

ORDER SHEET

IA NO. GA-COM/1/2024

In

AP-COM/744/2024

IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction

ORIGINAL SIDE

(Commercial Division)

ISGEC HEAVY ENGINEERING LIMITED

VS

KALINGA INTERNATIONAL COAL TERMINAL PARADIP PRIVATE LIMITED

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date : 30th September, 2024.

Appearance:

Mr. Ratnanko Banerji, Sr. Adv.

Mr. Arunabha Deb, Adv.

Ms. Sristi Burman Roy, Adv.

Ms. Ashika Daga, Adv.

Mr. Raunak Das Sharma, Adv.

Mr. Aayush Lakhota, Adv.

...for the petitioner

Mr. Krishnaraj Thaker, Adv.

Mr. Rohit Mukherji, Adv.

Mr. Subhrojyoti Mookherjee, Adv.

Mr. Ramanuj Ray Chaudhuri, Adv.

...for the respondent

The Court: Affidavit of service filed in Court today be kept on record.

IA NO. GA-COM/1/2024, which has been filed for expeditious hearing of the main matter, is taken up for hearing and allowed.

Accordingly, the main application under Section 11(6) of the Arbitration and Conciliation Act, 1996 is taken up for hearing.

The present application under Section 11(6) of the Arbitration and Conciliation Act, 1996 has been preferred, seeking reference to arbitration in

respect of a “project coordination” agreement (for short, the “present agreement”) between the parties dated November 5, 2018.

It is relevant to mention here that two subsequent agreements were entered into on November 6, 2018 between the parties which cover different components of the self-same ‘project’ referred to in the present agreement.

Disputes having arisen in respect of the said two subsequent agreements, initially an application under Section 9 of the Arbitration and Conciliation Act, 1996 was taken out by the present petitioner. Subsequently, the matter culminated in two references, which are being taken up together by the same learned Arbitrator.

Learned senior counsel appearing for the petitioner submits that although the present project coordination agreement was entered into prior to the two other agreements relating to the project, the present agreement specifically refers to the self-same projects, which are the subject matter of the subsequent agreements. It is pointed out that the respective Letters of Award (LoA) in respect of the said two components of the project were entered into in the month of August, 2018, that is, prior to the execution of the present project coordination agreement on November 5, 2018. The prior LoAs subsequently culminated in contracts on November 6, 2018. However, the rudiments of the subsequent project contracts can be found in the previous LoAs.

Learned senior counsel places specific reliance on Article 8.1 of the present project coordination agreement, which provides that any dispute or difference arising out of or in connection with the present agreement shall

be amicably settlement by mutual discussions; if the said process fails, the matter would be referred to arbitration.

Article 9.1 of the present agreement provides that the provisions of this agreement shall take precedence over the provisions of the project contracts and in the event of any apparent ambiguity or conflict or inconsistency between this agreement and any of the project contracts, the same shall be resolved in favour of this agreement. By placing reliance on the same, it is contended that the project coordination agreement acts as an umbrella contract covering the scope of disputes in respect of both the other project contracts.

It is pointed out that the matter came up before the learned Arbitrator who is taking up the arbitration proceedings in respect of the two project contracts and a specific issue arose as to the effect and interpretation of the present project coordination agreement vis-à-vis the project contracts.

The learned Arbitrator had mulled over the issue and ultimately it was left to the option of the parties to decide as to whether the dispute arising out of the present agreement should also be referred to the same learned Arbitrator, to which the respondent having not agreed, a subsequent invocation under Section 21 of the 1996 Act was made and the present application has thereafter been filed.

Learned senior counsel cites *DURO FELGUERA, S.A. –vs- GANGAVARAM PORT LIMITED* reported in (2017) 9 Supreme Court Cases 729 as well as *Cox & Kings Ltd. –vs- SAP India Pvt. Ltd. and Another* reported at 2024 SCC Online SC 2452 in support of the proposition that a Section 11 Court is only to ascertain the prima facie existence of an arbitration

agreement and not to delve into the disputes arising out of the same. Such disputes, even relating to the jurisdiction of the arbitral tribunal, are best left to be decided by the arbitral tribunal itself.

Learned counsel appearing for the respondent squarely opposes the contentions of the petitioner and submits that in the application under Section 9 of the 1996 Act, the petitioner canvassed disputes arising out of the project contracts and there was no whisper regarding any dispute arising out of the present project coordination contract. It is argued that the present application and invocation are merely afterthoughts.

It is next submitted that the self-same question as to the effect and applicability of the provisions of the project coordination agreement to the project contracts is at present the subject matter of the dispute before the arbitral tribunal relating to the project contracts. Learned counsel hands up a copy of the agreed issues between the parties as enumerated by the learned arbitral tribunal on the last occasion, Issue No.3 of which states “How, if at all, do the terms of the Project Coordination Agreement affect the rights and obligations of the parties under the two subsequent contracts?”

Accordingly, it is submitted that since the issue is already the subject matter of consideration before the tribunal, a further reference in respect of the present agreement is unnecessary and would be a wastage of public time and money.

Learned counsel next argues that no independent claim has been raised under the present agreement which is referable to arbitration.

Moreover, the present agreement has not been acted upon and has been subsumed by the subsequent project contracts which are of a later date than the present agreement.

Learned counsel for the respondent places reliance on a judgment of this court in the matter of *Rithwik Projects Private Limited –vs- MBL Infrastructures Limited* in AP No.67 of 2023 in support of the proposition that, as opposed to the contentions of the petitioner, the charter of the Section 11 Court is not restricted to ascertaining whether there is an arbitration agreement. There are several other facets of the disputes which can be entered into, such as the arbitrability of the disputes involved.

Learned counsel, for the same proposition, places reliance on *NTPC Limited –vs- SPML Infra Limited* reported at (2023) 9 Supreme Court Cases 385. It is pointed out that the Supreme Court, in the said judgment, had widened the scope of a Section 11 application from that as held in *DURO FELGUERA (Supra)*.

The Supreme Court, by placing reliance on previous judgments such as *Vidya Drolia –vs- Durga Trading Corporation* reported at (2021) 2 Supreme Court Cases 1, went on to observe that it is intertwined with the duty of the referral court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable.

If the court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court.

The Supreme Court observed that there are two facets of inquiry in an application under Section 11(6) of the 1996 Act. The primary inquiry is

about the existence and the validity of an arbitration agreement and the secondary inquiry is with respect to the non-arbitrability of the dispute.

Going by the said tests, it is submitted that the reference sought in the present application ought to be turned down at the outset.

In order to properly ascertain the context of the case, a reading of the relevant clauses of the present project coordination agreement is required.

Apart from the arbitration clause, that is Article 8.1, mentioning that any dispute or difference arising out of or in connection with the agreement being arbitrable, conspicuously, Article 9.1 speaks about conflicting provisions and provides that in the event of any apparent ambiguity or conflict or inconsistency between the project coordination agreement and any of the “project contracts” or between the project contracts inter se, the same shall be resolved in favour of the project coordination agreement.

The term “project contracts” has been referred to in Clause D at internal page 2 of the project coordination agreement. It has been stated there that the agreement is in consideration and in support of the said project contracts entered into between the parties.

Clause B, again, stipulates that the respondent has entered into contracts as listed in Appendix 1 to the project coordination agreement and the said contracts as listed in column 2 of the Appendix 1, are thereby collectively referred to as the ‘project contracts’.

Appendix 1 provides that the other two project contracts, which have subsequently been entered into on November 6, 2018, are the specific project contracts which have been referred to in Article 9.1 of the project coordination agreement.

A question obviously arises as to how the project coordination agreement could be prophetic and forecast two future project contracts to be entered into on a later date and speak about the connotations of the project coordination agreement on those. However, the answer to this question lies in the fact that the Letters of Award, which ultimately culminated in the project contracts of subsequent dates, had already been entered into at the juncture when the project coordination agreement was entered into.

A perusal of the LoAs also shows that those directly refer to the projects in question and, as such, the LoA and the subsequent project contracts respectively can be construed as a continuum. This quite sufficiently explains the reference to project contracts in the present agreement on a prior date than the project contracts being entered into.

I find from the provisions of the project coordination agreement that it categorically covers several aspects which are germane for execution of the work under the project contracts. For example, Article 5.2 of the present agreement provides limitations of liquidated damages and stipulates that the limit of liquidated damages set forth in each of the project contracts as well as in Appendix 2 of the agreement are not in duplicate.

There are other stipulations pertaining to the work to be done and claims to be made under the other two project contracts, which form the premise of the project coordination agreement. Thus, the project coordination agreement is undoubtedly an umbrella agreement which covers the operation under the project contracts.

The argument of the respondent that the application under Section 9 did not cover the present agreement is neither here nor there. Since at that point of time, disputes might very well have arisen within the conspectus of the project contracts only, it was obvious that the project coordination agreement was not required to be brought into the hotchpot of the dispute before the Section 9 Court. Only when the references were made to arbitration with regard to the project contracts did it dawn upon the parties and the tribunal, of course, that the connotations and interpretations as well as effect of the project coordination agreement on the project contracts is also a germane issue in deciding the said references.

At that juncture, the right of the petitioner to invoke the arbitration clause of the project coordination agreement ripened, which resulted in an invocation under Section 21 and the present application thereafter.

The other question which has been raised by the respondent is that no independent claim arises out of the project coordination agreement which can be referred to arbitration.

An important distinction is required to be kept in mind in this context. There is a sea of difference between a “dispute” and a “claim”. Whereas a dispute may form an issue in a claim or a legal action, a ‘claim’ actually comprises of what it suggests, that is, a demand or a relief claimed before a judicial forum.

Hence, it may very well be that an arguable and debatable issue arises out of an agreement which comprises the body of a dispute, but the same itself need not comprise of the claim to be made before the judicial forum. The language used galore in the Arbitration and Conciliation Act, 1996 is

“dispute”. What is referable is not a claim but a dispute arising out of an agreement. The very fact that an issue had to be framed by the arbitral tribunal taking up the disputes in respect of the project contracts on the specific question as to the effect of the project coordination agreement and its provisions on the project contracts, as well as the fact that the project coordination agreements and the rights flowing therefrom form a part of the pleadings in the statement of claim and a defence in the statement of defence, itself is a sufficient indicator that a dispute has now arisen within the ambit of the project coordination agreement. Thus, in view of such dispute having admittedly arisen regarding the effect of the clauses of the project coordination agreement vis-à-vis the project contracts, it would only be appropriate, even if *prima facie*, that the present dispute be referred and heard by the self-same arbitral tribunal along with the other disputes relating to the project contracts themselves.

Even accepting the ‘eye of the needle’ test and the primary and secondary considerations of a Section 11 Court, I am of the opinion that the present dispute arising under the project coordination agreement is definitely an arbitrable dispute and is best referred to the same arbitral tribunal which is dealing with the project contracts themselves, in respect of which the present project coordination agreement acts as an umbrella contract.

In such view of the matter, I do not find any reason not to refer the present matter to the Arbitrator.

Hence, AP-COM/744/2024 is allowed on contest, thereby appointing Justice Sanjib Banerjee, a retired Chief Justice of the Meghalaya High Court

and the Madras High Court and a retired Judge of this Court, as the sole Arbitrator to resolve the disputes between the parties, subject to a disclosure being obtained from the said learned Arbitrator under Section 12 of the Arbitration and Conciliation, Act 1996.

The present dispute shall be taken up by the learned Arbitrator along with the other two references in respect of the project contracts between the parties dated November 6, 2018.

The learned Arbitrator shall decide his own remuneration within the framework of the 1996 Act and its Fourth Schedule.

(SABYASACHI BHATTACHARYYA, J.)

R.Bhar/S.Pal