

# SUPREME COURT OF INDIA

TBEA Shenyang Transformers

Vs.

Alstom Projects India Ltd.

A.P.(Civil)No.8 of 2014

Anil R. Dave

21.09.2015

## JUDGMENT

**Anil R.Dave,J.,**

1. This is a petition under the provisions of Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”).
2. By virtue of this petition, the petitioner company, incorporated in Republic of China, has prayed that an Arbitrator be appointed so as to arbitrate the dispute which the petitioner company is having with the respondent company, incorporated under the provisions of the Companies Act, 1956, in India.
3. According to the learned counsel appearing for the petitioner company, the petitioner company had entered into a contract on 24.12.2007 with the respondent company for supply of Transformers and certain other electrical equipments which were necessary for the purpose of setting up Transformers. The said Transformers were to be supplied for Chuzachen Project at Sikkim.
4. According to the respondent company, there were some defects in the material supplied by the petitioner company and when the said defects were brought to the notice of the petitioner company, the petitioner company had agreed to replace the defective parts. It is pertinent to note that a bank guarantee had also been furnished by the petitioner company to the respondent company which was to be invoked in certain circumstances. According to the learned counsel appearing for the petitioner company, though there was no reason for invocation of the bank guarantee, without giving any intimation to the petitioner company, the respondent company invoked the bank guarantee on 22.06.2013.
5. In the aforesaid circumstances, the petitioner company was constrained to file an application under Section 9 of the Act in the District Court at Vadodra, State of Gujarat, but the said application had been dismissed on 02.09.2013.

6. Being aggrieved by the order, whereby an application under Section 9 of the Act had been rejected, the petitioner company had approached the High Court of Gujarat at Ahmedabad. The said appeal filed before the High Court had also been dismissed on 27.09.2013 and being aggrieved by the order passed by the High Court dismissing the appeal, the petitioner had filed Special Leave Petition before this Court which had also been dismissed on 07.10.2013 as this Court did not find any infirmity in the order of the High Court.

7. In view of the aforesaid background, mainly on account of invocation of the bank guarantee, the petitioner company, according to the learned counsel appearing for the petitioner, has approached this Court for appointment of an Arbitrator as per the provisions of Section 11(6) of the Act.

8. The learned counsel appearing for the petitioner-company mainly submitted that by invoking the bank guarantee without any justifiable reason and without giving any prior intimation to the petitioner company, the respondent company committed breach of the terms of the contract. The learned counsel also drew my attention to the contents of the contract entered into between the parties on 24.12.2007 and submitted that in the aforesaid circumstances an Arbitrator be appointed by this Court so that the dispute which has arisen between the parties can be resolved by way of arbitration under the provisions of the Act.

9. On the other hand, the learned counsel appearing for the respondent- company submitted that, in fact, there is no dispute between the parties and there is no reason for appointment of an Arbitrator. He submitted that the application filed under Section 9 of the Act by the petitioner company had been rejected and the said order of rejection had been confirmed not only by the High Court, but also by this Court. The fact that no interim protection was granted denotes that there was no dispute which would require appointment of an arbitrator. He further submitted that by invoking the bank guarantee and by encashing the amount payable to the respondent company, the issue with regard to invocation of the bank guarantee has become infructuous and there cannot be any dispute on the said subject. Thus, the learned counsel appearing for the respondent submitted that this is not a case where an Arbitrator should be appointed as per the provisions of the Act.

10. Upon hearing the learned counsel for the parties and going through the provisions of the contract, I am of the view, that there is a dispute between the parties which requires to be resolved by an Arbitrator under the provisions of the Act.

11. There is no dispute to the effect that there is a clause with regard to arbitration in the contract which had been entered into between the parties on 24.12.2007. The arbitration clause incorporated in the contract reads as under:

“33.0 Arbitration.

33.1 Where any dispute is not resolved as provided for in the preceding clause 32.1 then such dispute shall be referred to and settled by arbitration under and in

accordance with the provisions of the rules applicable in land of Law. The Award shall be final and binding upon the Supplier and Purchaser. The place of arbitration shall be Paris.

33.2 During settlement of disputes and arbitration proceedings, unless otherwise agreed in writing both Supplier and Purchaser shall be obliged to carry out their respective obligations under the Contract.”

12. As there was a dispute with regard to quality of material supplied, some letters were exchanged between the parties and the representatives of both the parties had also met for the purpose of resolving their disputes but unfortunately, the disputes with regard to quality of the material supplied could not be resolved and ultimately the respondent company had to invoke the bank guarantee.

13. In the aforestated circumstances, it cannot be said that there is no dispute between the parties and therefore, in my opinion, an Arbitrator is required to be appointed as per the provisions of Section 11(6) of the Act.

14. In view of the aforestated circumstances, Mr. Justice A.P. Shah, former Chief Justice of High Court of Delhi, having his office at F-15, Hauz Khas Enclave, New Delhi-110016, is appointed as an arbitrator and the place of arbitration shall be Delhi. Remuneration to be paid shall be fixed by the learned Arbitrator. The parties to the litigation have agreed to the above appointment and they have also agreed that they would request the learned Arbitrator to complete the arbitral proceedings preferably within six months and they shall extend their cooperation to the learned Arbitrator so that the proceedings can be concluded at an early date.

15. Intimation of this order be forwarded to the learned Sole Arbitrator by the Registry of this Court.

16. The Arbitration Petition is allowed in the aforesaid terms. No costs.