

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

Date of Reserve: 12.5.2009
Date of Order: 13th May, 2009

OMP 241/2009

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13.5.2009

M/s Excel Generators Pvt. Ltd.

... Petitioner

Through: Mr. Dayan Krishnan, Advocate
Mr. Gautam Narayan, Advocate and
Mr. Amit Gupta, Advocate

Versus

IJM Corporation Berhad

... Respondents

Through: Mr. J.P.Sengh, Sr. Advocate with
Mr. Somesh Arora & Mr. Yash Mishra, Advs.

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

This petition under Section 9 of the Arbitration & Conciliation Act, 1996 has been filed by the petitioner seeking a relief that the Court should restrain respondent from procuring 09 number 1500 KVA Diesel Generator Sets required for the MCD Civic Centre at Jawahar Lal Nehru, Minto Road, New Delhi and respondent should be restrained from divulging any of the proprietary

information such as design, drawings, technical specifications etc. to any third party.

2. Brief facts relevant for the purpose of deciding this petition are that the respondent was granted a contract by MCD for construction of Civic Centre at Jawahar Lal Nehru Marg, New Delhi. The respondent awarded a part of the work to the petitioner in respect of supply, installation and commissioning of 09 numbers of 1500 KVA Diesel Generator Sets at the Civic Centre. In the sub contract awarded by the respondent to the petitioner there was no arbitration clause however, in the sub contract under the heading 'General Conditions of Contract' it is mentioned that the general conditions, additional conditions and clauses of the contract would be same as specified in the tender document. Tender document was the one which was floated by MCD, on the basis of which respondent had got contract. It is contended by the petitioner that since the contract between petitioner and respondent specifically mentioned that general conditions of contract would be the same as specified in the tender document, the arbitration clause as mentioned in the tender document would govern their relations.

3. It is argued by the respondent that there can be no arbitration clause by implication. The parties to the contract had not executed any specific arbitration clause and the arbitration clause between MCD and respondent cannot govern the relationship between the petitioner and respondent. He

therefore argued that there was no arbitration clause between the parties. Respondent relied upon *K.Sasidharan v. Kerala State Film Development Corporation* AIR 1994 SC 2534 wherein Supreme Court had observed as under:

5. *Clause 12 relied upon by Sri Anam, the relevant part reads thus: “ And item of work shall be carried out as per Madras Detailed Standard Specifications and its addenda volume and shall be deemed to have been included here.” What clause 12 postulates is that the General conditions regarding the execution of the work will be as carried on in accordance with the conditions etc. contained in MDSS and addenda. General conditions of the contract provided the accepted rates, units, tentative quantities etc. which were given in the Schedule A and the time schedules for the work was given in Schedule B. The list and details regarding supply of drawings were given in Schedule C. The short descriptions given in the Schedule A for different items were only the General specifications. Thereafter, the above 12th clause has been added, namely, “All items of work shall be carried out as per Madras Detailed Standard Specifications and its addenda volume and shall be deemed to have been included here.” The arbitration agreement is collateral to the substantial stipulation of the contract. It is merely procedural and ancillary to the contract and it is a mode of settling the disputes, though the agreement to do so is itself subject to the discretion of the Court. Arbitration is distinguishable from other clauses in the contract. The other clauses set out the obligations which the parties have undertaken towards each other binding them, but the arbitration clause does not impose on one of the parties an obligation towards the other. It embodies an agreement of both parties with consensus ad idem that if any dispute arises with regard to the obligations undertaken therein which one party has undertaken towards the other, such a dispute shall be settled by a Tribunal of their own constitution. Therefore, arbitration clause in a contract, stands apart from rest of the contract, it must be construed according to its language and in the light of the circumstances in which it was made. Russell on Arbitration 19th Edition, p.27 states that “a Court cannot make a contract between the parties. In general its power would appear to*

end with interpretation. It applies equally to the establishment of an arbitration agreement.”

4. I consider that this judgment is not applicable in this case. In the case before the Supreme Court the contract between the parties referred to the main contract between the contractor and the employer only in respect of standard specifications, rates, units, tentative quantities etc. whereas in the present case, the contract between the petitioner and the respondent not only included that the work was to be executed as specified in the bill of quantities, general conditions of contract etc. but specifically provided that all general conditions, additional conditions and clauses of contract as specified in the tender document shall form part of the contract. Since, the tender document provided for arbitration as a mode of resolution of dispute, it will be deemed that there was an arbitration clause between the parties.

5. The petitioner was to supply 09 number 1500 KVA DG Sets, this contract between the petitioner and the respondent was cancelled by the respondent vide letter dated 26.3.2009. The contention of the petitioner's counsel is that the termination was contrary to the terms of the contract. The petitioner had already got the gensets manufactured. The respondent was to handover the site to the petitioner for installation of the gensets and thereafter the petitioner was supposed to install these gensets within a period of 90-120 days. The site was handed over on 27.2.2009. The contract was cancelled before the expiry of the installation period. It is submitted that even earlier, the

petitioner had got gensets manufactured but it was the respondent whose work was lacking and the respondent was not able to handover the site for installation of the gensets. The petitioner had to dispose of these generators as the petitioner could not keep its capital blocked.

6. On the other hand, it is submitted by the counsel for the respondent that the respondent had repeatedly writing to the petitioner for installation of the gensets. The petitioner had not even opened Letter of Credit by 26.3.2009 and the petitioner was informed about the urgency in completion of the work as the Civic Centre was to be handed over by May end.

7. The letter dated 27.2.2009 written by the respondent to the petitioner shows that all DG Sets were required to be shifted to site before 1.4.2009. However, the petitioner had been unable to assure that the shipment would reach Delhi by 1.4.2009 rather the shipment was postponed for 30.4.2009. The respondent had clearly stated that this was not acceptable. The respondent had informed that DG rooms were ready and foundations had been cast and major civil work had been completed, there was no hindrance in execution of the work. The petitioner was clearly told that the necessary installation must be made in time. The petitioner in response had assured that one genset was in its stock with custom duty paid and rest of the gensets had been booked and would be reaching ICD Delhi on 30.3.2009. This was however, found false. There is correspondence between the parties showing that the respondent had been

insisting upon timely completion of the work. Vide letter dated 21.3.2009, it was noted by the respondent that one DG which was tested at Singapore on 15.1.2009 and was scheduled to be delivered on site on 15.3.2009 had not even been shipped from Singapore. The position of delivery of balance 08 gensets was also uncertain.

The petitioner had failed to place on record any document to show that any of the gensets as ordered by the respondent was ready for commissioning or had reached the site by 31.3.2009 or thereafter. It is only under these circumstances that the respondent cancelled the contract in view of clause 21 of the contract which reads as under:

21. Cancellation of Contract in full or part

The accepting authority shall be entitled to foreclose and terminate the contract at any time if contractor makes default in proceeding with the work with the due diligence or commits default to complying with any of the terms and conditions of the contract and does not remedy it or take effective steps to remedy it, despite notice in writing from Engineer-in-Charge. The incomplete work will be carried out by IJMII at the risk and cost of contractor.

I consider where a contract is terminable contract and it can be foreclosed, the interim relief under Section 9 of the Arbitration & Conciliation Act, 1996 cannot be granted for specific performance of the contract. In all those cases where monetary damages can compensate the breach of contract, the Court cannot insist upon the parties that the contract should be specifically performed. Termination of the contract is one of the facets of the commercial law

and if a party is aggrieved that the contract was wrongfully terminated the remedy lies in claiming damages. The party cannot insist that the material sought to be purchased from it must be purchased from it. The Counsel for the petitioner relied on *Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd.* AIR 2007 SC 2563 and argued that keeping in view the fact that the contract had been terminated without following procedure as laid down in the contract, this Court should restrain the respondent from procuring DG Sets from some other party. I consider that the *Adhunik Steel* case is of no help to the petitioner. In the present case, the respondent had given sufficient opportunity to the petitioner to show that it would be able to install the DG Sets within the time schedule. But the petitioner was not able to even show that it had opened a Letter of Credit. Even one DG Set, the petitioner stated that was ready to be installed and was lying in Singapore had not been brought at site. In *Adhunik Steel* case, the Supreme Court had restrained the respondent from giving contract to a third party on the ground that the respondent therein had cancelled the agreement with the petitioner mainly because it was hit by Rule 37 of Mineral Concession Rules 1960, and the violation of the same rule would have been there if the contract was awarded to any third entity. I therefore find no force in the petition. The petition is hereby dismissed.

May 13, 2009

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SHIV NARAYAN DHINGRA, J.