

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.08.2017

PRONOUNCED ON: 24.10.2017

CORAM

THE HON'BLE DR.JUSTICE ANITA SUMANTH

O.P.No.211 of 2017

Mycon Construction Ltd.,
formerly known as
M/s.The Mysore Construction Company (MCC)
Industry House,
45, Race Course Road,
Bangalore 560 001
represented by its authorised signatory
Mr.Shantanu Malpani Petitioner

Versus

Mecon Ltd.,
MECON Limited, Vivekananda Path,
P.O.Doranda, Ranchi, Jharkhand,
Pin 834002 Respondent

Original Petition filed under section 11(6) of the Arbitration and Conciliation Act, 1996 praying to appoint the arbitral tribunal consisting of three members to adjudicate upon the disputes between the petitioner and respondent arising out of the letter of award dated 02.03.2006.

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For Petitioner : Mr.Anirudh Krishnan

For Respondent: Mr. Arun Karthik Mohan

ORDER

This petition is filed in terms of Section 11(6) of the Arbitration and Conciliation Act praying for the appointment of an arbitral tribunal

comprising three members to adjudicate upon disputes arising inter se the parties.

2. The sequence of events as presented by Mr. Anirudh Krishnan appearing for the petitioner are as follows:

(i) A memorandum of understanding was entered into between Mecon Limited, the respondent herein (in short and hereinafter 'Mecon') and the Proprietor, Mycon Construction Limited, the petitioner herein (in short and hereinafter Mycon). The memorandum of understanding dated 23.7.2005 records the mutual interest of the parties to co-operate with one another in bidding for the project of installation of Lignite Handling Plant at Thermal Power Station – II (Expansion of Neyveli Lignite Corporation).

(ii) Reference was made to clause 7 of the MOU, reading as follows:

'In case of an award of Contract by the Client to MECON based on finally accepted terms and conditions and prices, MECON shall place order on MCC clearly defining the scope of work and terms and conditions as agreed between the Client and MECON i.e. on a back to back basis but on item rates agreed to by Mecon already.'

(iii) The parties thereafter entered into detailed discussions on 22nd and 23rd of November 2005 and the minutes of the meeting provided at clause 11 that *'all other terms and condition shall be as per terms and conditions of the tender document of NLC as agreed by Mecon till issue of*

(iv) The letter of intent dated 5.12.2005 issued by Mecon upon Mycon reiterates at Article 9.3 that all other terms and conditions as agreed by Mecon till date with NLC will be binding on MCC (Mycon).

(v) The contract was awarded to Mycon, by letter dated 2.3.2006 whereunder Mecon placed an order on Mycon for the total civil construction work as per the technical specifications set out in annexure I thereof for the Lignite Handling System for Thermal power Station which reads as under:

'With reference to above, we, M/s.MECON LIMITED (herein also referred to as MECON or the PURCHASER) are pleased to place order on M/s.Mysore Construction Company, Bangalore (herein also referred to as Mysore Construction Company or the CONTRACTOR or MCC) for total civil construction work as per Technical Specifications enclosed in Annexure -I hereof for Lignite Handling System for Thermal Power Station -II Expansion Project (2x250 MW) of M/s.Neyveli Lignite Corporation Limited, Neyveli (herein also referred to as NLC or the OWNER).'

(vi) The letter of award dated 02.03.2006 specifically states thus in the preamble:

'The terms and conditions specified in the MOM dated 23.07.2005, the terms and conditions of the tender document as agreed between M/s.NLC and MECON, which the Contractor confirms to be fully aware of, correspondences and Minutes of discussions mentioned in the list of references above also form part of this Letter of Award. The salient terms and conditions, however, are briefly stated herein below for ready reference and reckoning.'

3. The agreement between Mecon and NLC provides for the resolution of disputes by alternate dispute resolution mechanisms at clause 10.33.2, extracted hereunder:

'10.33.2 Resolution of Disputes:

Informal Dispute Resolution

10.33.2.1 The parties agree to use reasonable efforts to resolve all disputes equitably and in good faith, if any dispute between the Contractor and the PURCHASER arises it shall in the first instance be referred in writing to the PURCHASER, who shall endeavour to resolve the dispute amicably and render a decision within 30 days. The period of 30 days shall be reckoned from the date of intimation of the dispute is received by the PURCHASER.

10.33.2.2 Save as hereinafter provided, in respect of a dispute so referred, the decision of the PURCHASER shall be final and binding upon the parties until the completion of the Contract and shall forthwith be given effect to by the Contractor who shall proceed with the Contract with all due diligence, whether or not either Party has sought arbitration of the dispute as hereinafter provided.

10. 33.3 Arbitration

10.33.3.1 Between NLC & another Central PSE

In the event of any dispute or difference, relating to the interpretation and application of the provisions of the Contracts, such dispute or difference shall be referred by either party to the arbitration of one of the Arbitrators in the Department of Public Enterprises. The Arbitration and Conciliation Act, 1996 shall not be applicable to the 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 authorised by the Law Secretary, whose decision shall bind the parties finally and conclusively. The parties in the dispute will share equally the cost of arbitration as intimated by the Arbitrator. The Procedure to be adopted in the case of arbitration is as per the Government's Circular dated 30.06.93.

10.33.3.2 For Other Contractors:

a) If either party is dissatisfied with the decision rendered by the PURCHASER, or if the PURCHASER omits or declines to render a decision within the said period of 30 days, then within a further period of 30 days, the dissatisfied Party may require by a notification that the dispute be referred to arbitration in the manner hereinafter provided. Such a notification shall be in

writing and it shall be duly served on the other party. Failure to invoke the arbitration within the time schedule shall debar the party from seeking reference to arbitration.

b) Except as otherwise provided in this clause, any dispute arising out of or relating to this agreement, or the breach, termination or validity thereof, shall be finally settled by arbitration in accordance with the Arbitration and Conciliation act 1996 (the "Act"). The arbitration shall be held at Neyveli or Chennai, Tamil Nadu. The arbitration proceedings shall be conducted, and the award shall be rendered in English. The award shall state the reasons upon which it is based.

c) There shall be three arbitrators of whom each Party shall appoint one. The Party requesting that the dispute be referred to arbitration shall, within 30 days of the notification in terms of Clause 10.33.3.2 (a), appoint an arbitrator as also call upon the other Party to appoint an arbitrator within 30 days. The two arbitrators so appointed shall, within 30 days of the date on which the second of them is appointed, agree on the third arbitrator who shall act as the presiding arbitrator of the tribunal.

d) The agreement and the rights and obligations of the Parties, shall remain in full force and effect pending the award in any arbitration proceedings. Supplies and/or services under the Contract shall, if reasonably possible, continue during arbitration proceedings.

e) For the purposes of this clause, the term 'dispute' shall include a demand or differences of any kind whatsoever, arising out of the Contract and respecting the performance of the Contract, whether during the Contract period including extensions if any, or after completion, and whether before or after termination, abandonment or breach of the Contract (except as to any matter, the decision of which is specifically provided for in any of these conditions).'

4. Disputes admittedly arose between Mecon and Mycon and

efforts were made to settle the same. Mr.Krishnan would draw attention to correspondence between the parties where Mecon, vide letter dated 09.08.2007 has called upon Mycon to resolve the disputes amicably and within the frame work of the contract.

5. Reference was also made to letters dated 6.8.2007 and 9.8.2007 from Mecon to Mycon and to the following portion in the former, extracted below:

'This shall constitute willful repudiation of contract by M/s.MCC, and shall tantamount to breach of the contract by them. MECON shall therefore be constrained to, and shall be well within its rights available in law and in the contract, vide inter alia Clauses no.10.25, 10.30, 10.6 of the GCC of the contract, to take necessary actions in the interest of the project, including partial/total withdrawal of work in the scope of M/s.MCC and /or termination of the contract and / or getting the work through alternate means at the risk and cost of the contractor, M/s.MCC. We shall, however, await positive and purposeful response of M/s.MCC.'

6. Pointing out to the contract references in the letter extracted above, Mr.Krishnan would argue that the contract should not be read narrowly and should encompass all clauses as contained in the contract between Mecon and NLC. The clause relating to resolution of disputes by arbitration would thus, according to him, be equally applicable to, and invokable as regards disputes inter se Mecon and Mycon.

7. Various demands and disputes were raised by Mycon vide letter dated 19.1.2017 for the resolution of which it invoked the clause for arbitration in the agreement between Mecon and NLC. By reply dated 10.2.2017, Mecon denies any such, according to it, 'imaginary claims' rejecting the same unconditionally. No reference is made specifically to the invocation of the arbitration clause.

8. A counter affidavit has been filed by the respondent denying the existence of an arbitration agreement between the parties.

9. Mr.Arun Karthik Mohan, learned counsel appearing for the respondent would argue that the contract between Mecon and NLC on the one hand and that between Mecon and Mycon on the other, are entirely separate and independent. He would deny that the dispute resolution clause as contained in its agreement with NLC has been incorporated by reference or otherwise into the agreement between itself and Mycon.

10. Moreover, attention was drawn to the dispute resolution clause itself to state that the structure and content of the said clause (as extracted above) is incapable of application to the sub-contract between itself and Mycon. While 10.33.3.1 is structured so as to address disputes between NLC and other Central Public Sector Enterprises (CPSE), 10.33.3.2 applies to disputes between NLC and other contractors that are not CPSEs. In the present case, in the event of a dispute between Mecon and NLC, the governing clause would be 10.33.3.1 that provides for dispute resolution under the auspices of the Department of Public Enterprises and specifically rules out the application of the Arbitration and Conciliation Act 1996. As such, the clause is incapable of being applied to the present case since Mycon is admittedly not a Central Public Sector Enterprise. In fact, the said clause would rule out the application of the 1996 Act and consequently this petition. Clause 10.33.3.2 cannot be invoked in the present case as what would govern the terms of contract between Mecon and NLC, as agreed to by the parties to the contract, would only be the former clause.

11. Mr. Anirudh Krishnan would refer to the following judgments in support of his contentions:

(i) *Alimenta S.A. V. National Agricultural Co-operative Marketing Federation of India Ltd and others* (1987) 1 SCC 615;

(ii) *J.K.Jain and others Vs. Delhi Development Authority and others* (1995) 6 Supreme Court Cases 571, wherein it is held as follows:

12. A Bench of the Supreme Court in the case of J.K.Jain and Others (supra) considered whether the following clause would, by implication, also include the arbitration clause that was contained in letter of acceptance dated 27.12.1982:

'That the terms and conditions contained in the tender form and conditions of the contract attached to this deed, and also the letter of acceptance dated 27.12.1982 shall be binding between the parties.'

13. Then at para 7, the Bench observes that in order to construe the existence of an arbitration agreement, it was not at all necessary that there be a formal agreement or a single document containing all terms between the parties. All that was necessary was that from the totality of the documentation executed, it must appear unequivocally that the parties have agreed to submit their differences to arbitration. He would then refer to paragraph 12 where the court states as follows:

'12. As already pointed out above, so far as the present case is concerned, the arbitration clause has not been included in the agreement itself. But it shall be deemed to be part of the agreement because the agreement specifically says that the terms and conditions contained in the tender form shall be binding

between the parties which obviously will include clause 14 of the tender form, which admittedly requires any dispute between the parties to be referred to an arbitration. The other special feature of the present case is that each page of the tender form which forms part of the agreement has been signed by the appellant, on behalf of the firm and the Executive Engineer on behalf of the respondent. A mere denial of the existence of the contract of arbitration by one party does not denude the arbitrator of jurisdiction. The arbitration gets jurisdiction to decide the disputes on basis of the agreement to refer such disputes and not by its acceptance or denial. The objection on behalf of the appellants, that there was no condition in the main agreement to refer the disputes to arbitration can be accepted only if it is held that the different terms and conditions mentioned in the tender form are not binding on the parties, because the parties never agreed to those terms and conditions, while entering in to a contract. But the fact about which there is no dispute, is that both the parties had signed the tender form in token of having accepted the terms and conditions mentioned therein including about reference of disputes, if any, to an arbitrator. They had also agreed in the main agreement, that the terms and conditions contained in the tender form shall be binding between the parties. In this background, it is difficult for us to comprehend as to how it can be held that the appellants had never agreed to refer any dispute arising between the parties to an arbitrator in terms of clause 14 of the tender form.'

(iii) A similar contention was made and accepted by a Division Bench of Bombay High Court in *Premlaxmi and Co. Vs. Trafalgar House Construction India Ltd.* 1998(4)Bom CR830.

(iv) Reference is also made to *Mc Dermott International Inc. v Burn Standard Co.Ltd and others* (2006)11 SCC 181, where at para 112, the Bench states:

'112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that

correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission, (2003) 8 SCC 593 and D.D. Sharma v. Union of India (2004) 5 SCC 325].'

(v) Both parties would rely on a judgment of the Supreme Court in the case of *M.R.Engineers and Contractors Pvt Ltd v. Somdatt Builders Ltd.* (2009) 7SCC 696. Mr.Krishnan would rely on paragraphs 17 and 24, extracted below:

'17. We will give a few instances of incorporation and mere reference to explain the position (illustrative and not exhaustive). If a contract refers to a document and provides that the said document shall form part and parcel of the contract, or that all terms and conditions of the said document shall be read or treated as a part of the contract, or that the contract will be governed by the provisions of the said document, or that the terms and conditions of the said document shall be incorporated into the contract, the terms and conditions of the document in entirety will get bodily lifted and incorporated into the contract. When there is such incorporation of the terms and conditions of a document, every term of such document, (except to the extent it is inconsistent with any specific provision in the contract) will apply to the contract. If the document so incorporated contains a provision for settlement of disputes by arbitration, the said arbitration clause also will apply to the contract.'

.....

"24. The scope and intent of section 7(5) of the Act may therefore be summarized thus:

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled :

(1) The contract should contain a clear reference to the documents containing arbitration clause,

(2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract.

(3) The arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent Trade or Professional Institution (as for example the Standard Terms & Conditions of a Trade Association or Architects Association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the Conditions of Contract of one of the parties to the contract shall form a part of their contract (as for example the General Conditions of Contract of the Government where Government is a party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties.

Mr. Arun C Karthik appearing for the respondent would rely on

'36.Even assuming that the arbitration clause from the main contract had been incorporated into the sub-contract by reference, we are of the view that the appellant could not have claimed the benefit of the arbitration clause. This is in view of the principle that the document to which a general reference is made, contains an arbitration clause whose provisions are clearly inapt or inapplicable with reference to the contract between the parties, it would be assumed or inferred that there was no intention to incorporate the arbitration clause from the referred document.'

14. He would further rely on the judgment of the Karnataka High Court in *CMP.No.26 of 2012* dated 22.2.2013 interpreting agreements in almost identical circumstances between Nuclear Power Corporation (NPC), Mecon and Babubhai Narottamdas and Company, the sub contractors in that matter. The Karnataka High Court had come to the conclusion that the sub-contractors could not take benefit of the arbitration clause in the contract between NPC and Mecon and that the terms incorporated would only be those relating to the execution of the work. The only material difference, in fact, was that the contract between Mecon and NLC named the specific sub-contractor to whom the sub-contract should be awarded. This fact, in my opinion, would place the case of that sub-contractor higher than in the present case, notwithstanding which the decision was adverse to the sub-contractor who carried the matter in Special Leave before the Supreme Court.

Special Leave Petition (c) No.20266 of 2013 dated 7.7.2014 dismisses the petition specifically observing that the Bench had '*gone through the arbitration clause. The judgment of the High Court is correct*'

16. Mr. Krishnan would then argue that a decision would be a precedent only for a limited purpose and would, on this issue press into service a judgment of the Supreme Court in the case of *Purbanchal Cables and Conductors Pvt. Ltd. Vs. Assam State Electricity Board and another*, (2012) 7 Supreme Court Cases 462, particularly paragraph 12 to the effect that '*....Precedents sub silentio and without argument are of no moment....and mere casual expressions carry no weight at all. Not every passing expression of a Judge, however eminent, can be treated as an excathedra statement, having the weight of authority....*'.

17. For its part, respondent would rely on the Judgment of the Supreme Court in *Kunhayammed and others Vs. State of Kerala and another* (2000) 6 Supreme Court Cases 359, reiterating the principle that a pronouncement by the Supreme Court at the stage of grant or dismissal of an SLP would be a declaration on a point of law only if it contain reasons specifically stated therein. Such a declaration of law would be binding on all Courts in terms of Article 141 of the Constitution of India.

18. The judgement of the Supreme Court dismisses the SLP after specifically noticing and referring to the arbitration clause in that matter and can hardly be said to be a casual observation. In fact, the clause

providing for arbitration in that contract reads as follows:

'24. Arbitration

24.1. Notwithstanding anything contained in this contract, all questions, disputes or differences whatsoever, between the parties to the contract, arising out of relating to the construction, meaning and operation or interpretation of provision of the contract or matters related thereto, whether during the currency of the contract, or its failure or after the completion of contract shall be settled by sole arbitrator to be nominated and appointed by the Chairman & Managing Director of the Purchaser. It will be no objection that the arbitrator is an employee of the Purchaser and that he had to deal with matters related to the contract or that in the course of his duties as an employee of the purchaser, had expressed views on all or any other matters in question, dispute or difference. The award of the arbitrator shall be final and binding on the parties to the contract. In an arbitration invoked at the instance of either party to the contract, the arbitrator would be free to consider the counter claim of the other party even though they are not mentioned in the reference to arbitration.'

19. The aforesaid clause providing for arbitration simplicitor, if held to be incorporated by reference could have very well applied to Mecon and the sub-contractor as well. This is in contra distinction to the clause in the present case which is applicable only vis-a-vis two Central Public Sector Enterprises, which status Mycon does not, admittedly, enjoy. The sub-contractor before me is thus, in my view, worse off in the present case than in that dealt with by the Karnataka High Court and Supreme Court.

Moreover, the respondent has also circulated the purchase order between

Nuclear Power Corporation and Mecon, the General Conditions of Contract as well as the purchase order placed by Mecon upon the sub-contractor to illustrate that there were hardly any distinguishable features between the two cases and the few differences would only serve to advance the case of the contractor in that case. As noted by the learned Single Judge of the Karnataka High Court, the agreement between Mecon and NPC specifically named the sub contractor while the contract in the present case admittedly does not.

20. Section 7 of the Act deals with arbitration agreements and reads thus:

'7. Arbitration agreement-(1) In this Part, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in -

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication (including communication through electronic means) which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document

containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.'

21. The existence or otherwise of an arbitration agreement is a *sine qua non* to determine the dispute resolution process agreed upon by the parties. The alternate dispute resolution clause set out in 10.33.3 contains two options, one specific to a CPSE and the second, other contractors. The first sub-clause, 10.33.3.1, would stand attracted as between NLC and Mecon, seeing as Mecon is a Central PSE. As a consequence, the terms of clause 10.33.3.2 would, for all practical purposes, stand effaced from the contract between NLC and Mecon since it provides for Arbitration between NLC and a private party which Mecon is not. The format of the contract document is seen to include a clause for arbitration both in cases of the contractor being a CPSE or a private party and obviously, what will stand attracted as between parties to the contract are those clauses that are relevant and applicable to them. This does not mean that any other party can seek to avail the benefit of the other clause as such clause would cease to have any real relevance. Clauses in a contract draw their relevance only from their applicability to the parties to a contract and not as regards third parties.

22. The pronouncement of the Supreme Court in *M.R.Engineers and Contractors Pvt Ltd v. Somdatt Builders Ltd*, (2009) 7SCC 696, at paragraph 36 (supra) would be directly applicable to a position such as the present one where the fact that the clause providing for arbitration was

itself not workable would seal the position that the clause had not been incorporated.

23. I have no doubt that if at all the parties intended to provide for dispute resolution by alternate means, a clause for arbitration that would be workable interse would have been specifically incorporated in the agreement or at least articulated in the extended documentation, such as correspondences. This was however not done. Thus the references to terms and conditions interse Mecon and NLC in the documentation between Mecon and Mycon can, at best, refer only to terms of execution of the works and do not constitute an agreement for arbitration. In view of the aforesaid discussion, I am of the considered view that there is no agreement as between the parties in the present case, providing for arbitration.

24. The Original Petition is dismissed, leaving the parties to bear their own costs.

24.10.2017

Speaking order/non speaking order

Index: Yes/No

Internet: Yes/No

msr/sl

Note: Issue order copy on or before 26.10.2017.

DR.ANITA SUMANTH, J.

msr/sl



Predeliver order in
O.P.No.211 of 2017

24.10.2017

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