

IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL JURISDICTION
(Original Side)

Pronounced on: 16/09/2021

AP 353 of 2020
(Through Video Conferencing)

TANTIA CONSTRUCTION LIMITED

... .Appellant(s)

Through : Mr. Ishaan Saha and Mr. Raghunath
Ghose, Advocates (VC)

v/s

UNION OF INDIA

....Respondent(s)

Through : Ms. Aparna Banerjee, Advocate

Coram : HON'BLE MR. JUSTICE RAJESH BINDAL,
CHIEF JUSTICE (ACTING)

ORDER

1. The present application has been filed under Section 11 of the Arbitration and Conciliation Act (for short, 'the Act') for appointment of an arbitrator for resolution of dispute between the parties. Arbitration clause in the agreement dated February 22, 2010, is not in dispute.

2. The learned Counsel for the applicants submitted that as during the currency of execution the project, there was dispute regarding price escalation the applicant prayed for appointment of an arbitrator by filing AP 92 of 2016 before this Court, which was disposed of on September 16, 2016 directing the appointing authority under to ensure constitution of Arbitral Tribunal. The Tribunal considered the claim. The contract was concluded on March 22, 2016. Final bill was prepared and submitted on December 16, 2016. As certain claims were rejected, fresh application was filed by the

applicant for appointment of arbitrator on August 21, 2017. At this stage, the Court is only to examine as to whether there exists an arbitration clause in agreement. Merits of the case cannot be gone into. All other objections are open before the arbitrator. In support of his argument reliance was placed on judgment of Hon'ble the Supreme Court in **Mayavati Trading Private Limited vs. Pradyut Deb Burman, (2019) 8 SCC 714**.

3. On the other hand, the learned Counsel for the respondent submitted that at the interim stage the applicant, raising certain disputes, sought appointment of an arbitrator. In terms of the direction issued by this Court in AP 92 of 2016 dated September 16, 2016 Arbitral Tribunal was appointed. The applicant submitted his claim petition on February 23, 2017, which was adjudicated upon by the Tribunal while passing award on December 11, 2020. The claim for which the Arbitral Tribunal is sought to be appointed by the applicant were part of the claim petition filed by him and have already been adjudicated upon by the Arbitral Tribunal. In fact by filing a subsequent demand notice on August 21, 2017 the applicant wishes to raise the same issues which he had been raised in the earlier arbitration proceedings and have already been dealt with and partly rejected. Once the claims made by the applicant have already been adjudicated upon by the arbitrator no question arises for appointment of fresh arbitrator.

4. Heard the learned Counsel for the parties and perused the relevant referred records. The fact that there is an arbitration clause in the concluded contract between the parties is not in dispute. It has come on record that during the currency of the execution of the project the applicant issued a notice to the respondents on July 02, 2015 calling the respondents to constitute the Arbitral Tribunal. The matter came to this Court. Vide order

dated September 16, 2016 passed by this Court in AP 92 of 2016, this Court directed the appointing authority under the agreement to appoint an Arbitral Tribunal and conclude the reference as expeditiously as possible. It further came on record that the project stood executed on March 22, 2016 and the final bill was also submitted by the applicant on December 16, 2016. As according to the applicant on submission of final bill certain dispute remained, a request was made to the appointing authority vide letter dated August 21, 2017 for appointment of an Arbitral Tribunal. The summary of claims made therein is extracted below:

Summary of Claims

S. No.	Account	Claim Amount
1	Inclusion of scope of preparation of general arrangement drawings and design.	6,75,39,597/-
2	Refund of Penalty	59,00,000/-
3	Excess amount of WB Sales Tax/VAT deducted from payable amount Claimant incl. Amount of 50 th Bill	1,40,50,111/-
4	Cost of additional resources (barge mounted crane with barge for central span erection w.e.f. 14.07.2015)	3,04,21,912/-
5	Cost of Arbitrations	
6	Interest on the outstanding amount from the date the payment should have been made till the date of payment	To be calculated

5. As it is evident from the communication dated January 01, 2016, from the applicant to the respondent seeking appointment of an Arbitral Tribunal in the first round, claim of Rs. 3,29,41,477/- was made on account of escalation bill.

6. A perusal of the claim petition filed by the applicant alongwith letter dated February 23, 2017, before the Arbitral Tribunal, as has been annexed by the respondent with the reply affidavit, shows that the applicant had claimed resolution of dispute with reference to the following items:

“Summary of Claims:

S. No.	Account	Claim Amount
1	Erroneous computation of Price Variation amount unfreezing of RBI Indices	3,28,83,942/- (incl. assessed differential amount corresponding to final bill)
2	Inclusion of scope of preparation of general arrangement drawings and design	6,75,39,597/-
3	Refund of Penalty	59,00,000/-
4	Excess amount of WB Sales Tax/VAT deducted from payable amount of Claimant incl. amount of 50 th Bill	1,40,50,111/-
5	Cost of additional resources (barge mounted crane with barge for Central span erection w.e.f 14-Jul-15)	3,04,21,912/-
	Grand total of Claim/ Outstanding amount	15,07,95,562/-

7. The Arbitral Tribunal gave its award on December 11, 2020 to the claims made by the applicants. The award in the paragraph 11 of part B thereof records that on October 10, 2017 it was noticed that further proceedings could commence only after completion of pleadings. In the final award the Arbitral Tribunal dealt with claims made by the applicant under the following heads:

Claim No. 1	Erroneous Computation of Price Variation amount. Unfreezing of RBI Indices.	Rs. 3,28,83,942.00 (including assessed differential amount corresponding to final bill)
Claim	Inclusion of scope of	Rs. 6,75,39,597.00

No. 2	preparation of general arrangement of drawings and design.	
Claim No. 3	Refund of Penalty	Rs. 59,00,000.00
Claim No. 4	Excess amount of West Bengal Sales Tax/VAT deducted from payable amount of Claimant including amount of 50 th Bill	Rs. 1,50,40,111.00
Claim No. 5	Cost of additional resources/barge mounted crane with barge for Central span erection w.e.f 15.07.15	Rs. 3,04,21,912.00
Part-D	Award on the Counter Claims preferred by the Respondent Railway.	Not quantified

8. A perusal of the claim petition filed by the applicant with reference to the subject matter of dispute in the present application and the award of the Arbitral Tribunal as has already been passed clearly shows that the issues, which are sought to be raised now for appointment of an Arbitral Tribunal, in fact have already been adjudicated upon the claim petition filed by the applicant. As to whether under such circumstances, the Court should direct appointment of an arbitrator has been gone into by Hon'ble the Supreme Court in **Bharat Sanchar Nigam Ltd. and Anr. v. M/s Nortel Networks India Pvt. Ltd., Civil Appeal Nos. 843-844 of 2021** decided on March 10, 2021, wherein it has been opined that at the referral stage, the Court can interfere when it is found that the claim is time barred or there is no subsisting dispute. The case in hand falls in the second category. Once a dispute has already been adjudicated upon, it cannot be said to be a subsisting dispute which requires resolution.

9. Considering the aforesaid enunciation of law and the fact that the appointment of an arbitrator is sought for resolution of the dispute which

in fact has already been adjudicated upon in the earlier claim petition filed by the applicant, I do not find any case is made out for appointment of an arbitrator afresh.

10. The present application is accordingly dismissed.

RAJESH BINDAL
Chief Justice (Acting)

KOLKATA
16.09.2021

PA(SS/RB)