

IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 303/2014

UNITY PRATIBHA CONSORTIUM Petitioner

Through: Mr. Kailash Vasdev, Senior Advocate
with Mr. S.S. Ray, Ms. Rakhi Ray
and Mr. Vaibhav Gulia, Advocates.

versus

AIRPORT AUTHORITY OF INDIA & ANR Respondents

Through: Mr. Digvijay Rai, Advocate.

CORAM: JUSTICE S. MURALIDHAR

ORDER

21.01.2015

1. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 ('Act') seeking the appointment of an Arbitrator to adjudicate the disputes between the parties arising out of an Agreement dated 2nd December 2006 between them whereby the Petitioner was awarded a contract to carry out the work of 'Modular Expansion of Terminal Building at Amritsar Airport, Amritsar (Phase-II) SH: Main Building Work.' The initial tender cost of the contract was Rs. 65,58,82,344.95p.

2. It is stated that the start date of the contract was 19th December 2006. Although the stipulated date of completion was 18th October 2007, the actual date of completion was 30th June 2009. *Inter alia* for the due performance of the contract, the Petitioner was required to furnish various bank guarantees ('BGs') including performance guarantees ('PBGs'). It is further stated that one such initial BG dated 16th March 2009 for an amount of Rs. 3.30 crores was subsequently amended and reduced to Rs. 1 crore. On the date of filing the petition, the said BG was still kept alive and was in the possession of the Respondent, Airport

Authority of India ('AAI'). Another BG dated 4th August 2009 for an amount of Rs. 44 lakhs which was amended on 4th August 2010 to an amount of Rs. 47,77,000. A third BG of the same date was initially for a sum of Rs. 67 lakhs which was subsequently amended on 10th August 2010 to an amount of Rs. 88,15,000. It is stated that the aforementioned three BGs were still kept alive even after completion of the works.

3. According to the AAI, the final bill was paid by it to the Petitioner in August 2010. According to AAI some rectification work still remained to be done by the Petitioner. In this regard two letters written by the AAI to the Petitioner are relevant. By letter dated 16th September 2013 AAI informed the Petitioner that "it is a matter of deep regret that the work of change of defective glasses has not been completed till date and unfortunately one of the glass removed from façade has not been replaced till date, which is resulting into loss of air conditions air besides being a serious security threat." It was alleged that the Petitioner was not serious about rectifying the defects. The Petitioner was asked to "restart the work to take immediate action to get this opening plugged within three days along with removal of broken glasses or else the action against M/s. Unity Pratibha cannot be overruled." This was followed by another letter dated 21st September 2013 written by AAI to the Petitioner stating *inter alia* as under:

"As yourself is aware that the work of modular expansion phase-II is under going the intensive scrutiny and in the last 17 months situation has under done changes and several recoveries are now expected to be effected. However in view of the assurance given for release of withheld amount on replacement of defective glasses, the withheld amount on this particular count can at best shall be released symbolically but shall have to be withheld in view of direction received from cheque dated 6th September 2013 that "in view of expected recovered on account of inspections no payment is to be released and any amount in the form of B.G. or otherwise be retained.

In the present given circumstances the extension of the said B.G. is imperative and this office is bound to withhold all the money available at disposal. This fact has already been brought to your notice telephonically earlier also. You are, therefore, advised to immediately get the BG extended or else encashment process shall be initiated.”

4. By its letter 10th December 2013 to the AAI, the Petitioner claimed that rectification has been successfully completed. It requested AAI “to release all our payments and bank guarantee immediately.” On 22nd January 2014, AAI wrote to the Punjab National Bank (‘PNB’), which had issued the BG dated 16th March 2009 for a sum of Rs. 1 crore, to encash the said BG. The Petitioner then approached this Court by filing a petition under Section 9 of the Act being OMP No. 125 of 2014.

5. It may be noted at this stage that OMP No. 125 of 2014 was dismissed by the learned Single Judge. Against the order of the learned Single an appeal has been preferred by the Petitioner before the Division Bench (‘DB’) which is stated to be pending. The current position is that encashment of the BG has been stayed by the DB.

6. On 20th March 2014 the Petitioner sent to AAI a notice invoking the arbitration clause and stating *inter alia* as under:

“In terms of the contract entered into between the parties for the reference work, and under Clause 25 therein, Arbitration was contemplated as the methodology of dispute resolution between the parties.

The nature of disputes that have arisen between the parties is beyond the disputes in contemplation under Clause 25 of the Agreement, meaning thereby beyond ‘all questions and disputes relating to meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used in the work order as to any other question claim the right matter of thing whatsoever in any way arising out of or relating to the

contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the work, or the execution or failure to execute the same.’ The arbitration of the disputes and alleged claims which have been raised by you cannot be referred to the sole Arbitrator in terms of the said clause, although the parties are *ad idem* with respect to arbitration as the mode of dispute resolution. We reserve our right to substantiate our claims/defences in proceedings before the Arbitrator nominated.”

7. The Petitioner had, thereafter, suggested a panel of three names and asked the Respondent to nominate the sole Arbitrator. On 29th April 2014, AAI wrote to the Petitioner stating that the final bill was paid to it in August 2010 and the request for arbitration had been received by it on 26th March 2013, i.e., almost after three and half years and that “too without any detail of claims.” The request of the Petitioner was declined since it was not “as per agreement condition.” Thereafter, the present petition was filed.

8. In its reply to the petition, AAI reiterated that the claim of the Petitioner, which in any event has not been quantified in its notice invoking the arbitration clause, and its request for appointment of the Arbitrator is barred by limitation.

9. Having perused the documents placed on record it is seen that the dispute arose with AAI seeking to invoke the BGs furnished by the Petitioner on the plea of non-satisfactory rectification of the defects pointed out by AAI. It has been stressed by Mr. Kailash Vasdev, learned Senior counsel appearing for the Petitioner, that, as already stated by the Petitioner in its petition under Section 9 of the Act, being OMP No. 125 of 2014, its claims are confined to (a) retention of the BGs (b) the attempt by AAI to encash the retained BGs and (c) retention of certain amounts owing to the Petitioner by AAI.

10. Mr. Digvijay Rai, learned counsel appearing for AAI, on the other hand drew the attention of the Court to a note dated 2nd January 2014 of the Chairman of AAI discussing the findings recorded in a Vigilance Investigation Report ('VIR') concerning the work i terms of the contract between the Petitioner and AAI, and issuing the following directions:

“In view of the above, the excess amount to be recovered be quantified in consultation with CVO and further action be taken for recovery of the said amount for recovery of the said amount from the Contractor”

11. The plea of AAI that the Petitioner's claim as well as its invocation of arbitration clause, are barred by limitation does not appear to be well founded. The dispute arose with AAI advising the Petitioner by its letter dated 21st September 2013 to extend the BG, failing which it would be encashed. Consequently, it cannot be said that in relation to such dispute the claim of the Petitioner is barred by limitation. As regards the objection that the Petitioner has not specified its claim in the notice invoking the arbitration clause, it is seen that the Petitioner has in the petition under Section 9 of the Act (O.M.P. No. 125 of 2014) as well as before this Court, i.e., confined its claim to (a) the non-release of the BGs, (b) the attempt to encash the BGs and (c) the retention of certain amounts owing by AAI to the Petitioner.

12. The question that next arises is whether in terms of the arbitration clause in the agreement between the parties, the appointment of the sole Arbitrator is to be made by the Chairman of the AAI. The relevant clause in the agreement reads as under:

“Clause 25. Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings, and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question claim, right, matter or thing whatsoever in

any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the work, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by Chairman Member (Planning) Airport Authority of India/Executive Director Engg. AAI (IAD) at the time of dispute. It will be no objection to any such appointment that the Arbitrator so appointed is Airports Authority of India (International Airports Division)'s Employee that he had to deal with the matters to which the contract relates and that in the course of his duties as Airports Authority of India's (International Airports Division) Employee he had expressed views on all or any of the matters in dispute or difference...."

13. Mr. Rai submitted that it is only the Chairman, AAI who has the authority to appoint the sole Arbitrator in terms of the above clause and not this Court. Mr. Vasdev, learned Senior counsel for the Petitioner, on the other hand placed reliance on the decision of the Supreme Court in ***Indian Oil Corporation Limited v. M/s. Raja Transport (P) Limited*** (2009) 8 SCC 520 and in particular the observations in para 45 which read as under:

"45. If the arbitration agreement provides for arbitration by a named arbitrator, the Courts should normally give effect to the provisions of the arbitration agreement. But as clarified by ***Northern Railway Admn. (2008) 10 SCC 240***, where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent arbitrator in accordance with Section 11 (8) of the Act. In other words, referring the disputes to the named arbitrator shall be the rule. The Chief Justice or his designate will have to merely reiterate the arbitration agreement by referring the parties to the named arbitrator or named Arbitral Tribunal. Ignoring the named

arbitrator/Arbitral Tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted for valid reasons.”

14. Mr. Vasdev points out that the note dated 2nd January 2014 was prepared by the Chairman himself. It was only in terms of the said note that action was taken by AAI to withhold the BGs and encash them. In the circumstances, the Chairman could not be expected to take a decision for the appointment of a sole Arbitrator objectively

15. In ***Indian Oil Corporation Limited v. M/s. Raja Transport (P) Limited*** (supra), the Supreme Court carved out an exception to the general rule that where an arbitration clause names an Arbitrator, such person should normally be appointed. The said rule could be departed from where "there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the arbitrator is not likely to act independently or impartially." As far the present case is concerned, both parties have repeatedly referred to the note dated 2nd January 2014 prepared by the Chairman, AAI wherein he has given specific directions, which have been extracted hereinbefore. It is also not doubt that the action initiated by the AAI against the Petitioner was based essentially on the above note of the Chairman. In the circumstances, he can hardly be expected to take an objective decision with regard to the appointment of a sole Arbitrator to adjudicate the disputes. In the considered view of this Court, this case is squarely covered by the exception carved out in the decision ***Indian Oil Corporation Limited v. Raja Transport (P) Limited*** (supra).

16. Recently, the above legal position was reiterated by the Supreme Court in ***North Eastern Railway v. Tripple Engineering Works (2014) 9 SCC 288***.

17. Mr. Rai, the learned counsel for AAI, then submitted that this being a technical matter, a retired Engineer of the CPWD may be appointed. Mr. Vasdev stated that he had no objection to the Court appointing a retired Engineer as a sole Arbitrator.

18. Accordingly, the Court appoints Mr. K.K. Verma, Additional Director General (retired), CPWD, residing at EA-290, DDA Flats, Maya Enclave, New Delhi-110064 (Mobile No. 9971127883) as a Sole Arbitrator to adjudicate the following disputes: (a) the non-release by AAI of the BGs furnished by the Petitioner, (b) the justification for AAI to encash the BGs and (c) the retention by AAI of certain amounts owing by it to the Petitioner. The AAI can also prefer counter-claims, if any, in relation to the above claims. The arbitration shall take place under the aegis of the Delhi International Arbitration Centre ('DAC'). The fees of the learned Arbitrator will be in terms of the Delhi High Court Arbitration Centre (Arbitrators' Fees) Rules.

19. The petition is disposed of. Order be given *dasti*. A copy of this order be communicated to the learned Arbitrator as well as Additional Coordinator, DAC forthwith.

S. MURALIDHAR, J.

JANUARY 21, 2015

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