

Ion Exchange India Ltd vs IIC Limited And Anr & Anr on 10 November, 2021

Author: Vibhu Bakhru

Bench: Vibhu Bakhru

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IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 209/2021

ION EXCHANGE INDIA LTD

.....
Through Ms Ayushi Kumar, Advocate.

versus

IIC LIMITED AND ANR & ANR.

..... Respondent
Through Mr Rajat Navet, advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% 10.11.2021 [Hearing held through videoconferencing]

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act') praying that an Arbitrator be appointed to adjudicate the disputes between the parties.

2. The petitioner had submitted its bid for executing certain works in connection with the Thermal Power Plant at Nandgaonpeth, Amravati, Maharashtra (Project), which was being developed by respondent no.1. Thereafter, on 04.05.2021, respondent no.1 issued a Letter of Award for executing the work of design, engineering, manufacture, shop inspection and testing, protective painting, supply packing and forwarding, transportation and demonstration of Performance Guarantees for sewage Waste and Water Management System of 45 KLD Capacity.

3. The petitioner thereafter submitted a Performance bank Guarantee in a sum of 15,70,000/- for the Civil Works in favour of respondent no.1. Subsequently, the petitioner also furnished two other bank guarantees in the sum of 27,95,000/- and 2,85,000/- in favour of respondent no.1 for the supply works as well as for the advance receipt.

4. Thereafter, on 28.06.2012, the petitioner and respondent no.1 entered into a formal Contract for execution of the aforesaid works. The petitioner states that disputes have arisen between the parties in connection with the said Contract. The Contract includes an Arbitration Clause that reads as under:-

"11.0 ARBITRATION 11.1 If any dispute or difference of any kind whatsoever shall arise between the Purchaser and the Supplier, arising out of the Contract for the performance of the Works whether during the progress of the Works or after its completion or whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place, be referred to and settled by the Purchaser, who, within a period of 30 (thirty) days after being requested to do so, shall give written notice of its decision to the Supplier.

11.2 Save as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the parties until the completion of the entire work under the Contract and shall forthwith be given effect to by the Supplier who shall comply with all such decisions, with all due diligence, whether he requires arbitration, as hereinafter provided or not.

11.3 If after the Purchaser has given written notice of its decision to the Supplier and no claim to arbitration has been communicated to him by the Supplier within 30 (thirty) days from the receipt of such notice, the said decision shall become final and binding on the Supplier.

11.4 In the event of the Purchaser failing to notify its decision, as aforesaid, within 30 (thirty) days after being requested, or in the event of the Supplier being dissatisfied with any such decision, or within 30 (thirty) days after the expiry of the first mentioned period of 30 (thirty) days, as the case may be, either party may require that the matters in dispute be referred to arbitration as hereinafter provided.

11.5 Subject to as specified in this Clause 11.0, all disputes or differences in respect of which the decision, if any, of the Purchaser has not become final or binding as aforesaid, shall be settled by arbitration, under and in accordance with the provisions of The Arbitration and Conciliation Act, 1996 or any statutory modification, in the manner hereinafter provided. The venue of the arbitration shall be New Delhi, India.

11.6 The arbitration shall be conducted by three arbitrators, one each to be nominated by the Supplier and the Purchaser and the third to be nominated by the two arbitrators nominated by the parties at the commencement of arbitration proceedings and failing agreement between them, in accordance with the said act. The third arbitrator so appointed shall act as the presiding arbitrator.

11.7 The decision of the majority of the arbitrators shall be final and binding upon the parties. The expense of the arbitration shall be paid as may be determined by the arbitrators. The arbitrators may, from time to time, with the consent of both the parties increase the time for making the award. In the event of any of the aforesaid arbitrators dying, neglecting, resigning or being unable to act for any reason, it will be lawful for the party concerned to nominate another arbitrator in place of the outgoing arbitrator.

11.8 The arbitrators shall have full powers to review and/or revise any decision, opinion, directions, certification or valuation of the Purchaser in consonance with the Contract, and neither party shall be limited in the proceedings before such arbitrators to the evidence or arguments put before the Purchaser for the purpose of obtaining the said decision.

11.9 No decision given the Purchaser in accordance with the foregoing provisions shall disqualify him as being called as a witness or giving evidence before the arbitrators on any matter whatsoever relevant to the dispute or differences referred to the arbitrators as aforesaid.

11.10 During settlement of dispute and arbitration proceedings, both parties shall be obliged to carry out their respective obligations under the Contract.

11.11 Parties agree that the party invoking arbitration shall specify all disputes to be referred to arbitration at the time of invocation of arbitration and not hereafter.

11.12 Parties agree that neither party to the Contract shall be entitled for any interest on the amount of the award."

5. It is relevant to note that the said Contract was entered into by the petitioner with respondent no.1; respondent no.2 was not a party to the said Contract. The learned counsel appearing for the petitioner states that respondent no.2 is an alter ego of respondent no.1 and it was in effect, executing the Contract as a part of respondent no.1.

6. He states that the petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 had been admitted in respect of respondent no.1 and currently a moratorium has been in place. He submits that in the aforesaid circumstances, he seeks that an arbitrator be appointed to adjudicate the disputes between the petitioner and respondent no.2.

7. Mr Navet, learned counsel appearing for respondent no. 2 states that he has no objection if an arbitrator is appointed while reserving the rights of respondent no. 2 to contest the proceedings on all grounds including lack of any arbitration agreement between the parties. He further states that respondent no.2 has already proceeded and nominated an arbitrator and therefore, the arbitrators nominated by petitioner and respondent no.2 can concur on the appointment of a presiding arbitrator for constitution of the Arbitral Tribunal. He submits that to this extent the present petition has become infructuous

8. After some arguments, the learned counsel for the parties (petitioner and respondent no.1) agree that instead of an arbitral tribunal comprising of three members, a Sole Arbitrator be appointed to adjudicate the disputes between the parties as the petitioner states that its claim is in the vicinity of on 66 lakhs. The learned counsel further request that the arbitration be conducted under the aegis of Delhi International Arbitration Centre (DIAC) and in accordance with its rules.

9. In view of the above this court considers it apposite to appoint Mr Lal Singh, (Retired) Additional District Judge, Delhi (Mob: 9910384617) as the Sole Arbitrator to adjudicate the disputes between the petitioner and respondent no.2. This is subject to the Learned Arbitrator making the necessary disclosure under section 12 of the A&C Act and not being ineligible under Section 12(5) of the A&C Act.

10. The arbitration shall be conducted under the aegis of DIAC and in accordance with its Rules. The parties are at liberty to approach the Coordinator, DIAC for further proceedings.

11. It is clarified that all contentions of the parties are reserved.

12. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J NOVEMBER 10, 2021 pkv [Click here to check corrigendum, if any](#)