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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.194 OF 2022

Samruddha Resources Ltd. **...Petitioner**

Versus

Shri Bharat Mines and Minerals **...Respondent**

Mr. A.S. Khandeparkar, Senior Advocate with Rishikesh G. Bhagat i/b. Khandeparkar and Associates for the Petitioner.

Mr. Vikram Walawalkar for the Respondent.

CORAM : R.I. CHAGLA J
DATE : 28TH NOVEMBER, 2023

ORDER :

1. By this Arbitration Petition, the Petitioner has sought appointment of arbitrator to act as a Sole Arbitrator to resolve the dispute between the parties under the Exclusive Sale Agreement for Sale of Iron Ore ("Agreement") dated 1st December, 2010.

2. The Petitioner had entered into the Agreement with the Respondent and for which the Mining Lease was required to be granted by the Government of Maharashtra to the Respondent which is mentioned in Clause 1(a) of the Agreement. Further, in Clause 2 of

the Agreement, the Agreement was to come into force on the date of execution of the agreement. The Agreement was to be for the entire period of lease granted by the Government. It is mentioned in Clause 4a of the Agreement that the Petitioner shall use its expertise and bear all the costs for completing all the formalities involved for obtaining the approval / permission of Government of India for the prospective license and carrying out the prospecting at the mine site, converting the prospective license into mining license from the appropriate authorities as well as other documents of permissions, clearances etc. from the Government or Non-Government agencies that may be required for commencement and running of mining activities on behalf of the Respondent.

3. Under Clause 5 of the Agreement, financial considerations have been mentioned. Under the said Clause the Petitioner is to give an initial interest free deposit of Rs.10,00,000/- to the Respondent at the time of signing of the MoU on 2nd September, 2010. Further, the Petitioner will make payment of the balance amount of Rs.1,40,00,000/- as per Clauses in (i) to (iii) of the schedule therein. These payments were to be made on the stipulated days in December, 2010 by the respective cheques,

particulars of which have been mentioned in Clauses (i) to (iii) therein. It is further mentioned in the Clause 5 that the Agreement shall come into force after realization of all above cheques on the stipulated dates. In case of non-realization of all or any of the above cheques, the agreement shall stand cancelled and deposit amount received by the Respondent from the Petitioner shall be forfeited and no refund of deposit shall be made by the Respondents.

4. There is an Arbitration Clause in Clause 6j of the Agreement which reads thus:-

> ***6j. If at any time dispute or question arises between BMM and SAMRUDDHA touching the meaning, construction or effect of this Agreement or any clauses or things herein contained or regarding the respective liabilities and rights under this Agreement then every such dispute or question except where specifically provided shall be referred to two Arbitrators each to be appointed by each of the party hereto under the provisions of the Arbitration and Conciliation Act, 1996, as amended upto date. The arbitration proceedings shall be held at Kolhapur, State of Maharashtra.***

5. The Petitioner had addressed a letter dated 18th August, 2020 to the Respondent, wherein they have mentioned about the Agreement and in due compliance of the Agreement, the Petitioner

had paid a sum of Rs.10 lakh on 2nd September, 2010 i.e. at the time of signing of MoU with the Respondent and Rs.40 lakh on 4th December, 2010 aggregating to Rs.50 lakh. It is further mentioned that the transaction could not be commenced due to reasons attributable to the events mentioned under the proviso to Clause 6(b) of the Agreement viz. failure to obtain necessary permission / clearances for commencement of mining and selling of the iron ore from the said mine applied by the Respondent within a stipulated period of six years from the date of signing of the Agreement, and which was attributable to the changes in acts, rules, policies of state or central government which may result in stoppage, ban or restriction on mining activities in the said area. It is then that this would be considered as the only exclusive and valid reason for the cancellation of the Agreement. It is further mentioned in the said letter that as per said clause which is invoked / become applicable, the Petitioner has been pursuing for the refund of security deposit. During the telephonic conversation between the Petitioner and Respondent, the Respondent had assented to refund the entire security deposit and rescind the contracts for the mutual benefit. Accordingly, the Respondent had been called upon to refund security deposit of Rs.50 lakh within 7 days from the date of the letter.

6. The Respondent by its Reply letter dated 4th September, 2020 has denied the request made by the Petitioner for refund of security deposit of Rs.50 lakh in letter dated 18th August, 2020. The Respondent has stated that, the Petitioner failed to pay entire consideration of Rs.1,50,00,000/- which was payable in the month of December, 2010 and in view of which the Agreement had not come into force and stood cancelled and deposit amount received by the Respondent shall be forfeited and no refund of deposit can now be made by the Respondent.

7. The Petitioner had made application under Right to Information Act, 2005 regarding current situation of application of the Respondent in respect of Prospecting of Iron Ore Mining Lease. The Petitioner was informed by Mr. Balaram Chandrakant Satelkar acting on behalf of the Petitioner that the Public Information Officer / Administrative Officer, DGM, Govt. of Maharahstra, Nagpur had addressed a letter dated 6th May, 2021 enclosing information pursuant to the Application under R.T.I. Act, 2005. From the information disclosed the Petitioner learnt that the Directorate of Geology and Mining, Government of Maharashtra, Nagpur vide Notification dated 3rd August, 2015 had declare the Applications

for Mining concessions received prior to the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015 as ineligible. Thereby the Government of Maharashtra had not granted the Prospective License and subsequent Mining Lease to the Respondent as applied by it and which is the subject matter of the Agreement.

8. Accordingly, the Petitioners had by their Notice dated 24th January, 2022 invoked the arbitration under Clause 6j of the agreement. It is mentioned in the Notice that the Petitioner had previously, due to change in circumstances from Government side regarding new prospecting of mines in Sindhudurg District requested the Respondent not to deposit additional cheques issued to the Respondent amounting to Rs.50 lakh each dated 25th December, 2010 and 30th December, 2010 and accordingly the said cheques were not deposited in pursuance of this request. Hence, the said cheques which had been tendered by the Petitioner to the Respondent had not been realized. By the said Notice, the Petitioner had nominated Senior Advocate at Sindhudurg to be its Arbitrator and called upon Respondents to inform the Petitioner of its choice of Arbitrator within a period of 30 days. There has been no response to

the Notice invoking the Arbitration.

9. Mr. Vikram Walawalkar the learned Counsel appearing for the Respondent has submitted that in view of the Respondent having contended that the arbitration agreement is not valid in view of Agreement having stood cancelled on account of non realization of the cheques under Clause 5 thereof, there is no question of referring the disputes to arbitration. He has placed reliance upon the decision of the Supreme Court in ***NTPC Ltd. Vs. SPML Infra Ltd.***[1] wherein the Supreme Court has held that the pre-referral jurisdiction of the Courts under Section 11(6) of the Arbitration and Conciliation Act, is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said Agreement. These are matters which require a thorough examination by the referral Court. The second inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute. This decision has been followed in ***Magic Developers Pvt. Ltd. Vs. M/s. Green Edge Infrastructure Pvt. Ltd.***[2]***.*** The Supreme Court held that so far as the first issue / primary

1 2023 SCC OnLine SC 389.

2 AIR 2023 Supreme Court 2339.

inquiry the same has to be conclusively decided by the referral Court at the referral stage itself.

10. Mr. Walawalkar has accordingly submitted that it would be for the referral Court to decide the validity of the arbitration agreement whilst considering the application under Section 11 (6) of the Arbitration and Conciliation Act, 1996.

11. Having considered the rival submissions, in my view, there a valid arbitration agreement in Clause 6j of the Exclusive Sale Agreement for Sale of Iron Ore dated 1st December, 2010 (referred to as "the Agreement"). The arbitration agreement which has been extracted above is wide and it covers any dispute or question which arises between the Respondent and the Petitioner touching the meaning, construction or effect of this Agreement or any clauses or things therein contained or regarding the respective liabilities or rights under the Agreement. The Arbitration Agreement has provided for appointment of two Arbitrators, each to be appointed by Petitioner and Respondent under the provisions of the Arbitration and Conciliation Act. The arbitration proceedings are to be held at Kolhapur, State of Maharashtra.

12. The contention of the Respondent that the Agreement stood cancelled on account of non realization of the cheques, particulars which have been mentioned in Clause 5 of the Agreement does not merit acceptance. This in view of the fact that the said cheques which had been given by the Petitioner to the Respondent had not been realized in view of the request made by the Petitioner to the Respondent for non deposit of these cheques and which request had been accepted. The Respondent cannot now take advantage of the non-realization of the cheques and claim that by virtue of non realization of cheques which was on account of their own acceptance of the request of the Petitioner not to deposit the cheques that the agreement has come to an end or stands cancelled.

13. Further, the Petitioner has invoked the Arbitration Clause i.e. Clause 6j of the Agreement vide Advocates Notice dated 24th January, 2022 wherein the aforementioned fact of non deposit of cheques have been mentioned. The reasons for invoking arbitration have also been provided in the said notice and reference has been made to the Government Resolution dated 3rd September, 2015 which the Petitioner become aware of in the response to the Right to Information Act, 2005 on 6th May, 2021 and by which the

Directorate of Geology and Mining, Government of Maharashtra, Nagpur held inter alia that application of the Respondent for prospecting license and subsequent mining lease made to the Government of Maharashtra had become ineligible. The said application is referred in the schedule to the said notification. The Petitioner has claimed refund of the amounts which have been paid under the Agreement, being an amount of Rs.50 lakh from the Respondent, for which it has invoked the arbitration agreement. This notice of invocation of the arbitration agreement has not been responded to by the Respondent. However, in its earlier communication dated 4th September, 2020, the Respondent had contended that the Agreement stood cancelled on account of the non-realization of cheques which were given by the Petitioner to the Respondent and issue of limitation had also been raised.

14. Thus, in my view, there is a valid arbitration agreement under which the Petitioners have invoked arbitration and which requires to be referred to the Arbitral Tribunal to be appointed. The disputes which have been raised by the Petitioner as mentioned in the Notice invoking the arbitration agreement are clearly within the ambit of arbitration agreement under Clause 6j of the Agreement.

Hence, the relief sought for in the Arbitration Petition requires to be granted.

15. Hence, the following order is passed:-

(i) The Petitioner has nominated Shri Rajendra Raorane, Senior Advocate practicing at Sindhudurg. This Court appoints Advocate Mr. Shrikrishna N Bhanage as the arbitrator for the Respondent.

(ii) Accordingly, Shri Rajendra Raorane, Senior Advocate practicing at Sindhudurg and Advocate Mr. Shrikrishna N Bhanage are appointed as Arbitrators to decide the disputes between the Petitioner and the Respondent arising out of the Exclusive Sale Agreement for Sale of Iron Ore dated 1st December, 2010.

(iii) The two appointed Arbitrators shall nominate an Umpire of their choice.

(iv) The venue of Arbitration shall be at Kolhapur as per

Clause 6j of the Agreement.

(v) Office to inform the Arbitrators regarding their appointment.

(vi) The Arbitrators are requested to file their Disclosure Affidavits of Arbitration under Section 11(8)(i) of the Arbitration and Conciliation Act, 1996 within a period of three weeks from the date of receipt of the notice issued by the Registrar Judicial-I and provide copies to the parties.

(vii) Parties to appear before the Arbitrators on the date fixed.

(viii) Fees of the Sole Arbitrators will be payable in accordance with the Bombay High Court (O.S.) Rules, 2018.

(ix) Arbitration Petition is disposed of in the above terms.

(xi) No costs.

[R.I. CHAGLA J.]