

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 04.01.2017

+ **ARB.P. 325/2016 & IA No.6571/2016**

C.E. CONSTRUCTION LTD.

..... Petitioner

Versus

**INTERTOLL ICS CECONS O&M
COMPANY (P) LTD. & ORS.**

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Mohit Chaudhary, Ms Damini Chawla,
& Mr Kunal Sachdeva.

For the Respondents : Ms Jasleen Oberoi & Mr Gauhar Mirza for R-1.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter referred to as 'CECL') has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying as under:-

“a) Allow the present petition and appoint a Sole Arbitrator to adjudicate upon the disputes which have arisen between the Petitioner and the Respondents under the agreement dated 29.1.2004 and other agreements between the parties.”

2. In paragraph 1 of the petition, CECL has described the disputes to have arisen out of a tripartite agreement dated 29.01.2004 (hereafter 'the Tripartite Agreement') and a settlement deed dated 17.03.2006 (hereafter 'the Settlement Deed') including other contracts executed between the

parties. Admittedly, the Settlement Deed dated 17.03.2006 does not include an arbitration clause. During the course of the arguments, CECL sought to rely on the arbitration clause as contained in the Tripartite Agreement dated 29.01.2004, in support of its prayer for appointment of an arbitrator.

3. At the outset, respondent no.1 had disputed the existence of any arbitration agreement between respondent no.1 and the petitioner. It was also pointed out that respondent nos.2, 3 and 4 are not parties to the Tripartite Agreement.

4. CECL does not dispute that respondent nos. 2, 3 and 4 are not parties to the Tripartite Agreement. Therefore, the question of appointing an arbitrator for any disputes between CECL and respondent nos.2, 3 and 4 does not arise. Thus, the learned counsel for CECL and respondent no.1 (Intertoll) were heard confined to the question as to the existence of arbitration agreement between the two parties in the context of the Tripartite Agreement.

5. The controversy, whether an arbitration agreement exists between CECL and Intertoll, has to be considered in the context of the following facts:-

5.1 Intertoll was constituted as a Joint Venture company between CECL, Intertoll ICS India Pvt. Ltd. and Intertoll (Pty) Ltd. Pursuant to tenders floated by the National Highways Authority of India (hereafter 'NHAI'), Intertoll bid for the works of operation and maintenance of four laned highways on certain sections of National Highway-2 and National Highway-24. The bid submitted by Intertoll was accepted and on

08.08.2002, a “Contract Agreement” dated 08.08.2002 was entered into between NHAI and Intertoll. Thereafter, by a letter dated 15.03.2003 - which is described as a back to back contract by CECL in the petition and hereafter referred to as ‘the letter agreement’ - CECL was appointed by Intertoll to execute the work of laying of fibre-optic cable system in connection with certain sections on NH-2, NH-24 and NH-8.

5.2 Thereafter, on 29.01.2004, the Tripartite Agreement was executed between CECL, Intertoll and M/s RPG Cables Ltd. (hereafter 'RPG') whereby CECL assigned all its rights, titles and interest in the letter agreement dated 15.03.2003 in favour of RPG. In furtherance of the Tripartite Agreement, RPG was approved as a sub-contractor by NHAI.

5.3 CECL further submits that it also exited the JV agreement and ceased to be a constituent JV Partner in Intertoll. CECL asserts that it has severed its relationship with Intertoll both as a constituent JV Partner and as a sub-contractor.

5.4 CECL states that, thereafter, it entered into a Consortium Agreement dated 21.03.2005 with RPG whereby the said parties agreed that CECL would assist RPG in performing its work as a sub-contractor to Intertoll; that is, the work that was contracted to CECL under the letter agreement and subsequently assigned to RPG under the Tripartite Agreement.

5.5 NHAI terminated the Contract Agreement dated 08.08.2002 with Intertoll on 21.11.2005. This led to certain disputes between NHAI and Intertoll, which were referred to arbitration.

5.6 Intertoll and RPG entered into a Settlement Deed dated 17.03.2006 for settlement of all claims of RPG against Intertoll in respect of the letter agreement dated 15.03.2003 (which was assigned by CECL to RPG).

5.7 Thereafter, RPG and CECL entered into an agreement dated 06.09.2011 - which is referred to in the petition, and hereafter, as the 'Closure Agreement' - whereby RPG relinquished all its rights, interest, entitlements and claims in the Consortium Agreement dated 21.03.2005 in favour of CECL and also assigned all its rights, issues, claims and entitlements arising from or emanating from the Settlement Deed dated 17.03.2006 and under the Tripartite Agreement dated 29.01.2004.

5.8 CECL invoked the arbitration clause contained in the Tripartite Agreement and sent a notice on 22.12.2011 requesting that Justice H.R. Malhotra (Retired), a former judge of this Court, be appointed as an arbitrator in connection with *inter se* disputes arising out of the Tripartite Agreement, Settlement Deed dated 17.03.2006 and the Closure Agreement dated 06.09.2011. Intertoll responded to the aforesaid notice and, *inter alia*, disputed the existence of any arbitration agreement between Intertoll and CECL. Further, Intertoll also declined to accept that CECL has stepped into the shoes of RPG in terms of the Closure Agreement. However, without prejudice to its contentions, Intertoll also declined the request for appointment of Justice H.R. Malhotra as a sole arbitrator and suggested the name of Justice J.K. Mehra (Retired) as the sole arbitrator. Intertoll also raised an objection as to the fact that provisions of the arbitration clause under the Tripartite Agreement had not been followed.

5.9 In view of the above, CECL filed a petition (being Arb. P. 81/2012) under Section 11 of the Act seeking appointment of an arbitrator.

However, CECL withdrew the said petition on 04.07.2013. The order passed by this Court (dated 04.07.2013 in Arb. P. 81/2012) indicates that CECL had initially pressed its petition and had withdrawn the same after some arguments with liberty to approach the Engineer as contemplated under Clause 50.2 of the Tripartite Agreement.

5.10 CECL asserts that in the meantime, Intertoll settled the disputes with NHAI on 06.08.2014. On 20.08.2014, Intertoll also withdrew its suit [CS(OS) 650/2011] filed against NHAI.

5.11 On or about 17.10.2014, CECL also filed a petition under Section 9 of the Act (being OMP No. 1282/2014) arraying several parties including Intertoll (which was arrayed as respondent no.8) as respondents. CECL alleged that ₹65 crores had been received by Intertoll from NHAI against surrender of claims of over ₹300 crores and, *inter alia*, sought for a direction that the money received from NHAI be preserved in a separate bank account.

5.12 The petition does not disclose the fate of the aforementioned petition under Section 9 of the Act (OMP 1282/2014); although a copy of the order dated 29.01.2016 disposing of that petition has been filed along with the petition.

5.13 However, it was pointed out by the learned counsel for Intertoll that initially an *ad interim* order dated 20.10.2014 was passed directing Intertoll to maintain *status quo* with regard to any funds received pursuant to the settlement with NHAI. However, the said order dated 20.10.2014 was subsequently vacated by an order dated 21.11.2014. CECL had preferred an appeal against the said order before a Division Bench of this Court

[being FAO(OS) 490/2014], which was also dismissed with cost of ₹1,00,000/- in favour of Intertoll.

5.14 The said petition was finally disposed of on 29.01.2016. The Court while disposing of the petition observed that the petition was pending for more than 15 months but no steps had been taken by the petitioners to invoke the arbitration clause, therefore, the petition could not continue. However, the Court further observed that if the contention of petitioners (therein) is accepted in a petition under Section 11 of the Act and an Arbitral Tribunal is constituted, the petitioners would be entitled to move an application for interim order under Section 17 of the Act.

Submissions

6. Mr Mohit Chaudhary, learned counsel appearing for CECL contended that by virtue of the Arbitration and Conciliation (Amendment) Act, 2015, the examination under Section 11 of the Act is confined only to existence of an arbitration clause. He submitted that in the present case, there is no dispute as to the existence of the arbitration clause and, therefore, an arbitrator is required to be appointed.

7. Ms Jasleen Oberoi, learned counsel appearing for Intertoll countered the submissions advanced by Mr Chaudhary and opposed the present petition. Her contentions are summarised as under:

7.1 First of all, she contended that there was no valid existing arbitration agreement between the parties. She pointed out that CECL had referred to disputes arising out of various agreements. However, Intertoll was not a party to the agreements referred to by CECL and although Intertoll was a party to the Tripartite Agreement, the arbitration clause contained therein

did not envisage reference of disputes between CECL and Intertoll to arbitration. She further contended that the notice invoking arbitration dated 10.02.2016 also referred to various agreements to which Intertoll was not a party. She pointed out that Clause 50.2 of the Tripartite Agreement only contained an arbitration agreement for reference of the disputes between Intertoll and RPG and, therefore, no arbitration agreement existed between Intertoll and CECL.

7.2 She further stated that the Closure Agreement dated 06.09.2011 relied upon by CECL in support of its contention that it had stepped into the shoes of RPG, was not with the consent of Intertoll and, therefore, did not bind Intertoll. She submitted that the Tripartite Agreement dated 29.01.2004 was governed by the General Conditions of Contract as issued by the Federation Internationale Des Ingenieurs Conseils, Third Edition 1987 (FIDIC). She contended that FIDIC conditions of contract did not permit the contractor to assign the contract without the prior consent of the employer and, thus, in the present case, Intertoll was not bound to accept that CECL had stepped into the shoes of RPG. She submitted that any assignment was thus *non est* as against Intertoll.

7.3 Next, she submitted that the Tripartite Agreement did not contain an arbitration agreement at all since in terms of Clause 50.2, the unresolved disputes '*could*' be settled in accordance with the Act. She submitted that the use of the word '*could*' only indicated that the parties could decide to settle the disputes by arbitration and the same was not mandatory.

7.4 She also submitted that CECL had not complied with the pre-conditions for invocation of the arbitration as set out in Clause 50.2 as it

had not referred the disputes to the Engineer as contemplated thereunder and, therefore, in any event, the petition was pre-mature.

7.5 She submitted that the agreement between Intertoll and RPG stood novated by the Settlement Deed dated 17.03.2006. The Tripartite Agreement dated 29.01.2004 only contemplated RPG replacing CECL as a sub-contractor for execution of the works under the letter agreement dated 15.03.2003. She stated that the contract itself stood discharged by the Settlement Deed dated 17.03.2006 and the said Settlement Deed did not contain an arbitration clause.

7.6 Lastly, she submitted that the question whether an arbitration agreement existed between Intertoll and CECL, stood concluded by the judgement of the Single Judge dated 21.11.2014 passed in OMP 1282/2014 as well as the decision of the Division Bench dated 20.04.2015 rendered in FAO(OS) 490/2014. She also contended that the petitioner had not approached this Court with clean hands and had suppressed the Judgment of the Single Judge dated 21.11.2014 as well as decision of the Division Bench dated 20.04.2015.

Reasoning and Conclusion

8. At the outset, it is necessary to refer to Clause 50.2 of the Tripartite Agreement which reads as under:-

“If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with or arising out of the Contract whether in connection or arising out of the Contract whether the execution of the Works or after the Completion and whether before or after reputation (sic) or other termination, certificate or valuation by the Engineer the matter in dispute shall in the first place be referred to

the Engineer with a copy to the Party. The Party shall attempt to settle the disputes amicably within a period of 30 days. If the disputes are not resolved in this manner then the aggrieved party can refer the dispute to the Employer for resolving the same after due discussions with the Chief Executive of the contracting parties.

In case the dispute still remains unresolved then it could be settled in accordance with the Arbitration and Reconciliation Act of 1996. The Performance under the Contract shall continue during the Arbitration proceedings and payment due to the Contractor by the Employer shall be withheld until they are the subject matter of the Arbitration Proceedings. The decision of the Arbitrator shall be final and binding upon the parties. The cost and expenses of the Arbitration Proceedings will be paid as determined by the Arbitrator.”

9. Admittedly, Intertoll has been referred to as an Employer and RPG has been referred to as Contractor in the aforesaid clause. Thus, it is clear on a plain reading of the clause that the same does not contemplate reference of any disputes between CECL and Intertoll to arbitration. Mr Chaudhary also did not dispute the aforesaid position. He, however, contended that by virtue of the Closure Agreement, RPG had assigned all its rights and entitlement under the Tripartite Agreement to CECL and, therefore, CECL was claiming to be a party through RPG. Admittedly, Intertoll is not a party to the Closure Agreement and the same was executed without any consent of Intertoll. Thus, *prima facie*, Intertoll cannot be compelled to accept CECL as a party to the arbitration agreement in place of RPG.

10. However, even if it is accepted that CECL had stepped into the shoes of RPG, it could not compel Intertoll to refer the disputes to

arbitration. This is so because the agreement between Intertoll and RPG had itself been discharged by virtue of the Settlement Deed dated 17.03.2006. A plain reading of the Settlement Deed indicates that Intertoll and RPG had agreed to settle all outstanding issues emanating from the contract in accordance with the terms as recorded in the Settlement Deed. It is clear from the above that all rights of RPG and Intertoll in relation to the contract - the letter agreement dated 15.03.2003 with CECL and subsequently substituted by RPG by way of the Tripartite Agreement - stood completely extinguished in terms of the Settlement Deed. The only contract that survived between the said parties was the Settlement Deed. Neither RPG nor Intertoll was required to perform any of the terms of the initial contract which stood discharged in terms of the Settlement Deed. And, as pointed out earlier, the Settlement Deed does not contain an arbitration clause.

11. In **Union of India v. Kishorilal Gupta and Bros.:** (1960) 1 SCR 493, the Supreme Court had considered the question whether an arbitration clause in a contract survived the substitution of the contract by another contract. After discussing the various decisions, Justice Subba Rao speaking for majority held as under:-

"10. The following principles relevant to the present case emerge from the aforesaid discussion : (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute

a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes.

11. We have held that the three contracts were settled and the third settlement contract was in substitution of the three contracts; and, after its execution, all the earlier contracts were extinguished and the arbitration clause contained therein also perished along with them. We have also held that the new contract was not a conditional one and after its execution the parties should work out their rights only under its terms. In this view, the judgment of the High Court is correct. This appeal fails and is dismissed with costs."

12. Applying the aforesaid principle, it is clear that the arbitration clause in the Tripartite Agreement dated 29.01.2004 does not survive. The Settlement Deed between RPG and Intertoll substituted their rights and obligations under the earlier contract.

13. In **Young Achievers v. IMS Learning Resources Private Limited:** (2013) 10 SCC 535, the parties therein had entered into another agreement which novated and superseded the earlier agreements. The agreements novating the earlier agreements did not contain an arbitration clause. In the

aforesaid context, the Supreme Court held that *"An arbitration clause in an agreement cannot survive if the agreement containing arbitration clause has been superseded/novated by a later agreement"*.

14. In view of the aforesaid, an arbitration agreement does not exist between CECL and Intertoll. In view of this conclusion, it is not necessary to consider other objections raised by Intertoll.

15. However, before concluding, it would be necessary to mention that the conduct of CECL is less than fair. The question whether there exists an arbitrable dispute was also one of the issues which was agitated before this Court in OMP 1282/2014. In the order dated 21.11.2014, this Court had, *inter alia*, observed as under:-

"(iii). That leaves me with the tripartite agreement dated 29.01.2004. The tripartite agreement was executed among, petitioner no.1, respondent no.8 and RPG. By virtue of this agreement, the sub-contract dated 15.03.2003 executed between petitioner no.1 and respondent no.8 was assigned in favour of RPG. It is stated that this contract dated 29.01.2004, contains an arbitration agreement which is incorporated in clause 50.2 of the agreement. A perusal of various provisions of the agreement would show that assignment in the first instance of the sub-contract dated 15.03.2003 was made in favour of RPG by petitioner no.1 with the consent of respondent no.8. Petitioner no.1, seeks to re-agitate rights contained in the tripartite agreement by virtue of a closure agreement dated 06.09.2011. Respondent no.8 is not a party to the said agreement. Re-assignment of rights which were assigned long ago in favour of RPG without the consent of respondent no.8, seems prima facie untenable."

16. In the above mentioned matter, Intertoll was arrayed as respondent no.8. The aforesaid decision was carried in appeal (in FAO(OS) 490/2014).

In that case, the Division Bench had unequivocally held that the disputes between RPG and Intertoll were not arbitrable. The relevant extract of the said decision is quoted below:-

"28. The agreement dated March 17, 2006 between respondent No.8 and RPG Cables Ltd. makes a reference to a right in favour of RPG Cables Ltd. against respondent No.8 with respect to such amount which respondent No.8 would receive from NHAI pertaining to Optical Fiber Cables (OFC), but this agreement does not have any arbitration clause and assuming the appellant was assigned the rights of RPG Cables under the agreement dated March 17, 2006 when appellant and RPG Cables executed the agreement dated September 06, 2011, which agreement also does not have any arbitration clause, the dispute relating to claims of RPG Cables against respondent No.8 would not an arbitrable dispute."

17. It is also relevant to note that that the aforesaid appeal was dismissed with cost of ₹1,00,000/- awarded in favour of Intertoll.

18. Indisputably, the aforesaid decisions are relevant to the controversy in question but the same were not mentioned in the petition. Although, CECL had mentioned the aforesaid petition under Section 9 of the Act and also annexed the pleadings as well as the order dated 29.01.2016 disposing of the said petition, it failed to make any reference to the judgement dated 21.11.2014 as well as the proceedings before the Division Bench in FAO(OS) 490/2014.

19. Thus, I consider this a fit case where the petition should be dismissed with costs. Accordingly, the petition is dismissed with cost of ₹1,00,000/-. The cost shall be paid to respondent no.1 (Intertoll) within a

period of two weeks from today. The pending application also stands disposed of.

VIBHU BAKHRU, J

JANUARY 04, 2017

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