

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 149 OF 2022

Oriental Structural Engineers Pvt.Ltd. ...Applicant
vs.
Modern Road Makers Pvt.Ltd. & Anr. ...Respondents

Mr.Anil Airi with Mr.Venkat Rao and Mohan Kanojiya, Mr.Akash Gaonkar i/b.
Sindhu Kotian for Legalserve and Associates, for the Applicant.

CORAM : G.S. KULKARNI, J.
DATE : 21 June, 2022

ORDER:

1. This is an application filed under section 11 of the Arbitration and Conciliation Act, 1996 (for short “the Act”) whereby the applicant has prayed for appointment of an arbitral tribunal for adjudication of disputes and differences, which have arisen between the petitioner and respondents under the Contract Agreement dated 23 February, 2016.

2. The contractual work as required to be performed by the applicant pertained to “Construction of six laning of Agra to Etawah Bypass Section of National Highway-2 from Km. 199 + 660 to Km. 323 + 525 situated in the State of Uttar Pradesh (total length – 124.485 kms.)”. The National Highway Authority of India awarded respondent No.2-IRB Infrastructure Developers Ltd. the principal contractual work. Respondent No.2 in turn appointed respondent no.1, one of its

subsidiary companies, described to be an “Associate EPC Contractor.” Respondent no.1 so authorized by Respondent no.2 has executed the contract agreement in question with the applicant.

3. The following clause as contained in the contract agreement indicates the relevancy of the documents, in regard to the terms and conditions of the contract agreement:-

“THE, further terms, conditions and covenants of the Contract are set forth in the following exhibit Parts each of which is attached hereto and by this reference made a part thereof:

- a) The said Tender and Appendix thereto
- b) The Conditions of Contract and Annexures thereto
- c) The Performance Bond
- d) The Specification
- e) The Schedule of Prices
- f) The Letter of Acceptance dated 23rd October 2015
- g) Bar-Chart”

4. As noted above, respondent no. 1 is a subsidiary of respondent no. 2 and is appointed by respondent no. 2 as an ‘Associate EPC Contractor’. In such context, from the “words and expressions” as used in the contract and as defined in ‘Article GC 01’ of the General Conditions of Contract, the definition clause is required to be noted. The following are the relevant definitions:

“ **GENERAL CONDITIONS OF CONTRACT**
ARTICLE GC 01

DEFINITIONS

1.1 In the Contract, as hereinafter defined, the following words and expressions shall have the meanings hereby assigned to them, except where the context otherwise requires.

- (i) **Associate EPC Contractor** means the Agency (Modern Road Makers

Pvt. Ltd) Situated at A-703, Dream Apartments, Plot No. 14, Sector 22, Dwarka, Phase 1, New Delhi – 110 075 appointed by Principal EPC Contractor for execution of the works. And the legal successors in title to the Associate EPC Contractor represented by the Officer authorized in writing by the Associate EPC Contractor from time to time including his authorized representative where such authority is given to the Representative.

(iv) Client means “IRB Infrastructure Developers Limited.”

(v) **Concessionaire** means the SPV formed by the Client for implementation of the Project.

(vii) **“Contract”** means the Conditions of Contract, Specification, Drawings, Lump Sum Turn Key Price, Addenda if any, Letter of Acceptance including the annexed term sheet, and the Contract Agreement. Agreement shall have the same meaning as of the Contract.

(xx) **Principal EPC Contractor** (IRB Infrastructure Developers Limited) is the Client and is responsible for execution of the works on behalf of the Concessionaire.

5. In Article 25 of the General Conditions of Contract, the parties have agreed for dispute resolution and arbitration. The relevant portion of Article GC 25 is required to be noted, which reads thus:

ARTICLE GC 25: SETTLEMENT OF DISPUTES

Dispute Resolution & Arbitration

Whereas it is clearly understood by both the parties to this contract (Associate EPC Contractor and Contractor) that the Concessionaire has a contract with the Authority.

It is further understood by both the parties to this contract that the Associate EPC contractor is essentially bound by a separate contract whose contents & spirit are known to the contractor & therefore it is intended that in event to comply with intents & purpose of the said contract by the Associate EPC contractor the contractor shall comply with such terms & obligations as may lead to completion & fulfillment of all relevant obligations pertaining to the scope of the Contractor as may be necessary to be fulfilled. In event of such compliance should the contractor experience any differences with the

Associate EPC contractor the same along with whatever other disputes / difference arising out of or related to this contract shall be resolved through Arbitration as per the provision of A & C Act 1996 and as amended from time to time.

The party desiring to invoke jurisdiction of Arbitral Tribunal shall issue notice of 60 days from the day of occurrence of such disputes / differences to be resolved by a Tribunal comprised of three Arbitrators, one each to be appointed by the parties and the third and Presiding Arbitrator shall be nominated and appointed by these two Arbitrators. It is the condition of this contract that such invocation shall be permitted only once for all the issues of disputes / differences on completion of construction, abandonment or termination of this contract further subject to the condition that such an event as completion or abandonment or termination if does not occur within 30 months from the date of commencement, the invoking party shall however be entitled to have the option of serving the other party a notice for commencement of arbitration.

It is further agreed that following the notice of 60 days received by one party from the other, efforts shall be made for an amicable settlement to be arrived at by mutually selecting an eminent, neutral Engineer experienced in Highway constructions, failing which the Arbitration as above shall be invoked.”

(emphasis supplied)

6. It is the case of the applicant that in terms of the letter of award issued by NHAI, respondent no. 2 was required to incorporate a special purpose vehicle, for the purpose of executing the project. Accordingly, respondent no. 2 promoted and incorporated M/s. AE Tollway Private Ltd. (the Concessionaire) as a limited liability company under the Companies Act,. 1956 for executing the project. An agreement between the NHAI and the Concessionaire (Concession Agreement) came to be executed on 1 September, 2015. It is stated that although respondent no. 2 is not a party to the Concessionaire Agreement, respondent no. 2 is the ultimate beneficiary of the Concessionaire Agreement, as the Concessionaire is fully owned and controlled by respondent no. 2.

7. The applicant contends that the Concessionaire further entered into an Engineering Procurement and Construction (EPC) contract with respondent no. 2 thereby providing complete control on execution of the project to respondent no. 2. Thereafter respondent no. 1 is stated to have been appointed by respondent no.2 which is its fully owned subsidiary, as its Agent and Associate EPC Contractor for execution of the project.

8. The applicant has contended that respondent no.1 is the EPC arm of respondent no. 2 group. It is stated that all construction works undertaken by respondent no. 2 are currently executed through respondent no. 1, hence, the term 'Associate EPC Contractor' is not found anywhere in the concession agreement and is coined by respondent no. 2 for the purpose of the contract in question, as entered with the petitioner. It is contended by the applicant that accordingly respondent no. 1 acting as an agent of respondent no. 2 has entered into the contract agreement with the petitioner for construction of the said works on a Lump-Sum Term Key (LSTK) base price. It is stated that the contract was thus signed by respondent no. 1 not only as an Associate EPC Contractor but also as an agent of respondent no. 2. The applicant thus contends that Respondent no. 2 has established a complete control over the project as both the concessionaire and respondent no. 1 are fully controlled by respondent no. 2, of which

respondent no. 2 is the sole and ultimate beneficiary of the Concessionaire Agreement between the Concessionaire and the NHAI.

9. It is the case of the applicant that in accordance with the provisions of the contract, the project was completed by the applicant by 24 November 2020, which was within the extended time period of the contract. An independent engineer appointed by NHAI for supervision of the project had issued a completion certificate on 24 November 2020. Also respondent no.1 issued a substantial completion certificate on 18 January 2021 recording that the effective date of substantial completion to be 24 November 2020.

10. It is contended that during the execution of the project the applicant incurred huge costs and suffered losses for the reasons which were solely attributable to the respondents, details of which are set out in paragraphs 9 to 11 of the application. It is hence contended that disputes and differences have arisen between the parties in respect of which here was a detailed correspondence between the parties. The disputes are inter alia in regard to respondent no.1 not releasing the genuine and certified payments including certified substantial amounts of GST, obstructions on the sites which was beyond the scope of the work of the applicant, bringing about a situation that the applicant was required to remain idle resulting into huge expenses and losses. There

is also a dispute alleged to be on a malafide settlement agreement executed by the concessionaire, reference to which is made in some detail in paragraph 10 of the application. The applicant has also contended that disputes had arisen on account of illegal foreclosure of the contract by the respondents so as to cover up their lapses and that there was no provision for foreclosure of the contract in question.

11. The applicants referred to the correspondence between the parties between the period May 2021 upto November 2021, to contend that such disputes and differences were sought to be referred to arbitration.

12. The applicants contend that on the backdrop of the illegal foreclosure, the respondents no.1 by its letter 24 September 2021 informed the applicant that as respondent no.1 had foreclosed the contract, all further payments were withheld until the accounts are settled after the completion of defect liability period as per Clause 12.3 of GCC although, according to the applicant, such clause was not applicable. It is contended by the applicant that the respondents through the concessionaire have fully compromised and sabotaged the delay costs claim of the applicant, namely, the claims towards increasing construction costs due to prolongation of the execution of the project, by the settlement agreement dated 12 November 2020 which was

executed between the concessionaire and the NHAI.

13. It is the applicant's case that a final bill was accordingly submitted by the applicant as per clause 22 of the contract under the applicant's letter dated 10 December 2021, claiming an amount of Rs.593 crores being the dues payable by the respondents to the applicant. The respondents however did not take any step to make payment of the said amount to the applicant. Hence, disputes had arisen between the applicant and the respondents.

14. The applicant has contended that as per clause 25 of the General Conditions of the contract, the parties seeking arbitration are required to issue a notice of 60 days to the other party during which period the parties can make efforts for amicable settlement of the disputes through an eminent "Neutral Engineer" experienced in highway construction. Upon failure to reach an amicable settlement, the parties were free to pursue arbitration by appointing a three member arbitral tribunal. Each party was entitled to appoint one arbitrator and the two arbitrators were to appoint a presiding arbitrator.

15. It is the case of the applicant that respondent no.1 by its letter dated 19 November 2021 and 23 November 2021 attempted to create an impression that the respondents were interested in resolving the

disputes amicably. Respondent No.1 by such letters called for a meeting to discuss and settle “work done” bill. However, no concrete actions were taken by respondents to resolve the disputes.

16. The applicant has contended that in these circumstances, the applicant invoked Article 25 (supra) of the contract agreement whereby the applicant issued a 60 days notice for commencement of arbitration. Such notice was addressed to both the respondents being notice dated 20 December 2021. By such notice the applicant proposed to the respondents that the process of amicable settlement can be undertaken through Mr.A.D.Narain, Retired DG, Ministry of Road Transport & Highways (MORTH), who met the eligibility criteria set out in Article 25 of the contract to act as a neutral engineer. The applicant also referred to the collateral issues the details of which are set out in paragraph 22 of the application. However, the respondents despite receipt of the said notice of the applicant showed no inclination whatsoever to have any amicable settlement of the disputes. In such context the details of the correspondence as ensued between the parties between December 2021 to February 2022, are set out in paragraphs 23 to 26 of the memo of the application.

17. The applicant has thus contended that the respondents having failed to agree for appointment of neutral engineer within the 60 days

stipulated time as provided under Article 25 (GCC) of the contract agreement, the process to amicably settle the disputes failed.

18. The applicant accordingly, by its letter dated 22 February 2022 invoked the arbitration agreement (Clause 25 of the GCC) (supra) and appointed Mr. Justice Deepak Verma, Former Judge of the Supreme Court as its nominee arbitrator on the arbitral tribunal to be constituted, for adjudication of the disputes between the parties. The applicant called upon the respondents to nominate their arbitrator so that the nominee arbitrators can appoint a Presiding Arbitrator, so as to form an arbitral tribunal. The said letter of the applicant invoking arbitration was received by the respondents.

19. The applicant contends that respondent no.1 although received the applicant's notice invoking the arbitration agreement, however, without in any manner acknowledging and referring to the invocation notice and with an intent to create evidence and/or to mislead and wriggle out of the liability towards the applicant, took a position that respondent no.1 can discuss the pre-final bill in the next conciliation meeting, knowing fully well that no conciliation has taken place between the parties as a neutral engineer was never mutually appointed to facilitate amicable settlement of the disputes. In this context reference is made by the applicant to letter dated 2 March 2022 of

respondent No.1. The applicant states that the contentions of respondent no.1 being totally baseless were responded by the applicant's letter dated 8 March 2022.

20. On the above backdrop, the applicant contends that disputes and differences have arisen between the parties which could not be amicably settled within a period of sixty days in a manner as agreed between the parties under Article 25 of the GCC requiring the applicant to nominate its arbitrator for reference of the disputes to arbitration, and respondents having not nominated their arbitrator, the applicant was constrained to file the present application.

21. This application was listed for hearing before this Court on 19 April 2020 when it was informed to the Court that the respondents are served. Also as per the well established practice and procedure of this Court, an affidavit of service stating that the respondents are served was placed on record, however, the respondents were not represented despite service. To enable the respondents, as a matter of last chance, to appear in the present proceedings, the following order was passed by the Court on 19 April, 2020:-

“1. It is informed by the learned senior counsel for the applicant that the respondents are served and affidavit of service to that effect is also placed on record. However, despite service, none represents for the respondents.

2. As a matter of last chance, to enable the respondents to appear in the present proceeding, stand over to **5 May, 2022**

(H.O.B).

3. Learned advocate for the applicant is permitted to serve the respondents by private notice by all permissible modes and place on record affidavit of service before the returnable date.

4. If the respondents despite service are not represented on the adjourned date of hearing, the Court shall proceed to hear the applicant and pass appropriate orders.

5. Let the copy of this order be also served along with the advocate's notice to be issued to the respondents.

22. In pursuance of the above order, a fresh service was effected on the respondents. Accordingly, another affidavit of service of Mr. Akshay Bhosale dated 29 April, 2022 was placed on record, stating that the respondents were duly served. The documents evidencing service on the respondents namely the receipts/acknowledgments of service of the proceedings, are annexed to the affidavit of service from page nos.4 to 9.

23. Today when the application is called out for hearing, the respondents despite another chance and a fresh service being effected, are again not represented. The hearing on this application could not have been adjourned any further.

24. Mr. Anil Airi, learned Senior Counsel for the applicant has made elaborate submissions on the present application. Mr. Airi has drawn the Court's attention to the various documents as placed on record including the nature of the contract and the correspondence as entered

between the parties as noted above. Mr.Airi has submitted that after this application was filed on 28 March 2022 and the same was served on the respondents on 4 April 2022 (as per affidavit of service dated 18 April 2022), the respondents initiated correspondence with the applicants without acknowledging such service. To support such contention, Mr.Airi has placed on record a compilation of such correspondence between the parties which is subsequent to the filing of the present application.

25. In the above context, it is submitted by Mr. Airi that after service of such proceedings, respondent no.2 addressed an e-mail dated 6 April 2022 to the applicant inviting the applicant to have a meeting at the head office of the respondents at Mumbai for amicable resolution of the disputes. It would be appropriate to note the said e-mail which reads thus:

“From: **Vinod Menon** <vinod.menon@irb.co.in>
Date: Wed, Apr 6, 2022 at 4:23 PM
Subject: Invite for amicable settlement in the dispute relating to Agra-Etawah Road Project
To: <sbakshi@orientalindia.com>
CC: <raman@orientalindia.com>, VDM<vdm@irb.co.in>, Sudhir Hoshing>

Dear Sir,

Greetings from IRB.

Hope this mail finds you in the best of health.

This is to invite you to our head office in Mumbai for an amicable resolution of our dispute in the subject matter. Kindly give your convenient date and time for the said meeting.

In view of our long standing relation, we shall try our best to resolve the issues in the best interests of both the Parties.

Thanks & regards,

V. K. Menon.
IRB”

26. The applicant responded to the above e-mail by its letter dated 11 April 2022 addressed to respondent no.2 inter alia stating that although the applicant would welcome the suggestion of a meeting to be held for resolution of the disputes, however, the applicants were of the opinion that the respondent no.2 had created frivolous disputes to deprive the applicant of its legitimate dues. The respondent no.2 was reminded of the invocation of the arbitration agreement, however, without prejudice to the rights and contentions of the applicant, the applicant stated that the applicant would be still willing to sit with respondent no.2 to explore an amicable resolution of the disputes, provided all disputes claims raised by the applicant in various letters including the ones raised in the letter invoking the arbitration agreement are discussed.

27. Mr.Airi has submitted that the applicant's letter dated 11 April 2022 was replied by respondent No.2 by its letter dated 19 April 2022, thereby proposing a meeting to be held between the parties on 29 April 2022 at the Corporate office of respondent No.2. It is submitted that such meeting was convened, however, there was no meaningful

discussion and the meeting ended up without any conclusion, which according to the applicant was called for reasons other than to resolve any disputes. This was also recorded by the applicant by its letter dated 4 May 2022 addressed to respondent no.2.

28. Mr.Airi would hence submit that such disputes and differences have arisen between the parties. He has submitted that there is a lawful invocation of the arbitration agreement. Mr. Airi would submit that respondent No.2 is inextricably connected with the contract in question as firmly borne out by the contract itself, apart from the fact that it fully controls its subsidiary respondent no.1. It is thus his submission that the disputes between the parties are required to be referred to arbitration, this Court exercising jurisdiction under Section 11(6) of the Act, by appointing a nominee arbitrator for the respondents. He submits that in the context of the contract agreement, in so far as respondent no.2 is concerned, respondent no.2 is a necessary party to the arbitration following the settled principles of law as laid down by the Supreme Court in **Choloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification IMC, (2013)1 SCC 641** and the subsequent decisions.

29. Having heard Mr.Airi, learned Counsel for the applicant and having perused the record with his assistance, it appears to be quite clear that the arbitration agreement between the parties is contained in

Article 25 of the GCC. The applicant also has taken a recourse to the pre-arbitral procedure to the effect that as agreed between the parties, the applicant nominated an engineer to bring about an amicable settlement of the disputes which was to be brought about within a period of sixty days from a notice being received to that effect from the applicant. It is clear from the record that such request triggering the settlement mechanism was not accepted by the respondent and/or not acted upon, when invoked by the applicant. It appears that repeated attempts of the applicant to bring about an amicable resolution of the disputes had failed. Hence by notice dated 22 February 2022, the applicant invoked the arbitration agreement, by nominating an arbitrator on its part, and requested the respondents to nominate its arbitrator, so that an arbitral tribunal can be formed. However, even such request was not considered by the respondents, and it appears that a pretence of a settlement talk was sought to be foisted upon the applicant.

30. In so far as Mr.Airi's contention in regard to respondent No.2 being intrinsically connected to the contract agreement in question is concerned, the contract agreement itself is replete with involvement of respondent No.2. In fact, respondent No.2 is so intricately connected with the contract, that without the recognition of respondent No.2, the contract simply would be left without any meaning and could not have

been performed/completed by the applicant. As noted above, respondent No.2 has also addressed letters to the applicant that too after service of the notice of the present application, calling upon the applicant for a settlement meeting. In these circumstances, in my opinion, the principles of law as recognized by the Supreme Court in its decision in *Chloro Controls India Pvt.Ltd. Vs. Severn Trent Water Purification Inc. & Ors.*(supra) would certainly become applicable which hold that even a non-signatory / respondent No.2 would be subjected to arbitration when the transaction involves group of companies.

31. In the above circumstances, it is quite clear that the requirements for this Court to exercise jurisdiction under Section 11(6) of the Act, are eminently present, hence, the Court needs to appoint a nominee arbitrator for the respondents. Accordingly, the application is allowed by the following order:-

ORDER

- (i) Mr.Justice Deepak Verma, Former Judge of the Supreme Court, is proposed to be appointed as an arbitrator on behalf of the applicant;
- (ii) The Court appoints Mr. Justice A. K. Sikri, Former Judge of the Supreme Court, as a nominee arbitrator on behalf of the respondents;
- (iii) The learned nominee arbitrators so appointed shall appoint the Presiding Arbitrator;

(iv) The learned prospective arbitrators, before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court (e-mail: rgpsm-bhc@nic.in) so as to be placed on record of this application with a copy to be forwarded to both the parties;

(v) The parties shall appear before the arbitral tribunal as per the date and time which may be mutually fixed by the arbitral tribunal;

(vi) All contentions of the parties on merits are expressly kept open;

(vii) The application is disposed of in the above terms. No costs.

32. Office to forward a copy of this order to Mr. Justice A.K. Sikri, Former Judge of the Supreme Court, on the following address:-

N-58, Panchsheel Park,
New Delhi 110017,
E-mail: aksikrij@gmail.com ;
pstojusticesikri@gmail.com,

(G.S.Kulkarni, J.)