

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

COMMERCIAL ARBITRATION APPLICATION NO.178 OF 2017

Knowledge Infrastructure Systems Pvt. Ltd.Applicant

Vs.

Maharashtra Power Generation Company Ltd.Respondent

Mr. Venkatesh Dhond, senior advocate a/w. Mr. Shyam Kapadia, Ms. Faiza Dhanani and Ms. Juhi Dave I/b. M/s. Dhruve Liladhar and Company for applicant.

Mr. Sanjay Jain a/w. Mr. Sumeet Bansod I/b. L.J. Law for respondent.

CORAM : K.R.SHRIRAM, J.

DATE : 30th OCTOBER 2018

P.C.:

1 This application is filed under Section 11 of the Arbitration and Conciliation Act, 1996. Respondent had invited bids on 18th April 2013 for procuring of 2.992 million metric tons of non-coking steam coal of foreign origin (the said coal). Applicant was one of the bidder and by a Letter of Award dated 30th July 2013 was awarded the tender for supply 1.148 million metric tons of the said coal to Bhusawal Thermal Power Station and by a Letter of Award dated 23rd September 2013 applicant was given a contract to supply 0.96 million metric tons of coal to Chandrapur Thermal Power Station.

2 Pursuant to the two Letters of Award, formal contracts dated 30th August 2013 and 25th October 2013 were executed between applicant and respondent. It is applicant's case that it supplied the said coal as

required under the contracts and raised invoices from time to time. According to applicant, it was paid all the invoices submitted upto March 2014.

3 In or around March 2014, i.e., 4 months into execution of the contracts, Chief Engineer (FMC) of respondent addressed a communication dated 1st March 2014, in which respondent raised an issue of availing basic custom duty at 0% in respect of import of coal. Respondent advised applicant to take necessary action for availing the preferential basic custom duty of 0% and pass on the same to the purchaser, i.e., respondent. Applicant responded to the said letter and raised certain allegations against respondent. According to applicant, respondent led applicant to believe that it was not interested in availing the concessional duty for import of coal from ASEAN countries and called upon respondent to pay the duty as claimed by customs at 2%. In response to this letter, the Chief Engineer (FMC) of respondent, vide letter dated 19th March 2014, informed applicant that respondent was entitled to avail the benefit of preferential basic custom duty at 0% and as such the custom duty paid are being recovered from the payment to applicant under the current contract. Applicant responded to this last missive by a letter dated 31st August 2017 invoking arbitration. There was no response to this from respondent. Hence this application.

4 Respondent has filed an affidavit in reply of one U.K. Dhamankar, Chief Engineer (FMC), Mumbai, affirmed on 8th February 2018 opposing the application. According to respondent, the application is misconceived and not maintainable because applicant has not invoked the arbitration clause in accordance with the contract and there is no valid invocation of arbitration agreement. Though respondent has also mentioned that there is no cause of action and there is no dispute, in the affidavit in reply, they have not elaborated as to why there is no cause of action or there is no dispute.

5 Clause 19 of the contracts read as under :

19. GOVERNING LAW AND DISPUTE RESOLUTION:

19.1 This Contract shall be governed and construed in accordance with the Indian laws without giving effect to the principles of conflict of laws thereunder. The courts at Mumbai shall have exclusive jurisdiction in all matters/disputes (other than a dispute with respect to quantity and quality of coal) arising out of this Contract. The quantity and quality as determined in terms of the relevant clauses of the contract shall be final and binding.

19.2 The Purchaser and the Seller make every effort to resolve amicably by direct informal negotiation, any disagreement or dispute arising between them under or in connection with the Contract except a dispute with respect to quantity and quality of coal. A dispute other than a dispute with respect to quantity and quality of coal, which may be submitted to arbitration is hereinafter referred to as a "Contract Dispute".

19.3 Powers for determination of matters of arbitration

All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred in the form of petition (along with all claims & documents) by the contractor to the Chief Engineer (FMC), Mumbai. Chief Engineer (FMC) (within 60 days) after receipt of the contractor's

representation and after hearing the same shall make and notify decisions of all matters referred to by the contractor in writing.

i) Demand for Arbitration:

In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, the dispute or difference on any account or as to the withholding by MAHAGENCO of any certificate to which the contractor may claim to be entitled to, and if the Chief Engineer (FMC), Mumbai fails to make a decision (within 60 days) then and in any such case, the contractor (after 60 days) shall submit a memorandum of his claim alongwith relevant documents to the Managing Director, MAHAGENCO. The Managing Director, MAHAGENCO, on going through the claim above, shall call partner in charge of the contractor/Bidder and shall try to conciliate the matter mutually.

In case, no mutual understanding or settlement is reached within two months from the date of submitting memorandum of claim, arbitration clause may be invoked within 180 days of presenting his final claim on disputed matter, but not otherwise.

(ii) The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim Item-wise. Only such dispute or difference, in respect of which the demand has been made, together with counter claims or set off, shall be referred to arbitration and other matters shall not be included in the reference.

(a) The arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the MAHAGENCO.

(b) The Claimant shall submit his claim stating the facts supporting the claims alongwith all relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.

(c) The MAHAGENCO shall submit its defence statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claims from the Tribunal thereafter unless otherwise extension has been granted by the Tribunal.

(iii) No new claim shall be added during the proceedings by either party. However, a party may amend or supplement the original claim or defense thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.

(iv) if the contractor(s) does/do not refer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation

from the MAHAGENCO, that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the MAHAGENCO shall be discharged and released of all liabilities under the contract in respect of these claims.

(v) In the event MAHAGENCO have any recoveries of claims against the contractor, arising out of this contract, may be referred for arbitration. In this regard MAHAGENCO shall inform the contractor about the claims recoverable from the contractor and call him upon to pay the same within 30 days from the date of the said demand. In case the contractor fails to pay the said claims, it would be treated as dispute and MAHAGENCO shall then make a request to the Managing Director of Mahagenco for appointment of Arbitrator/s and for constituting the Arbitral Tribunal as provided by Clause No. 19.5 given below.

19.4 Obligation during pendency of Arbitration

Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by MAHAGENCO shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should be continued during arbitration proceedings.

19.5 Procedure for Appointing Arbitrator :

(i) The Arbitral Tribunal shall comprise of three arbitrators of which, the seller and purchaser shall appoint one arbitrator each within 15 days from the date of the notice requiring the dispute to be settled by arbitration. The two arbitrators so appointed shall appoint the third arbitrator within 15 days. If the third arbitrator is not appointed by within the aforementioned period of 15 days or any further period mutually agreed between the parties, the third arbitrator shall be appointed in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

(ii) If one or more arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever; or dies or in the opinion of the Managing Director fails to act without undue delay, the Managing Director shall appoint new arbitrator/s to act in his/their place in the same manner in which the earlier arbitrator/s had been appointed. Such reconstituted Tribunal, may, as its discretion proceed with the reference from the stage at which it was left by the previous arbitrator(s).

(iii) The Tribunal shall have powers to call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal shall think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay.

(iv) Arbitral award shall state item wise, the sum and reasons upon which it is based.

(v) A party may apply for corrections of any computations errors, any typographical or clerical errors or any other error of similar nature occurring in the Award and interpretation of specific point of award to tribunal within 30 days of receipt of the award.

(vi) A party may apply to Tribunal within 30 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings, but omitted from the arbitral award.

(vii) Any ruling or award shall be made by a majority of Members of Tribunal. In the absence of such a majority, the view of the presiding Arbitrator shall prevail.

(viii) Where the arbitral award is for payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.

(ix) The cost of the arbitration shall be borne equally by the respective parties.

(x) Subject to the provisions as aforesaid, Arbitration and Conciliation Act, 1996 and the rules there under, and any statutory notification thereof shall apply to the arbitration proceedings under this clause.

(xi) The courts at Mumbai shall have exclusive jurisdiction to deal with any or all the matters/disputes, if any, arising out of or in connection with this contract.

(xii) The venue of the arbitration shall be Mumbai. The venue of arbitration can be shifted by mutual consent of the parties.

6 According to respondent, for applicant to invoke arbitration, applicant has to, as per clause 19.3, first refer all disputes and differences of any kind whatsoever in the form of petition to the Chief Engineer (FMC), Mumbai. Chief Engineer (FMC) (within 60 days) after receipt of the contractor's representation and after hearing the same shall make and notify decisions of all matters referred to by the contractor in writing. If the Chief Engineer (FMC), Mumbai fails to make a decision (within 60 days) then and

in any such case, the contractor (after 60 days) shall submit a memorandum of his claim alongwith relevant documents to the Managing Director of respondent, who on going through the claim, shall call applicant and try to conciliate the matter mutually and in case, no mutual understanding or settlement is reached within two months from the date of submitting memorandum of claim, arbitration clause may be invoked within 180 days of presenting his final claim on disputed matters, but not otherwise.

7 Mr. Dhond for applicant submits that the question of referring the matter to Chief Engineer (FMC), Mumbai, does not arise since the Chief Engineer (FMC) has already, by his letter dated 19th March 2014, informed applicant that the 2% basic custom duty that has been paid by applicant is not payable to applicant and will be recovered from applicant's payments during the contract period. Mr. Dhond states that the claim, which applicant is claiming, is only restricted to this 2% difference which has been wrongfully deducted by respondent.

 Mr. Jain reached only when the order was being dictated. Mr. Bansod, though an opportunity was given, did not make any submissions.

8 When a procedure for commencing arbitration is mentioned in the contract, in my view, the parties will have to strictly follow the procedure prescribed before referring their disputes to arbitration. The

dispute resolution clause does prescribe applicant to make a reference to the Chief Engineer (FMC), Mumbai on all disputes and differences who shall take a decision within 60 days. It would have been necessary for applicant to make an application to the Chief Engineer (FMC) if the Chief Engineer (FMC) had not addressed the communication dated 1st March 2014 and 19th March 2014. When the Chief Engineer (FMC) himself has taken a decision and communicated to applicant that they will not be paid the basic custom duty that has been paid on the coal imported, the question of referring the disputes again to the Chief Engineer (FMC) serves no purpose and is not required. The reason this clause is provided is because when there are disputes, respondent will make an effort through its high ranking official to address the dispute raised by a contractor or atleast narrow down the points of dispute. But when the same high ranking official in a correspondence signed by him has already given a decision, which I would assume was well thought decision, it will be an exercise in futility to once again make a representation to the same person. In any event, it is not required. Further, the reason why such a clause is provided for where all disputes and differences are referred to the Chief Engineer (FMC) is because instead of parties embarking on litigation immediately, atleast a person of the level of Chief Engineer will be able to consider the representations of the claim and try to resolve the disputes. When the person, who has to attempt to resolve the dispute, has already given his finding, there is no need to

refer the dispute once again to the same person. Applicant having addressed a communication dated 14th March 2014 to the Chief Engineer (FMC) seeking their claim to be paid the entire amount and the Chief Engineer (FMC) in his reply dated 19th March 2014, having rejected the claim, I would also proceed on the basis that the pre-condition of referring disputes to Chief Engineer (FMC) has also been met.

9 Respondent has not elaborated how the requirements of clause 19.3 (i) has not been met. Still in my view, that clause gets triggered only if the Chief Engineer (FMC) “fails” to make a decision (within 60 days). The clause expressly states “..... if the Chief Engineer (FMC), Mumbai “fails” to make a decision (within 60 days) then and in any such case”. Here, as I have noted earlier, the Chief Engineer (FMC) has already taken a decision. Therefore, “fails” to make a decision does not arise. Hence, in my view, clause 19.3 (i) is not applicable in the present facts and circumstances.

10 What is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties and the evidence such as correspondence exchanged between the parties. Respondent did not reply to the notice invoking arbitration and suggest that the dispute between the parties is required to be referred to the Chief Engineer (FMC). Respondent in its affidavit in reply which is dated 8th February 2018, almost six months after the notice invoking arbitration

was sent, has, as an afterthought, stated that the dispute has to be referred to the Chief Engineer (FMC) and the person, who has affirmed the affidavit in reply, is the Chief Engineer (FMC) himself.

11 In the circumstances, I find nothing wrong in the method of applicant invoking the arbitration clause. The arbitration clause is validly invoked in accordance with the contracts. Therefore, application allowed.

12 Applicant has already appointed Mr. Justice Bhimrao Naik (Retd.), former Judge of this Court, as Arbitrator. On behalf of respondent, I appoint Mr. Justice S.J. Vazifdar (Retd.), former Chief Justice of Punjab and Haryana High Court and before that Judge of this Court, as Arbitrator. Both the Arbitrators can decide who the presiding Arbitrator will be. The Arbitral Tribunal to arbitrate on all disputes and differences, including counter claim, if any, arising out of or in connection with or relating to formal contracts dated 30th August 2013 and 25th October 2013. As the dispute is the same in both contracts, it will be a common reference. All rights and contentions of the parties are kept open, except the question of jurisdiction of the arbitrators.

13 The fees of the Arbitrators, to be fixed by the Arbitrators, administrative expenses, typing charges and venue charges to be shared equally between the parties, i.e., 50% by applicant and 50% by respondent and the same shall be subject to costs in the arbitral proceedings.

14 The Arbitrators to communicate in writing to the Advocate for applicant, with copy to respondent, the disclosures as required under Section 11 (8) read with Section 12 (1) of the Arbitration and Conciliation Act, 1996 within three weeks of receiving a copy of this order from any of the party.

15 Liberty to apply.

16 Application accordingly stands disposed.

(K.R. SHRIRAM, J.)