OCD 40

ORDER SHEET
AP-COM/493/2024
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

JAY ISPAT TRADERS
VS
KOLKATA METROPOLITAN DEVELOPMENT AUTHORITY AND ANR.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 9th December, 2024.

Appearance:
Mr. Mainak Bose, Sr. Adv.
Mr. Rishabh Karnani, Adv.
Mr. Pranav Sharma, Adv.
…for the petitioner

Mr. Sirsanya Bandhopadhyay, Adv.
Mr. Avishek Guha, Adv.
Ms. Debika Misra, Adv.
Ms. Shilpa Das, Adv.
…for the respondent no.1

Mr. Kamal Kumar Chattopadhyay, Adv.
…for the respondent no.2 (MSTC)

The Court: This is an application under Section 11 of the Arbitration and Conciliation Act, 1996, for appointment of an Arbitrator to adjudicate the disputes between the parties. The dispute arose out of an e-auction held by MSTC Ltd., as the agent of Kolkata Metropolitan Development Authority.

According to the petitioner, the dispute arose when the total quantity of structural steel components obtained upon dismantling the Vivekananda Road Flyover along with scrap and other materials had not been delivered by the seller i.e., KMDA, despite KMDA having received the payment for the entire amount on the basis of the e-auction catalogue and general terms and conditions of the said auction notice.

The petitioner's case is that the e-auction notice was published in the portal of MSTC Ltd. for the sale of materials which have been mentioned hereinabove. The petitioner participated in the said auction and was the H1 bidder. Clause 16 of the catalogue specifically provided that the sale would be governed by the material list and the Special Terms and Conditions (STC), the General Terms and Conditions (GTC) and Buyer Specific Terms and Conditions (BSTC). These conditions were accepted by the petitioner at the time of registration.

As per the requirement of the terms and conditions, allegedly, the petitioner made onsite inspection on June 5, 2023. According to the e-auction notice, 1489.77 MT of steel were being sold and accordingly bids were invited. The sale was allegedly quantity based and not lot based. The e-auction catalogue provided that the materials would be available at the stock yard of KMDA at Baguiati and at Salt Lake. Although the petitioner was the highest bidder, having quoted Rs.5,71,64,079.78/-, the sale confirmation was not received. The petitioner wrote to both the respondents and finally after a delay of 40 days, on July 20, 2023 MSTC issued the sale intimation letter in favour of the petitioner. Pursuant to the email dated July 20, 2023, the petitioner paid 10% of the security deposit amounting to Rs.57,16,408/- on July 24,2023. Between July 24, 2023 and August 7, 2023, the petitioner paid the total consideration amount. The delivery order was issued on August 22, 2023 by MSTC.

The petitioner's further case is that the respondent no.1, that is, KMDA informed the petitioner that the steel lying at the stockyard at Salt Lake should be removed first and thereafter the petitioner would be allowed to enter and remove materials from the Baguiati stockyard. It is alleged that between September 13, 2023 to October 16, 2023, the petitioner was given delivery of 613.58MT of scrap material from the Salt Lake stockyard. A further amount of 876.19 MT of materials were to be delivered by the KMDA. The entire consideration for 1489.77 MT had not been received although, the petitioner was allowed inspection of the stock lying at the Baguiati Stockyard. The petitioner was given delivery of steel weighing 206.055 MT. According to the petitioner, delivery of 819.635 MT of scrap steel was made and 670.138 MT of steel still remained with the KMDA. They had received the payment for the entire quantity of 1489.79 MT. The petitioner contends that Rs.2,57,13,865/- worth of steel was not delivered to the petitioner, which was contrary to the terms and conditions of the e-auction. The petitioner contends to have had a series of discussions with KMDA and there were allegations and counter allegations. The dispute was not resolved. Finding no other alternative, the petitioner sent a letter as also an email on January 8, 2024 and January 9, 2024, respectively, calling upon the KMDA to refund the proportionate value of the undelivered materials in terms of clause 7 of the Special Terms and Conditions of the e-auction catalogue, aggregating to a total sum of Rs.2,57,13,865.65/-. Despite having received the notice, KMDA did not respond. Another email was sent to KMDA and on January 30, 2024, KMDA replied to the said notice by making allegations with regard to the breach of the terms and conditions committed by the petitioner, with regard to lifting of the materials and allied issues. Ultimately, on February 14, 2024, the petitioner issued notice under Section 21 of the Arbitration and Conciliation Act, by invoking the arbitration clause which is clause no.3 of the BSTC. KMDA replied to the said notice and asserted that the said arbitration clause was not applicable in respect of KMDA. KMDA was a non-signatory to the agreement.

Mr. Mainak Bose, learned senior advocate appearing for the petitioner submits that KMDA was the principal and MSTC was the agent, who was engaged only to conduct the e-auction on behalf of the KMDA. The claim was against KMDA and KMDA was an integral part of the agreement and the arbitration clause.

Mr. Bose, refers to page 15 of the application to substantiate the quantity of the materials to be sold and the location from where such material had to be lifted. Admittedly, the materials were lying at KMDA's stockyard at Baguiati and Salt Lake. The lifting period was for thirty days from the date of lifting to be mentioned by KMDA. Upon 100% advance payment, lifting was to be allowed. Page 16 is referred in order to substantiate that the Special Terms and

Conditions provided that the rate obtained in the auction from the bidders would be subject to approval by KMDA. Names of the officials of the KMDA, who could answer to the queries of the bidders was specifically mentioned in the Special Terms and Conditions. Clauses 1, 2, 3, 4, 5 and 6 of the important notes which are at page 19 and Clauses 13, 14, 16, 17 which are at page 21 of the application, have also been relied upon to bring home the fact that the seller, that is, KMDA was responsible for the delivery of the materials in lots. The bidder was further instructed to down load the material list and the STC which were displayed in the home page of the e-auction website. The said documents specified that the bidders would be governed by the material list and Special Terms and Conditions. Clause 17 provided that the principal/owner of the materials, reserved the right to withdraw at any stage from the sale of any item or quantity of material either by number or by weight and the principal would not be bound to assign any reason or details thereof. Value of materials so withdrawn if any, paid by the buyer would be refunded. However, the principal would not be responsible for any damage or loss to the buyer nor for payment of any interest. BSTC was referred to in order to show how KMDA was described in the entire contract that is as the "principal". Clause 3 of the BSTC provided the Arbitration Clause. Mr. Bose relied on the following decisions:

1. *Cox and Kings Limited vs. Sap India Private Limited and Anr. reported at (2024) 4 SCC 1;*
2. *Oil and Natural Gas Corporation Ltd. vs. Discovery Enterprises Pvt. Ltd. and Anr. reported at (2022) 8 SCC 42;*

3. *Ajay Madhusudan Patel and Ors. Vs. Jyotrindra S. Patel and Ors. reported at 2024 SCC online SC 2597.*

Mr. Sirsanya Bandhopadhayay, learned advocate for the KMDA submits that the arbitration clause could not be invoked against KMDA. The clause was in respect of the terms and conditions of the e-auction, and not beyond. KMDA was a non-signatory. Page 15 has been referred to again, in support of the contention that the MSTC was holding the event of auction. Page 16 has been relied upon to show that the contracts/transactions entered into by the buyer, arising out of the e-auction, would be governed by the integrity pact. The integrity pact was between the MSTC and the buyer. Nowhere in the said document, did KMDA affix its signature or demonstrate its consent to be bound by any of the terms and conditions of the either the said pact or the e-auction notice. KMDA was not an entity of the group of Companies of MSTC Ltd. Intention of KMDA to be bound by the terms and conditions of the e-auction agreement was never displayed. There was neither any legal obligation nor any legal relationship between KMDA and the buyer, insofar as, the auction notice was concerned. What ever may have transpired after the conclusion of the auction was beyond the scope of the auction, notice and even if the buyer had any claim against KMDA, such claim could not be adjudicated by arbitration. Mr. Bandyopadhayay relied on several paragraphs of the decision in Cox and Kings (supra) and submitted that incidental involvement in the performance of any contractual obligation is insufficient to constitute consent of the non-signatory to be bound by the said contract. What is to be decided is whether the commercial dispute sufficiently implicated the non-signatory party to the extent that the arbitral tribunal would have jurisdiction with regard to the dispute. The subject matter of the dispute in the instant case, according to Mr. Bandhopadhayay, is beyond the scope of the e-auction notice. The arbitration agreement between the buyer and MSTC was up to the point of the completion of the auction. Thus, in the instant case, commonality of the subject matter is also absent. The burden was on the party seeking the joinder of the non-signatory to the arbitration agreement to prove a conscious and deliberate involvement of KMDA in the entire transaction.

Mr. Chattopadhyay, learned advocate for the respondent no.2 submits that MSTC was only responsible for holding the auction. Non-supply of materials and the allegations of breach made by either party were beyond the agreement and the terms and conditions of the e-auction. Section 230 of the Indian Contract Act was referred to by Mr. Chattopadhayay in support of his contention that, if at all the petitioner had a claim, the claim was against KMDA and not the respondent no.2. The role of the respondent no.2 ended with the conclusion of the e-auction and issuance of the delivery order.

Mr. Chattopadhayay has relied upon the following decision:

1. *Vivek Automobiles Ltd. vs. Indian Inc. reported at (2009) 17 SCC 657;*
2. *Marine Container Services South Pvt. Ltd. vs. Go Go Garments reported at (1998) 3 SCC 247.*

The law is well-established. The scope of interference by the referral Court under Section 11 of the Arbitration and Conciliation Act, 1996 is very narrow and limited. All that the Court is required to do is to ascertain whether there is an existence of an arbitration clause and whether there is a live claim. The fact that the dispute arises allegedly out of non-delivery of goods in respect of the e-auction held on June 9, 2023 makes the claim a live claim.

This Court finds that Clause 3 of the BSTC contains the arbitration clause. BSTC is an integral part of the e-auction notice and the general terms and conditions of the contract arising out of the said e-auction. Clause 16 at page 21 categorically provides so. The existence of the arbitration clause is not in dispute.

The question which now arises is whether KMDA would be bound by such clause. Clause 1.1 of the BSTC describes KMDA as the principal and MSTC as the selling agent or the service provider. Further, it appears that KMDA has been described in all the documents, namely the BSTC and STC as the owner or the seller or the principal. The auction is with regard to the sale of structural steel, scrap and other materials upon dismantling Vivekananda Road Flyover. Such materials were lying at the KMDA's stockyard at Baguiati and Salt Lake. The money was to be separately paid to KMDA and MSTC, by the buyer. The bids were to be accepted and approved by KMDA. The lifting of the materials, the period etc. were all fixed by KMDA. The buyers were required to take stock of the materials and satisfy themselves as to the quality, quantity thereof from the stockyard of KMDA, prior to the auction. Clause 17 of the BSTC provides that no claim against the principal or against MSTC would arise if the goods were sold in lots and not in numbers and were found deficient in any way. Clause 18 provided that in the event of non-removal of the sold materials after expiry of the time allowed in the relevant order and subsequent extension(s) thereof, if any, the principal/owner of the materials would have the right to order re-sale of the said material as also to forfeit relevant payments made by the defaulting buyer.

Prima facie, the integrity pact did not deal with the terms and conditions of the e-auction notice which contains the arbitration clause. The terms and conditions of the e-auction notice provided the mode and manner of payment, lifting period, ground rent, waste, rights and liability of the buyer and the principal. Thus, in this case, the relationship of principal and agent is, prima facie, established and the intrinsic relation between the buyer and KMDA is evident from the terms and conditions, namely, the BSTC and STC. The subject-matter of the dispute is non-delivery of materials and arises out of that e-auction notice.

Thus, prima facie, the direct relationship between buyer and KMDA cannot be ruled out. Commonality, of the subject matter, composite nature of the transaction and the inter-linked performance of the contract are, prima facie, evident. Under such circumstances, this Court, is of the opinion that even if KMDA was a non-signatory, the arbitration clause would be applicable to KMDA. The referral court cannot delve deeper into such issue. KMDA can raise such point in the proceeding before the learned Arbitrator.

In the decision of Discovery Enterprises Pvt. Ltrd. & Anr. *(supra),* the Hon'ble Apex Court held that a non-signatory may be held to be bound on a consequential theory, founded on agency and assignment or on a non-consequential theory, such as estoppel or alter ego. The fact that MSTC was an agent of KMDA and/or its service provider, is not in dispute and the same is evident from the documents. When the dispute alleged by the petitioner i.e., non-delivery of the entire quantity of the materials e-auctioned despite KMDA having received payment had arisen, communications were made by the petitioner. The Executive Engineer, North Division, R & B Sector, KMDA replied to such allegation. The reply is quoted below:

> "KMDA has received a letter from your end on 18/01/2024 for refund of balance material payment of remaining structural steel components obtained by dismantling from Distressed Vivekananda Road fly over. As per the letter, it appears that a refund of payment for 670.138 MT of scrap steel material has been requested from your end, but no intimation of shortfall of material was given by you during the entire lifting period. Also, as per auction catalogue generated by MSTC, it appears that "the quantities indicated against the lot are purely indicative subject to a variation of +/- 20%. The lifting was done in several phases from 13.09.23. to 15.12.23., within that period some of days were intimated to us and on those days our Divisional Engineers were present at the time of lifting, but some of the days were not intimated to us properly but from local people we were informed that lifting process was going on continuously. We already informed the Proper Authority that without any information, lifting process were going on and we apprehended some unscrupulous activities were going on at the site. At present we are astonished to receive your letter dated 17/01/2024. We apprehended that

> you have lifted the entire scrap goods on your part as per auction and the men and agents who came at that time at Stack yard for lifting the scrap on query, they disclosed they are appointed by you for lifting. Now, you have not intimated us properly for other days, as such and concocted allegations put against us regarding short fall of scrap goods."

The tenor of the reply clearly indicates that in the entire performance of the contract, KMDA had a role to play. The intrinsic connection cannot be, ruled out.

In the case of Ajay Madhusudan Patel vs. Jyotrindra S. Patel reported in 2024 SCC Online SC 2597, the Hon'ble Apex Court once again reiterated that the intention of the parties to be bound by an arbitration agreement could be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance and termination of the contract. Elaborate discussions have been made hereinabove with regard to the subject-matter, commonality of the contract, role of KMDA over the acceptance of bid, delivery of goods, payment mode, lifting mode, failure to lift on time etc. For the referral Court to go beyond such materials would be improper and the issue is left to the learned Arbitrator to adjudicate at the appropriate stage, if any of the parties raise any objection.

With regard to Mr. Chattopadhyay's contention that Section 230 of the Indian Contract Act would be attracted in this case, this Court is of the view that such issue will also have to be raised before the learned Arbitrator and the learned Arbitrator will decide whether at all the petitioner has any claim either against the respondent no.1 or against the respondent no.2 or both or none.

Under such circumstances, this Court appoints the Hon'ble Justice Subrata Talukdar, Former Judge of the High Court at Calcutta, as the sole arbitrator, to arbitrate upon the disputes between the parties. The appointment is subject to compliance of Section 12 of the Act of 1996. The learned Arbitrator shall be at liberty to fix his remuneration as per the schedule of the Act.

All points are left open to be raised before the learned Arbitrator.

Accordingly, AP-COM/493/2024 is disposed of.

All parties are to act on the basis of server copy of this order.

(SHAMPA SARKAR, J.)

B.Pal/AS/SP