

IN THE HIGH COURT OF ANDHRA PRADESH: AMARAVATI

HON'BLE MR.JUSTICE DHIRAJ SINGH THAKUR, CHIEF JUSTICE

Arbitration Application No.13 of 2023

M/s Shree Swaminarayan Travels, represented by
its proprietor Sri. Bhavikkumar, J. Patel,

... Applicant

Versus

M/s Oil Natural Gas Corporation Limited
(represented by its CGM – Logistics)
Rajahmundry Asset, Logistics Section,

...Respondents

Mr. K.V. Pavan Kumar, Counsel for the applicant.

Mr. D. S. Siva Darshan, Counsel for respondents.

DATE : 10.05.2024

PER DHIRAJ SINGH THAKUR, CJ:

This is an application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'the Act') for reference of the disputes to an independent Arbitrator.

2. The case of the petitioner is that respondent No.1 i.e., M/s Oil and Natural Gas Corporation Limited called for tender for hiring of services of eight number of 25 seater AC shift buses for 24 hrs duty on regular monthly basis for a period of four years for carrying out the operations of respondent No.1. The petitioner claims that bid was submitted and was found successful where after an agreement was executed between the two, dated 08.04.2019.

3. Disputes are stated to have arisen between the parties in connection with and arising out of the contract in question. An amount of Rs.65,61,300/- is sought to be recovered from the petitioner's subsequent bills. The recovery is stated to be effected in equal monthly instalments of Rs.4,10,081.25/- along with GST with effect from January, 2022 till the expiry of the contract period.

4. According to the petitioner, a letter, dated 28.03.2022, was addressed to the Deputy Chief Legal Adviser, ONGC, for referring the matter to the Outside Expert Committee (OEC) for resolution of the issue on which no further action was taken by the respondents and hence, the petitioner claims that the present petition was filed seeking reference of the disputes to an independent Arbitrator. Learned counsel for the respondents, on the other hand, with reference to their counter-affidavit took a stand that although a request for reference for resolution of the

issue was sought through the OEC in accordance with clause 27.3 of the agreement, yet the petitioner had not sought adjudication of the disputes through arbitration and no notice in terms of Section 21 of the Act of 1996 was ever issued or served upon the respondents, which was otherwise also the requirement under clause 27.1.3 of the agreement. In those circumstances, it was urged that no reference could be made for adjudication of the disputes through arbitration.

5. Heard learned counsel for the parties.

6. According to the conditions of the agreement, and in particular clause 27.1, it is clearly envisaged that arbitration can be invoked by giving an Invocation Notice only after the expiry of 60 days period as per the Dispute Notice stipulated in the agreement. Clause 27.3 of the agreement envisages as under:

“27.3 Resolution of disputes through conciliation by OEC

Parties hereby agree as under:

If any difference or dispute (hereinafter referred as "Dispute") under the Contract arises, the party shall give a 60 days written notice ("Dispute Notice") to the identified officer of the other party mentioned in the Contract giving details of the Dispute. The Parties shall use all reasonable endeavours to resolve the Dispute mutually and amicably. All efforts by either party within these 60 days Dispute Notice Period shall be kept confidential by both the parties under Section 75 of the Arbitration and Conciliation Act, 1996.

Parties shall not rely upon any views expressed or suggestions made by the other party, admissions made by the other party or the fact that the

other party had indicated his willingness to enter into a settlement as evidence in any Forum / arbitration / court proceeding.

If Parties are unable to resolve the Dispute amicably within 60 days of receipt of the Dispute Notice, then after expiry of the 60 days' Dispute notice period, the aggrieved Party can refer the Dispute to conciliation and / or arbitration subject to terms and conditions contained herein below:

1) Parties further agree that following matters shall not be referred to conciliation or arbitration:

i) Any claim, difference or dispute relating to, connected with or arising out of ONGC's decision to initiate any proceedings for suspension or banning, or decision to suspend or to ban business dealings with the Bidder / Contractor and/or with any other person involved or connected or dealing with bid / contract / bidder / contractor.

ii) Any claim, difference or dispute relating to, connected with or arising out of ONGC's decision under the provisions of Integrity Pact executed between ONGC and the Bidder / Contractor.

.....”

7. As per the terms and conditions of the agreement, although the petitioner appears to have sought resolution of the disputes through conciliation by Outside Expert Committee (OEC), yet no formal notice appears to have been given to the respondents by the petitioner invoking the arbitration clause after the expiry of the 60 days period. The fact that there is no notice issued or served upon the respondents invoking the arbitration clause has not been rebutted, as no rejoinder has been filed by the petitioner.

8. Reference to Section 11(6) of the Act would clearly show that a party has a right to make an application for reference of the disputes to an Arbitrator, where under the appointment procedure agreed upon by the parties, *inter alia*, a party fails to act as required under that procedure. Therefore, it is clear that with a view to maintain an application under Section 11(6) of the Act, the petitioner was required to show that the respondents had failed to act as required under the aforesaid clause, which is reproduced in the preceding paragraph, and had failed to refer the disputes to the Arbitrator even after a notice invoking the arbitration clause had been served on the respondents.

9. It is now fairly well settled that the application under Section 11 of the Act can be filed only after a notice of arbitration in respect of the claims to be referred to arbitration as otherwise contemplated by Section 21 of the Act is made and that there is failure to make the appointment. Reference in this regard can be made to the judgment in the case of **Bharat Sanchar Nigam Ltd v. M/S Nortel Networks India Pvt. Ltd**¹.

10. Be that as it may, in the absence of any notice having been served upon the respondents in terms of clause 27.1.3 of the agreement r/w Section 21 of the Act, the disputes as prayed for cannot be referred for adjudication to an independent Arbitrator. The arbitration application is

¹ (2021) 5 SCC 738

accordingly dismissed with liberty to the petitioner to follow the procedure as prescribed. No costs.

Pending miscellaneous applications, if any, shall stand closed.

DHIRAJ SINGH THAKUR, CJ

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HON'BLE MR.JUSTICE DHIRAJ SINGH THAKUR, CHIEF JUSTICE

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