

**HIGH COURT OF TRIPURA
AGARTALA**

Arb.P. No.03/2024

Sri Arun Kumar Dey, Contractor, son of Late Biraj Mohan Dey, resident of A.D. Nagar, Police Line, P.O.-A.D. Nagar-799003, P.S.-A.D. Nagar, District-West Tripura.

..... Petitioner(s).

V E R S U S

The Oil & Natural Gas Corporation Limited (ONGC), represented by its Executive Director, Tripura Asset, Badharghat Complex, Agartala, P.O.-ONGC-799014, P.S.-Amtali, District-West Tripura.

.....Respondent(s).

For Petitioner(s) : Mr. A. Sengupta, Advocate.

For Respondent(s) : Mr. Jyotirmoy Das, Advocate.

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH

Order

05/09/2024

Heard Mr. A. Sengupta, learned counsel appearing for the petitioner and Mr. Jyotirmoy Das, learned counsel appearing for the respondent-ONGC.

2. In terms of Clause 25 of the agreement dated 26.06.2018 in relation to execution of the work "Renovation of Dispensary building at Badharghat Complex, ONGC Tripura Asset, Agartala", petitioner has invoked Section 11(6) of the Arbitration and Conciliation Act, 1996 as amended for appointment of an independent and impartial arbitrator by this Court in the present application. He had approached the competent authority vide letter dated 18.10.2023 (Annexure-4) to which the respondents have replied through letter dated 04.01.2024 (Annexure-5). He invoked the Arbitration clause vide Annexure-6 dated 10.04.2024. The same was replied by the respondents on 13.05.2024 (Annexure-7). The claims

raised by the petitioner are furnished under paragraph-5(x) and are extracted hereunder:

Sl.No.	Particulars	Amount
1.	Whether the claimant-contractor is entitled to get refund of the amount which was levied and recovered as liquidated damage from the bill of the claimant-contractor.	Rs.3,71,587/-
2.	Whether the claimant-contractor is entitled to get refund of the amount which was deducted by the ONGC from the bill of the claimant contractor as water charges.	Rs.33,554/-
3.	Whether the claimant is entitled to get refund of the amount which was withheld from his bill as short payment of EPF by the claimant-contractor.	Rs.1,00,000/-
4.	Whether the claimant-contractor is entitled to get interest @12% per annum on the demanded sum of Rs.5,05,141/- w.e.f. his demand notice dated 18.10.2023 till the date of actual payment.	As would be decided by Arbitral Tribunal
5.	Whether the claimant-contractor is entitled to get cost of Arbitration proceeding and incidental thereto and if so to what extent.	As would be decided by the Arbitral Tribunal
	TOTAL	Rs.5,05,141/-

3. Learned counsel for the petitioner submits that the respondents do not have right to deduct EPF contribution from the pending bills of the petitioner. This claim is, therefore, in the arena of dispute and arbitrable apart from the other claims of refund of certain amounts recovered as liquidated damages from the bill of the claimant contractor and towards water charges, i.e. Rs.3,71,587/- and Rs.33,554/-. Over and above these claims, petitioner is also entitled to interest over the admissible amount. Reference is made to Clause 25 and specifically Clause 25.1.12 which stipulates that if the parties are not able to resolve the dispute through OEC or do not opt for conciliation through OEC, the party may invoke arbitration clause as provided in the contract. He submitted that the respondents are unnecessarily trying to wriggle out of the arbitration clause by excluding the claim of Rs.1,00,000/- allegedly deducted by them against EPF dues of the contractor. The respondents are unnecessarily trying to harp upon Clause 25.2 by excluding the claim relating to EPF dues to

bring the disputes or claims of a value less than Rs.5,00,000/-. The above stand of the respondents itself shows that it is a dispute between the parties and can very well be referred for arbitration. Therefore, this dispute is arbitrable and fit for independent adjudication by an impartial arbitrator appointed by this Court.

4. Respondents have filed a counter affidavit. A specific stand has been taken at paragraph-5 to the effect that the first two disputes mentioned at Sl. No.(i) and (ii) of the claim raised by the petitioner are admitted as deductions made by the respondents from the bill of the contractor which may be considered as dispute totalling Rs.(3,71,587/- + 33,554/-) = Rs.4,05,141/-. However, respondents contend that the third dispute at Sl. No.(iii) of the claim which relates to withholding of Rs.1,00,000/- from the bill due to non-submission of documentary proof regarding statutory deposit of EPF amount by the contractor to the Employee's Provident Fund Organization (EPFO) against the employees appointed by the contractor during execution of the contract is a non-arbitrable dispute. They have also referred to Clause 19B(ii)(i) and 19B(ix) of the General Conditions of Contract (GCC), extracts of which have been enclosed to the counter affidavit. It is their contention that the contractor is supposed to submit the original invoice along with documentary evidence of deposit of EPF, like copy of challans etc. for release of payment as per Clause 8 of the GCC which he has failed to do. As such, the respondent had no other alternative but to withhold the amount for non-compliance of Clause 8 of GCC with necessary intimation sent through Payment Advice which is at page-20 of the petition (Annexure-3). If the amount of Rs.1,00,000/- claimed as EPF dues is reduced from the total claim,

the dispute relating to Clause (i) and (ii) goes out of the purview of Arbitration Clause 25.2 as the value of the claim is less than Rs.5,00,000/-. Learned counsel for the respondent, therefore, submits that the present petition raising dispute for reference to an arbitration cannot be allowed as the terms and conditions of the agreement do not permit reference of dispute less than Rs.5,00,000/- to an independent arbitrator and moreover, disputes relating to EPF claims are non-arbitrable.

5. Learned counsel for the petitioner in reply submits that the respondent has no authority to deduct any amount in lieu of EPF dues payable by the contractor and withhold it on the ground that relevant documentary proof has not been submitted by him. As such, this dispute is in the arena of arbitrable disputes. Therefore, reference may be made to an independent arbitrator for adjudication of the claims raised by the petitioner.

6. I have considered the submissions of learned counsel for the parties and taken note of the relevant materials placed on record. I have also taken note of the nature of disputes raised by the petitioner in the light of the rival contentions of the parties that certain disputes accepted by the respondent are arbitrable but disputes relating to EPF claims are non-arbitrable.

7. Relevant Arbitration and Conciliation Clauses of the agreement dated 26.06.2018 are quoted hereunder which are relevant for the purposes of consideration of the case:

CLAUSE 25: ARBITRATION & CONCILIATION

25.1 Resolution of disputes through conciliation by OEC (Not applicable in cases valuing less than Rs. 5 lakhs):

If any dispute, difference, question or disagreement arises between the parties hereto or their respective representatives or assignees, in connection with construction, meaning, operation, effect, interpretation of the contract or breach thereof which parties are unable to settle mutually, the same may first be referred to conciliation through Outside Expert Committee ("OEC") to be constituted by CMD, ONGC as provided hereunder.

25.1.12 If the parties are not able to resolve the dispute through OEC or do not opt for conciliation through OEC, the party may invoke arbitration clause as provided in the contract.

25.2 Arbitration (Applicable in case of supply order/contracts with firms, other than Public Sector Enterprises) (Not applicable in cases valuing less than Rs.5 lakhs).

25.2.1 A party wishing to commence arbitration proceeding shall invoke Arbitration Clause by giving 60 days notice to the other party. The notice invoking arbitration shall specify all the points of disputes with details of the amount claimed to be referred to arbitration at the time of invocation of arbitration and not thereafter. If the claim is in foreign currency, the claimant shall indicate its value in Indian Rupee for the purpose of constitution of the arbitral tribunal.

25.2.2 The number of the arbitrators and the appointing authority will be as under:

Claim amount (excluding claim for interest and counter claim, if any)	Number of arbitrators	Appointing authority
Upto Rs. 50 lakhs	Sole Arbitrator to be appointed from a panel of retired officers from ONGC/other PSU/Non- PSU organisations	ONGC(Note:- ONGC will forward a list containing names of five retired officers from ONGC/other PSU/Non-PSU organizations for selecting one from the list who will be appointed as sole arbitrator by ONGC)
Above Rs.50 lakhs to Rs. 5 Crores	Sole Arbitrator to be appointed from a panel of retired Jurists	ONGC (Note:- ONGC will forward a list containing names of five jurists to the other party for selecting one from the list who will be appointed as sole arbitrator by ONGC)
Above Rs. 5 Crores	3 Arbitrators	One arbitrator by each party and the 3 rd arbitrator, who shall be the presiding arbitrator, by the two arbitrators. ONGC will appoint its arbitrator from the panel of jurists.

8. From the claims raised by the petitioner, it is apparent that one of the claims relates to refund of the amount deducted from the contractor's bill as short payment of EPF by the claimant-contractor. In this regard, it is relevant to refer to Clause 19 which relates to compliance of Labour Laws by the

contractor and in particular, Clause 19B, 19B(i), 19B(ii), 19B(ix)(a) and 19B(xi) which are extracted hereunder:

"CLAUSE 19B: PAYMENT OF WAGES:

(i) The Contractor shall pay to his workmen, employed by him not less than minimum wages fixed by the appropriate labour authority from time to time.

(ii) The Contractor shall comply with the provision of all applicable laws including labour laws, regulations and notifications, including:

a) The Minimum Wages Act, 1948 Rules, Orders, and Notifications issued thereunder from time to time, from the office of Regional Labour Commissioner/Asstt. Labour Commissioner, Govt. of India.

b) The Contract Labour (Regulation & Abolition) Act, 1970 with Rules, orders and notifications issued thereunder from time to time.

c) The Industrial Disputes Act, 1947 with Rules, Orders and Notifications issued thereunder from time to time.

d) The Workmen's Compensation Act, 1923 with Rules, Orders and Notifications issued thereunder from time to time.

e) The Mines Act, 1952 (if applicable), Factories Act, 1948 or Shops and Establishment Act, whichever applicable with Rules, Orders and Notifications issued thereunder from time to time.

f) The Payment of Gratuity Act, 1972 with Rules, Orders and Notifications issued thereunder from time to time.

g) The Payment of Bonus Act, 1965 with Rules, Orders and Notifications issued thereunder from time to time.

h) Payment of Wages Act, 1936 with Rules, Orders and Notifications issued thereunder from time to time.

i) The Employees Provident Fund & Misc. Provisions Act, 1952 with Rules, Orders and Notifications issued thereunder from time to time.

j) ESI act 1948 (if applicable).

k) The Maternity Benefit Act, 1961.

l) Inter State Migrant Workmen Act, 1979.

m) All other Acts/Rules/regulations, Bye-Laws, Orders, Notifications etc. present or future, applicable to the CONTRACTOR from time to time, for executing the work.

19B(ix)(a).

The Project Manager/Engineer-in-charge shall have the right to deduct from the moneys due to the contractor any sum required or expected to be required for making good the loss suffered by a worker or workers by reason for non-fulfilment of the conditions of the contract for the benefit of the workers, non-payment of wages or of deductions made from his or their wages which are not justified by their terms of the contract or non-observance of the Regulations.

19B(xi).

The laws aforesaid shall be deemed to be part of his contract and any breach thereof shall be deemed to be a breach of this contract."

9. Clause 8 which relates to Invoice submission is also extracted hereunder:

"Clause 8: Invoice Submission"

8.1 The contractor shall submit invoices(s) once in each month along with four copies, with all required supporting documents and details of the said work to ONGC Representative for certification of the said invoice, for approval of the amount payable and payment thereafter.

The payment to the agency will be made once in a month, on the basis of actual days for which supervisor services were provided for both type of categories. Work is to be performed for about 8 hours daily during execution of work at various sites of ONGC, Tripura Asset Agartala, (excluding the journey time up to that site of execution) however the activity may prolong even after evening depending upon the nature of activity and/the requirement at site). However, in certain cases, the site supervision engineer may have to work for a longer period, in case of the execution of any critical activity like concreting of main foundation etc.

The Original invoice should also accompany the following documents/details:

- (i) Along with first invoice:
Following documents/details should be invariably furnished along with the first invoice:
 - a) Copy of valid registration under the GST rules.
 - b) Particulars required for making payments through 'Electronic Payment Mechanism', in accordance with clause 8.7 below.
 - c) Mobile No. (Optional).
 - d) E-mail ID.
- (ii) Periodical/Monthly Payment:
 - a) Invoice (i.e., Tax invoice as per relevant GST rules, in original and duplicate, clearly indicating GST registration number, Service Classification, Rate and amount of GST shown separately).
 - b) Insurance policies and proof of payment of premium (As applicable).
 - c) Details of statutory payments like EPF and ESI (as per clause below), etc., (As applicable).
 - d) Undertaking by the contractor regarding compliance of all statutes.
 - e) Any other document specifically mentioned in the Contract, or supporting documents in respect of other claims (if any), permissible under the contract.
 - f) Agency shall submit invoice for actual technical supervisor working days each site wise separately in consultation with Engineer in-charge/ Project manager for financial accounting.
 - g) Attendance signed by EIC."

10. On a close scrutiny of the relevant clauses of the agreement, the first inference which can be drawn is that if the value of the case is less than Rs.5 lakhs, arbitration is not applicable in case of supply orders/contracts with firms, other than Public Sector Enterprises under Clause 25.2. A reading of Clause 19B and its sub-clauses extracted above shows the liability of the contractor to comply with provisions of applicable Labour Laws, regulations and notifications which include other Labour Acts such as, Minimum Wages

Act, 1948, Contract Labour (Regulation & Abolition) Act, 1970, Industrial Disputes Act, 1947, the Workmen's Compensation Act, 1923, the Mines Act, 1952 (if applicable), Factories Act, 1948 (if applicable), the Payment of Gratuity Act, 1972, the Payment of Bonus Act, 1965, the Payment of Wages Act, 1936 and the Employees Provident Fund and Misc. Provisions Act, 1952 also with Rules, Orders and Notifications issued thereunder from time to time.

Sub-clause (ix)(a) of Clause 19B provides that the Project Manager/Engineer-in-charge shall have the right to deduct from the moneys due to the contractor any sum required or expected to be required for making good the loss suffered by a worker or workers by reason for non-fulfilment of the conditions of the contract for the benefit of the workers, non-payment of wages or of deductions made from his or their wages which are not justified by their terms of the contract or non-observance of the Regulations.

Sub-clause (xi) of Clause 19B provides that the aforesaid laws are deemed to be part of the contract and any breach thereof shall be deemed to be a breach of the contract.

Under Clause 8, it is the obligation of the contractor to submit invoices including details of statutory payments like EPF and ESI as applicable.

There are no pleadings to the effect that petitioner has duly deposited the EPF contributions with the EPFO as per the Act of 1952. Petitioner has also not enclosed documentary proof as regards payment of such dues in lieu of which petitioner claims refund as deductions have been made by the respondent from his bills in the capacity of "employer" as per Section 2(e) of the Act.

11. Learned counsel for the petitioner has raised a question that the respondents are not entitled to deduct any contribution towards Employees Provident Fund in terms of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and as such, withholding of the said amount is illegal. The terms and conditions of the agreement/ contract between the parties stipulate deduction on the part of the employer, i.e. the respondent of sums which are for the benefit of workers from the dues of the contractor due to non-payment of wages or of deductions made from his or their wages. The scheme of the Act of 1952 provides a complete mechanism on the determination of the liability of the employer or the contractor of making such contributions and the applicability of the Act. Such a dispute relating to either the applicability of the Act of 1952 upon the parties herein or the liability of the employer or the contractor to make deductions and deposit the contributions to the EPF authorities fall in the adjudicatory functions of the statutory authorities under the relevant statute like the Act of 1952 by express and necessary implication. As such, the legislative intention is to exclude arbitration in such matters is apparent since the statute provides for determination of the rights and liabilities to be dealt with by the specified Courts or Tribunals or authorities duly constituted in that behalf under the said legislation.

12. The Apex Court in the case of *Vidya Drolia & others vrs. Durga Trading Corporation* reported in (2021) 2 SCC 1 has clearly delineated sovereign functions of the State which are inalienable and non-delegable and as such, non-arbitrable in comparison to arbitrable disputes involving commercial

activities, economic adventures etc. The opinion of the Apex Court is extracted hereunder:

“50. Sovereign functions of the State being inalienable and non-delegable are non-arbitrable as the State alone has the exclusive right and duty to perform such functions. [Ajar Raib, “Defining Contours of the Public Policy Exception — A New Test for Arbitrability”, Indian Journal for Arbitration Law, Vol. 7 (2018) p. 161.] For example, it is generally accepted that monopoly rights can only be granted by the State. Correctness and validity of the State or sovereign functions cannot be made a direct subject-matter of a private adjudicatory process. Sovereign functions for the purpose of Arbitration Act would extend to exercise of executive power in different fields including commerce and economic, legislation in all forms, taxation, eminent domain and police powers which includes maintenance of law and order, internal security, grant of pardon, etc. as distinguished from commercial activities, economic adventures and welfare activities. [Common Cause v. Union of India, (1999) 6 SCC 667 : 1999 SCC (Cri) 119 and Agricultural Produce Market Committee v. Ashok Harikuni, (2000) 8 SCC 61.] Similarly, decisions and adjudicatory functions of the State that have public interest element like the legitimacy of marriage, citizenship, winding up of companies, grant of patents, etc. are non-arbitrable, unless the statute in relation to a regulatory or adjudicatory mechanism either expressly or by clear implication permits arbitration. In these matters the State enjoys monopoly in dispute resolution.

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58. Consistent with the above, observations in Transcore [Transcore v. Union of India, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116] on the power of the DRT conferred by the DRT Act and the principle enunciated in the present judgment, we must overrule the judgment of the Full Bench of the Delhi High Court in HDFC Bank Ltd. v. Satpal Singh Bakshi [HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] , which holds that matters covered under the DRT Act are arbitrable. It is necessary to overrule this decision and clarify the legal position as the decision in HDFC Bank Ltd. [HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] has been referred to in M.D. Frozen Foods Exports (P) Ltd. [M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd., (2017) 16 SCC 741 : (2018) 2 SCC (Civ) 805] , but not examined in light of the legal principles relating to non-arbitrability. The decision in HDFC Bank Ltd. [HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] holds that only actions in rem are non-arbitrable, which as elucidated above is the correct legal position. However, non-arbitrability may arise in case of the implicit prohibition in the statute, conferring and creating special rights to be adjudicated by the courts/public fora, which right including enforcement of order/provisions cannot be enforced and applied in case of arbitration. To hold that the claims of banks and financial institutions covered under the DRT Act are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act. Therefore, the claims covered by the DRT Act are non-arbitrable as there is a prohibition against waiver of

jurisdiction of the DRT by necessary implication. The legislation has overwritten the contractual right to arbitration.”

13. Therefore, the contention of the respondent that the claim for refund of Rs.1 lakh deducted towards EPF contributions is non-arbitrable and not fit to be referred to for arbitration is correct and justified. In such circumstances, subtraction of claim of Rs.1 lakh under Clause (iii) would bring the value of the dispute below Rs.5 lakhs, in more specific terms Rs.4,05,141/-, apart from the last claim of interest on refund on such amount if adjudicated in favour of the claimant, which cannot be referred to arbitration in view of Clause 25.2 of the agreement between the parties noticed above since the value of such claims are less than 5 lakhs.”

14. In such circumstances, this Court is of the considered view that not only the claim relating to refund of EPF contributions is in the arena of non-arbitrable disputes but the remaining claims are excepted from arbitration under Clause 25.2 of the agreement dated 26.06.2018 entered into between the parties.

15. As such, this Court does not find any merit in the instant application seeking reference of the claims to an independent arbitrator in exercise of the powers under Section 11(6) of the Arbitration and Conciliation Act, 1996 (as amended). Petition is accordingly dismissed.

Pending application(s), if any, shall also stand disposed of.

(APARESH KUMAR SINGH), CJ

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