

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 11.01.2017

+ **ARB. P. 35/2016**

**M/S RPP CONSTRUCTIONS (P) LTD.
(Presently RPP Infra Projects Limited)**

..... Petitioner

Versus

RITES LTD.

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Govind Manoharan.

For the Respondent: Mr Udit Seth.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. RPP Infra Projects Ltd. (hereafter 'RIPL') has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') for appointment of a sole arbitrator to adjudicate the disputes between the parties that have arisen in connection with the Agreement dated 07.05.2010.

2. RIPL states that on 21.07.2008, the respondent (hereafter 'RITES') entered into an agreement with Sri Lankan Railways for upgradation of Colombo-Matara Coastal Railway Line in the Democratic Republic of Sri Lanka.

3. Thereafter, on 25.10.2009, RITES issued a notice inviting tenders for "Construction of DMU Maintenance Sheds, Maintenance Building and Washing Aprons at Dematagoda, Aluthgama and Galle for the Colombo-Matara Coastal Railway Line, Sri Lanka". RIPL (then known as RPP

Constructions Pvt. Ltd.) submitted its bid for the aforesaid works pursuant to the aforementioned notice. RIPL's bid was accepted and RITES issued a letter of acceptance (LOA) dated 08.02.2010 whereby it was communicated that RIPL's tender for the work for a total contract price of SLR 27,98,32,740/- (Sri Lankan Rupees Twenty Seven Crores Ninety Eight Lacs Thirty Two Thousand Seven Hundred and Forty Only) had been accepted. In terms of the LOA, the execution of the work was to be commenced from the fifteenth day after the issuance of the LOA and was to be completed within a period of six months. Thereafter, the parties entered into an Agreement dated 07.05.2010 (hereafter 'the Agreement').

4. RIPL claims that there were delay and hindrances in the execution of works, which were duly informed to RITES. Accordingly, RITES also extended time for completion of the works which were finally completed on 19.01.2012. RIPL claims that after curing the defects during the defect liability period, it submitted the final bill on 20.11.2012.

5. RIPL claims that RITES insisted that a No Claim Certificate be also submitted for release of the admitted amounts due to RIPL and on such insistence, RIPL submitted a No Claim Certificate dated 20.11.2012, albeit under protest.

6. RIPL claims that thereafter, it pursued with RITES for release of its dues, however, its communications were ignored. Finally, on 16.06.2015, RIPL issued a notice for its claim under Clause 13 of the Special Conditions of Contract claiming a sum of SLR 1,96,86,868.26 which according to RIPL had been illegally withheld by RITES. The final bill was for a sum of SLR 24,84,86,690/- against which RITES had made payments of SLR 2,87,67,258.43 on 12.02.2013 and SLR 1,45,59,517.95

on 04.11.2014. However, the balance sum of SLR 1,96,86,868.26 was not released and RIPL claimed that the same had been withheld without any explanation whatsoever. The aforesaid notice was thereafter followed by another notice dated 15.09.2015 whereby RIPL called upon RITES to appoint a sole arbitrator for adjudication of the disputes.

7. On 29.09.2015, RITES responded to RIPL's letter dated 15.09.2015 whereby it declined to appoint an arbitrator on the ground that RIPL's demand for appointment of an arbitrator was delayed. RITES asserted that in terms of the Agreement between the parties, if a demand for appointment of an arbitrator was not made within 120 days of receiving the intimation that the final bill was ready for payment, the contractor would be deemed to have waived any such claim and the employer would be discharged of all its liabilities under the Agreement in respect of those claims.

8. In view of the refusal of RITES to appoint an arbitrator, RIPL has preferred the present petition.

9. RITES has opposed the present petition on several grounds. First of all, it is contended that there is no contract between RIPL and RITES since RITES had only acted as an agent of the “employer” which was the Sri Lankan Railways. Secondly, it is contended that this Court has no jurisdiction to entertain the present petition as any arbitration in respect of the disputes with Sri Lankan Railways - being a foreign entity - would be an international commercial arbitration. Thirdly, it is claimed that claims raised are barred by time. Fourthly, it is asserted that the disputes fall within excepted matters and, therefore, are not referable to arbitration. Fifthly, that the amounts withheld were on account of levy of liquidated

damages and, therefore, RIPL's claims are without merit. And, lastly, RIPL has not complied with the arbitration clause as it has not specified the disputes sought to be referred in its letter dated 15.09.2015 invoking the arbitration clause.

10. The contentions that (a) the claims made by RIPL are time barred; (b) they fall within excepted matters; and (c) are without merit cannot be examined at this stage. At this stage, it is not necessary to examine the rival contentions of the parties in relation to the merits of the disputes. Further, the question whether the claims made by RIPL are barred by limitation is a contentious issue and is not required to be examined in the present proceedings which are confined to the examination of the existence of an arbitration agreement. The contention that RIPL's letter invoking the arbitration was deficient as it did not specify the disputes is not persuasive since RIPL's letter dated 15.09.2015 invoking the arbitration clause referred to an earlier letter dated 16.06.2015 and a perusal of the same indicates that RIPL had clearly specified its claim - the dispute. In fairness, the learned counsel for RITES also did not pursue its objection in this regard.

11. The principal issue canvassed before this Court by both the parties related to the jurisdiction of this Court to entertain the present petition as it was contended on behalf of RITES that it had entered into the Agreement with RIPL as an agent of Sri Lankan Railways and, therefore, the disputes of RIPL were essentially with Sri Lankan Railways. Thus, Sri Lankan Railways was a necessary party to the arbitration proceedings, which would fall within the scope of "International Commercial Arbitration";

consequently, this Court would have no jurisdiction to entertain the present petition.

Submissions

12. Mr Govind Manoharan, learned counsel appearing for RIPL contended that RIPL's disputes were mainly against RITES and, therefore, Sri Lankan Railways was not a necessary or a proper party to the present proceedings. He submitted that RITES had sufficient interest in the Agreement and, therefore, was liable in its independent capacity to the extent of that interest. He referred to Clauses 7, 9 and 29 of the General Conditions of the Contract (GCC) (which formed a part of the Agreement) and contended that in terms of the Agreement, RITES was responsible for making payment of interim as well as final bills and was also entitled to exercise of lien on the payments due from RIPL. He contended that this clearly indicated that RITES was not acting merely as an agent but had sufficient interest in execution of the Agreement. He also referred to clause 25 of the GCC in terms of which RITES was the authority specified for appointment of an arbitrator.

13. Mr Manoharan earnestly contended that a plain reading of the Agreement would indicate that in substance, RITES was acting as the main contractor and RIPL was a sub-contractor for execution of the works for Sri Lankan Railways. He also referred to Section 230 of the Indian Contract Act, 1872 and submitted that although an agent would not be liable for the contract entered into by him on behalf of the principal, however, the said provision was subject to a contract to the contrary. He submitted that in the present case, the Agreement sufficiently indicated that RITES had an independent and a separate interest and, therefore, could be

sued in its individual capacity. He strongly relied on the decision of a Division Bench of the Karnataka High Court in **Rail India Technical and Economic Services Limited (“Rites”), New Delhi v. Ravi Constructions, Bangalore and Anr.**: 2001 Supp Arb. LR 436 (DB) wherein the Division Bench of Karnataka High Court had concluded that non-joinder of the principal employer as the party to the arbitration did not vitiate the arbitral award.

14. He also relied on the decision of the Supreme Court in **Tashi Delek Gaming Solutions Ltd. and Anr. v. State of Karnataka and Ors.**: (2006) 1 SCC 442 in support of his contention that an agent who has an interest in the contract could also be sued with regard to its liabilities.

15. Mr Udit Seth, learned counsel appearing for RITES countered the aforesaid submissions. He referred to the notice inviting tenders dated 25.10.2009, the LOA dated 08.02.2010 and the Agreement dated 07.05.2010 which expressly indicated that RITES was acting on behalf of the Sri Lankan Railways. He thereafter referred to Section 226 of the Indian Contract Act, 1872 (hereafter ‘the Contract Act’) and contended that disputes, if any, in relation to the Agreement existed only between RIPL and Sri Lankan Railways and RITES as being a disclosed agent of the Sri Lankan Railways could not be made a party to the said disputes. He relied on the decision of the Supreme Court in **Vivek Automobiles Ltd. v. Indian Inc.**: (2009) 17 SCC 657 in support of his contention that when the principal had been disclosed, the agent could not be sued. He also referred to the decisions of this Court in **Raj & Associates v. Videsh Sanchar Nigam Limited and Ors.**: 2004 (76) DRJ 60; **Rites Ltd. v. Shabir Ahmed & Sons and Ors.**: 2010 SCC OnLine Del 463 and **Rites Limited v.**

Vidhyawati Construction Co. & Anr: OMP 21/2006, decided on 21.03.2012. He submitted that in the aforesaid cases, this Court had considered cases, where RITES had acted in a similar capacity and held that the principal employer would be a necessary and a property party.

Reasoning and Conclusion

16. At the outset it is necessary to note that the tenders were invited by RITES on behalf of Sri Lankan Railways. The opening words of the notice inviting tenders clearly indicated that tenders were invited by “*RITES LIMITED for and on behalf of SRI LANKA RAILWAYS*”. The LOA dated 08.02.2010 also clearly indicated that RIPL’s tender had been accepted by the Competent Authority of RITES LIMITED “*in its capacity as an Agent/Power of Attorney Holder acting for and on behalf of Sri Lankan Railway*”.

17. The Agreement also clearly stated that the agreement was entered into by RITES for and on behalf of Sri Lankan Railways who was referred to as the “employer”. The opening paragraph of the Agreement which describes the parties thereto reads as under:-

“THIS AGREEMENT is made on 7th day of May Two thousand Ten between RITES Ltd. a Government of India Enterprise and a Company registered under Companies Act, 1856 having its registered office at SCOPE Minar, Laxmi Nagar, (Delhi) – 110092 and its Corporate Office at RITES BHAWAN, Plot No.1, Sector 29, Gurgaon (Haryana) representing through General Manager, RITES LIMITED for and on behalf of Sri Lankan Railways hereinafter called the Employer (which expression shall, wherever the context so demands or requires, include their successors in office and assigns) on one part and M/s R. P. P. Constructions (P) Ltd., P&C Tower, 3rd floor No.140, Perundurai Road, Erode-

638011, Tamil Nadu, India hereinafter called the Contractor (which expression shall wherever the context so demands or requires, include his/their successors and assigns) of the other part.”

18. The Agreement was also signed by RITES “*in the capacity of Agent and Power of Attorney Holder for and on behalf of Sri Lankan Railways (The Employer)*”. It is apparent from the above that RITES was not a party to the Agreement and the Agreement was only between RIPL and Sri Lankan Railways. Although, RITES had a significant role to play in the execution of the works, the same was only in its capacity as an Agent and a Power of Attorney Holder of Sri Lankan Railways.

19. Mr Manoharan’s contention that the present petition was maintainable against RITES since RITES had sufficient interest in the Agreement is difficult to accept. Undoubtedly, RITES was responsible for conduct of certain business including payment of bills raised by RIPL; however, even in this regard, RITES was acting on behalf of the employer – Sri Lankan Railways and not in any other capacity. RITES was not liable to pay any consideration to RIPL in its independent capacity and its obligations to do so were only in its capacity as an agent of the Sri Lankan Railways.

20. The reliance placed by Mr Manoharan on Clauses 7 and 9 of GCC is misplaced. A plain reading of the said clauses does not indicate that the payment obligations of RITES as reflected therein was in its capacity other than that as an agent of the employer. The last sub paragraph of Clause 7 also clearly indicated that the payments being made by RITES were on behalf of the employer –Sri Lankan Railways and this is evident from the plain language of the said sub paragraph of Clause 7 which reads as under:-

“Since the contract is being entered into with the Contractor by RITES acting for and on behalf of the Employer as Agent and Power of Attorney Holder, no RA Bill will be certified by the Engineer unless sufficient funds have been made available by the Employer.”

21. It is clear from the above that disbursement of payments undertaken by RITES was on behalf of the employer and subject to sufficient funds being made available by the employer.

22. Clause 25 of GCC, *inter alia*, provides for settlement of disputes by arbitration. Sub-clause 3 of Clause 25 expressly provides that the arbitral award shall be binding upon the parties to the disputes. Sub-clause 6 of Clause 25 is relevant as it expressly provides that RITES, acting as an Agent to the Employer as well as the Employer will implead themselves as parties to the arbitration proceedings. The said sub-clause is set out below:-

“6. Parties to be impleaded in the arbitration proceedings

In case of any claims by the Contractor, the Employer as well as RITES Ltd. acting as Agent to the Employer will implead themselves as parties to the Arbitration Proceedings.”

23. In view of the above, it is clear that Sri Lankan Railways as the employer is a necessary and proper party.

24. In ***Rites Limited v. Shabir Ahmed*** (*supra*), a coordinate bench of this Court had set aside an arbitral award under Section 34 of the Act solely for the reason that the award was passed against RITES (the petitioner therein) and not the principal employer. In that case, RITES had entered into a contract as an Agent of the Governor of Uttar Pradesh. Both the Governor of UP and RITES were parties to the arbitration proceedings, however, the

arbitrator made an award only against RITES. This Court referred to the provisions of Sections 226 and 230 of the Contract Act and held that once there is a disclosed principal, an agent incurs no liability and takes no benefit, both of which are only of the disclosed principal. In view of the above, this Court did not disturb the relevant findings in the award but directed that the award would be against the principal, UP Technical Education Department, Rawatpur, Kanpur through Governor of UP, and not against RITES.

25. A similar case came up before this Court in ***Rites Limited v. Vidhyawati Construction Co. & Anr.*** (*supra*). In that case, RITES challenged the arbitral award which was made against RITES in connection with the contract entered into by the claimant therein (VCC). In that case, RITES had issued a notice inviting tenders on behalf of the Governor of Uttar Pradesh for the works in connection with up gradation of a technical institute in Uttar Pradesh. VCC was successful in securing the contract. Subsequently, disputes arose between VCC; it invoked the arbitration clause and called upon RITES to appoint an Arbitrator. During the arbitration proceedings that ensued thereafter, RITES filed an application seeking impleadment of UP Technical Education Department (UPTED). The said application was considered by the Arbitrator and he held that provisions of Section 230 of the Contract Act were not attracted since the contract did not specifically mention that RITES was acting as a consultant. The review petition filed against the said decision was also dismissed by the arbitrator. Thereafter, the arbitrator passed an arbitral award, which was impugned by RITES before this Court. In the petition filed under Section 34 of the Act, RITES also impleaded UPTED. UPTED's stand before this Court was that RITES alone was liable as the

contract in question therein was between RITES and VCC. This Court took note of the fact that the notice inviting the tenders was issued by RITES on behalf of the UPTED. The award was set aside by the Court on the ground that RITES was acting as an agent for and on behalf of the UPTED. The Court observed that “*While the Act envisages only parties to an arbitration agreement being parties to the arbitral proceedings, where one of the parties is not acting on its own but as an agent, then the Principal of such agent has to under Section 226 of the Contract Act be held liable to meet the claims of the contractor*”.

26. In ***Raj & Associates v. Videsh Sanchar Nigam Limited & Ors.*** (*supra*), the coordinate bench of this Court rejected the contention that RITES was a necessary and a proper party in a suit instituted by the contractor for recovery of certain monies in relation to a contract entered into between the contractor and VSNL acting through RITES. This Court held that RITES had entered into the contract for and on behalf of VSNL as a consultant and, therefore, had acted as VSNL’s agent. Thus, in terms of Section 230 of the Contract Act, RITES was not a necessary and property party to the proceedings.

27. In the facts of the present case, it is amply clear that RITES had acted as an Agent and a Power of Attorney Holder of Sri Lankan Railways. As observed hereinbefore, this was expressly disclosed in the notice inviting tenders dated 25.10.2009, the LOA as well as in the Agreement. Section 230 of the Contract Act expressly makes it clear that an agent is not liable for a disclosed principal. This is of course subject to the caveat that there is no contract to the contrary. However, this Court is unable to accept that there exists a contract whereby RITES had agreed to be liable

for performance of the Agreement. The reference to a contract to the contrary in Section 230 of the Contract Act must necessarily mean a contract whereby the agent contracts to be bound for enforcement of the obligations of the employer. A plain reading of the clauses of GCC relied upon by Mr Manoharan (Clauses 7, 9, 25 and 29) do not indicate that RITES had agreed to be independently liable for any claims in relation to the Agreement. As stated above, the payment obligations undertaken by RITES were clearly on behalf of the employer and not in its individual capacity. In fact the entire Agreement clearly indicates that RITES had executed the same on behalf of Sri Lankan Railways as an Agent and a Power of Attorney Holder.

28. In ***Rail India Technical and Economic Services Limited v. Ravi Constructions*** (*supra*), the Court observed that in many cases independent contractors are loosely called as agents and in case the contractor undertakes to execute a particular work by adopting processes or means of his own choice, he becomes personally liable to the employer (principal) as also to the sub-contractors. The Court referred to a passage from Anson's "Law of Contract" (27th Edition) explaining the principle that "*As a general rule, two persons cannot, by any contract into which they may enter, thereby impose contractual liabilities upon a third party*". The court, thereafter, examined the contract between RITES and the principal employer and found that RITES was acting as an independent contractor and had sub contracted part of the works. The court, thereafter, held that RITES had entered into the contract in its own name as an employer albeit, stating that it had entered it on behalf of the principal employer. The Court further found that the general conditions of the contract showed that RITES was an employer and a contracting party. Although, this Court has some

reservations as to the said decision, there can be no dispute as to the principle that where a court concludes that a party had entered into an agreement in its independent capacity and not as an agent it would be liable for the breach thereof to the other party. In that case, the court found that there was no privity of contract between the principal employer and the sub-contractor.

29. It is not RIPL's case that there is no privity of contract with Sri Lankan Railways. Clearly, the Agreement is between RIPL and Sri Lankan Railways *albeit* acting through RITES.

30. Having stated above, at this stage, the only limited question to be examined is whether Sri Lankan Railways is a necessary party to the arbitration. In my view, the express terms of sub clause (6) of Clause 25 of GCC clinches the issue; it expressly provides that RITES acting as an Agent to the Employer as well as the Employer will implead themselves as parties to the arbitration proceedings. In view of this express clause, it is no longer open for RIPL to contend that Sri Lankan Railways is not a necessary party to the disputes sought to be referred to arbitration. Thus, plainly, the arbitration would fall within the definition of "International Commercial Arbitration" as given in Section 2(1)(f) of the Act and, therefore, by virtue of 11(9) of the Act, an application for appointment of an Arbitrator can only be made to the Supreme Court and not this Court.

31. The petition is, accordingly, dismissed.

VIBHU BAKHRU, J

JANUARY 11, 2017
RK/MK