

OD- 6 to 7

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

AP/538/2023

DECIMIN CONTROL SYSTEMS PRIVATE LIMITED
VS
GARDEN REACH SHIPBUILDERS AND ENGINEERS LIMITED

AP/619/2023

GARDEN REACH SHIPBUILDERS AND ENGINEERS LIMITED
VS
DECIMIN CONTROL SYSTEM PRIVATE LIMITED

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 13th September, 2023

Appearance:

Mr. Saptarshi Datta, Adv.

Mr. Satadeep Bhattacharyya, Adv.

Ms. Srinjita Ghosh, Adv.

Ms. Rafat Reyaz, Adv.

Mr. Pourush Kanti Pal, Adv.

*...for the petitioner in AP/538/2023 and
respondent in AP/619/2023*

Mr. Tanoy Chakraborty, Adv.

Mr. Shaunak Mukhopadhyay, Adv.

Mr. Kallol Saha, Adv.

Mr. Akash Ghosh, Adv.

Ms. Shinjita Ray, Adv.

*...for the respondent in AP/538/2023 and
petitioner in AP/619/2023*

AP/538/2023

The Court:- The petitioner has filed the present application under Section 11 of 1996 Act for appointment of Arbitrator. The arbitration agreement is

embedded in the 24 purchase orders issued by the respondent to the petitioner. There are 3 tenders which are brought to the notice of the Court. The tenders relate to supply of shipside exhaust system with IRSS device and for design and development of water separators. The respondent seeks to oppose the application on the ground that instead of a single application, the petitioner should have filed 17 applications for appointment of presumably 17 arbitrators. The ground taken is that each of the 17 purchase orders (P.O.s) contained individual arbitration clauses and which are specific to the said purchase order. Learned counsel appearing for the respondent also relies on the “individuality of contract” mentioned in the purchase order and the fact that each of the purchase orders should be treated as an individual contract. Learned counsel appearing for the petitioner seeks to take the point that all the 17 P.O.s are intrinsically connected in terms of 3 tenders for supply of IRSS and design and development work for water separators. Counsel submits that all 3 tenders were issued for the same 7 shipyards meant for 7 stealth vessels which would hence require InfraRed Suppression System. The issue which falls for consideration, apart from the existence of an arbitration agreement and a subsisting dispute between the parties relatable to that arbitration agreement, is whether the Court should appoint 1 or 17 Arbitrators. The last part of the aforesaid is being decided first.

The agreement between the parties relates to 3 tenders, the first of which was issued by the respondent on 21st August, 2018 for supply for ship side exhaust system with IRSS device, the second on 31st May, 2021, for design and

development of water separator and the third on 14th August, 2021, for supply of water separator for exhaust and IRSS System. All of the 3 tenders contained description of supply and/or services which are identical in form and related to 7 ships together with identical specifications. 14 P.O.s were issued under the first tender. 1 pursuant to the second tender and 2 pursuant to the third tender. The documents placed before the Court show that 7 of the 14 P.O.s issued under the first tender were amended to increase the price and to extend the delivery schedules with other terms and conditions of the earlier 7 P.O.s remaining the same.

The point of inter-relatability of the 3 tenders would also appear from the Preamble to the second tender which contains a specific clause for additional scope/growth of work for IRSS. To repeat, supply of IRSS equipment was under the first tender. The Preamble proceeds to mention that changes in specifications emerged after placing of the order under the first tender to the petitioner which required consequent changes in the specification to meet evolving requirements brought in by the Indian Navy which is the end customer. Likewise, the first portion of the third tender which is for supply of exhaust water separators mentions the same 7 shipyards which were part of the first and second tenders.

The instruction to bidders in the third tender also refers to the IRSS device which was again the subject-matter of the first tender.

Apart from the details in the three tenders showing the intrinsic connection between not only three tenders but the 24 P.O.s issued under those

three tenders under a common umbrella project for IRSS systems for seven ships of the Indian Navy for which the petitioner was engaged as a contractor, there are other significant factual revelations which have come to the fore. The respondent significantly terminated all 24 P.O.s by way of a single notice of termination on 14th November, 2022 and made a composite reference to all the 24 P.O.s in paragraph 40 of the termination notice.

The petitioner accordingly sent a composite claim/notice to the respondent on 6th May, 2023 in response to the notice of termination. The petitioner thereafter invoked the arbitration proceedings by a composite notice sent under Section 21 of the 1996 Act on 19th June, 2023. The respondent did not give any reply to this notice.

The respondent significantly issued a notice invoking the arbitration clause under Section 21 of the Act on 12th July, 2023 under one of the P.O.s dated 13th July, 2021.

The fact whether alleged separate P.O.s/work orders are to be treated as one single contract or whether they are to be seen as separate contracts is entirely a matter of fact. The Court has to assess the substance and contents of the documents to come to this finding. In the present case, the contents of the three tenders and the admitted fact of all three tenders and the P.O.s being covered under a common agreement referring to the same seven shipyards meant for seven ships presumes an unified transaction. Further, the conduct of the respondent in terminating all 24 P.O.s by way of a common termination notice and making a composite reference to all the P.O.s in that termination

notice together with the conduct of the parties in treating all the three tenders to come within a single agreement leaves little doubt that the Court should treat all 24 P.O.s under a single umbrella/arbitration agreement.

The arbitration agreement contained in the first purchase order is identical in form and content to the remaining P.O.s (with or without the amendment of the 7 P.O.s as mentioned above).

There is admittedly a dispute between the parties since the petitioner has claimed approximately Rs.15 crores on account of unpaid bills for the work done by the petitioner under the 24 P.O.s. The claim is in the nature of compensation/damages for the loss suffered by the petitioner. The claim also relates to price escalation and other consequential losses suffered by the petitioner on account of the respondent's delay in making payment after an initial payment of Rs.23 lakhs. The respondent now seeks refund of this amount. The presence of the arbitration agreement and the continuing dispute between the parties establishes the petitioner's case under Section 11(6) of the 1996 Act.

AP/538/2023 is accordingly allowed and disposed of by appointing Mr. Ashok Ganguly, former Judge of the Supreme Court to act as the Arbitrator subject to the learned Arbitrator communicating his consent in the prescribed format to the Registrar, Original Side of this Court within three weeks from date.

The petitioner's advocate-on-record shall communicate this order on the learned Arbitrator by 16th September, 2023 along with the requisite details of the contact person of the petitioner.

AP/619/2023

This relates to the respondent invoking the arbitration agreement under one of the purchase orders.

The respondent is the petitioner in this arbitration petition.

Since AP/538/2023 has been decided and disposed of, AP/619/2023 is accordingly disposed of in terms of the above by appointing the same learned Arbitrator as in AP 538 of 2023.

(MOUSHUMI BHATTACHARYA, J.)

T.O./sg.