

AP 15 of 2021

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

THE BRAITHWAITE BURN AND JESOP CONSTRUCTION COMPANY LIMITED
-Versus-
M/S. CONSULTANTS COMBINE PRIVATE LIMITED

BEFORE:

The Hon'ble JUSTICE ASHIS KUMAR CHAKRABORTY

Date : 14th January, 2021.

Appearance:

Mr. Rajarshi Dutta, Adv.

Mrs. Sharmistha Ghosh, Adv.

Mr. Swarbhanu Bhattacharya, Adv.

...for the petitioner.

Mr. Nilay Sengupta, Adv.

Mr. S. Banerjee, Adv.

Ms. Swati Agarwal, Adv.

...for the respondent.

The Court : This is an application under Section 11(6) of the Arbitration & Conciliation Act, 1996 (in short, 'the Act of 1996') for appointment of a sole Arbitrator to adjudicate the disputes arising between the parties relating to the agreement dated December 29, 2008 read with the memorandum of understanding dated March 11, 2009.

It is the case of the petitioner that by a memorandum of understanding dated March 11, 2009 the parties herein and Diamond and Gem Development Corporation Limited (in short, 'DGDC') entered into a consortium agreement for the purpose of bidding a tender issued by the Government of Gabon for construction of a township at Bikele (in short, 'the said township'). The tender submitted by the said consortium comprising the parties herein and DGDC was accepted by the Government of Gabon and the contract for

consortium of the said township was awarded to the said consortium. Subsequently, however, DGDC had withdrawn itself from the said consortium. Accordingly, on December 29, 2008 a supplementary agreement was entered into between the parties herein recording the fact that the consortium for construction of the said township would consist of themselves only. Clause 4 of the said supplementary agreement dated December 29, 2008 contemplated that all disputes arising between the parties thereto shall be settled through arbitration under the Act of 1996 and the seat of arbitration shall be in Kolkata. On March 11, 2009 the parties herein entered into another memorandum of understanding, thereby superseding the original memorandum of understanding dated August 14, 2008 and specifying the respective scope of work towards construction of the said township.

According to the petitioner, the consortium carried out all work towards construction of the township as per the contract awarded by the Government of Gabon, but certain disputes have arisen between the parties herein relating to the said supplementary agreement dated December 29, 2008, read with the memorandum of understanding dated March 11, 2009 on the grounds, inter alia, that the respondent has withheld certain payments from the petitioner. Accordingly, by a letter dated July 3, 2020 the petitioner invoked the arbitration agreement contained in Clause 4 of the said supplementary agreement dated December 29, 2008 and requested the respondent to agree to the appointment of an

arbitrator suggested by them. By a letter dated July 3, 2020 the respondent refuted the claims made by the petitioner.

In the background of the above facts, the petitioner has filed this application praying for the leave mentioned above.

An objection has, however, been raised by the respondent to the maintainability of the application on the ground that the claim raised by the petitioner against the respondent is barred by the laws of limitation. The respondent, however, could not dispute the existence of the arbitration agreement between the parties contained in Clause 4 of the said supplementary agreement dated December 29, 2008.

In the present case, the existence of the arbitration agreement between the parties herein as contained in Clause 4 of the said supplementary agreement dated December 29, 2008 is not in dispute. It is also evident that the parties have failed to agree to the appointment of the sole Arbitrator as contemplated in the arbitration agreement. From the records disclosed in the petition it cannot be said with certainty that the claim of the petitioner against the respondent is barred by limitation. Be that as it may, it is well settled that in view of insertion of Sub-section(6A) to Section 11 of the Act of 1996 while dealing with an application to Sub-section(6A) of Section 11 of the Act of 1996 the Court has to ascertain the existence of the arbitration agreement between the parties and if, the parties have failed to agree to the appointment of an Arbitrator as per the arbitration agreement.

The plea of the respondent that the claim of the petitioner in this application against the respondent barred by limitation is a mixed question of fact and law and it remains within the domain of the power of the Arbitrator to decide such issue. This view is supported by the Supreme Court decision in the case of Uttarakhand Purv Sainik Kalyan Nigam Limited -versus- Northern Coal Field Limited, reported in (2020) 2 SCC 455.

For the reasons aforesaid, the application, AP NO.15 of 2021 succeeds. Accordingly, Justice Ranjit Kumar Bag, a former Judge of this Court (Mobile No.8335073394), is appointed as the sole Arbitrator to adjudicate the disputes between the parties. The learned Arbitrator will be free to fix his remuneration as per the Fourth Schedule to the Act of 1996 and to engage the necessary staff for conducting the arbitral proceeding. The fees of the Arbitrator and the remuneration of the staff to be engaged by the Arbitrator shall be borne by the parties in equal shares.

There shall, however, be no order as to costs.

Urgent certified website copies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(ASHIS KUMAR CHAKRABORTY, J.)