

SUPREME COURT OF INDIA

Taiyo Membrane Corp.P.Ltd.

Vs.

Shapoorji Pallonji & Co.Ltd.

Ar.(Civil)No.2 of 2015

(Ranjan Gogoi,J.,)

09.09.2015

JUDGMENT

1. This application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) has been lodged by one Taiyo Membrane Corporation Pty. Ltd. seeking appointment of an arbitrator to resolve certain disputes that have arisen out of three sub- contracts executed with the respondent in respect of works relating to renovation of the Jawaharlal Nehru Stadium, New Delhi. The said works were awarded to the respondent by the C.P.W.D.

2. The area of dispute is small and narrow, namely, the entitlement of the petitioner to 5% of his claimed dues which, according to the petitioner, has been wrongly withheld by the respondent.

3. The respondent has objected to the appointment of an Arbitrator by the Court, inter alia, on the ground that the contractual obligations incumbent on the petitioner/applicant have not been fulfilled without which the demand for release of the amount, as aforesaid, is not justified. As the said objection itself raises an arbitrable issue the same need not engage the attention of the Court. Such attention, however, has to be focused on the principal objection of the respondent. The same is to the effect that the two of the sub-agreements were between Taiyo Membrane Corporation and the respondent Company whereas one sub-agreement was between Taiyo Membrane Corporation (India) and the respondent. The applicant is Taiyo Membrane Corporation Pty. Ltd. which is not a party to any of the said sub-agreements. Besides, it is contended that invocation of the arbitration clause was by the applicant who is not a party to the agreements. On the said basis, it is urged that there is no valid invocation of the arbitration clause and consequently there is no failure on the part of the respondent to appoint the arbitrator so as to warrant an order from the Court under Section 11(6) of the Act. It is also urged that one of the sub-agreements being between two Indian entities i.e. Taiyo Membrane Corporation (India) and the respondent Company any appointment of an arbitrator would fall outside the jurisdiction of this Court under Section 11(6) of the Act.

4. The above objections of the respondent have been sought to be met by the petitioner by filing a rejoinder affidavit to point out that the Letters of Intent with regard to the works allotted under the sub- agreements were issued in favour of Taiyo Membrane Corporation Pty. Ltd. That apart, several correspondences exchanged between the respondent Company and the Taiyo Membrane Corporation Pty. Ltd. with regard to the works covered by the sub-contracts have also been referred to and relied upon to contend that there is no doubt and ambiguity with regard to the fact that the Taiyo Membrane Corporation Pty. Ltd. and Taiyo Membrane Corporation are one and the same entity. Insofar as the agreements executed by Taiyo Membrane Corporation (India) is concerned, it is urged that the above position has also been clarified by subsequent communications exchanged between the respondent Company and Taiyo Membrane Corporation Pty. Ltd. with respect to the work covered by the agreement in which one of the parties is Taiyo Membrane Corporation (India).

5. While it is correct that there is some confusion with regard to the description of the parties in the sub-agreements; the legal notice(s); and the letter(s) of invocation; the L.O.Is. issued in respect of the works and the correspondences exchanged by and between the parties make it clear that the applicant Taiyo Membrane Corporation Pty. Ltd. and Taiyo Membrane Corporation are one and the same entity and the works under the sub- agreements had been allotted by the respondent to the said entity. In this regard it may also be relevant to note that under the Australian Corporation Act, 2001 (Section 57A) a Corporation includes a Company and a proprietary Company Limited by shares is incorporated as Pty. Ltd.

6. In the above circumstances the alleged mis-description will not affect the maintainability of the present application. As already observed, the Court does not find any ambiguity or inconsistency in the description of parties so as to non-suit the applicant-petitioner by dismissing its application on the above basis. The ambiguity, if any, in the description of the parties having been explained and the respondent Company itself having issued L.O.Is. and having exchanged subsequent correspondences with the applicant with regard to the works under the sub- contracts, though executed in the name of the Taiyo Membrane Corporation and Taiyo Membrane Corporation (India), the applicant's petition cannot be held to be not maintainable as urged on behalf of the respondent.

7. Having held as aforesaid and the remaining objections, as noticed, being within the province of the Arbitrator the Court is inclined to grant the prayers made. Accordingly, Dr. Justice M.K. Sharma, a former Judge of this Court is appointed as the sole Arbitrator.

8. All disputes including the disputes raised in the present petition are hereby referred to the learned sole Arbitrator. The learned Arbitrator shall be at liberty to fix his own fees/ remuneration/other conditions in consultation with the parties.

9. Let this order be communicated to the learned Arbitrator so that the arbitration proceedings can commence and conclude as expeditiously as possible.

10. The Arbitration Petition is disposed of in the above terms.

