

Calcutta High Court

HON'BLE JUDGE(S): PRAKASH SHRIVASTAVA, C.J.

M/S BLUE STAR LIMITED V. SHRIRAM EPC LIMITED

A.P- 366 of 2021, decided on 18/01/2022

Arbitration and Conciliation Act (26 of 1996) , S.11(6)- Appointment of Arbitrator - By Court - Dispute arising out of purchase orders for designing, engineering, manufacturing, erecting, supplying and commissioning of plant equipments - All purchase orders contain identical arbitration clause - Complete payment not made and attempt for amicable settlement also failed - In meeting between parties, buyer company agreed to release balance amount by December 2018 - But thereafter, some dispute again arose, but no amount has been received - Procedure for amicable settlement has been exhausted - Arbitration agreement exist between parties and attempt for amicable settlement also failed - Case is made out to appoint sole arbitrator to resolve dispute between parties.

(Para 6, 7, 10)

Case Referred :

Chronological Paras

AIR 2009 SC 1366 :

2009 AIR sew 791

AIROnline 2019 Cal 415

Name of Advocates

Satadeep Bhattacharyya, Avishek Guha, Ms. Akansha Chopra, for Petitioner; Ajay Gaggar, Ms. Uttiyo Mallick for Respondent.

I. ORDER :-The Court:- This application under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed for appointment of arbitrator to resolve the dispute between the parties.

2.The case of the applicant is that on and from the beginning of 2009, the respondent had issued the following Purchase Orders/Work Orders with identical arbitration clause:

SCHEDULE	Purchase Order/Work Order	Serial Number	Date	Amount
1.	SEPC/ISP/ACVS/070	August 25, 2009	Rs. 1,37,02,631.00	
2.	SEPC/ISP/ACVS/071	August 25, 2009	Rs. 49,66,840.00	
3.	SEPC/ISP/ACVS/0182	September 13, 2010	Rs. 21,45,000.00	
4.	SEPC/ISP/ACVS/0183	September 13, 2010	Rs. 6,12,811.00	
5.	SEPC/ISP/ACVS/0254	August 02, 2011	Rs. 2,88,000.00	
6.	SEPC/ISP/ACVS/0256	August 04, 2011	Rs. 22,48,480.00	
7.	SEPC/ISP/ACVS/0269	September 09, 2011	Rs. 1,03,006.00	
8.	SEPC/ISP/ACVS/0271	September 23, 2011	Rs. 7,55,468.00	
9.	SEPC/ISP/ACVS/0184	September 19, 2010	Rs. 4,94,063.00	
10.	1100003262	September 24, 2010	Rs. 2,53,690.00	

3. Further case of the applicant is that these purchase orders were for the purpose of designing, engineering, manufacturing, erecting, supplying and commissioning of plant and equipments by the applicant. A further plea has been raised that the purchase orders form part of the composite transaction in respect of a project at IISCO Steel Plant and are interconnected with each other. According to the applicant, he had carried out the work in respect of the purchase orders but the full payment was not made by the respondent and the amount to the tune of Rs. 33,49,343.52 is still due. The correspondence was exchanged between the parties and the meeting also took place but with no success. Hence, the applicant had sent the rd notice dated 03 March, 2021 to the respondent invoking the arbitration clause and proposing the name of the sole arbitrator. In spite of service of notice, no response was received by the applicant. Hence, the present application has been filed.

4. Submission of learned Counsel for the applicant is that all the purchase orders contained identical arbitration clause and the purchase orders are not in dispute

and attempt for amicable settlement has failed, therefore, an arbitrator be appointed for settling the dispute.

5. The objection of learned Counsel for the respondent is that as per the arbitration clause, initially attempts are required to be made for amicable settlement which has not been done. Hence, Section 11 cannot be invoked.

6. Having heard the learned Counsel and on perusal of the record, it is noticed that the arbitration agreements are undisputed. These arbitration agreements in the form of purchase orders contain following arbitration clause:

"7.0 ARBITRATION:

Any disputes, differences, whatsoever, arising between the parties out of or relating to the construction, meaning, scope, operation or effect of this contract shall be settled between the Employer and the contractor amicably. If however, the Employer and the Contractor are not able to resolve their disputes/differences amicably as aforesaid the said disputes/differences shall be settled by conciliation, failing which, through Arbitration at City of Kolkata."

7. The record further reflects that the applicant had submitted the claim for the balance amount of Rs. 33,49,343.52 on 17 March, 2017. Thereafter, the deliberations took place and in the meeting dated 14 August, 2018, the respondents had agreed to release balance amount by December, 2018. But thereafter, some dispute again arose, hence, the amount has not been received. Thus, the procedure for amicable settlement has been exhausted.

8. That apart in the affidavit-in-opposition, the respondent has claimed the liquidated damages and RPN cost to the tune of Rs. 8.94 lakhs, hence, the amicable settlement is not possible now. The Hon'ble Supreme Court in the matter of VISA International Limited Vs. Continental Resources (USA) Limited, (2009) 2 SCC 55 : **(AIR 2009 SC 1366)**, in a case where in spite of the attempt, amicable settlement could not be arrived at and there was no further scope for amicable settlement, has found it to be a proper case for appointment of the arbitrator.

9. **That** apart, the Hon'ble Supreme Court in the matter of Mayavati Trading Private Limited Vs. Pradyut Deb Burman, (2019) 8 SCC 714: **(AIROnline 2019 Cal 415)**, considering Section 11(6- A) and the effect of 2019 Amendment Act has held that the effect of omission of Section 11(6-A) would not be to resuscitate the law that was prevailing prior to the Amendment Act of 2015.

10. **In** view of the aforesaid, I am of the opinion that since the arbitration agreement exist between the parties and the attempt for amicable settlement has failed and considering the stand of the parties, now the amicable settlement is not possible and also considering the limited scope of proceedings under Section 11 of the Act, I am of the opinion that a case is made out to appoint the sole arbitrator to resolve the dispute between the parties.

11. Accordingly, the A.P. No. 366 of 2021 is allowed and Mr. Kaushik Dey, Advocate, Bar Association Room No. 2, (9830467715) is appointed as arbitrator to resolve the dispute between the parties.

Petition Allowed