

ORDER SHEET

IA No. GA/1/2020
AP No. 124 of 2020
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

NATIONAL PROJECTS CONSTRUCTION CORPORATION LTD.
Versus
INDIAN INSTITUTE OF TECHNOLOGY (IIT), KHARAGPUR

BEFORE :

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 5th November, 2020

Mr.Debajyoti Basu,
Ms.Reshmi Mukherjee, Advs.,
for the petitioner.

Mr.Rabindranath Majumder,
Mr.Supratim Bhattacharjee, Advs.,
for the respondent.

The Court : This application has been filed under Section 11 of The Arbitration and Conciliation Act, 1996, by the contractor of a project agreed to be executed for IIT, Kharagpur (the respondent). The project involved construction of an Indoor Sports Complex and a Food Court in the IIT, Kharagpur Campus. The relevant facts leading to the dispute, as alleged by the petitioner, would appear from a letter of invocation of the arbitration component of the dispute resolution clause contained in the agreement executed between the parties on 30th October, 2018.

The petitioner claims that the petitioner was to commence and execute its part of the obligations under the agreement after the respondent undertook to take certain measures for making the project site ready for execution of the work. According to the petitioner, despite several requests made to the respondent both orally as well as in writing, the respondent failed to take suitable measures for making the site conducive for the work. The petitioner maintains that it undertook all necessary measures for honouring its part of the agreement but was obstructed from performing the work due to the respondent's continued failure and inaction to ensure the commencement of the project work. A series of correspondence followed between the parties containing allegations and counter-allegations with regard to the failure and inaction on the part of each other leading to a letter of 12th June, 2019 from the respondent wherein it was alleged that the petitioner is in default of the terms of the agreement and the petitioner was directed to cure the alleged breach and respond on the issues of the allegations within a certain time frame. The petitioner received a letter of termination from the respondent dated 25th October, 2019. The petitioner invoked the dispute resolution clause under the agreement on 29th August, 2019 for resolving the disputes amicably.

The petitioner claims that it did not receive any response from the respondent to the 29th August, 2019 letter and further that on 25th October, 2019, the respondent proceeded to invoke the performance

bank guarantee amounting to Rs.1.36 crore which has been arranged by the petitioner before entering into the agreement with the respondent.

The petitioner invoked Article 14.2 of the Dispute Resolution Clause by the notice of invocation dated 11th November, 2019 which provides for reference of the disputes to arbitration. The petitioner informed the respondent that the petitioner would appoint its Arbitrator in due course.

According to the respondent, the petitioner failed to commence the project work by reason of which the respondent was constrained to terminate the contract and write to the relevant bank for invoking the bank guarantee. It is also the case of the respondent that there is no “dispute” between the parties as envisaged under clause 14 of the agreement and that the notice invoking the arbitration clause was hence not responded to by the respondent.

On considering the facts of the case as urged by counsel appearing for the parties, it is necessary to first set out the dispute resolution clause of the agreement dated 30th October, 2018 which provides as follows :

“DISPUTE RESOLUTION

14.1 Amicable Settlement : In the event of any difference of opinion or dispute on any issue, parties would endeavour to mutually resolve in the best interest of the Institution. Mutual discussion may be held at the apex level between the Director, IITKGP and the Managing Director of PMC.

14.2 Arbitration : In the case of dispute arising upon or in relation to or in connection with the contract between the parties which has not been settled amicably, any party can refer the dispute for Arbitration under (Indian) Arbitration and Conciliation Act, 1996. Such disputes shall be referred to Arbitral Tribunal. The Arbitration Tribunal shall consist of three (3) Arbitrators. Each party shall appoint one Arbitrator within 30 days of the receipt of request for settlement of dispute by Arbitration. The two appointed Arbitrators shall within 30 days of their appointment, appoint a third Arbitrator who shall act as presiding Arbitrator. In case the party fails to appoint an Arbitrator within 30 days from the date of receipt of request or the two appointed Arbitrator fails to agree on third Arbitrator within 30 days of their appointment, the appointment of Arbitrator, as the case may be, shall be made in accordance with the Indian Arbitration and Conciliation Act, 1996. The Arbitration and Conciliation Act, 1996 and any statutory modification or re-enactment thereof, shall apply to these arbitration proceedings.

14.3 Arbitration proceedings shall be held in Kharagpur and the language of the arbitration proceeding and that of all documents and communications between the parties shall be English.

14.4 The award shall be of majority decision, if there is no majority, the award will be given by the presiding Arbitrator. The Parties agree that the decision or award resulting from arbitration shall be final and binding upon the Parties and shall be enforceable in accordance with the provisions of the Arbitration Act subject to the rights of the aggrieved parties to secure relief from any higher forum”.

The interpretation given to the above clause by the petitioner is that Article 14.2 would come into play only after Article 14.1 has been explored and exhausted. This Court agrees with such contention since

the very wording of the clause makes it clear that parties can refer their disputes to arbitration as the second and the last resort only after the option of mutually resolving disputes and differences has been exercised and thereafter failed.

The point of adjudication in the present matter involves construction of Article 14.2 of the disputes resolution clause. The sequence contemplated therein as would appear from a plain reading of 14.2 is as follows :

- i) Each party shall appoint one Arbitrator within 30 days of the receipt of request for settlement of dispute by arbitration;
- ii) The two appointed Arbitrators shall within 30 days of their appointment, appoint a third Arbitrator who shall act as Presiding Arbitrator;
- iii) In case the party fails to appoint an Arbitrator within 30 days from the date of receipt of request; or
- iv) The two appointed Arbitrators failed to agree on a third Arbitrator 30 days of their appointment

. . .

The appointment of Arbitrator shall be made in accordance with the 1996 Act together with any modifications thereof.

Point nos.(i) and (iii) are relevant for the purpose of the present petition. These two points have to be read against the last two paragraphs of the petitioner's letter invoking the dispute resolution clause dated 11th November, 2019. The relevant paragraphs are set out below :

“In the view of the aforesaid, I do hereby on behalf of NPCC invoke Article 14.2 of the said Agreement dated October 30, 2018, inter alia, for resolution of the disputes and differences arising upon or in relation to or in connection with the said Agreement/contract between IIT and NPCC by way of arbitration under the Arbitration and Conciliation Act, 1996, as amended till date by the Arbitration and Conciliation (Amendment) Act, 2019 (Act No.35 of 2019), on the event of such failure of IIT to settle such disputes and differences amicably as per Article 14.1 of the said Agreement.

In view of the Article 14.2 of the said Agreement dated October 30, 2018 I do hereby request to the IIT for settlement of the disputes between NPCC and IIT, by way of arbitration and to do the needful as stipulated under Article 14.2 of the said Agreement. It is trite that in due course NPCC shall intimate to the IIT, the name of arbitrator to be appointed on its behalf as per Article 14.2 of the said Agreement dated October 30, 2018.”

The point which falls for adjudication is whether the letter of invocation is an effective communication warranting the interference of the Court under section 11 of the Act in the absence of the petitioner's nominee Arbitrator being named in the said notice. To answer this issue, sections 11(3), 11(4) and 11(6) of The Arbitration and Conciliation Act, 1996 would have to be read together with the relevant paragraphs from the invocation letter. Section 11(3) contemplates a situation of a three-member Arbitral Tribunal where each party shall appoint one arbitrator and the two appointed arbitrators shall appoint the third arbitrator as

the presiding arbitrator. Section 11(4) refers to the appointment procedure in Section 11(3) and provides for the following:

“If the appointment procedure in sub-section (3) applies and

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(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment
²[the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be].”

Sub-clause 4(a) is relevant for the present issue.

Section 11(6) is also relevant in this context since certain events have been enumerated under it which must occur disjunctively, for triggering the intervention of the Court for appointment of arbitrator/s.

Section 11 and the above clauses do not contemplate any specific obligation on the party invoking the arbitration clause to name or appoint its arbitrator at the time of such invocation. In the present case, Article 14.2 contemplates a sequence which casts an obligation on the first party, i.e., the party invoking the arbitration clause to only refer the dispute to arbitration under Article 14.2. This would be clear from the line “*In the case of dispute any party can refer the dispute for arbitration*” and “*each party shall appoint one arbitrator within thirty days of the receipt of request for settlement of dispute by arbitration*” as well as “*in case the party fails to appoint an arbitrator within thirty days from the date of receipt of request ...*”. The petitioner invoked the Article 14.2 on 11th November, 2019 without naming its Arbitrator. The

petitioner merely stated that “...*in due course NPCC shall intimate to the IIT the name of arbitrator to be appointed on its behalf as per Article 14.2 of the said agreement dated October 30, 2018.*”

This Court was initially tempted to give a purposive interpretation to clause 14:2 to mean that the party invoking the arbitration clause must name its Arbitrator in such invocation for seeking the statutory recourse under Section 11 of the Act. However, upon considering the express language of the clause, it is clear that the clause cannot be read in a manner as to compel a party to name its arbitrator at the time of invocation. In fact, a plain reading of the clause indicates that once the arbitration clause has been invoked and such invocation communicated to the other party, the onus shifts to the second party to appoint its arbitrator within 30 days from the date of receiving the request. No other interpretation is possible. Primacy must be given to the agreement between the parties and the mechanism agreed upon for resolving the disputes. Section 11(6) states that the appointment procedure agreed upon by the parties would be the determining factor. The freedom of the parties in matters of choice as to the place, forum, appointment procedure etc. runs through the Act as a *leitmotif*. Hence, forcing a construction of Article 14.2 not intended by the parties is not warranted in the facts.

A dispute admittedly exists between the parties. This would be evident not only from the letter of invocation of 11th November, 2019 but also the notice of default dated 12th June, 2019 and the notice of termination of 25th October, 2019 culminating in the respondent's communication to the bank to invoke the bank guarantee on the same day. The contention of the respondent that there is no dispute between the parties, cannot, therefore, be accepted. Since there is a dispute and the agreement provides for a dispute resolution mechanism under which the petitioner has sought recourse, the petitioner's case

succeeds. The petitioner's attempt to amicably settle the disputes under clause 14.1 failed. This would be clear from the respondent's act of invoking the bank guarantee on 25th October, 2019.

Under clause 14.2, the party receiving the request for settlement of dispute by arbitration is under an obligation to appoint its arbitrator within thirty days from the date of receiving the request. The respondent received the notice of invocation on 13th and 14th November, 2019 by way of speed post and courier. The respondent should have appointed its arbitrator by 14th December, 2019 which it failed to do. The present application was filed on 21st February, 2020. The respondent did not reply to the letter of invocation.

The application succeeds for the reasons as stated above.

Justice Manojit Mandal and Justice Madhumati Mitra, former Judges of this Court are appointed as Arbitrators for the petitioner and the respondent respectively. Justice Sahidullah Munshi, former Judge of this Court, is appointed as the Presiding Arbitrator. The Arbitral Tribunal shall adjudicate the claims of the petitioner as well as any counter-claim of the respondent, if filed. The Arbitral Tribunal shall be free to fix their remuneration and engage secretarial staff. Such fees and expenses shall be borne by the parties in equal measure. The Tribunal shall be at liberty to decide upon the venue and the cost etc. of such venue shall also be equally borne by the parties.

AP No.124 of 2020 along with GA No.1 of 2020 are disposed of in terms of this order.

(MOUSHUMI BHATTACHARYA, J.)

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