In The High Court at Calcutta
Original Civil Jurisdiction
Original Side

The Hon'ble Justice Sabyasachi Bhattacharyya

AP NO.140 OF 2023

Godrej & Boyce Mfg. Co. Ltd.

VS.

Shapoorji Pallonji and Company Pvt. Ltd.

For the petitioner	:	Ms. Deblina Lahiri, Adv., Mr. M. Chatterjee, Adv.
For the respondent	:	Mr. Bodhisatta Biswas, Adv.
Hearing concluded on	:	08.05.2023
Judgment on	:	12.05.2023

The Court:

1. The present application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") seeks a reference to arbitration in respect of a money claim arising out of three Purchase Orders between the parties.

2. An invocation under Section 21 of the 1996 Act was made by the petitioner on August 22, 2022, claiming an outstanding amount of money for furniture sold by the petitioner in terms of the said three contracts.

3. The respondent (SPCL) has raised an objection as to maintainability of the single Section 21 invocation as well as the single application under Section 11 of the 1996 Act on the ground that the dispute arises out

of three separate purchase orders having distinct arbitration clauses, although the language of the clauses may be identical.

4. Learned counsel for the respondent argues that the dates of all three purchase orders were not the same, that each of them pertained to different zones and were independent contracts in their own right. As such, it is contended that the petitioner was required to take out three separate applications for reference under Section 11 of the 1996 Act, preceded by three separate invocations on each of the arbitration clauses in the separate contracts.

5. Learned counsel for the petitioner relies on the identical language of the three arbitration clauses and submits that all the purchase orders emanated from a single parent contract between the respondent SPCL and its employer, the West Bengal Medical Services Corporation Ltd. The purchase orders, it is argued, are inextricably interlinked.

6. Learned counsel for the petitioner places reliance on the demands made prior to the invocation and the purported e-mail replies thereto by the respondent, which allegedly relate to payment of a consolidated sum of money. It is argued that furniture was supplied by the petitioner under the purchase orders for eighteen Super Specialty Hospitals in West Bengal, under the contract entered into between the respondent and the employer.

7. Furthermore, it is contended, the payments were released in favour of the petitioner in a consolidated manner and even the respondent treated the outstanding dues as a consolidated claim in its communications.

8. Learned counsel for the petitioner places reliance on *Duro Felguera, S.A. Vs. Gangavaram Port Limited*, reported at *(2017) 9 SCC 729*, in which separate arbitrators were appointed for six separate arbitrable agreements, two for international commercial arbitration and four for domestic. However, the Supreme Court had observed that the arbitrators can be the same for the matters.

9. Learned counsel for the respondent, while relying on the same report, contends that separate arbitrators were directed to be constituted for each agreement.

10. The petitioner's counsel also cites *NTPC Ltd. Vs. SPML Infra Ltd.*, reported at *2023 SCC OnLine SC 389*, for the proposition that the primary inquiry under Section 11 (6) of the 1996 Act is about the existence and validity of an arbitration agreement and also in respect to the non-arbitrability of the dispute.

11. The Supreme Court also stressed the need for quicker and efficient resolution of disputes.

12. However, learned counsel for the respondents seeks to distinguish the said decision, by arguing that the propositions laid down therein do not help the petitioner in the present case.

13. There are, thus, two fulcrums of the present inquiry - the arbitration clause(s) and the nature of the dispute.

14. From the perspective of the first, we find that there are three separate arbitration clauses in three distinct purchase orders of different dates, although the language of the said clauses are identical. The clauses pertain to supply of different tranches of furniture to different areas, covering eighteen Super Specialty Hospitals in total.

15. If we search for commonalities among the agreements, we find that all the three purchase orders were issued by the respondent to the petitioner to fulfill the terms of a master (principal) agreement between the respondent SPCL and the employer.

16. Another common factor is that both parties refer to a consolidated claim of the petitioner in their purported communications leading up to the dispute. In some of the e-mails annexed to the affidavit-in-reply of the petitioner, it is seen that both parties, on occasions, refer to the dispute as "the issue" and mention a consolidated amount of claim, such as the emails dated December 1 and December 30, 2021 sent from the end of the respondent.

17. Although the respondent argues that this court, under Section 11 of the 1996 Act, is only to look into the arbitration clauses and joint arbitrability, even for deciding such questions on a tentative footing, there is no reason as to why the materials annexed to the application, opposition and reply cannot even be prima facie looked into.

18. Clause 31 of each of the purchase orders, which are exactly identical, are the respective arbitration clauses.

19. Sub-clause (a) of Clause 31 contemplates that if a dispute of any kind whatsoever arises between the respondent and the petitioner in connection with, or arising out of the Purchase order, whether during the performance or after their completion and whether before or after repudiation or other termination of the order, then either of the parties may give a notice of such dispute to the other party.

20. The parties agree on the question as to the present dispute being arbitrable and being covered by the said clause. The bone of

contention is whether a common invocation for the three separate contracts and a single application under Section 11 for reference in respect of all are maintainable in law.

21. Although the employer of the respondent SPCL is not a party to any of the agreements, sub-clause (b) of Clause 31 of the Purchase Orders refer to disputes between the respondent and its employer. It provides for arbitration in case of a dispute of any kind whatsoever arising between the employer and the present respondent in connection with, or arising out of the Main Contract, whether during the execution of the Main Works or after their completion and whether before or after repudiation or other termination of the Main Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the employer's representative.

22. Sub-clause (b) further provides that if the respondent SPCL is of the opinion that such dispute touches or concerns the vendor's (read, petitioner's) purchase order and arbitration of such dispute under the Main Contract commences, the respondent may by notice require that the petitioner provides such information and attend such meetings in connection therewith as the respondent may reasonably request: such information supply and attendances being at the petitioner's cost, or as directed at the sole discretion of the respondent.

23. The existence of Clause 31 (b) in each of the purchase orders empowers the respondent, even in connection with arbitral disputes relating to the Main Contract between the respondent and its employer, to require the petitioner not only to provide information but to attend meetings in connection with such disputes. The occasion for

such requirement is entirely the perception and opinion of the respondent/SPCL that *such dispute touches or concerns the purchase orders* of the petitioner.

24. Hence, the purchase orders, although separate and pertaining to different bulks of furniture for different areas in West Bengal, share a common underlying bond with the Main Contract between the respondent and its employer. Importantly, such interplay between the performance of the Main Contract and the purchase orders is 'observer-dependent' on the perception of the respondent.

25. That apart, we cannot turn a blind eye to the communications between the parties preceding the reference, in which both parties refer to "the issue" (denoting singular) of a single, total, consolidated claim amount.

26. All the purchase orders, though issued at different times for different zones, are a sub-set of the respondent's performance of a single Main Contract with the employer, which view is completely endorsed by Clause 31 (b) of the purchase orders. Notably, although the employer is not a party to the purchase orders-in-question, a link of such purchase orders has been established with the Main Contract between the respondent and its employer, by drawing a correlation between disputes relating to the Main Contract and the purchase orders.

27. Although the charter of sub-clause (b) of Clause 31 is apparently restricted to the petitioner supplying necessary information and attendance at the meetings between the respondent and the principal/employer, the same undeniably establishes a link between

the liabilities arising out of the purchase orders and the Main Contract.

28. The underlying scheme of the 1996 Act, as discussed in *NTPC Ltd. (supra)* while quoting *Vidya Drolia's case*, is quicker and efficient resolution of disputes, for which the court, under Section 11 of the 1996 Act, may embark upon an *intense yet summary prima facie review*.

29. Thus, although the contours laid down in the cited judgments cannot be lost sight of, being an examination of the existence and validity of the arbitration clause and the arbitrability of the dispute, for the purpose of deciding such core issues, the scope of inquiry can definitely touch the two pivots - the arbitration clause and the nature of the dispute.

30. Technically, of course, the contracts in the form of purchase orders are different, containing separate arbitration clauses. Yet, the language of the same is identical. Moreover, sub-clause (b) of Clause 31, the arbitration clause in each of the purchase orders, leaves ample scope for interlinking disputes arising out of the single Main Contract and the respective Purchase Orders. Stress must be laid here on the fact that the said sub-clause leaves it entirely to the discretion of the respondent/SPCL to embroil the petitioner, through the purchase orders, in the parent dispute pertaining to the Main Contract as well. Hence, it does not lie in the mouth of the respondent to contend that the claim of the petitioner and its rebuttal in a consolidated form is segregable.

31. The invocation under Section 21 of the 1996 Act is merely a culmination of the communications leading up to the dispute, which club the claims in respect of all the purchase orders as a consolidated amount.

32. Section 7 of the 1996 Act contemplates arbitrable "disputes" to be "certain disputes which have arisen or which *may arise*" between the parties in respect of a defined legal relationship.

33. The expression "may arise" is wide enough to encompass not only the specific disputes spelt out in the invocation but also disputes which may reasonably arise out of those. A close scrutiny of Clause 31(b) of the purchase orders leaves no manner of doubt as to the implicit correlatability between the individual Purchase Orders and the performance of the common Main Contract.

34. Hence, the single composite invocation under Section 21 of the 1996 Act vide communication dated August 22, 2022, pertaining to a consolidated claim in respect of three purchase orders, cannot be labelled as invalid or unlawful, sufficient to vitiate the same.

35. Moreover, it is well-settled that a notice is not to be construed hyper-technically so as to defeat its very purpose. The present invocation notice clearly furnishes the particulars of the three purchase orders and narrates the build-up to the consolidated claim, which has been treated in a composite manner even by the respondent in its e-mails. Hence, the same clearly conveys the petitioner's intention to refer the dispute to arbitration and specifies such dispute amply. Thus, the invocation is valid in law.

36. Insofar as the application under Section 11 is concerned, the reference sought would pertain to different contracts, but the crux of the dispute does not pertain to the nitty-gritties of performance defects or difficulties but is the liability of the respondent to pay the entire amount, primarily based on GST calculations.

37. Even if we borrow the spirit of Order II of the Code of Civil Procedure (of course, with the caveat that the same is not applicable in terms to arbitration), joinder of the causes of action in the present case can only prevent unnecessary multiplicity of proceedings and facilitate quick and efficient settlement of the disputes.

38. The hyper-technical objection as to non-maintainability, if upheld, would only militate against the scheme of the 1996 Act.

39. An arguable sticking-point for the petitioner here might have been the decision in *Duro Felguera (supra)*, where a composite reference was tested on the anvil of Section 7 of the 1996 Act. There, the context was whether an arbitration clause in another document would get incorporated into a contract by reference and, if so, under what circumstances.

40. However, the limited scope of inquiry while deciding an application under Section 11 of the 1996 Act, particularly keeping in view sub-sections (6) and (6A) thereof, cannot be a conclusive adjudication but is only a tentative exploration or a "summary prima facie review" as termed by the Supreme Court in NTPC Ltd. (supra), endorsing the first *Vidya Drolia*'s case.

41. Such summary review leaves scope for ascertaining the nature of the dispute vis-à-vis the arbitration clause, to find out whether the

dispute falls within the wide range between a Section 7-scenario, where the arbitration clause in one contract gets unambiguously incorporated into another by reference, and the other end of the spectrum, where the arbitration clauses are placed in different contracts but are relatable to a single Main Contract indirectly through reference, though not going so far as to be 'incorporated' into each other.

42. In the first case, the reference is specific and clear, whereas in the second case, as the present one [by virtue of Clause 31 (b) of the Purchase Orders and the single consolidated claim for all], the reference may be incidental, falling in the category of "may arise" as envisaged in Section 7 (1) of the 1996 Act.

43. Hence, in the facts of the instant case, instead of relegating the parties to a fresh invocation and necessitating a *de novo* application under Section 11, the most expeditious and prudent course of action would be to entertain the present application by turning down the objection as to maintainability and to refer the disputes raised by the petitioner against the respondent in respect of the three Purchase Orders to a single Arbitrator who would consolidate the claim(s) and adjudicate on those in a composite manner.

44. In such view of the matter, A.P. No. 140 of 2023 is allowed, thereby appointing Mr. Debasish Roy (Mobile No.9831173923), an Advocate practising in this court and a member of the Bar Association (Room No. 2), as the sole Arbitrator to resolve the dispute between the parties, arising out of the three Purchase Orders-in-dispute, in a

consolidated manner, subject to obtaining his consent/declaration under Section 12 of the Arbitration and Conciliation Act, 1996.

(Sabyasachi Bhattacharyya, J.)