

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 25.10.2018

Date of decision :03.12.2018

+ ARB.P. 355/2018

S P SINGLA CONSTRUCTIONS PRIVATE LIMITED

..... Petitioner

Through: Mr.Anirudh Wadhwa, Mr.Hiresh
Choudhary, Mr.S.Abhishek Iyer,
Advs.

versus

STEEL AUTHORITY OF INDIA LIMITED & ANR.

.... Respondents

Through: Mr.Santosh Kumar, Mr.Ram
Gupta, Mr.Shivam Parihar, Advs.
for R-1

Mr.Vivek Mathur, Adv. for R-2

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner praying for the following reliefs:

“a. Declare that the Respondent No 1 has failed to act in terms of the agreed procedure between the parties as regards the constitution of the arbitral tribunal, and has as such forfeited its right to nominate an arbitrator and

consequently appoint an arbitrator on its behalf as also a presiding (third) arbitrator;

b. Declare that the Respondent No 2 has failed to perform the functions in terms of the ICA Rules of Domestic Arbitration and that the ICA Rules of Domestic Arbitration are no longer applicable to the disputes between the parties;

c. Direct the Respondent No 2 to refund the remaining amounts paid by the Petitioner to the Respondent No 2 amounting to about Rs 10,48,500;

d. Declare that the arbitration between the Petitioner and the Respondent No.1 is required to be conducted as per the default statutory procedure under the Arbitration and Conciliation Act, 1996.”

2. The disputes between the parties have arisen in relation to Contract No. DGM/PCC/TK/2010/316 executed between the petitioner and the respondent no.1 on 14.07.2010 relating to the construction of Flyover at three locations and Road Network (PKG.111-01) at Bhilai Steel Plant.

3. Article 9 of the Contract contains the Arbitration Clause and is reproduced hereinunder:

“Article 9 Arbitration (Reference GCC Clause 6)

9.1 Conciliation and Arbitration

Any disputes, differences, whatsoever, arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this Contract shall be settled between the Employer and the Contractor amicably. If however, the Employer and the Contractor are not able to resolve their disputes/differences amicably as aforesaid the said disputes/differences shall be settled by Conciliation, failing which, through Arbitration.

Conciliation shall be resorted to prior to invoking Arbitration. The Arbitration Clause is to be invoked by the parties to the Contract only on failure of conciliation proceedings to amicably settle the disputes.

The arbitration shall be governed in accordance with The Arbitration and Conciliation Act 1996 (hereinafter referred to as the "Act") of India. The language of Arbitration shall be English.

9.2 Subject to the stipulations made hereinabove, Arbitration shall be conducted as per forum specified below:

Arbitration of contracts, with Indian parties, where contract value is more than India Rs. 5 crore and the contracts with foreign parties for value of more than Indian Rs. 5 crore and up to Indian Rs. 20 crore shall be governed by the Rules of Indian Council of Arbitration (ICA)/ "SCOPE Forum of Conciliation and Arbitration" (SCFA) as agreed by the party. The venue shall be New Delhi.

During the pendency of the Conciliation or Arbitration proceedings both the parties (i.e. the Contractor and the Employer) shall continue to perform their contractual obligations.

The arbitral tribunal shall give reasons for its award. The tribunal shall apportion the cost of arbitration between the parties, the award rendered in any arbitration hereunder shall be final and binding upon the parties. The parties agree that neither party shall have any right to commence or maintain any suit or legal proceeding concerning any dispute under this agreement until the dispute has been determined in accordance with the arbitration proceeding provided for herein and then only to enforce or facilitate the execution of an award rendered in such arbitration.

Unless otherwise mentioned, the Arbitration shall be held at Durg, Chhattisgarh, India. The court of Durg, Chhattisgarh, India (with exclusion of all other courts)

shall have exclusive jurisdiction over all matter of dispute.”

4. Disputes having arisen between the parties, the petitioner invoked the Arbitration Agreement vide its letter dated 24.11.2016 proposing arbitration in accordance with Rules of Arbitration of the Indian Council of Arbitration (‘ICA Rules’). The respondent no.1, vide its letter dated 22.05.2017, gave its consent for the arbitration to be conducted under the ICA Rules. Accordingly, the petitioner addressed a letter dated 03.07.2017 to the ICA seeking appointment of an Arbitral Tribunal.

5. Respondent no.2 (ICA) vide its notice dated 20.07.2017 called upon the parties, that is, the petitioner and respondent no.1 to deposit their share of advance deposit in terms of Rule 28 of the ICA Rules and further called upon the respondent no.1 to nominate its nominee Arbitrator.

6. The petitioner made the deposit and nominated its nominee Arbitrator vide letter dated 21.08.2017. ICA, vide its letter dated 23.08.2017, granted further opportunity to respondent no.1 to deposit its share of the deposit. Further time to do the same was granted to the respondent no.1 by the ICA vide its e-mail dated 07.09.2017 and 20.09.2017.

7. The petitioner objected to grant of extension of time relying upon Rule 18 and 23 of the ICA Rules. The petitioner submitted that the timelines stipulated in the said Rules are non-extendable and therefore, the respondent no.1 should be proceeded against in default. This

submission of the petitioner was, however, rejected by the ICA vide its communication dated 19.09.2017.

8. The respondent no.1 finally nominated its Arbitrator and communicated the same to the ICA vide its e-mail dated 16.09.2017 and filed its Statement of Defence on 18.10.2017.

9. The learned counsel for the petitioner submits that the ICA having granted extension of time to the respondent no.1 for filing its Statement of Defence as also for nominating its Arbitrator, is deemed to have failed to act in accordance with its rules thereby making the present petition maintainable.

10. Rule 18 and 23 of the ICA Rules are reproduced hereinbelow:

“Rule 18

(a) On receipt of the application together with the claim statement, the Registrar shall send to the other Party (Respondent) a copy of the claim statement and attached documents and ask such other party to furnish within thirty days or within any extended date not exceeding thirty days, a defense statement setting out his case accompanied by all documents and information in support of or bearing on the matter.

(b) Any communication sent by the Registrar under Registered Post to the Respondent on the address appearing in the Arbitration Agreement/the contract between the parties, as per the information supplied to the Council, will be deemed to be duly served on the Respondent, if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address last known, even if the Respondent refuses to accept the said communication or if it is returned to the

Council by the postal authorities as unclaimed by the said party. The Registrar may proceed further with the arbitration proceedings as per the rules as if such communication had been duly served on the concerned party. The Registrar may in such cases make an additional communication to the Parties by Registered Letter or by other means which may provide a record of attempts to deliver it.

(c) A copy of the defence statement and all appended documents, if any, shall be sent to the Claimant for information.

(d) The communication is deemed to have been received on the day it is so delivered.

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Rule 23

The appointment of sole arbitrator or three arbitrators shall be made in the following manner:

(a) In case a Sole Arbitrator has to be appointed, the Registrar shall, by a notice in writing, call upon the parties to the dispute to forward the name of an agreed arbitrator from among the Panel of Arbitrators. The said notice shall specify the period within which the nomination shall be made which shall not be more than thirty days from the date of the said notice to the respective parties. If the parties fail to agree on the person to be appointed as sole arbitrator within the time granted by the Registrar, the Registrar in consultation with the Chairman of the Committee and in his absence in consultation with the member of the Governing Body designated by the Chairman, shall appoint the sole arbitrator from among the Panel of Arbitrators. The sole arbitrator so nominated shall constitute the arbitral tribunal to hear the dispute and shall be appointed as such in writing by the Registrar. The Registrar shall give notice to the Parties of the constitution of the arbitral tribunal.

(b) Where the reference is to three arbitrators, the Registrar shall in the first instance call upon the parties to nominate one arbitrator each from among the Panel of Arbitrators by a notice in writing, sent to them. The said notice shall specify the period within which the nomination shall be made which shall not be more than thirty days from the date of the said notice to the respective Parties. If a Party to the dispute refuses or neglects to appoint an arbitrator on his behalf within the period specified or if he requests the Registrar to nominate an arbitrator on behalf of that party, the Registrar in consultation with the Chairman of the Arbitration Committee and in his absence in consultation with the members of the Governing Body designated by the Chairman shall appoint the arbitrator from the Panel of arbitrators on behalf of that party. On receipt of the nominations from the respective parties or on the appointment as aforesaid by the Registrar, the Registrar shall appoint another person as the Presiding Arbitrator of the arbitral tribunal in consultation with Chairman of the Committee and in his absence in consultation with members of the Governing Body designated by the Chairman, from among the panel of arbitrators to be additional arbitrator to act as Presiding Arbitrator of the arbitral tribunal.”

11. Though, a reading of the above provisions would indicate that rigid timelines are provided for the filing of the Statement of Defence and for the nomination of the Arbitrator, it must also be remembered that these are rules of a private institution and not laws of limitation having a statutory flavour. In any case, the primary reason of the petitioner for filing the present petition is the refusal of respondent no.1 to pay its share of the deposit demanded by the ICA and refusal of the ICA to appoint the Arbitral Tribunal unless the petitioner deposits the respondent no.1's

share of such deposit and ICA further proceeding to close the reference before it, as communicated vide its letter dated 01.02.2018. I say so, as even after being aware of the delay by the respondent no.1 in filing of its Statement of Defence and nominating its Arbitrator, the petitioner sought appointment of the Presiding Arbitrator by the ICA vide its letter dated 12.01.2018.

12. The learned counsel for the petitioner submits that as the ICA has refused to appoint the Arbitral Tribunal, the petitioner has filed the present petition. The counsel for the petitioner has placed reliance on Rule 28 and 38 of the ICA Rules to contend that the respondent no.2 could not have refused to appoint the Arbitral Tribunal on the failure of the petitioner to pay the respondent no.1's share of the deposit. He submits that the effect of such non payment has to be considered by the Arbitral Tribunal itself and not by the Registrar of the ICA.

13. Rule 28 and 38 of the ICA Rules are quoted hereinunder:

“Rule 28

The Registrar may require the Parties before passing the case on to the arbitrators under Rule 38, to deposit in advance such sums of money as he deems necessary to defray expenses of the arbitration including the administrative charges, arbitrator's fee and stamp duties. As a general rule, the deposits shall be called for in equal shares from the Claimant(s) and the Respondent(s). The arbitral tribunal may, during the course of the arbitration proceedings or in the arbitration award, require further sums to be deposited by the Parties or any one of them to meet the expenses of the arbitration. When one of the Parties neglects or refuses to make the deposit, the Registrar or the arbitral tribunal, as the case may be, may

require such deposit whether in relation to a claim or a counter-claim, to be made by the other Party to the dispute (Claimant or Respondent as the case may be). Should the whole or part of the deposit be not made by the Parties or any one of them, the Registrar shall inform the Parties or the Party concerned that the claim or counterclaim, as the case may be, will not be the subject matter of the reference. The arbitral tribunal shall proceed only in respect of those claims or counter-claims for which the deposits has been duly paid to the Council and otherwise may order the suspension or termination of the arbitral proceedings.

All deposits towards costs and expenses shall be made with the Council and no payment shall be released to the arbitrators directly by the parties. The deposit made shall be taken into account by the arbitral tribunal in apportioning the cost while making the award. Any deposit made in excess shall be refunded to such of parties as the arbitral tribunal may direct. The Council shall have a lien for the arbitral award on any unpaid cost of the arbitration.

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Rule 38

(i) The Arbitral Tribunal shall be deemed to have entered on the reference on the day on which the arbitrator or all the arbitrators, as the case may be, have received notice in writing of their appointment by the Registrar after disposal of the challenge to their appointment, if any, made.

(ii) The Registrar shall send copies of all papers relating to arbitration such as claim statement, defence statement, counter claims, reply, statements, or other documents received from the parties to the dispute to the Arbitrator/ Arbitrators constituting the Arbitral Tribunal with a request to proceed with the arbitration.

(iii) If the Claimant does not file all the requisite documents, papers, etc. or does not deposit the

appropriate fees as per the Rules after having been given due opportunity for the purpose by the Registrar or the arbitral tribunal, the Registrar or the arbitral tribunal may dismiss/ close the case on file for lack of pursual by the Claimant. Similarly, if the Respondent fails to produce any requisite documents, papers including the statement of defence or information or fails to deposit administrative fees, or arbitrators fees etc. after having been given due opportunity for the purpose by the Registrar or the arbitral tribunal, the Registrar or the arbitral tribunal may proceed further with the arbitration proceedings as per the Rules, notwithstanding such failure or refusal by the Respondent.”

14. I am unable to agree with the above submissions of the counsel for the petitioner. Rule 28 in no ambiguous terms states that incase one of the parties neglects or refuses to make the deposit as demanded by the Registrar in accordance with ICA Rules, the Registrar may require such deposit to be made by the other party to the dispute. It further provides that incase the whole or part of the deposit is not made by the parties or any one of them, the Registrar shall inform the parties or the party concerned that the claim will not be the subject matter of the reference. The reference to the Arbitral Tribunal in Rule 28 is only in relation to the direction of the Arbitral Tribunal to the deposit of further sums by the parties and not to the initial demand by the Registrar.

15. Rule 38 of the ICA Rules again clarifies that in case of failure of the claimant to deposit the appropriate fee, the Registrar or the Arbitral Tribunal may dismiss/close the case on file for lack of pursual by the claimant. Rule 38 of the ICA Rules does not stipulate that the Arbitral

Tribunal would necessarily be constituted by the Registrar, ICA even though the full amount of initial deposit has not been made by the parties to the arbitration.

16. In view of the above, the refusal of the ICA to appoint the Arbitral Tribunal on account of non deposit of the fee cannot be faulted.

17. Section 11(6) of the Act allows a party to request the Supreme Court or the High Court, as the case may be, to take necessary measures for the appointment of an Arbitral Tribunal where *inter-alia* the institution empowered to appoint an Arbitrator has failed to perform the function entrusted to it. Section 11(6) of the Act is reproduced hereinunder:

“11(6) Where, under an appointment procedure agreed upon by the parties,—

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

18. In the present case, as the institution, namely ICA, has acted in accordance with its Rules, it cannot be said that it has failed to perform

the function entrusted to it, thereby justifying the filing of the present petition under Section 11 of the Act. In similar circumstances, the Supreme Court in *Antrix Corporation Ltd. v. Devas Multimedia P. Ltd.*, MANU/SC/0514/2013 held that the provision of Section 11 (6) of the Act cannot be resorted to.

19. The reliance of the counsel for the petitioner on the LCIA Arbitration Rules or the Arbitration Rules for the International Chamber of Commerce or the SIAC Rules is also ill-founded. Each institute is to be governed by its own rules and therefore, even assuming that these institutes provide for different consequences incase the payment of initial deposit is not made, the same cannot have any effect on the interpretation and working of the ICA Rules. I may only hasten to add that Article 24.3 read with 24.4 of the LCIA Rules, Article 16 of the ICC Rules and Rule 34.6 of the SIAC Rules do not support the contentions raised by the counsel for the petitioner.

20. The learned counsel for the petitioner has further submitted that the respondent no.1 having failed to deposit its share of the fee demanded by the ICA, it should be deemed to have decided not to proceed under the ICA Rules. He submits that in view of such failure and refusal, the first part of the Arbitration Agreement contained in Article 9.1 of the Agreement, being independent of Article 9.2, which provides for institutional arbitration, would survive and as the parties have failed to agree on the appointment of the Arbitral Tribunal, this Court will have the jurisdiction to entertain the present petition and to appoint the Arbitral Tribunal.

21. I am unable to agree with the said submission of the counsel for the petitioner. Mere non-deposit of the fee by the respondent no.1 cannot be considered as its refusal to the arbitration being conducted under the ICA Rules. Rule 28 of the ICA Rules provides for the consequence of a party not making the deposit of its share of fees and expenses. Therefore, by mere non-deposit of its share of the fee and expenses, the respondent no.1 cannot be said to have abandoned the arbitration under the ICA Rules. Both parties were aware of the ICA Rules when they entered into the Arbitration Agreement, including the Rules relating to the consequence of non-deposit of fee and are, therefore, bound by the same.

22. The counsel for respondent no.1 has submitted that in view of the arbitration proceedings having been terminated by the ICA by its letter dated 01.02.2018, the same amounts to termination of the arbitration proceedings under Section 32 (2) of the Act and the remedy, if any, of the petitioner is not in form of an application under Section 11 of the Act.

23. In my view, the said submission has no force. Section 32(2) of the Act provides for termination of the arbitral proceedings by the Arbitral Tribunal. In the present case, the Arbitral Tribunal has not been constituted and therefore, Section 32(2) of the Act shall have no application. However, for the reasons stated hereinabove, the petition under Section 11 of the Act would equally not be maintainable.

24. The learned counsel for the respondent no.1 has further submitted that the parties had agreed to arbitration only through the ICA or through the SCOPE Forum of Conciliation and Arbitration (SCFA). The parties having already agreed not to proceed with SCFA and the proceedings

with ICA having been terminated, the Arbitration Agreement perishes. He has placed reliance on the judgment of the Supreme Court in *Newton Engineering and Chemicals Ltd. v. Indian Oil Corporation and Ors.*, MANU/SC/1266/2012.

25. I am unable to agree with the submission of the counsel for the respondent no.1. A reading of Article 9.1 and 9.2 of the Agreement would show that the Arbitration Agreement is independent of the Rules governing the same. The same would survive even where for some justified reasons, arbitration cannot take place under the ICA or SCFA Rules. Reliance can be placed on judgment of the Supreme Court in *TRF Ltd. v. Energo Engineering Projects Ltd.* (2017) 8 SCC 377.

26. Learned counsel for respondent no.1 has further contended that once the petitioner has refused to deposit the fee as demanded by the ICA, it is deemed to have repudiated the Arbitration Agreement. The respondent no.1 accepts such repudiation and therefore, the Arbitration Agreement ceases to operate any further.

27. In my view, mere filing of the present petition after non-deposit of other party's share of fee cannot amount to an act of repudiation of the Arbitration Agreement by the petitioner.

28. In view of the above, the present petition is dismissed as not maintainable, leaving it open to the petitioner to avail such other remedy as may be available to it in law. There shall be no order as to cost.

NAVIN CHAWLA, J

DECEMBER 03, 2018/Arya