

IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 300/2014

ZANGAS-KPTL CONSORTIUM Petitioner
Through: Mr. Dayan Krishnan, Senior Advocate
Mr. Anil Airi, Mr. Ravi Krishan Chandana and
Ms. Anu, Advocates.

versus

GAIL (INDIA) LTD Respondent
Through: Mr. Ramji Srinivasan, Senior Advocate
with Ms. Ranjana Gawai, Mr. Shailesh Suman,
Mr. S. Mehrotra & Ms. Sara Sundaram, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
13.03.2015

1. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 ('Act') by M/s Zangas KPTL Consortium seeking the appointment of a sole Arbitrator to adjudicate the disputes between it and the Respondent GAIL (India) Ltd. ('GAIL') arising out of a the contract for laying, testing and commissioning of Vijaipur-Dadri Pipeline Section and associated services for Vijaipur-Dadri-Bawana Pipeline Project.

2. The Petitioner's tender for the above project was accepted by the Respondent. The fax of acceptance ('FOA') dated 12th September 2008 was issued for Rs.239.99 crores. The mechanical completion of works was to be achieved within eleven months from the date of the FOA i.e., by 11th August 2009. Drying and commissioning was to happen within one month

thereafter. It is stated that a detailed letter of acceptance ('LOA') dated 7th November 2008 was subsequently issued. It was stated that the time for completion would include the time required for mobilization/de-mobilization and carrying out of works. The extended stay compensation ('ESC') was Rs.40 lacs per month. Engineers India Ltd. ('EIL') was named as the 'Engineer' for the entire project.

3. The case of the Petitioner is that there was a substantial change in the location of the designated storage yard and transportation of the pipeline was beyond the lead of 21 km. According to the Petitioner this change resulted in extra work having to be performed by the Petitioner which resulted in increase in cost of transportation and ancillary costs. By letter dated 22nd December 2008, the Petitioner informed the Respondent that it would be required to be compensated for the extra work. The Petitioner claimed that it was liable to be paid approximately Rs 7.26 crores for the extra work.

4. The second bone of contention is that according to the Petitioner the Respondent failed to make available to the Petitioner the continuous stretch of site for execution of the work. The Petitioner had to therefore 'move in and move out' from the site i.e., mobilization of resources for a short stretch and thereafter de-mobilize and again mobilize as per the new stretch made available at different times. This led to idling of men and machinery and additional costs for 'move in and move out' to the Petitioner. Claiming these additional costs, the Petitioner wrote to the Respondent on 29th May 2009 and 19th April 2010.

5. The case of the Respondent is that the above claims were totally untenable

in terms of the contract. The claim in regard to extra work as a result of change of location was rejected by the EIL by letter dated 5th June 2009. Reference is made to Clause 32.5 of the Special Conditions of Contract ('SCC'). As regards the costs for 'move in and move out', EIL rejected it by its letter dated 23rd April 2010 by referring to Clause 28.5 of the SCC.

6. On 14th December 2010, a No Claim Certificate ('NCC') was signed by the Petitioner in which the actual completion date was indicated as 30th August 2010. The relevant portion of the NCC was in the following terms:

“This is to certify that we don't have any claim of whatsoever nature except the balance dues against the final bill & Extra work submitted.

We further certify that the payment certified against this bill shall be full and final settlement of work executed the subject contract.”

7. On 19th January 2011 the Petitioner raised the claim for the extra lead for pipeline transportation due to the shifting in the location of the pipe dump site. On 20th January 2011, EIL again rejected the said claim. By a covering letter dated 30th March 2011 addressed to the EIL, the Petitioner submitted a revised bill No.18 'final bill' for Section B for a sum of Rs. 29,48,56,116.81. Attached to the said letter was the invoice raised by the Petitioner with the description of the work being 'laying of pipeline and related facility'. By a parallel letter of the same date i.e. 30th March 2011 the EIL forwarded the said bill to the Respondent stating that the revised bill had been given after the Petitioner had given its consent for withdrawing the claim for extra Claim No.4 for a sum of Rs. 18,72,183. This was followed by an internal memo of the same date from the General Manager (PE) of the Noida office

to the New Delhi office advising that after adjusting the on account payment the amount payable under the revised final bill comes to Rs.19,28,775,15. It is stated that the said amount has since been paid to the Petitioner. The Respondent has placed on record a complete statement regarding the aforementioned payments having been made on 18th April 2011.

8. The Petitioner addressed a letter dated 2nd September 2011 to the General Manager (Legal) referring two specific disputes. The first was on account of change of location of stockyard. It quantified the claim at Rs.7,26,24,674.64. The second dispute was on account of 'move in and move out'. This claim was quantified at Rs.4,18,34,113. On 18th October 2011 a completion certificate was issued.

9. On 18th January 2012 another letter was addressed by the Petitioner seeking resolution of the above two disputes. In response thereto on 9th March 2012 the Respondent advised the Petitioner that three conciliators had been nominated by the Respondent. They would constitute the Settlement Advisory Committee ('SAC'). The said letter drew the Petitioner's attention to the detailed terms and conditions set out in the GAIL (India) Ltd. Conciliation Rules, 2010 (hereinafter 'Conciliation Rules'). It was stated that the date and time of the first meeting of the SAC would be communicated in the due course.

10. Rules 10 and 16 of the aforementioned Conciliation Rules, which are relevant for the present purposes, read as under:

“10 (a) The total number of hearings/meetings of the Settlement Advisory Committee as Conciliators in a Conciliation proceeding shall be not more than 5, but the same may be

extended in consultation with and with the mutual consent of the parties.

(b) The Settlement Advisory Committee as Conciliator (s) shall attempt to dispose of the entire Conciliation proceedings within a time frame of seven months, but the same may be extended in consultation and with the consent of the parties, but not beyond the ninth month.

(c) Notwithstanding the above, a Settlement Agreement signed after the 9 months period stipulated above shall not become void or unenforceable only because of such an Agreement having been signed after the stipulated nine months period.

16.(a) During the course of/pendency of conciliation proceedings under these Rules, the Parties shall not initiate or take any steps to initiate any Arbitral or judicial proceedings in respect of a dispute, which is a subject matter of the pending conciliation proceedings.

(b) Subject to the above Sub-Rule (a), reference of any dispute to conciliation under these Rules shall be without any prejudice to any of the rights and interest of the parties involved, more particularly the rights of the parties to resort to other dispute resolution mechanisms such as arbitration, litigation etc.”

11. As it transpired the SAC could not complete the exercise within the outer time limit of nine months. On 29th January 2014, the Petitioner wrote to the Respondent pointing out that since no amicable settlement could be achieved before the SAC within the stipulated time, the Petitioner was invoking the arbitration proceedings in terms of Clauses 59.11 and 59.12, of the subject conditions of the contract. It was requested that the Respondent should submit within 14 days the details of three independent and distinguished persons to enable the Petitioner to choose one of them as a sole Arbitrator.

12. By its letter dated 17th April 2014, the Respondent rejected the request

pointed out that the claims now raised by the Petitioner were not included in the final bill; the Petitioner had issued a NCC on 14th December 2010 of its own free will; the claims made fell within excepted matters and lastly the claims were barred by time.

13. The Petitioner addressed another letter dated 23rd April 2014 to the Chairman-cum-Managing Director of GAIL for his intervention. Thereafter the present petition was filed.

14. Mr. Dayan Krishnan, learned senior counsel appearing for the Petitioner, points out that in terms of Clause 27.3 SCC a change order which requires a change in the costs of the works having an impact on the contract value 'shall be dealt towards the end of contract'. Consequently, the claim for the extra work and the variation orders could not have been made prior to the completion of the contract. He submitted that in the NCC dated 14th December 2010 the Petitioner had reserved its right to claim the balance dues both against the final bill and the 'extra work' submitted. According to him the claim made by the Petitioner in respect of the two matters by its letters dated 2nd September 2011 and 18th January 2012 resulted in the SAC being constituted by the Respondent on 9th March 2012. As long as the SAC did not give its decision, the Petitioner could not have in terms of the Clause 16(a) of the Conciliation Rules initiated steps for arbitration. Placing reliance on the decision in *Indian Oil Corporation Ltd. v. SPS Engineering Ltd. (2011) 3 SCC 507*, Mr. Krishnan submitted that in the circumstances it could not be said that the claim raised by the Petitioner by invoking the arbitration clause on 29th January 2014 was time barred or a dead claim. It ought to be left to be decided by the Sole Arbitrator. He submitted that inasmuch as the

Respondent had failed to appoint a sole Arbitrator in terms of the procedure outlined in the SAC, this Court should in exercise of its jurisdiction under Section 11(6) of the Act, appoint an Arbitrator.

15. Mr. Ramji Srinivasan, learned senior counsel appearing for the Respondent, maintained that the claim for the extra work had been rejected by EIL way back on 5th June 2009. The claim for 'move in and move out' had been rejected on 23rd April 2010. He submitted that Rule 10 (b) of the Conciliation Rules gave a very specific time frame of nine months for the conciliation proceedings to conclude. Referring to Rule 16 (b) he submitted that the reference to conciliation of the disputes was without prejudice to the rights of the parties “more particularly the rights of the parties to resort to other dispute resolution mechanisms such as arbitration, litigation etc.”. He submitted that the Petitioner was fully aware of both the claims being time barred since the limitation in respect of both the claims began to run from the respective dates of rejection by EIL. The Petitioner took no steps to save its rights as to limitation and allowed both the claims to become time barred. It could not seek to take refuge under Clause 16 (a) of the Conciliation Rules to urge that the limitation for both the claims did not expire. Since both the claims were on the face of it time barred this Court should not entertain the present petition.

16. The Court finds that a letter dated 9th March 2012 written by the Respondent to the Petitioner, advising it of the setting up of the SAC for ‘amicable settlement’ was specifically in respect of the above two disputes raised by the Petitioner by its letter dated 2nd September 2011 and for which a reminder was sent on 18th January 2012. Although, Mr. Ramji Srinivasan

sought to urge that the said letter dated 9th March 2012 was without prejudice to the rights of the Respondent, it does not state so. It also does not reserve the Respondent's right to urge that the said two claims were barred by limitation.

17. Once the dispute was before the conciliation process, then in terms of Rule 16(a) neither party could initiate any steps towards referring the disputes to arbitration. This is evident from Rule 16(a) of the Conciliation Rules. Rule 16(b) begins with the words “Subject to the above Sub-Rule (a)” and states that it will be open to the either party to have resort to other dispute resolution mechanisms such as arbitration, litigation. The rights referred to in Rule 16 (b) would obviously be the right to seek interim reliefs like filing a petition under Section 9 of the Act depending on the nature or urgency of the interim relief sought.

18. The language of Rule 16 (b) appears to have been borrowed from Section 77 of the Act which also states that the pendency of the conciliation proceedings would not prejudice the rights of a party to initiate arbitration proceedings ‘where, in his opinion, such proceedings are necessary for preserving his rights’. However, this does not imply that if a party fails to take steps to preserve his rights, which in his opinion are necessary to take, then such party would lose his right to go in for arbitration. That is not the legislative intent.

19. Likewise, Rule 16(b) read with Section 16(a) has to be understood as preserving the right of the parties to seek interim measures in order to protect their respective ‘rights’ notwithstanding the pendency of the conciliation

proceedings. Otherwise there would be no purpose in Rule 16 (a) requiring the Petitioner to await the outcome of the conciliation proceedings before initiating the steps for seeking reference of the disputes to the arbitration. No doubt the Petitioner could not have waited indefinitely. The Petitioner had to wait for the period of nine months to lapse before it could seek reference of the disputes, which remained unresolved, to arbitration. This court is therefore, *prima facie*, unable to be persuaded to hold that the claims raised by the Petitioner are 'patently long time barred'. It is a disputed question for which evidence would have to be led by the parties and examined by the Arbitrator.

20. The following observations in *Indian Oil Corporation Ltd.*(supra) are relevant in this context:

“To find out whether a claim is barred by res judicata, or whether a claim is "*mala fide*", it will be necessary to examine the facts and relevant documents. What is to be decided in an application under Section 11 of the Act is whether there is an arbitration agreement between parties. The Chief Justice or his designate is not expected to go into the merits of the claim or examine the tenability of the claim, in an application under Section 11 of the Act. The Chief Justice or his Designate may however choose to decide whether the claim is a dead (long-barred) claim or whether the parties have, by recording satisfaction, exhausted all rights, obligations and remedies under the contract, so that neither the contract nor the arbitration agreement survived. When it is said that the Chief Justice or his Designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time barred claim and there is no need for any detailed consideration of evidence. We may elucidate by an illustration: If the contractor makes a claim a decade or so after completion of the work without referring to any acknowledgement of a liability or other factors that kept the claim alive in law, and the claim is patently long time barred, the

Chief Justice or his Designate will examine whether the claim is a dead claim (that is, a long time barred claim). **On the other hand, if the contractor makes a claim for payment, beyond three years of completing of the work but say within five years of completion of work, and alleges that the final bill was drawn up and payments were made within three years before the claim, the court will not enter into a disputed question whether the claim was barred by limitation or not. The court will leave the matter to the decision of the Tribunal.** If the distinction between apparent and obvious dead claims, and claims involving disputed issues of limitation is not kept in view, the Chief Justice or his designate will end up deciding the question of limitation in all applications under Section 11 of the Act.” (emphasis supplied)

21. Consequently, the Court reserves the right of the Respondent to urge its plea that the Petitioner’s aforementioned two claims are time barred before the learned Arbitrator who shall then decide such issue in accordance with law uninfluenced by any observations made by this Court in the present order.

22. The Court, accordingly appoints Justice R.C. Chopra, former Judge of this Court, residing at N-12, Greater Kailash-I, New Delhi-110048 (Mob. No. 9818097777) as sole Arbitrator to adjudicate the aforementioned two specific disputes raised by the Petitioner in its letter dated 2nd September 2011 addressed to the Respondent. The Petitioner is permitted to claim any further amount in respect of the two claims towards the interest and costs of arbitration as well. All the pleas of the Respondent in respect of the aforementioned claims are permitted to be urged and the learned Arbitrator will then decide all such pleas of both the parties in accordance with law.

23. The arbitration shall take place under the aegis of the Delhi International
Arb. P. No. 300/2014 *Page 10 of 11*

Arbitration Centre ('DAC'). The fees of the learned Arbitrator will be in terms of the Delhi International Arbitration Centre Arbitration Proceedings' (Arbitrators' Fees) Rules.

24. The petition is disposed of. A copy of this order be communicated to the learned Arbitrator as well as Secretary, DAC forthwith.

S. MURALIDHAR, J.

MARCH 13, 2015

mg

