

HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Arbitration Application No. 21/2022

PME Power Solutions (India) Ltd., A Company Incorporated And Registered Under Companies Act, 1956 B-10 And 11, Site-C, Surajpur Industrial Area, Greater Noida, State Of Uttar Pradesh Through Its Authorised Representative, Shri Manish Sehgal.

-----Petitioner

Versus

Airen Metals Pvt. Ltd., G-750, Road No. 9F-2, Vki Area, Jaipur-302013, State Of Rajasthan, Through Its Director.

-----Respondent

For Petitioner(s)	:	Ms. Ankita Kedia through VC & Mr. Naman Jain
For Respondent(s)	:	Mr. Rajesh Gautam Mr. Ajay Kumar Agarwal

HON'BLE MR. JUSTICE SUDESH BANSAL

Order

08/11/2024

1. Applicant has filed instant arbitration application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short "the A&C Act, 1996"), seeking appointment of a sole Arbitrator for resolution of its claims qua non-applicant Company, in terms of the purchase agreement dated 28.07.2014, whereunder Clause 16(B) provides an arbitration agreement between the parties for resolution of dispute through Arbitrator, if the dispute has not been resolved amicably.

2. Heard learned counsel for both parties and perused the record.

3. The arbitration application has been resisted by the non-applicant-Company, though the execution of the purchase agreement dated 28.07.2014 and the existence of arbitration

agreement between the parties, contained in Clause 16(B) of the purchase agreement have not been disputed. For ready reference, Clause 16(B) of the purchase agreement dated 28.07.2014, containing arbitration agreement between parties, is being extracted hereunder:-

Clause 16(B):-

Any dispute which is not resolved amicably shall be referred to a sole Arbitrator in terms of arbitration and Conciliation Act, 1996. For this purpose the Chief Executive of the Supplier Company shall appoint a sole arbitrator which will be a retired District Judge Cadre. For this purpose, the supplier company shall forward a penal of three persons to dealer company who will convey its acceptance for one person within fifteen days of receipt of such penal on failure of dealer company to convey its acceptance within stipulated time the supplier company shall finalise name of Arbitrator and shall further steps for arbitration proceedings. The decision of such Arbitrator shall be final and binding on the parties and such arbitration shall be subject to the provision of Arbitration and Conciliation Act, 1996.

4. The relevant facts, briefly stated, are that under the purchase agreement dated 28.07.2014, copper was agreed to be supplied by the non-applicant-Company to the applicant-Company and the claim of applicant-Company is that against purchase of copper having worth of Rs.1,96,76,27,937/-, some excessive payment to the tune of Rs.2,05,05,96,649/- was made, hence the applicant-Company is entitled for refund/ repayment of the excessive amount with interest from the non-applicant-Company. It is the case of applicant-Company that since such dispute of claiming refund/ repayment could not be resolved amicably, despite serving legal notices dated 08.12.2021 and 12.01.2022, the instant arbitration application has to be filed on 20th January,

2022, seeking appointment of a Sole Arbitrator for resolution of such dispute.

5. The resistance for appointment of an Arbitrator in respect of the claim put forth by applicant-Company, has been made fundamentally in view of certain subsequent events, transpired after filing of the instant arbitration application.

It has been pointed out by the learned counsel for non-applicant that one financial creditor namely M/s Kedia Financial Services Pvt. Ltd. had initiated proceedings of Corporate Insolvency Resolution Process (CIRP) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter for short "IBC, 2016"), before the National Company Law Tribunal, Jaipur, which was admitted on 28.04.2022 and period of moratorium commenced. It has been pointed out that in such CIRP proceedings, Resolution Professional was appointed, who invited claims against the Corporate Debtor company i.e. non-applicant-Company vide advertisement dated 13.05.2022, and pursuant to which belated claim was submitted by the applicant-Company, hence same was rejected by the Resolution Professional on 25.03.2023 and thereafter, vide order dated 31st March, 2023, the NCLT, Jaipur has approved the resolution plan in respect of the non-applicant-Company i.e. Corporate Debtor.

6. Further contention of learned counsel for non-applicant is that thereafter, the Management of the non-applicant-Company has come in the hands of the Successful Resolution Applicants (SRA) viz. Mr. Rajendra Prasad Sharma, proprietor of M/s Rajbharti Industries, Smt. Bharti Sharma, M/s Polywin Industries and M/s Complex Cable Industries, jointly and by virtue of the

approval of resolution plan, all the claims of creditor i.e. applicant-Company, qua non-applicant Company- corporate debtor, have extinguished.

7. It is noteworthy here that the non-applicant-Company, after undergoing to the CIRP proceedings, is now being represented through the Successful Resolution Applicants, named hereinabove and, they are duly represented by the learned counsel for non-applicant, in that view, notices are not required to be issued to SRAs.

8. Learned counsel appearing on behalf of Successful Resolution Applicants, representing the non-applicant-Company i.e. now the Corporate Debtors, has strenuously relied upon the provision of Section 31(1) of the IBC, 2016, to contend that after approval of the CIRP proceedings by the NCLT, Jaipur vide judgment dated 31st March, 2023, the claim put forth by the applicant-Company against the non-applicant Company and sought to be referred for resolution before the Arbitrator, has virtually been extinguished.

In support of such contention, reliance has been placed on a judgment of the Hon'ble Supreme Court in case of **Ghanashyam Mishra & Sons (P) Ltd. Vs. Edelweiss Asset Reconstruction Co. Ltd. [(2021) 9 SCC 657]**.

9. Thus, the contention of learned counsel for non-applicant-Company is that since the claim of applicant-Company has been extinguished and no more survive, the appointment of an Arbitrator for resolution of such dispute is not warranted at all, hence arbitration application be dismissed. His submission is that at the most, the remedy lies with the applicant is to challenge the rejection of its claim by the Resolution Professional vide order

dated 25.03.2023, which remedy applicant-Company failed to avail. Hence, his submission is that the instant arbitration application deserves to be dismissed. A copy of judgment dated 31st March, 2023 passed by the NCLT, Jaipur, has been placed on record.

10. Having considered the contentions made by the learned counsel appearing on behalf of the non-applicant-Company and from perusal of record, this Court finds that as far as execution of purchase agreement dated 28.07.2014, whereunder the copper was agreed to be supplied by non-applicant-Company to the applicant-company and supply of copper in pursuance thereof, is an undisputed fact. The arbitration agreement, contained in such purchase agreement in Clause 16(B), extracted hereinabove, is also not in dispute.

11. The scope of arbitration application, in view of Section 11(6A) of the A&C Act, 1996 is confined and limited to the extent of examining the existence of arbitration agreement between the parties for resolution of dispute. For ready reference, Clause 11(6A) of the A&C Act, is being extracted as under:-

"(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

12. A seven judges' Bench of the Hon'ble Supreme Court in recent judgment dated 13th December 2023, delivered **In Re: Interplay Between Arbitration Agreements Under The Arbitration and Conciliation Act 1996 And the Indian Stamp**

Act, 1989 [AIR 2024 SC 1], has observed in Para Nos.152 & 154 that the omission of Section 11(6A), through Arbitration and Conciliation (Amendment) Act, 2019 (Act 33 of the 2019), has not been notified in the official gazette and therefore, the said provision continues to remain in full force. In this judgment, placing reliance on previous judgments of the Apex Court delivered in cases of **Duro Felguera, S.A. Vs. Gangavaram Port Limited [(2017) 9 SCC 129]** and **Mayavati Trading Private Limited Vs. Pradyuat Deb Burman [(2019) 8 SCC 714]**, it has been held that the legislature confined the scope of reference under Section 11(6A) to the examination of existence of an arbitration agreement. It has been held that the referral Court only need to consider one aspect to determine the existence of an arbitration agreement- whether underlying contract contains arbitration agreement which provides for arbitration pertaining to the dispute which has arisen between parties to the agreement. Thus, this Court has to rely upon the provision of Section 11(6A) of the A&C Act, which is extracted hereinabove.

13. It may be noted that Section 11(6A) was added by the Legislature by introducing the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016), and there was an impression that the provision of Section 11(6A) has been omitted vide Arbitration and Conciliation (Amendment) Act, 2019 (Act 33 of the 2019), but the present prevailing position about such proposition of law, has been clarified by the seven judges' Bench of the Apex Court in the above referred judgment recently delivered on 13th December 2023.

14. As far as contention of the learned counsel for non-applicant that the claim of applicant has extinguished on account of approval of the CIRP plan by the NCLT, Jaipur vide judgment and order dated 31.03.2023 and the claim does not survive at all, this Court is of considered opinion that such contention touches to merits of the claim, which can be considered and examined by the Arbitrator. This Court being a referral Court, in exercise of its jurisdiction under Section 11 of the A&C Act, 1996, would refrain to enter into merits/ demerits of the claim. Nevertheless, prima facie, it may be observed that the CIRP plan has been approved during the pendency of this arbitration application, which had been filed much prior thereto i.e. on 20.01.2022. Thus, on the date of filing of the arbitration application, the claim of applicant put forth qua the non-applicant-company was obviously survived. The effect of approval of CIRP against non-applicant Company-Corporate debtor by the NCLT, on the claim of applicant-Company, can be seen and decided by the arbitration tribunal, taking into consideration the provision of Sections 31(1) and 32-A of the IBC, 2016 and in the light of judgment of the Apex Court in case of **Ghanashyam Mishra & Sons (P) Ltd. (Supra).**

15. It is hereby observed that undeniably the dispute between the parties has not been resolved amicably and the arbitration clause contained in Clause 16(B) of the purchase agreement comes in play. Before filing the arbitration application, the applicant had issued legal notices dated 08.12.2021 and 12.01.2022, of which though, reply of one notice dated 12.01.2022 has been filed by the non-applicant Company on 03.09.2022, but admittedly the Arbitrator has not been appointed.

16. As far as the issue of limitation is concerned, the arbitration application is well within limitation.

17. All other respective contentions of parties, including the quantum of claim and counter claim, which touches to the merits of the main dispute, are left open to be raised before the Arbitrator.

18. As a final result, the instant arbitration application is allowed and this Court appoints Hon'ble Mr. Justice Ashok Kumar Gaur (Former Judge of High Court), Mob. No. 9414071848, Address:- 30, Tagore Nagar, Opp. Regal Restrau, DCM Ajmer Road- Jaipur, E-mail:- ashokgaur_jaipur@yahoo.co.in as a sole Arbitrator to adjudicate/ resolve the dispute between parties in accordance with provisions of the Arbitration and Conciliation Act, 1996.

19. The appointment of the Sole Arbitrator is subject to the declaration being made under Section 12 of the Arbitration & Conciliation Act, 1996 with respect to independence and impartiality, and the ability to devote sufficient time to complete the arbitration within the prescribed period.

20. The arbitration fee of the Sole Arbitrator shall be payable in accordance with the provisions contained in the Manual of Procedure for Alternative Dispute Resolution, 2009 as amended by the Manual of Procedure for Alternative Dispute Resolution (Amendment), 2017 vide notification dated 23.03.2017 read with 4th Schedule appended to the Act of 1996 or as determined by the Arbitrator with consensus of parties.

21. The Registry is directed to intimate Arbitrator Hon'ble Mr. Justice Ashok Kumar Gaur (Former Judge of High Court), for his approval and consent to act as Arbitrator.

22. All other issues may be raised by the parties before the Arbitrator, which shall be considered in accordance with law.

23. Since as per Section 29A of the Arbitration and Conciliation Act, 1996, the arbitration proceedings are required to be concluded within scheduled time as stipulated therein, it is expected from the parties to appear before the Arbitrator on 09.12.2024 or any other date as informed by the Arbitrator to parties or agreed between parties with the consent of Arbitrator, and further parties shall provide their respective E-mail/ Contact Number/ Mobile Number as also of their authorized representatives/lawyers, appearing on their behalf before the Arbitration Tribunal, in order to facilitate the Arbitrator to send information to the parties, whenever required. The information send by the Arbitrator, on such address/ E-mail/ cellphone of the parties/ their authorized representatives/lawyers, shall be treated as sufficient unless same is not changed.

24. The Arbitration Application stands disposed of accordingly.

(SUDESH BANSAL),J

SACHIN/SOURAV /1