

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

MISC. CIVIL APPLICATION (ARBN) NO. 90/2022

M/s. Shri Khatu Shyam Traders,
 through its Proprietor, Mr. Kamal Soni,
 having its office at Shri Shyam Kripa,
 Khaparganj, Bilaspur,
 Dist. Bilaspur, Chhattisgarh.

... **APPLICANT**

VERSUS

Western Coalfield Limited,
 through its Chairman cum
 Managing Director (CMD)
 having its office at Coal
 Estate Civil Lines, Nagpur-
 440001, Maharashtra.

... **NON-APPLICANT**

Mr. R.D. Dharmadhikari, Advocate for applicant.
 Mr. C.S. Samudra, Advocate for non-applicant.

CORAM : **VINAY JOSHI, J.**

RESERVING THE JUDGMENT ON : **20.08.2022**

PRONOUNCING THE JUDGMENT ON : **07.01.2023**

JUDGMENT :

This is an application under Section 11(6) of the Arbitration

and Conciliation Act 1996 ('Act of 1996') for appointment of sole Arbitrator for resolution of dispute. The applicant-proprietary concern has invoked Arbitration Clause by issuing notice dated 02.12.2021 calling upon non-applicant for appointment of sole arbitrator, however it was not responded that is why this application for appointment of arbitrator.

2. The applicant M/s. Shri Khatu Shyam Trader is a proprietary concern whilst the non-applicant Western Coalfield Limited ('WCL') is a Government of Indian undertaking. Non-applicant – WCL, vide tender notice dated 18.07.2018 invited bids from the prospective bidders for the work of processing of overburden to segregate sand and clay from the overburden including storage of segregated sand, desiccated clay and rejects within the plant/mine premises at specified places. The total value of the contract work was to the tune of Rs. 75.92 crores and the contract period was for seven years. The scope of work was specified in notice inviting tender (NIT).

3. The applicant has participated in the subject NIT and after due process, the bid submitted by the applicant was found to be suitable. In consequence, vide letter dated 16.01.2019, acceptance was given to the applicant. In pursuance of letter of acceptance, an agreement was entered in between the parties on 23.09.2020 to carry

out subject tender work. In terms of NIT, the applicant has deposited performance security to the tune of Rs. 59,76,393/-. The applicant has made huge investment by setting up a plant for segregation of sand and clay from overburden with a production capacity of 2000 cum sand per day as required under NIT. The applicant has commenced the actual work on 10.01.2020 to comply the contractual work.

4. It is applicant's case that he has faced several difficulties in executing the contract work. The applicant has repeatedly informed to the non-applicant about the difficulties faced in carrying the work. According to the applicant, the major issues were about non-lifting of finished product, that is sand from stock yard, which has caused hindrance in the smooth functioning of plant. There was interruption in supply of electric and water and other technical issues. Since the non-applicant has failed to lift the finished product, even after repeated request, the applicant was compelled to halt the production as it was not possible to run the plant smoothly. It is applicant's contention that, as per terms and conditions of contract, the non-applicant was responsible to lift the finished goods from the stock yard. However, the non-applicant failed to comply its obligation.

5. The applicant would contend that vide several communications in between 22.07.2019 to 05.05.2021, they have

requested the non-applicant to lift the goods expeditiously, however, it was not responded. After great persuasion, on 11.09.2021, a meeting was held to resolve the issue faced by the applicant. On due deliberation, the non-applicant sought time to resolve the issue, but they did not. Vide communication dated 10.11.2021, the non-applicant has first time informed that the only limited quantity of sand would be lifted and thus, the problem was not solved. According to the applicant, the non-applicant has failed to comply obligation which has halted the applicant's smooth functioning of plant. The applicant is incurred huge losses and therefore, the dispute arose between the parties.

6. The NIT bears Clause 13 and 13(A) pertaining to settlement of dispute by way of appointment of Arbitrator. The applicant took preliminary steps for resolution of dispute. The applicant has also issued a notice dated 12.11.2021 calling upon the non-applicant to constitute a Committee in terms of dispute resolution clause, however, it was not acted upon. Since the non-applicant failed to constitute a Committee, the applicant vide notice dated 02.12.2021 has invoked the Arbitration Clause 13(A), however the non-applicant has not agreed for appointment of Arbitrator.

7. The sole non-applicant resisted the application vide its reply dated 25.05.2022. It is not in dispute that a work contract was awarded to the applicant being a suitable bidder. There is no dispute that the agreement contains arbitration clause. However, the non-applicant has challenged the maintainability of the application on account of non-payment of requisite stamp duty. It is non-applicant's case that the agreement has been executed on deficit stamp duty and therefore, on the basis of said document arbitration clause cannot be invoked. In other words, the insufficiently stamped document is unenforceable in law.

8. The non-applicant has submitted that the applicant has not taken preliminary steps about resolution of dispute as per Clause 13 of the contract. The contract specifically provides that efforts should be made to settle the dispute at company's level, however the applicant has not approached to the General Manager for settlement of dispute. It is stated that as per Clause 13 and 13(A) of the contract, the sole arbitrator is to be appointed by the competent authority. Sub-clause (b) to Clause 13(A) of the contract provides that no person other than a person appointed by the competent authority should be arbitrator, and in its absence, the matter cannot be referred for arbitration.

9. It is stated that the non-applicant – Company is a subsidiary of CIL/CMD. In view of Section 12(5) of the Act of 1996, CMD of non-applicant is ineligible to be appointed as arbitrator and thus, in view of Sub-clause (b) to Clause 13(A) of the contract, the matter cannot be referred for arbitration. Moreover, the non-applicant would submit that the applicant did not issue a valid notice seeking appointment of the arbitrator. The applicant has not made out a specific claim for invoking arbitration clause. With such contentions, application is prayed to be rejected.

10. The first and foremost objection raised by the non-applicant is about unenforceability of the arbitration clause on account of insufficiently stamped document. It has been submitted that the statutory bar contained in Section 35 of the Indian Stamp Act, 1899 is applicable to the instrument chargeable to stamp duty and therefore, it would render the arbitration agreement non-existent, unenforceable and invalid. It is submitted that the Supreme Court in case of *N.N. Global Mercantile Private Limited Vs. Indo Unique Flame Limited and others*, (2021) 4 SCC 379, though doubted the decision rendered in case of *Vidya Droliya Vs. Durga Trading Corporation*, (2021)2 SCC 1, however referred the said issue to the Constitutional Bench of five Judges for authoritative decision. It is submitted that till the

authoritative pronouncement by the Constitutional Bench, arbitration clause cannot be invoked. The said submission is countered by the learned counsel appearing for the applicant by placing reliance on the later decision of the Supreme Court rendered by the coordinate Bench in case of *Intercontinental Hotels Group (India) Pvt. Ltd. and another vs. Waterline Hotels Pvt. Ltd.*, AIR 2022 SC 797. In said case, the Supreme Court has considered the earlier decision in case of Vidya Droliya, Garware Wall Ropes, (2019) 9 SCC 209 and case of N.N. Global Mercantile Private Limited (*supra*) relating to the issue canvassed herein. After examining the question of stamp duty and reference made to the larger Bench in case of N.N. Global Mercantile Private Limited (*supra*), it has been observed that until decision of larger Bench, arbitration shall be carried on and accordingly matter was referred for arbitration. The relevant observations made in para 22 reads as below:-

“22. Although we agree that there is a need to constitute a larger Bench to settle the jurisprudence, we are also cognizant of time-sensitivity when dealing with arbitration issues. All these matters are still at a per-appointment stage, and we cannot leave them hanging until the larger Bench settles the issue. In view of the same, this Court – until the larger Bench decides on the interplay between Sections 11(6) and 16 – should ensure that arbitrations are carried on, unless the issue before the Court patently indicates existence of deadwood.”

11. In view of above dictum, there is no legal impediment in enforcing arbitration agreement for the purpose of invoking jurisdiction under Section 11(6) of the Act of 1996 though document is insufficiently stamped. It is not the case that the contract agreement was unstamped, but it was executed on stamp of Rs. 500/-, meaning thereby it was insufficiently stamped document which assumes significance.

12. It is non-applicant's contention that the arbitration clause specifically provides a mechanism as to how the dispute shall be settled. It is submitted that in terms of Arbitration Clause No. 13(A) (b), no person other than the person appointed by the competent authority should act as arbitrator and if it is not possible, then the matter shall not be referred to arbitration at all. It necessitates to reproduce the Arbitration Clause 13 for quick appreciation. The said Clause No. 13 captioned as 'settlement of disputes through arbitration' reads as below:-

"13. "SETTLEMENT OF DISPUTES."

It is incumbent upon the contractor to avoid litigation and disputes during the course of execution. However, if such disputes take place between the contractor and the department, effort shall be made first to settle the disputes at the company level.

The contractor should make request in writing to the Engineer-in-charge for settlement of such disputes/claims within 30 (thirty) days of arising of the cause of

dispute/claim failing which no disputes/claim of the contractor shall be entertained by the company.

Efforts shall be made to resolve the dispute in two stages.

In first stage dispute shall be referred to Area CGM, GM. If difference still persist the dispute shall be referred to a committee constituted by the owner. The committee shall have one member of the rank of Director of the company who shall be chairman of the company.

If differences still persist, the settlement of the dispute shall be resolve in the following manner:

Disputes relating to the commercial contracts with Central Public Sector Enterprises/Govt. Departments (except Railways, Income Tax, Customs & excise duties)/State Public Sector Enterprises shall be referred by either party for Arbitration to the PMA (Permanent Machinery of Arbitration) in the department of Public Enterprises.

In case of parties other than Govt. Agencies, the redressal of the dispute may be sought through Arbitration (THE ARBITRATION AND CONCILIATION ACT, 1996 as mended by AMENDMENT ACT of 2015.)

13(A) SETTLEMENT OF DISPUTES THROUGH ARBITRATION

If the parties fail to resolve the disputes/differences by in house mechanism, then, depending on the position of the case, either the employer/owner or the contractor shall give notice to other party to refer the matter to arbitration instead of directly approaching Court. The contractor shall, however, be entitled to invoke arbitration clause only after exhausting the remedy available under the clause 12.

In case of parties other than Govt. agencies, the redressal of disputes/differences shall be sought through Sole Arbitration as under.

Sole Arbitration:

In the event of any question, dispute or difference arising under these terms & conditions or any condition contained in this contract or interpretation of the terms of, or in connection with this Contract (except as to any matter the decision of which is specially provided for by these conditions), the same shall be referred to the sole arbitration of a person, appointed to be the arbitrator by the Competent Authority of CIL/CMD of subsidiary Company (as the case may be). The award of the arbitrator shall be final and binding on the parties of this

Contract.

(a) In the event of the Arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his/her award being set aside by the court for any reason, it shall be lawful for the Competent Authority of CIL/CMD of Subsidiary Company (as the case may be) to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.

(b) It is further a term of this Contract that no person other than the person appointed by the Competent Authority of CIL/CMD of Subsidiary Company (as the case may be) as aforesaid should act as arbitrator and that, if for any reason that is not possible, the matter is not to be referred to Arbitration at all.

Subject as aforesaid, Arbitration and Conciliation Act, 1996 as amended by Amendment Act of 2015, and the rules thereunder and any statutory modification thereof for the time being in force shall be deemed to apply to the Arbitration proceedings under this clause.

The venue of arbitration shall be the place from which the contract is issued.”

13. Close examination of arbitration clause postulates that initial efforts shall be made to settle the dispute at the Company level. The Contractor shall make request in writing for settlement of such a dispute. In case the parties fail to resolve the dispute by in-house mechanism, the Contractor shall invoke the arbitration clause.

14. The matter shall be referred to the sole arbitrator appointed by the competent authority of subsidiary company and its decision shall be final. Further, it was a term that no person other than a person appointed by the competent authority shall act as an arbitrator, and if it is not possible, matter shall not be referred to arbitration.

15. The learned counsel appearing for the applicant would submit that in terms of Section 12(5) of the Act of 1996, a person having relationship with subject matter of dispute is ineligible to be appointed as arbitrator. In this regard, the learned counsel appearing for the applicant by placing reliance on the decision of the Supreme Court in case of *Perkins Eastman Architects DPC and Anr. Vs. HSCC (India) Ltd., AIR 2020 SC 59* would contend that, since the authority of the company is ineligible by operation of law, he cannot appoint an arbitrator and thus, Sub-clause (b) to Clause 13 (A) of the Contract has become redundant and unenforceable. In above case, the Supreme Court has observed that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The ineligibility was a result of operation of law and for this reason, Sub-clause (b) to Clause 13(A) of the contract becomes redundant and therefore, submission in this regard is untenable.

16. The learned counsel appearing for the non-applicant would also submit that if the contract specifically excludes the matter from reference to the arbitration, no arbitrator can be appointed. In this regard, reliance is placed on the decision of the Supreme Court in case of *United India Insurance Company Limited and another Vs. Hyundai Engineering and Construction Company Limited and others, (2018) 17*

SCC 607. In the said case, it was under consideration that the arbitration clause which would get activate, only if an insurer admits or accepts liability. On facts, it was found that the insurer has repudiated the claim despite existence of arbitration clause. However, since the insurer has disputed the quantum to be paid under the policy, as per accepted clause contained in arbitration, the matter was not referred. Herein, the non-applicant is unable to point out any other clause carving out an exception to refer the contractual dispute to the arbitration. The entire reliance is placed on Sub-clause (b) to Clause 13(A) of the contract with which in above para, it is already observed that due to amended of Section 12(5) of the Act of 1996, the said clause has become inoperative. In view of that, the non-applicant's submission in this regard is not acceptable.

17. The learned counsel appearing for the non-applicant has canvassed one another objection pertaining to the defect in notice by which arbitration clause has been invoked. It is canvassed that notice dated 02.12.2021 does not specify the statement of claim and thus, it does not amount to invocation of arbitration clause. Close examination of notice discloses that in initial part, scope of the work of the contract under NIT has been stated. The applicant-contractor has stated that the efforts have been made at his end to settle the dispute by making

several communications. Para 4 and 5 of the notice indicate the particulars as to how the dispute arose between the parties. Moreover, the learned counsel appearing for the applicant by placing reliance on the decision of this Court in case of ***Veena Vs. Seth Industries Limited, 2011(2)Mh.L.J. 226*** would submit that there is no necessity to incorporate proposed statement of claim in the arbitration notice. Particularly, he has attracted my attention to para 18 of the decision which reads below:-

“18. There is nothing in the Arbitration and Conciliation Act, 1996, or in principle, which requires the notice invoking the arbitration to state the claims proposed to be made in the reference. A notice merely indicating the disputes or that disputes have arisen and invoking the arbitration clause is sufficient unless the arbitration agreement itself requires the invocation to be in a particular manner.”

The notice invoking the arbitration clause sets out a dispute which is sufficient for invocation of arbitration clause therefore, the said objection is not sustainable in law.

18. It has been argued on behalf of the non-applicant that the preliminary steps have not been followed by the applicant for in-house settlement of dispute. In this regard, the learned counsel appearing for applicant has attracted my attention to several communications made to various authorities of non-applicant about the grievance. These

communications were made to subject area manager which are dated 22.07.2019, 24.03.2020, 14.07.2020, 25.07.2020, 17.08.2020, 16.11.2020, 02.12.2020, 12.02.2021, 22.02.2021, 28.02.2021 and 12.04.2021. It is non-applicant's contention that as per Arbitration Clause 13 for in-house settlement of dispute, the Contractor should have made written request to the engineer-in-charge, which he did not. Pertinent to note that the non-applicant has not disputed all above communications made to the subject area manager of WCL. Not a single letter is responded by stating that the communication shall be addressed to the engineer-in-charge of WCL nor receipt of letters by the addressee has been denied. Therefore, it is certain that the applicant has bonafidely endeavoured to resort the in-house mechanism for settlement of dispute, but it failed though letters were received by the authority of the WCL. On technical ground, it cannot be held that the applicant has not resorted in-house mechanism for settlement of dispute. Moreover, notice dated 12.11.2021 indicates that the applicant has also called upon the non-applicant to constitute a Committee in terms of arbitration clause, however, it was not responded which also assumes significance.

19. In view of above, it is evident that a genuine dispute arose in between the parties. Undisputedly, there was arbitration clause and

as stated above, the said clause is enforceable despite existence of Sub-clause (b) to Clause 13(A) of the contract. In above referred case of Vidya Droliya, it has been ruled that if the Court *prima facie* comes to the conclusion about validity of an arbitration agreement and existence of dispute, the Court shall refer the matter for arbitration.

20. In view of above, the applicant has made out a case for appointment of arbitrator. At this juncture, both learned counsel were requested to suggest name of sole arbitrator. As there is no consensus in between the parties, it necessitates to appoint arbitrator from the panel of arbitrators maintained by this Court.

21. Accordingly, Misc. Civil Application is allowed and disposed of by appointing Former Hon'ble Judge Smt. Pushpa V. Ganediwala, as a sole arbitrator. It is made clear that all objections sought to be raised on behalf of the non-applicant, are kept open, may be raised before the learned arbitrator.

22. The Registry is directed to request the learned arbitrator for consent letter and for disclosure statement as per the provisions of the the Act of 1996.

JITENDRA
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(VINAY JOSHI, J.)