

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

ARBITRATION CASE © NO.22 OF 2013

ONGC Petro Additions Limited ..Applicant
versus
Daelim Industrial Company Limited, Korea ..Non-applicant

J U D G M E N T

JAGDISH SINGH KHEHAR, J.

1. In spite of the fact, that notice in this case was issued to the non-applicant, and the non-applicant-Daelim Industrial Company Limited, Korea, was duly served, yet none entered appearance on behalf of the non-applicant. Even though the matter came to be adjourned on some dates, on account of the absence of representation on behalf of the non-applicant, under the belief that some one or the other would enter appearance on its behalf. The hope entertained by this Court was belied, in the sense, that none has entered appearance on behalf of the non-applicant. Since the non-applicant was duly served, this Court is left with no other alternative, but to proceed with the case against the non-applicant, ex-parte.

2. We have heard learned counsel for the applicant.

3. The applicant ONGC Petro Additions Limited (hereinafter referred to as the 'OPaL') issued a notice inviting tenders, on 17.11.2009. By the aforesaid notice, the applicant solicited bids for construction of a dedicated high

density Poly Ethylene plant, for its Dahej Petrochemical Complex. The pleadings in the present arbitration petition reveal, that the non-applicant-Daelim Industrial Company Limited, Korea, submitted its tender in response to the aforesaid notice on 17.11.2009. According to the learned counsel representing OpaL, in terms of the conditions depicted in the notice inviting tenders, the bid documents submitted by the tenderers could be accepted by the applicant finally, and such acceptance, would result in a concluded and binding contract. Insofar as the instant aspect of the matter is concerned, reference was made to Clause 26 of the notice inviting tender dated 17.11.2009. The same is being extracted hereunder:

"Clause 26 of the Instructions to the Bidder of the NIT dated 17.11.2009

26.0 Notification of Award:

26.1 Prior to the expiration of the period of Bid Validity, the company shall notify the successful Bidder in writing by registered letter or by fax or by telex that their tender has been accepted.

26.2 The above letter/ telex/ telefax of acceptance shall construe that the Contract shall be deemed to have been concluded. The Notification of Award shall constitute a binding contract between the successful bidder and the Company."

(emphasis is mine)

From a perusal of Clause 26.2, it clearly emerges, that the acceptance of the bid by the applicant, would by itself,

conclude the contract. Thereupon, the consequential 'notification of award', would be treated as a binding contract between the bidder and the applicant. It also emerges from the pleadings, that having accepted the bid furnished by the non-applicant-Daelim Industrial Company Limited, Korea, the applicant issued a 'notification of award' on 6.1.2011. According to the learned counsel representing the applicant, the above notification demonstrates, the factum of a concluded contract between OPaL and the non-applicant; whereby Daelim Industrial Company Limited, Korea, became bound by the bid submitted by it, in response to the notice inviting tenders.

4. It is also necessary to reproduce herein, some other clauses depicted in the 'notification of award' dated 6.1.2011, which have a bearing on the determination of the present case. In this behalf, clauses 8 to 12 of the 'notification of award' are being extracted hereunder:

"8.0 M/S. Daelim Industrial Company Ltd. Shall be required to sign a formal Contract with Opal within 30 (thirty) days from the date of issue of this NOA. This NOA shall constitute binding Contract between M/S. Daelim Industrial Company Ltd and Opal and shall be subject to all terms and conditions of the Biddings Documents and other documents mentioned in Para 1.0 above.

The date of commencement of activities under this Contract shall be the date of issuance of this NOA.

9.0 All other terms and conditions shall be as per Bidding document No. MR/OW/MM/HDPE/15/2009, subsequent Amendments and Documents issued thereof as mentioned at Para 1.0 above.

10.0 Kick off meeting shall be held within 2

weeks from the date of acceptance of this NOA.
Exact date/time and venue shall be communicated shortly.

11.0 The effective date of Contract is the date of this Notification of Award i.e. 06.01.2011.

12.0 Kindly acknowledge this Notification of Award immediately."

(emphasis is mine)

A perusal of clause 8.0 of the 'notification of award', extracted hereinabove, reveals, that M/s Daelim Industrial Company Limited, Korea, was required to sign a formal contract with OpaL within 30 days, from the date of issue of 'notification of award'. A perusal of the same clause, further leads to the inference, that the 'notification of award' would constitute a binding contract between the applicant and the non-applicant, and that, the terms and conditions expressed in the bidding documents, would also constitute the conditions of the contract. Furthermore, clause 8.0 also finalised the date of commencement of activities under the contract, as the date of issuance of the 'notification of award'. Learned counsel for the applicant also invited the Court's attention to clause 10.0 of the 'notification of award' dated 6.1.2011, which reveals, that the kick off meeting between the contracting parties would be convened within two weeks from the date of acceptance of the 'notification of award' by the non-applicant-Daelim Industrial Company Limited, Korea.

5. In order to demonstrate the conclusion of the contract, and also the acceptance of the 'notification of

award' dated 6.1.2011, learned counsel for the applicant invited this Court's attention to a communication dated 7.1.2011, addressed by the General Manager of the non-applicant-Daelim Industrial Company Limited, Korea. An extract of the aforesaid communication is being reproduced hereunder:

"Sub:- Acknowledgment of Notification Award (NOA) for Dedicated High Destiny Poly Ethylene Plant (HDPE) for Dahej Petrochemical Complex against Bidding Document No. MR/OW/MM/HDPE/15/2009

Dear Sir(s) ,

With reference to your Notification of Award (NOA) dated Jan. 6, 2011 (Ref No. OPAL/BDA/CTS/089/10-11), as per the clause 12.0 of the foregoing NOA, we, Daelim Industrial Co., Ltd, are pleased to hereby acknowledge the NOA.

As for the Kick Off Meeting, we respectfully propose to invite you and hold the meeting in Daelim Seoul Office from Jan. 25, 2011 to Jan. 27, 2011. We would like you to kindly confirm the proposed meeting schedule, or otherwise, inform us of your preferred date(s) and place for the meeting.

Assuring you of our readiness to fulfill all your requirements for this Project, we are looking forward to accentuate our competency and ability to provide you with success in this Project.

Faithfully yours,

Sd/-
S.Y. Lee
General Manager,
Daelim Industrial Co., Ltd."

(emphasis is mine)

Learned counsel for the applicant pointedly invited the Court's attention, to the second paragraph of the aforesaid

communication, and contended that, the non-applicant had requested for the convening of the 'kick off meeting' from 25.1.2011 to 27.1.2011. It was the submission of the learned counsel for the applicant, that the aforesaid 'kick off meeting' could have been solicited by the non-applicant, only on the acceptance of the 'notification of award' dated 6.1.2011 (as is clearly evident from clause 10 thereof).

6. Learned counsel then invited this Court's attention to a message, addressed by the non-applicant-Daelim Industrial Company Limited, Korea, to the applicant-OPaL on 22.1.2011, wherein in compliance with clause 3.3, the non-applicant submitted a scanned copy of the 'performance bank guarantee'. The aforesaid message dated 22.1.2011 is also being extracted hereunder:

"Message

(Jinho Shin) shinjh@daelim.co.k Sat, Jan 22, 2011
at 4.04 PM

To: sunilkumar upadhyay skuopal@gmail.com
Cc: "01 (LESSY) Leesy@daelim.co.kr
(Park, Dong-Jib)"
djpark@daelim.co.kr, "01
(Dongkjh0907@daelim.co.kr,
jspark@daelim.co.kr

Dear Mr. Upadhyay,

As per the clause 3.3. "Performance Guarantee" in General Conditions of Contract, we hereby submit our scanned "Performance Bank Guarantee" as enclosed.

The original copy is to be submitted in the contact signing ceremony on Jan.27, 2011.

Sincerely,

Jinho Shin
Jinho SHIN
Assistant Manager/Overseas Plant Business Team 1
DAELIM
17-7 Asiaone, Youngdungpo Ga, Yuido-Dong, Seoul,
150-010,
Korea."

(emphasis is mine)

Based on the communication dated 7.1.2011, and the message dated 22.1.2011, learned counsel for the applicant contended, that the non-applicant-Daelim Industrial Company Limited, Korea, had voluntarily accepted the contract. Based on the above acceptance, the terms and conditions of the contract were liable to be construed, in consonance with the 'notification of award' dated 6.1.2011, read along with the bid documents.

7. There can be no doubt whatsoever, that the submissions advanced by the learned counsel for the applicant deserve acceptance, even though the terms and conditions, especially clause 26 of the notice inviting tender dated 17.11.2009 reveals, that the acceptance of bid documents by the applicant would constitute a concluded contract between the parties. The communication dated 7.1.2011, and the message dated 22.1.2011, fully affirm the above conclusion. The two communications dated 7.1.2011 and 22.1.2011 leave no room for any doubt, that the non-applicant consciously accepted the 'notification of award' dated 6.1.2011, and thereby, bound itself to the terms and conditions of the contract. .

8. Despite the afore-stated concluded contract between the parties, it seems, that the non-applicant-Daelim Industrial

Company Limited, Korea, could not fulfill its obligations in terms of the 'notification of award' dated 6.1.2011. It is therefore, that the non-applicant addressed a letter dated 11.2.2011 to the applicant, wherein the non-applicant expressed its regret in not being in a position to execute its obligation, under the contract. The letter dated 11.2.2011 is reproduced hereunder:

"Date: February 11, 2011
Ref: OBD-075

ONGC PETRO Additions LIMITED
VCCI Complex, 4th Floor, 73-GIDC Makarpura Road
Vandora -390010, India

Attention: Mr. Sunil Upadhyay, General manager
(MM) - Opal.

Subject: Tender No.: MR/OW/MM/HDPE/15/2009 -
Dedicated High Destiny Poly Ethylene Plant (HDPE)
for Dahej Petrochemical Complex at Dahej.

Dear Sirs,

Further to our email dated 8, 2011, we have been intensively discussed with the licensor, Chevron Philips Co., LP, in order to maintain our partnership established for a success in the subject project.

However, it is immensely regretful to inform you that we are not in a position to enter into the contract since we failed to resolve the unsettled issues recently undergone with the licensor.

With much gratitude for your hospitality towards us, we respectfully solicit your kind understanding for our situation.

Faithfully yours,
Sd/-
S.Y.Lee
General Manager
Daelim Industrial Co., Ltd."

(emphasis is mine)

9. Consequent upon the default at the behest of the non-applicant-Daelim Industrial Company Limited, Korea, in executing the contract in compliance with the 'notification of award' dated 6.1.2011, the applicant issued a legal/arbitration notice, to the non-applicant-Daelim Industrial Company Limited, Korea. While indicating the obligations which the non-applicant had failed to fulfill, in consonance with the 'notification of award' dated 6.1.2011, the legal/arbitration notice dated 26.11.2012 nominated Mr. Justice V.N. Khare, former Chief Justice of India, as the applicant's nominee arbitrator, for the resolution of the disputes raised in the legal/arbitration notice. The law firm (R.S.Prabhu and company) which had issued the above notice dated 26.11.2012, issued a further communication to the non-applicant, on behalf of the applicant-OPaL (in continuation of the legal/arbitration notice dated 26.11.2012). It is not relevant, for the purpose of disposal of the present controversy, to delineate the position depicted in the latter communication.

10. In response to the legal/arbitration notice dated 26.11.2012 (issued on behalf of the applicant), the non-applicant through its law firm (Kim and Chang) served a reply dated 21.1.2013. Whilst denying the claims raised by the applicant, against the non-applicant, as were set out in the legal/arbitration notice dated 26.11.2012, the non-applicant adopted the following expressed position in its reply:

"10. In addition to the reservation set out in

paragraph 5 of this Response, Respondent denies that the provisions of the Indian Arbitration and Conciliation Act, 1996 should apply to this arbitration or that the Chief Justice of India (or any person or institution designated by him) has the authority to appoint the third and presiding arbitrator if any agreement cannot be reached between the party-appointed arbitrators.

11. If an arbitration agreement does exist between the parties, which is not admitted, the law and rule governing the procedure of any arbitration between the parties is the Singapore International Arbitration Act (the "Act") and the UNICITRAL Rules respectively.

12. Therefore, subject to the reservation set out in paragraph 5 of this Response and pursuant to Articles 7.1 and 9.1 of the UNICITRAL Rules, Respondent agrees to a three arbitrator arbitral tribunal and nominates Mr. Peter Leaver QC as its party appointed arbitrator. Mr. Leaver's details are as follows:"

(emphasis is mine)

A perusal of paragraph 10 of the reply issued by the law firm, on behalf of the non-applicant-Daelim Industrial Company Limited, Korea, would reveal, that the non-applicant denied the applicability of the provisions of the Indian Arbitration and Conciliation Act, 1996. In fact, it was specifically pointed out in paragraph 11 of the above reply, that the procedure for settlement of disputes by way of arbitration between the parties, would be regulated as per the Singapore International Arbitration Act, and in consonance with the UNICITRAL Rules. In paragraph 12, the non-applicant agreed to an arbitral adjudication, by a three member arbitral tribunal. It is therefore, that in response to the applicant having nominated Justice V.N. Khare, former Chief Justice of India, the

non-applicant-Daelim Industrial Company Limited, Korea, nominated Mr. Peter Leaver, Q.C. to act as arbitrator on its behalf.

11. It is not a matter of dispute, that the two nominated arbitrators, were to appoint the presiding arbitrator, by mutual consent. Despite mutual consultations, the two nominated arbitrators, could not arrive at a consensus on the name of the presiding arbitrator. It is therefore, that the applicant approached this Court, requiring it to appoint the presiding arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996.

12. Before the prayer made at the behest of the applicant, under Section 11 of the Arbitration and Conciliation Act, 1996, is accepted, it would be imperative for this Court to conclude, that the provisions of the 1996 Act are indeed applicable to the contract, executed between the rival parties. It is therefore, that the Court required the learned counsel for the applicant, to respond to the objections raised by the law firm (Kim and Chang), through its communication dated 21.1.2013.

13. In response, learned counsel for the applicant invited this Court's attention to clause 1.3 of the General Conditions of Contract (Part-II) (as amended) of the notice inviting tender, dated 17.11.2009. Clause 1.3 relied upon by the learned counsel for the applicant is being reproduced hereunder:

"1.3 Laws/Arbitration:

1.3.1 Applicable Laws

All questions, disputes or differences arising under, out of or in connection with this Contract shall be settled in accordance with laws of India (both procedural and substantive) from time to time in force and to the exclusive jurisdiction of the Courts in India, subject to the provisions of Clause 1.3.2.

1.3.2 Arbitration:

Except as otherwise provided elsewhere in the contract if any dispute, difference, question or disagreement arises between the parties hereto or their respective representatives or assignees, at any time in connection with construction, meaning, operation, effect, interpretation or out of the contract or breach thereof the same shall be decided by an Arbitral Tribunal consisting of three Arbitrators. Each party shall appoint one Arbitrator and Arbitrators so appointed shall appoint the third Arbitrator who will act as Presiding Arbitrator.

In case a party fails to appoint an arbitrator within 30 days from the receipt of the request to do so by the other party or the two Arbitrators so appointed fail to agree on the appointment of third Arbitrator within 30 days from the date of their appointment, upon request of a party, the Chief Justice of India or any person or institution designated by the him (in case of International Commercial Arbitration) shall appoint the Arbitrators/ Presiding Arbitrator. In case of domestic contracts, the Chief Justice of the High Court or any person or institution designated by him within whose jurisdiction the subject contract has been made, shall appoint the arbitrator/ Presiding Arbitrator upon request of one of the parties."

(emphasis is mine)

Having perused the notice inviting tender, dated 17.11.2009, and the 'notification of award' dated 6.1.2011, it is apparent, that the terms and conditions in the notice inviting tender,

were binding between the parties. A perusal of clause 1.3.1 "applicable laws" leaves no room for any doubt, for recording an effective conclusion, that the parties had agreed, that all questions or disputes arising between them, would be settled in accordance with laws of India (both procedural and substantive) in force, from time to time. Insofar as the instant aspect of the matter is concerned, it is apparent, that the provisions of the Indian Arbitration and Conciliation Act, 1996, lays down the procedural, as well as, the substantive provisions, relating to the settlement of arbitral disputes in India. It is therefore not possible for this Court to accept, the objections raised by the non-applicant-Daelim Industrial Company Limited, Korea, in paragraph 10 of the reply filed on behalf of the non-applicant through its law firm, expressing that the provisions of the Indian Arbitration and Conciliation Act, 1996 would not apply to the settlement of disputes arising between the applicant and the non-applicant. Having so concluded, the assertion made by the law firm (representing the non-applicant) in paragraph 11, to the effect that the parties would be bound by the provisions of the Singapore International Arbitration Act, is liable to be rejected, and is accordingly rejected.

14. It has already been recorded hereinabove, that Justice V.N. Khare, former Chief Justice of India, was nominated as arbitrator on behalf of the applicant, and Mr. Peter Leaver Q.C. was nominated as arbitrator on behalf of the

non-applicant. In terms of clause 1.3.2. of the General Conditions of Contract (Part-II) (as amended) of the 'notice inviting tender' dated 17.11.2009, the arbitrators nominated by the rival parties, were to appoint the presiding arbitrator by mutual consultation. Insofar as the present controversy is concerned, even though there was mutual consultation between the two nominated arbitrators, yet the same did not fructify into the appointment of an agreed presiding arbitrator. It is in the above circumstances, that the applicant approached this Court, for appointing the presiding arbitrator, under Section 11 of the Indian Arbitration and Conciliation Act, 1996.

15. Having arrived at the conclusion, that there was a binding contract between the parties, and further, that the parties were to be governed by the provisions of the Indian Arbitration and Conciliation Act, 1996, there remains no room for any doubt, that in the absence of consensus between the nominated arbitrators, this Court is obliged to appoint the presiding arbitrator. Accordingly, Mr. Justice R.V.Raveendran, a retired Judge of this Court, is appointed as the presiding arbitrator, to settle the disputes raised by the applicant.

16. The presiding arbitrator shall be free to settle his terms and conditions of engagement. He shall be forwarded a copy of this order, by the Registry of this Court, without any delay. The presiding arbitrator shall commence proceedings of the arbitral tribunal comprising of himself, Mr. Justice V.N. Khare and Mr. Peter Leaver Q.C., after consulting them, at the

earliest.

17. It is necessary to record, that consequent upon a request made by the non-applicant, it was agreed between the parties, that the venue of the arbitral proceedings would be Singapore. This position was conceded by the learned counsel for the applicant. It is accordingly directed, that arbitral proceedings shall, subject to a mutual consensus to the contrary, be conducted at Singapore.

18. Disposed of in the above terms.

.....J.
[JAGDISH SINGH KHEHAR]

NEW DELHI;
APRIL 07, 2015.



JUDGMENT

ITEM NO.401

COURT NO.4

SECTION XVIA

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Before Hon'ble Mr. Justice Jagdish Singh Khehar

Arbitration Case (Civil) No(s).22/2013

ONGC PETRO ADDITIONS LTD.

Applicant(s)

VERSUS

DAELIM INDUSTRIAL COMPANY LTD. KOREA

Non-Applicant(s)

Date : 07/04/2015 This petition was called on for hearing today.

For Petitioner(s) Mr. Tushar Mehta, ASG
Mr. Rajat Nair, Adv.
for Mr. K. R. Sasiprabhu, AOR

For Respondent(s)

UPON hearing the counsel the Court made the following
O R D E R

The arbitration case (c) no.22 of 2013 is disposed of in terms of the signed judgment.

Having arrived at the conclusion, that there was a binding contract between the parties, and further, that the parties were to be governed by the provisions of the Indian Arbitration and Conciliation Act, 1996, there remains no room for any doubt, that in the absence of consensus between the nominated arbitrators, this Court is obliged to appoint the presiding arbitrator. Accordingly, Mr. Justice R.V.Raveendran, a retired Judge of this Court, is appointed as the presiding arbitrator, to settle the disputes raised by the applicant.

The presiding arbitrator shall be free to settle his terms and conditions of engagement. He shall be forwarded a copy of this order, by the Registry of this Court, without any delay. The presiding arbitrator shall commence proceedings of the arbitral tribunal comprising of himself, Mr. Justice V.N. Khare and Mr. Peter Leaver Q.C., after consulting them, at the earliest.

It is necessary to record, that consequent upon a request made by the non-applicant, it was agreed between the parties, that the venue of the arbitral proceedings would be Singapore.

This position was conceded by the learned counsel for the applicant. It is accordingly directed, that arbitral proceedings shall, subject to a mutual consensus to the contrary, be conducted at Singapore.

(Parveen Kr. Chawla)

Court Master

[Signed Judgment is placed on the file]

(Renu Diwan)

Court Master

SUPREME COURT OF INDIA



JUDGMENT