STANDARD CORROSION CONTROLS PVT. LTD. A

v.

SARKU ENGINEERING SERVICES SDN BHD

(Arbitration Application No. 6 of 2008)

NOVEMBER 11, 2008 B

[MARKANDEY KATJU, J.]

Arbitration and Conciliation Act, 1996; S.11(5):

Appointment of Arbitrator – Agreement entered into between Indian company and foreign company for painting workscope package – Termination of contract by foreign company – Dispute – Invoking of arbitration clause by Indian company asking foreign company to select an Arbitrator – Foreign company refusing to select – Application for appointment of Arbitrator before Supreme Court – Held: In terms of agreement, applicant-Indian company, to apply to ICC for appointment of an Arbitrator in accordance with Arbitration Rules of International Chambers of Commerce – Hence, application not maintainable. C D E

S.11(2), (5) and (6) of 1996 Act – Appointment of an Arbitrator – Procedure for.

Applicant, an Indian company, entered into an agreement with a foreign company, respondent, for painting workscope package. Respondent suspended the contract for not furnishing requisite bank guarantee. This had resulted in a dispute between the parties. The applicant called upon the respondent to send a list of eminent persons for appointment of sole Arbitrator. When the respondent did not respond, applicant himself had sent a list of persons to respondent for appointment of an Arbitrator. In response, respondent stated that the matter could be settled by mutual consent, failing which F G

 H

A arbitration could be held at Mumbai by applying the Rules of International Chambers of Commerce. Hence, the present application filed by the applicant u/s. 11(5) of the Act.

B Applicant submitted that the Arbitration Rules of the International Chambers of Commerce (ICC) cannot prevail over the Arbitration and Conciliation Act, 1996.

Dismissing the application, the Court

C HELD: 1.1. It is true that a statute overrides the contract, but it has to be noticed that Section 11(2) of the Arbitration and Conciliation Act states that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Admittedly, the D conditions mentioned in sub-section (6) of Section 11 are not attracted in this case. Hence, the procedure to appoint an arbitrator agreed upon by the parties will be applicable. [Para 10] [1056-A-C]

1.2. The scheme of the Act is that under Section 11(2) E of the Act, the parties are free to agree on a procedure for appointing an Arbitrator subject to the provisions of Section 11(6). A petition under Section 11(5) of the Act would not lie if there is any agreement between the parties providing for the procedure for appointment of an F arbitrator. In the present case, Article X of the agreement provides for such procedure. [Para 13] [1056-G-H; 1057-A]

2. The parties had agreed that any dispute between them shall be settled as far as possible by mutual G consultation and consent, failing which by arbitration to be held at Mumbai applying the Arbitration Rules of the ICC. The applicant has to apply to the Secretariat of the ICC, as mentioned in the Arbitration Rules of the ICC, and it cannot approach this Court for appointment of an H Arbitrator. No doubt, the arbitration will have to be held

at Mumbai, but the entire procedure of appointment of the Arbitrator has to be in accordance with the Arbitration Rules of the ICC, which requires that first a request has to be made to the Secretariat of the ICC. Admittedly, the applicant has not approached the ICC Secretariat. Hence, the application filed by the applicant is not maintainable at all. [Para 11] [1056-C-E]

Iron & Steel Co. Ltd. vs. Tiwari Road Lines **(2007) 5 SCC 703 and** *Rite Approach Group Ltd. vs. Rosoboronexport,* **(2006) 1 SCC 206, relied on.**

CIVIL ORIGINAL JURISDICTION : Arbitration Application No. 6 of 2008.

Anurag Kumar, P.N. Kumar, Bindra Rana and Meenu Sharma (for M/s. S.S. Rana & Co.) for the Applicant.

Kavin Gulati, Rashmi Singh, Avinash Pandey and T. Mahipal for the Respondent.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. By means of this Arbitration Application the applicant has prayed for appointment of an arbitrator under Section 11(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) for resolution of the disputes between the parties arising out of the agreement dated 21.2.2006.

2. Heard learned counsel for the parties and perused the record.

3. The applicant is a company registered under the Indian Companies Act, having its registered office at Thane, Maharashtra. The respondent is a company incorporated under the law of Malaysia having its registered office at Miri, Sarawak, Malaysia. The respondent had been awarded a contract of 26 Well Unmanned Platforms by the Oil & Natural Gas Corporation

A (in short `ONGC'). The applicant had been short-listed as one of the potential sub-contractors for painting workscope package and was requested to submit its quotations. On going through the quotation of the applicant, the respondent issued a contract dated 21.2.2006. Copy of the agreement is at
B Annexure A-4 to this application.

4. Subsequently, the applicant received a letter dated 8.9.2006 from the respondent stating that they had no choice but to exercise Article VII, the Suspension and Termination
C Clause, of the Contract Agreement with immediate effect on the alleged plea that the respondent was unable to furnish bank guarantee and feedback confirmation of the applicant's readiness for work. This resulted in a dispute between the parties and the applicant wrote a letter dated 14.4.2007 invoking the arbitration clause in the agreement between the
D parties, being Article X. The applicant called upon the respondent to send a panel of eminent persons to be selected to act as a Sole Arbitrator. The applicant also mentioned in the said letter that in the event the respondent fails to send the list as required by the applicant, the applicant shall approach the
E High Court to appoint the Sole Arbitrator for resolving the dispute. When the respondent did not send any reply, the applicant wrote a letter dated 11.10.2007 to the respondent and had proposed the names of eminent prospective arbitrators and asked the respondent to select one of them as the Sole
F Arbitrator to adjudicate the dispute. The applicant also mentioned in the letter dated 11.10.2007 that if the respondent fails to do so, the applicant will then approach the Supreme Court for getting the arbitral forum constituted.

G 5. The respondent replied by email dated 16.10.2007 and stated that in Article X of the Arbitration it was mentioned tha in case of any dispute or difference between the parties regarding the contract, the matter should be settled, as far as possible, by mutual consultation and consent, failing which by arbitration to be held at Mumbai, applying the Arbitration Rules
H

of the International Chamber of Commerce (hereinafter referred to as the ICC). Article X states as follows :

> *"Article X Arbitration*
>
> Any dispute or difference in view regarding this CONTRACT shall be settled, in so far as is possible, by mutual consultation and consent, failing which by arbitration to be held at Mumbai, India applying the Arbitration Rules of the International Chamber of Commerce by a single arbitrator."

6. Since the parties could not agree, the applicant applied to this Court under Section 11(5) of the Act for appointment of an Arbitrator.

7. A counter-affidavit has been filed by the respondent and I have perused the same. The respondent has relied on Article X of the Agreement dated 21.2.2006 between the parties and has urged that the arbitration has to be held at Mumbai but by applying the Arbitration Rules of the ICC. As per the Rules of Arbitration of ICC, the party who wishes to have recourse to arbitration under the said Rules is required to request for arbitration to the ICC Secretariat. The respondent submitted that the applicant has not followed that procedure for appointment of an Arbitrator because it has not submitted any request to the ICC Secretariat. Instead, the applicant has rushed to this Court without following the procedure mentioned in Article X of the Arbitration Agreement.

8. Annexed to the counter-affidavit is the Rules of the ICC and I have perused the same. Admittedly, the applicant has not made any request for arbitration to the ICC Secretariat. Hence, in my opinion, this application is dnot maintainable at all.

9. There is no dispute that the applicant had, with open eyes, signed the contract dated 21.2.2006, which contains Article X, quoted above.

A 10. Learned counsel for the applicant submitted that the Arbitration Rules of the ICC cannot prevail over the Parliamentary law, which is the Arbitration and Conciliation Act, 1996. In my opinion, it is true that a statute overrides the contract, but it has to be noticed that Section 11(2) of the Act B states that subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Admittedly, the conditions mentioned in sub-section (6) of Section 11 are not attracted in this case. Hence, the procedure to appoint an arbitrator agreed upon by the parties will be C applicable.

11. As already stated above, the parties had agreed that any dispute between them shall be settled as far as possible by mutual consultation and consent, failing which by arbitration to be held at Mumbai applying the *Arbitration Rules of the ICC.* D In my opinion, the applicant has to apply to the Secretariat of the ICC, as mentioned in the Arbitration Rules of the ICC, and it cannot approach this Court for appointment of an Arbitrator. No doubt, the arbitration will have to be held at Mumbai, but the entire procedure of appointment of the Arbitrator has to be E in accordance with the Arbitration Rules of the ICC, which requires that first a request has to be made to the Secretariat of the ICC. Admittedly, the applicant has no approached the ICC Secretariat. Hence, in my opinion, the application filed by the applicant herein, is not maintainable at all.

F

12. This Court in a series of decisions has held that such an application/petition without approaching the authority nominated and agreed upon by the parties is not maintainable vide *Iron & Steel Co. Ltd. vs. Tiwari Road Lines* 2007(5) SCC 703, *Rite Approach Group Ltd. v. Rosoboronexport* 2006(1) G SCC 206 etc.

13. The scheme of the Act is that under Section 11(2), the parties are free to agree on a procedure for appointing an Arbitrator subject to the provisions of Section 11(6). A petition H under Section 11(5) of the Act would not lie if there is any

agreement between the parties providing for the procedure for appointment of an arbitrator. In the present case there is Article X of the agreement (quoted above). A

14. Learned counsel for the applicant has relied upon Article IX of the Agreement, which states: B

> *" Article IX*
>
> This CONTRACT shall be governed by the laws of India. The CONTRACTOR shall be responsible to keep itself informed and comply with all laws, rules, regulations, C standards, codes and the like applicable to the WORKS, CONTRACTORS and its subcontractors and CONTRACTOR shall protect, indemnify and hold ONGC, SARKU, their AFFILIATES and associated companies and their stockholders, directors, agents, employees, and D representative of each of the aforementioned parties harmless from and against all liabilities for any breach thereof attributable to CONTRACTOR or its subcontractors."

15. In my opinion, Article IX has no relevance to the E controversy in this case as it only says that the contract shall be governed by the laws of India. The laws of India would mean the Contract Act, Limitation Act, Specific Relief Act etc. Article/ Clause IX does not deal with the procedure by which the arbitrator has to be appointed. That is governed by Clause X. F

16. In view of the above, this Arbitration Application is not maintainable and it is accordingly dismissed.

S.K.S. Arbitration Application dismissed.