

OD-5

ORDER SHEET

AP/356/2023

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

JYOTI CNC AUTOMATION LIMITED
Versus
UNION OF INDIA, THROUGH THE DIRECTOR GENERAL,
ORDINANCE FACTORIES, ISHAPORE

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 21st June, 2023.

Appearance:

Mr. Sarthak Dubey, Adv.

Mr. Shubradip Roy, Adv.

...for the petitioner

Mr. Dibashis Basu, Adv.

Mr. Arun Bandopadhyay, Adv.

...for the respondent UOI

The Court: The dispute arises out of an Agreement dated 02.04.2019 under which the petitioner was to supply, install and commission Machining Centres to the respondent. The agreement is in the form of a Supply Order from the General Manager of the respondent/Rifle Factory, Ishapore to the petitioner for supply, installation and commission of the Machining Centres. The Agreement contains an arbitration clause whereby disputes and disagreements relating to the contract or performance/construction thereof may be resolved through arbitration. A sole Arbitrator is to be appointed by the Director, General Ordnance Factories, Government of India.

The case of the petitioner, as submitted by learned counsel, is that the petitioner complied with the terms of the Supply Order and the respondent agreed to extend the period of warranty. The respondent, however, deducted a sum of Rs.29.98 lakhs approximately on the ground of liquidated damages and prevailed upon the petitioner to extend the performance bank guarantee. The petitioner was constrained to do this as would appear from letters dated 26.12.2022 and 29.12.2022. The letters say that the petitioner is willing to resolve the issues and restore the machines in good condition for continued production in the concerned factory.

The respondent, however, failed to issue gate passes to the petitioner making it impossible for the petitioner to take corrective action. The respondent thereafter proceeded to encash the performance bank guarantee on 16.01.2023. The petitioner was hence constrained to send a notice under Section 21 of the 1996 Act on 24.04.2023 to the respondent requesting for appointment of an Arbitrator under the arbitration clause.

The defence of the respondent is that the notice under Section 21 could only be served on the General Manager of the respondent Rifle Factory on 12.05.2023 on account of certain internal restructuring of the respondent.

The dispute between the parties is evident from the rival contentions advanced in Court. The respondent has already encashed the performance bank guarantee of the petitioner and has also failed to reply to the notice under Section 21 of the Act.

Section 11(5) of the 1996 Act contemplates that in the case of the parties failing to agree on the Arbitrator within 30 days from receipt of a request by one party from the other party to so agree, the appointment shall be made by the High Court, upon application by a party.

In the facts of the present case, the respondent received the notice under Section 21 on 26.04.2023 which would be clear from a postal track consignment report annexed to the application. Hence, the 30 days contemplated under Section 11(5) is over. The present application was filed on 06.06.2023.

It is also evident that the parties have failed to act as required under the Section 11(6)(a) of the Act. In any event, the arbitration clause in the agreement falls foul of the law settled by the Supreme Court in respect of unilateral appointment.

AP/356/2023 is, accordingly, allowed and disposed of by appointing Mr. Prakash Srivastava, former Chief Justice of this Court, as the Arbitrator to resolve the disputes and differences between the parties subject to the Arbitrator communicating his consent as required under Section 12 and the Schedules to the 1996 Act to the Registrar, Original Side of this Court within a period of three weeks from date.

This order is to be communicated to the Arbitrator forthwith.

(MOUSHUMI BHATTACHARYA, J.)