

AP 426 of 2020

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

MERINT INDUSTRIAL INFRASTRUCTURE PRIVATE LIMITED
-Versus-
NATIONAL INSTITUTE OF TECHNOLOGY, DURGAPUR

BEFORE:

The Hon'ble JUSTICE ASHIS KUMAR CHAKRABORTY
Date : 28th January, 2021.

Appearance:
Mr. Prasanta Kumar Dutt, Adv.
Mr. Rajarshi Dutta, Adv.
Mr. Ayan Dutta, Adv.

Mrs. Aparna Banerjee, Adv.
Mr. A. Dey, Adv.

The Court : In this application under Section 11(6) of the Arbitration & Conciliation Act, 1996 (in short, 'the Act of 1996') the petitioner company has prayed for appointment of a sole Arbitrator to adjudicate the disputes arisen between the parties herein relating to the work order bearing no.NITD/118/Con.C/EXP/H-5/2009/110/2144 dated November 17, 2009 for carrying out the work, namely, "construction of four storied RCC framed annex building to existing hostel no.5 inside the NIT campus at Durgapur" (hereinafter referred to as 'the said work').

The terms and conditions under which the petitioner was required to carry out the said work were those forming part of the General Conditions, annexed to the notice inviting tender dated July 29, 2009 issued by the respondent as also those stated in the Annexure to the said work order. As per Clauses 9.1 and 9.2 of

the General Conditions of Contract as annexed to the said notice inviting tender (hereinafter referred to as 'the said General Conditions') the disputes arising between the parties relating to or arising out of the said work order would first be referred to the Dispute Resolution Board and if any party is aggrieved with the said decision of the Dispute Resolution Board, such disputes would be referred to arbitration under the Act of 1996 or any statutory modification thereto.

It is the case of the petitioner company that since the respondent refused to pay their claim arising out of the said work order, by letter dated July 4, 2019 they requested the respondent to refer their claim to the Dispute Resolution Board. However, the said letter evoked no response to the respondent, nor the Dispute Resolution Board was constituted. Accordingly, by letter dated September 17, 2019 the petitioner requested the respondent to refer all disputes arisen between the parties relating to the said work order, as well as the some other work orders to arbitration. Once again, the respondent did not respond to the said letter dated September 17, 2019. Thus, the petitioner filed an application, AP No.50 of 2020 before this Court praying for an order of appointment of a sole Arbitrator to adjudicate the disputes arising between the parties herein not only relating to the said work order but also relating some other work orders. On February 13, 2020 this Court passed an order in the said application, AP No.50 of 2020 allowing the petitioner to withdraw the said application with liberty to file a fresh application in connection with the said work order. Thus, by letter dated

September 21, 2020 the petitioner issued a fresh notice to the respondent and invoked the arbitration clause contained in Clause 9.2 of the said General Conditions of the said work order. The petitioner also requested the respondent to appoint a fit and proper person as the sole Arbitrator to adjudicate the disputes arising between the parties relating to the said work order. Once again, the respondent did not respond to the said letter. Petitioner has, therefore, filed the present application seeking the relief already mentioned above.

Although the respondent has filed an affidavit-in-opposition, but nothing has been disclosed to substantiate that any Dispute Resolution Board was ever constituted for adjudication of the disputes arisen between the parties herein on account of claims of the petitioner.

In the present case, there is no dispute with regard to the existence of the arbitration agreement contained in Clause 9.2 of the General Conditions of the said work order. However, from the facts of the case as discussed above, it is evident that the parties have failed to appoint an Arbitrator as per the procedure agreed in Clause 9.2 of the General Conditions of the said work order.

Accordingly, in view of the insertion of sub-Section(6A) of Section 11 of the Act of 1996 and the decision of the Supreme Court in the case of *Duro Felguera, S.A. -versus- Gangavaram Port Limited* reported in (2017) 9 SCC 729, the present application filed by the petitioner succeeds.

With consent of the parties, Mr. Ranjan Deb, Senior Advocate and Barrister-at-Law of Bar Library Club(First Floor) is appointed as the sole Arbitrator to adjudicate the disputes arisen between the parties relating to the work order bearing no. NITD/118/Con.C/EXP/H-5/2009/110/2144 dated November 17, 2009. The learned sole Arbitrator will be free to fix his remuneration and to engage the secretarial staff. The fees of the learned sole Arbitrator, as well as the remuneration of the secretarial staff shall be borne by the parties in equal shares.

Before parting with the matter, it is, however, clarified that the respondent will also be entitled to raise its counter-claim, if any, against the petitioner before the learned sole Arbitrator.

With the above directions, the application, AP No.426 of 2020 stands disposed of without any 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.)