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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: April 29, 2009
Date of Order: April 30, 2009

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30.04.2009

Rajendera Sethia

...Petitioner

Through : Mr. Jayant Bhushan, Sr. Adv. with Ms. Preeti, Advocates

Versus

Gail (India) Limited

...Respondent

Through: Mr. Rakesh Munjal with Ms. Rakhi Ray and Mr. S.S. Ray,
Advocates

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

1. By this application under Section 9 of the Arbitration & Conciliation Act, 1996 (for short, "the Act"), the petitioner has made a prayer that the respondent should be restrained from acting any further in receiving of tender No.GAIL/ND/BD/C&P/PW8004/2002234 1 (Bid Invitation No.8000001069) dated 3rd April 2009, inviting Bids for "Transportation of Polymer from Gail's Petrochemical Complex Pata to various Zones across the Country", particularly with regard to inviting of Bid in respect of Zones West-1 and West-2. The contention of the petitioner is that the petitioner was a successful bidder in respect of these Zones in the previous tender invited by the respondent and as per the terms and conditions contained in bid documents dated 12th August 2008, the petitioner was required to submit bank guarantee towards earnest money/ bid security. The petitioner had

submitted the bank guarantee and the petitioner was duly awarded the contract pursuant to bid of document dated 12th August 2008 for Region West-1 and West-2. The respondent had issued a fax of intent dated 16th December 2008 awarding the contract for Zones West-I and West-II for an estimated value of approximately Rs.19.49 crore and in accordance with the terms and conditions of the contract; the petitioner was required to furnish the performance bank guarantee. The petitioner was already having contract vide acceptance letter dated 19th May 2008 in respect of regions Daman and Maharashtra, falling in the said two zones. Only additional contract was to be awarded to the petitioner for regions Madhya Pradesh, Silvassa and Goa. The petitioner wrote a letter that since he was already having the contract for two regions, he should be allowed to furnish the bank guarantee only in respect of remaining three regions viz Madhya Pradesh, Silvassa and Goa and sought clarification regarding this from the respondent. The respondent should have clarified this and asked the petitioner to give performance bank guarantee only for three regions but instead the respondent insisted on contract performance bank guarantee for the entire zones and threatened that in case of failure, the respondent would be constrained to initiate actions as per the provisions of the contract. After this threat, the petitioner approached this Court under Section 9 of the Act and sought an injunction against encashment of the bank guarantee towards earnest money for a sum of Rs.21,50,000/-. Since the respondent had retendered the same region again for which the letter of intent was issued to the petitioner, the petitioner has approached this Court with this second application under Section 9 of the Arbitration & Conciliation Act, 1996.

2. Counsel for the respondent submitted that there was no concluded

contract between the petitioner and the respondent. Issuance of letter of intent does not amount to conclusion of contract in terms of clause 1.1.1.0. The tender documents very categorically provided that the contract shall mean the agreement between the employer and the contractor for execution of work including therein all contract documents. The contract documents have been defined as collective tender document designs, drawings, specifications, schedule of quantity, rates, letter of acceptance and agreed variations, if any and such other documents constituting the tender and acceptance thereof. It is submitted that pursuant to acceptance of tender, no agreement was executed between the parties as required under the tender document and mere acceptance of tender does not tantamount to a concluded contract. Counsel for the petitioner rebutted this argument by stating that the tender invitation amounted to an offer on behalf of the petitioner and once this offer was accepted by sending an acceptance letter, a concluded contract came into force and therefore there was a concluded contract.

3. Counsel for the respondent further submitted that the tender document specifically provided that this tender was for 'zero deviation' tender as provided in clause 16.2. and the offer was to be made by the parties based on terms and conditions as specified in the tender document, general conditions of contract, special condition of contract and instructions to bidder, scope of work, technical specifications etc. It was also provided that no commercial clarification or technical clarification will be sought by the bidder after receipt of bid and in case of any deviation/ non-confirming, the bid was liable to be rejected. It is submitted that the petitioner's non giving of performance bank guarantee in respect of zones for which he gave bid, amounted to non

conformity to the conditions of the tender and the bid therefore stood rejected despite letter of intent given by the respondent. The acceptance letter was an indication to the petitioner that if he fulfils all the conditions as given in the bid, then only the contract will become concluded contract and the contract will come into force. No concluded contract can come into force without fulfilling all the conditions.

4. An application under Section 9 of the Act can be made by a party to the contract where there is an arbitration clause, in the event of a dispute having arisen and the party intends to refer the dispute to arbitration. The dispute sought to be referred to the Arbitrator therefore must be specified in the application. In the present case, the petitioner has not stated as to what dispute is sought to be referred to the arbitrator.

5. However, the dispute seems to be made out by the petitioner is that the retendering was bad and was contrary to the contract and amounted to breach of contract. If, the petitioner's contention that there was a concluded contract is accepted, at the most petitioner would be entitled to the damages from the respondent for not awarding the contract to be performed despite alleged fulfilling of the conditions by the petitioner. The petitioner cannot come to the Court and say that the respondent should be stopped from giving the contract to anyone else because the petitioner considers that the respondent had breached the contract with the petitioner. The purpose of Section 9 is not to keep the broken contract surviving. The intent and purport of Section 9 is to preserve the interim custody of any goods or order sale of any goods which are the subject matter of the contract or to secure amount of the dispute in the arbitration or detention or preservation or inspection of

any property which is the subject matter of the disputes or appointment of a receiver etc. The Court cannot stop a party from breaching the contract nor can give directions under Section 9 to the Respondent not to breach the contract. Breaching a contract is a cause which gives rise to arbitration and it is the arbitrator who has to decide which of the parties is at fault and what compensation/ damages are to be given.

6. The application filed by the petitioner seeking a relief that the respondent should be given directions to keep the contract of the petitioner surviving, presuming that the petitioner had fulfilled all the conditions, is misconceived. The respondent is at liberty to float tenders in respect of any services that the respondent requires. If the petitioner considers that its earlier contract has been breached, the petitioner would be at liberty to raise this dispute before the Arbitrator and claim compensation. The petitioner itself pleaded that even the earlier regions for which the petitioner was having the contract were retendered and the petitioner had participated in the retendering of the earlier tender on August 2008. The documents filed by the petitioner show that even in the present tendering process, the petitioner is participating and has taken part in the conference of the contractors.

7. In view of foregoing facts, I consider that the present application under Section 9 is not maintainable and is hereby dismissed. No orders as to costs.

April 30, 2009
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SHIV NARAYAN DHINGRA J.