

ODC-1

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

AP/389/2020

M/S. ALLIED INFRASTRUCTURE AND PROJECTS PVT. LTD.
VS.
STEEL AUTHORITY OF INDIA LIMITED
.....

BEFORE:
The Hon'ble JUSTICE ASHIS KUMAR CHAKRABORTY
Date : 24th December, 2020.

Mr. Kushagra Shah, Ms. Sonal Shah, advs...for petitioner.

Mr. Anirban Roy,
Mr. Prantik Gharai, Ms. S. Bose, advs...for respondent.

The Court : In this application under Section 11(6) of the Arbitration and Conciliation Act, 1996, as amended by Act 3 of 2016(in short "the Act of 1996"), the petitioner has prayed for appointment of a sole Arbitrator to adjudicate the disputes arisen between the parties relating to the contract dated April 23, 2014 (hereinafter referred to as 'the contract'). Under the contract, the petitioner was required to carry out various works for construction of a flyover at IISCO Steel Plant, Burnpur, West Bengal. Clauses 9.1 and 9.2 of the contract contemplated that any dispute arising between the parties thereto shall be first sought to be amicably settled, failing which the same

should be adjudicated through arbitration by an Arbitrator to be appointed by the Managing Director of IISCO Steel Plant.

According to the petitioner, the respondent failed to discharge its obligations under the contract and also wrongfully withheld payment of various claims of the petitioner resulting in various disputes and differences arisen between the parties. The process for amicable settlement of such disputes have failed and, as such, the petitioner is entitled to have the disputes relating to the contract adjudicated through arbitration. It is further submitted that in view of the decision of the Supreme Court in the case of Perkins Eastman Architects DPC and Another vs. HSCC (India) Ltd., reported in 2019 SCC OnLine SC 1517, the Managing Director of IISCO Steel Plant is debarred from appointing any Arbitrator. By a notice dated February 17, 2020 issued under section 21 of the Act of 1996 addressed to the Managing Director of IISCO Steel Plant, Burnpur, the petitioner proposed the names of the three advocates, one of whom to be appointed as sole Arbitrator. The said notice was not replied by the Managing Director of IISCO Steel Plant, Burnpur, but by a letter dated March 7, 2020, the Senior Manager (Projects) of the respondent asserted that under clause 6.2 of the General Conditions of Contract framed by the respondent, the petitioner should take necessary steps before SCOPE Forum of Conciliation and

Arbitration, New Delhi for appointment of the Arbitrator under the rules of SFCA.

It is asserted by the petitioner that as per Article 1.2 read with Article 1.3 of the said contract, it is the contract agreement which shall have the precedence over the General Conditions of Contract framed by the respondent no.1. It is further submitted that the petitioner has already filed an application under section 9 of the Act of 1996 before the Commercial Court at Asansol and the respondent is contesting the same without raising any objection with regard to the jurisdiction of the said court to entertain such application. It is vehemently argued that in the present case the disputes arisen between the parties herein under the contract cannot be referred to SCOPE Forum of Conciliation and Arbitration. The petitioner prays for an order for appointment of the sole Arbitrator by this Court.

However, it is contended by the respondent that Article 9 of the contract refers to Clause 6 of the General Conditions of Contract and as such it is the General Conditions of Contract which shall prevail over the Articles of the contract. It is strenuously contended that as per Clause 6 of the General Conditions of Contract the disputes arisen between the parties can only be adjudicated as per the Rules of SCOPE Forum of Conciliation and Arbitration, New Delhi and as such this Court lacks the

territorial jurisdiction to entertain the present application.

Considering the materials on record, I find that it is an admitted position that disputes and differences have arisen between the parties relating to the contract.

In order to appreciate this rival contention with regard to the maintainability of the application, it would be appropriate to set out the following articles of the Contract agreement.

"Article 1 ***Contract Documents***

1.1 Definitions (*Reference GCC Clause 1*)

1.2 Contract Documents (*Reference GCC Clause 2*)

The following documents shall constitute the Contract between the Employer and the Contractor, and each shall be read and construed as an integral part of the Contract:

- (a) *This Contract Agreement and Appendices hereto*
- (b) *Special Conditions of Contract and Annexure hereto*
- (c) *General Conditions of Contract and Annexure hereto*
- (d) *Technical Specifications*
- (e) *General Technical Specifications*
- (f) *Safety code for Contractors*

Order of Precedence (*Reference GCC Clause 2*)

In the event of any ambiguity or conflict between the Contract Documents listed above, the order of precedence shall be the order in which the Contract Documents are listed in Article 1.2(Contract Documents) above."

For the purpose of deciding the rival contentions of the parties in this application it would further be appropriate to extract Article 9 of the Contract document which runs as follows:-

"Article 9

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 in 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.

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

9.2 The Contract shall go for Ad hoc Arbitration, where an impartial Arbitrator would be appointed by the Managing Director of IISCO Steel Plant, and the arbitration proceedings shall be governed by the Arbitration and Conciliation Act of 1996 of India.

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 IISCO Steel Plant, Burnpur, West Bengal India. The Court of Asansol, West Bengal, India (with exclusion of all other Courts) shall have exclusive jurisdiction over all matter of dispute."

From a conjoint reading of the aforementioned Articles of the contract I find that the petitioner is justified to contend that the disputes between the parties under the contract is to be adjudicated by an Arbitrator in the manner stipulated in clause 9.2 of the conditions of contract. It is not the case of the respondent that the Managing Director of IISCO Steel Plant is the only authority who can appoint Arbitrator. The sole contention urged by the respondent is that the arbitration proceeding is to be conducted as per the Rules of SCOPE Forum of Conciliation and Arbitration, New Delhi, the petitioner ought to have approached the competent Court in New Delhi to file the present application. In other words, the only ground of defence put forth by the respondent in this application is that this Court lacks the jurisdiction to appoint an Arbitrator under the arbitration agreement contained in Article 9 of the Conditions of Contract.

As I have already held that in the present case the arbitration proceeding is to be conducted under Article 9.2 of the contract, there appears to be no merit in the

submission made by the respondent to challenge the jurisdiction of this Court to entertain this application.

In the present case, the petitioner has already substantiated the ground under Section 11(6) of the Act of 1996 for appointment of a sole Arbitrator by this Court.

For the foregoing reasons this application succeeds.

Justice Madhumati Mitra, a former Judge of this Court (Mobile No.9073962869) is appointed as the sole Arbitrator to adjudicate the disputes arisen between the parties.

The Arbitrator shall be free to fix his fees, which shall be borne by the parties in equal share. The Arbitrator will be free to engage the secretarial staff whose remuneration shall also be borne by the parties in equal share.

Since the respondent was not called upon to file the affidavit-in-opposition the allegations made in the petition shall be deemed not to have been admitted.

With the above directions, the application, AP/389/2020 stands disposed of.

(ASHIS KUMAR CHAKRABORTY, J.)