

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

925 ARBITRATION APPLICATION NO.20 OF 2021

FIVES CAIL KCP LTD THR ITS AUTHORIZED REPRESENTATIVE
K.B.PRANESH
VERSUS
RAJLAXMI PETROCHEM PVT. LTD

...
Advocate for Applicant : Mr. G.K. Naik-Thigle
...

CORAM : SMT. BHARATI H. DANGRE, J.
DATED : 23/02/2022

PER COURT :

1. Heard the learned advocate Mr. G.K. Naik-Thigle for the applicant and though the respondent is served, there is no appearance on record. On 31st January 2022, the following order was passed :-

“1. Despite service, there is no appearance on behalf of the respondent. Let the learned counsel for the applicant serve the respondent by private service, intimating that the matter is listed for further hearing on 23.2.2022 and in case of failure to put an appearance, the Court would proceed with the prayer made in the application. The applicant is also permitted to serve the respondent through an email.

2. Stand over to 23.2.2022.”

The agreement was entered into the parties for the work covered by the Letter Of Intent dated 31.10.2017 at Rajlaxmi Petrochem Pvt. Ltd., Unit-2, Pangerkhel, PO Budh, Taluka Khatav,

District Satara. The scope of the work was set out in the contract and the total value of the contract was estimated at Rs.1,201 lakhs comprising a sum of Rs.1,051 lakhs towards design, manufacturing, supply, erection commissioning of a new boiler and Rs.150 lakhs towards modification of existing boiler. The agreement placed on record at 'Exh. A' entered into the parties dated 5th September 2018 in the resitels set out the details and the subject matter of the agreement is described in para 2 of the agreement to the following effect.

"2. SUBJECT MATTER OF AGREEMENT :

SELLER agrees to sell to the PURCHASER and PURCHASER agrees to purchase from SELLER, the design, manufacture and Supply Erection & Commissioning of slope fire boiler 16 TPH 45 kg/cm² and modification of PURCHASER's existing boiler to make it suitable for spent wash incineration boiler with coal as supporting fuel for the distillery site.

All the specific material and equipment as per Annexure I to VII shall be supplied on door delivery basis to Site at Pangarkhel, Tal. Khatav, Dist. Satara"

The contract price, terms of payment etc. are set out in the agreement in detail. Clause 25 incorporates arbitration clause which reads thus :-

"25. ARBITRATION :

25.1 Any technical controversy, claim or dispute, termination or indefinite hold in respect of or arising

out of this agreement and its annexes or the breach thereof shall be settled by amicable consultation among the parties. In case such settlement shall prove impossible then such technical controversy, claim or dispute shall be finally resolved by arbitration under the Rules of Indian Arbitration & Conciliation Act, 1996, as may be applicable, by one or more arbitrators or technical experts appointed in conformity with the said rules.

- 25.2 Any such ruling by arbitration shall not materially affect parties' right and obligations under this contract agreement. The ruling by the Arbitration shall be final and accepted by both parties."

The contract came in to force on the effective date and remained in force till the application of the parties still carried and discharged. The annexures of the contract were declared to file in decretal part of contract and ascribed the same force as contract itself.

In terms of the arbitration clause, the dispute arose since the claim of the applicant is to the effect that under the contract they continued the work diligently in terms of the provisions of the contract, but since their outstanding dues were not settled and there was failure to pay the outstanding amount in timely manner, the huge amount remained to be unpaid and outstanding. The difficulty was faced in completing the project. The sum of Rs.7,15,97,667/- was

estimated to be the amount due since the payment was not made for several months which resulted in stoppage of the manufacturing activity with effect from 13.3.2019. In the wake of the aforesaid situation, several communications were made to the respondents through E-mails, the details of which are placed on record and the amount due and payable on the date of issuance of notice to the respondents on 22.3.2021 was set out at Rs. 11,48,65,600/-.

By making reference to the clause 25 in the contract dated 5.9.2018 without prejudice to the opportunity being afforded to the aforesaid payment and the completion of the remaining work, the willingness was sought from the defendant to participate in amicable consultation in terms of para 1 of Clause 25 of the agreement failing which they were reminded that necessary remedy would be invoked by them.

The letter addressed on 22.3.2021 is placed on record at page No. 95. Another communication dated 23.2.2021 reiterates the earlier communication and further by communication dated 16.6.2021 the name of arbitrator was also suggested as the applicant proposed to nominate Justice Thiru R. Balsubramanian, Retired Judge of High Court of Madras as a sole arbitrator and the venue of arbitration was suggested at Chennai. Consent of Justice R. Balsubramanian was

obtained to act as a sole arbitrator in terms of agreement.

Despite the aforesaid communication, there is no response from the respondent and even the respondents have failed to contest the application by securing their presence either themselves or through their counsel.

2. I have heard the learned advocate and perused the agreement which comprise of arbitration clause in the form of clause 25, which contemplate any claim or dispute arising out of the agreement shall be settled by amicable settlement amongst the parties. If such settlement prove to be impossible then such claim shall be finally resolved by arbitration under the Rules of Indian Arbitration & Conciliation Act, 1996. Pertinent to note that repeated correspondence of the applicant with the respondent to settle their claim did not yield and series of communications show that since there was failure on the part of respondent to effect any settlement and settlement appears to be impossible at their end the name of arbitrator came to be suggested.

There is no denial of the existence of arbitration clause in the agreement and by referring to the said clause which undisputedly amount to arbitration clause, depicting existing of arbitration clause in the said agreement entered into the parties and which was acted upon,

I deem it fit in the wake of above and the aforesaid situation emerging, as per the request of applicant which has been communicated to the respondent vide letter dated 16.2.2021 and since there is no response from respondent, to support the Hon'ble Justice R. Balsubramanian, Retired Judge of High Court of Madras, who has accorded his consent to be appointed as Arbitrator to decide the dispute between the parties.

Though the seat of arbitration has been suggested at Chennai in terms of section 20, there can be no other place of arbitration in terms of section 20 (2) and (3).

On completing the procedural formalities contemplated under the statute, arbitration proceedings shall commence by setting up the claim before the Arbitrator within a period of four weeks.

Arbitration application is disposed of in aforesaid terms.

[SMT. BHARATI H. DANGRE, J.]

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