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THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 17.02.2012

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FAO(OS) No. 75/2012

M/S SENBO ENGINEERING LTD.

...Appellant

VERSUS

AHLCON READY MIX CONCRETE

...Respondent

Advocates who appeared in this case:

For the Appellant : Mr Suhail Dutt, Sr. Adv. with Mr Viplav Sharma, Adv.

For the Respondent: Mr Rishi Kapoor, Adv.

CORAM :-

HON'BLE MR JUSTICE SANJAY KISHAN KAUL

HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

Caveat No. 171/2012

Learned counsel for the caveator has entered appearance and, thus, the caveat stands discharged.

CM No. 3021/2012 & 3022/2012 (Exemptions)

Allowed, subject to just exceptions.

CM No. 3019/2012 (for Condonation of delay of 2 days in filing the appeal)

Notice, which is accepted by learned counsel for the respondent.

The delay of two (2) days in filing the appeal is condoned and the application is allowed.

FAO(OS) No. 75/2012 & CM No. 3020/2012 (Stay)

1. By this appeal a challenge has been laid to the judgment of the learned Single Judge dated 05.12.2011 passed in OMP No. 898/2011, and the award

dated 01.08.2011. The appellant before us, is aggrieved by the fact that its challenge to the award by way of a petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the said Act), was repelled. The appellant, both before the arbitrator as well as before the learned Single Judge, appears to have reiterated three issues qua the claims raised by the respondent. It may, however, also be noted that the appellant had also raised counter claims before the learned arbitrator, which has been rejected. No submissions were raised before us vis-à-vis the counter claims.

2. The three issues, out of which two are preliminary issues, are as follows:

- (i) Firstly, that there was no arbitration agreement as between the parties.
- (ii) The claim, lodged by the respondent was not maintainable as, at the relevant time the concerned division of the respondent was owned by one Ahluwalia Contracts (India) Ltd. (in short ACIL), whereas, the authority to lodge the claims before the arbitrator was conferred by Ahlcon Ready Mix Concrete Pvt. Ltd. In other words, an entity different from one with which the Memorandum of Understanding dated 20.08.2007 (in short MOU) was executed.
- (iii) The MOU, on which the dispute is pivoted, required the respondent-claimant to make supplies of, what is known as, Ready Mix Concrete (in short RMC), till the conclusion of the contract executed between the appellant and the Delhi Metro Rail Corporation Ltd. (in short DMRC).

3. These issues briefly arise in the background of the following facts:

3.1 For the sake of convenience the appellant and the respondent will be collectively referred to as parties.

3.2 The appellant, which claims to be in the business of hi-tech infrastructure construction of metro rail projects and flyovers was awarded a

contract on 20.02.2006 by the DMRC, which is referred to as Contract BC-2 project. It appears that there was a back to back arrangement between the parties, reflected in a contract of even date, i.e., 20.02.2006, whereby the respondent was required to supply RMC to the appellant from its unit situated at Bela Road, Delhi qua which land was provided free of cost by DMRC. Evidently, on account of “*supervening impossibility*” respondent was unable to perform the contract. This resulted in the appellant and the respondent entering into the aforementioned MOU.

3.3 In the MOU, the parties crystallized their intention to enter into an agreement which would include:- (i) lease of respondent’s RMC manufacturing unit; (ii) deployment and maintenance of the said RMC unit by the respondent, including provision of requisite utilities and; (iii) lastly, procurement of raw material to manufacture the RMC by the appellant. The MOU, clearly provided that it would be the respondent’s responsibility to manufacture, process, transport and pump RCM on behalf of the appellant as per the specification of DMRC. This MOU was configured to last a period of 90 days from the effective date. In the interregnum or immediately thereafter the parties intended to enter into a definitive agreement, covering detailed terms and conditions. In the event, an agreement was not signed for any reason within the stipulated period of 90 days, parties agreed that the MOU would stand extended for a further period of 30 days.

3.4 A part of the MOU, on which much stress has been laid by the appellant before every forum is the provision made in clause 4, wherein it is stated that parties agree that “operational lease agreement” would continue till completion of contract BC-2 entered into between the appellant and the DMRC with volume commitments of 3000 M³ to 3500 M³ by the appellant. For this the appellant was required to pay a rent at the rate of Rs 850/- per M³ per month, in addition to taxes.

3.5 It is not in dispute that the MOU operated for a period of 120 days, i.e., the first 90 days, and thereafter, the extended period of 30 days. The parties, were unable to enter into a further agreement as envisaged under the MOU. Consequently, disputes arose between the parties, which ultimately resulted in an arbitrator being appointed by this court vide order dated 09.04.2010. The arbitrator entered upon reference on 10.05.2010. Upon pleadings being completed, and evidence being led; and upon hearing submissions on behalf of parties, the learned arbitrator pronounced an award in favour of the respondent.

3.6 The claim made by the respondent before the arbitrator was broadly on three counts: firstly, in respect of the outstanding amounts against invoices raised between March, 2007 to June, 2007 qua supplies of RMC. Secondly, towards what it claimed was wrongful encashment of bank guarantee in the sum of Rs 20 lacs. And lastly, claim of interest at the rate of 18% per annum and costs of arbitration proceedings. Before the arbitrator, the appellant had filed counter claims, as indicated hereinabove, under various heads in the sum of Rs 171 lacs. The learned arbitrator, by the impugned award, allowed the claim of the respondent to the extent of Rs 1,11,49,108/-. In addition he awarded consolidated cost of Rs , 1,12,000/- as also interest at the rate of 9% per annum simple, with effect from 01.08.2011 till realization, on a sum of Rs 81,98,063/-. The counter claims of the appellant were, however, rejected; as mentioned above.

3.7 The aforesaid award was challenged before the learned Single Judge who by the impugned judgment dismissed the OMP.

4. Before us Mr Suhail Dutt, Sr. Adv. instructed by Mr. Viplov Sharma, Advocate raised the very same issues which have been adverted to, by us, in the very beginning of our judgment.

4.1 In so far as the first issue is concerned, both the learned Arbitrator as well as the learned Single Judge have, in our view, correctly noticed that the MOU contained clause 7(i), which quite clearly made the disputes arising under the MOU, amenable to adjudication by recourse to proceedings under the Act. The argument that this was not an agreement within the meaning of Section 7 read with Section 2(b) of the Act as a further agreement had to be executed between the parties, was quite correctly rejected, both by the arbitrator and the learned Single Judge. We have no hesitation in doing the same

4.2 The second issue, which pertains to the maintainability of the claim lodged by the respondent, also lacks merit. Mr Dutt, on behalf of the appellant, had submitted that since the MOU had been executed by Ahlcon Ready Mix Concrete (in short ARMC), a division of ACIL, the claim could not have been lodged by another entity, i.e., Ahlcon Ready Mix Concrete Pvt. Ltd. As noticed, by the learned arbitrator, as well as the learned Single Judge, it appears that ARMC, which was the division of ACIL, was demerged, and thereafter, given a corporate form with the birth of Ahlcon Ready Mix Concrete Pvt. Ltd. This transformation of ARMC was brought about upon, due compliance with the provisions of the Companies Act, 1956 (in short the Companies Act), whereby the shareholders of ACIL passed the requisite resolutions under Sections 293(1) of the Companies Act. The approval given to the demerger by the shareholders of ACIL, was also intimated to various stock exchanges including the Bombay Stock Exchange, as also, the Ministry of Corporate Affairs, in the prescribed format. The documents evidencing the transfer of the ARMC, a division of ACIL, were also placed on record before the learned arbitrator. Therefore, the arbitrator, had correctly in our view, come to the conclusion that, Ahlcon Ready Mix Pvt. Ltd. was nothing but a successor-in-interest of ACIL. Given these factual findings, in our view, no perversity can be found with this conclusion.

4.3 Before us, Mr Dutt sought to argue, that under clause 7(f) of the MOU, no rights and obligations under the MOU could have been assigned to Ahlcon Ready Mix Concrete Pvt. Ltd. without the consent of the appellant. It was contended that any “*assignment*” without consent, as per clause 7(f) of the MOU was null and void. We had put to Mr Dutt as to whether this very argument was, ever advanced before the learned arbitrator and the learned Single Judge, as this contention did not appear to emerge either from the award or the impugned judgment. Mr Dutt, was unable to demonstrate that this contention was raised. Therefore, on this short ground, this contention deserves to be rejected without more. However, in order to put the matter beyond doubt, we are also of the view that, clause 7(f) has no applicability as this was not a case of assignment of rights and interest in the MOU. All that had happened was, the change of ownership of the ARMC division, (i.e., the RCM division) from ACIL to Ahlcon Ready Mix Concrete Pvt. Ltd.

5. This brings us to the last issue, which is that, the respondent could claim the minimum lease rent at the rate of 850 per M³ per month only on it, supplying, RMC to the appellant till the completion of the contract BC-2, executed between the appellant and DMRC. In order to appreciate this contention it would be important to note the observations of the arbitrator made in this regard, which for the sake of convenience are extracted hereinafter:

“The intention of the parties was certainly there that Operational Lease Agreement to be executed would be till completion of Contract No. BC-2 of DMRC with volume commitments of 3000 M³ to 3500 M³ and the MOU had outlined this intention. The Operational Lease agreement could be executed by the parties at any time after 28.02.2007 but within 90 days. In the meantime the parties agreed to the Term as contained in above quote Clause which defines the duration of MOU. MOU was to remain in force for a period of 90 (ninety) days from the effective date (i.e. 28.02.2007) within which the parties had to enter

into a definitive agreement. In case the detailed agreement was not signed for any reason whatsoever within the stipulated ninety days period, the parties agreed to extend the MOU for a further period of thirty (30) days by mutual consent. Thus the duration of the performance of the contract under MOU was 90 days extendable by another 30 days as per Clause 2 in the absence of the Operational Lease agreement which has not been admittedly executed. This is the harmonious construction of Clauses 2 and 4 of MOU. Thus, in my view, there is no contract between the parties as contained in the MOU out of which present disputes have arisen that the claimant had made a volume commitment of minimum of 3000 M³ – 3500 M³ ready mix concrete per month to the respondent until the completion of BC-2 Project of DMRC. My finding is that, it was the intention of the parties that Operational Lease agreement would be till completion of Contract No. BC-2 of DMRC but the said agreement was never entered into and so 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. With this finding I express my decision on claims.”

5.1 Mr Dutt, based on clause 4 and 6 of the MOU, argued that the obligation to pay minimum lease rent, in a matter of speaking, dissolved, on the MOU being terminated for reasons other than those given in clause 6. In order to appreciate this argument of Mr Dutt, the following clauses of the MOU require to be noticed.

“Clause 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 definite agreement covering detailed terms and conditions agreed to between the parties.

2.1.2 Should be 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.

Clause 4. Consideration of Volumes

The parties agree that Operational Lease agreement would be till completion of Contract No. BC-2 of DMRC with volume commitments of 3000 M³ to 3500 M³ on behalf of Senbo.

The parties agree that the Rent payable for operation and maintenance of the RMC and lease allied facilities payable by Senbo to Ahlcon 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 applicable.

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

Clause 6. Termination

This MOU shall 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, of any, as to performance of the MOU.”

5.2 A conjoint reading of the aforementioned clauses would show that, while parties intended to transform the MOU into a definitive agreement, they also envisaged a situation whereby the entire arrangement could come to an end without such an agreement being executed within a maximum period of 120 days. This apart, the MOU would also stand terminated on happening of any of the eventualities indicated in clause 6, including the completion of contract BC-2 of the appellant with the DMRC. Therefore, while clause 6 spoke of termination of the MOU, based on events articulated in the said clause, clause 2 of the MOU envisaged a situation whereby the MOU would come to an end by sheer efflux of time. The two clauses thus took into account two different situations. Clause 4, which pertains to consideration, did not necessarily tie in the lease rent with the completion of the contract

BC-2 as parties were aware that an operational lease agreement may or may not be executed. There is nothing in clause 4 to suggest such an intention existed between parties. Mr Dutt's argument that the first part of clause 4, which says "...Operational Lease agreement would be till completion of Contract No. BC-2 of DMRC with volume commitments of 3000 M³ to 3500 M³ on behalf of Senbo" is linked to the remaining part of clause 4, which deals with the payment of rent is not what is perceived or understood by the learned arbitrator. The conclusion of the arbitrator, based on the material before him, cannot be faulted on this score. Amongst other aspects what appears to have persuaded the arbitrator to accept the respondent's submission on this aspect are the following facts:

5.3 It is not in dispute that RMC was supplied by the respondent. The appellant had made part payments against three out of the four invoices. The fourth invoice was for a sum equivalent to the minimum lease rent, (which a product of the rate, Rs. 850 per M³ per month and volume 3000 M³ of RMC) against which a cheque was issued in the first instance, by the appellant. This cheque, however, bounced for the reason that the appellant had stopped payment. The fact that parties could have executed an operational lease any time after the execution of the MOU, i.e., 28.02.2007 within the maximum period of 120 days from the effective date did not prevent the appellant from issuing a cheque for the minimum lease rent of Rs 25,50,000/-. It is another matter that cheque bounced. Based on the evidence placed before him, the learned arbitrator came to the conclusion that clause 4 of the MOU, did envisage payment of minimum lease rent by the appellant to the respondent at the rate of Rs 850 per M³ on the basis of a minimum monthly volume commitment of 3000 M³ of RMC. This figure, as indicated above, comes to a sum of Rs. 25,50,000/-.

5.4 Therefore, having regard to the above facts, this is a plausible conclusion. Therefore, we find no difficulty in coming to the same view, as taken by both the arbitrator as well as the learned Single Judge.

6. There were no other submissions made before us by Mr Dutt. In view of the above, the appeal is dismissed with the costs of Rs 15,000/-.

SANJAY KISHAN KAUL, J

RAJIV SHAKDHER, J

FEBRUARY 17, 2012
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