

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

% **Judgment reserved on: 6th April, 2016**
Judgment pronounced on: 9th May, 2016

+ **ARB.P.No. 678/2015**

SKIPPER LIMITED Petitioner
Through Mr. Sudhir Nandrajog, Sr.Adv. with
Mr.P.Kapur & Mr.Pritpal Singh
Nijjar, Advs.

versus

ABIR INFRASTRUCTURE PRIVATE LIMITED Respondent
Through Mr.Arun Khatri, Adv. with
Mr. Anshul, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the present arbitration petition under the provisions of Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator for adjudication of the disputes having arisen between the parties.
2. The petitioner is a company duly incorporated and existing under the provisions of the Companies Act, 2013 having its registered office at Calcutta who is claiming itself as one of the leading manufacturer and supplier of Towers (Telecom and transmission), PVC, GI and SWR Pipes and Fittings.

3. The respondent is in the business of tower erection and procurement on behalf of its client M/s Teesta Valley Power Transmission Limited, a Government of India Undertaking, for the Teesta Project at Kishanganj and having its registered office at New Delhi who on 13th April, 2011 awarded the petitioner the Purchase Order bearing Ref No. PO/ABIR/TL/SL/053 for manufacture, galvanising, testing and supply of tower structures for Project 400kV Quad D/D Transmission Line, Teesta III- Kishanganj.

4. The Clause 3 of the above mentioned Purchase Order provided the terms and conditions of Quantity and Delivery Schedule which were duly adhered by the petitioner at all times, which read as follows:-

"3. Quantity and Delivery Schedule:

Quantity 5000 MT (+ or_ 20%). We may consider further quantity based on timely delivery and as per project requirement.

First lot of manufacturing schedule month wise enclosed for a quantity of 3835 MT as Annexure 1.

Delivery Schedule:

- Proto assembly of DA +9M Extension shall be offered for inspection by 30.05.2011.

- Proto assembly of DDH+9 M Extension tower shall be offered for inspection by 15.06.2011.

You shall supply DA towers in lots of 30 No.s of completed towers.

You shall supply DDH towers in lots of 10 No. of completed towers.

-You shall supply 2500 MT/ Month from 01.06.2011 onwards.

- You shall ensure Body/Leg Extensions are delivered first.

Above delivery schedule is tentative and you shall ensure that the deliveries of tower structures match project requirements in close coordination with our project head so that to avoid any accumulations of materials at site."

5. The said Clause 3 in the Purchase Order was amended subsequently through Amendment No.I PO/ABIR/TL/SL/053/A1 dated 20th April, 2011, thereafter Amendment No. II PO/ABIR/TL/SL/053/A2 dated 18th October, 2011 and finally Amendment No. III PO/ABIR/TL/SL/053/A3 dated 18th January, 2012 to the extent that quantity of 1456 Metric Tonnes of DDH towers was added. The petitioner maintains that the said order of 1456 Metric Tonnes of DDH Towers were ready for delivery within time. An inspection of goods was also carried out as per terms of the Purchase Order dated 13th April, 2011.

6. The petitioner in course of its business issued the Proforma Invoice dated 24th May, 2012. Despite goods being made available within time by the petitioner as per the delivery schedule under the Purchase Order and consequent issuance of the Proforma Invoice, the respondent failed to take delivery of the goods and failed to open a letter of credit in terms of the Purchase Order. The petitioner thereafter sent out several reminders to the respondent informing of the goods ready for delivery and for opening letter of credit. It is contended on behalf of the petitioner that the petitioner has suffered substantial financial losses due to considerable delay on part of the respondent taking delivery and making payments for the goods, at times more than a year, though the petitioner has maintained the delivery schedule as per the Purchase Order in a timely and effective manner.

7. It appears from the pleading that later on, a Memorandum of Understanding dated 3rd January, 2013 was entered between the petitioner, the respondent and the client of the respondent, M/s Teesta Valley Power Transmission Limited, wherein the delivery terms for remainder goods with the petitioner not yet lifted by the respondent were revised and the delay on part of the respondent was acknowledged and admitted in the following manner:-

“During the last eight months “The Customer” is not able to lift the balance Tower Parts which is ready at the premises of “The Vendor”.

8. It is stated that due to the considerable delay in taking delivery of the ready goods, an interest amounting to Rs. 1,48,99,655/- had accrued upon the respondent on the final payment of Rs. 9,37,66,336/- in terms of Amendment No. III of the Purchase Order dated 18th January, 2012. Thereafter, the petitioner sent a Claim Letter dated 12th July, 2013 for the interest accrued due to the delayed payment along with the Debit Note for the same amount.

9. On 4th November, 2013, the petitioner sent the respondent another Claim Letter reminding the respondent of its liability to clear the accrued interest on the delayed payment. In addition to this claim, owing to the delay on part of the respondent to take delivery of the goods, the petitioner also raised claim of an amount of Rs. 20,00,000/- towards assessed damages incurred by way of storage due to the negligence on part of the respondent. Hence, the subsequent Claim Letter dated 4th November, 2013 had a total claim amount of Rs. 1,68,99,655/-.

10. By letter dated 15th November, 2013, the respondent replied to the claim letters, while rejecting the claims of the petitioner by giving the reasoning that no further payments arose beyond those as recorded in the Memorandum of Understanding dated 3rd January, 2013, as full and final payments for materials were released.

11. It is submitted by the petitioner that the respondent had misunderstood the purpose of the Memorandum of Understanding dated 3rd January, 2011, which merely revised the rates for the tower materials under the Purchase Order dated 13th April, 2011 and did not provide for full and final payment terms. The respondent on basis of such poor understanding has attempted to absolve itself of its liabilities accrued due to its own negligence and defects in performance of the Purchase Order dated 13th April, 2011.

12. The petitioner has denied the respondent's interpretation of the terms of Purchase Order and the Memorandum of Understanding has given rise to a dispute well within the terms of the Purchase Order.

13. These are the main submissions of the parties. Let me deal with the rival arguments of both the parties.

14. The Clause 17 of the Purchase Order dated 13th April, 2011 provides that:-

"17) Arbitration:

All disputes or differences both the parties will discuss mutually to arrive at settlement. Un-resolved disputes will be referred to arbitration in the manner provided herein below:

The arbitration shall be conducted by three arbitrators, one each to be nominated by vendor and vended and third to be appointed by both the arbitrators in accordance with the Indian Arbitration

Act. If either of the parties fails to appoint its arbitrator within 60 days after the receipt of a notice from the other party invoking the Arbitration Clause, the arbitrator appointed by the party invoking the arbitration clause shall become the sole arbitrator to conduct the arbitration.

The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 or any statutory modification thereof. The venue of arbitration shall be New Delhi.

The decision of the majority of the arbitrators shall be final and binding upon the parties. In the event of any of the aforesaid arbitrators dying, neglecting, resigning or being unable to act for any reason, it will be lawful for the party concerned to nominate another arbitrator in place of outgoing arbitrator.

During settlement of disputes and arbitration proceedings, both parties shall be obliged to carry out their respective obligations under the contract.”

15. As per clause 17 of the Purchase Order dated 13th April, 2011 the parties were to appoint their respective Arbitrators and the Arbitrators were further to appoint the Presiding Arbitrator. The petitioner while invoking clause 17 issued a legal notice dated 7th July, 2015 calling upon the respondent to nominate their Arbitrator. The petitioner nominated Senior advocate Mr. Rana Mukherjee as their Arbitrator. However, despite giving response to the legal notice, the respondent has failed to nominate their Arbitrator as it was envisaged under the purchase order.

16. The respondent has admittedly denied the claims of the petitioner by stating that there is no arbitral dispute in view of Memorandum of Understanding dated 3rd January, 2013 wherein full and final settlement was arrived at by settling all the disputes. All the payments were discussed

and nothing is due now. The claims of the petitioner are false and frivolous.

17. The entire dispute now revolves around the payment of interest accrued on delayed payment. It is not denied by the petitioner about the execution of Memorandum of Understanding dated 3rd January, 2013 which was executed between the petitioner, respondent and Teesta Valley Power Transmission Limited (TVPTL).

18. The contents of MOU reads as under:-

“MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is made on 03/01/2013 between **M/s Skipper Limited**, having registered office at 3A, Loudon Street, 1st Floor, Kolkata 700017 (hereinafter referred to us “**The Vendor**”) and **M/s Teesta Valley Power Transmission Limited** having registered office at 145 & 146 Udyog Vihar Phase-IV, Gurgaon 122015, Haryana (hereinafter referred to as “**The Client**”) and M/s **Abir Infrastructure Private Limited**, having registered office at SF-2, Bhikaji Cama Bhawan, Bhikaji Cama Place, New Delhi-110066 (hereinafter referred to as “**The Customer**”) AND whereas in accordance with the terms of **Purchase Order** No.PO/ABIR/TL/SL/053 dated 13.04.2011 & PO/ABIR/TL/SL/053/A1 dated 20.04.2011 & PO/ABIR/TL/SL/053/A2 dated 18.10.2011 & PO/ABIR/TL/SL/053/A3 dated 18.01.2012 issued by “The Customer” to “The Vendor” for supply of Tower Parts for the project “400 Kv Quad D/C Transmission Line, Teesta III-Kishanganj” awarded by The Client”.

That “The Vendor” has manufactured and supplied Tower Parts to “The Customer” against the above purchase orders. During last eight months “The Customer” is not able to lift the balance Tower Parts which is ready at the premises of “The Vendor”. Given below the details of PO no./date/quantity/type of tower

etc. and inspection carried out earlier and recently with quantities.

PO Number & Date	Materials	MT	Amount in Rs.*	Status
PO/ABIR/TL/S L/053 dated 13.04.2011	Proto Towers	105.357	61,52,884/-*	Dispatched 56.69 MT Balance 48.667 MT
PO/ABIR/TL/S L/053 A3 dated 18.01.2012	Tower DD-20+ Extns	1395.36	8,70,21,559/-*	Dispatched 6.49 MT Balance 1388.87 MT 1 st Inspection 472.405 MT cleared on 21-06-2012 2 nd Inspection 692.337 MT cleared on 10-07-2012 3 rd Inspection 230.618 MT cleared on 24-12-2012
PO/ABIR/TL/S L/053 dated 13.04.2011	Proto Assembly Charges	105.357	5,91,894/-	
Total			9,37,66,336/-	

* The amount given in the above table represents 90% of ex-works price for supply and 100% of taxes and duties **but does not include Freight & Insurance.**

That the **Freight & Insurance shall be charged extra** at the rates mentioned here in below depending upon the requirement of materials by “the Client” at their different stores.

- 1. Siliguri Store:- Rs.1500 Per MT**
- 2. Dung Dung Store- Rs.3300 per MT**

That “The Client” is in need of the balance tower materials to complete the line and accordingly approached “the Vendor” directly for supply of Balance Tower Materials on the following terms.

A) "The Customer" will inform the details of Invoicing and delivery address to "the Vendor"

B) delivery shall be started on receipt of duly **accepted Proforma Invoice** being issued by "The Vendor" on "The Customer"

C) "The Vendor" will supply the Balance Tower Materials **DIRECTLY** to "the Customer"

D) "The Vendor" agrees to send his representative to the Customers respective site stores prior to dispatch for assistance in tower storage.

E) "The Client" agrees to pay the 100% of the Invoice Amount which includes 90% of ex-works price plus 100% taxes, Duties and Freight & Insurance.

F) "The Client" will make full **payment** of the amount **DIRECTLY** to "the Vendor", immediately upon receipt of the tower material at site and receipt of dispatch documents from "The Customer". "The Customer" has agreed to forward accept dispatch documents to the client within 7 days of bill submission along with receipted LR by vendor.

G) 10% advance bank guarantee will be valid till joint inspection completed and shortages if any replenished by vendor.

That the expressions "The Vendor" & "The Client" & "The Customer" herein used shall, unless such an interpretation is repugnant to the subject or context, include their respective successors and assignees.

IN WITNESS WHEREOF the undersigned has herein set his hand on this 26th day of December, 2012.

Yours faithfully

For and on behalf of "The Vendor"

WITNESS
Signature
Name

For SKIPPER LIMITED
Sd/-
(SHARAN BANSAL)

Office Address.....

Director”

19. The petitioner is not denying the contents of MOU or its obligation. The submissions of the petitioner are that despite of MOU, the material/goods were not lifted by the respondent in time due to which the petitioner had to suffer financial loss and are entitled to recover compensation. The respondent’s contention is that as per MOU, 100% payment was made and after signing of MOU dated 3rd January, 2013 the same tantamount to novation and thus, any claims can only be raised in terms of MOU dated 3rd January, 2013. In view of this, invocation of Clause 17 of the Purchase Order dated 13th April, 2011 is illegal and baseless.

20. *Prima facie* it appears to the Court that the nature of claims in both letters dated 12th July, 2013 and 4th November, 2013 are different; there is no force in submissions of the respondent that once the MOU was signed and which superceded the original Purchase Order, no claim can be raised under the Purchase Order.

21. At this stage, it is not proper to express any opinion on merit however, one thing is clear in my mind that the claim(s) raised by the petitioner in its letter dated 12th July, 2013 and 4th November, 2013 are to be adjudicated as there are allegations that despite of MOU, the material was not lifted by the respondent in time and the petitioner has allegedly suffered loss.

22. Without arriving at any conclusion, I am of the view that the prayer made in the petition cannot be rejected without adjudication. Thus, the same is allowed.

23. Accordingly, the matter is referred to the Delhi International Arbitration Centre ('DAC') who will appoint an Arbitrator in accordance with the provisions of the Act. The Arbitrator to adjudicate the disputes arising out of the agreement in question between the parties including their claims and counter-claims.

24. The arbitration shall take place under the aegis of DAC. The Arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The fees of the learned Arbitrator shall be in terms of the Delhi International Arbitration Centre (Administrative Cost Arbitrator's Fees) Rules. The petitioner to appear before the DAC on 27th May, 2016 for directions.

25. The petition is accordingly disposed of.

Copy of this order be given *dasti* to the learned counsel for the parties and a copy thereof be delivered to the Additional Coordinator, DAC forthwith.

(MANMOHAN SINGH)
JUDGE

MAY 09, 2016