

SUPREME COURT OF INDIA

National Aluminium Company Limited

Vs.

Subhash Infra Engineers Pvt.Ltd.

C.A.No.6605 of 2019

(Abhay M.Sapre and R.Subhash Reddy,JJ.,)

23.08.2019

JUDGMENT

R.Subhash Reddy,J.,

SLP(C)No.5610 of 2017

1. Leave granted.
2. This civil appeal is filed by the first defendant/National Aluminum Company Limited (NALCO), a Government of India Enterprise, in pending Civil Suit No. 2610 of 2015, on the file of Learned Senior Civil Judge, Gurgaon, Haryana, aggrieved by the order dated 22.10.2016, passed in Civil Revision No.2471 of 2016 (O&M) by the High Court of Punjab & Haryana at Chandigarh.
3. The appellant-Company, a Government of India enterprise, has issued a tender notice on 05.05.2011, inviting tenders for construction of Ash Pond-IV in District Angul of Odisha State. The first respondent herein i.e Subhash Infra Engineers Pvt. Ltd. (for short 'SIE') has submitted its offer/tender on 06.06.2011. On 09.11.2011, the appellant herein has accepted the offer/tender submitted by the first respondent herein and issued the work order to the said respondent. By a letter dated 18.11.2011, the appellant addressed the first respondent to attend a kick off meeting on 19.11.2011. As no one on behalf of first respondent attended the meeting proposed on 19.11.2011, the appellant again issued a letter dated 21.11.2011, requesting the first respondent once again to come for a kick off meeting. In response to the letter dated 21.11.2011, the first respondent/SIE herein vide letter dated 21.11.2011, expressed his inability to execute the work, unless certain specifications are changed/revised. In the said letter dated 21.11.2011, the first respondent/SIE herein has agreed that the appellant- Company has accepted the offer made by it. Further, vide letter dated 02.12.2011, the respondent/SIE informed the appellant that the work order is not acceptable to them.

4. Subsequently, when the first respondent herein was not coming forward to participate in the kick off meeting and instead addressed a letter dated 02.12.2011, vide letter dated 30.01.2012, the appellant-company informed the respondent/SIE that the contract work will be carried out, through some other agency, at the risk and cost of the respondent/SIE. Further by letter dated 06.02.2015, the appellant-company has informed the first respondent/SIE that it suffered a financial loss of Rs.4,86,61,440/-(Rupees Four Crore Eighty-Six Lakh Sixty-One Thousand Four Hundred and Forty Only).The respondent /SIE was directed to deposit the said amount otherwise the appellant will be forced to invoke Arbitration Clause as per Clause 22 of NIT and Clause 87 of the General Conditions of Contract. Then, the first respondent/SIE has disputed the claim made by the appellant, on the ground that there is no binding contract, that came into existence between the parties, as such, the demand is illegal and unjustified. A letter dated 28.02.2015 was communicated to that effect, to the appellant.

5. Further, when the appellant-company asked the respondent/SIE to select an arbitrator from a panel of three names sent by it, the respondent/SIE, vide letter dated 23.07.2015, informed the appellant that, as much as, there is no binding contract that came into existence between the parties, the disputes cannot be resolved by the arbitrator.

6. The appellant herein, having regard to terms and conditions of contract, invoked the arbitration clause, by proceeding dated 02.09.2015 and appointed the second respondent Shri C.R. Pradhan, who was the Former Chairman(CMD) of the Company, as an arbitrator. The learned arbitrator initiated the proceeding by issuing notice dated 07.09.2015, asking the appellant, as well as the first respondent to attend the preliminary meeting on 09.10.2015 at Bhubaneswar.

7. On receipt of such notice issued by the arbitrator, the first respondent herein approached the Civil Court and filed Civil Suit No.2610 of 2015 on the file of Senior Civil Judge, Gurgaon, seeking relief of declaration that the appointment of second respondent, as a sole arbitrator, is null and void. Further, relief of permanent injunction was also sought restraining the arbitrator, from proceeding with arbitration proceedings. Pending suit, interim injunction sought for is rejected by the Learned Trial Judge i.e Senior Civil Judge, Gurgaon.

8. Against the order of the Trial Court, refusing to grant injunction orders, the first respondent approached the District Court. The Appellate Court i.e the Additional District Judge, Gurgaon, vide order dated 25.01.2016, allowed the appeal and granted the injunction, restraining the second respondent-arbitrator from proceeding further, pursuant to notice dated 07.09.2015. When the appellant herein has questioned such order by way of Civil Revision No. 2471 of 2016, before the High Court of Punjab and Haryana at Chandigarh, the same is dismissed vide order dated 22.10.2016. Hence this appeal by way of Special Leave.

9. We have heard the Sri Ashok K. Gupta, learned senior counsel appearing for the appellant and Sri Manoj Swarup, learned counsel for the first respondent, though the

second respondent is served, there is no appearance on his behalf. We have perused the impugned order and other material placed on record.

10. It is the case of the appellant, that as much as the appellant has accepted offer/tender submitted by respondent, it is a concluded contract and is an arbitration agreement within the meaning of Section 7 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act'). On the other hand, it is the case of the respondent, as acceptance was not unconditional, it does not amount to a binding contract between the appellant and the first respondent, as such, the arbitrator has no jurisdiction to decide the lis between the parties. Mainly, it was a case of the appellant that as much as the acceptance of the bid will conclude the contract and having regard to terms and conditions of NIT and General Conditions of Contract, it is a binding contract between the parties, as such, dispute is to be resolved only by way of arbitration.

11. The learned counsel for the appellant has placed reliance on judgment in the case of *Kvaerner Cementation India Limited V. Bajranglal Agarwal and Another* .

12. It is a case of the appellant-Company that even if the first respondent disputes the jurisdiction of the arbitrator, it is open for the first respondent to move an application before the arbitrator under Section 16 of the Act, but at the same time, the suit filed by the first respondent, for declaration and injunction is not maintainable.

13. In the Judgment of this Court, in the case of *Kvaerner Cementation India Limited V. Bajranglal Agarwal and Another*¹, this Court has examined the similar issue and held that any objection with respect to existence or validity of the arbitration agreement, can be raised only by way of an application under Section 16 of the Act and Civil Court cannot have jurisdiction to go into such question.

14. Having regard to aforesaid judgment of this Court and various communications between the parties, we are in agreement with the submission made by the learned senior counsel for the appellant that, if the first respondent wants to raise an objection with regard to existence or validity of the arbitration agreement, it is open for the first respondent to move an application before the arbitrator, but with such plea, he cannot maintain a suit for declaration and injunction. Though the Trial Court rightly rejected the interim injunction sought for by the first respondent, the same is erroneously reversed by the learned Additional District Judge and such order is confirmed by the High Court, by the impugned order.

15. As we are of the view that the order passed by the Additional District Judge and the High Court are not in conformity with the law on the subject and are contrary to judgment of this Court as referred above, the impugned order is liable to be set aside by vacating the injunction orders.

16. At the same time, it is to be noted that when the first respondent has not responded to select one of the members as an arbitrator, from the panel, the appellant has appointed Sri

C.R. Pradhan, former Chairman-cum- Managing Director of the company itself as an arbitrator, who has commenced arbitration proceedings. Having regard to the Fifth Schedule introduced, by Act 3 of 2016 to the Act, second respondent cannot be continued as an arbitrator, to adjudicate the lis between the parties.

17. For the aforesaid reasons, we allow this Civil Appeal and set aside the impugned order dated 22.10.2016 passed in C.R. No.2471 of 2016, by the High Court of Delhi. Further we also quash the appointment of second respondent, as an Arbitrator.

18. Learned counsels on both sides, have consented and requested this Court to appoint an arbitrator, for resolution of dispute. In view of such request and consent of the learned counsels on both sides, we appoint Hon'ble Mr. Justice M.L. Mehta, Former Judge of Delhi High Court, as an arbitrator, to adjudicate the disputes between the parties. It is open for the learned arbitrator to fix his own fees.

19. We also make it clear that if the first respondent disputes the jurisdiction of the arbitrator, it is open for it to file appropriate application before the arbitrator under Section 16 of the Act. If any such application is filed, same is to be decided on its own merits in accordance with law, uninfluenced by, any of the observations and findings recorded by this Court.

20. We direct the Registry to communicate a copy of this order to Hon'ble Mr. Justice M.L. Mehta.

Judgment Referred.

¹(2012) 5 SCC 0214