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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 472/2015

LMJ INTERNATIONAL LTD

..... Petitioner

Through: Mr. Sanjay Poddar, Senior Advocate
with Mr. Vikash Sethi, Mr. Govind Kumar and
Mr. Sachin Kumar, Advocates.

versus

**INTEGRATED WAREHOUSING KANDLA PROJECT
DEVELOPMENT PVT LTD**

..... Respondent

Through: Mr. Rishi Aggarwala and Ms. Malavika
Lal, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
10.11.2016

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1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') filed by LMJ International Ltd. is to an Award dated 26th May, 2005 passed by the sole Arbitrator in the dispute between the Petitioner and the Respondent, Integrated Warehousing Kandla Project Development Pvt. Ltd.

2. The background facts as narrated by the Petitioner in the petition are that the Respondent floated a tender or request for proposal ('RFP') in November 2010 for participation in the bidding process for the selection of the strategic partner for the development of project for setting up a free trade and warehousing zone ('FTWZ') at Kandla in Gujarat on 75 acres of land

allotted to the Respondent by the office of the Development Commissioner, Kandla Special Economic Zone (KASEZ).

3. The Petitioner is stated to be the lead company/member of a consortium consisting of three companies, namely, LMJ International Ltd., LMJ Logistics Ltd., and Veerprabhu Marketing Ltd. formed with the sole purpose of participating in the aforementioned tender/RFP. The Petitioner is stated to be the power of attorney holder of the other two companies, namely, LMJ Logistic Ltd. and Veerprabhu Marketing Ltd., and had participated in the tender/RFP accordingly.

4. The Respondent is the wholly-owned subsidiary company of Free Trade Warehousing Pvt. Ltd. ('FTWPL') promoted by MMTC Ltd. and Infrastructure, Leasing and Financial Services Ltd. ('IL&FS') with the objective of carrying on the business of establishing, acquiring, developing, managing and maintaining warehouses and warehousing zones in free trade areas. It is stated that the Respondent had signed the Co-Developer Agreement with KASEZ for developing the FTWZ. Pursuant thereto, a letter dated 15th February, 2007 was issued by the Department of Commerce, Ministry of Commerce and Industries, Government of India, granting approval to the Respondent to develop the project for setting up a free trade and warehousing zone for providing specialized multi-product warehousing services at Kandla. The office of the Development Commissioner, KASEZ had allotted land for KFTWZ on sub-lease basis which was to be a part of the existing KASEZ. The possession of the land was handed over to the Respondent. The Respondent decided to invite the bids to facilitate the

process of selection of strategic partner interested in acquiring a minimum 74% or the maximum 100% of the shareholding of the Respondent.

5. It is stated that the Respondent floated three tenders i.e., March 2008, August 2008 and August 2009, respectively. In all three tenders, the Petitioner participated but the tender could not be completed.

6. Thereafter, on 1st November 2010, the Respondent floated a tender/RFP for participation in the bidding process for the selection of the strategic partner for the development of the project for setting up a FTWZ and also for providing specialized multi-product warehousing services at Kandla.

7. It is stated by the Respondent in the tender that the total area to be developed by the successful bidder was 75 acres. The scheme envisaged creation of a world-class infrastructure for the warehousing of various products, state-of-the-art equipment transformation and handling facility, commercial office spaces, water, power communication and connectivity with one-stop clearance of import and export formality.

8. The RFP document contained Appendix 13 titled 'Format for Share Purchase and Shareholder's Agreement'. This format contained Article 24 which provides for arbitration. Article 24.2 envisages the constitution of a three-Member Arbitral Panel to be nominated one each by MMTC, IL&FS and 'XXXX', viz., the successful bidder. This Appendix 13 would apply in the event the bidder was opting for purchase of 75% shares in the Respondent. Where the bidder was bidding for the purchase of 100% shares, as in the present case, Appendix 14 was to apply. Appendix 14 was titled

‘Format for Share Purchase Agreement’ and this, too, contained an arbitration clause. It simply stated that the disputes between the parties would be settled by “final and binding arbitration in accordance with the Act and that the arbitration proceedings shall take place at New Delhi, India.”

9. The fact of the matter is that while the RFP was issued by the Respondent, the question of entering the SPAs either in terms of Appendix 13 or Appendix 14 to the RFP would not arise till the bid was finalised and the offer made by the Petitioner was in fact accepted. In other words, the arbitration clauses forming part of either agreement would not become operative till the agreements in the format set out either in Appendix 13 or Appendix 14 were signed by both parties.

10. The Petitioner submitted its technical and financial bids along with the bid security equivalent to Rs. 2 crores in the form of Bank Guarantee (‘BG’) dated 5th February, 2011 issued by the Allahabad bank.

11. On 28th July, 2011, the Respondent wrote to the Petitioner stating that the finalization of the bids would take some time. The Respondent then requested the Petitioner to extend the date of the validity of the bid from 7th August, 2011 to 7th October, 2011. The Petitioner states that even while it was in the process of discussing the issue with its other consortium partners, on 5th August, 2011 the Respondent issued a Letter of Intent (LOI) in favour of the Petitioners for development of the KFTWZ on 100% equity basis.

12. Clause 9 was inserted in the LOI which stipulated the settlement of disputes by a sole Arbitrator appointed by the Director of FTWPL or his

nominee. The said clause reads as under.

"9) Notwithstanding anything to the contrary contained hereinabove, the arbitration clause hereunder shall be a final and binding agreement between IWKPDL/ FTWPL and the selected Bidder and shall survive the cancellation/ revocation/ annulment of this LOI:

(i) Any and all dispute controversy or claim, relating to or arising out of the LOI or the rights and obligations of IWKPDL/ FTWPL and the Selected Bidder, under this LOI, including but not limited to validity, interpretation, scope, effect, termination of the terms contained in this LOI shall be settled by arbitration by a sole arbitrator to be appointed by Director of FTWPL or his nominee within thirty (30) days after receipt of request for appointment of arbitrator, which notice should contain all information regarding the dispute (s) between the parties.

(ii) The arbitration shall be conducted in accordance with the Arbitration and Conciliation Act, 1966 as amended. The venue of arbitration shall be at New Delhi, India and it shall be conducted in the English language.

(iii) The arbitral award shall be in writing, state the reasons for the award and be final and binding on IWKPDL/ FTWPL and the Selected Bidder. The award may include award may include an award of costs, including reasonable attorney's fees and disbursements.

(iv) The agreement shall be governed by the laws of India and all matters arising out or relating to this LOI, the courts at New Delhi, India shall have exclusive jurisdiction."

13. The Petitioner states that it was "again taken by shock and surprise when it came to know" upon verification by its technical expert that the actual land for development was less than 75 acres. This, according to the Petitioner, was a misrepresentation by the Respondent, thus entitling the Petitioner to avoid the agreement. The Petitioner did not sign the LOI but

wrote a letter dated 16th August, 2011 seeking clarification from the Respondent.

14. It is stated that the Respondent convened a meeting with the Petitioner on 17th August, 2011 and sought time till 19th August, 2011 to provide the clarification sought. The Petitioner states that it was decided that a joint inspection of the site would be undertaken on 25th August, 2011. However, according to the Petitioner, the Respondent, all of a sudden, issued a show cause notice ('SCN') dated 18th August, 2011 to the Petitioner asking it to reply within seven days as to why the BG deposited by it should not be encashed. The Petitioner replied on 22nd August, 2011 seeking clarification regarding availability of the land. In this letter, *inter alia*, the Petitioner pointed out that the land was less than 75 acres and that if there was deviation in the land "it will change the entire scenario of our bidding".

15. The Petitioner states that a joint inspection was undertaken by both the parties on 25th August, 2011. It is submitted that the verification of the land by AUTOCAD method was undertaken. Citing the reason that physical inspection of the site would involve huge costs, the Petitioner was not physically present at the time of inspection. However, a reference was made to the measurement carried out by the surveyor, M/s Chestha, and according to the Petitioner, it was indicated that the actual land available was 68.92 acres.

16. The Petitioner wrote to the Respondent on 6th September, 2011 asking the Respondent to provide details of the shortage of land of 6.08 acres. The Respondent by email dated 9th September, 2011 insisted that the LOI be

complied with by 15th September, 2011 failing which the Respondent would be compelled to take action.

17. On 15th September, 2011, the Petitioner filed OMP 703/2011 in this Court under Section 9 of the Act to restrain the Respondent from invoking and encashing the BG in the sum of Rs. 2 crores. An interim order to that effect was passed on 15th September, 2011. Thereafter on 24th November, 2011 the following order was passed:

“This is a petition under Section 9 of the Arbitration and Conciliation Act, 1996. While issuing notice in the petition, Respondent No.1 was restrained from invoking and encashing the bank guarantee No. 0191311SDG000004/LMJ dated 5th February 2011 for a sum of Rs.2.0 crores issued by Respondent No.2, i.e., Allahabad Bank, S.M.E.F.,3, Red Cross Place, Kolkata.

Mr. Rajiv Nayar, learned counsel for the Respondent on instructions submits that Respondent has appointed an Arbitrator and the interim order be continued for a period of six weeks after the Arbitrator enters upon reference with a direction to the Arbitrator to consider the prayer of the Petitioner herein for interim relief at the first instance.

Mr. Sandeep Sethi, learned Senior counsel for the Petitioner on instructions accepts the offer, however, he submits that appointment of the Arbitrator by the Respondent is without prejudice to his rights and contentions. Mr. Sethi further submits that the interim order should continue till such time the same is not varied by the Arbitrator and after hearing both the parties. While the apprehension of Mr. Nayar is that the interim order should not be prolonged by the Petitioner, Mr. Sethi submits that interim order cannot be automatically vacated without hearing.

Accordingly, it is agreed that the Petitioner will file an

application for interim relief under Section 17 of the Arbitration and Conciliation Act before the Arbitrator within ten days of his entering upon reference. The Arbitrator shall after hearing dispose of the application preferably within six weeks thereafter and the interim order will continue till then.

In view of above, the petition is disposed of.”

18. The Petitioner then filed AA No. 395 of 2011 in this Court under Section 11(6) of the Act seeking the appointment of an Arbitrator in terms of Clause 24 of the RFP. What was perhaps not noticed at that stage was that Article 24.2 which was part of Appendix 13 would not apply in the present case. Secondly, the Petitioner was bidding for 100% of the shares, therefore, it was Appendix 14 that would be applicable. Thirdly, also the arbitration clause was part of a 'format' SPA which had not yet been entered into between the parties. On its part, the Respondent was relying on the arbitration clause in the LOI which, again, was not applicable because the LOI had not been signed by the Petitioner by way of acceptance.

19. In its order dated 9th December, 2011 disposing of the aforementioned AA No. 395 of 2011, the Court noted that the Respondent had in fact appointed the sole Arbitrator in terms of the clause in the LOI. The Court negated the objections of the Petitioner to the said Arbitrator continuing as such. However, the Petitioner was permitted to go before the Arbitrator and object to his jurisdiction by filing an application under Section 16 of the Act. The relevant portion of the order passed by this Court reads as under:

"8. The Arbitrator who was appointed by the Respondent entered upon reference by a letter dated 2nd December 2011 and asked the parties to appear before him on 29th December 2011

in regard to the application filed by the Petitioner under Section 17 of the Act.

9. Mr. Sandeep Sethi, learned Senior counsel appearing for the Petitioner relies on the decision of the Supreme Court in ***Unissi (India Private Limited v. Post Graduate Institute of Medical Education and Research (2009) 1 SCC 107*** to contend that with the Petitioner having submitted its bids on the basis of the RFP which contained the arbitration Clause 24.0 and with the Respondent having issued a letter of intent accepting the said offer, it is the arbitration Clause 24 which would govern the parties and not the substituted arbitration clause as indicated in the Respondent's letter dated 5th August 2011.

10. This Court is not inclined to accept the above submission. A perusal of petition filed by the Petitioner under Section 9 of the Act shows that the Petitioner proceeded on the basis that with the Respondent's letter dated 5th August 2011 a concluded contract came into existence between the parties. There is no whisper in the said petition under Section 9, on the strength of which the Petitioner secured an interim order in its favour of stay of encashment of the bank guarantee, that the Petitioner had any objection to the conditional acceptance of its bid by Respondent by its letter dated 5th August 2011. The Petitioner was fully aware that the said arbitration clause as indicated in the letter dated 5th August 2011 was the one which would govern the parties.

11. As regards the decision in ***Unissi (India) Private Limited v. Post Graduate Institute of Medical Education and Research***, the facts are distinguishable. There, the acceptance by the Respondent of the bid submitted by the Petitioner was unconditional. It was accordingly held that the arbitration clause which figured in the proforma agreement, which formed part of the tender documents, would govern the parties. However, in the present case, the Respondent's letter dated 5th August 2011 accepting the Petitioner's offer clearly indicated that the arbitration clause earlier appearing in the RFP was

being substituted by the arbitration clause set out in the said letter.

12. It was then contended by Mr. Sethi that the Petitioner had not signed on the duplicate copy of the letter dated 5th August 2011 by way of acceptance of its conditions. Therefore, he submitted, it is the original Clause 24.0 of the RFP which would govern the parties. This submission is unacceptable for the reason that in the petition under Section 9 of the Act the Petitioner sought interim relief on the basis of the arbitration clause in the Respondent's letter dated 5th August 2011. Although in the order passed by this Court on 24th November 2011 in OMP No. 703 of 2011 the submission of Mr. Sethi that the appointment of the Arbitrator by the Respondent is without prejudice to his rights and contentions was noted, that by no means can be construed as the Petitioner having objected to the substituted arbitration clause. In any event, it would always be open to the Petitioner to raise an objection as to the jurisdiction of the Arbitrator by taking recourse to the remedy under Section 16 of the Act. It is clarified that the present order will not preclude the Petitioner from raising such a plea before the learned Arbitrator in accordance with law. When raised, such plea will be decided by the learned Arbitrator uninfluenced by the present order."

20. It is significant that this Court specifically directed that the learned Arbitrator would decide the application under Section 16 "uninfluenced" by the order of the Court. The Petitioner did file an application before the learned Arbitrator under Section 16 of the Act. This application was dismissed by the Arbitrator by an order dated 4th February, 2012. The Arbitrator selectively quoted paras 9 and 10 of the above order dated 9th December, 2011 of the Court and for some reason did not quote para 12. The Arbitrator rightly noted that "since the claimant had opted for 100% equity to be purchased he was not to be governed by appendix 13 of the RFP

but appendix 14.” However, the Arbitrator observed that, “in any case, the main RFP document does not talk of arbitration at all.” What the Arbitrator perhaps meant to convey was that the arbitration clause was contained in Appendices 13 and 14 of the RFP which were in fact format SPAs which were yet to be signed by the parties. To that extent, the learned Arbitrator was perhaps right in observing that there was no arbitration agreement yet between the parties in terms of the RFP. Therefore, the Arbitrator was right in concluding that “there is no scope for arbitration under article 24 of the tendered document”.

21. However, where the learned Arbitrator appears to have erred is in not appreciating that his own jurisdiction in terms of the arbitration clause in the LOI dated 5th August, 2011 was also in doubt. In negating the contention of the Petitioner in this regard, the learned Arbitrator observed that the Petitioner had approached this Court twice under Section 9 of the Act and on neither occasion questioned the appointment of the sole Arbitrator. The learned Arbitrator also referred to the averment by the Petitioner in OMP 703/2011 referring to Clause 9 of the LOI and article 24 of the RFP by pointing out that both of them contained an arbitration clause which formed the basis of petition under Section 9 of the Act. The Arbitrator then observed:

“Thus the Claimant was fully aware of the LOI terms and did not specifically raise any objection to the appointment of the arbitrator by the Respondent.

The above indicates that they have accepted the situation as it is. I am inclined to agree with the Respondent that the Claimant cannot approbate and reprobate in the same

breath.”

22. The learned Arbitrator was in error in making the above observation. As was already noticed by this Court while disposing of AA No. 395 of 2011, the Petitioner has specifically objected to the appointment of the Arbitrator in terms of the amended arbitration clause in the LOI. The Petitioner pointed out that it had not signed the LOI by way of acceptance. This Court in its order dated 9th December, 2011 after noting the above contention, in para 12 of its order specifically permitted the Petitioner to raise it before the Arbitrator in the application under Section 16 of the Act. Also what was overlooked was the direction of the Court that the Arbitrator should decide the issue uninfluenced by the order of the Court.

23. The arbitration clause in the LOI could not have been acted upon as the LOI also was not a document signed by both parties. At this juncture, it is important to refer to Section 7 of the Act which reads as under:

“7. Arbitration agreement.—(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through

electronic means which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

24. In terms of Section 7(3) of the Act, an arbitration agreement under the Act has to be in writing. Section 7(4) of the Act sets out the three possible modes of such agreement. None of those clauses under Section 7 (4) of the Act are attracted in the present case. Neither the said document was signed by the parties nor had they exchanged correspondence providing a record of the agreement between the parties about referring the disputes to arbitration. Even Section 7 (5) of the Act is not attracted. With there being no signed agreement between the parties, the very basis of the entire arbitration proceedings was non-existent.

25. Turning to Section 34 of the Act, it is seen that one of the grounds for invalidation of the Award is stipulated in Section 34(2)(a)(v) which reads thus:

"34. Application for setting aside arbitral award.

(2) An arbitral award may be set aside by the Court only if –

(a) the party making the application furnishes proof that –

...

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of

the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part;"

26. In the present case, the appointment of the sole Arbitrator was itself a legal error since there was no arbitration agreement between the parties justifying such appointment. This is not a case where the Petitioner waived its rights to object and Section 4 of the Act would then be attracted, as the Petitioner throughout raised an objection to the jurisdiction of Arbitrator as is noted in the order dated 9th December, 2011 and further in the filing of the application under Section 16 of the Act before the Arbitrator.

27. The inevitable result, therefore, is that the entire arbitration proceedings including the Award stand vitiated. In that view of the matter, the Court does not consider it necessary to deal with the other grounds of challenge to the impugned Award on merits. Resultantly, the impugned Award dated 26th May 2005 is hereby set aside by the Court.

28. Mr. Sanjay Poddar, learned Senior counsel appearing for the Petitioner then stated that with there being no scope for the Court to refer the parties at this stage for a fresh arbitration and in any event since there is no arbitration clause available to be invoked, the Petitioner's only remedy would be to file a suit in the Court of appropriate jurisdiction and seek to avail the benefit of Section 14 of the Limitation Act, 1963. Mr. Rishi Aggarwala, learned counsel appearing for the Respondent submitted that the Respondent would oppose the above plea of the Petitioner under Section 14 of the Limitation Act if raised before the Court in which the civil suit is filed.

29. The Court does not consider it necessary to decide the above issue in the present proceedings. It will be for the Court before which such a plea is raised to decide it in accordance with law.

30. The petition is accordingly disposed of in the above terms.

NOVEMBER 10, 2016
Mg/dn

S.MURALIDHAR, J

