

AL JAZEERA STEEL PRODUCTS COMPANY SAOG A

v.

MID INDIA POWER & STEEL LTD.  
(Arbitration Petition No. 6 of 2009)

MAY 08, 2012

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[SURINDER SINGH NIJJAR, J.]

*Arbitration and Conciliation Act, 1996:*

*ss.11(5) and (9) – Appointment of arbitrator – Sale-purchase contract – Goods supplied found defective and of poor quality – Held: The applicant has raised bona fide disputes arising out of or relative to the construction of the contract which contains the arbitration clause – The petition can not be said to be belated – Sole Arbitrator appointed and all the disputes and differences that have arisen between the parties referred to arbitration.* C  
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**The applicant company, having its registered office in Sohar, Sultanate of Oman and the respondent, and Indian Company, entered into a sale purchase contract dated 18.6.2008 whereunder the respondent was to supply to the applicant 2000 metric ton Prime Alloy Steel Billets of specific chemical composition and physical specifications as described in Article 3 of the contract. The respondent encashed the Letter of Credit opened by the applicant. The goods supplied by the respondent were found defective. Since the disputes raised by the purchaser-company were not resolved, it filed the instant application for appointment of an arbitrator. The respondent claimed that the application was not maintainable in view of the fact that the dispute sought to be referred to arbitration was “not a dispute arising out of contract” but rather a dispute which was deliberately planted post the completion of the contract; that the** E  
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A dispute about the defective goods was a belated attempt by the applicant to evade its liability under the contract; and that the applicant did not raise a proper claim which could be referred to arbitration.

B Allowing the petition, the Court

C HELD: 1.1. The applicant has clearly raised *bona fide* disputes arising out of or relative to the construction of the contract which contains the arbitration clause. Article 10 of the contract contemplates resolution of disputes between the applicant and the respondent through arbitration, as per the procedure laid down under the Arbitration and Conciliation Act, 1996. [para 12] [405-F-G]

D 1.2. The applicant through its e-mail dated 31.8.2008 had informed the respondent about defective material. In the second e-mail on the same date, the applicant had set out the defects in the Billets and informed the respondent that it had stopped de-stuffing of containers. The respondent was called upon to take back the rejected goods urgently and arrange to refund the amount paid at the earliest. In response to the said e-mail, the respondent on 1.9.2008 indicated its concern and deeply regretted the inconvenience caused to the applicant. The applicant was also assured that the problem would be sorted out to the entire satisfaction of the applicant. Thereafter, the respondents proposed a joint inspection, which according to the applicant was never arranged. On the other hand, the respondent claims that the applicant had rebuffed all the efforts made by the respondents to resolve the issue. The applicant was intent on claiming the refund. These facts and circumstances are sufficient to show that the *bona fide* disputes have arisen between the parties, which are within the scope and ambit of the arbitration clause and need to be resolved through arbitration. [para 15-16] [406-G-H; 407-A-D]

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2. The disputes having arisen in September, 2008 and the application having been filed on 4.2. 2009, the petition can not be said to be belated. [para 16] [407-D]

3.1. A bare perusal of the arbitration clause (Clause 10 of the contract) is sufficient to indicate that it covers all disputes and differences of any kind arising between the parties. The applicant has clearly raised a number of issues, which can be summarized as: (a) failure of the respondent to remove the defective Billets supplied by the respondent and lying at applicant's premises; (b) failure to remit the amount drawn by respondent against the Letter of Credit; (c) failure to pay interests and costs incurred by the applicant; (d) failure to pay warehousing charges @ USD 20 per Metric Ton per day on and from 1.10.2009 till the actual removal of defective Billets from the premises of the applicant. In such circumstances, it can not be said that the applicant has failed to raise *bona fide* dispute which cannot be referred to arbitration. [para 13] [406-C-F]

3.2. The Sole Arbitrator is appointed and all the disputes that have arisen between the parties are referred to arbitration for adjudication on such terms and conditions as the Arbitrator deems fit and proper. [para 17] [407-F]

*SBP & Co. Vs. Patel Engineering Ltd. & Anr. 2005 (4) Suppl. SCR 688 = 2005 (8) SCC 618; National Insurance Company Limited Vs. Boghara Polyfab Private Limited 2008 (13) SCR 638 = 2009 (1) SCC 267; Nandan Biomatrix Limited Vs. D 1 Oils Limited 2009 (3) SCR 115 = 2009 (4) SCC 495; Visa International Limited Vs. Continental Resources (USA) Limited 2008 (16) SCR 1043 = 2009 (2) SCC 55; and Reva Electric Car Company Private Limited Vs. Green Mobil 2011 (13) SCR 359 = 2012 (2) SCC 93 – cited.*

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A Case Law Reference:

2005 (4) Suppl. SCR 688 cited para 9

2008 (13) SCR 638 cited para 9

2009 (3) SCR 115 cited para 10

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2008 (16) SCR 1043 cited para 10

2011 (13) SCR 359 cited para 10

C CIVIL ORIGINAL JURISDICTION : Arbitration Petition No. 6 of 2009.

Under Section 11(6) of the Arbitration and Conciliation Act, 1996.

D K.V. Vishwanathan, Shabyashachi Patra, Sanjeev Kumar (Khaitan & Co.) for the Petitioner.

G.L. Rawal, Sanjay Kapur, Ashmi Mohan for the Respondent.

E The Order of the Court was delivered by

**O R D E R**

F **SURINDER SINGH NIJJAR, J.** 1. This petition under Sections 11(5) and (9) of the Arbitration and Conciliation Act, 1996 read with paragraphs 2 and 3 of the appointment of the Arbitrators by the Chief Justice of India Scheme, 1996 seeks appointment of an independent and impartial person as an Arbitrator.

G 2. The applicant is a Company incorporated in Oman having Registration No.1550438 and having its registered office at Sohar Industrial Estate, PO Box 40, PC 327, Sohar, Sultanate of Oman. The respondent is an Indian Company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Shanti Heights, 32/2, South

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Tukoganj, 2nd Floor, Above Cosmos Bank, Indore 452001  
(Madhya Pradesh).

3. The applicant entered into a Sale Purchase Contract dated 18th June, 2008 bearing No.MIPSL/BILLET/EXP/08-09/003 (hereinafter referred to as the 'Contract') with the respondent for supply of 2000 metric ton Prime Alloy Steel Billets of specific chemical composition and physical specifications more particularly described in Article 3 of the Contract. In accordance with the terms and conditions of the Contract, the applicant had opened a Letter of Credit bearing No. DC BAF 080939 through HSBC Bank Middle East Limited Muscat. The Letter of Credit was encashed by the respondent on 21st August, 2008 through its bankers, State Bank of Travancore. On 23rd August, 2008, the applicant took delivery of first shipment of 243.2 Metric Ton of Billets at Sohar Port. Upon unloading the containers, the applicant noticed that far from complying with the specifications mentioned in the Contract, the Billets supplied by the respondents were of a very poor quality. The Billets had cracks which were visible to naked eyes. Even then, to confirm the defects, the applicant chose some random Billets and sent the same to two independent laboratories for testing. Both the laboratories, after conducting the requisite tests, confirmed that the Billets supplied by the respondent did not comply with the specifications mentioned in the Contract. The applicant sent an e-mail dated 31st August, 2008, informed the respondent about the non-conformity and made it clear that the same were not acceptable. On the same day, i.e., 31st August, 2008, another e-mail was sent setting out in detail the defects in the Billets. It was also mentioned that the applicant had done random cross verifications on chemical composition, and the respondents will be intimated after getting results. It is further stated that the applicant has stopped de-stuffing of containers, the respondent was requested to kindly arrange to take back the rejected goods urgently and arrange for the refund of the amount paid at the earliest. The applicant informed the respondent that all unloading, loading and

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A demurrage at Port and with the shipping company will be to your account.

4. The respondent by its letter dated 1st September, 2008 stated that the complaint has been noted and they were equally and greatly concerned. The applicant was informed that the complaint was being accorded highest priority by the respondent that they were investigating at their end the reasons for the same. The letter states that it was never the intention of the respondent to send substandard material to any of their esteemed customers. It notes that "we understand your concern and deeply regret the inconvenience caused to you. However, we would like to assure you that we will sort out this problem to your entire satisfaction. We wish to assure that we believe in ethical business practices and strive hard for customer satisfaction." The applicant was further informed that "in order to ascertain the intensity of the problem and discuss the various issues involved for an amicable resolution of the same, it is planned to send a high level delegation to your site within the next few days". In the meanwhile, the applicant was requested to carry out de-stuffing of the containers and take delivery of lot 2, 3 and 4 as the same will unnecessarily incur charges on account of detention and demurrage. The applicant was once again re-assured that the issue would be resolved to their entire satisfaction. Pursuant to the aforesaid assurances, the respondent cleared the remaining 1234.63 MT of the Billets which, according to the applicant, were defective. On 10th September, 2008, there was a meeting between the representatives of the applicant and the respondent. It was decided that the joint inspection would be undertaken to have the sample analyzed from independent recognized laboratories in Dubai on 13th September, 2008. The joint inspection was not arranged. The applicant issued several reminders informing the respondent that the defective Billets stood rejected, and they were requested to remove the same. Since the joint inspection was not carried out, the applicant got an inspection conducted through one of the reputed firms in Dubai on 9th October, 2008.

The Expert, known as SGS Dubai, in its report dated 16th October, 2008 concluding that “the lot is having lot of serious visual defects” and that “all the analyzed samples were not complying with provided contractual specification”. All efforts and settlements having failed, the applicant invoked the arbitration clause in terms of Article 10 of the Contract, through its notice dated 17th December, 2008.

5. No reply was received from the respondent. The applicant, therefore, nominated the Sole Arbitrator (Hon.Mr.Justice S.N.Variava, a former Judge of this Court). Since the respondent did not reply to the aforesaid letter, the applicant was left with no alternative but to move the present petition.

6. In the reply, the respondent claimed that it was issued inspection certificates dated 28th July, 2008 and 31st July, 2008 of quality and quantity by Inspectorate Griffith India Pvt. Ltd., an independent third party inspection agency of international repute, with respect to the goods that were to be dispatched to the applicant as per the said Contract. The goods were duly accepted by the applicant. The Letter of Credit had been opened by the applicant in accordance with Article 5 of the Contract. The applicant took delivery of the first shipment on 27th August, 2008. It accepts that applicant had sent e-mail dated 31st August, 2008 to the representative of the respondent alleging that the Billets were defective and making the demands, as noticed earlier. The respondent gave another version as to why the joint inspection was not carried out. According to the respondents, all efforts to persuade the applicant had failed. They had a cursory meeting with the CEO of the applicant which lasted two minutes. The applicant insisted that the respondent lift the material and refund the money. The applicant, according to the respondent, is arbitrarily calling upon the respondent to pay warehousing charges @ US \$ 20 per metric ton per day after 30th September, 2008. The respondent claimed that the application is not maintainable in

- A view of the fact that the dispute sought to be referred to arbitration is “not a dispute arising out of contract” but rather a dispute which has been deliberately planted post the completion of the Contract to escape a liability that the applicant has already incurred, i.e., payment of price for the goods supplied. According to the respondents, it is not a dispute in real sense but a “moon shine dispute”. Further it is a dispute that has been raised after the Contract has been validly completed. The dispute about the defective goods is a belated attempt by the applicant to evade its liability under the Contract.
- C The real reason for trying to avoid the Contract is the downfall of the price in the international market of steel Billets.

7. The applicant in its rejoinder has reiterated the averments made in the application. It is stated that the inspection notes mentioned by the respondent had come to the knowledge of the applicant only from the reply filed by the respondent to the application. The applicant denies that the material supplied by the respondent was in accordance with the specifications given in the Contract. It is stated that the applicant has not tried to evade the liability under the Contract.

E It is also denied that the Contract has become commercially unviable. The applicant also denied that the respondent has made attempts to resolve the issues raised by the applicant. The further details given by the applicant need not be noticed at this stage.

F 8. I have heard the learned counsel for the parties.

9. Mr. Viswanathan, learned senior counsel appearing for the applicant submits that the matter herein is specifically covered by the judgment of this Court in *SBP & Co. Vs. Patel Engineering Ltd. & Anr.*<sup>1</sup> and *National Insurance Company Limited Vs. Boghara Polyfab Private Limited*<sup>2</sup> In reference to the arbitration clause, Mr. Viswanathan submits that the disputes have arisen between the parties. The disputes relate

1 (2005) 8 SCC 618

H 2 (2009) 1 SCC 267

to live claims which are not belated. The disputes fall within the scope and ambit of the arbitration clause which are worded very widely. The arbitration clause clearly states that “all disputes and differences whatsoever arising between the buyer and seller out of or relative to the construction meaning and operation of effect of this Contract or any breach thereof shall be settled by the arbitration.”

10. Learned counsel also relied on *Nandan Biomatrix Limited Vs. D 1 Oils Limited*<sup>3</sup> and *Visa International Limited Vs. Continental Resources (USA) Limited*<sup>4</sup> and *Reva Electric Car Company Private Limited Vs. Green Mobil*<sup>5</sup>.

11. On the other hand, counsel for the respondent submits that the petition is not maintainable as the condition precedent for invoking arbitration, as agreed in the agreement, has not been satisfied. Since there has been no joint inspection of the material, no reliance can be placed on the expert reports submitted by the applicant. In this case, it was agreed that the parties shall try to settle the dispute amicably, which was a condition precedent for invoking the arbitration. According to the learned counsel, in the present case, the applicant has not even raised a proper claim, which can be referred to arbitration.

12. I have considered the submission made by the learned counsel for the parties. I am of the considered opinion that the applicant has clearly raised bonafide disputes arising out of or relative to the construction of the contract which contains the arbitration clause. Article 10 of the contract contemplates resolution of disputes between the applicant and respondent through arbitration, as per the procedure laid down under the Arbitration and Conciliation Act, 1996. The clause reads as under:-

“All disputes and differences whatsoever arising between buyer and seller out of or relative to the construction

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3 (2009) 4 SCC 495

4 (2009) 2 SCC 55

5 (2012) 2 SCC 93

A meaning and operation of effect of this contract or any breach thereof, shall be settled amicably, failing which it shall be settled as per the Indian Arbitration and Conciliation Act, 1996.

B The place of arbitration would be Mumbai, India the decision made by the arbitration organization shall be taken as final and binding upon both parties. The arbitration expenses shall be borne by the losing party unless otherwise awarded by the arbitration organizations.”

C 13. A bare perusal of the aforesaid clause is sufficient to indicate that it covers all disputes and differences of any kind arising between the parties. The applicant has clearly raised a number of issues, which can be summarized as follows:-

- D (a) Failure of the respondent to remove the defective Billets supplied by the respondent and lying at applicant's premises
- (b) Failure to remit the amount drawn by respondent against the Letter of Credit
- (c) Failure to pay interests and costs incurred by the applicant
- E (d) Failure to pay warehousing charges @ USD 20 per Metric Ton per day on and from 1st October, 2009 till the actual removal of defective Billets from the premises of the applicant.

F 14. In such circumstances, it can not be said that the applicant has failed to raise bonafide dispute which cannot be referred to arbitration.

G 15. As noticed earlier, the applicant through its e-mail dated 31st August, 2008 had informed the respondent about defective material. In the second e-mail on the same date, the applicant had set out the details in the Billets and informed the respondent that it has stopped de-stuffing of containers. The respondent was called upon to take back the rejected goods urgently and arrange to refund the amount paid at the earliest.

H In response to the aforesaid e-mail, the respondent on 1st

September, 2008 had indicated its concern and the inconvenience caused to the applicant was deeply regretted. The applicant was also assured that the problem would be sorted out to the entire satisfaction of the applicant. Thereafter, the respondents have proposed a joint inspection, which according to the applicant was never arranged. On the other hand, the respondent claims that the applicant had rebuffed all the efforts made by the respondents to resolve the issue. The applicant was intent on claiming the refund.

16. In my opinion, the aforesaid facts and circumstances are sufficient to show that the bonafide disputes have arisen between the parties, which are within the scope and ambit of the arbitration clause and need to be resolved through arbitration. I do not find any substance in the submission of the learned counsel for the respondent that the disputes are either belated or raised only to avoid liability under the contract. The disputes having arisen in September, 2008 and the present application having been filed on 4th February, 2009, the petition can not be said to be belated.

17. Keeping in view the facts and circumstances narrated above, the application is allowed. All the disputes that have arisen between the parties are hereby referred to arbitration. I hereby appoint Hon. Mr. Justice S.N. Variava, Former Judge of this Court, as the Sole Arbitrator to adjudicate upon all the disputes and differences that have arisen between the parties, on such terms and conditions as the learned Sole Arbitrator deems fit and proper. Undoubtedly, the learned Sole Arbitrator shall decide all the disputes arising between the parties without being influenced by any prima facie opinion expressed in this order, with regard to the respective claims of the parties.

18. The registry is directed to communicate this order to the Sole Arbitrator to enable him to enter upon the reference and decide the matter as expeditiously as possible.

19. The Arbitration Petition is accordingly disposed of.

R.P.

Arbitration petition allowed.