

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

% Judgment delivered on: 08.12.2014

+ **OMP 1554/2014**

SHADEED IRON AND STEEL LLC PETITIONER

Versus

ORES AND MINERAL CORPORATION RESPONDENT

Advocates who appeared in this case:

For the Petitioner : Mr. Rajiv Nayar, Sr. Advocate with Mr. Navin Chawla, Ms. Sonali Jaitley, Mr. Karan Kanwal and Mr. Rajat Jain, Advocates

For the Respondent:

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER,,J

IA No.24520/2014 (Exemption) and 24521/2014 (Exemption)

1. Allowed subject to just exceptions.

OMP 1554/2014 and IA No.24519/2014 (stay)

2. This is a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the Act) purportedly against the “partial arbitral award dated 03.11.2014”. The learned arbitrator, who has passed the award, is one, Mr. Dato Jude P. Benny. The appointment has taken place upon a request being made in this behalf by the respondent, to the International Chamber of Commerce, Paris (hereinafter in short referred to as ICC).

3. Broadly, the grievance of the petitioner, is that despite the fact the

disputes inter se the parties stand settled, the learned arbitrator at the behest of the respondent has, by virtue of the aforementioned impugned award, decided to proceed with the arbitration.

4. Briefly, the petitioner's grievance arises in the background of the following facts :-

4.1 On 10.11.2013, the respondent made a request to the ICC for appointment of an arbitrator based on an allegation that the petitioner had breached the terms of the contract dated 16.10.2012. Under the said contract, the petitioner was to supply the following material :- Quench Tank Fines (QTF), Sludge Pond Fines (SPF) and Iron Oxide Fines (IOF).

4.2 An addendum dated 24.10.2012 was also executed between the parties which, according to the petitioner, changed the names of the aforementioned material from QTF and SPF to Iron Fine Lot No.1 & 3 respectively, and similarly, from IOF to Iron Ore Pellet Fines.

4.3 It seems that a dispute erupted as between the parties herein as regards the rate of the materials in issue.

4.4 Accordingly, on 13.02.2014, Mr. Dato Jude P. Benny, was appointed as a sole arbitrator by the ICC. The terms of reference, as per the ICC Rules of Arbitration, was signed on 13.02.2014. The arbitration proceedings were registered as : ICC case no.19825/CYK.

4.5 The petitioner avers that upon completion of pleadings in the matter, on 04.05.2014, the respondent via its agent expressed its interest to meet the representative of the petitioner to explore the possibility of an amicable settlement in the matter. A consequent request was also made to the learned arbitrator to keep the proceedings in abeyance.

4.6 The petitioner, it appears, on 14.05.2014, responded constructively and, sought intimation of the time and venue to hold a meeting in that

behalf.

4.7 Resultantly, in a meeting held on 01.06.2014, parties resolved to keep the arbitration proceedings in abeyance and to address outstanding issues by employing commercial means. Apparently, this decision was duly acknowledged by the respondent vide their e-mail dated 04.06.2014.

4.8 In this background, the counsel for the respondent, it appears on 11.06.2014, wrote to his counterpart that a joint request should be made to the learned arbitrator to keep the proceedings in abeyance for a further period of three months.

4.9 Accordingly, on 13.06.2014, the petitioner's counsel made the relevant request to the learned arbitrator.

5. Evidently, by e-mail dated 16.06.2014, the learned arbitrator acceded to the request made by parties herein and conveyed that, he would have no objection to the proceedings being kept in abeyance for a period of three months, that is, till 10.09.2014.

5.1 The ICC Secretariat, on 18.06.2014 issued a similar directive whereby, arbitration proceedings were kept in abeyance till 10.09.2014.

5.2 Evidently, on 07.07.2014, parties negotiated an agreement, which required the petitioner to supply 40,000 MT of Iron Ore Pellet Chips and Fines at a price of USD 65 per dry MT, free on board basis at Sohar. The agreement is subject matter of a sales contract bearing no. 224000015 dated 07.07.2014.

5.3 It appears on the same date i.e., 07.07.2014, the respondent wrote to the petitioner that in case shipment of 40000 MT of Iron Ore Pellet Chips and Fines was made under contract 224000015, dated 07.07.2014 then, it would withdraw the pending arbitration proceedings, i.e., ICC's case no.19825/CYK.

5.4 The petitioner claims that the shipment was made and the consideration amounting to USD 2,761,303.37 in respect of the same was received by it, on 16.09.2014.

5.5 In the interregnum, on 08.09.2014, the learned arbitrator's office sent an e-mail dated 08.09.2014 to the counsels for parties herein seeking a status update qua the pending matter. Apparently, by an earlier communication dated 15.08.2014, the Secretariat of ICC had also made a similar request.

5.6 Consequently, on 08.09.2014, the petitioner's counsel informed the learned arbitrator's office about the factum of the letter dated 07.07.2014 written by the respondent that they would withdraw arbitration proceedings which was subject matter of ICC case no.19825/CYK once they received shipment of 40000 MT Iron Ore Pellet Chips and Fines. The petitioner's counsel further conveyed that they were expecting payment of the shipment made via letter of credit either that day or by the next day i.e., 09.09.2014. Accordingly, it was conveyed once payment was received, it would seek necessary orders.

5.7 The respondent's counsel on the other vide letter dated 09.09.2014 informed the office of the learned arbitrator that though the shipment had been received, there were outstanding issues with regard to the finalization of the demurrage charges which, the respondent had incurred for reasons attributable to the petitioner, and that, this issue remained unresolved.

5.8 The communication concluded with the assertion that parties had not been able to finalize accounts, which was a pre-requisite, as per the understanding arrived at between the parties, for withdrawal of arbitration proceedings.

5.9 On 18.09.2014, the petitioner's counsel confirmed to the office of the learned arbitrator that though they had received payment, since the

respondent had raised issue with regard to demurrage, he would shortly update the learned arbitrator in that behalf.

6. The petitioner's counsel in his e-mail dated 25.09.2014, conveyed as much, that there was in fact an unsettled issue, with regard to demurrage.

6.1 Evidently, the respondent's counsel on 30.09.2014 informed the learned arbitrator that attempts made at amicable resolution of disputes had not resulted in a "fruitful outcome".

6.2 Accordingly, based on written submissions of both sides, the learned arbitrator passed the impugned order.

7. Mr. Nayar, the learned senior counsel who appeared for the petitioner submitted that since disputes had been settled by virtue of agreement dated 07.07.2014 arrived at between the parties, the learned arbitrator could not proceed further in the matter.

7.1 It was Mr. Nayar's contention that if there were disputes with regard to the agreement dated 07.07.2014 then, based on the arbitration clause obtaining in that agreement, a request could be made for fresh reference to the ICC. It was thus, Mr. Nayar's submission, that the, present reference had worked itself out in the background of the fact that parties had arrived at a settlement and the respondent vide letter dated 07.07.2014 had, in so many words, undertaken to withdraw the pending arbitration i.e., arbitration case no.19825/CYK.

8. I have perused the record and also deliberated upon the findings returned by the learned arbitrator. First and foremost, what is to be borne in mind, is that the purported partial award has been termed as a procedural order by the learned arbitrator. Therefore, whether a petition under Section 34 of the Act would lie, may be open to debate as there has been no final determination of rights of parties; even at this interim stage.

8.1 However, notwithstanding this aspect of the matter, and assuming that the impugned order is in the nature of a partial / interim award, what comes to fore, is that, while the petitioner asserts that, with the shipment of the Iron Ore Pellet Chips and Fines in pursuance of agreement dated 07.07.2014, the grievance of the respondent, which is the original claimant, before the arbitrator, came to an end, the respondent asserts to the contrary. As noted in the impugned order, the issue qua demurrage was outstanding; an aspect which was recognized by the petitioner's counsel, in his e-mail dated 25.09.2014, to which I have made a reference above. This aspect has also been noted by the learned arbitrator in the impugned order.

8.2 Therefore, the learned arbitrator, to my mind, has correctly appreciated the issue at hand, which is : as to whether there was enough evidence on record to show that the dispute with regard to satisfactory performance of inter se obligations qua agreement dated 07.07.2014 had been resolved. There is no gainsaying that withdrawal of pending arbitration proceedings (i.e., arbitration case no.19825/CYK) was dependent upon satisfactory performance of obligations undertaken by parties herein, with respect to agreement dated 07.07.2014.

8.3 The learned arbitrator having not been provided requisite evidence in that behalf by the petitioner ruled that there was no settlement as between the parties. Notably, while saying so, the learned arbitrator has quite correctly indicated that the petitioner would be free to take recourse to an appropriate dispute resolution mechanism if, it were of the view that a breach had been committed by the respondent vis-a-vis its obligations undertaken provided for in the agreement dated 07.07.2014.

9. Having regard to the above, I am of the opinion that there is no merit in the petition. The captioned petition and the pending application are

accordingly dismissed.

10. Needless to say, the observations made hereinabove, will not impact the merits of the proceedings pending adjudication before the learned arbitrator.

11. There shall, however, be no order as to costs.

RAJIV SHAKDHER, J

DECEMBER 08, 2014

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