

ODC-6

ORDER SHEET

AP/270/2021

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

TECHNO ELECTRIC AND ENGINEERING COMPANY LIMITED
Versus
BENGAL ENERGY LIMITED

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 20th July, 2021.

[Via video conference]

Appearance:

Mr. Jishnu Saha, Sr. Adv.

Mr. Sourav Kumar Mukherjee, Adv.

Mr. Ishaan Saha, Adv.

Mr. Debdeep Sinha, Adv.

Mr. Priyankar Saha, Adv.

Ms. Urmila Chakraborty, Adv.

Mr. Aasish Chowdhury, Adv.

Mrs. Aindrila Basu, Adv.

Ms. Puja Tripathi, Adv.

The Court: This is an application under Section 15(2) of The Arbitration and Conciliation Act, 1996 (the Act) for appointing an Arbitrator in place and stead of the learned Sole Arbitrator who was appointed in an application filed under Section 11(6) of the Act by the petitioner herein who is also the Claimant before the Arbitrator.

The trigger to this application is a letter of the Arbitrator dated 19th June, 2021 which records the inability of the applicant to file its Statement of

Claim within the stipulated date and the Arbitrator expressing his inability to devote sufficient time to the arbitration and complete the same within a period of 12 months. The Arbitrator has referred to Section 12 and the Sixth Schedule to the Act in reference to his position. The order by which the Arbitrator was appointed was passed by a learned single Judge of this Court on 13th December, 2019 in an application under Section 11.

Learned counsel appearing for the respondent, both here as well as in the arbitration, submits that the process of substituting the present Arbitrator for a new Arbitrator can only be done in accordance with the Rules that were applicable to the appointment of the Arbitrator who was being replaced. Counsel places emphasis on Section 15(2) of the Act which requires the aforesaid to be followed. It is also submitted that the petitioner who was engaged for a project by the respondent was appointed in terms of purchase orders and a work order, some of which documents do not contain an arbitration clause. Counsel again refers to those documents to contend that it is arguable whether arbitration can continue at all. It is also submitted that the dispute of unpaid bills etc. is of 2012 and the entire issue may be barred by limitation. Counsel relies on (2006) 10 SCC 763 [*National Highways Authority of India vs. Bumihway DDB Ltd. (JV)*] to urge that Section 15(2) is different from Section 11(6) and that a Court appointing a substitute Arbitrator cannot disregard the Rules which were relevant for the appointment of the Arbitrator in a proceeding.

Upon hearing learned counsel appearing for the parties, this Court is of the view that the resistance to the application is without any statutory basis. Section 15(2) provides for a specific situation, namely, where the mandate of an Arbitrator is terminated and the situation calls for appointment of a substitute Arbitrator. Section 15 can be seen as an additional provision to Sections 13 and 14 which also provide for situations where it becomes impossible for the Arbitrator to act and the mandate is terminated on that basis. The language of Section 15(2) with regard to the relevance of Rules for appointing a substitute Arbitrator would become pointless if the submissions made on behalf of the respondent are seen as correct. The issue of a few of the documents on which the parties agreed to enter into a contract not containing an arbitration clause was taken into account by the learned single Judge in the application under Section 11 and specifically decided. Relevant portions of the judgment of the learned single Judge would show that the Court agreed with the contentions of the petitioner that disputes and differences between the parties arose out of the said purchase orders which were covered by the arbitration clause contained in the first purchase order and that such disputes, therefore, should be referred to arbitration. The judgment further proceeds to point out that the respondent in its letter dated 16th July, 2019 had also expressed its intention to refer the disputes and differences to arbitration and had even suggested the name of an Advocate who would be appointed as the Arbitrator. It cannot be disputed under any circumstances that the categorical finding of the learned Judge was that there exists an

arbitration agreement between the parties for adjudication of the disputes and differences relating to all the four purchase orders. A Sole Arbitrator was appointed on this basis. The issue with regard to the claim being belated also cannot be gone into at this stage since every possible objection to appointment of an Arbitrator was gone into by the learned single Judge in the Judgment dated 13th December, 2019.

The simple fact which has to be taken into account in the present application is the learned Arbitrator expressing his difficulty in acting in the matter on the ground of Section 12 read with the Sixth Schedule which takes into account circumstances which are likely to affect the ability of the Arbitrator to devote sufficient time to the arbitration and, in particular, to finish the entire arbitration within 12 months. In paragraph 44 of *National Highways*, the Supreme Court noted that it was only after the two nominated Arbitrators were unable to reach a consensus on the third Arbitrator and on their failure to arrive at such consensus that the High Court could appoint the third Arbitrator under Section 11(6) of the Act. Moreover, there is a fundamental difference between the contemplation of the legislature in Sections 11(6) and 15(2) of the Act. Section 11(6) outlines the scenario where there is a failure of the parties or of the two appointed Arbitrators to decide on a Sole Arbitrator or a third Arbitrator while Section 15(2) is only concerned with appointment of a substitute Arbitrator when the mandate of an existing Arbitrator comes to an end. The difference in the two provisions has been stated to address the concern of counsel appearing for the respondent that a

Court cannot step for appointing an Arbitrator without first referring to the Rules for such.

This Court is therefore completely disinclined to turn the clock back and put the parties to the position where they were before the Arbitrator was appointed in an application filed under Section 11(6) of the Act.

AP No. 270 of 2021 is hence disposed of in terms of prayer (a); prayer (a) being for recording the termination of the mandate of the learned Sole Arbitrator and for appointing an Arbitrator in his place and stead for adjudicating the disputes and differences between the parties. Mr. Syama Prosad Sarkar of the Bar Library Club is appointed Arbitrator in place and stead of Mr. Malay Kumar Ghosh.

Needless to say that the parties will be at liberty to urge all points including that of limitation before the learned Arbitrator.

(MOUSHUMI BHATTACHARYA, J.)

sg.