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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

ARBITRATION APPLICATION 11 OF 2014

M/s A2Z Infraservices Limited, Gurgaon

APPLICANT

VERSUS

Union of India and Another

RESPONDENTS

.....
Mr. Soumitra Paliwal h/f Mr. S. H. Panchal, Advocate for applicant
Mr. Manish N. Navandar, Advocate for respondent
.....

[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 12th AUGUST, 2016

ORDER :

1. Heard learned advocates for the parties.
2. The applicant had been awarded a contract of work of mechanized cleaning of coaches at Nanded Coaching Depot, South Central Railway, Nanded by the respondents under a written instrument containing provision for resolution of disputes by arbitration.
3. Duration of the contract was of five years from 8th October, 2007 to 07th October, 2012. The applicant, accordingly, had carried out the work till June, 2011. It is the case of the applicant that after June, 2011, the respondents started

harassing the applicant and it had become difficult for it to continue the contractual work.

4. Under a communication dated 11th November, 2011 the applicant indicated its inability to execute the work and further expressed that it would withdraw from the work. Under a communication dated 31st January, 2012 respondent No.2 had informed the petitioner that they will not accept closure of contract. The petitioner protested penalties imposed on it by the respondents. Upon requests / instructions of respondents, applicant continued working after period of notice up to 27th April, 2012. Beyond that, it is submitted, it was impossible for the applicant to keep on executing work.

5. The respondents purported to forfeit security deposit and encash performance bank guarantee furnished by the applicant. The applicant claimed certain amounts to be due and payable from the respondents, however, there was no response. It is contended that dispute between the parties had arisen and as such, the applicant had invoked arbitration clause.

6. Despite communication invoking arbitration clause for over thirty days, the respondents did not act upon, eventually leading the applicant to institute proceedings pursuant to the

provisions of section 11 of the Arbitration and Conciliation Act, 1996.

7. Learned advocate for the applicant, during the course of hearing, pointed out that while initially, proceedings were lodged at the Principal Seat at Bombay and notice was issued.

8. Upon notice having been served, a communication dated 14th/15th July, 2014 came to be issued constituting arbitration committee nominating persons from the panel of officers suggested under the list and the applicant was advised to give choice of two officers from the list, one from which was to be appointed by the General Manager.

9. Subsequently, the matter came to be transferred to Bench at Aurangabad and then reply has been filed on behalf of the respondents opposing claims under the arbitration application.

10. It has been referred to in the affidavit in reply that the petitioner had refused to accept the recommendations of the pre-arbitration committee, since it had approached high court for appointment of arbitrator. It has further been referred to that suggestion by the respondents to choose upon arbitrator out of four names given were refused to be accepted by the applicant,

since that had not come within time. It is referred to that all the while efforts were being made for reconciliation before appointment of arbitration committee, but those have proved to be in vain which consumed considerable period and in the meanwhile, the applicant had approached high court. In such a case, opting for an arbitrator through legal action would deprive the respondents to settle the issue through agreed established procedure of resolving grievances.

11. The reply does not appear to resist applicant's contentions for appointment of arbitrator save stating that the same is not maintainable as respondent had initiated action for constitution of arbitration committee and the applicant remained non co-operative and as such, application be dismissed.

12. It appears that the respondents appear to have considered that penalties were sought to be levied alleging poor performance and that the applicant had purported to withdraw from execution of contract. Taking review of the case, the General Manager, South Central Railway, had considered that the case was not fit for arbitration and it could be decided on merits at CME's level. The Divisional Railway Manager, Nanded had proposed a meeting. However, the applicant had not shown

willingness, since it had already approached this court for appointment of arbitrator.

13. The respondents had taken an action of appointment of pre-arbitration committee and the committee, which had recommended forfeiture of security deposit and encashing of performance bank guarantee and further recommended refund of penalty levied on the applicant.

14. Learned advocate for the applicant contends that events as have occurred would evince that dispute has arisen between the parties and there is an arbitration clause, and the arbitration clause having been duly invoked which had not been responded to by respondents, an action under section 11 of the Arbitration and Conciliation Act, 1996 for appointment of arbitrator is being pursued.

15. It is submitted that there is now resistance to appointment of arbitrator taking up an altogether new contention that the dispute is from the category which is referred to as "*excepted matter*" under the arbitration clause. However, the position would not be so.

16. Learned advocate refers to clause 16 of the agreement,

particularly clause "C" thereof and contends that the forfeiture of security deposit and encashment of performance bank guarantee, invoking said clause has given rise to a dispute between the parties and a dispute has arisen, whether forfeiture and encashment has been in accordance with the terms of the agreement and could be resorted to. As such, the arbitration clause has been invoked. Even the respondents, hitherto had not been at loggerheads in matter of arbitration and in fact after receipt of notice of arbitration application, had issued communication dated 14th / 15th July, 2014. Even respondents during proceedings depicted acceptance to refer the matter to arbitration. He submits that the respondents are estopped from going back on, as to whether the dispute can be referred to arbitrator or not. They would not be allowed to blow hot and cold in the same breath, sending communication on one occasion, accepting that a dispute has arisen for settlement by arbitration, reply does not refer to any such ground and now contending that the dispute cannot be said to be gone into by the arbitrator.

17. He submits that the situation is now different in view of the amendments in 2015 to the Arbitration and Conciliation Act, 1996. Officers from the Railway Administration as arbitrators is passé. One will have to look for an independent arbitrator rather

than an employee or for that matter a retired employee of railway administration.

18. He submits that reference to the same has been necessitated since arguments tend to go beyond the scope of the arbitration clause or for that matter even the reply filed by the respondents.

19. Countering aforesaid submissions, Mr. Navandar, learned advocate for the respondents submits that action about forfeiture of security deposit and encashment of performance bank guarantee is pursuant to the terms of the contract and the railway administration has been authorized, under the terms. Since this being so, and having regard to that the petitioner has abandoned execution of work under the contract, such an abandonment being beyond the scope of arbitration pursuant to the terms of the agreement, being a matter covered under the term / clause 62 (1) (vi), which is captioned as "*Determination of contract owing to default of contractor*".

20. As such, according to him, since the abandonment of contract is owing to the default of the contractor, the situation is squarely covered by clauses 62 (1) (vi) and 63. It becomes an '*excepted matter*' i.e. matters not arbitrable. He as such, goes

on to submit that in the circumstances, the court will have to consider as to whether a dispute, which can be said to be arbitrable is in existence or that it can be said that there is no arbitration agreement in respect of nature of dispute which has arisen in the matter.

21. Reproduction of clauses 62 (1), 63 and 64 (1) (i), (1) (ii), (3) (a) (ii) would facilitate appreciation of the matter in the proper perspective.

“62 (1) Determination of contract owing to default of contractor:- If the Contractor should:-

- (i)*
- (ii)*
- (iii)*
- (iv)*
- (v)*
- (vi) abandon the contract, or”*

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Then any in any of the said cases, the Engineer on behalf of the Railway may serve the Contractor with a notice (Proforma at Annexure III) in writing to that effect and if the Contractor does not within seven days after the delivery to him of such notice proceed to make good his default in so far as the same is capable of being made good and carry on the work or comply with such directions as aforesaid to entire satisfaction of

the Engineer, the Railway shall be entitled after giving 48 hours notice (proforma at Annexure IV) in writing under the hand of the Engineer to rescind the contract as a whole or in part or parts (as may be specified in such notice) and after expiry of 48 hours notice, a final termination notice (proforma at Annexure (V) should be issued.”

“63. Matters finally determined by the Railway – All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the GM and the GM shall within 120 days after receipt of the contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in clause 8, 18, 22 (5), 39, 43 (2), 45 (a), 55, 55-A (5), 57, 57-A, 61 (1), 61 (2) and 62 (1) i to (xiii) B of General Conditions of contract or in any clause of the special conditions of the contract shall be deemed 'excepted matters' (matters not arbitrable) and decisions of the Railway authority, thereon shall be final and binding on the contractor; provided further that 'excepted matters' shall stand specifically excluded from the purview of the arbitration clause.”

64 (1) (i) Demand for Arbitration

In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the “excepted matters” referred to in Clause 63 of these conditions, the contractor, after 120 days but within 180 days

of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

64 (1) (ii) *The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item wise. Only such dispute (s) or difference (s) in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference.*

(a) *The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.*

(b) *The claimant shall submit his claim stating the facts supporting the claims along with all the relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.*

(c) *The Railway shall submit its defence statement and counter claim (s), if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by Tribunal.*

(d) *The place of arbitration would be within the geographical limits of the Division of the Railway where the cause of action arose or the Headquarters of the concerned Railway or any other place with the written consent of both the parties.*

64 (2)

64 (3)

64 (3) (a) (ii) *In cases not covered by the clause 64 (3) (a) (i), the Arbitral Tribunal shall consist of a Panel of three Gazetted Rly. Officers not below JA grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will sent a panel of more than 3 names of Gazetted Rly. Offices of one or more departments of the Rly. Which may also include the name (s) of retired Railway Officer (s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM. Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of the contractor's nominees. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts departments. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other department of the Railway for the purpose of appointment of arbitrator.”*

Aforesaid clauses are indicative of that in case of any dispute and difference, procedure that would be required to be taken recourse to.

22. Events, as those have occurred show that applicant had

raised certain claims against the respondents and made grievance in respect of forfeiture of security deposit and encashment of performance bank guarantee. There had been no response from respondents and as such, applicant opted for invoking arbitration clause. Applicant had put in its requisition and demanded arbitration under a communication dated 30th January, 2013 and there had been no response from the Railways. In the circumstances, present arbitration application had been lodged initially at the principal seat at Bombay and eventually the same came to be transferred at this court. It is when the matter was pending before this court, a communication dated 14th / 15th July, 2014 had been made suggesting election from panel of officers referred to in said communication. However, by then, the court had seisin over the matter. Additional consideration may not be out of place to refer to that in 2015, the Arbitration and Conciliation Act has undergone some amendments.

23. In view of the aforesaid there appears to be claim that dispute between the parties has arisen and arbitration is sought by the applicant claiming that there is existence of arbitration agreement. The proceedings have been initiated. It is being contended by respondents that there is abandonment. Whether

there exists or not an arbitration agreement for dispute of nature arising and contentions about "*excepted matters*" would be amenable to be considered by the arbitration tribunal itself, having regard to section 16 of the Arbitration and Conciliation Act, 1996.

24. In the circumstances, situation leads me to consider that the matter deserves to be sent for arbitration. Parties, on instructions, agree upon Justice (Retd) Mr. A. B. Naik to be their arbitrator. As such, Mr. Justice A. B. Naik is requested to take up arbitration proceedings. All points, grounds and contentions are kept open for the parties.

25. Arbitration application stands allowed in aforesaid terms and is disposed of.

[SUNIL P. DESHMUKH, J.]