

THE HON'BLE THE CHIEF JUSTICE SRI THOTTATHIL B. RADHAKRISHNAN

ARBITRATION APPLICATION No.21 OF 2014

ORDER:

This is an application under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996; hereinafter referred to as 'the Act'.

2. The applicant and the respondent entered into a Memorandum of Understanding, for short 'MoU', dated 22.04.2008 and formed a Joint Venture (JV) for the purpose. A copy of the MoU is produced along with the application as Annexure P-3. Clause 8 of that MoU provides arbitration agreement, which is to the following effect:-

"8. Arbitration

Any difference arising out of this Agreement shall be settled by mutual discussions. Any dispute that could not be settled by mutual discussions shall be settled by Arbitration under the rules of Indian Arbitration and Conciliation Act 1996. The place of Arbitration shall be at New Delhi and law governing the interpretation of this Agreement shall be under laws of India."

3. Acting under the terms of the aforesaid MoU, the applicant and the respondent participated in various tenders floated by the Power Grid Corporation of India Limited; hereinafter referred to as 'PGCIL', and carried forward different works. It is also pleaded by the applicant that there were certain amendments to the MoU as it originally stood and supplemental MoU was also executed. The applicant asserts that the disputes have arisen between the parties and they are to be resolved by recourse to arbitration.

4. Issues relating to encashment of Bank Guarantee became the subject matter of O.P.Nos.1849 of 2013 and 2602 of 2013 before the Chief Judge, City Civil Courts, Hyderabad. Interim injunctions were

granted therefrom and it is submitted that the matter was carried to the Hon'ble Supreme Court of India and certain issues as between the parties became the subject matter of Civil Appeal No. (S) 8769 of 2017 arising out of S.L.P. (Civil) No.17186 of 2017. That has been ordered requiring the applicant herein to extend the validity of the Bank Guarantees and leaving the parties to resolve the differences by arbitration subject to orders as may be passed on the Application under Section 11 of the Act, which is pending before this Court. That application is the one, which is being considered through this Order.

5. The respondent filed counter affidavit disputing the MoU and the arbitration agreement by pleading that the MoU was not signed by both the parties. This stand taken by the respondent in the counter affidavit is refuted by the applicant through reply affidavit asserting that the MoU is one, which has been acted upon and the copy produced by the respondent itself would show that it was signed and acted upon. It is also the respondent's plea that different aspects of the facts would show that the arbitrability of the disputes are themselves matters, which are to be settled before referring the issues for adjudication.

6. Heard learned Senior counsel for the applicant and learned Senior counsel for the respondent.

7. While the material papers on record clearly show that the MoU was signed, accepted and acted upon by the parties, the Application for interim measure under Section 9 of the Act was itself one that ultimately led to the Apex Court issued the Order, dated 07.07.2017 in Civil Appeal No.(S) 8769 of 2017, which is as follows:

"1. Leave granted.

2. We have heard the learned counsels for the parties.

3. Upon such hearing we are of the view that the present appeal should be disposed of in the following terms:

(i) The appellant – M/s.ICOMM Tele Limited shall extend the validity of the Bank Guarantees for Rs.10,45,00,125/- and Rs.9,18,24,577/- for a period of one year;

(ii) The parties may resolve their differences by arbitration subject to such orders as may be pleased in this regard in the application under Section 11 of the Arbitration and Conciliation Act, 1996 which is stated to be pending before the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh.

(iii) Once and only if the arbitration commences it will be open for the respondent (s) to urge before the learned Arbitrator for transfer of the amount covered by the Bank Guarantee (s) to a interest bearing account subject to such conditions as may be considered appropriate by the learned Arbitrator.

4. With the aforesaid modification in the impugned judgment and order of the High Court, the present appeal is disposed of. We make it clear that we have not expressed any opinion on the issue of arbitrability of the disputes between the parties.”

8. The learned Senior counsel for the respondent placed reliance on the decision of the Apex Court in **Sukanya Holdings (P) Limited v. Jayesh H.Pandya**¹ and argued for the position that there are segregable issues based on the nature of the transaction between the parties and therefore, the arbitrability of the issues are themselves matters to be decided in this Application under Section 11 of the Act. In the counter affidavit, the respondent has pleaded that there is no continuing eligibility for the applicant to prosecute the Application under Section 11 of the Act having regard to the findings rendered by this Court while deciding C.M.A.No.628 of 2015, which according to

¹ (2003) 5 SCC 531

the respondent, has not been negated by the Apex Court in the aforequoted order. It is also the plea of the respondent in paragraph 3(xvii) of the counter affidavit that the aforequoted order, dated 07.07.2017 issued by the Hon'ble Supreme Court contains a direction to this Court to decide the issue of maintainability of the arbitration clause in the purported MoU. Thus, it is pointed out that the arbitrability of the disputes on the basis of the arbitration agreement in the MoU is itself a matter which this Court ought to decide under Section 11 of the Act.

9. The existence of MoU between the parties is established since the MoU relied on by the respondent is not different from that which contains the arbitration clause as pleaded by the applicant is that MoU signed by the parties. The question whether the JV had thereafter carried forward the activity proposed or intended in terms of the MoU and had entered into or carried forward the different contracts or works are matters, which are in the realm of disputes between the parties.

10. The decision of the Hon'ble Supreme Court in Civil Appeal No.(s) 8769 of 2017 is not to be interpreted in the manner in which the respondent has attempted to project. It is not one which compels this Court, acting under Section 11 of the Act, to decide on the arbitrability of the disputes in the course of consideration of the Application which is now being decided. This is so because this Application under Section 11 of the Act is, going by the premise of that Statute, one to be adjudicated leaving open the issue relating to the arbitrability, for the arbitral tribunal to decide. There is no direction by the Hon'ble Supreme Court to the contrary, warranting

this Court to adjudicate on the question of arbitrability of the disputes notwithstanding the settled legal position and the distinction maintained between Sections 8 and 11 of the Act as enunciated by the Apex Court through its decisions; see for support **Booz Allen & Hamilton Inc v. SBI Home Finance Limited**² and **Magma Leasing & Finance Limited v. Potluri Madhavalata**³. Beyond that is the fact that paragraph 3 (ii) of the Order of the Apex Court quoted above is to the effect that the parties may resolve their differences by arbitration subject to such orders as may be passed in that regard in the Application under Section 11 of the Act. Therefore, this Application and the arbitral proceedings would depend upon the Order that this Court may issue. This is how the direction of the Hon'ble Supreme Court through paragraph 3 (iii) of the aforequoted Order would operate. The terms of that provision would open to operate only if arbitration commences. If this Application is allowed and the arbitration commences, it will be open for the respondent to urge before the learned Arbitrator to transfer the amounts covered by the Bank Guarantee to a interest bearing account subject to such condition as may be considered appropriate by the learned Arbitrator. The directions contained in the Order of the Hon'ble Supreme Court does not by itself require this Court to decide on the arbitrability of the disputes, going beyond the requirements of Section 11(5) and (6) of the Act.

11. Having found that there is an arbitration agreement between the parties, arbitrability of the disputes and all questions arising as between the parties in relation to MoU and the transactions on the

² (2011) 5 SCC 532

³ (2009) 10 SCC 103

basis of that MoU are matters which are to be raised before the Arbitral Tribunal. It will be open to the parties, upon appointment of an Arbitrator, to raise all issues as between them in relation to all aspects of the MoU as would fall within the arbitration agreement.

12. For the aforesaid reasons, this Application is eligible to succeed.

13. In the result, this Arbitration Application is allowed appointing an Arbitrator.

14. Accordingly, Sri Justice B.Sudershan Reddy, former Judge of Hon'ble Supreme Court of India, is appointed as Arbitrator to arbitrate on the disputes between the applicant and the respondent, including the claims and counter claims of both sides. The said Arbitrator shall enter on reference and proceed with, as enjoined by the Act. The venue of the arbitration will be in terms of the arbitration agreement unless otherwise agreed to by the parties before the learned Arbitrator. No order as to costs.

THOTTATHIL B. RADHAKRISHNAN, CJ

02.11.2018
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