

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBP No.69 of 2021

Emcure Pharmaceuticals Ltd. ***Petitioner***

-versus-

The Managing Director, Odisha State Medical Corporation and others ***Opposite Parties***

Advocates appeared in this case:

For Petitioner : Mr. Kamal Bihari Panda
Senior Advocate
For Opposite Parties : Mr. P.K. Muduli,
Advocate
(for Opposite Party Nos.1 and 2)

**CORAM:
THE CHIEF JUSTICE**

JUDGMENT
13.05.2022

Dr. S. Muralidhar, CJ.

1. This is a petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (A and C Act) seeking appointment of an Arbitrator to adjudicate the disputes between the Petitioner on the one hand and the Odisha State Medical Corporation (OSMC) [Opposite Party Nos.1 and 2] on the other, arising out of the bid submitted by the Petitioner for supply of medical drugs, injections etc. pursuant to an e-tender floated on 4th June, 2021.

2. The OSMC floated the above tender which had two components viz., technical and financial. The last date for

submission of tender documents was 14th July 2021. The Petitioner was one of the bidders as was Opposite Party No.4.

3. According to the Petitioner, the technical bids submitted by Opposite Party No.4 showed that it was in no way qualified to participate for the item for which it had bid. However, according to the Petitioner, the bid of Opposite Party No.4 was wrongly accepted by the OSMC in violation of the tender conditions. The present Petitioner was L-2 and according to the Petitioner the tender ought to have been awarded to it. A representation was made by the Petitioner to the OSMC on 1st and 2nd September, 2021. However, OSMC did not reply to those letters.

4. By a letter dated 15th September 2021, OSMC called for the Petitioner to give its consent to supply the item quoted as per the L-1 approved rate. By a reply dated 18th September 2021, the Petitioner expressed its willingness to supply the said item at L-1 rates "on the condition that it is awarded the entire quantity mentioned in the item 39 for supply". The Petitioner submitted a further amended response on 7th October, 2021.

5. OSMC sent a trailing mail dated 20th September 2021 accepting the matching offer of the Petitioner and stating that the purchase order would be issued in its favour as per the terms and conditions of the tender. However, the said letter was silent on whether the Petitioner would be given a purchase order for the entire quantity. Thereafter, no purchase order was placed by OSMC with the Petitioner and there was no communication either.

6. This according to the Petitioner gave rise to the disputes between the parties. Invoking Clause-6.34 of the General Conditions of Contract (Section VI), the Petitioner issued a notice to OSMC on 20th October 2021 seeking the appointment of an Arbitrator, in the event that it was not awarded the tender for the bulk supply in its entirety. With no response forthcoming, the present petition was filed on 1st December, 2021.

7. In response to the notice issued in the present petition, OSMC filed a reply questioning the maintainability of the arbitration petition. According to OSMC, Clause-6.34.1, the dispute or difference could arise only between the tender inviting authority (i.e. OSMC) and the "successful bidder in connection with/or relating to the contract". It was contended that since Opposite Party No.4 and not the Petitioner was the successful bidder, the Petitioner could not invoke the above clause. It was pointed out by OSMC that no letter of intent had been issued and no contract/agreement had in fact been executed with the Petitioner as envisaged under Clause 6.25.1 of the tender document. Further, it was submitted that the dispute that had arisen was not in relation to the contract but in relation to the bidding process. It was pointed out that in terms of Clause 6.35.2, dispute arising out of the bid were to be subject to "jurisdiction of courts of law in Bhubaneswar/High Court of Orissa"

8. Mr. Kamal Bihari Panda, learned Senior Advocate for the Petitioner referred to Clause 6.34 and submitted that the

applicable procedure in the event of dispute between the parties arising out of the bid document were to be referred to the arbitration in terms of the A and C Act and therefore, this petition was maintainable. He emphasized that the limited/conditional offer made by the Petitioner by its letter dated 18th September 2021 was accepted by the OSMC on 20th September 2021. This constituted a completed contract.

9. Mr. Panda placed reliance on the decision in *Hythro Power Corporation Ltd. v. Delhi Transco Ltd. AIR 2003 SC 4219* to contend that the question whether in such circumstances an Arbitrator should be appointed was also required to be referred to the Arbitral Tribunal and ought not to be gone into by the Court at this stage. He also placed reliance on the decisions in *UNISSI (India) Private Limited v. Post Graduate Institute of Medical Education and Research 2008 ABLR (4) 81* and *Trimex International FZE Limited v. Vedanta Aluminium Limited (2010) 1 ABLR 286*. It was submitted that all pleas of the parties can be reserved to be urged before the Arbitral Tribunal.

10. Countering the above submissions, Mr. P.K. Muduli, learned counsel appearing for the OSMC, placed considerable reliance on the decision of the Supreme Court in *Bharat Sanchar Nigam Ltd. v. Telephone Cables Limited (2010) 5 SCC 213* and submitted that since no purchase order was in fact placed with the Petitioner, there was no concluded contract and therefore the question of any dispute arising therefrom being referred to arbitration did not arise. He also relied on the observations in *PSA Mumbai*

Investments PTE. Limited v. Board of Trustees of the Jawaharlal Nehru Port Trust (2018) 10 SCC 525 and an order dated 29th October 2021 passed by this Court in Arbitration Petition No.31 of 2021 (*Vision Spring v. Odisha State Medical Corporation Ltd.*)

11. The above submissions have been considered. The relevant clauses of the General Conditions of Contract which forms part of the bid document read as under:

"6.34 Resolution of Disputes

6.34.1 If dispute or difference of any kind shall arise between the Tender Inviting Authority and the successful bidder in connection with or relating to the contract, the parties shall make every effort to resolve the same amicably by mutual consultations.

6.34.2 If the parties fail to resolve their dispute or difference by such mutual consultation within twenty-one days of its occurrence, then, unless otherwise provided in the bid document, either the Tender Inviting Authority or the successful bidder may give notice to the other party of its intention to commence arbitration, as provided. The applicable arbitration procedure will be as per the Arbitration and Conciliation Act, 1996 of India.

6.34.3 Venue of Arbitration: The venue of arbitration shall be the place from where the contract has been issued, i.e., Bhubaneswar, Odisha.

6.35 Applicable Law & Jurisdiction of Courts

6.35.1 The contract shall be governed by and interpreted in accordance with the laws of India for the time being in force.

6.35.2 All disputes arising out of this bid will be subject to the jurisdiction of courts of law in Bhubaneswar/High Court of Orissa."

12. Under Clause 6.34.1 the dispute has to arise between the OSFC on the one hand and the "successful bidder" on the other. Also, in the present tender the 'successful' bidder was Lupin Limited and, therefore, it has been impleaded by the Petitioner as Opposite Party No.4 to the present petition. In fact, the case of the Petitioner is that the tender ought not to have been awarded to Opposite Party No.4. Therefore, on its own showing, the Petitioner was not the 'successful' bidder and yet it is also a fact that for some reason, Opposite Party No.4 could not supply the quantity as required by the OSMC. It is also a fact that the Petitioner made an offer to supply 100% of the quantity by its letter dated 18th September 2021, as modified on 7th October 2021 and that by an e-mail dated 20th September 2021, the OSMC did accept the Petitioner's offer to match the price of the L-1 bidder. In that letter, it was further added by OSMC that the "purchase order shall be issued as per the tender terms and conditions". The fact of the matter is that such purchase order was never issued.

13.1 The Court, in this context, would first like to refer to the decision in *Bharat Sanchar Nigam Ltd. v. Telephone Cables Limited* (*supra*). A two-Judge Bench of the Supreme Court examined a similar case where bids were invited by BSNL for supply of 441 LCKM of different sizes of polythene insulated jelly filled cables. NICCO was the successful bidder whereas

according to the Respondent - Telephone Cables Limited (TCL), it should have been given the highest vendor rating on an evaluation of bids. Consequently, order only for a limited quantity was placed on TCL. This resulted in a shortfall of a substantial quantity which affected the size of TCL's order.

13.2 When a notice was issued to BSNL by TCL for referring the disputes to arbitration, BSNL rejected the request. TCL then filed an application for appointment of an Arbitrator which was allowed by the High Court appointing a retired Judge as Arbitrator. BSNL then appealed to the Supreme Court. It was concluded by the Supreme Court on an analysis of the entire case law including *Dresser Rand S.A. v. Bindal Agro Chem Ltd. (2006) 1 SCC 751* that it is only when a purchase order is placed that a 'contract' would be entered into and it is only when the contract is entered into that the arbitration clause would become part thereof.

13.3 The observations in this regard in para 29 of the decision in *Bharat Sanchar Nigam Ltd. v. Telephone Cables Limited (supra)* read as under:

"29. Therefore, only when a purchase order was placed, a 'contract' would be entered; and only when a contract was entered into, the General Conditions of Contract including the arbitration clause would become a part of the contract. If a purchase order was not placed, and consequently the general conditions of contract (Section III) did not become a part of the contract, the conditions in Section III which included the arbitration agreement, would not at all come into existence or operation. In other words, the arbitration clause in Section III was not

an arbitration agreement in praesenti, during the bidding process, but a provision that was to come into existence in future, if a purchase order was placed."

13.4 It was further explained in para 32 as under:

"32. To constitute an arbitration agreement for the purpose of Sections 7 and 11 of the Act, two requirements should be satisfied. The first is that there should be an arbitration agreement between the parties to the dispute. The second is that it should relate to or be applicable to the dispute in regard to which appointment of an Arbitrator is sought (See *Yogi Agarwal v. Inspiration Clothes & U* – (2009) 1 SCC 372. For the foregoing reasons, we hold that in the absence of an arbitration agreement, the application under section 11 of the Act was not maintainable."

14. The facts in *Bharat Sanchar Nigam Ltd. v. Telephone Cables Limited* (*supra*) are more or less similar to the facts of the present case. Here too, although there was a letter accepting the Petitioner's offer to supply by matching the price of the L-1 bidder, the acceptance was not of the Petitioner's condition that it should be allowed to supply the entire quantity. Further, a caveat was entered into by OSMC in the reply dated 20th September 2021 that a purchase order would be issued. It was clear, therefore, that till such time the purchase order was issued pursuant to such acceptance of the offer made by the Petitioner, there was no completed 'contract'. Consequently, there is merit in the contention of Mr. Muduli that in the present case Clause-6.34.1 would not get attracted.

15. At the same time, it is not as if the Petitioner is entirely without a remedy. Clause 6.35.2 clearly states that dispute arising out of the bid would be subject to jurisdiction of the courts of law which would include a Civil Court.

16. In ***PSA Mumbai Investments PTE. Limited v. Board of Trustees of the Jawaharlal Nehru Port Trust*** (*supra*), the Supreme Court came to a similar conclusion in the context of a two-stage bid process pursuant to the tender floated for development of the fourth Container Terminal Project at Jawaharlal Nehru Port. In the first stage, there was a global invitation of request for qualification (RFQ) and it is only after the eligibility was demonstrated that the second stage of a request for proposal (RFP) could be reached. One of the questions that arose was whether a concluded contract could be said to have been entered into for the purposes of invoking the arbitration clause in the agreement in the draft concession agreement. It was held that unless there was an agreement between the parties, the question of invoking such a clause would not arise. The Supreme Court followed its earlier judgment in ***Bharat Sanchar Nigam Ltd. v. Telephone Cables Limited*** (*supra*) and negatived the plea of the Appellant in that case that the arbitration clause could not have been invoked.

17. Interestingly, in its decision in ***PSA Mumbai Investments PTE. Limited v. Board of Trustees of the Jawaharlal Nehru Port Trust*** (*supra*), the Supreme Court distinguished the decision in ***UNISSI (India) Private Limited v. Post Graduate Institute of***

Medical Education and Research (supra) which was relied upon by learned counsel for the Petitioner, by observing as under:

“18. xxx Insofar as the judgment in *UNISSI (India) (P) Ltd. (2009) 1 SCC 107* is concerned, it is important to note that, in para 15 of the said judgment, it is stated that the tender of the appellant was accepted by PGI for supply of 41 pulse oxymeters. Since the tender document contained an arbitration clause, and since it was found on facts that a binding contract had been entered into by acceptance of the tender, the parties therein would be bound by the aforesaid clause. It was also stated that, in addition, performance by way of supply of material by the appellant and acceptance thereof by PGI had also taken place, which would show that the tender of the appellant, containing an arbitration clause, was admittedly accepted by the respondent. It is clear that this case is wholly distinguishable, and does not apply on facts as has been stated by us hereinabove. It is clear that there was no concluded contract at the Letter of Award stage and this judgment would, therefore, not apply.”

18. As far as the decision in ***Hythro Power Corporation Ltd. v. Delhi Transco Ltd. (supra)*** is concerned, it appears to have turned on its own facts. Although it was held that whether in fact there exists an arbitration agreement can also be examined by the arbitral tribunal under Section 16 of the A and C Act, in view of the above settled position in law as explained in ***Bharat Sanchar Nigam Ltd. v. Telephone Cables Limited (supra)*** and ***PSA Mumbai Investments PTE. Limited v. Board of Trustees of the Jawaharlal Nehru Port Trust (supra)*** both of which are later decisions, the occasion for invoking the arbitration clause does not arise in the facts and circumstances of the present case.

19. This Court's decision in *Vision Spring v. Odisha State Medical Corporation Ltd.* (*supra*) is also to the same effect.

20. For all the aforementioned reasons, the Court declines the prayer of the Petitioner for the appointment of an Arbitrator, but clarifies that it will be open to the Petitioner, if so advised, to avail other remedies as may be available to it in accordance with law.

21. The arbitration petition is accordingly dismissed, but with no order as to costs.



(S. Muralidhar)
Chief Justice

S.K. Guin/Sr. Stenographer