

ITEM NO.301(PH)

COURT NO.9

SECTION XVIA

IN THE SUPREME COURT OF INDIA

BEFORE HON'BLE MR. JUSTICE ALTAMAS KABIR

ARBITRATION PETITION NO. 3/2006

IN THE MATTER OF

EXPRESSWELL INTERNATIONAL LTD.  
 APPLICANT (S)

VERSUS

ADHUNIK METALIKS LTD.  
 RESPONDENT (S)

For Applicant (s) : Mr.Alok Krishna Agarwal, Adv.  
 Mr.Shashank Kumar, Adv.  
 Ms.Nikita Mehta, Adv.  
 Mr. T.Mahipal, Adv.

For Respondent (s) : Mr.Ravindra Srivastava, Sr.Adv.  
 Ms.Smita Bankoti, Adv.  
 Mr.Kunal Verma, Adv.  
 Mr.Arjun Garg, Adv.  
 Mr.Rajul Shrivastav, Adv.  
 Mr.Devendra Singh, Adv.  
 Md.Mannan, Adv.

O R D E R

This petition has been filed under Section 11(4) and (6) of the Arbitration and Conciliation Act, 1996 read with Rule 2 of the

Appointment of Arbitrators by the Chief Justice of India Scheme, 1996 for the appointment of an Arbitrator.

The applicant is a Company incorporated under the laws of China and is engaged in the trading of commodities viz. Coke, coal and iron ore.

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The respondent is also a Company incorporated under the Indian Companies Act, 1956 and is engaged in the manufacturing of steel.

It appears from the materials on record that the applicant entered into a contract with the respondent on 28.07.2005 for the sale and purchase of Low Ash Metallurgical Coke of China origin. In terms of the contract, the respondent had agreed to purchase 25,000 MT of Low Ash Metallurgical Coke at the unit price of USD 189/MT from the petitioner. Under the terms of payment as included in the contract, the respondent was required to open an irrevocable Letter of Credit at least 15 days prior to the time of shipment. Admittedly, on 11.08.2005, the said contract was amended and the price was lowered while the quantity of Low Ash Metallurgical Coke to be supplied was increased from 25,000 MT to 30,000 MT. The time of shipment as stipulated in the contract was 20.08.2005 to 30.08.2005 and in terms of the contract, the Letter of Credit was to be opened at least 15 days prior to the time of

shipment.

As will appear from the petition and from the statements of the respective parties, the contract could not be worked out.

On behalf of the applicant, various letters have been shown

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which seem to indicate that the applicant was willing to perform its part of the contract but for whatever reason, the respondent did not open the Letter of Credit and ultimately the shipment was called off.

Thereafter, correspondence was exchanged between the parties and on 10.12.2005, the applicant invoked Clause 18 relating to arbitration contained in the contract and issued notice to the respondent. Clause 18 of the contract as amended reads as follows :-

"All disputes in connection with this contract or the execution thereof shall be settled by negotiation between two parties. If no settlement can be reached, the case in dispute shall then be submitted for arbitration in the country of defendant in accordance with the arbitration regulations of the arbitration organization of defendant country. 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 organization."

From the said Clause, it will be apparent that prior to giving notice of arbitration, the parties were required to settle their disputes that might have arisen in connection with the contract or its

execution by negotiation and if no settlement could be reached then,  
in that case, the dispute could be submitted for arbitration.

From the records, it will be seen that on 15.11.2005, the applicant wrote to the respondent stating that a rather long period of time had been given to submit proposals on how to settle the matter and that since there was no response, the applicant had no other alternative but to dictate its claim for clean acceptance within

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10 calendar days from the date of the notice, failing which appropriate legal action would be taken without further intimation.

On response to the said letter, the respondent by its letter also of 15.11.2005, intimated the applicant that they would be happy to receive the applicant in India during the next visit to strengthen the long term relationship. Thereafter, on 10.12.2005, a notice of arbitration was sent by the applicant to the respondent indicating the points of dispute and also naming its Arbitrator.

ON 30.12.2005, the applicant once again wrote back to the respondent stating its willingness for pre-arbitration, conciliation and negotiation proceedings. The said letter was in its turn acknowledged and affirmed by the respondent and as has been submitted, a meeting is supposed to have taken place at Kolkata on 16.01.2006 where no agreement could be arrived at and as indicated on behalf of the respondent, no attempt was also made to arrive at

such settlement.

From the facts disclosed, it is clear that the parties had entered into an agreement for supply of Low Ash Metallurgical Coke by the applicant to the respondent and a certain time schedule was also fixed for operation of the contract. The contract agreement, as amended, also discloses that there is an arbitration agreement

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between the parties contained in Clause 18. It is also evident that the contract could not be worked out for whatever reason and who was responsible for the non-performance of the contract is a matter which is yet to be decided.

In view of the submissions made on behalf of the respondent that the notice of arbitration was premature, it is to be seen whether the said defence taken on behalf of the respondent can be accepted.

From the materials disclosed, it is clear that a dispute exists as to the failure of the parties to work the contract and that the applicant was willing to settle the dispute by negotiation. In such a situation, the respondent cannot now take shelter under the first part of Clause 18 and consequently under Section 61 of the Arbitration and Conciliation Act, 1996. In fact, on behalf of the applicant, a decision has been cited in the case of M.K.Shah Engineers & Contractors vs. State of M.P., reported in (1999) 2 SCC 594, in which this kind of a

situation arose for consideration and basing its views on the principle that no one can be permitted to take advantage of its own wrong, this Court held that the party at fault cannot be permitted to set up the bar of non-performance of pre-requisite obligations so as to exclude the applicability and operation of the arbitration clause.

In such circumstances, I am of the view that this is a fit case for appointment of an arbitrator for which I appoint Mr. Justice

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G.B. Pattanaik, former C.J.I., to go into the dispute and to make his award expeditiously. The Arbitrator shall be guided by the provisions of the contract and the arbitration clause while making his award.

By consent of the parties, the arbitration proceedings may be held in Delhi.

Any observation made herein shall not, in any way, prejudice the arbitrator while making his award.

....., J.

( ALTAMAS KABIR )

NEW DELHI;

NOVEMBER 24, 2006.