

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/PETN. UNDER ARBITRATION ACT NO. 76 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

ADANI ENTERPRISE LTD
 Versus
 M/S SMS CARBON AND MINERALS PVT LTD

Appearance:

DR.ABHISST K THAKER(7010) for the Petitioner(s) No. 1
 MR SALIL M THAKORE(5821) for the Respondent(s) No. 1

**CORAM: HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE
 SUNITA AGARWAL**

Date : 13/09/2024

CAV JUDGMENT

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (in short as 'the Act'1996') has been filed seeking for appointment of the Arbitrator to adjudicate the disputes that have arisen between the parties under the coal sale and purchase agreement bearing No.AEL/GPL/2022-23/SMS CARBON/04022 dated 04.04.2022 read with the

General conditions of coal sale and purchase contract dated 04.04.2022 and various coal sale and purchase contracts arrived at between the parties on dates 05.04.2022, 06.04.2022, as also the Service agreements dated 04.04.2022, 05.04.2022 and 06.04.2022.

2. It is stated that the petitioner seeks to invoke the arbitration Clause 17 of the General conditions to coal sale and purchase contract, Supply/GCC/2022-23/SMS-Carbon dated 04.04.2022 pertaining to dispute resolution which reads as under:-

“17. DISPUTE RESOLUTION

In the event of any dispute, claim, question or difference of opinion arising or occurring between the Parties in relation to anything or any matter arising out of or under the terms of this Contract (“Dispute”), either Party may refer the Dispute for arbitration by a sole arbitrator under the provisions of the Arbitration and Conciliation Act, 1996 (Arbitration Act”). The sole arbitrator shall be jointly and mutually appointed by the Parties to the Dispute in accordance with the provisions of the Arbitration Act.

The venue and seat of arbitration shall be Ahmedabad and arbitration proceedings shall be conducted in English language. The awards and orders passed by such sole arbitrator shall be final and binding upon the parties.”

3. It is stated that the General conditions of coal sale and purchase contract dated 04.04.2022 being integral part of the five coal sale and purchase agreements between the parties entered between 04.04.2022 and 06.04.2022 for sale of total quantity of 45000 MT of imported steam coal, would be attracted, in the matter of appointment of Arbitrator to

adjudicate the dispute and differences between the parties arising under the contract documents. The petitioner is a seller and the respondent in the dispute being the buyer under the above stated coal sale and purchase agreements, are bound by the General conditions to coal sale and purchase contract (GCC) dated 04.04.2022 having subscribed the same. The dispute arose between the parties as stated in the petition is that as per the conditions under the agreements, the respondent had agreed to purchase the aforesaid quantity of coal from the petitioner on stockyard/port basis from Gangavaram Port, in accordance with the terms and conditions agreed under the contract. As per the Clause 9 of the coal sale and purchase (Contract) dated 04.04.2022 at page No.'16' of the paper book, the buyer/ respondent was obligated to lift the coal within 45 days from the date of vessel discharge completion (free period).

4. It was agreed that in case the buyer does not lift the entire contracted quantity within the free period, the seller shall not be responsible for any loss whatsoever including for any degradation in the quality or any difference in the quantity of the coal since the vessel discharge was completed on 15.06.2022, the said period commenced from the said date as per Clause 9 of the agreement and expired on 30.07.2022. In spite of various reminders sent by the petitioner and follow up for lifting the contracted quantity and even making payment towards the price of contracted quantity along with the plot rent and interest arising out of the agreement, the respondent sought an extension of six months for lifting the cargo vide e-mail dated 12.07.2022.

5. Owing to the long standing business relationship between the parties, the said request was acceded to by the petitioner for the period of two months and the time extension was communicated vide email dated 29.07.2022. The said extension was with the pre-condition that the cargo had to be lifted within the extended time and it was without prejudice to the petitioner's rights and contentions and remedies available under law. Thus, as per the email agreed period was extended upto 30.09.2022, subject to the cargo being lifted within the said period vide email dated 11.08.2022 and 18.08.2022. The petitioner reminded the respondent of its obligation to share lifting plan by 20.08.2022 and also share signed *ad idem*. Vide email dated 07.09.2022, the petitioner asked the respondent to fulfill its obligation under the agreement and the payment of Rs.2,48,15,692.38/- which was required to be made in the form of EMD as against the total EMD payable as Rs.12,50,01,552.38/-, the payment of Rs.10,01,85,860/- was made.
6. As the respondent failed to fulfill the contractual obligations, again the demand was raised by the letter dated 09.12.2022 and the respondent was informed as to the breach of clause 11 of GCC pertaining to "Buyers event of default". The letter also stated to mitigate the losses and the petitioner would be constrained to short close the agreement as stated in clause 9(d) of Coal sale and purchase (contract). It was communicated that failure to lift the contracted quantity has led to shortage of space which has adversely affected unloading of incoming cargo thereby causing losses to the petitioner and that in terms of Clause 3 of the GCC, in the event of any default or breach by the buyer to any of the obligations under the agreement, the seller reserves the right

to forfeit the EMD amount. In response thereto, the respondent gave an evasive reply on the contents of the demand letter dated 09.12.2022 and denied the allegations made therein. Resultantly, the notice dated 10.02.2023 invoking arbitration clause 17 under the agreement (GCC) had been issued proposing the name of the sole Arbitrator. Reply dated 11.03.2023 had been received from the respondent who had disagreed on the proposed name of the Arbitrator and instead proposed another Arbitrator. Again, the petitioner wrote a letter dated 18.04.2023 proposing a third name of Arbitrator.

7. However, no consensus had been arrived at between the parties and, hence, the petitioner has approached this Court under Section 11 of the Act' 1996 for appointment of the Arbitrator.
8. In reply to the petition, the respondent has raised the dispute with regard to the maintainability of the one petition for appointment of Arbitrator for adjudicating multiple claims under 10 contracts illustrated at pages No.'2 to 4' of the petition. It was asserted by the learned counsel for the petitioner that the claims of the petitioner fall under separate contract and under separate arbitration clause and, therefore, arbitration have to be evoked separately under each contract and separate petitions are to be filed for appointment of Arbitrator. A single petition praying for appointment of an Arbitrator under multiple contracts and multiple arbitration clause is not maintainable. However, essentially no dispute has been raised by the respondent in its reply about the existence of the arbitration clause, binding the parties to invoke the same in case of any dispute or differences between the parties.

9. There is an acknowledgment of existence of arbitration clause in the reply dated 11.03.2023 to the arbitration notice by the petitioner dated 10.02.2023. A perusal of the said communication at Page no.'78' of the paper book indicates that though there is a denial of all contentions and allegations in the letter, but with reference to the notice invoking arbitration, it was stated that the respondent cannot accede to the appointment of the proposed name of the sole Arbitrator, rather the respondent gave another name as its nominee as sole Arbitrator and called upon the petitioner to take consent to his appointment which was not agreed by the petitioner who had suggested another name vide communication dated 18.04.2023.
10. However, when the matter was taken up, the respondent vehemently argued on the maintainability of one writ petition pertaining to ten contracts, which according to the petitioner, are separate contracts. The contention is that there are five sale and five service agreements, which are of different dates between 04.04.2022 and 06.04.2022. They contain five distinct arbitration clauses, five references and five arbitral tribunals are, thus, to be appointed in separate petitions to be filed by the petitioner. The contention of the petitioner that the GCC dated 04.04.2022 was mother agreement correlated to all sale contracts was vehemently refuted.
11. Learned counsel for the petitioner would submit in rebuttal that all sale and purchase contracts were made with reference to one parent (GCC) General Conditions to Coal Sale and Purchase contract dated 04.04.2022 and the same is an integral part of the sale and purchase agreements executed between the parties. Further all sale and purchase

contracts were either executed on the same date of the execution of the parent contract or on the later dates but not earlier, referring to the parent contract dated 04.04.2022. It is for this reason that the petitioner has invoked arbitration for resolving the dispute between the parties by giving one notice for invoking arbitration Clause No.17 of GCC dated 04.04.2022 by notice dated 10.02.2022. In reply to the said notice vide communication dated 11.03.2023, no dispute had been raised by the petitioner with regard to the appointment of sole Arbitrator for adjudication of dispute pertaining to 10 contracts referred to in the notice itself as Coal sale and purchase contracts between 04.04.2022 and 06.04.2022 as well as corresponding service agreements, which are to be read along with the GTC dated 04.04.2022.

12. Reliance is further placed on the decision of the High Court of Delhi in the case of ***KGPS Mechanical Pvt. Ltd. vs. Cinda Engineering and Construction Pvt. Ltd., 2024 SCC OnLine 2985***, to submit that in the said case there were nine contracts between the parties, five having arbitration clause and remaining four with no arbitration clause. The question before the High Court was whether only the dispute under five agreements could be referred to for arbitration or whether the dispute in respect of all nine contracts, i.e. five contracts containing arbitration clause and four contracts having no arbitration clause could be referred together to one Arbitrator. The Delhi High Court taking note of the various factors has held that in order to avoid multiplicity and since all contracts related to the same project and form part of the same series of work and further the correspondence between the parties show that they were treated as part of the same series of contracts, has held that

the appointment of one Arbitrator for adjudication of all disputes shall be justifiable.

13. It would be pertinent to note that the GCC dated 04.04.2022 was executed as a document containing the General terms and conditions pertaining to the transaction of sale and purchase of coal on EXW basis, whereas coal sale and purchase contract “ as defined in GCC”, would mean the contract to be entered into from time to time for recording the commercial terms and conditions regarding the sale and purchase of coal on EXW basis. The ‘contract documents’ as defined therein shall collectively mean the coal sale and purchase contract and “the parties” defined in the GCC would collectively mean the buyer and the seller. The relevant clauses of the contract, namely the GCC i.e. Clause 2,3,11 and 16 are to be extracted hereinunder:-

“2. CONTRACT DOCUMENTS

The Contract Documents are intended to be correlative, complementary and mutually explanatory of one another. However, in the event of any ambiguity or conflict *inter se* the Contract Documents, the Coal Sale and Purchase Contract shall prevail over this GCC.

xxx xxx xxx

3. EARNEST MONEY DEPOSIT

The Buyer shall pay earnest money deposit (“EMD”) through RTGS/NEFT/electronic transfer in the bank account nominated by the Seller for the purpose of this Contract. The EMD shall be for an amount as mentioned in the Contract. The Buyer shall deposit the EMD with the Seller as specified in the Coal Sale and Purchase Contract. Such EMD shall remain with the Seller until satisfactory performance and fulfillment of all obligations by

the Buyer under the Contract.

In the event of any default or breach of the Contract Documents by the Buyer, the Seller, without prejudice to its other rights under the Contract Documents and the law, shall have the right to forfeit the EMD. The EMD shall not in any manner be construed as limiting the damages payable by the Buyer to the Seller in accordance with the provisions of this Contract Documents. The Buyer waives all its rights, whether under law or contract to contest or dispute the forfeiture of EMD or otherwise claim refund of EMD upon its failure to perform its obligations under the Contract Documents.

The Seller also reserves the right either to adjust the EMD against the last consignment and/or lot value and/or to recover/adjust any outstanding dues payable by the Customer to AEL.

xxx xxx xxx

11. BUYER'S EVENT OF DEFAULT

Each of the following events, acts, occurrences, or conditions shall constitute a "Buyer Event of Default":

(a) The Buyer breaches or fails to perform any of its covenants or obligations under the Contract Document including but not limited to deposit of EMD(part/full) within the agreed timeline, non payment of Contract Price towards lifting of coal, and not lifting the coal within free period as per the Coal Sale and Purchase Contract: (b) A resolution for the bankruptcy, insolvency, winding up, liquidation, or other similar proceedings relating too the Buyer is passed; (c) any assets of the Buyer have been attached by the Government Authority; or (d) Buyer has defaulted in meeting its obligations towards its lenders or its bankers have designated Buyers' accounts as a non performing assets (e) a trustee, receiver, liquidator, custodian, provisional manager or similar person is appointed, which appointment has not been set aside or stayed within thirty (30) days of such appointment, or a court having jurisdiction enters an order for winding up or otherwise enters an order for winding up or otherwise confirming the bankruptcy

or insolvency of Buyer, which order has not been set aside or stayed within a period of thirty (30)days.

xxx xxx xxx

16. GOVERNING LAW AND JURISDICTION

The Contract Documents shall be governed by and construed in accordance with the laws of India and the courts at Ahmedabad shall have exclusive jurisdiction over any dispute.”

14. As is evident from the definition of the “Contract Document “ as noted hereinabove, it would mean the coal sale and purchase contract and the GCC.
15. The coal sale and purchase contract in Clause 12 reads as under:-

“12. General Conditions of Contract(“GCC”)

The GCC dated 04/04/2022 signed between Buyer and Seller shall form an integral part of this Contract. Further, Scanned Signed and Stamped Contract shall be treated as originally signed Contract.”

16. Similarly, the General Terms and Conditions (GTC) contract dated 04.04.2022 was executed as service agreement, which is defined therein as GTC along with service agreement entered into between the parties and shall include all or any modifications/amendments or alterations thereto in writing from time to time. The term “service” shall mean the purpose of any of the activity of work by AEL. “Petitioner” as enumerated in the service agreement is the service provider and the respondent has been referred as “customer” therein. Clause 16 of the GTC contains an arbitration clause which is extracted hereinunder:

“16. ARBITRATION:

In the event of any dispute, claim, question or difference of opinion arising or occurring between the Parties in relation to anything or any matter

arising out of or under the terms of this Agreement (“Dispute”), either Party may refer the Dispute for arbitration by a sole arbitrator. The Parties agree that such sole arbitrator shall be mutually appointed by the Parties. The awards and orders passed by such sole arbitrator shall be final and binding upon the Parties. The arbitration proceedings shall be conducted in English language and in accordance with the provisions of Arbitration and Conciliation Act, 1996. The seat of arbitration shall be Ahmedabad.”

17. The service agreements as noted hereinabove were executed between 04.04.2022 and 06.04.2022 and Clause 8 of such service agreement reads as under:-

“8.General Terms & Conditions (“GTC”)

The GTC dated 04/04/2022 signed between AEL and Customer shall form an integral part of this Service Agreement. Scanned Signed and Stamped Contract shall be treated as originally signed Contract.”

18. A careful reading of GCC dated 04.04.2022 and coal sale and purchase agreement entered into between 04.04.2022 and 06.04.2022 as also GTC dated 04.04.2022 along with service agreements entered into between 04.04.2022 and 06.04.2022, clearly indicate that all agreements are part of a single commercial project. Single notice was served invoking arbitration clause for 10 contracts, which was replied by the respondent, but no dispute was raised about invoking arbitration and appointment of sole Arbitrator to decide the dispute arising out of 10 contracts. The only dispute raised was about the name of the Arbitrator. Thus, there is a consent to arbitrate and that one Arbitrator be appointed to decide all disputes arising out of 10 contracts which are governed by two mother contracts dated 04.04.2022, namely GCC and GTC. In the said scenario, the dispute raised by the

learned counsel for the respondent during the course of argument with regard to the maintainability of the arbitration petition is liable to be turned down.

19. This Court may also note the decision of the Apex Court in the case of **Ameet Lalchand Shah and others vs. Rishabh Enterprises and another, (2018) 15 SCC 678**, where the Apex Court has appointed one Arbitrator referring all agreements to arbitration noticing that since multiple agreements entered into between the parties are part of a single commercial project, the dispute could be resolved by referring all the agreements to arbitration.
20. In another decision in **Mahanagar Telephone Nigam Ltd. vs. Canara Bank and others, (2020) 12 SCC 767**, the Apex Court has even gone to the extent that the arbitration agreement need not be in any other particular form. What is required to be ascertained is the intention of the parties to settle their disputes through arbitration. The agreements are to be construed according to the general principles of construction of statutes, statutory instrument and other contractual documents. The intention of the parties must be inferred from the terms of the contract, conduct of the parties and correspondences exchanged to ascertain the existence of binding contract between the parties. If the documents on record show that the parties were *ad idem* and had actually reached an agreement upon all material terms, then it would be construed to be a binding contract. The meaning of contract must be gathered adopting a common sense approach, and must not be allowed to be thwarted by a pedantic and legalistic interpretation. A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An

“arbitration agreement” is a commercial document inter parties, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities.

21. Taking note of the above, having carefully gone through the terms and conditions of the contract and the relevant clauses of GCC and GTC, this Court is of the view that the GCC is an integral part of five coal sale and purchase agreement and similarly GTC was an integral part of all the five service agreements and all agreements were executed between 04.04.2022 and 06.04.2022 and, they were part of the same commercial transactions between the parties. The service agreement giving details of scope of work stated that :-

“1. Scope of Work

AEL agrees to do the following:

- a) Stacking & piling of Coal at Designated Place and loading of coal into trucks/dumpers/ Rakes arranged by the Customer.
- b) Shifting/re-handling of Cargo, if any.
- c) Keeping safety and security of Cargo including water sprinkling, as required for fire control.
- d) Weighment of each truck/dumper/Rake.
- e) Coordination and assistance for indenting, ensure rake loading in line with permissible carrying capacity (PCC), freight payment coordination Railway Receipt(RR).
- f) If Customer will opt for covering of Tarpaulin on the cargo additional service cost and cost of Tarpaulin shall be charged extra.

Customer’s obligation:

- a) Customer is solely responsible for generation of E-way bill.
- b) Customer shall advice AEL about the schedule of dispatches within one week of signing of this Service Agreement.
- c) Customer shall arrange for the transportation of Coal.”

22. Designated place prescribed in the service agreement is “Gangavaram Port” and the cargo is imported steam coal in bulk of South African origin, whereas in the service agreement, the description of goods is imported steam coal in bulk of South African original and the delivery terms in Clause 9 are as under:

“9.Delivery terms:

- a) The Buyer shall be responsible for arranging rake/truck for evacuation and transportation of Coal from Gangavaram port at its own cost.
- b) E-Way Bill be in Buyer’s Scope.
- c) The Contracted Quantity shall be lifted within a period of 45 days period from date of vessel discharge completion (“Free period”). The Buyer acknowledges that for any reason whatsoever, if it does not evacuate/lift the entire Contracted Quantity within the Free Period, the Seller shall not be responsible for any loss whatsoever including for any degradation in the quality and any difference in the quantity of the Coal.
- d) In the event the Buyer fails to lift the Contracted Quantity within Free period, the Seller reserves the right to short close the Contract without giving any prior notice about such short closure.

- e) In the event, if the balance un-lifted quantity is lesser than the rake/truck load, the Seller reserves the right to Short close the Contract.”
23. A careful reading of both the coal sale and purchase contract and service agreement dated 04.04.2022 further indicates that they are corresponding agreements pertaining to the contracted quantity of coal which is 20,000 MT. Other similar corresponding agreements were executed for different quantity of coal between 05.04.2022 and 06.04.2022.
24. In the said scenario, this Court is inclined to appoint a sole Arbitrator to adjudicate the disputes, in order to avoid multiplicity and keeping in mind that all contracts are related to the same project and form part of the same series of work. The correspondence between the parties show that there was a consent on the part of the respondent for appointment of sole Arbitrator and the dispute was only on the name of the Arbitrator.
25. In the said scenario, the objections raised by the learned counsel for the respondent about the maintainability of the present petition and the claim that the separate Arbitrators are to be appointed for 10 coal sale and purchase agreements and service agreements entered into between the parties, between 04.04.2022 and 06.04.2022, are hereby turned down.
26. Noticing the above, I proceed to pass following :

O R D E R

- (i) Petition is **ALLOWED**.

- (ii) Mr.K.A.Puj, Former Judge, High Court of Gujarat, residing at Bungalow No.2, Neetibaug Judges Society, Opp. Gujarat High Court,(M)-9825049093, email address:kpuj02@gmail.com is appointed as sole Arbitrator to resolve the disputes between the parties in accordance with the Arbitration Centre (Domestic and International), High Court of Gujarat Rules, 2021. Both parties would be governed by said Rules.
- (iii) Registry is directed to communicate this order to the sole arbitrator forthwith by speed post. No order as to costs.
- (iv) Consequently, all pending connected application/s, if any, stands disposed of.

SUDHIR

(SUNITA AGARWAL, CJ)