

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

% Judgment Reserved on: 03.01.2017
Judgment delivered on: 20.02.2017

+ FAO(OS) 382/2016

M/S GEO MILLER & CO PVT LTD

..... Appellant

versus

**BIHAR URBAN INFRASTRUCTURE DEVELOPMENT
CORPORATION PVT LTD & ANR** Respondents

Advocates who appeared in this case:

For the Appellant : Mr S.D. Singh with Mr Rahul Kr. Singh & Mr
Jitender Singh.

For the Respondents : Mr Shivam Singh with Mr Vikram Singh
Chauhan.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

CM 47779/2016 (Exemption)

Allowed, subject to all just exceptions.

FAO(OS) 382/2016

1. This appeal is directed against the order dated 06.12.2016 passed by a learned single Judge of this Court in the appellant's petition under Section 9 of the Arbitration and Conciliation Act, 1996 being OMP (I)

No. 290/2015 whereby it was held by the learned single Judge that such petition was not maintainable by the appellant in its individual capacity.

2. The appellant had sought setting aside of orders dated 26.10.2013 and 27.05.2015 debarring the appellant from participating in future tenders by the respondent no.1 and blacklisting the appellant for a period of 5 years respectively.

3. The respondent no.1 had invited bids for a project for design, construction, installation, commissioning, management, operation and maintenance of Intake, RWPH, 220 MLD water treatment plant and water distribution network in Patna.

4. The appellant (Geo Miller) and another company, Gammon India, intending to bid jointly, formed a consortium by way of a 'Joint Bidding Agreement' dated 12.01.2012. Under this agreement the parties intended to constitute a proposed SPV i.e. Patna Water Supply Distribution Networks Pvt. Ltd. for the purpose of conducting the works under the agreement. The lead member of the consortium was Gammon India having an equity participation of 74% and Geo Miller held 26% equity.

5. The bid of the consortium/JV was accepted vide Letter of Acceptance dated 27.02.2014 at a bid price of Rs. 5,48,83,14,670/-. A

tripartite agreement (TPA) was entered between the JV/consortium, Respondent no.1 (BUIDCO) and Patna Nagar Nigam in terms of which bank guarantees were furnished by the appellant and Gammon India up to the value of 10% of the contract value.

6. A supplementary agreement (SA) was also entered into between aforesaid three parties, containing the dispute resolution clause, the arbitration clause and a clause regarding applicability of law and jurisdiction. In terms of Clause 20.4 of the agreement, it was agreed that arbitration would be held in accordance with the rules of arbitration of the International Centre for Alternative Dispute Resolution, New Delhi. The venue of arbitration was to be Patna. Clause 24.1 provided for "governing law and jurisdiction." viz. that the Courts at Delhi would have jurisdiction over matters arising out of or relating to the contract.

7. Because of the disputes between the respondents and the JV/consortium as also because of delay in execution of contract, the respondents, by order dated 26.10.2013 debarred the appellant and Gammon India from participating in future tenders to be floated by BUIDCO. On 27.05.2015, the appellant as well as Gammon India were blacklisted for 5 years.

8. The learned single Judge, by noticing the Clause 20.4 of the agreement dealing with arbitration, held that arbitration clause could be invoked only in case of dispute between the parties. The "party", the learned single Judge further observed, was defined under section 2(1)(h) of the Arbitration and Conciliation Act, 1996 which means party to an arbitration agreement. Since the "party" to the arbitration agreement in the present case was the consortium and not Geo Miller in its individual capacity, it was held that such invocation of the arbitration clause by only the appellant was not maintainable.

9. For the sake of completeness, Clause 20.4 of the agreement is being reproduced below:

"20.4 Arbitration

1. Any Dispute which is not resolved amicably by conciliation of the Expert Committee, as provided in Clause 20.3 shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules") or such other rules as may be mutually agreed by the Parties. And shall be subject to the provisions of the arbitration Act. The venue of such arbitration shall be Patna Bihar (India) and the language of arbitration proceedings shall be English.
2. There shall be a board of three arbitration of whom each Party shall select one and the third arbitrator shall be appointed by the two arbitrators so selected and in the

even of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

3. The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 20.4 shall be final and binding on the Parties as from the date it is made and the Contractor and the Employer, agree and undertake to carry out such Award without delay.
4. The Contractor and the Employer agree that an Award may be enforced against the Contractor and/or the Employer as the case may be and their respective assets wherever situated.
5. This Contract and the rights and obligations of the Parties shall remain in full force and effect pending the Award in any arbitration proceedings hereunder."

10. The agreement dated 12.01.2012 between the members of the consortium clearly indicates that Gammon India shall be the lead member of the consortium and shall be authorised to receive instructions and incur liabilities for the project. The lead member i.e. Gammon India, according to the agreement, had equity participation and total shareholding of 74% whereas the appellant being the other consortium member had a shareholding of 26%. Only the consortium, according to the agreement, could invoke the arbitration agreement.

11. The contention of the appellant that the agreement had been signed not only by the lead member but also by the appellant who could invoke the arbitration clause in its own capacity was rightly rejected by the

learned single Judge as the wordings of the agreement unambiguously indicate that the consortium would be represented through the lead member of the consortium.

12. Mr S. D. Singh, the learned counsel for the appellant submitted that the appellant could not have been blacklisted for the non-performance of the contractual obligations of the JV/Consortium unless the same was determined by a competent court and that holding of the appellant as not a "party" to the agreement in terms of section 2(1)(h) of the Arbitration Act was unnecessary and unreasonable. In fact, it was argued that the blacklisting of the appellant individually for alleged non-performance of the consortium could not be justified and therefore, by a reverse logic, the appellant ought not to have been precluded from invoking the arbitration clause individually. It was further contended that the blacklisting of the appellant under Rule 8 of Bihar Contractors Registration Rules was illegal as the appellant was not registered under the said rules, which in fact is a precondition for attracting the provision of the rules. The blacklisting and debarring, it was asserted, was an individual and separate action on the appellant and the appellant being a member of the

consortium could invoke the arbitration clause individually and was not dependant on the action of the consortium.

13. We are afraid we cannot accept the submission of the appellant as the intention reflected in the agreement clearly belies the contention of the appellant that the arbitration clause could be invoked by any member of the consortium/JV independently or individually. The learned single Judge was absolutely justified in holding that the remedy of the appellant does not lie under the Tripartite Agreement between the respondent, consortium and Patna Nagar Nigam.

14. In **Automation Technologies (I) Pvt. Ltd. v. Unitech Ltd.**, 2009 (1) RAJ 444 (Del), the court had permitted the invocation of the arbitration clause in the Memorandum of Understanding at the instance of one of the members of the agreement because of the special wordings of the arbitration clause which permitted invocation in case of any dispute or difference arising out of or in connection with the agreement or with the interpretation thereof. In the arbitration clause of that agreement, it was not covenanted that only a party to the agreement could invoke the arbitration clause. A broad meaning was, in that context given to the word

“party” as defined under section 2(1)(h) of the Arbitration and Conciliation Act, 1996.

15. In the present case, the arbitration clause (Clause 20.4), clearly refers to a dispute between the “parties”. It was the consortium which was one of the 'parties' and not the appellant.

16. Thus we do not find any reason to differ with the view taken by the learned single Judge.

17. The appeal is dismissed but without any order as to costs.

CM 47778/2016

1. In view of the appeal having been dismissed, the application has become infructuous.

2. The application is disposed of accordingly.

ASHUTOSH KUMAR, J

BADAR DURREZ AHMED, J

FEBRUARY 20, 2017/ab