

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION APPLICATION NO.213 OF 2024

M/s. Ace Energy Infrastructure Pvt. Ltd.Applicant

Versus

Kalpataru Projects Pvt. Ltd.Respondent

Mr. Pramod Bhosale *i/b. Devika Nigade, Advocate for Applicant.*

Mr. Yuvraj Singh *a/w. Biju Joseph, Louis T.V. i/b. J. Sagar & Associates, Advocates for Respondent.*

CORAM: SOMASEKHAR SUNDARESAN, J.

DATE : FEBRUARY 14, 2025

PC :

1. This Application has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (***“the Act”***), seeking appointment of an arbitrator in connection with disputes and differences that are said to have arisen between the parties under an agreement dated February 1, 2019. The arbitration agreement is contained in Clause 34 (found at Page 97 of the Application).

2. Invocation of arbitration was effected by way of a notice dated September 28, 2023. The Respondent has replied to the invocation notice evidently not disputing the arbitration and in fact recommending three names of judges from the outside Mumbai, who could act as an arbitrator.

3. Today, when the matter is called out, Learned Counsel for the Respondent presents three primary objections. The first objection is that the arbitration proceedings shall be governed by the Indian Council of Arbitration Rules and consequently, the invocation is not in consonance with the agreed procedure. Not being in consonance with the agreed procedure, according to him, no arbitrator may be appointed in exercise of powers under Section 11 of the Act.

4. In the interest of felicity, the arbitration clause is extracted below:-

34.0 ARBITRATION

34.1 Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this WORK ORDER or the validity or the breach thereof shall be settled by arbitration in accordance with the Arbitration and Conciliation Act, 2015. The arbitration proceedings shall be governed by the rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties.

34.2 The arbitration shall be conducted by a sole arbitrator. The SUB-CONTRACTOR will select the sole arbitrator from a panel of three (3) arbitrators provided by the CONTRACTOR.

34.3 The seat of arbitration shall be Mumbai, India. Courts in Mumbai shall have exclusive jurisdiction.

34.4 The language to be used in the arbitral proceedings shall be English language.

34.5 Performance under the WORK ORDER shall be continued during the arbitration proceedings unless otherwise directed by the CONTRACTOR in writing or unless the matter is such that the performance cannot be possibly continued until the decision of arbitrator is obtained.

5. It is seen from a plain reading of the forgoing that under Clause 34.1 the arbitration proceedings were meant to be governed by the Rules of Arbitration of the Indian Council of Arbitration (***“ICA Rules”***),

but the parties had also explicitly agreed under Clause 34.2 that the arbitration would be conducted by a sole arbitrator to be selected from a panel of three arbitrators provided by the Respondent. This is in direct conflict with the initiation process set out in the ICA Rules, which provide for the ICA selecting the arbitrator. Therefore, this Clause has to be harmoniously read with the ICA Rules. The parties have displaced that element of the ICA Rules that govern initiation of arbitration.

6. It is also now trite of law that independence and impartiality is the bedrock of arbitration. If one party gets to select the arbitrator, whether directly or by a seemingly larger catchment area of three arbitrators, giving no option to the other party to participate in the selection, the process of appointment would be contrary to the Act. Consequently, it would only be appropriate to dispose of this Application, taking on board the fact that an arbitration agreement is indeed in existence, dispute and differences have arisen and invocation notice puts the Respondent clearly to terms as to the nature and scope of the dispute between the parties.

7. A harmonious reading of the arbitration agreement with the ICA Rules would mean that the procedural facets of conduct of arbitration would be governed by the ICA Rules.

8. With the aforesaid directions, this Application is ***finally disposed of*** sending the parties to conduct arbitral proceedings before the Arbitral Tribunal appointed hereby in the following terms : -

A] Mr. Aditya Bapat, an advocate of this Court is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes

and differences between the parties arising out of and in connection with the Agreement referred to above. The details of the Learned Arbitrator's are as follows:-

Office Address :- 2nd Floor, New Wadia Building,
Dalal Street, Mumbai – 400 001.
Email Id :- adityasbapat@gmail.com

B] A copy of this Order will be communicated to the Learned Sole Arbitrator by the Advocates for the Applicant within a period of one week from today. The Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this Order;

C] The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties within a period of two weeks from receipt of a copy of this Order;

D] The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers of the respective Advocates of the parties to the Arbitral Tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration;

E] All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance, and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

9. Needless to say, nothing contained in this order is an expression of an opinion on merits of the matter or the relative strength of the parties. All issues on merits are expressly kept open to be agitated before the arbitral tribunal appointed hereby.

10. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]