

THE HONOURABLE SRI JUSTICE SANJAY KUMAR

ARBITRATION APPLICATION No.131 of 2018

ORDER

Ms/.Hinsui Engineering Private Limited, New Delhi, the applicant company, seeks appointment of a sole Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (*for brevity*, 'the Act of 1996'), to resolve its claim against M/s.Sokeo Power Private Limited, Hyderabad, the respondent company, in relation to the Minutes of Meeting (MoM) dated 01st and 02nd September, 2014 and the Letter of Intent (LoI) dated 12.02.2014.

Notice having been ordered on 14.12.2018, Mr. D.Narender Naik, learned counsel, entered appearance for the respondent company and filed a counter-affidavit.

The respondent company was awarded the work of commissioning a 2 x 300 MW Plant in the State of Chhattisgarh by M/s.SKS Power Generation (Chhattisgarh) Limited. Erection of the cooling water piping for the plant was sub-contracted by the respondent company to the applicant company under the LoI dated 12.02.2014. However, 'Termination letter' dated 12.08.2014 was issued by the respondent company terminating the contract on the ground that the applicant company was unable to meet the schedules and performance standards as stated in the contract. In order to settle the matter amicably, the applicant company and the respondent company held a joint meeting at the office of the respondent company in Hyderabad on 01.09.2014 and 02.09.2014 and reduced their terms of agreement to writing, *vide* the MoM dated 01st and 02nd September, 2014. Clause (2) thereof provided for payment of Rs.9,02,725/- by the respondent company to the applicant company within a week of the successful completion of BK-073 and BK-074 boiler

light up or release of the amount to the respondent company by M/s.SKS Power Generation (Chhattisgarh) Limited, whichever was earlier. Claiming that it had completed its part of the obligation in terms of this clause but the respondent company failed to adhere to its commitment to remit the amount, the applicant company filed a suit in CS (OS) No.207 of 2015 on the file of the learned Additional District Judge (South East District), Saket Courts, New Delhi, against the respondent company seeking payment of Rs.9,02,725/- with interest @ 24% p.a. The respondent company entered appearance before the trial Court and filed an application under Section 8 of the Act of 1996 stating that there was an arbitration agreement in the Lol dated 12.02.2014 and in view thereof, the trial Court should dismiss the suit relegating the parties to the agreed remedy of arbitration. Accepting the plea of the respondent company, the trial Court passed order dated 26.02.2018 holding that the plaint was liable to be rejected under Order 7 Rule 11(d) CPC read with Section 8 of the Act of 1996.

Thereupon, the applicant company got addressed legal notice dated 06.09.2018 to the respondent company invoking the arbitration agreement contained in Clause 17 of the Lol dated 12.02.2014 in relation to the claimed amount of Rs.9,02,725/-. In response thereto, the respondent company got issued reply legal notice dated 24.10.2018, raising various issues on the merits of the claim apart from asserting that the said claim was barred by limitation. The respondent company further claimed that upon issuance of the termination letter dated 12.08.2014, the Lol as well as the arbitration clause contained therein also stood terminated.

It is at this stage that the applicant company filed the present application under Section 11 of the Act of 1996 seeking appointment of a sole Arbitrator to resolve its claim against the respondent company for the

sum of Rs.9,02,725/-, in terms of Clause 2 of the MoM dated 01st and 02nd September, 2014.

In the counter-affidavit filed before this Court, the Managing Director of the respondent company, while admitting the execution of the Lol dated 12.02.2014, asserted that upon its termination, *vide* the termination letter dated 12.08.2014, the arbitration clause contained therein also perished. He further admitted the MoM dated 01st and 02nd September, 2014 and the payment that was to be made upon the successful completion of BK-073 and BK-074 boiler light up. He conceded the filing of a suit by the applicant company in relation to the said payment and the filing of an application therein by the respondent company under Section 8 of the Act of 1996. He however stated that the MoM dated 01st and 02nd September, 2014 was an independent contract which did not contain any arbitration clause and therefore, the applicant company could not invoke the arbitration clause contained in the Lol dated 12.02.2014.

Ms. A.Divya, learned counsel for the applicant company, would assert that the arbitration agreement contained in Clause 17 of the Lol dated 12.02.2014 would be available to the applicant company for seeking resolution of its claim for the sum of Rs.9,02,725/- and that it is not open to the respondent company to take varying and contradictory stands in relation thereto.

Per contra, Mr. D.Narender Naik, learned counsel, would reiterate the stand put forth in the counter and assert that the MoM dated 01st and 02nd September, 2014 has to be read as a separate contract, independent of the Lol dated 12.02.2014. He would further argue that, in any event, once the termination letter dated 12.08.2014 was issued by the respondent company terminating the contract awarded to the applicant

company, the arbitration clause contained therein also ceased to have operation.

Clause 17 of the Lol dated 12.02.2014 reads as under:

'17) ARBITRATION: All disputes and differences arising out of which and / or in relation to this contract or subject matter thereof or with regard to interpretation of the terms and conditions thereof (whether at the time of such dispute this contract is subsisting or not) shall be referred to the arbitration of two arbitrators one of whom being nominated and appointed by us and another of whom being appointed and nominated by Hinsui in accordance with the Indian Arbitration and Conciliation Act 1996 and amendments thereof. The decision of an umpire to be appointed by such arbitrators within one month after entering upon reference shall be final and binding on both the parties. The place of Arbitration will be at Hyderabad, Andhra Pradesh.'

Even if the Lol dated 12.02.2014 was subjected to termination by the respondent company, *vide* the termination letter dated 12.08.2014, it would not have the effect of extinguishing the arbitration agreement contained in Clause 17 thereof. (See *EVEREST HOLDING LIMITED V/s. SHYAM KUMAR SHRIVASTAVA*¹ and *REVA ELECTRIC CAR COMPANY P. LTD. V/s. GREEN MOBIL*²). The argument to the contrary by Mr.D.Narender Naik, learned counsel, is therefore without merit.

Perusal of the MoM dated 01st and 02nd September, 2014, demonstrates that the terms and conditions agreed to during the meeting were in reference to the Lol dated 12.02.2014 and it was categorically recorded that both parties agreed to the clauses which were recorded therein. As already pointed out *supra*, Clause 2 required a sum of Rs.9,02,725/- to be released by the respondent company to the applicant company within a week of the successful completion of BK-073 and

¹ (2008) 16 SCC 774

² (2012) 2 SCC 93

BK-074 boiler light up or on release of the said amount to the respondent company by M/s.SKS Power Generation (Chhattisgarh) Limited, whichever was earlier.

As the MoM clearly brings out that it was in consequence and in reference to the Lol dated 12.02.2014, it is not open to the respondent company to claim that the two are separate and distinct, having no link with each other. Further, the absence of a fresh arbitration clause in the MoM dated 01st and 02nd September, 2014, is of no consequence as the said MoM is a product of and was made with reference to the Lol dated 12.02.2014. That apart, the acts on the part of the respondent company also negate any such stand being taken by it at this stage. It is an admitted fact that when the applicant company filed CS (OS) No.207 of 2015 before the competent civil Court seeking payment of the sum of Rs.9,02,725/- under Clause 2 of the MoM dated 01st and 02nd September, 2014, it was the respondent company which filed an application therein under Section 8 of the Act of 1996, relying upon Clause 17 of the Lol dated 12.02.2014 and praying that the parties should be relegated to the agreed remedy of arbitration. Having taken such a stand, which was duly accepted by the trial Court, it is not open to the respondent company to approbate and reprobate to suit its own convenience.

Be it noted that in the order dated 26.02.2018 rejecting the plaint in CS (OS) No.207 of 2015, the trial Court specifically took note of the issue as to whether termination of the contract in which the arbitration clause was incorporated and the drawing up of a fresh agreement between the parties thereafter would result in a situation where, on account of the subsequent contract between the parties, the arbitration clause would stand superseded. The trial Court recorded that on a careful perusal of the relevant documents, it was of the view that the arbitration

clause continues to survive even after the MoM was signed between the parties. One reason cited by the trial Court was the fact that the MoM dated 01st and 02nd September, 2014 made clear reference to the Lol dated 12.02.2014 in the introductory paragraph. The trial Court therefore held that it was not a case where the new contract superseded the old contract and 'rather the Lol which had been drawn previously was brought alive and remained the foundation of the contract between the parties'.

In the light of this categorical finding of the competent civil Court which is binding upon the parties thereto, it is not open to the respondent company to take a stand contrary thereto. If the respondent company was aggrieved by such a finding being recorded, it ought to have carried the matter further. However, it did not choose to do so and allowed the aforesaid order dated 26.02.2018 to attain finality. Therefore, on grounds more than one, it is not open to the respondent company to claim that the arbitration agreement in Clause 17 of the Lol dated 12.02.2014 is not applicable to the MoM dated 01st and 02nd September, 2014.

In that view of the matter, this Court finds that the arbitration agreement is very much in existence between the parties even in relation to the claim made by the applicant company under Clause 2 of the MoM dated 01st and 02nd September, 2014. The respondent company therefore cannot deny the request of the applicant company for appointment of an arbitrator to resolve its claim.

As this Court is given the provision to deal with applications under Section 11 of the Act of 1996 by the Hon'ble The Chief Justice, High Court of Telangana, it would be within its power to undertake the exercise contemplated by Section 11(5) & (6) of the Act of 1996. As per Section

11(6A) of the Act of 1996, which was inserted therein by Act 3 of 2016 with effect from 23.10.2015, the High Court, while considering an application under Section 11(5) & (6) of the Act of 1996 shall confine itself to examination of the existence of an arbitration agreement and no more.

The Arbitration Application is accordingly ordered appointing Sri N.Jaya Raj, Retired District Judge, residing at Flat No.10, Amar Apartments, H.No.10-3-73/6-A, Teachers Colony, East Marredpally, Secunderabad-500026, as the sole arbitrator to resolve the claim of the applicant company against the respondent company under Clause 2 of the MoM dated 01st and 02nd September, 2014, in accordance with the provisions and mandate of the Act of 1996. The learned Arbitrator shall be entitled to fees as per the rates specified in the Fourth Schedule to the Act of 1996, inserted by Act 3 of 2016 with effect from 23.10.2015, which shall be borne by both parties in equal measure. No order as to costs.

13th FEBRUARY, 2019

PGS

JUSTICE SANJAY KUMAR