Disputes (CoD) was constituted, in terms of the direction of the Supreme Court in the case of **ONGC v. Collector of Central Excise, Mumbai**: 1995 Suppl. (4) SCC 541, to ensure that no litigation between the government companies/departments of governments are commenced without being first examined by the CoD. The petitioner referred to the OM dated 24.01.1994 which contained further instructions with regard to the jurisdiction of the CoD constituted by the OM dated 31.12.1991. The petitioner contends that the Office Memoranda

dated 31.12.1991 and 31.12.1994 were superseded by the OM dated 01.09.2011 issued pursuant to the decision of the Supreme Court in *Electronics Cooperation of India (supra)*.

7. The learned counsel for the EPIL stated that whilst the CoD which was constituted by the OM dated 31.12.1991 stood dissolved, the PMA has not been discontinued and continues to be effective and functional. The learned counsel for the EPIL referred to the OM dated 12.03.1985 which, *inter alia*, records the decision that all disputes between government departments or government companies should be resolved amicably or through arbitration and recourse to litigation in courts should be eliminated. The learned counsel for the EPIL also referred to the OM dated 30.03.1989 issued by the Government of India, Ministry of Finance, Bureau of Public Enterprises by virtue of which the PMA was set up. In addition, the learned counsel for EPIL has also drawn the attention of this Court to OM dated 22.01.2004 which also provides for settlement of disputes through PMA.

8. It was further contended by the learned counsel for EPIL that the contract between UPSEB and EPIL included an arbitration agreement which specifically provided that arbitration as suggested by the Bureau of Public Enterprises would be applicable. He submitted that the Bureau of Public Enterprises had suggested an arbitration clause and the disputes have been referred to respondent no.3 in terms of the said agreement.

9. I have heard the learned counsel for the parties.

10. Admittedly, the mechanism for referring the disputes to CoD before commencing any litigation which had been put in place in compliance of the following judgments of the Supreme Court in:- (i) **ONGC v. CCE: 1995**

Suppl. (4) SCC 541; (ii) ONGC v. CCE: 2004 (6) SCC 437; and (iii) OL & Natural Gas Commission v. City & Industrial Development Corporation Ltd., Maharashtra: 2007 (7) SCC 39, was done away with by the judgment of the Supreme Court in *Electronics Corporation (supra)*. Thus, it is now not necessary to seek the approval of the CoD before initiating any litigation. However, the mechanism of PMA has not been dissolved and the parties are at liberty to agree to resolve the disputes through the mechanism of PMA.

11. The PMA was set up by an executive decision to settle commercial disputes between public sector enterprises inter se and public sector enterprises and government departments. The OM dated 30.03.1989 issued by the Bureau of Public Enterprises, Ministry of Industry Government of India communicated the said executive directive. The relevant extract of the said OM is quoted below:

“In supresession of all previous O.M.s issued on this subject Government has now decided to set up a Permanent Machinery of Arbitrators in the Bureau of Public Enterprises to settle all current and future commercial disputes between PSEs *inter-se* as well as between PSE and a Government Department. Disputes concerning Income-tax, Customs and Excise will continue to be settled as heretobefore.

2. Every effort should be made to settle all disputes mutually and reference by either party should be made to the machinery only as a measure of last resort. The machinery will entertain reference after satisfying prima facie existence of a dispute. Since the disputants are required to bear equally the cost of service rendered by the machinery, all effort need be made to avoid reference to the machinery.

3. The Administrative Ministries will be separately issuing directives requiring insertion of an arbitration clause in all existing and future commercial contracts agreements etc. between the parties mentioned.”

12. It is relevant to note that the PMA was set up independent of and prior to the mechanism of CoD which was made effective by virtue of the decisions of the Supreme Court referred above (i.e. the ONGC decisions).

13. By an OM dated 30.06.2009 issued by the Department of Public Enterprises, all administrative ministries were called upon to issue Presidential Directives under the Articles of Associations of Government Companies and under the relevant provisions of enactments establishing statutory corporations, requiring insertion of an arbitration clause in all existing commercial contracts/agreements/supply orders etc. The said OM also contained a draft arbitration clause which, in effect, incorporated the contractual basis for implementing the PMA.

14. An OM dated 22.01.2004 was issued by the Government of India to revise and consolidate various guidelines, which were issued from time to time with respect to the PMA. The said OM dated 22.01.2004 also contained provision for clearance from CoD which had been set up pursuant to the directions of the Supreme Court in **ONGC v. Collector of Central Excise** (*supra*).

15. Article III of the said OM dated 22.01.2004 specified the parties, who could resort to PMA for dispute resolution as well as the disputes and differences in respect of which recourse to the PMA was available. Article III of the said OM reads as under:

“III ENTITLEMENT

(i) In the event of any dispute or difference relating to the interpretation and application of the provisions of commercial contract(s) between CPSEs, Banks, Port Trusts etc. inter se, or CPSE and the Government Department(s) hereto (except a dispute or difference concerning the Railways, Income-tax, Customs and Excise duties), such dispute or difference shall be referred by either party for arbitration to the PMA in the Department of Public Enterprises through the Secretary to the Government of India in-charge of the DPE.

(ii) The mechanism of PMA is primarily meant for Central Government Departments/organizations/enterprises. Therefore, the disputes between State Government Departments/organizations will not be entertained by the PMA. However, if the contract involves a Central Government Department/Organization with any State Government Department/Organization and both the parties have signed Arbitration Clause in favour of PMA as per annexure referred to in subsequent paragraph V(i), in such a situation the PMA shall entertain such dispute(s) for arbitration, if any such reference is received. In case of dispute(s) with a CPSE which has been privatized due to disinvestment or other-wise, it shall also be entertained by the PMA if the same relates to the contract(s) entered into by the parties before privatization, as merely change of ownership of a PSE would not debar the company from the obligation of following PMA procedure.”

16. The annexure to the said OM dated 22.01.2004 also suggested an arbitration clause which reads as under:-

“In the event of any dispute or difference relating to the interpretation and application of the provisions of the contract, such dispute or difference shall be referred by either party for

Arbitration to the sole Arbitrator in the Department of Public Enterprises to be nominated by the Secretary to the Government of India in-charge of the Department of Public Enterprises. The Arbitration and Conciliation Act, 1996 shall not be applicable to 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 a 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.”

17. The OM dated 22.01.2004 was subsequently superseded by an OM dated 12.06.2013, however, the said OM also specifically provided that “*if in a commercial contract between an CPSE and SLPE they agree for arbitration by the PMA for settling the disputes, the PMA guidelines will be applicable on the same terms as applicable to CPSEs*”. The contents of the OM dated 12.06.2003 were in material aspects similar to the contents of the OM dated 22.01.2004 except reference to CoD had been deleted. It is also relevant to note that the arbitration clause as suggested under OM dated 12.06.2013 also remained the same as annexed to the OM dated 22.01.2004.

18. The arbitration clause, which was suggested by the Bureau of Public Enterprises, Ministry of Industry, Government of India by OM dated 30.3.1989 and subsequently followed in the later OM's provided the contractual basis for resorting to the PMA. In the present case, the contract

between the parties included an arbitration agreement which reads as under:-

“the arbitration clause suggested by Bureau of Public Enterprises shall be applicable”.

19. In the given circumstances, it is apparent that the arbitration agreement as suggested under the aforementioned OM's issued by the Department of Public Enterprises is applicable by virtue of the express terms of the contract entered into between EPIL and the petitioner. And, as the arbitration clause incorporates the procedure and mechanism of the PMA, the arbitration between the petitioner and EPIL is now required to proceed in terms of the mechanism as spelt out in the OM dated 22.01.2004 and 12.06.2013. In this view, the contention raised by the petitioner that arbitration before respondent no.3 is without jurisdiction cannot be accepted.

20. For the reasons stated above, the writ petition is dismissed. The parties are left to bear their own costs.

VIBHU BAKHRU, J

AUGUST 21, 2014

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