

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
#37
+ O.M.P. 898/2011

M/S SENBO ENGINEERING LTD Petitioner
Through: Mr. Viplav Sharma with
Ms. Nilanjana Banerjee, Advocates.

versus

AHLCON READY MIX CONCRETE Respondent
Through: Mr. Rishi Kapoor, Advocate.

CORAM: JUSTICE S. MURALIDHAR

% **ORDER**
05.12.2011

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') by Senbo Engineering Ltd. ('SEL') is to an Award dated 1st August 2011 passed by the learned Sole Arbitrator allowing the claims of the Respondent Ahlcon Ready Mix Concrete ('ARMC'), a Division of Ahluwalia Contracts (India) Ltd. ('ACIL') which was succeeded by Ahlcon Ready Mix Concrete Pvt. Ltd. ('ARMCPL'). By the impugned Award, the learned Arbitrator held that SEL should pay the Respondent Rs. 1,11,49,108/-, consolidated costs of Rs. 1,12,000/- and interest on Rs. 81,98,063/- at 9% per annum with effect from 1st August 2011 till realization. By the said impugned Award all the counter-claims of SEL were rejected.

2. On 20th February 2006 SEL was awarded the contract of BC-2 Project by the Delhi Metro Rail Corporation ('DMRC'). According to the SEL,
O.M.P. No. 898 of 2011 *Page 1 of 13*

it required ready mix concrete (`RMC`) to enable it to meet the deadline for the completion of the DMRC project. For this purpose on 28th February 2007 a Memorandum of Understanding (`MoU`) was entered into between SEL and ARMC, a Division of ACIL. Certain clauses of the MoU which are relevant for the present dispute read as under:

“WHEREAS

- A. Senbo is a company engaged in high tech infrastructure construction of Metro Rail Projects and Flyovers, all of which are time bound projects and are of national importance;
- B. Ahlcon, inter alia, is engaged in the business of manufacture of Ready Mix Concrete (hereinafter referred to as “RMC”);
- C. In pursuance of the contract entered into between the parties on 20th February 2006 Ahlcon used to supply RMC from its manufacturing unit (including all plant and machinery, transportation equipments, wire house, laboratory, sanitation, hutment and other utility rooms adjacent to the Batching Plant, barricading and gates) situated Bela Road, Delhi – 110054 (hereinafter referred to as “Manufacturing Unit”) for which the Land has been provided free of cost by Delhi Metrol Rail Corporation (hereinafter referred to as “DMRC”);
- D. Due to supervening impossibility, Ahlcon cannot perform the said contract anymore.

This MOU outlines the intention of the parties to enter into an agreement whereunder Ahlcon will lease out above RMC Manufacturing Unit exclusively to Senbo in order to meet the

deadline of completion of DMRC Projects (Contract No. BC-2 in particular) notwithstanding that operation and maintenance of the Manufacturing Unit by deployment of all existing human resources, and provision of requisite utilities will be procured and provided by Ahlcon without interruption and for which Raw Materials will be procured and provided by Senbo.

1. Scope of the proposed transaction

Ahlcon will manufacture, process, transport and pump RMC on behalf of Senbo as per the specification of DMRC from time to time from the above Manufacturing Unit for which it will deploy all existing machinery for manufacture, transportation and pumping of RMC into requisite areas of above DMRC Project and Senbo will provide requisite Raw Materials and maintain inventory for the said purpose (save and except utilities like, Fuel, electricity, water, etc.) from the Warehouse maintained at the above address and Senbo will supervise the quality norms from the Laboratory maintained at the above address by Ahlcon.

2. Term

2.1.1 This MOU will be in force for a period of 90(ninety) days from the Effective Date, within which the Parties shall enter into a definitive agreement covering detailed terms and conditions agreed to between the Parties.

2.1.2 Should the detailed agreement be not signed for any reason whatsoever within the stipulated ninety day period, the Parties agree to extend the MOU for a further period of thirty (30) days by mutual consent.”

procure requisite quantities of the raw materials, viz., cement, coarse aggregates, sand and admixture required for the manufacture and processing of RMC, ensuring that quality specifications for manufacture and processing of RMC of DMRC are met from the Laboratory of the Respondent, provide indent to the Respondent for manufacture and processing of RMC on a regular basis. Among the responsibilities of the Respondent was to ensure uninterrupted manufacture, processing, transportation and pumping of RMC on 24-hour basis, seven days in every week, manufacture, process, transport and pump the said RMC strictly in accordance with the technical specifications provided by the DMRC, providing SEL with existing warehouse for manufacturing and allied facilities at the site, providing all the existing manufacturing and infrastructural facilities at the site to SEL.

4. Under Clause 4 of the MoU, the parties agreed that the Operational Lease Agreement ('OLA') would be till completion of Contract No. BC-2 of DMRC with volume commitments of 3000 M³ to 3500 M³ on behalf of SEL. The parties further agreed that the rent payable for operation and maintenance of the RMC and lease allied facilities "would be at all inclusive price of Rs. 850/- (Rupees Eight Hundred and Fifty) per M³ as lease rent, of quality approved RMC manufactured, processed, transported and pumped at the desired destinations of Contract No. BC-2 of DMRC as required by SENBO from time to time taxes extra

O.M.P. No. 898 of 2011 *Page 4 of 13*

applicable. All supplies of RMC for each of the above Contracts shall be jointly certified by both the parties on loading of RMC in Transit Mixers.”

5. Clause 6 of the MoU stated that it would terminate:

- “a. On entering into an Agreement.
- b. On completion of Contract No. BC-2 of DMRC.
- c. On determination of non-continuation, by a Notice of 60 days by either Party to the other.
- d. Due to supervening impossibility, if any, as to performance of the MOU.

6. Clause 7 (i) read as under:

- “i. Any dispute, controversy, or claims arising out of or relating to this MOU or the breach, termination or invalidity thereof, shall be resolved by amicable settlement between the parties in the first instance and any unresolved matters relating to dispute shall be settled by arbitration in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996, as amended from time to time. The place of arbitration shall be New Delhi and any award, whether interim or final, shall be made, and shall be deemed for all purposes between the parties to be made in New Delhi.”

7. According to the Respondent, it commenced supplying RMC to SEL from 1st March 2007. The MoU was to continue to be in force for ninety days, i.e., till 31st May 2007. Since a detailed agreement (OLA) could

not be signed, therefore, as stipulated in Clause 2.1.2 of the MoU, the agreement automatically stood extended for another thirty days. According to the Respondent, a cheque issued by SEL for a sum of Rs. 25,50,000/- in favour of the Respondent against the invoice for June 2007 was dishonoured. When confronted SEL gave an evasive reply. There were other outstanding amounts which were also not cleared by SEL. As a result, the Respondent stopped supplying RMC to SEL and informed SEL that it will resume supplies upon the outstanding amounts being cleared. A legal notice dated 12th March 2009 was sent to SEL by the Respondent calling upon SEL to pay a sum of Rs. 88,81,744/- being the outstanding amount along with interest at 18% per annum from the date of payment till its realization. Upon SEL failing to make payment the Respondent invoked the arbitration clause by way of a notice dated 15th June 2009 for appointment of an arbitrator and also proposed the name of an arbitrator. With the SEL failing to concur on such appointment the Respondent filed Arb. P. No. 339 of 2009 in this Court under Section 11(6) of the Act. By an order dated 9th April 2010, the Court appointed Justice S.S. Chadha, a retired Judge of this Court as Sole Arbitrator to adjudicate the disputes between the parties.

8. The Respondent filed a statement of claim before the learned Arbitrator stating *inter alia* that in respect of the MoU dated 28th February 2007 SEL owed Respondent a sum of Rs. 81,98,063/-. Further,

O.M.P. No. 898 of 2011

a bank guarantee in the sum of Rs. 20 lakhs towards mobilization of advance had been wrongly encashed by SEL and was liable to be refunded to the Respondent, and a further sum of Rs. 61,98,063/- was due towards outstanding unpaid minimum guaranteed rentals. The Respondent also claimed 18% interest on the aforementioned amounts. Along with its list of documents, the Respondent also placed a copy of the Board Resolution of ARMCPL authorising Mr. Vikaas Ahluwalia, Whole Time Director and Mr. Rakesh Kumar, Authorised Signatory of the RMC Division of ACIL to institute and pursue the legal proceedings on behalf of the Respondent.

9. Before the learned Arbitrator, there were two preliminary issues raised by SEL. The first was that the MoU was not an arbitration agreement in terms of Section 2(b) read with Section 7 of the Act. This was rejected by the learned Arbitrator by holding that the MoU itself was an agreement containing an arbitration clause pursuant to which the parties performed the contract and disputes had arisen between them as a result.

10. Mr. Viplav Sharma, learned counsel appearing for the Petitioner took exception to the observation of the learned Arbitrator in the impugned Award that the above preliminary submission was only “half-heartedly pressed” by him before the Arbitrator. He further submitted

O.M.P. No. 898 of 2011

that inasmuch as the MoU was not an arbitration agreement in terms of Section 2(b) read with Section 7 of the Act, there was no arbitration clause either.

11. This Court is unable to find merit in the above submission. The MoU was by itself an agreement between the parties containing an arbitration clause, i.e., Clause 7(i) which has been extracted hereinbefore. Indeed both SEL and the Respondent commenced acting on the MoU in terms of their respective obligations. Disputes indeed arose out of their actions or omissions with reference to the said MoU. The arbitration clause, Clause 7(i) of the MoU is unambiguous. This Court, therefore, finds no ground to interfere with the impugned Award of the learned Arbitrator to the extent it rejects the first preliminary objection as being without merit.

12. The second preliminary objection raised by SEL before the learned Arbitrator was that while the MoU was entered into between SEL and ARMC, a Division of ACIL, the Board Resolution dated 12th August 2009 was of ARMCPPL which was a stranger to the MoU and with which entity there was no agreement entered into by SEL. It was pointed out by the Respondent before the learned Arbitrator that the RMC division of ACIL was demerged from ACIL and a new company ARMCPPL was formed. The learned Arbitrator accepted the above

O.M.P. No. 898 of 2011 *Page 8 of 13*

explanation. The learned Arbitrator referred to an additional affidavit dated 17th June 2011 of Shri Rakesh K. Joshi which together with its enclosed documents evidenced the transfer on 1st August 2008 of the RMC Division of ACIL to ARMCPL. An agreement was duly executed between ACIL and ARMCPL in terms of a Board Resolution dated 30th June 2008, and the RMC Division of ACIL stood transferred to ARMCPL, which had duly authorised Shri Rakesh Kumar Joshi to file, sign, institute and depose in the arbitral proceedings.

13. Mr. Viplav Sharma relied on the judgment of the Supreme Court in ***Andhra Pradesh Tourism Development Corporation v. M/s Pampa Hotels Ltd. AIR 2010 SC 1806*** to urge that with “if one of the two parties to the arbitration agreement was not in existence when the contract was made, then obviously there was no contract and if there was no contract, there is no question of a clause in such contract being an arbitration agreement between the parties.” The facts in the said case bear no comparison to the facts of the present case. There an agreement was entered into with an entity which was subsequently shown to not exist in the eye of law at the time of the agreement. That is not the position as far as the present case is concerned. The company which was in existence at the time of the MoU, ACIL, transferred its RMC Division to another company viz., ARMCPL which was properly incorporated under the Companies Act, 1956. The said decision is,
O.M.P. No. 898 of 2011

therefore, distinguishable on facts.

14. This Court finds that the Respondent had placed sufficient material before the learned Arbitrator to show that ARMCPL was in law the successor-in-interest of ARMC, the RMC Division of ACIL. It was perfectly possible for the successor company ARMCPL to step into the shoes of ARMC. The rejection of the second preliminary objection of SEL by the learned Arbitrator also does not call for interference.

15. Mr. Viplav Sharma then challenged the Award of the learned Arbitrator to the extent Claim Nos. 1 and 4 of the Respondent towards outstanding unpaid minimum guaranteed lease rent and towards wrongful encashment of bank guarantee were allowed. It was submitted that the learned Arbitrator having concluded that the OLA was never really entered into and, therefore, “no contract came into existence between the parties that the claimant would supply ready mix concrete until the completion of BC-2 Project of DMRC” and that “there could be no breach or abandonment of contract which never came into existence”, and therefore, the invocation and encashment of the bank guarantee was wrongful and illegal could not have also required SEL having pay any minimum guarantee lease rent to the Respondent under such contract.

16. A perusal of the impugned Award as regards Claim No. 1 and 2 shows that the only defence of SEL to the claim of lease rent was that the Respondent had breached the term of supply of RMC “until the completion of BC-2 Project of DMRC and abandoned the work/supplies in midst, so no amount much less minimum monthly rent of Rs.25,50,000/- as lease rent is payable.” The above stance was negated by the learned Arbitrator who concluded that although the parties intended that there would be an OLA in place which would run for the entire term of contract of the BC-2 Project of the DMRC such an agreement was actually never entered into. Consequently, there was no obligation on the Respondent to supply RMC until the completion of the BC-2 Project of the DMRC. At the same time, the learned Arbitrator found in the statement of account, Ex. CW-1/10 that payments of the lease rent were indeed made up to a certain point in time by SEL, and thereafter stopped. The statement of account also showed that an amount of Rs. 61,98,063/- was due as lease rent. It also included a debit entry of bank guarantee invocation of Rs. 20,00,000/-. It appears to this Court that the learned Arbitrator rightly drew a distinction between the MoU which cast an obligation on SEL to pay the minimum lease rental and the OLA which, if it had been entered into, might have obliged the Respondent to supply RMC during the entire tenure of the BC-2 project.

MoU and urged that the intention of the parties was that the supply of RMC had to continue during the entire term of the BC-2 Project of the DMRC. This Court is unable to agree with the above submission. Although the MoU does refer to the SEL having to meet the deadline of the completion of the DMRC Project, there is no clause in the MoU stating that it would also continue for the entire term of the DMRC Project, i.e., Contract No. BC-2. On the other hand Clauses 2.1.1 and 2.1.2 which have been extracted hereinbefore indicate to the contrary. Although in Clause 4, it is stated that the OLA would be till completion of Contract No. BC-2 of the DMRC, there was in fact no OLA entered into between the parties. In the absence of such agreement, the payments had to be made as and when the requisite RMC quantities were manufactured, transported and delivered to SEL in terms of the MoU. Clause 2.1.2 of the MoU clearly states that where the detailed agreement cannot be signed for any reason within the stipulated 90 day period after the MoU, “the parties agree to extend the MOU for a further period of thirty (30) days by mutual consent.” In the absence of any OLA agreement, the MoU came to an end thirty days after the stipulated ninety day period. Consequently, the conclusion of the learned Arbitrator that there was no obligation on the Respondent to supply RMC for the entire period of the BC-2 Project to SEL cannot be said to be contrary to the express terms of the contract or any provision of law.

18. In any event, given the scope of the proceedings under Section 34 of the Act, this Court is not expected to sit in appeal over the Award, re-examine the evidence led before the Arbitrator and set aside the Award only because a different view is possible. The award of interest at 9% per annum with effect from 16th July 2007 till 31st July 2011 and at 9% per annum on Rs. 20 lakh from 18th September 2007 to 31st July 2011 cannot also be said to be illegal. As regards the rejection of SEL's counter-claims also this Court is unable to find any illegality in the impugned Award calling for interference under Section 34 of the Act.

19. For the aforementioned reasons, the petition is dismissed.

S. MURALIDHAR, J

DECEMBER 05, 2011

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