

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMMERCIAL ARBITRATION APPLICATION NO.140 OF 2017

Suresafety (India))....Applicant
V/s.

Indian Oil Corporation Ltd.)....Respondent

Mr.Anoshak Dawar a/w Ms.Kanchi Vyas I/by Tejaswita Nalawade
for the applicant.

Mr.Chirag Mody a/w Mr.Ashish Singh I/by DSK Legal for respondent.

CORAM : K.R.SHRIRAM,J

DATE : 3.9.2018

P.C.:-

1. The application is under section 11 of the Arbitration & Conciliation Act 1996 (the said Act). The applicant is engaged in the manufacture of low temperature suit and was one of the bidder for tender released by respondent for the procurement of the suits. Purchase agreement dated 20.8.2015 was entered into between the parties. Clause 31 of the said agreement provided for arbitration and the same reads as under :-

“31. ARBITRATION :

In the event of question or dispute arising under these conditions or in connection with this contract (except as to any matter the decision of which is specially provided for in these conditions) the matter in dispute shall be referred to the Sole Arbitration of the Director (Marketing) of the INDIAN OIL CORPORATION LIMITED and if the Director (marketing) is unable or un willing to act as the Sole Arbitrator, the matter shall be referred to the Sole

Arbitration of some other person appointed by the Director (Marketing) in writing who is willing to act as such arbitrator. There will be no objection to any such appointment that the arbitrator so appointed is a servant of the IOC and that he had to deal with the matters to which the contract relates and that in the course of his duties as Servant of the IOC and that he had expressed views on all or any of the matters in dispute or differences. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reasons, such Director (Marketing) as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as Arbitrator in accordance with the term of the contract. Such person shall be entitled to proceed with the reference from the point of which it was left by his predecessor. It was also a terms of this contract that no person other than a person appointed by Director (Marketing) of the IOC as aforesaid should act as Arbitrator and if for any reason that is not possible, the matter is not to be referred to arbitration at all. The award of the arbitrator so appointed shall be final and conclusive and binding on all parties, subject to the provision of the Indian Arbitration and Conciliation Act 1996 and the rules there under and any statutory modification or re-enactment thereof and the rules made there under and for the time being in force thereof deemed to apply to and be incorporated in this contract. The venue of such arbitration shall be in India and Indian Law shall apply.”

2 Certain disputes arose and the applicant invoked the arbitration vide its letter dated 28.11.2016. Respondent responded vide letter dated 12.12.2016 and agreed for adjudication of disputes by way of arbitration and requested the applicant to provide written consent to enable respondent no.2 (Marketing) to act as an arbitrator or nominate another person. Applicant replied by its letter dated

17.12.2016 under which applicant agreed to the Director (Marketing) of respondent to act or nominate an arbitrator. Both the parties were conscious of the provision of section 12(5) in the said Act. The two letters read as under :-

“Ref : HCC/PO-MM/36/19/2015-16 Date : 12.12.2016

*M/s.Sure Safety (India) Pvt. Ltd.,
42 A/B, Yoginagar Township,
Near Zenith Tins, N.H.No.08,
Channi, Vadodara-391740*

Attn. Shri Nishith Dand, Director

Sub : In the matter Arbitration between yourself and IOCL

We have for reference your letter dated 28.11.2016 whereby you have sought to refer the dispute arisen between yourself and our Corporation to arbitration.

In view of the amended provisions of the Arbitration and Conciliation Act 1996 effective 23.10.2015 and pursuant to Section 12(5) proviso thereof, we hereby convey that we are ready and willing to refer the dispute arisen between us to arbitration and therefore, we seek your written consent to enable Director (marketing) of Indian Oil Corporation Ltd. To act or nominate an Arbitrator for adjudication of the dispute arisen between us.

Thanking you,

Yours faithfully,

For Indian Oil Corporation Ltd.

Dy. General Manager (Contracts)

*WITHOUT PREJUDICE**Ref No.SSIPL/OCL/019**Date : 17.12.2016*

*To,
The DGM (Contracts)
Indian Oil Corporation Limited, Indian Oil Bhavan,
G-9, Ali Yavar Jung Marg,
Bandra (East),
Mumbai-400 051*

SUB : Supply of Low temperature suit.

*REF : Your Letter No.HCC/PO-MM/36/19/2015-16 Dated
12.12.2016.*

*Dear sir,
We refer to the above, and wish to confirm our request for
Arbitration and hereby authorise Director (marketing)
Indian Oil Corporation Ltd., to act or nominate an
arbitrator for adjudication of the dispute arisen between us
as per the Arbitration and Conciliation Act 1996 effective
23.10.2015 and pursuant to section 12(5) proviso thereof.*

*Thanking you,
For Sure Safety (India) Pvt. Ltd.*

*Nishith Dand
Managing Director”*

3 Mr.Dawar for the applicant submitted that the letter dated 17.12.2016 was “without prejudice” and therefore cannot be considered as waiver under the proviso to sub section-5 of section 12 of the said Act. Mr.Dawar submitted that therefore, the marketing director or any of his nominee shall be ineligible to be appointed as arbitrator.

4 Mr.Mody for respondent submitted that the words “without prejudice” in applicants' letter dated 17.12.2016 has no meaning. Mr.Mody submitted that thereafter respondent by his letter dated 1.2.2017 informed the applicant that the marketing director is unable to act as an arbitrator due to his pre-occupation and nominated Satish Kumar Thatipelli, General Manager (planning) as sole arbitrator to adjudicate upon disputes that have arisen between the parties and to give his award. Mr.Mody submitted that even at that stage, the applicant did not question the appointment by pointing out to this letter dated 17.12.2016 being without prejudice. Thereafter the arbitrator by his letter dated 27.2.2017 made a declaration in writing under section 12(1) of the Act and passed directions calling upon the applicant to file its statement of claims. Even at that stage, the applicant never questioned the directors citing without prejudice noting in its letter dated 17.12.2016. Thereafter the arbitrator issued a letter dated 3.4.2017 informing the applicant that the period of filing statement of claims has lapsed and the applicant had not even sought an extension. The arbitrator fixed date for personal hearing and directed the parties to remain present. Even at this stage the applicant did not object to the arbitrator's jurisdiction by citing 'without prejudice' endorsement in its letter dated 17.12.2016. This was followed by a letter dated 15.4.2017 from the applicant to the

arbitrator informing the arbitrator that the concerned person in applicant's organization was not available /un well and sought an extension. The letter reads as under :-

“ Ref. No. SSIPL/IOCL/01

Date : 15.04.2017

*To,
The Sole Arbitrator
Indian Oil Corporation Limited, Indian Oil Bhavan,
G-9 Ali Yavar Jung Marg,
Bandra (East),
Mumbai-400 051*

*Kind Attn : Mr.Satish Kumar Thatipelli, General Manager
(Planning)*

*SUB : 1) Your Letter No.Arbitrations/17-18/2 Dated
03.04.2017*

*2) Your earlier letter No.Arbitrations/17-18/1 dated
27.02.2017*

*REF : 1) Supply of Low temperature suit-IOCL P O
No.MM/35/PT/17/2014-15 Dated 18.06.2015.*

Dear Sir,

We refer to the above letter (Ref 1) asking us to present ourselves for hearing on 17.04.2017 at 11 AM against which we humbly wish to state that since our Managing Director Mr.Nishith Dand and the only person currently empowered and authorised to attend the hearing has suddenly fallen ill and advised hospitalisation and hence is not in a position to attend the arbitration proceedings slated for Monday the 17th of April 2017. Since this has suddenly happened and we did not have your email id and/or Mobile no we are not in a position to convey the seriousness over Mobile/Phone hence this letter request.

Hence on compassionate grounds may we request your kind self to extend the hearing/Arbitration proceedings by

another 15 days to enable him to attend the same.

Kindly do the needful and oblige under confirmation to us.

Thanking You

For Sure Safety (India) Pvt. Ltd.

Sushil Behl

Director (projects) & Authorised Signatory

+919825063176

CC : Mr.P Srinivasan, DGM-Contracts”

5 After this letter was sent, the applicant seems to have hit upon this idea of questioning arbitrator's jurisdiction by suggesting that the arbitrator would stand disqualified under item-1 of the Seventh schedule under section 12(1)(B) of the said Act. The applicant thereafter filed this application seeking appointment of the Arbitrator by this court. Of course, in between, some correspondence seems to have been exchanged by applicant suggesting alternative arbitrator and respondent not agreeing.

6 Shri Dawar relied upon the Judgment of the Apex Court in ¹***HRD Corporation (Marcus Oil and Chemical division) Vs. Gail (India) Limited (formerly Gas Authority of India Ltd.)*** to submit that the arbitrator already appointed would still be disqualified under section 12(5). I have considered the said judgment and the

1 2017 SCC OnLine SC 1024

judgment was not on any issue relating to interpretation of or considering sub section 5 of Section 12 of the said Act. In fact, in paragraph-12 of the said judgment, the court while referring to the provisions of the Act has observed “.....Unlike the scheme contained in the IBA Guidelines, where there is a non-waivable Red List, parties may, subsequent to disputes having arisen between them, waive the applicability of the items contained in the Seventh Schedule by an express agreement in writing.....”

7 Therefore, where any person due to his relationship with the parties becomes ineligible to be appointed as arbitrator, parties may, subsequent to disputes having arisen between them waive applicability of the items contained in seventh schedule by an agreement in writing. In this case, in my opinion, the applicant has, subsequent to dispute having arisen between the parties, waived the applicability of sub-section 5 by an express agreement in writing and the said writing is letter dated 17.12.2016, copy whereof is at Exh.P to the application. As noted earlier the words “without prejudice” mentioned in the said letter has no meaning because subsequently the applicant has not protested the arbitrator's appointment and in fact, I would add participated in the arbitration proceeding. Further in the said letter applicant was not making any offer or concession the words

“without prejudice” to have any meaning. The applicant vide its letter dated 15.4.2017 even sought an extension of the hearing/arbitration proceeding by another 15 days to enable the applicant's managing director to attend the hearing.

8 In the circumstances, in my view, the application has no merits and requires to be dismissed. Application hereby dismissed. The arbitrator to fix the next date of hearing within two weeks from today and pass necessary directions.

Application disposed.

Jahagirdar
Kiran
Ganesh

Digitally
signed by
Jahagirdar
Kiran Ganesh
Date:
2018.09.05
18:38:18
+0530

(K.R.SHRIRAM,J)