

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Order delivered on: 2nd August, 2016*

+ **Arb. P. No.43/2016**

METROPARK DATATECH PVT. LTD. Petitioner
Through Mr.Dinesh C. Pandey, Adv. with
Ms.Jyoti Pandey & Mr.Tushar
Sharma, Advs.

versus

GENINS INDIA TPA LTD. & ORS Respondents
Through Mr.Pratap Shanker, Adv. with
Mr.Swetank Shantanu & Ms.A.
Shivani, Advs. for R-1 & 2.
Mr.A.K.De, Adv. with Mr.Zahid
Ali, Adv. for R-3.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J. (Oral)

1. The petitioner has filed the abovementioned petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") for the appointment of an Arbitrator to adjudicate the disputes between the parties.

Petitioner's case

2. During the period of 2013-2014, the respondents No.1 and 2 (who were appointed/nominated by the respondent No.3) approached the petitioner. After negotiations, an Enrollment Implementation Agency (Contractor) was appointed for the purposes of providing services in relation to the enrollment of beneficiaries and to provide the services related thereto including providing Smart

Cards in the specified districts covered under the Rashtriya Swasthya Bima Yojna in the States of Uttar Pradesh and Haryana.

3. From January, 2014 to 19th August, 2015, the petitioner executed the works under the Tripartite Agreements of the respondents; raised the invoices and the respondent No.1 acting for and on behalf of self as well as respondents No.2 and 3 made part payment in respect of some of the invoices and, thereby leaving a balance outstanding due and payable sum of Rs.13,08,824/- with respect to works/services of enrolments carried out/executed/done in the Districts of Kannauj and Farukhabad in the State of U.P. and Rs.38,09,208/- with respect to works/services of enrolments carried out/executed/done in the Faridabad, Jind, Jhajjar, Panchkula and Sonapat Districts of Haryana thereby totalling to the sum of Rs.55,05,638/- which also includes the amount paid by the petitioner for FKO payments which as per the agreement needs to be reimbursed. All the details/ information/particulars/data etc. regarding the works undertaken and completed; invoices and FKO payments were duly conveyed/communicated to the respondent No.1 against due acknowledgement of the receipts thereof by the respondents who accepted the same without any objections.

4. The case of the petitioner is also that despite having completed its part of the work as per the agreements entered into between the petitioner and the respondents to their entire satisfaction, the outstanding amount has not been received by the petitioner from the respondents No.1 and 2. The petitioner gave various reminders by way of letters dated 24th June, 2014, 29th January, 2015, 10th June, 2015, 23rd June, 2015, 29th June, 2015

and 14th July, 2015 including telephone calls, but no payment was made.

5. It is urged by the petitioner that the respondent No.1, by letter dated 19th August, 2015 acknowledged the satisfactory completion of awarded works by the petitioner. Vide its e-mail dated 19th August, 2015, it had confirmed (minor differences/variation taking into account the number of enrollments etc.) and verified the abovementioned dues, outstanding and payable amounts with respect to the works executed/services rendered by the petitioner in carrying out the enrollments by the petitioner.

6. The petitioner, relying on the computation made and communicated to it by the respondents in terms of their email dated 19th August, 2015, was constrained to serve the legal notice dated 6th October, 2015 to the respondents calling upon them to clear the total outstanding amount of Rs.55,05,638/- along with 18% interest p.a. from the date of receipt of the notice till the actual date of payment besides also remitting the amounts against the reimbursements of the FKO payments to the petitioner. The petitioner further invoked the arbitration clause and suggested two names for the purposes of adjudicating the matter as per the Arbitration Clause existing in the Tripartite Agreements. The respondent No.1 vide its reply dated 28th October, 2015 sent on 30th October, 2015 for the first time had denied the averments made in the legal notice which is contrary to the documents produced. The petitioner in its rejoinder dated 9th November, 2015 asked them to accept the name of the sole Arbitrator as suggested.

7. The present petition was filed in December, 2015. Counsel for the petitioner agreed to delete respondent No.3 from the array of

parties, as the respondent No.3 was not a party to the agreement. Counsel further submits that the petitioner has no objection if this Court may appoint a sole Arbitrator, as the petitioner is now not insisting for appointment of any Member as earlier suggested by the petitioner.

8. In its reply, respondent No.2 has pleaded that the present petition is not maintainable since no *bonafide* dispute exists. The present petition has been filed on the basis of provisional invoices and hence, the present petition under Section 11 of the Act is premature.

9. It is further submitted that the present petition is barred under the law, as the petitioner cannot seek the relief for appointment of an Arbitrator for four different independent Agreements by way of the present single petition. The law does not allow clubbing together various agreements in one single petition, as all the agreements are independent one.

10. Learned counsel for respondents No.1 and 2, however, does not deny; firstly, there are disputes between the parties and secondly, the existence of agreements and the arbitration clause therein. He also does not deny the fact that all the four agreements are between the parties.

11. In support of his submissions, counsel for the said respondents has referred to a decision of this Court in the case of ***Delhi Printing & Publishing Co. (P.) Ltd. v. Municipal Corporation of Delhi and another***, 49(1993) DLT 722.

12. As far as the objection raised by respondents No.1 and 2 that the disputes are not arbitrable is concerned, *prima facie* the same

has no force. The said respondents have not denied the fact that the part payment has been received by them. Counsel for the petitioner submits that despite of having received the payment from the employer, the said respondents are not making the payment. Further, respondent No.3 is not a party to the Agreement. Thus, after considering the averments made in the petition and the material placed on the record, I am of the considered view that the disputes are arbitrable, therefore, the same are to be adjudicated by the Arbitrator.

13. Pertaining to the second objection, the learned counsel for the petitioner submits that firstly, when the letter of invocation was issued by the petitioner to respondents No.1 & 2, no such objection was taken in their reply. Secondly, he submits that under the similar situation, the Supreme Court has already given the judgment. In support of his contentions, learned counsel for the petitioner has referred the decision of the Supreme Court rendered in the case of **Gas Authority of India Ltd. and Another v. Ket Construction (I) Ltd. and Others**, (2007) 5 SCC 38, paras 3, 7, 11 & 12 of which read as under:-

"3. Gas Authority of India Ltd. (GAIL, Appellant 1 herein) awarded four contracts for its project at Petro-Chemical Complex, Dibiyapur, District Etawah (U.P.) to M/s Ket Construction (I) Ltd., Indore (the contractor), which is arrayed as Respondent 1 in the present appeal. All the four contracts were awarded in the year 1995 and they related to construction of certain types of houses for GAIL Vihar Township, premix bitumen carpeting and repair of roads in GAIL Vihar Colony, construction of external sewerage line and construction of certain residential quarters in UPPC Complex, Dibiyapur. Certain disputes arose between the parties regarding completion of the construction work in accordance with the design

and cost of construction, etc. The contracts entered into between the parties contained arbitration clause. Appellant 1 referred the dispute with regard to contract dated 28-9-1995 for arbitration to Justice N.N. Goswami (Retd.) who was formerly a Judge of the Delhi High Court. The arbitrator gave a "no-claim award" on 19-4-2000. Respondent 1 filed a petition under Section 34 of the Act in the Delhi High Court for setting aside the award. A learned Single Judge who heard the petition, after detailed discussion of the material on record, found that the petition was devoid of merits and accordingly dismissed the same by the judgment and order dated 20-10-2003. Respondent 1 then preferred an appeal before the Division Bench of the High Court under Section 37 of the Act which allowed the same by the judgment and order dated 7-12-2004 and set aside the award of the arbitrator. It was further directed in the order that parties shall appear before Brig. Nardip Singh (Retd.) who had been nominated as arbitrator by Respondent 1 (the contractor) and he shall proceed in accordance with law and give the award.

7. Gas Authority of India Ltd. (Appellant 1 herein) awarded four contracts to M/s Ketu Construction (I) Ltd. (Respondent 1 herein) for various construction works at its Petro-Chemical Complex, Dibiyapur, District Etawah (U.P.) which were as follows:

"(A) Work Order No.CE/AUR/Ph-II Extn. B. Works/97A/95 dated 26-5-1995: Balance work of construction of C-6 and D-2 Houses at GAIL Vihar Township, Dibiyapur;

(B) Work Order No.CE/115/Auraiya/Gail/Gail Vihar Road Work/95 dated 10-2-1995: Construction of premix bitumen carpeting and repairs of roads in Gail Vihar Colony and Compressor Station;

(C) Work Order No.CE/137/Auraiya/Ext/SER/95 dated 1-11-1995: Construction of external sewerage line at UPPC Nagar, Dibiyapur; and

(D) Work Order No.CE/136/Auraiya/Housing/95 dated 28-9-1995: Construction of residential quarters Type A—25 units, Type B—105 units, Type C—55 units for UPPC Complex, Dibiyapur.”

11. The evidence on record shows that in connection with the dispute with regard to all the four contracts several meetings had taken place in the office of GAIL also and in the office of their consultant, M/s C.P. Kukreja & Associates in which the representatives of Respondent 1 had participated. This fact is not in dispute that several meetings did take place to resolve the dispute regarding all the four contracts between the representatives of Appellant 1 and Respondent 1. The Senior Manager (Civil) of Appellant 1 sent a letter dated 15-11-1999 to Respondent 1 which has considerable bearing on the controversy in hand and, therefore, the same is being reproduced below:

“Ref.: CE/GAIL/99November 15, 1999
M/s Ketu Construction (I) Ltd.
31/6, Sneh Nagar, Main Road
Opp. Sapna Sangeeta Theatre
Indore (M.P.).

Subject : Disputes relating to:

(A) Work Order No.CE/AUR/Ph-II Extn. B. Works/97A/95 dated 26-5-1995 Balance work of construction of C-6 and D-2 numbers of houses at GAIL Vihar Township, Dibiyapur.

(B) Work Order No.CE/115/Auraiya/GAIL/GAIL Vihar Road Work/95 dated 10-2-1995 Construction of premix bitumen carpeting and repairs of roads in GAIL Vihar Colony and Compressor Station.

(C) Work Order No.CE/137/Auraiya/Ext/SER/95 dated 1-11-1995 Construction of external sewerage line at UPPC Nagar, Dibiyapur.

(D) Work Order No.CE/136/Auraiya/Housing/95 dated 28-9-1995 Construction of residential quarters TYPE A-25 units, TYPE B-105 units, TYPE C-55 units for UPPC Complex, Dibiyapur.

Dear Sir,

Kindly recall various meetings held in our office and also in the office of Consultant, M/s C.P. Kukreja Associates in respect of the above-referred contracts and the disputes arising therefrom, wherein it was agreed between us to settle the disputes amicably and through discussions. Despite this clear understanding, you had vide your letters dated 25-8-1998 invoked arbitration clause in respect of Work Orders Nos.: (1) CE/AUR/Ph-II/Extn. B. Works/97A/95 dated 26-5-1995 relating to balance work of construction of C-6 and D-2 numbers of houses at GAIL Vihar Township of Dibiyaipur and (2) CE/115/Auraiya/GAIL/GAIL Vihar Road Work/95 dated 10-2-1995 relating to construction of premix bitumen carpeting and repairs of roads in Gail Vihar Colony & Compressor Station. Subsequently, vide your letters dated 5-10-1998 in respect of the above work orders, you submitted a panel of three arbitrators asking us to select one of them to act as sole arbitrator on the above two cases. However, we responded to your communications vide our letters dated 16-2-1999 and as per the terms of the contract suggested the following panel of three distinguished persons:

1. Mr Justice N.N. Goswami (Retd.) Judge, Delhi High Court
2. Dr. Avtar Singh, Professor of Law, IIM, Lucknow
3. Mr Harish Chandra, Director General, CPWD (Retd.) & Ex-Member, UPSC.

You were requested to select any of them to act as sole arbitrator. However, no action has been taken by you so far and even the issues which seem to have been resolved by discussions have not been confirmed, keeping the matters pending unnecessarily.

During our meetings, we have suggested to you that all the disputes arising out of the above contracts which cannot be settled by mutual discussions, may be referred to a sole arbitrator selected by you from among the panel of distinguished persons mentioned above, so that the resolution of disputes by reference to arbitration becomes cost effective, economical and quick.

In view of the above, you are requested once again to select any of the persons mentioned herein to act as a sole arbitrator in all the above disputes.

Assuring you of our best cooperation at all times.

Yours faithfully,

sd/-
(P.K. Sarkar)
Sr. Manager (Civil)"

12. It may be noted that the abovenoted letter of 15-11-1999 was written by the Senior Manager (Civil) of Appellant 1 in connection with the disputes relating to all the four contracts viz. (A), (B), (C) and (D). In this letter reference was made to the earlier letter dated 16-2-1999 sent by Appellant 1 and the same panel of three names in which name of Justice N.N. Goswami (Retd.) was at Serial No.1 was reiterated. The last paragraph of the abovequoted letter is very important where it was clearly mentioned that the dispute arising out of the four contracts which cannot be mutually settled may be referred to a sole arbitrator selected by Respondent 1 from amongst the persons mentioned in the panel so that the resolution of disputes by reference to arbitration becomes cost effective, economical and quick. Towards the end of the letter a request was made to Respondent 1 to select any one of the persons mentioned in the said letter to act as sole arbitrator in all the above disputes, which means all the disputes relating to Contracts Nos.

(A), (B), (C) and (D). It is, therefore, clear that a panel of three names had been sent by the appellant to Respondent 1 on 16-2-1999 which was categorically reiterated in the letter dated 15-11-1999, sent by the Senior Manager (Civil) of Gas Authority of India Ltd. (Appellant 1) to Respondent 1. This letter was not confined to any particular contract but specifically referred to all the four contracts including the disputed Contract No.(D) dated 28-9-1995. The stand of Appellant 1 was quite reasonable that if all the disputes were referred to a single arbitrator, the arbitration proceedings would be cost effective, economical and quick. After receipt of this letter dated 15-11-1999, wherein the earlier panel communicated vide letter dated 16-2-1999 had been reiterated, there was no occasion for Respondent 1 to appoint Brig. Nardip Singh (Retd.) as arbitrator by sending a communication to that effect subsequently on 10-12-1999. The stand of the appellant had been made very clear and explicit by the aforesaid two letters and it was not required to respond again specifically to the letter dated 28-10-1999 sent by Respondent 1 to select an arbitrator from the panel intimated by it. The stand of Respondent 1 to the effect that as the appellant did not respond to its letter dated 28-10-1999, it selected Brig. Nardip Singh (Retd.) by sending a communication on 10-12-1999 is, therefore, wholly unjustified."

14. In the present matter also, it appears to the Court that the disputes have arisen in all the four agreements, parties are also same, thus, in order to save heavy costs, time and to avoid conflicting orders, it would be appropriate to appoint the sole Arbitrator.

15. Having gone through the said judgment and after considering the fact that in the reply to the notice of invocation, the said objection was not taken by respondents No.1 & 2, the prayer in the present petition is allowed.

16. Thus, the matter is referred to the Delhi International Arbitration Centre ('DAC') who will appoint an Arbitrator in accordance with the provisions of the Act. The Arbitrator to adjudicate the disputes arising out of the agreement in question between the parties as mentioned in the present petition. The parties are also allowed to file their respective claims and counter-claims before the Arbitrator.

17. The arbitration shall take place under the aegis of DAC. The Arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The fees of the learned Arbitrator shall be in terms of the Delhi International Arbitration Centre (Administrative Cost Arbitrator's Fees) Rules. Parties to appear before DAC on 22nd August, 2016 at 4.00 p.m.

18. The petition is accordingly disposed of.

19. Copy of this order be given *dasti* to the learned counsel for the parties and a copy thereof be delivered to the Additional Coordinator, DAC forthwith.

(MANMOHAN SINGH)
JUDGE

AUGUST 02, 2016