

ORDER SHEET

AP/865/2022

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

AADARSH TRADLINK LIMITED
VS
THE WEST BENGAL POWER DEVELOPMENT CORPORATION LIMITED

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 4th September, 2023.

Appearance:

Mr. Pranit Bag, Bar-at-Law

Mr. Reetoban Sarkar, Adv.

Mr. Varun Kothari, Adv.

Mr. Aasish Choudhury, Adv.

Ms. Uma Bagree, Adv.

...for the petitioner

Mr. Jishnu Chowdhury, Adv.

Mr. Sarvapriya Mukherjee, Adv.

Mr. Aritra Basu, Adv.

Mr. Ratul Das, Adv.

Mr. Aviroop Mitra, Adv.

...for the respondent

The Court: This is an application under Section 11 of the 1996 Act for appointment of an Arbitrator.

The agreement binding the parties before the Court is a Notice Inviting Tender of 30th September, 2020 which was for engaging an entity for lifting dry flyash. The undisputed facts before the Court are that the petitioner's bid was accepted and the letter of acceptance was issued by the respondent to the

petitioner on 30th September, 2020. The petitioner was however subsequently handed up the contract on 21st April, 2021.

The negotiations between the parties with regard to the price of lifting did not lead to any fruitful result as the petitioner sought for reduction of the price and ultimately culminated in the contract of 21st April, 2021. The petitioner furnished a performance bank guarantee and earnest money deposited in pursuance of this contract. The petitioner was thereafter awarded a second contract on 8th April, 2022 which the petitioner also started to perform. However, disputes arose between the parties in relation to the first contract of 21st April, 2021 and the respondent invoked the performance bank guarantee in relation to the first contract and pocketed the petitioner's EMD also in relation to the first contract.

The petitioner invoked the arbitration clause by a notice dated 15th September, 2022 with regard to the first contract and also filed an application for interim relief before the Commercial Court at Rajarhat. The petitioner obtained a restraint order on the respondent on 15th September, 2022 but found out later that the respondent had already invoked the performance bank guarantee.

The alleged dispute brought to the Court admittedly relates to the NIT dated 30th September, 2020 and the first contract of 21st April, 2021.

Learned counsel appearing for the respondent opposes appointment of an Arbitrator by urging that there is no dispute before the Court for which an Arbitrator can be appointed. The basis for arguing this is that according to the

petitioner's own case made out in the notice issued under Section 21 of the Act on 15th September, 2022, the petitioner has stated that the first contract merged into the second contract. Counsel also places a paragraph from the Section 9 application which was filed by the petitioner for interim relief with regard to the same point, namely, that the petitioner's own case is of the first contract not being in existence anymore. Counsel submits that this is a case of novation where the first contract has merged into the second contract along with the arbitration clause. According to counsel, there is hence no subsisting arbitration agreement between the parties.

The only question before the Court is whether there is a dispute between the parties for which an Arbitrator must be appointed. The objection taken on behalf of the respondent must also be decided. The issue, in essence, is whether the first contract has perished carrying with it the arbitration clause, subsequently leaving the Court without any arbitration clause to look at for the purpose of the present application.

The invocation notice of 15th September, 2022 contains a statement to the effect that the previous tender has terminated and merged into the new tender and that the earlier contract is no longer in existence.

Section 62 of the Contract Act applies where the parties to a contract agree to substitute a new contract or to rescind or alter the earlier contract pursuant to which the earlier/original contract need not be performed. The section involves parties to a contract being *ad idem* on the point of the earlier contract being novated or rescinded and agreeing to substitute the earlier

contract with a new one. In the present case, the unilateral statement made by the petitioner is in any event arguable on the facts of the case. There is also no evidence that the respondent agreed to the petitioner's stand by way of a reply. Admittedly, the respondent did not reply to the petitioner's notice invoking the arbitration clause.

The belated issue is whether the first contract perished carrying with it the arbitration clause. This argument is also fallacious since the arbitration clause is contained not in the first contract specifically, but in the NIT of 30th September, 2020. The NIT is really the source document from which the respondent awarded two contracts to the petitioner. Hence, there is no question of the arbitration clause in the NIT having perished or being substituted by a new contract.

The Supreme Court in *Union of India vs Kishorilal Gupta & Bros.*, AIR 1959 SC 1362 laid down six principles with regard to an arbitration clause being extinguished when the substantive contract perishes. This decision would have been relevant had the respondent been able to show that the arbitration clause in the NIT perished by reason of the parties to the NIT agreeing to substitute the arbitration agreement with a fresh arbitration agreement. This is not the case made out by the respondent.

The objection having been taken care of, the factual conspectus in the matter points inescapably to a continuing dispute between the parties. The respondent has invoked the performance bank guarantee furnished by the petitioner and pocketed the EMD. The respondent invoked the bank guarantee

in the teeth of the order passed by the Commercial Court at Rajarhat. These facts would certainly point to a dispute between the parties and also to one which needs to be resolved by an Arbitrator.

AP/865/2022 is accordingly allowed and disposed of by appointing Ms. Chandreyee Alam to act as the Arbitrator subject to the learned Arbitrator communicating her 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 Arbitrator by 7th September, 2023 along with the requisite details of the contact person of the petitioner.

Needless to mention, the respondent will be at liberty to take the objections which were urged in the present application in the arbitration.

(MOUSHUMI BHATTACHARYA, J.)