

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO. 18 OF 2011

M/S. CALCUTTA INDUSTRIAL CORP.

Petitioner(s)

VERSUS

M/S. JAYA STEEL & SCRAP LLC

Respondent(s)

O R D E R

This is an application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 read with paragraph 3 of the Scheme framed by Hon'ble the Chief Justice of India under Section 11(10) of the said Act for appointment of an arbitrator.

It is the case of the petitioner that the parties had entered into an agreement dated 25.5.2009. As per the agreement, the respondent non-applicant was to supply 12500 MT metal scraps consisting of used Rails to the petitioner-applicant. The rate was fixed at USD

240/PMT/CIF/ASWP and the total contract value was USD \$ 3,000,000.00 (Three Million United States Dollars). The payment was to be made on DP basis (i.e Presentation of Documents) within 4-7 days of receipt of documents in buyers (petitioner) bank as mentioned in Article 14 of the agreement. Article 20 of the agreement provided for a penalty in case of failure/late delivery of the materials.

In accordance with the agreement, the applicant has sent to the non-applicant \$ 1,000,000 (One Million Dollars) from time to time, but no material was received from the non-applicant. In the meantime, in anticipation of the receipt of the material, the applicant had already entered into an agreement for sale of the same. In spite of the repeated requests, the material was not sent by the non-applicant. Consequently, on 29.10.2009, the applicant sent a notice to the non-applicant seeking to refer the matter to arbitration in terms of the arbitration clause contained in Article 24 of the Agreement which reads as under:

"This contract the Polish law, the European Union member is only accepted any dispute

arising from or in connection with the contract shall be settled through friendly negotiation. In case no settlement is reached, the dispute shall be submitted to District Court in Spain and India for arbitration in accordance with its rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties."

A perusal of the aforesaid clause indicates that the parties were at liberty to submit to the arbitration to an appropriate authority either in Spain or in India. By the aforesaid notice, the applicant has chosen to seek arbitration in India. In spite of the opportunity having been given to the non-applicant, they have not chosen to nominate any arbitrator.

The Office Report indicates that the service of notice in this matter is complete. However, in spite of the notice having been served, none appears on behalf of the non-applicant. The averments made in the petition have remained un-controverted. The arbitration clause does not indicate as to whether the arbitration is to be referred to a sole

arbitrator or more than one arbitrator.

Learned counsel for the applicant submits that the applicant would be satisfied if the matter is referred to the sole Arbitrator. He has also submitted that it would be appropriate to nominate a former Judge of this Court.

In my opinion, there is a valid subsisting arbitration clause. The non-applicant seems to have prima facie acted in breach of the agreement. The dispute seems to have arisen out of a bona fide arrangement between the parties. The arbitration petition also seems to have been filed within limitation. In such circumstances, I allow this petition and refer the dispute raised in this petition or any other dispute that may become available to the parties, to the sole arbitrator. The non-applicant shall be at liberty to raise any counter-claim, if so advised.

I hereby appoint Mr. Justice B.P. Singh, former Judge of this Court, residing at A-7, Neeti

Bagh, (3rd Floor), New Delhi-110049, as the sole Arbitrator.

The learned arbitrator shall be at liberty to fix his own remuneration and any other terms and conditions for the arbitration as deemed fit and proper, at his sole discretion. The seat of the arbitration shall be in Delhi. However, the Arbitrator may hold the arbitration proceedings at a place most convenient to the parties, either within India or outside India.

Let a copy of this order be communicated to the learned Arbitrator so that he may enter upon reference as expeditiously as possible.

JUDGMENT

.....J
(SURINDER SINGH NIJJAR)

New Delhi;
July 25, 2012.