

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

% Date of decision: 22nd October, 2019

+ ARB.P. 131/2019

MS. G. KAPOOR Petitioner

Through: Mr.Raman Kapur, Sr. Adv. with
Mr.R. P. Singh, Adv.

versus

M/S REACON ENGINEERS PVT. LTD. Respondent

Through: Mr. M. K. Ghosh and Ms.Tina Singh,
Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. This petition has been filed by the petitioner under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator. The facts as noted from the petition and contended by Mr. Kapur are, the petitioner is the sole proprietor of M/s. JPE International and is engaged in business of contracts for electrical work, structural and other business related to electrical works.

2. The petitioner and the respondent entered into an agreement for carrying out internal electrical works for renovation and expansion of ESIC Hospital, Okhla Project. The main contract was between ESIC and TCIL. A further sub-contract was between the respondent and TCIL. It is the case of the petitioner and contended by Mr. Kapur that the respondent has awarded the contract to the petitioner on back-to-back basis vide LOI dated September 18, 2013

and the total value of the contract was for Rs.5.92 Crores. That certain disputes arose between the petitioner and the respondent inasmuch it is alleged that complete payments have not been released by the respondent to the petitioner.

3. According to Mr. Kapur, the main contract between the respondent and the TCIL / ESIC contains an arbitration clause. It is also his case, that clause 2 of the LOI dated September 18, 2013 addressed to the petitioner by the respondent clearly states that the scope of work, commercial and technical terms and conditions including payment terms of contract between the petitioner and the respondent is on back-to-back basis with the main contract between the ESIC and TCIL and as such all the terms and conditions will apply to the agreement between the petitioner and the respondent including the arbitration clause which reads as under:

"20.6.

Arbitration. Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by reference to arbitration Unless otherwise agreed by both parties.

a). the dispute shall be finally settled under the Arbitration and Conciliation Act, 1996.

b). the dispute shall be settled by three arbitrators appointed in accordance with these Rules.

c). the arbitration shall be conducted in the language for communications defined in Sub-Clause 14 (Law and Language).

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction,

opinion or valuation of (or on behalf of) Employer, and any decision of the DAB, relevant to the dispute.

Neither Party shall be limited the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction. Any decision of the DAB shall be admissible in evidence in the Arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties and the DAG shall not be altered by reason of any arbitration being conducted during the progress of the works".

4. It is the submission of Mr. Kapur that as there is inaction on the part of the respondent to release the money to the petitioner, which resulted in the petitioner vide letter dated November 27, 2016 invoking the arbitration clause and proposing two names of retired Judges of this Court, for one to be appointed as sole Arbitrator. He states, the respondent vide letter dated December 19, 2016, instead of accepting the names, stated that they would suggest their own list of Arbitrators. However, there was no response thereafter.

5. According to Mr. Kapur, vide legal notice dated November 16, 2018, the petitioner nominated Justice Vijender Jain, a retired Judge of this Court as an Arbitrator and requested the respondent to nominate their nominee Arbitrator so that the two Arbitrators so appointed shall nominate the Presiding Arbitrator. However, there was no reply to the legal notice, even though the same was duly served on the respondent.

6. It is the submission of Mr. Kapur that as the respondent had not denied the existence of the arbitration clause in the agreement

between the parties, which is through incorporation, as such an Arbitrator need to be appointed. In this regard, he has relied upon the judgment of the Supreme Court in the case of ***M.R. Engineers and Contractors Pvt. Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696***. He also relied upon the Judgment of the Supreme Court in the case of ***Inox Wind Limited v. Thermocables Ltd. (2018) 2 SCC 519*** wherein the Supreme Court also on similar lines as was held in ***M.R. Engineers (supra)*** held that “*a general reference to a standard form of contract of one party will be enough for incorporation of an arbitration clause*”. He also relied upon the judgment in the case of ***Mahanagar Telephone Nigam Ltd. v. Canara Bank Civil Appeal No. 6202-6205 of 2019*** to contend that arbitration agreement is a commercial document inter parties and as the parties vide clause 2 of the LOI dated September 18, 2013 have agreed that the scope of work, commercial and technical terms and conditions including payment will be on back-to-back basis, it is clear that the arbitration clause as is given in the agreement between the ESIC and the TCIL vide clause 20.6 shall bind the petitioner and the respondent herein. That apart, it is his submission that the existence of the arbitration agreement / clause has been accepted by the respondent in its reply to the communication dated October 27, 2016 wherein, they have stated that “*it is further made clear to you, the suggestion given by you with respect to choice of Arbitrators are as such being considered, but my client however prefers to suggest his own list of Arbitrators if at all that dispute is relegated for arbitration*”. So according to him, the respondent having not agreed

for appointment of an arbitrator the petitioner has no other remedy but to approach this court for appointment of an arbitrator.

7. On the other hand, Mr. M.K. Ghosh, learned counsel appearing for the respondent would submit that any incorporation of an arbitration clause has to be by way of a specific reference to the arbitration clause. In other words, there has to be a specific incorporation of the arbitration clause and in the absence of such clause having been incorporated in the LOI dated September 18, 2013, it cannot be said an arbitration clause / agreement binds the parties herein. In support of his submission, Mr. Ghosh has relied upon the two judgments of the Supreme Court in the case of *Elite Engineering and Construction (Hyderabad) Pvt. Ltd. v. Techtrans Construction India Pvt. Ltd. (2018) 4 SCC 281* and *S.N. Prasad, Hitek Industries (Bihar) Ltd. v. Monnet Finance Ltd. and Ors. (2011) 1 SCC 320*. He seeks the dismissal of the present petition.

8. Having heard the learned counsel for the parties, the issue which arises for consideration is whether the parties have incorporated in the LOI, the arbitration clause / agreement as existed in the contract between the ESIC and the TCIL. The relevant clause 2 of the LOI reads as under:

“The scope of work, commercial and technical terms and conditions including payment terms will be on a back to back basis. Payment to JPEI will be made within 5 working days of receipt of the corresponding payments from TCIL.

9. It is not the case of the respondent that clause 2 of the stipulation in the LOI is not binding between the parties. Rightly

so, as the parties to the LOI had in fact performed each other's obligation under the LOI. The grievance of the petitioner is that, she is entitled to the payments for the work done pursuant to LOI.

10. The words '*back-to-back basis*' has some meaning / relevance. The words 'back-to-back' means "consecutive" as per the Cambridge Guide (Ref: Cambridge Guide to English Usage), Cambridge University Press, South Asian Edition, 2004.

11. There is no dispute that the TCIL was allotted the work of construction by the ESIC. The TCIL has in turn appointed the respondent herein as an agency to carry out the construction. The respondent had outsourced the electrical works of the project to the petitioner herein. There is also no dispute that there is an agreement between the ESIC and the TCIL, and clause 20.6 thereof relates to arbitration. The respondent also does not dispute the presence of an arbitration clause in its agreement with TCIL.

12. Clause 2 of the LOI, states that the scope of work, commercial and technical terms and conditions including payment terms will be on back-to-back basis. That apart, LOI also depicts that the mobilization advance of 3% paid to the petitioner by the respondent was to be recovered from monthly RAR Bills as per the terms of ESIC / TCIL @ 12% of gross bill. Clause 5 of the LOI also stipulates that the work will be executed as per the conditions laid out in the contract / agreement between the respondent and the TCIL. There are certain other terms and conditions based on the norms, as agreed by TCIL / ESIC, which clearly suggest, that the parties have consciously decided to govern themselves with same

terms and conditions as agreed between TCIL / ESIC / respondent. What is important in this case is in the notice dated November 27, 2016 addressed to the respondent, the petitioner had specifically stated that in terms of clause 2 and 5 of the LOI dated September 18, 2013, there exists an arbitration clause, i.e., clause 20.6 of the main contract condition / agreement between the TCIL and the respondent. Hence being back-to-back contract, arbitration clause is also applicable to them.

13. In reply dated December 19, 2016 to the notice of the petitioner, the respondent had not disputed the existence of the arbitration clause between them. The relevant portion of which has been reproduced above does reveal that the respondent intended to suggest its own list of Arbitrators if at all dispute is relegated for arbitration. The words “*if at all the dispute is relegated for arbitration*” has to be read in the context that the respondent disputed the claim raised by the petitioner in its notice but not their arbitrability. That apart, I find that the subsequent notice dated January 20, 2017, which is enclosed with Annexure A, remained unanswered by the respondent.

14. Mr. Kapur is justified in relying upon the judgment of the Supreme Court in the case of **MTNL v. Canara Bank** (*supra*) to contend that the arbitration agreement is a commercial document, which would mean that the commercial term in the contract would also mean an arbitration clause. So, it follows, the respondent has not denied the incorporation of an arbitration clause vide the LOI in its reply dated December 19, 2016. It also follows that it was the

understanding of the respondent that the arbitration clause as existing in the consecutive agreements as executed between the ESIC / TCIL / M/s. Reacon Engineers Pvt. Ltd. (respondent herein) shall be applicable to the parties herein.

15. Further, the exchange of notice and reply between the parties clearly suggests exchange of settlement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. This position is clear from the opinion of the Supreme Court in the case of **S.N. Prasad Hitek Industries (Bihar) (Supra)** wherein in para 12, the Supreme Court has held as under:

“But the words, ‘statements of claim and defence’ occurring in section 7(4)(c) of the Act, are not restricted to the statement of claim and defence filed before the arbitrator. If there is an assertion of existence of an arbitration agreement in any suit, petition or application filed before any court, and if there is no denial thereof in the defence/counter/written statement thereto filed by the other party to such suit, petition or application, then it can be said that there is an “exchange of statement of claim and defence” for the purposes of section 7(4)(c) of the Act. It follows that if in the application filed under section 11 of the Act, the applicant asserts the existence of an arbitration agreement with each of the respondents and if the respondents do not deny the said assertion, in their statement of defence, the court can proceed on the basis that there is an arbitration agreement in writing between the parties.”

16. In the aforesaid judgment, the Supreme Court has said the statement of claim and defence shall also mean a suit, petition or application filed before the court which includes a petition under Section 11 of the Act. In the case in hand, it is the notice invoking

arbitration clause / agreement, (which is in the nature of request under Section 11(4) (a) of the Act, before filing of the petition under Section 11(6) of the Act), which refers to Clauses 2 and 5 of the LOI dated September 18, 2013 and also to Arbitration Clause 20.6 of the main contract between the TCIL and the respondent, followed by a clear statement that the arbitration clause is applicable between them. This statement of the petitioner is not controverted, rather it is stated by the Advocate of the respondent that the respondent prefers to suggest his own list of arbitrators, if at all the dispute is relegated to arbitration.

17. It is clear, that to constitute an arbitration agreement under Section 7(4)(c) of the Act, there is a statement of claim containing a specific allegation about the existence of an arbitration agreement by the petitioner and non denial thereof by the other party. The said requirement is fulfilled in this case, inasmuch as the respondent did not dispute the existence of an arbitration clause.

18. Insofar as the judgment relied upon by Mr. Ghosh in the case of *Elite Engineering and Construction (Hyderabad) Pvt. Ltd. (supra)* is concerned, in view of my conclusion above, a commercial term would also mean an arbitration clause, which has been incorporated in Clause 2 of the LOI, which aspect has not been denied, the judgment is not applicable in the facts of this case. Accordingly, the petition is allowed. This Court appoints Justice Manmohan Singh, a retired Judge of this Court, as a sole Arbitrator, who shall adjudicate the inter-se disputes between the parties. The appointment of Justice Manmohan Singh (Retd.) shall be regulated

by the provisions of Arbitration & Conciliation Act. A copy of this order be sent to Justice Manmohan Singh (Retd.) for information. Petition is disposed of. No costs.

V. KAMESWAR RAO, J

OCTOBER 22, 2019/jg

