IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO.12 OF 2023

M/s.KVS Enterprises … Applicant

Versus

Oil & Natural Gas Corporation Limited …Respondent

Mr.Karl Tamboly i/b Mr.Girish Thakur for the Applicant
Mr.S.A.Bhalwal with Ms.Usha Singh i/b M/s.Vyas & Bhalwal for the Respondent

CORAM:	**FIRDOSH P. POONIWALLA, J.**
RESERVED ON:	**27th February, 2024**
PRONOUNCED ON:	**30th April, 2024**

JUDGMENT:

1. This Application has been filed under the provisions of Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act") for appointment of an Arbitrator under Clause 27 of Annexure II of the Tender Document issued by the Respondent.

2. In October 2019, the Respondent issued a Tender Document inviting offers for a contract for hiring of 03 MT Forklifts for a period of 5 years. On 22nd October 2019, the Applicant submitted its Bid for the said Tender. In compliance with the Tender, the Applicant approached HDFC Bank Limited ("HDFC Bank") for a Bank Guarantee. By a letter dated 17th October 2019, HDFC Bank issued a Performance Bank Guarantee of an amount of Rs.15,48,000/- in favour of the Respondent, on behalf of the Applicant, which was to expire on 28th February 2020.

3. Thereafter, the Respondent, vide its letter dated 17th August 2020, initiated an enquiry process against the Applicant consequent to alleged

violations of the provisions of the Integrity Pact with respect to the Tender Document. The Respondent informed the Applicant that the Applicant , at the time of Bid submission, had violated the provisions of Section 2 of the Integrity Pact, which was annexed at Annexure VI to the Tender Document, along with another partnership firm, M/s.KVS Associates. The Applicant was further informed that the Bid of the Applicant and M/s.KVS Associates were rejected as per Tender BEC criteria and the Applicant was requested to extend the Bank Guarantee up to 30th August 2020. It was also decided by the Respondent that, upon completion of the inquiry, and depending upon its outcome, the Respondent may decide to recover liquidated damages equivalent to the Earnest Money Deposit and also put the Applicant on a holiday as per the provisions of the Tender Document.

4. The Bank Guarantee was extended from time to time.

5. Upon submission of the Bids and their receipt by the Respondent, the contract with respect to the Tender Document was awarded to M/s.Chandni Cranes Private Limited and M/s.R.A.Mhatre & Co. in December 2019.

6. On 1st September 2020, the Respondent addressed a Show Cause Notice to the Applicant, stating that, as part of the bidding process for the Tender Document, the Applicant and M/s.KVS Associates, both having common partners, viz. Mr.Krishna Gopal Reddy and Mr.Kunal Krishna Reddy, had submitted Bids. The Show Cause Notice also alleged that Mr.Kumal Krishna Reddy, by singing the bid documents for both the Applicant and M/s.KVS Associates, violated the terms and conditions mentioned in paragraph 2 of Section 2 of the Integrity Pact. The Show Cause Notice also informed that because of the alleged violation as above, the Respondent rejected the bid offers of the Applicant and M/s.KVS Associates. The Show Cause Notice further stated that the Respondent had initiated an inquiry against the Applicant and threatened to blacklist the Applicant from any future tenders invited by the Respondent if the Applicant was found guilty of

the alleged violation of the Integrity Pact. The said show cause notice called upon the Applicant to respond thereto within a period of two weeks from its receipt.

7. On 1st October 2020, Mr.Kunal Krishna Reddy, on behalf of the Applicant, addressed a letter to the Respondent giving a detailed response to the Show Cause Notice. The Applicant , through the said letter, requested the Respondent that, considering the facts and circumstances of the case, the Respondent should not impose any ban on the Applicant or encash / invoke the Bank Guarantee.

8. However, on 25th February 2021, the Respondent addressed a letter to HDFC Bank requesting it to remit the amounts under the Bank Guarantee to the Respondent. Thereafter, HDFC Bank addressed an e-mail to the Applicant informing it about the request for unconditional invocation of the Bank Guarantee in favour of the Respondent.

9. On 26th February, 2021, the Applicant received a Debit Advice cum Invoice from HDFC Bank stating that the amount of Rs.15,48,000/- had been debited from the Applicant's bank account with HDFC Bank, and that the same had been transferred to the account of the Respondent. The Applicant, on 26th February 2021, filed a Petition, under Section 9 of the Act against the Respondent and HDFC Bank claiming reliefs as more particularly prayed therein.

10. On 1st March 2021, the Applicant received a Banning Order dated 26th February 2021 through which the Respondent imposed on the Applicant a ban of six months effective from the date of its issue i.e. 26th February, 2021, and further informed that, during the above period of six months, the Applicant would not be considered for any tender inquiry or ongoing tenders.

11. After learning about the payment of money by HDFC Bank to the Respondent and about the Banning Order, the Applicant, with the permission of this Court, carried out an amendment to the Section 9 Petition.

12. By its Advocate's letter dated 25th March 2021 addressed to the Respondent, the Applicant invoked Arbitration under Clause 27 of Annexure II of the Tender Document, nominated its Arbitrators and called upon the Respondent to consent to one of the nominated Arbitrators acting as the Arbitrator.

13. In response to the said letter dated 25th March 2021, the Respondent, through its Advocates, addressed a letter dated 12th April 2021 to the Applicant, whereby the Respondent submitted that the matter could not be referred to Arbitration.

14. In these circumstances, the Applicant has filed the present Application.

15. The Applicant seeks appointment of an Arbitrator under Clause 27 of Annexure II of the Tender Document. Clause 27 of Annexure II is in three parts. Clause 27.2 deals with Arbitration for settlement of commercial disputes between Central Public Sector Enterprises inter se and between Central Public Sector Enterprises and Government Departments / Organisations. Clause 27.3 refers to resolution of disputes through conciliation by OEC.

16. Mr.Karl Tamboly, the learned counsel appearing on behalf of the Applicant, has referred to Clause 27.1 of Annexure II of the Tender Document and has submitted that the matter should be referred to Arbitration under the said Clause. Clause 27.1 reads as under:

> ***"27:1 Arbitration (Applicable in case of supply orders/Contracts with firms, other than Public Sector Enterprises)***

1. There shall be no arbitration for disputes involving claims upto Rupees 25 lakhs and more than Rs. 100 crores. Disputes involving claims above Rs. 100 crores shall be adjudicated under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

2. Arbitration can be invoked by giving Invocation Notice only after expiry of the 60 days' period Dispute Notice stipulated in the para above.

3. The party wishing to refer a Dispute to Arbitration shall give notice to the other party specifying all the points of Disputes with details of the amount or claim to be referred to arbitration ("Invocation Notice"). If the claim is in foreign currency, the claimant shall indicate its value in Indian Rupee also. The closing market rate in an exchange declared by SBI on the date prior to the date of notice should be adopted for conversion of foreign currency in Indian Rupees.

4. For a dispute involving claims above Rs 25 lacs and upto Rs 5 crores, in case other party is Claimant, ONGC will forward a list containing names of five jurists to the other party for selecting one from the list who will be appointed as sole arbitrator by ONGC. In case ONGC itself is the Claimant, it shall appoint the Sole Arbitrator by invoking the Arbitration clause and inform the Contractor. Such dispute shall be resolved by fast track procedure specified in Section 29B of the Arbitration and Conciliation Act, 1996.

5. For a dispute involving claims above Rs.5 crores and upto Rs. 100 crore, the claimant shall appoint an Arbitrator and communicate the same to the other Party in the Invocation Notice itself along with the copy of disclosure made by nominated Arbitrator in the form specified in Sixth Schedule of the Arbitration & Conciliation Act, 1996. For the purpose of Section 21, the Arbitration Proceeding shall commence only upon date of receipt of Invocation Notice complete in all respects mentioned above.

The other Party shall then appoint the second

Arbitrator within 15 days from the date of receipt of written notice. The two Arbitrators appointed by the Parties shall appoint the third Arbitrator, within 30 days, who shall be the Presiding Arbitrator.

The parties agree that they shall appoint only those persons as arbitrators who accept the conditions of this arbitration clause. No person shall be appointed as arbitrator or presiding arbitrator who does not accept the conditions of this arbitration clause.

6. For the purpose of appointment of Arbitrator(s), claims amount shall be computed excluding claim for interest, if any.

7. Parties agree that neither party shall be entitled for any pre-reference or pendente-lite interest, i.e. date of cause of action till date of Award by Arbitral Tribunal. Parties agree that claim for any such interest shall not be considered and shall be void. The Arbitrator or Tribunal shall have no right to award pre-reference or pendent-lite interest in the matter.

8. The fees payable to each Arbitrator shall be as per rules framed by the High Court in whose territorial jurisdiction as per contract and seat of arbitration is situated. In case no rules have been framed, the fees prescribed may be as per Fourth Schedule of the Arbitration and Conciliation Act, 1996. However, Arbitrator may fix their fees keeping the aforesaid schedule as guiding factor.

9. If after commencement of the Arbitration proceedings, the parties agree to settle the dispute mutually or refer the dispute to conciliation, the arbitrators shall put the proceedings in abeyance until such period as requested by the parties. Where the proceedings are put in abeyance or terminated on account of mutual settlement of dispute by the parties, the fees payable to the arbitrators shall be determined as under:

(i) 20% of the fees if the claimant has not submitted statement of claim

(ii) 40% of the fees if the pleadings are complete

(iii) 60% of the fees if the hearing has commenced

(iv) 80% of the fees if the hearing is concluded but the award is yet to be passed

10. Each party shall be responsible to make arrangements for the travel and stay etc. of the arbitrator appointed by it. Claimant shall also be responsible for making arrangements for travel/stay arrangements for the Presiding Arbitrator and the expenses incurred shall be shared equally by the parties.

In case of sole arbitrator, ONGC shall make all necessary arrangements for his travel/ stay and the expenses incurred shall be shared equally by the parties.

11. The seat of the arbitration shall be the place from where the LOA / NOA has been issued. For the sake of convenience, Parties may agree to hold the proceedings at any other venue. The arbitration shall be conducted in the English language. Insofar as practicable, the Parties shall continue to implement the terms of the Contract notwithstanding the initiation of Arbitration proceedings.

12. Parties agree that neither party may amend or supplement its claim during the course of arbitral proceedings.

13. The parties may, after invocation of dispute, agree for sharing the cost of Arbitration equally on 50:50 basis.

14. Subject to the above, the provisions of the Arbitration and Conciliation Act, 1996 as amended and applicable from time to time shall apply to the arbitration proceedings under this Contract."

17. On the other hand, it would be the submission of Mr.Bhalwal, the learned counsel for the Respondent, that Clause 27.1 is applicable only if

there is a supply order or a contract between the Respondent and some other party and not otherwise. He submitted that, in this case, since, admittedly, the bid of the Applicant was not accepted by the Respondent, there was no supply order nor any contract with the Applicant, and, therefore, Clause 27.1 was not applicable.

18. I have heard the learned counsel for the parties and perused the documents on record. The Applicant has sought to invoke Arbitration under Clause 27.1 of Annexure II of the Tender Document. The said Clause 27.1 is applicable in case of supply orders / contract with firms other than public sector enterprises. Thus, essentially, Clause 27.1 comes into operation if the Respondent has placed a supply order with a party or has entered into a contract with a party. In the present case, admittedly, the Bid of the Applicant has been rejected by the Respondent and there is no supply order given to the Applicant. The Applicant does not have any contract with the Respondent. The Applicant has sought to invoke Arbitration with regard to the monies paid to the Respondent under the Performance Bank Guarantee and the Banning order issued by the Respondent against the Applicant.

19. In these circumstances, in my view, Clause 27.1 is also not applicable. Therefore, Clause 27.1 does not contain any Arbitration Agreement between the Applicant and the Respondent. Since there is no Arbitration Agreement between the Applicant and the Respondent, the Applicant cannot seek to invoke Clause 27.1 and seek appointment of an Arbitrator.

20. In the light of the aforesaid discussion, and for the aforesaid reasons, the Arbitration Application is dismissed. In the facts and circumstances of the case, there will be no order as to costs.

(FIRDOSH P. POONIWALLA, J.)