

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve: 13.2.2009
Date of Order: 5th March, 2009

Arb. P. No. 169/2008, Arb. P. No. 448/2008 & Arb. P. No. 449/08

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05.03.2009

M/s Simplex Infrastructure Ltd.

... Petitioner

Through: Mr. P.C.Markenda, Sr. Advocate with
Mr. Naresh Markenda & Mr. Kamlesh Mahajan, Advocate

Versus

M/s D.S.Construction Ltd.

... Respondent

Through: Mr. A.S.Chandhiok, Sr. Advocate with
Mr. Ashish Dholakia, Advocate

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

By this application/petition (Arb.P.-169/2008) under Section 11 of the Arbitration and Conciliation Act, 1996 the applicant/petitioner has prayed for appointment of an independent and impartial second arbitrator by this Court on behalf of the respondent to constitute Arbitral Tribunal to adjudicate the disputes raised by the applicant.

2. The applicant contended in the petition/application that he had entered into three contracts with the respondent as mentioned below:

- (1) Conversion of Delhi-Gurgaon section of NH-8 into Access Controlled Highway from KM 13.60 to KM 42.00 for Execution of Flyover Works at Mahipalpur & IGI Link Road, Shankar Chowk-Kendriya Vihar (Udyog Vihar), IFFCO Chowk and Rajeev Chowk-Sohna Gurgaon Junction. Contract No. DSCL/Struct-4/2004, dated 1.3.2004*
- (2) Conversion of Delhi-Gurgaon section of NH-8 into Access Controlled Highway (Delhi Sector) from KM 13.60 to KM 23.96 – Package P1-Piling Work. Contract No. JIL/P-1/2002, dated 2.12.2002*
- (3) Conversion of Delhi-Gurgaon section of NH-8 into Access Controlled Highway (Haryana Sector) from KM 23.96 to KM 42.00 – Package P2 – Piling Work. Contract No. DSCL/P-2/2002, dated 2.12.2002*

3. All the above three contracts were similarly worded and provided for a settlement of disputes in terms of Clause 38 of each of the contract. The procedure laid down for settlement of dispute provided that initially an attempt was to be made for settling the disputes amicably, if amicable settlement was not possible, then the disputes were to be referred to the arbitration of an Arbitral Tribunal of three arbitrators; each party to appoint one arbitrator and third one to be appointed by the two arbitrators.

4. The petitioner submitted that the three contracts were completed by it to the satisfaction of the respondent and the toll road constructed by petitioner was opened to traffic by the respondent and the respondent was earning revenue out of the same. However, the claims of the petitioner regarding the three

contracts have not been settled despite petitioner writing a number of communications to the respondent for amicable settlement. The respondent had initially appointed Mr. S.K.Jain (Senior Advisor, Billing) from their side for resolving the disputes. The petitioner also appointed its nominee and made an attempt to settle the dispute amicably. However, no amicable settlement could be arrived at and a number of excuses were given for denying the petitioner's claims. The petitioner's initial name was M/s Simplex Concrete Piles and later on petitioner changed its name to M/s Simplex Infrastructures Limited and the bills were being raised by the petitioner under this changed name and were being duly honored by the respondent in this name but the respondent even raised the issue of name of the petitioner for denying the claims of the petitioner. Since, mutual settlement failed, the petitioner vide letter dated 26/27.2.2008, invoked the arbitration clause contained in all the above three contracts and informed the respondent that it had appointed Mr. Justice P.K.Palli (Retd.), H.No. 246, Sector 19-A, Chandigarh as its Arbitrator and called upon the respondent to appoint its nominee within a period of thirty days from the date of communication. However, respondent failed to nominate its arbitrator within thirty days. The petitioner therefore, filed this application before the Court for appointment of Arbitrator on behalf of the respondent. The petitioner has mentioned list of his claims in the para 14 of the petition/application. A prayer is made that the second arbitrator be appointed by the Court and third Arbitrator shall be appointed by the two arbitrators.

5. In reply to this application, the respondent had taken preliminary objection that the petition was not maintainable since a single petition was filed for appointment of arbitrator for three different contracts and this was not permissible. It is submitted that Section 11(6) of the Arbitration & Conciliation Act can be invoked only for one contract. These three contracts could not be considered as one composite contract, neither it was the intention of the parties nor it was agreed that one single arbitrator would deal with the three contracts. All the three contracts had separate arbitration clause and therefore have to be dealt separately. It is stated that a single composite notice of arbitration sent by the applicant was no notice in the eyes of law. However, without prejudice to these contentions, respondent stated that by way of reply to the notice, the respondent vide its letter dated 29.3.2008 had agreed to the arbitration and told the petitioner as under:

“We shall be appointing our Nominee Arbitrator, as per law and according to the Arbitration and Conciliation Act, 1996, within the stipulated time period, therein, separately for each of the three contracts.”

6. It is submitted that respondent only deferred the appointment of the arbitrator as the notice was not a valid and complete notice. However, petitioner failed to respond to the letter of the respondent for a long time consequently, respondent vide letter dated 24.5.2008 appointed Mr. A.K.Jain, Kavi Nagar, Ghaziabad as its nominee Arbitrator in respect of the contract no.1 (referred above). The respondent also appointed Mr. K.K.Mutreja, J-229, Sector 25,

Noida, UP as its nominee arbitrator for rest of the two contracts. It is submitted that petitioner rushed to the Court prematurely and the petition was liable to be dismissed.

7. During pendency of the petition, the petitioner filed two more petitions/applications being Arb. P. Nos. 448/2008 & 449/2008 under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrators in respect of two contracts at sl.no. 2 & 3 in para 2 above so now there are three arbitration petitions in respect of three different contracts. The leave was sought vide IA No. 15444/2008 and in para 3 of this application, applicant/petitioner stated that though Arb. P. No.-169/2008 was filed in respect of three contracts but in order to obviate the objection taken by the respondent, the petitioner filed separate arbitration applications in pursuance to the liberty sought from the Court. Arb. P. No. 169/2008 be read as being confined to contract mentioned at Sl. No. A [Contract No. (1) in para 2 above] only.

8. This application was allowed. In view of this application Arb. P. no. 169/2008 of the petitioner has to be treated only for one contract, the other two petitions no. 448 & 449/2008 are in respect of other two contracts. The respondent in response to the two petitions filed subsequently, has taken the stand that respondent had appointed Mr. K.K.Mutreja as its nominee Arbitrator and petitions have become infructuous.

9. During arguments, learned Counsel for the petitioner/applicant stated that the respondent had lost right to appoint Arbitrator since the respondent failed to appoint Arbitrator within the time provided in law i.e. within 30 days. He stated that the Arb. P. No-169/2008 was listed before the Court for the first time on 2.5.2008 and the order of the service of notice of the issued by the Court and appointment of Arbitrator by the respondent was made on 24.5.2008. The petitioner also argued that there was no infirmity in the petition no. Arb.P. 169/2008 when it asked for appointment of a combined arbitral tribunal for the three contracts and relied upon Gas Authority of India Ltd. & Anr. v. Ketu Construction (I) Ltd. (2007) 5 SCC 38 wherein the Supreme Court had upheld the appointment of an Arbitrator for four contracts observing that there was no requirement of law that for each of the contract a separate panel ought to have been formed. The same panel could be very well utilized for the disputes arising out of the other contracts between the parties.

10. This issue has become redundant since petitioner itself had chosen to make an application that initial petition be considered restricted to only one contract and the petitioner simultaneously filed two more petitions. As far as right of the respondent to appoint Arbitrator is concerned, I consider that in view of the judgment of Supreme Court in Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Limited (2008) 10 SCC 240, it is incumbent upon the Court that while considering the application under Section

11 of the Arbitration and Conciliation Act, the effort of the Court should be to adhere to the contract between the parties and to give effect as closely as possible to the Arbitration Agreement entered into between the parties. The Supreme Court observed that the Court may ask to do as what has not been done and the Court must first ensure that the remedies provided for, are exhausted. It was not mandatory for the Chief Justice or any person or institution designated by him to appoint the named arbitrator or arbitrators, but at the same time, due regard has to be given to the qualifications required by the agreement and other considerations.

11. In the present case, the agreement provides for appointment of a panel of three arbitrators; one to be appointed by each party and the third one to be appointed by the two arbitrators. The petitioner has already named its arbitrator. The respondent nominated its arbitrator on 24.5.2008 before respondent received notice of this petition. The respondent had informed to the petitioner about its willingness to appoint arbitrator in March'08 itself and the petitioner was to provide some more information to the respondent. The petitioner could have after providing information to the respondent asked the respondent to appoint an arbitrator as the respondent had shown its willingness to refer the matter to arbitration and matter could have referred to the arbitrators, so appointed.

12. I consider that in this case the respondent has not lost the right to appoint Arbitrator. The respondent after receipt of combined notice for three contracts did respond to the notice though denied the claim of the petitioner and certainly showed its willingness to refer the matter to the Arbitral Tribunal. There was a delay in appointment of arbitrator on the part of the respondent, but the arbitrator was appointed before respondent received notice from the Court. Under these circumstances, I consider that arbitrator appointed by the respondent would be the proper arbitrator in terms of agreement and the two arbitrators can then appoint an umpire (third arbitrator). However, the respondent has appointed two different arbitrators for the three contracts, I consider that it would be appropriate that the same Arbitral Tribunal decides the disputes relating to the three contracts. The arbitrator Mr. K.K.Mutreja, appointed by the respondent for two of the contracts shall be considered as arbitrator for the disputes regarding all the three contracts. Thus, the Arbitral Tribunal shall consist of three arbitrators viz. Mr. Justice P.K.Palli (Retd.), H.No. 246, Sector 19-A, Chandigarh, Mr. K.K.Mutreja, J-229, Sector 25, Noida, and the third arbitrator to be appointed by the two arbitrators. All the three petitions are disposed of in terms of this order.

March 05, 2009
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SHIV NARAYAN DHINGRA, J.