

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

ARBITRATION APPLICATION No.151 of 2017

ORDER :

This Arbitration Application is filed under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 to appoint an Arbitrator on behalf of the 1st respondent as also a Presiding Arbitrator so as to complete the constitution of the Arbitral Tribunal to adjudicate the claims and disputes between the applicant and the 1st respondent arising out of the Job Works Agreement dt.26.03.2015.

2. The applicant contended that it is a proprietary concern dealing with infrastructure projects; that 1st respondent is a Company incorporated under the Companies Act, 1956 in 2009 and it is engaged in business of civil construction activities, infrastructure facilities, Engineering, Procurement And Construction projects, BOT projects on annuity basis from State Governments like Andhra Pradesh, Madhya Pradesh, Chattisgarh, etc.; that the 2nd respondent is a unit of the Public Works Department of Government of Chattisgarh; that 3rd respondent was appointed by 2nd respondent to render project monitoring consultancy services for Kairagarh-Dongargarh-Tumdibod Road (M.D.R.); that 2nd respondent invited a tender vide Tender No.2/2013-14/CGPWD/IND-298/8-01 dt. 21.02.2014 for an estimated cost of Rs.124.22 crores for awarding the Asian Development Bank funded work of rehabilitation and upgradation of Kairagarh-

Dongargarh-Tumdibod (M.D.R.) Package No.12 from Ch 0+000 to 56+410 (Net Project Length=53.310 Kms.) in Rajnandgaon District of Chattisgarh State, on the basis of Engineering, Procurement And Construction; that 1st respondent was awarded the said contract by the 2nd respondent on 20.02.2015; and that 1st respondent entered into agreement 06/ADB/2014-15 dt.23.02.2015 with 2nd respondent for execution of the said work.

3. It is contended that the applicant approached the 1st respondent to sub-contract a portion of the said work, ie., execution of items contained in Bill No.5 and Bill No.6 of BOQ of the State Road Project Agreement No.06/ADB/2014-15 dt.23.02.2015; and the 1st respondent appointed the applicant as its sub-contractor and entered into a Job Work Agreement dt.26.03.2015 with the applicant for Rs.50,50,43,379/-.

4. It is contended that due to fault of the 1st respondent, applicant could not start the work assigned to it under the Job Work Agreement dt.26.03.2015 even till September, 2015; that thereafter, the applicant commenced work; that certain part payments were made by 1st respondent to the applicant on 03.10.2015, 03.12.2015, 12.01.2016, 18.02.2016, 13.05.2016 to the tune of Rs.90 lakhs, but Rs.2,11,10,446/- was withheld by the 1st respondent. According to the applicant, subsequently it raised a bill for Rs.5,34,87,604/- on 19.06.2016; but 1st respondent after receiving it vide e-mail

dt.08.07.2016 delivered two letters dt.10.12.2015 communicating termination of the contract.

5. The applicant contends that the termination of the Job Work Agreement dt.26.03.2015 by 1st respondent was *mala fide* and the reasons assigned by the 1st respondent for doing so are false.

6. It is contended that the applicant is entitled to Rs.13,08,81,395/- from the 1st respondent with interest at 12% per annum from 08.07.2016, on which date it had sent a e-mail questioning the termination of the agreement.

7. It is also contended that applicant issued a letter dt.22.05.2015 making a request for invoking the arbitration as per clause “DISPUTES AND SETTLEMENTS” provided in the Job Work Agreement and nominated V.K. Amar, Chief Engineer (Retd.), Public Works Department, Madhya Pradesh as its nominee Arbitrator and requested 1st respondent to nominate its arbitrator; but 1st respondent issued a letter dt.16.06.2017 contending that the requirements for invocation of arbitration clause were not fulfilled and alleging that it is bad in law and not maintainable. It is contended that the applicant issued a legal notice dt.04.07.2017 asking 1st respondent to nominate its arbitrator, but the 1st respondent sent a legal notice on 31.07.2017 refusing to nominate that arbitrator.

8. The applicant therefore prayed that this Court should appoint an arbitrator on behalf of the 1st respondent and also a Presiding

Arbitrator to complete the constitution of the arbitral tribunal to adjudicate the claims and disputes between the applicant and 1st respondent.

9. The Counsel for applicant Mr. Ankul Raj for Anindita S. Chander contended that 1st respondent is a party to the Job Work Agreement dt.26.03.2015, that the existence of the agreement is not disputed by the 1st respondent, there is a dispute between the parties, and there is an arbitration clause in the said agreement, and therefore, this application may be allowed as prayed for.

10. Though he initially contended that respondent nos.2 and 3, though not parties to the above agreement, also need to be roped in because of a plea raised by the 1st respondent that sub-contracting to the applicant was not permitted by the main contract dt.23.02.2015 between the 1st respondent and 2nd respondent, and their presence is necessary to cause production of the main contract, when Dr. Amit George, Advocate, representing K. Dhananjaya Naidu, counsel for 1st respondent, stated that the main contract is not confidential and agreed to supply a copy of the Agreement dt.23.02.2015 to the applicant / its counsel within one week from 29.04.2019 (when arguments were last heard), he did not press the said contention.

11. The counsel for 2nd respondent Sri Srinivas Mantha, did not appear and address any arguments either on 24.04.2019, 25.04.2019 and 29.04.2019 when the matter was heard by me. Since the applicant

is not seeking any relief against the 2nd respondent, there is no necessity to consider the counter-affidavit of 2nd respondent.

12. None appears for 3rd respondent though notice is served on the 3rd respondent. Since the Counsel for the applicant also stated that he will not claim any relief herein against the 3rd respondent, there is no necessity to hear the 3rd respondent as well.

13. The clause dealing with 'arbitration' in the Job Work agreement dt.26.3.2015 states as under :

“ DISPUTES AND SETTLEMENT :

In the event of any dispute arising between the parties relating to the various terms and conditions set forth herein above, the parties undertake to resolve the differences by mutual negotiation. If such dispute or difference cannot be resolved within one month from the date it has arisen, the same shall be referred to the Chief Executives of MS and NSPR. If the Chief Executives also fail to agree then such differences / disputes shall be referred to a Sole Arbitrator to be appointed by MS and NSPR by mutual consent.

If, however, the parties fail to agree upon a Sole Arbitrator with mutual consent, as aforesaid, MS and NSPR will each nominate an Arbitrator of their choice, and the two arbitrators so nominated shall choose a third arbitrator. The award of the Arbitrator/s so appointed shall be final and conclusive and be binding on both the parties to this JOB WORK AGREEMENT. The provisions of the Indian Arbitrator Act of 1996 or any statutory modification or re-enactment thereof and the rules made thereunder for the time being in force shall apply to the arbitration proceedings under this clause. The venue of arbitration shall be Hyderabad. The Courts in the city of Hyderabad shall have exclusive jurisdiction to entertain any suit

/ litigation in respect of any matters arising out of this Memorandum of Understanding.”

14. Firstly, it is the contention of the 1st respondent that the arbitration application is filed by a proprietary concern, but the party to the agreement dt.26.03.2015 is a Firm by name M/s. M.S. Constructions, and so the arbitration application at the instance of the applicant is not maintainable. Reliance is placed on the judgment of the Supreme Court in **Andhra Pradesh Tourism Development Corporation and another vs. Pampa Hotels Limited**¹ wherein the Supreme Court dealt with the question as to what is to be done where the party seeking arbitration is a company which was not in existence on the date of the signing of the contract containing the arbitration agreement. The Supreme Court held that in such situation there is no arbitration agreement between the parties.

15. A look at the Job Work Agreement dt.26.03.2015 indicates that the applicant M/s. M.S. Constructions was shown to have been represented by its Managing Partner Sri Munna K.R. Singh Brij Kumar Singh on its first page and last page. This matter was typed. But, on pages 1 to 5, there was a rubber stamp of M/s. M.S. Constructions describing it to be a ‘*proprietor*’. On the last page, the signature of Munna Kumar Singh is available between the words ‘M.S. Constructions’ and ‘Managing Partner’.

¹ (2010) 5 S.C.C. 425

16. In the reply-affidavit filed by the applicant, it is asserted in page no.6 that the applicant is a proprietorship entity with Munna Singh as its sole proprietor.

17. When the 1st respondent did not object to the applicant's representative signing the said Job Work Agreement on 5 pages as 'proprietor' and acquiesced in it, it is estopped from contending that because the word 'Managing Partner' was used on the 1st and the last page, the party to the agreement is a Firm and not a proprietary entity. Nowhere in the agreement were the words 'Partnership Firm' / 'Firm' used.

18. Merely because there is a typographical error in the description of the applicant in the printed matter contained on page no.1 and 6 in the agreement dt.26.03.2015 describing the applicant as represented by '*Managing Partner*' *Munna K.R. Singh Brij Kumar Singh*, the 1st respondent cannot ignore the mention of '*M.S. Constructions*' *Munna Kumar Singh* '*Proprietor*' on 5 pages of the said agreement, and contend that the party to the agreement is a Partnership Firm and not a proprietary concern. Therefore, I find no merit in this contention raised by the 1st respondent to this application.

19. Next, it is the contention of counsel for 1st respondent that as per the clause dealing with disputes and settlement, initially parties were to resolve the differences by mutual negotiation; if within one month from the date of the dispute, such resolution did not occur, it

has to be referred to the Chief Executives of the applicant and the 1st respondent; if the Chief Executives also fail to agree, then such differences / disputes shall be referred to a sole arbitrator to be appointed by both parties by mutual consent; and if parties fail to agree upon a sole arbitrator with mutual consent as aforesaid, each of the parties will nominate an arbitrator of their choice, and the two arbitrators so nominated shall choose a third arbitrator. He contended that the stages of negotiation, reference to Chief Executives of both parties, did not occur; and therefore, the application is premature.

20. The counsel for the applicant refuted the said contention and pointed out that in its letter M.S./010/2017 dt.04.05.2017, it had specifically stated that it is prepared to *sit across the table with* 1st respondent to present any details and respond to any query for *amicable settlement* of the dispute and had requested 1st respondent to communicate a suitable date, convenient to both parties, to meet and resolve the dispute; but the 1st respondent in its letter dt.15.05.2017 did not accept applicant's request for amicable settlement taking a plea that the Job Work Agreement was cancelled with explicit consent of the applicant. He therefore contended that the 1st respondent cannot take advantage of its own failure to negotiate with the applicant as per the procedure in the Clause dealing with 'DISPUTES AND SETTLEMENT', and oppose grant of relief to the applicant.

21. In Datar Switchgears Ltd. v. Tata Finance Ltd.², the Supreme Court had held :

“When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause.”

22. Therefore, having agreed for mutual negotiation as the first step, and having refused the request of the applicant in its letter dt.04.05.2017 for amicable settlement by such negotiation vide its letter dt.15.05.2017, it is now not open to the 1st respondent to insist that there was no mutual negotiation or that the other steps following it (such as reference to Chief Executives of both parties for resolution), did not occur. The 1st respondent cannot be allowed to take advantage of its own wrong.

23. In Deep Trading Co. v. Indian Oil Corpn.³ the Supreme Court considered sub-section (6) of Section 11 and declared :

“Sub-section (6) makes provision for making an application to the Chief Justice concerned for appointment of an arbitrator in three circumstances: (a) a party fails to act as required under the agreed procedure, or (b) the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure, or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure. If one of the three circumstances is satisfied, the Chief Justice may

² (2000) 8 SCC 151

³ (2013) 4 SCC 35

exercise the jurisdiction vested in him under Section 11(6) and appoint the arbitrator.” (emphasis supplied)

24. Therefore, this contention of the 1st respondent is also rejected.

25. A third contention is also raised by 1st respondent that on a letter dt.10.04.2015 (Ex.R.2) addressed by the 1st respondent to the applicant communicating termination of the Job Work Agreement, a representative of the applicant signed, and so it amounts to the applicant's acceptance/assent of the termination of the agreement.

26. This is refuted by Counsel for the applicant who denied that the applicant affixed his signature on the letter dt.10.04.2015 as a sign of assent for cancellation / foreclosure of the aforesaid Job Work Agreement. According to him, the letter dt.10.04.2015 is fictitious and created with ulterior motive and is untenable; and the Job Work Agreement was in operation till 08.07.2016, i.e., the date on which the applicant for the first time received the two letters of termination dt.10.12.2015. He denied that the jural / contractual relationship between the applicant and respondent ended on 10.04.2015, and contended that in fact, the contractual relationship was in existence till the receipt of e-mail dt.08.07.2016 containing the aforesaid two letters of termination.

27. He asserted that the Job Work Agreement never came to an end till the applicant on 08.07.2016 through e-mail received two letters of termination of same date, i.e., 10.12.2015 by same person, viz., Sri N. Anurag Reddy, but with two distinct reasons; that the above two

letters of Sri N. Anurag Reddy dt.10.12.2015 were kept on hold for about 7 months with mala fide intention, and communicated to the applicant for the first time vide e-mail dt.08.07.2016; and that 1st respondent failed in substantiating the need of serving two letters of same date, i.e., 10.12.2015 signed by the same person Sri N. Anurag Reddy with two distinct reasons for Contract Termination.

28. In the letter dt.10.04.2015 (Ex.R.2) addressed by the 1st respondent to the applicant terminating the Job Work Agreement dt.26.03.2015 with the applicant, the reason given is *‘as per clause 4.4 of particular conditions of Contract Agreement, the contractor shall not sub-contract more than 25% of the contract value. It is unlawful due to agreement conditions and the Job Work Agreement is hereby cancelled with immediate effect’*. There is a signature appearing on the bottom right side of this document, but it does not tally with the signature of Munna Kumar Singh, the Proprietor of the applicant on the Job Work Agreement or on the letters dt.04.05.2017, 22.05.2017 admittedly addressed by the applicant to the 1st respondent. There is any amount of doubt whether the said signature is of Sri Munna Kumar Singh, Proprietor of the applicant.

29. Also, even if it is his signature, it cannot be presumed that he assented to the termination because, other than the signature, there is nothing else written by the signatory allegedly representing the applicant, on the said letter. Moreover, there is no evidence that it was served on the applicant at all.

30. In the subsequent letter Ex.R.3 dt.10.12.2015, the 1st respondent stated that the Job Work Agreement dt.10.03.2015 is cancelled because of ‘(i) *slow progress of work, and (ii) not achieving the required milestones*’.

31. Another letter Ex.R.3 also dt.10.12.2015 mentions that the Job Work Agreement dt.10.03.2015 is terminated effective from that date due to breach of performance and progress, and as per Clause 16.2 contained in the contract terms, that the decision is final and will not be negotiated. The next paragraph states that the applicant has not started work.

32. If the Job Work Agreement had already been cancelled on 10.04.2015, why the two subsequent letters were issued by 1st respondent on 10.12.2015 mentioning a different date of the Job Work Agreement as ‘10.03.2015’ instead of ‘26.03.2015’ giving a different reason, is not satisfactorily explained by the 1st respondent.

33. In **National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.**⁴, the Supreme Court considered the effect of discharge of contract by an agreement signed by both parties on an arbitration clause. It held :

“25.When a contract has been fully performed, there is a discharge of the contract by performance, and the contract comes to an end. In regard to such a discharged contract, nothing remains — neither any right to seek performance nor any obligation to perform. In short, there cannot be any dispute. Consequently, there cannot obviously be reference to arbitration of any dispute arising from a discharged contract. Whether the contract has been discharged by

⁴ (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117

performance or not is a mixed question of fact and law, and if there is a dispute in regard to that question, that is arbitrable. But there is an exception. Where both the parties to a contract confirm in writing that the contract has been fully and finally discharged by performance of all obligations and there are no outstanding claims or disputes, courts will not refer any subsequent claim or dispute to arbitration. Similarly, where one of the parties to the contract issues a full and final discharge voucher (or no-dues certificate, as the case may be) confirming that he has received the payment in full and final satisfaction of all claims, and he has no outstanding claim, that amounts to discharge of the contract by acceptance of performance and the party issuing the discharge voucher/certificate cannot thereafter make any fresh claim or revive any settled claim nor can it seek reference to arbitration in respect of any claim.” (emphasis supplied)

34. Therefore whether the Job Work Agreement continued after 10.4.2015 or not is an arbitrable dispute and I do not wish to express any final conclusion on it.

35. Since according to the applicant the Job Work Agreement was in operation till 08.07.2016 (on which date through e-mail the two letters of termination dt.10.12.2015 were received by it), sub-Section (6-A) of Section 11, introduced by Act 3 of 2016 with retrospective effect from 23.10.2015, would be attracted, and this Court has to confine itself to the existence of the arbitration agreement only.

36. Therefore, I do not intend to go into the question ‘whether there was a valid termination of the Job Work Agreement dt.26.03.2015 on 10.04.2015 or not’ and ‘whether it occurred on 10.12.2015 or much later on 08.07.2016’, and leave them open to be considered by the arbitral tribunal. Whatever observations are made *supra* by me are

merely *prima facie* and they shall be only treated as having been made for disposal of this application.

37. All other contentions raised in the pleadings of the parties are left open to be raised before the Arbitral Tribunal including objections of 1st respondent regarding deletion of 2nd respondent from arbitration.

38. Accordingly, this application is allowed, Justice G.V.Seethapathy, former Judge of the Andhra Pradesh High Court, R/o.H.No.5-8-30/34, Govardhanpuri Gardens, Yapral, Secunderabad – 500 087, Telephone Nos.040-2786 5766, 0 99899 68686 is appointed as the Arbitrator on behalf of the 1st respondent; and Justice Madan B. Lokur, Former Judge of Supreme Court of India, R/o.A-26, First Floor, Gulmohar Park, New Delhi-11 00 49 is appointed as a Presiding Arbitrator.

39. As a sequel, miscellaneous applications pending if any in this application, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 03-06-2019

Ndr