

**IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE**

Present :

Hon'ble Justice Moushumi Bhattacharya.

A.P. 81 of 2023

Trilok Infracon (India) Private Limited

vs

M/s. Hindustan Marketing Company

For the petitioner : Mr. Abhidipto Tarafdar, Adv.
Mr. Souradeep Banerjee, Adv.
Ms. Sanjana Sinha, Adv.

For the respondents : Mr. Shailendra Jain, Adv
Ms. Swati Agarwal, Adv.

Last heard on : 13.09.2023

Delivered on : 19.09.2023.

Moushumi Bhattacharya, J.

1. This is an application under section 11 of The Arbitration and Conciliation Act, 1996, for appointment of an Arbitrator.
2. The dispute, according to the learned counsel appearing for the petitioner arises out of a "Techno-Commercial Offer (TCO) dated 11.7.2018 for

Pre-Engineered Building for Mr. Rishabh Agarwal, Amingaon, Guwahati, Assam”. The TCO contains an arbitration clause which provides for disputes and differences to be settled by arbitration with three arbitrators, two of who would be nominee arbitrators of the parties to the contract. The TCO was issued by the respondent to the petitioner. The parties thereafter entered into an Erection and Supply Contract on 17.7.2018 incorporating the TCO dated 11.7.2018 which would be evident from the “Contract Documents” clause in the Supply Contract. The respondent sent a mail to the petitioner on 10.9.2018 confirming the approval of the petitioner’s drawings and asked the petitioner to start production in accordance with the drawings. The mail was sent by the Managing Director and Partner of the respondent. The MD / Partner of the respondent sent another mail to the petitioner on 21.11.2019 acknowledging the fact that the respondent will clear the outstanding balance claimed by the petitioner under the Contract in full without deducting any amounts against compensation for the delay subject to the work being completed to the satisfaction of the respondent on a priority basis. The mail, sent by the MD/ Partner of the respondent also asked for the petitioner’s confirmation as to the date on which the work will be completed.

3. The petitioner thereafter sent several reminders for payment of the petitioner’s unpaid bills for the work done under the Contract dated 17.7.2018. The demand notice was sent by the mail of 4.9.2021 and addressed to the MD / Partner of the respondent claiming an amount of Rs. 27.75 lakhs and petitioner requesting the respondent to release the payment at the earliest on

the ground that the petitioner is an MSME and is suffering huge financial losses on account of the non-payment. The petitioner ultimately invoked the arbitration clause in the TCO dated 11.7.2018 by a notice issued under section 21 of the Act on 25.4.2022. The respondent did not reply to the letter of invocation.

4. Learned counsel for the respondent opposes the appointment of an arbitrator on the ground that the parties did not give any effect to the TCO / Agreement of 17.7.2018 relied on by the petitioner and the petitioner entered into a fresh agreement with a third party on 21.7.2018. Counsel submits that the TCO dated 11.7.2018 was superseded and novated by another agreement of 21.7.2018. Counsel relies on mails exchanged between the petitioner and the respondent to substantiate this point. It is also submitted that even if the arbitration agreement contained in the TCO dated 11.7.2018 is accepted, the present application is premature since the parties were to explore mutual discussions before appointing an arbitrator.

5. The dispute brought to the Court is essentially on whether the arbitration agreement contained in the Techno-Commercial Offer dated 11.7.2018 and incorporated in the Supply Contract entered into between the parties on 17.7.2018 was superseded by a fresh agreement entered into between the petitioner and one Ramesh Agarwal.

6. The correspondence relied upon by the respondent are contained in the affidavit-in-opposition of the respondent and includes a mail of 20.7.2018 from the petitioner to one Rishabh Agarwal stating that the petitioner has registered

the project in the petitioner's system together with the job number allotted to the respondent's building. The second document relied upon is a mail from the petitioner to Mr. Rishabh Agarwal with a revised offer as per the discussion between Mr. Rishabh Agarwal and the petitioner's representative. The next document of the respondent is a mail from the petitioner sent to Mr. Rishabh Agarwal on 21.7.2018 reiterating the fact of the Revised Offer and the petitioner's request for advance payment. The petitioner sought to treat this mail as a final mail on the Revised Offer.

7. It should be mentioned that the respondent has not shown any "fresh" or "new" contract executed by the petitioner and the respondent partnership firm. Significantly, no new TCO was enclosed with the alleged new offer sent by the petitioner to Rishabh Agarwal on 20.7.2018. In any event, the petition encloses documents subsequent to the mail of 20.7.2018 evidencing that parties gave effect to the arbitration agreement dated 11.7.2018 and contract dated 17.7.2018.

8. The other documents relied upon by the respondent include the money receipts prepared by the petitioner being in the name of the Proprietorship Firm of Mr. Ramesh Agarwal, the consignment note and invoices issued by the petitioner being in the name of Ramesh Agarwal.

9. The contentions made on behalf of the respondent are not tenable or acceptable to this Court for the following reasons.

10. First and foremost the respondent has not produced any evidence of the TCO dated 11.7.2018 and the Erection and Supply Contract dated 17.7.2018 being novated or substituted by the later TCO dated 21.7.2018. The argument is fallacious since novation or substitution under section 62 of the Contract Act, 1872 requires both or all of the parties to a contract to agree on substituting or novating the earlier contract with a fresh contract. In the present case, the respondent's admitted case is that the earlier contract was allegedly novated / substituted by the petitioner by a second contract with a third party / Ramesh Agarwal. Therefore, the case sought to be made out of novation / substitution is contrary to the Act and accordingly rejected.

11. There is no evidence to show that the earlier contract was not given effect to. The mails sent by the petitioner simply contain an offer presumably on revised terms on the work to be performed without stating anything more. In fact, the petitioner has addressed all the mails to Rishabh Agarwal who was named in the first TCO dated 11.7.2018 and in the Erection and Supply Contract which followed on 17.7.2018. The respondent has relied on these mails in support of his argument of a fresh contract. Further, the correspondence relied upon by the petitioner show that Rishabh Agarwal replied to the petitioner's mails as the Managing Director of the respondent including for approval of the petitioner's drawings, and directed the petitioner to start production. There is nothing on record to show that Ramesh Agarwal was a completely different entity / person who was not connected in any manner to the respondent firm. Besides, privity of contract is only between the

petitioner and Rishabh Agarwal. The tax invoices were sent to Ramesh Agarwal admittedly as a partner of the respondent firm. The petitioner's contention of having to direct such documents to Ramesh Agarwal is also believable in light of the relevant correspondence between the parties.

12. On the other hand, the undisputed fact is that the petitioner performed the work in terms of the Supply Contract which is evident from the respondent making part payment to the petitioner. The letter of demand sent by the petitioner on 4.9.2021 contains the relevant figures. The letter / mail records that the petitioner received payment of about Rs. 85 lakhs from the respondent. The contentions made on behalf of the respondent therefore appear to be a desperate attempt to avoid payment of the outstanding amounts to the petitioner.

13. In any event, a Court dealing with an application under section 11 of the 1996 Act is not required to go into the merits of the dispute but only to see whether there is an arbitration agreement between the parties and whether disputes relating to that arbitration agreement exist between the parties.

14. In the present case, the arbitration agreement is contained in both the Techno Commercial Offer relied on by the petitioner. The dispute is apparent from the respondent taking the point of the petitioner entering into a new contractual relationship allegedly with the third party. The issue involves construction of the terms of the TCO and any other subsequent contract which may have been executed and which is entirely within the domain of an arbitrator. The respondent has not been able to make out a case that no

arbitration agreement exists between the parties. In fact according to the counsel appearing for the respondent, even the alleged later TCO contains an arbitration clause.

15. The objection taken with regard to the venue of the arbitration being Siliguri is completely misconceived. Section 11(6) of the Act confers power only on the Supreme Court or the High Court, as the case may be, to appoint an arbitrator/s.

16. Although the arbitration agreement mentions 3 arbitrators, parties agree to 1 arbitrator being appointed.

17. This Court is therefore satisfied that the present case would fall under section 11(6) of the 1996 Act. AP 81 of 2023 is accordingly allowed and disposed of by appointing Mr. Domingo Gomes, counsel to act as the arbitrator subject to the learned arbitrator indicating his consent in the prescribed format to the Registrar, Original Side within 3 weeks from the date of this judgment. The Advocate of the petitioner shall communicate this order on the learned arbitrator within 3 days from the date of this judgment together with the required details of the contact person of the petitioner.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)