

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO. 413 OF 2021

Visual Education Aids Pvt. Ltd. ... Petitioner

vs.

Madras Regional Purchase Unit ... Respondent
Directorate of Purchase and Stores.

Ms. Saakshi Saboo a/w. Ms. Bhakti Jain, i/b. M/s. Raval Shah & Co., for the
Petitioner.

Mr. Swapnil Bangur i/b. Mr. Dushyant Kumar for the Respondent.

CORAM : A. K. MENON, J.

DATED : 24th AUGUST, 2021.

P.C. :

1. This is an application by way of Arbitration Petition seeking substitution of the Tribunal. The dispute between the parties arises out of purchase order dated 26th August, 2015 issued by the Directorate of Purchase and Stores, Madras Regional Purchase Unit of the Department of Atomic Energy, Government of India issued to the petitioners for carrying out certain works set out in the annexure. The purchase order was issued subject to General Conditions of all Contracts and Special Conditions of Contract governing the supply of plant and machinery in the Form No. DPS-P-11.

2. DPS-P-11 contained an arbitration agreement in Clause 17. It contemplates reference of disputes to the sole arbitration of the Directorate of Purchase and Stores or of some other person appointed by him. Essentially the respondent seeks to appoint an arbitrator.

3. Pursuant to this correspondence ensued between the parties and at some stage the petitioner vide letter of 24th February, 2021 suggested that they have chosen two members “for arbitration committee” These were retired employees / former employees of BARC and Department of Atomic Energy. In response letter of 11th March, 2021 contended as follows :

It is hereby intimated to you that, DPS has constituted an Arbitration Tribunal wherein following are appointed as the members of the tribunal :

1. *Shri Puthiya Vinayagam, Director, RDG, IGCAR [Retd.]*
2. *Shri N. D. Khopkar, Jt. Director, P & S, DPS [Retd.]*
3. *Smt. V. Kalyani, Jt. Controller of Accounts, DAE [Retd.]*

Please note all arbitration related matters will be decided by the above arbitration tribunal

All three persons nominated were retired officials. The respondent thus contended that the arbitration would now be conducted by a tribunal of the aforesaid three members.

4. This led to further correspondence and the petitioner has vide letter of 9th April, 2021 invited attention of respondent to clause 17 of DPS-P-11 and

sought to contest constitution of a three member tribunal. Vide its reply dated 19th April, 2021 the respondent claimed that DPS-P-11 has been replaced by P-100. While DPS-P-11 had provision for appointment of sole arbitrator the respondent contended as follows :

“Please note that, P-11 has been replaced by P-100. P-11 had provision for appointment of sole arbitrator. Since, P-11 does not exist, as of date, therefore, sole arbitrator as requested by you cannot be appointed as arbitral tribunal. An arbitral tribunal can only be appointed in terms of P-100 as amended from time to time. Hence, on this ground also your request for appointment of sole arbitrator cannot be accepted.”

The respondent contended that the tribunal now cannot consist of a Sole Arbitrator as contemplated under DPS-P-11, but would consist of three member tribunal under DPS-P-100 which contained Arbitration clause being clause 28, thus requiring the petitioners to approach the Court.

5. The respondent filed an affidavit in reply initially to oppose the petition of one Somnath Banerjee, Dy Director (P&S). In that affidavit several contentions have been raised. However what is material is that in paragraph 5 the deponent states as follows

“With regard to paragraph 2 of the Arbitration Petition (L), the Respondent submit that the Clause 17 of the Tender terms is non-

obstante clause and above tender will be governed by the General conditions of Contract & Special conditions of contract governing supplies of plant and machinery (Form DPS-P-11) (Annexure A1) and the terms and conditions mentioned therein. Therefore, there will be a sole Arbitrator appointed by the Directorate, Purchase and Stores as mutually agreed by the parties."

In view of the above it is now evident that as on date the respondent has realised that DPS-P-100 has no application and it is DPS-P-11 that parties to the contract had initially subjected themselves to and therefore clause 17 contains the relevant Arbitration Agreement. Having acknowledged this aspect both parties are now ad-idem that the Arbitration proceedings are to be conducted in accordance with clause 17.

6. The parties have been unable to arrive at a consensual appointment. While both agree that the arbitral proceedings will be held now in Mumbai, both sides have suggested names of arbitrators to one another, but there is no meeting of minds and no common name has been identified. Today both learned counsel submit to orders of the Court as far as appointing the sole arbitrator is concerned. In view thereof I pass the following order :

- (i) Mr. Hiren Kamod, Advocate is appointed as Sole Arbitrator to adjudicate upon claims and counter claims, if any.

(ii) The learned Arbitrator is request to file his disclosure statement under Section 11(8) and Section 12(1) on or before 14th September, 2021 with the Prothonotary and Senior Master and provide copies to the parties.

(iii) Parties to appear before the Sole Arbitrator on a date to be fixed by him at his earliest convenience.

(iv) Fees payable to the Sole Arbitrator will be in accordance with the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

(v) Arbitration Petition is disposed in the above terms.

(vi) No costs.

(A. K. MENON, J.)