

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 16.03.2018

+ **ARB.P. 620/2017**

M/S INDO NABIN PROJECTS LTD.

.....Petitioner

Versus

M/S BHARAT HEAVY ELECTRICALS LTD.Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Rauf Rahim, Ms Awantika Prashant
and Mr Nikhil Mishra.

For the Respondent : Ms Mani Gupta.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an arbitrator be appointed to adjudicate the disputes that have arisen between the petitioner and the respondent (hereafter ('BHEL')).

2. The learned counsel appearing for BHEL did not dispute the existence of an arbitration agreement. She; however, contended that this Court does not have the jurisdiction to entertain the present petition as the arbitration is to be conducted in Bhopal, Madhya Pradesh.

3. Briefly stated, the relevant facts necessary to address the aforesaid controversy are as under:-

3.1 On 11.05.2007, BHEL issued a Notice Inviting Tender (NIT) for “civil works, erection, testing and commissioning of 220KV transmission line for loop in and loop out and augmentation of existing 220 KV Chandrapura switchyard including dismantling and handing over of all equipments (including dismantled equipments/materials) to principal employer / customer (Damodar Valley Corporation) as detailed in technical specification”. The tender documents comprised of (a) Conditions of Contract for Civil Work; (b) Conditions of Contract for Erection Work; and (c) Special Commercial Terms and Conditions.

3.2 The petitioner submitted its bid on 26.05.2007 in response to the afore-mentioned NIT. BHEL issued a Letter of Intent (LOI) on 23.06.2007 awarding the contract for execution of the subject works at a contract price of ₹1,87,92,538/- (Rupees One Crore Eighty Seven Lakh Ninety Two Thousand Five Hundred Thirty Eight Only). The petitioner accepted the LOI by a letter dated 09.01.2008.

3.3 Thereafter, BHEL issued a Work Order bearing W.O. No.: TBSM/CHP/TL PACKAGE/WO/07-08 dated 16.01.2008 (hereafter ‘the Work Order’) awarding the works.

3.4 Simultaneously, the parties also entered into “the Contract Agreement” dated 16.01.2008 (hereafter ‘the Contract Agreement’). Admittedly, the subject works could not be completed within the

specified time. The petitioner claims that this was on account of non-availability of materials and work fronts. Accordingly, the petitioner requested for extension of the contract period from time to time, which was granted by BHEL. The petitioner states that the works were finally completed on 31.12.2014 and BHEL issued the Completion Certificate certifying the same.

3.5 The petitioner, *inter alia*, claims that it is entitled to over-run charges on account of prolongation of the works. BHEL does not accept the said claim. This is at the core of the disputes between the parties.

3.6 In view of the disputes that are stated to have arisen between the parties, the petitioner sent a notice dated 30.01.2017 invoking the arbitration clause and called upon BHEL to appoint an independent arbitrator within 30 days thereof. BHEL by a letter dated 20.02.2017 declined the request made by the petitioner by stating that since the full and final certificate had been given by the petitioner without raising any contractual disputes, the request for appointment of an arbitrator was not tenable. This has led the petitioner to file the present petition.

4. Ms Gupta, the learned counsel appearing for BHEL contended that the arbitration agreement between the parties was contained in several documents, which collectively comprised the ‘contract’ between the parties. She submitted that the terms of Clause 13 of the “Special Commercial Terms and Conditions” provides that the

place/seat of arbitration should be at Bhopal and since the commercial terms stated therein override the standard clauses specified in the conditions of the contract, the arbitration is to be conducted in Bhopal. She referred to the decision in *Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and Ors.: (2017) 7 SCC 678* and on the strength of the said decision contended that since it is agreed that the place of arbitration is at Bhopal, the Courts in Madhya Pradesh would have the exclusive jurisdiction in respect of the arbitration between the parties.

5. She contended that the arbitration clause in the Work Order was not applicable since the Work Order expressly provided that the terms and conditions would be applicable till the signing of the 'Contract Agreement' and the Contract Agreement expressly provides that the arbitration shall be as per the tender specifications.

6. Lastly, she contended that the arbitration clause was not enforceable to the extent that it designates the 'Heading TBG Division' of BHEL as an arbitrator and this would not be permissible in terms of Section 12(5) of the Act read with Seventh Schedule to the Act.

Reasons and Conclusion:

7. First and foremost question that falls for consideration is whether the parties have agreed that the arbitration proceedings would be conducted at Bhopal as contended on behalf of BHEL.

8. At this stage, it would be necessary to refer to relevant clauses of various documents comprising of the ‘contract’ between the parties. Clause B.2.0 of the General Terms and Conditions of Contract for Civil Work, which formed part of the tender documents as well as the Contract Agreement entered into between the parties, expressly provides that the Courts at Delhi would have the exclusive jurisdiction with regard to all claims in respect of the contract. Clause B.15.0 of General Terms and Conditions of Contract for Civil Work is the arbitration clause. Clauses B.2.0 and B.15.0 are set out below:-

**“B.2.0.LAW GOVERNING THE CONTRACT
AND COURT JURISDICTION:**

The Contract shall be governed by the Law for the time being enforce in the Republic of India. The Civil Court at Delhi having ordinary Original Civil Jurisdiction shall alone have exclusive jurisdiction in regard to all claims in respect of this contract.

B.15.0 ARBITRATION:

B.15.1 Except where otherwise provided for in the contract all questions & disputes relating to the meaning of the specification designs, drawings and instruction herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings specifications, estimates, instructions, orders of these conditions or otherwise concerning the works, of the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred

to the sole arbitration of the General Manager BHEL, New Delhi and if the General Manager is unable or unwilling to act, to the sole arbitration of some other person appointed by the General Manager willing to act as such arbitrator. There will be no objection if the arbitrator so appointed is an employee of BHEL, and that he had to deal with the matters to which the contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute of difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason such General Manager as aforesaid at the time of such transfer vacation of office or inability to act shall appoint (see note) another person to act as arbitrator in accordance with the terms of the contract such person shall be titled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such General Manager as aforesaid should act as arbitrator and if for any reason that is not possible the matter is not to be referred to arbitration at all, in all cases where the amount of the claim dispute is Rs.50,000/- (Rupees fifty thousand) and above the arbitrator shall give reasons for the award.

Subject as aforesaid the provisions of the arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made there under and the time being in force shall apply to the arbitration proceeding under this clause.

It is a term of the contract that the party involving arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amounts claimed in respect of each dispute.

The arbitrator (s) may from time to time with consent of the parties enlarge the time for making and publishing the award.

The work under the contract shall, if reasonably possible, continue during the arbitration proceedings and no payment due or payable to the contractor shall be withheld on account of such proceedings.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing.

The Arbitrator shall give a separate award in respect of each dispute or difference referred to him.

The Venue of arbitration shall be such place as may be fixed by the Arbitrator in his sole discretion.

The award of the arbitrator shall be final, conclusive and binding all parties to this contract.

Laws governing the Contract:

The contract shall be governed by the Indians Laws for the time being in force.”

9. The General Terms and Conditions of Contract for Erection Work also contained an identically worded Clause.

10. Clause 13 of the Special Commercial Terms and Conditions provides for the place of arbitration to be at Bhopal. The said clause reads as under:-

“13.0 Arbitration

In case of any dispute, a sole arbitrator will be appointed by BHEL and whose decision would be

final and binding on both the parties. The place of arbitration shall be Bhopal.”

11. The note to the Special Commercial Terms and Conditions reads as under:-

“If any discrepancies between above “special commercial terms & conditions” and “conditions of Contract for Civil work, Doc. No. : TB-Civil-GCC, Rev-02 and conditions of contract for erection works, DOC. NO. - TB-ETC-GCC, REV.-02 20th JUNE 2005”. The specials commercial terms and conditions shall supersede the standard clause specified in the “conditions of Contract for Civil work, Doc. No. : TB-Civil-GCC, Rev-02 and conditions of contract for erection works, DOC. No. - TB-ETC-GCC, REV.-02, 20th JUNE 2005”.

12. It is apparent from the aforesaid note that if there is any discrepancy between the Special Commercial Terms and Conditions and Conditions of Contract for Civil Work and Conditions of Contract for Erection Work, the Special Commercial Terms and Conditions would supersede the Standard Clause.

13. Thus, although, the Conditions of Contract for Civil Work and Conditions of Contract for Erection Work expressly provides that the arbitration shall be conducted at New Delhi. The said clauses are overridden by Clause 13 of the Special Commercial Terms and Conditions.

14. In view of the above, there can be no dispute that insofar as the tender documents are concerned, the place of arbitration is to be at Bhopal.

15. The Work Order executed subsequently also includes an arbitration clause. The Work Order also provides that the Courts at Delhi would have the exclusive jurisdiction. The relevant Clauses (Clauses 19, 25 and 26) of the Work Order are set out below:-

“19.0 LAW GOVERNING THE CONTRACT AND COURT JURISDICTION:

19.1 The Contract shall be governed by the Law for the time being enforced in the Republic of India. The Civil Court at Delhi having ordinary Original Civil Jurisdiction shall alone have exclusive jurisdiction in regard to all claims in respect of this contract.

25.0 ARBITRATION:

In case of any dispute, a sole arbitrator will be appointed by BHEL and whose decision would be final and binding on both the parties. The place of arbitration shall be New Delhi.

26.0 GENERAL:

26.1 Above are the main terms and conditions of the contract. However all other terms and conditions mentioned in our Tender Specification are applicable.

26.2 Till the signing of contract agreement, the terms & conditions mentioned in this work order & reference documents mentioned at Sl. No. 1.0 of this work order shall be applicable.

26.3 This work order is being issued in duplicate. Please return one copy duly signed, stamped and accepted as token of receipt and unconditional acceptance of this Work Order.”

16. The Contract Agreement expressly provides that the tender documents as well as the Work Order would form a part of the Contract Agreement. Further, Clause 6(c) of the Contract Agreement provides for reference of disputes to Arbitration and Clause 6(d) of the Contract Agreement also provides for exclusive jurisdiction of the Court at Delhi. Clause 6(c) and 6(d) of the Contract Agreement are set out below:-

“6(c) That all disputes arising out of or relating to this agreement shall be referred to the sole Arbitrator as per arbitration clause mentioned in the Tender Specifications. The Arbitrator from time to time with the consent of the parties enlarge the time for making and publishing award without reference to the court for the purpose.

6(d) That the jurisdiction in all suits or claims arising out of this agreement shall be of New Delhi Courts only.”

17. The intention of the parties has to be ascertained from the relevant clauses as set out above. It is relevant to observe that there is uniformity in the tender documents, Work Order and the Contract Agreement, in so far as the jurisdiction of the Courts is concerned; it has been explicitly stated in those documents that the Courts at New Delhi would have the exclusive jurisdiction in respect of claims relating to the contract. This, plainly, indicates that the parties did not intend that the matters relating to this agreement be adjudicated in any Court other than Court at New Delhi.

18. Clause 25 of the Work Order also expressly provides that the place of arbitration would be at New Delhi.

19. Clause 26.1 of the Work Order is also important. A plain reading of the said Clause indicates that Clauses 1 to 25 of the Work Order were agreed to be the *main terms and conditions of the contract*. *However, all other terms and conditions mentioned in our Tender Specification would be applicable*. Indisputably, in this view, the arbitration clause as provided in the Work Order, which expressly provides that the place of arbitration shall be at New Delhi, would be applicable. And, so would *other terms and conditions* of the tender documents; which, obviously, would not include the arbitration clause.

20. The learned counsel appearing for BHEL had relied upon Clause 26.2 of the Work Order, which indicates that till the signing of the Contract Agreement, the terms and conditions as mentioned in the Work Order and the reference documents (which include the tender documents) would be applicable. A plain reading of Clauses 26.1 and 26.2 of the Work Order indicates that insofar as the main conditions referred to the Work Order are concerned, the same would be applicable notwithstanding any other terms and conditions in the tender documents. However, this would be subject to the terms and conditions contained in the Contract Agreement. In this view, the main terms and conditions of the Work Order and the Contract Agreement must be read to ascertain whether there is any repugnancy between the said documents.

21. It is well settled that insofar as possible contract the documents must be read in harmonious manner and an interpretation that avoids any conflict between the said documents must be preferred. The principle has been explain in **Chitty on Contracts, 29th Edition, Volume-I, in paragraph 12-078**, in the following words:

“12-078 Inconsistent or repugnant clauses. Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the real intention of the parties as gathered from the instrument as a whole, and that part which would defeat it must be rejected. The old rule was, in such a case, that the earlier clause was to be received and the later rejected, but this rule was a mere rule of thumb, totally unscientific, and out of keeping with the modern construction of documents. To be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses. A term may also be rejected if it is repugnant to the intention of the parties as it appears from the document. However, an effort should be made to give effect to every clause in the agreement and not to reject a clause unless it is manifestly inconsistent with or repugnant to the rest of the agreement.”

22. In ***Bank of India v. K. Mohandas (2009) 5 SCC 313***, the **Supreme Court** observed as under:-

“31. It is also a well-recognized principle of construction of a contract that it must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be interpreted so as to bring them into harmony with the other provisions if that interpretation does no violence to the meaning of which they are naturally

susceptible. [(The North Eastern Railway Company vs. L. Hastings) (1900 AC 260)].” (Also see ***Provash Chandra Dalui v. Biswanath Banerjee 1989 Supp (1) SCC 487***).

23. It is also relevant to bear in mind that both the Work Order and the Contract Agreement were executed on the same date. It, therefore, does not stand to reason that the parties would have intended any repugnancy or conflict between the clauses of the said two documents, which were executed almost simultaneously.

24. If Clause 6(c) of the Contract Agreement is read keeping in view the aforesaid principles, it is at once clear that there is no irreconcilable conflict between Clause 25 of the Work Order and Clause 6(c) of the Contract Agreement. Whereas Clause 25 of the Work Order provides that the sole arbitrator would be appointed by BHEL and the arbitration shall held in Delhi, Clause 6(c) of the Contract Agreement merely provides that the disputes would be “referred to the sole Arbitrator as per arbitration clause mentioned in the Tender Specifications”. This clearly indicates that, whereas, the parties agreed that the place of arbitration would be New Delhi (as per Clause 25 of the Work Order), the disputes would be referred to the sole Arbitrator as per the arbitration clause (in terms of Clause 6(c) of the Contract Agreement). Thus, the procedure for reference as contained in the tender documents would have to be followed but arbitration agreement would be held in New Delhi.

25. Clause 6(c) of the Contract Agreement cannot be read to mean that the place of arbitration would be as per the Tender Specifications. The said clause should be read in the restricted sense of only providing for the reference to be as per the arbitration clause contained in the Tender Specifications (tender documents). If Clause 6(c) of the Contract Agreement and Clause 25 of the Work Order are read in the aforesaid manner, there is no conflict between the clauses of the said two documents.

26. Considering that all the documents – Tender Specifications, Work Order and the Contract Agreement – expressly provided that the Courts at New Delhi would have the exclusive jurisdiction in regard to the suits and claims arising from the said agreement, it is difficult to accept that the parties intended that the arbitration agreement would be at Bhopal. The parties having expressly agreed that the Courts at New Delhi would have the exclusive jurisdiction in regard to all claims in respect of the contract, clearly indicates that the parties did not intend to exclude the jurisdiction of this Court in respect of arbitration.

27. It would also be relevant to mention that the registered/principal office of BHEL is located at New Delhi and the works are executed in the State of Jharkhand and there is no ostensible reason why parties would have agreed to hold the arbitration proceedings at Bhopal.

28. In view of the above, this Court is of the view that the arbitration has to be conducted at New Delhi and the contention that

this Court does not have jurisdiction to entertain the present petition is unmerited.

29. Indisputably, in terms of the Work Order and the tender documents, the arbitrator was to be appointed by BHEL. However, BHEL has failed to appoint an Arbitrator, despite being called upon to do so by the petitioner.

30. In the circumstances, this Court is of the view that the present petition is to be allowed. Accordingly, Mr. Justice Badar Durrez Ahmed, Former Judge of Delhi High Court (Mobile No. 7042205786) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties. This is subject to the Arbitrator making the necessary disclosure under Section 12 of the Act and not being ineligible under Section 12(5) of the Act.

31. The Arbitrator shall fix his fees in consultation with the learned counsel for the parties.

32. The parties are at liberty to approach the Arbitrator for further proceedings.

33. The petition is disposed of in the above terms.

VIBHU BAKHRU, J

MARCH 16, 2018
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