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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION NO. 1 OF 2015

Marcotex Engineers & Consultants ...Petitioner
Versus
ABB India Ltd ...Respondent

Mr Yogendra Singh, *with Sagar Thakkar i/b Auris Legal for the Applicant.*
Mr Kedar Wagle, *with Sagar Wagle & Sayali Puri for the Respondent No.4.*

CORAM: G.S. PATEL, J
DATED: 7th March 2017

PC:-

1. Heard.

2. This is an application under Section 11 of the Arbitration and Conciliation Act, 1996. ONGC floated a tender for the operation and maintenance of its HVAC Systems of Offshore installations at ONGC group A, D & F for a three-year period. The Respondent, ABB India Ltd ("**ABB**") submitted a tender. It was short listed. It was then awarded the contract for this work. On 5th May 2005, ABB entered into a sub contract with the Petitioner ("**Marcotex**"). This first sub-contract had ONGC's consent and approval.

3. On 19th April 2004, the parties entered into an MoU. There seem to have been some difficulties with the performance of the first contract. Nonetheless Marcotex says it performed its obligations although an amount of over Rs.35 lakhs remained unpaid at the time.

4. This takes us to the genesis of the present dispute, and this is a second tender No.921BC08802 floated by ONGC for another four years for the same kind of work. This was a tender of 15th October 2009 and, as in the case of first contract, also contained a specific tender condition requiring ABB to appoint a sub-contractor. On Marcotex's insistence, ABB cleared all pending payments against the first contract. Given its past experience, Marcotex insisted on the parties entering into an MoU setting out all the terms and conditions of their agreement. Accordingly, the parties executed an MoU dated 23rd February 2009. A copy of this is at Exhibit "A". This is on non-judicial stamp paper of Rs.100/-, a matter of some consequences to the defence. ABB was ultimately the chosen bidder for ONGC's second tender. It seems that between the parties, since ABB had reduced its quote or offer to ONGC, ABB also required Marcotex to reduce its rates. After some negotiations, ONGC finally approved Marcotex as a sub-contractor for the second contract by a letter dated 9th July 2009.

5. Under Clause 7 of the MOU, Marcotex was to raise invoices periodically on ABB. These were to be paid within 45 days of the invoice, failing which the invoices would carry interest at the rate of 24% pa. Clause 19 of the MoU contained a general arbitration clause. This specified the venue of the arbitration as Mumbai and said the parties would be referred to the arbitration under the provisions of Arbitration Act.

6. The term of the second contract, and, consequently, of the MoU, was still 21st May 2013. At the end of that period, a sum of Rs.1,56,77,039/- was still due to Marcotex. ABB paid an amount of Rs.13,40,225/- on 18th December 2013 and Rs.10,37,973/- on 3rd January 2014. Thus an amount of Rs.1,32,98,843/- remained due. Marcotexs demanded the amount through its Advocate's letter dated 23rd December 2013. Marcotex then filed a Petition under Section 9 of the Arbitration and Conciliation Act 1996. That is still pending and I will take it up separately. By its letter dated 29th October 2014, ABB invoked arbitration. A copy of this letter is at Exhibit "F" to the present Petition. This Petition was filed on 3rd December 2014.

7. I have heard Mr Singh for Marcotex and Mr Kedar Wagle for ABB at some length. Mr Wagle raises three principal defences. The first is that the present claim is not under the MoU at all but is under unpaid invoices. According to him the invoices contain no arbitration clause themselves.

8. The answer from Mr Singh is that this factually incorrect. Purchase orders placed periodically by ABB on Marcotex specifically not only reference the MoU 23rd December 2009, but in terms said that the conditions of the MoU would apply.

9. It is not possible to accept Mr Wagle's argument based on the decision of the Supreme Court in *MR Engineers & Contractors Pvt Ltd v Som Datt Builders Ltd*[1] That the requirements of Section 7(5) of the Arbitration Act require a specific reference in the invoices of the purchase orders to the arbitration clause in the MoU. In the case before the Supreme Court, the Public Works Department of the Government of Kerala entrusted certain road building contracts to the respondent before the Supreme Court. The appellant before the Supreme Court was the respondent's sub-contractor. The submission before the Supreme Court was that the terms of the sub-contract embodied the terms and conditions of the main contract and that included the arbitration clause. It was in that context that the Supreme Court observed that the contract should contain a clear reference to the documents containing the arbitration clause and that an arbitration clause from another contract can be incorporated only by specific reference. This is akin to the sub-contractor before me claiming that the arbitration clause in the contract between ONGC and ABB could also apply to the MoU between Marcotex and ABB. But that is not the case. The case before me simply invokes the arbitration clause in the MoU between Marcotex and ABB and it contains its own arbitration clause. The entire argument from Mr Wagle is postulated on an incorrect premise that the invocation of arbitration is under the invoices, and that these invoices have nothing to do with the MoU. As we have seen, the invoices were only a method adopted by the parties for tracking bills, raising demands and accounting for payments. But for the MoU, there would have been no purchase orders or invoices. The placing of the purchase orders by ABB and Marcotex's invoices required

1(2009) 7 SCC 696.

ONGC's approval of Marcotex as a sub-contractor. This approval was not given to the purchase orders or invoices. It was accorded to the MoU. This was not a case where without any sub-contract being in place, ABB issued individual stand-alone job-work purchase orders on Marcotex. It could not have done so. Instead, we have a governing MoU and it is in the operation or working of the MoU that invoices came to be raised. This submission by Mr Wagle must therefore be rejected, and it is therefore entirely inconsequential whether these purchase orders or invoices mentioned the Arbitration Clause or not. It seems to me most inequitable and unjust to allow a party that solemnly entered into a contract, issued purchase orders on the basis of that contract, accepted invoices under that contract (some of which it paid), to turn around and say the contract does not govern and that its own purchase orders do not contain every term of the governing contract and hence the provisions of the contract are to be disavowed. No law requires every Purchase Order or Invoice to embody every single term of a contract under and pursuant to which they are issued. Those purchase orders and invoices are nothing more than an accounting mechanism. It is the principal contract or MoU that will govern the rights and obligations of the parties.

10. The only other submission made on by Mr Wagle is of the MoU being insufficiently stamped with Rs.100/-. He says that Article 63 of the Stamp Act will apply as this is a works contract and since parties knew it was bound to exceed Rs.10 lakhs the maximum stamp duty of Rs.5 lakhs ought to have been paid. He relies on the definition of a works contract under the Maharashtra Value Added Tax Rules and also submits that both parties have paid works contract tax. Mr Singh points out the value of the contract was unknown and it is for this reason that there is no question of making payment of some *ad hoc* figure of stamp duty. None are able to speak to a stated value of the MoU. Admittedly, that document would need no registration. *SMS Tea Estates (P) Ltd v Chandmari Tea Co (P) Ltd*,[2] related to a question of a lease, and that document required both registration and payment of stamp duty assessed on the value of the property in question. That is not the question here.

11. Mr Singh also refers to the Supreme Court decision in *Chloro Controls India Pvt Ltd v Seven Trent Water Purification Inc & Ors*[3] to say that unless the Court concludes that the arbitration agreement is null and void, inoperative or incapable of being performed, parties must be referred to Arbitration. This is not a question merely of determining the existence of an arbitration agreement. What Mr Wagle seems to submit is that the arbitration agreement that exists is unenforceable. That is qualitatively a very different thing.

12. The present arbitration agreement is, in my view, sufficient enough to cover the present dispute as well and there is absolutely no reason not to give effect to it. In my view it would be thoroughly unjust and inequitable if, after having solemnly signed the agreement and acted on it, ABB was now to be permitted to deny the binding nature or efficacy of that very agreement.

13. Marcotex invoked arbitration and nominated Mr Justice SS Jhunjhunwala. ABB replied and did not accept this appointment.

2(2011) 14 SCC 66.

3(2013) 1 SCC 641.

The parties now agree that the arbitrator to be appointed should be a counsel of this Court. They have left the choice of arbitrator to me. On indicating five names, both sides have agreed on Mr MR Khandeparkar as their sole arbitrator. Mr Singh will place a copy of this order before Mr Khandeparkar on or before 17th March 2017. Mr Khandeparkar is requested to call a preliminary meeting at his earliest convenience. Since the invocation is of 29th October 2014, i.e., prior to the Amendment Act 3 of 2016 coming into force on 23rd October 2015, this Arbitration will be governed by provisions of unamended Arbitration and Conciliation Act, 1996.

14. All rights and contentions are kept open before the Arbitrators. Both sides will be at liberty to apply to the learned Sole Arbitrator for an interim award.

15. The Arbitration Application is disposed of in these terms. No costs.

(G. S. PATEL, J.)