

AP/57/2023
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

M/S. CIMA ROADLINERS
VERSUS
HINDUSTAN PETROLEUM CORPORATION LIMITED & ORS.

BEFORE

The Hon'ble Justice SABYASACHI BHATTACHARYYA

Date: 28TH APRIL, 2023

APPEARANCE

Mr. Sirsanya Bandopadhyay, Advocate
Mr. Arka Kumar Nag, Advocate
....for the petitioner
Mr. Prasun Mukherjee, Advocate
Mr. Deepak Agarwal, Advocate
...for the respondents

The learned Advocate for the petitioner contends that there was an arbitration clause in the Notice Inviting Tender (NIT) floated by the respondent authorities, a copy of which was signed and returned by the petitioner, thereby expressing its agreement to the same. Subsequently, a dispute arose with regard to some of the tank trucks offered by the petitioner in terms of the tender, which were refused to be accepted by the respondent authorities. Litigation ensued and the matter came up before a co-ordinate Bench, where, in the year 2021, an order was passed directing that the said remaining trucks should also be accepted by the respondent authorities. Pursuant to such order, in the year 2021, transporter agreements were entered into between the parties with regard to the said remaining trucks.

However, in the interregnum, that is, between the years 2018 and 2021, certain disputes arose between the parties. The petitioner, inter alia,

claims compensation, damages and other reliefs on the cause of action sought to be made out in respect of such disputes, raised by the petitioner within the conspectus of the arbitration clause of the NIT.

As such, the petitioner invoked the arbitration clause of the NIT and not those contained in the subsequent agreements. However, there being no consensus between the parties with regard to appointment of arbitrator, the present application under Section 11 has been taken out.

The learned Advocate for the petitioner places reliance on *Unissi (India) Private Limited v. Post Graduate Institute of Medical Education and Research* reported at (2009) 1 SCC 107. In the said case, a two-Judge Bench of the Supreme Court, under similar circumstances as the case at hand, had observed that although no formal agreement was executed between the parties, the tender documents indicated certain conditions of contract contained in the arbitration clause. Accordingly, it was held that there was an arbitration clause and the matter was required to be referred to arbitration.

Learned Advocate next cites another judgment of the Hon'ble Supreme Court in *Rajesh Verma v. Ashwani Kumar Khanna* reported at (2016) 12 SCC 678, primarily for the proposition that jurisdiction of the High Court under Section 11 of the Arbitration & Conciliation Act, 1996 is very limited and confined to the examine as to whether there is an arbitration agreement between the contracting parties and, if so, whether any dispute has arisen between them out of such agreement which may call for appointment of Arbitrator to decide such disputes.

While refuting the contentions of petitioner, the learned Advocate for the respondents argues, by placing reliance on a judgment in *South Eastern Coalfields Limited and Others v. S. Kumar's Associates AKM (JV)* reported at (2021) 9 SCC 161, by another two-Judges' Bench of the Supreme Court, that the clauses in the NIT did not comprise of a concluded contract for the purpose of referring the matter to arbitration on the basis of such a clause in the NIT.

It is further argued that in the affidavit-in-opposition of the respondents, it has been clearly mentioned without there being any denial by the petitioner that in April 2021, separate transportation agreements in respect of the remaining eleven tank trucks was executed.

Hence, after the execution of such agreements, which contain independent arbitration clauses, the petitioner cannot resile and rely on the arbitration clause purportedly contained in the NIT for the purpose of invoking the arbitration clause of the NIT post-contract.

Insofar as the first contention of the respondents is concerned, the same cannot be accepted in the eye of law in view of the ratio laid down in *Unissi India Private Limited (supra)*. In exactly similar circumstances, the Supreme Court had observed in the said report that the arbitration agreement did exist and, therefore, the matter should be referred to arbitration for decision. It was further observed by the Supreme Court that supply of the material by the appellant to the PGI and acceptance thereof by the PGI in pursuance of the tender enquiry by them and the tender of the appellant containing the arbitration clause, was admittedly accepted by the PGI. Accordingly, it was held that arbitration agreement did exist. It

was also held that although no formal agreement was executed, the tender documents indicated that certain conditions of contract contained arbitration clause.

In the present case, in fact, the petitioner is on a better footing than the said reported judgement. Here, there was a specific arbitration clause by such definition in the NIT itself. By participation in the tender process, the petitioner accepted the offer made by way of the NIT which contained arbitration clause in turn.

In fact, even the respondent acquiesces to such acceptance by awarding contract with regard to some of the trucks offered by the petitioner pursuant to the Notice Inviting Tender.

Moreover, subsequently, the matter culminated in an order of a coordinate Bench of this Court, pursuant to which subsequent agreements were entered into regarding the self-same remaining tank trucks, in 2021. Hence, there is no dispute as to the fact that the petitioner had accepted the tender condition and participated in the tender process, thereby giving rise to the presumption that the NIT itself, insofar as the arbitration clause is concerned, formed the basis of an independent contract, which contained an arbitration agreement.

Regarding the second objection raised by the respondents, the same is also not tenable in the eye of law. There cannot be any retrospective effect to an arbitration clause in a contract. In the present case, the subsequent transporter agreements were entered into in April 2021. Hence, only a cause of action arising thereafter could be covered by the said arbitration clause in the contract.

However, since the present dispute sought to be referred to arbitration arose in the interregnum between the NIT and the subsequent transporter agreements of 2021, the same was squarely covered by the arbitration clause in the NIT itself.

As regards the judgment cited by the respondents, the same cannot aid the respondents in the present matter. The Supreme Court, in the facts of that case, had held that none of the mandates of the NIT were fulfilled except the mobilization of the equipment at site and fixing commencement of the work. Hence, in such circumstances, it was held that there was no concluded contract or arbitration agreement. Such factual backdrop is not applicable in the instant case and hence, there cannot be any impediment to refer the dispute to arbitration.

Accordingly, AP 57 of 2023 is allowed, thereby appointing Mr. Piyush Chaturvedi (Mobile No. 9831007327), an Advocate practising in this Court, subject to obtaining declaration/consent from him under Section 12 of the Arbitration & Conciliation Act, 1996.

It is made clear, however, that all questions raised by the parties shall be kept open to be decided.

(SABYASACHI BHATTACHARYYA. J.)