

(2016) 10 PAT CK 0018
In the Patna High Court
Case No : Request Case No.7 of 2016

A.B. Grain Spirits Pvt. Ltd.

APPELLANT

Vs

Bihar Urban Infrastructure Development Corporation Ltd.

RESPONDENT

Date of Decision : 20-10-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(5), Section 11(6)
Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008 — Section 2(b),
Section 2(k), Section 22, Section 9

Citation : (2017) 1 PLJR 147

Hon'ble Judges : I.A. Ansari, CJ.

Bench : Single Bench

Advocate : Mr. Rabindra Priyadarshi, Advocate, for the Respondent; Mr. Nilanjan Chatterjee, Advocate Mr. Apurva Roy, Advocate, for the Petitioner

Final Decision : Allowed

Judgement

I.A. Ansari, CJ. - A.B. Grain Spirits Pvt. Limited, a Public Limited Company, registered under the Companies Act, 1956, has come to this Court with the present petition, made under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996, seeking appointment of a sole arbitrator for deciding the disputes and differences between petitioner and respondents pursuant to an agreement, dated 19.08.2014.

2. The background facts, giving rise to the present petition, may, in brief, be set out as under:-

(i) Initially, the respondents herein issued a notice inviting tender for operating intra-city bus services in Patna and Bodh Gaya by Request for Qualification, dated 02.01.2014. Later on, by corrigendum, dated 22.04.2014, the Request for Qualification, dated 02.01.2014, was recalled, excluding Bodh Gaya from the said project and a fresh tender was issued for operating intra-city bus services in Patna by a Request for Proposal.

(ii) During the process of finalization of the tender, the respondents issued specific clarifications and corrigenda to the queries of the petitioner and other bidders with regard to the scope of work, more particularly, overlapping operation and maintenance services for the intra-city bus services.

(iii) In the tender process, the petitioner succeeded inasmuch as its offer/bid was accepted by letters of acceptance, dated 15.07.2014 and 12.08.2014. Thereafter, the petitioner furnished the required bank guarantees and by the agreement, dated 19.08.2014, entered into between the petitioner and the respondents, the petitioner was awarded the contract for operation and maintenance of intra-city bus services in Patna. Schedule I to the agreement deals with maintenance.

(iv) In terms of the agreement, the respondents, according to the petitioner, failed to provide the basic infrastructure for operating intra-city bus services in Patna. For instance, the complete fleet of 260 buses and basic infrastructure at the depot(s) were not provided by the respondents. Only 40 buses were handed over to the petitioner for operation. Though 25 new buses were also stationed at the depot of the petitioner, the same could not be made operational, because the respondents, the petitioner pleads, failed to provide the adequate infrastructure. The petitioner, through various correspondences, kept on making requests, in this regard, to the respondents, but the respondents did not respond to any of the correspondences. It is the case of the petitioner that because of the manner in which the respondents had conducted themselves, the petitioner not only faced hardship in operating and maintaining the contracted services, but the petitioner also suffered huge financial loss.

(v) It is also the case of the petitioner that despite all odds, the petitioner tried to keep the services operational at its own cost and expenses and, in the process, the petitioner's dues towards the maintenance's charges, from August, 2014, to December, 2015, rose to Rs.1,10,16,663/-; whereas the respondents issued a notice, dated 20.05.2015, to the petitioner alleging therein that the petitioner was doing nothing to maintain the buses and, in this regard, a penalty was also imposed upon the petitioner and an explanation was sought for as to why the maintenance agreement be not terminated.

(vi) Again, by notice, dated 07.07.2015, the respondents, referring to the notice, dated 20.05.2015, aforementioned, directed the petitioner to submit its reply within ten days; or else, action for termination of maintenance agreement would be taken against the petitioner.

(vii) Thereafter, respondent No.1 issued, unilaterally, a letter to the Oriental Bank of Commerce, dated 20.07.2015, requesting the bank to encash the bank guarantee on 02.08.2015 and to deposit the same in the respondents' account if the petitioner failed to renew the bank guarantees by 01.08.2015.

(viii) By its letter, dated 31.07.2015, the petitioner filed a detailed reply to the respondents' letters dated, 20.05.2015 and 07.05.2015. The petitioner by its letter, dated 03.08.2015, also intimated the respondents about the extension of

bank guarantees upto 11.08.2016.

(ix) Finding no headway to the dispute, the petitioner, by its letter, dated 25.08.2015, made a representation, in this regard, to the Principal Secretary, Urban Development and Housing Department. Thereafter, a meeting was held, on 26.08. 2015, in the Office of the Principal Secretary, Urban Development and Housing Department, between the representatives of the petitioner and the representatives of the respondents and it was decided to place the matter before the Chief Secretary, Government of Bihar, for a final decision; but despite the petitioner's correspondences, dated 14.09.2015, 21.09.2015 and 28.09.2015, nothing came forth.

(x) Faced with the circumstances, mentioned herein above, the petitioner, having been left with no option, issued, a notice, dated 26.10.2015, expressing its intention to terminate the agreement by invoking Article 10.1 of the agreement if the respondents failed to cure the material breaches of the agreement.

(xi) When no response came forth from the end of the respondents to the petitioner's notice, dated 26.10.2015, aforementioned, the petitioner issued a notice of termination of the agreement, dated 07.12.2015, with immediate effect, calling upon the respondents to comply with the post termination obligations under the agreement.

(xii) Pursuant to the notice of termination, dated 07.12.2015, the respondents, by their letter, dated 17.12.2015, requested the petitioner to hand over 40 buses completing the related paper works with all equipment to the authorised representative of the respondents. It is the case of the petitioner that in response to the respondent's letter, dated 17.12.2015, aforementioned, the petitioner handed over possession and control of forty buses along with bus depot and project facilities, in good operational condition, to the authorised personnel of the respondents on 17.12.2015 itself.

(xiii) It is also the case of the petitioner that the respondents, in utter disregard of the contractual provisions of the agreement, reiterated their threat and intention to invoke and encash the bank guarantees furnished by the petitioner.

(xiv) Thereafter, according to the petitioner, the petitioner, left with no option, moved a petition, under Section 9 of the Arbitration and Conciliation Act, 1996, before the District Judge, Patna, giving rise to Misc. Case No.141 of 2015, seeking ad interim ex parte relief restraining the respondents from invoking, encashing or taking any coercive steps with respect to the bank guarantees furnished by the petitioner. The learned District Judge, by order, dated 21.12.2015, directed, as an interim measure, the parties to maintain status quo with regard to the bank guarantees and the Misc. Case is still pending for its final adjudication. The respondents are not co-operating in the disposal of the said case.

(xv) It is in the circumstances, indicated above, that the present application has

been made seeking appointment of the sole arbitrator.

3. We have heard Mr. Nilanjan Chatterjee, learned Counsel, appearing on behalf of the petitioner, and Mr. Ravindra Priyadarshi, learned Counsel, appearing for the respondents.

4. Mr. Nilanjan Chatterjee, learned Counsel, appearing on behalf of the petitioner, submits that the petitioner had, on being declared successful in its bid, entered into an agreement, dated 19.08.2014, for operating intra-city bus services in Patna. The agreement contained operation as well as the maintenance of intra-city bus services. Since the required infrastructure, as agreed to between the petitioner and the respondents, were not provided to the petitioner for smooth running of the services by the respondents, the petitioner tried to persuade the respondents to carry on its obligation in terms of the agreement so as to enable the petitioner to run the contracted services smoothly and strictly in accordance with the agreement.

5. Mr. Chatterjee, learned counsel for the petitioner, also submits that after failure of the respondents to carry out their responsibilities, the matter was taken to the Principal Secretary, Urban Development and Housing Department, Government of Bihar, Patna, and, upon deliberations between the parties concerned, it was decided that the matter would be taken up at the level of the Chief Secretary, Government of Bihar, but even thereafter, when nothing happened and the respondents started threatening the petitioner with the termination of agreement and resorted to coercive action by approaching the bank for encashing the bank guarantees, the petitioner was compelled to invoke the provisions of Article 10.1 of the agreement thereby terminating the agreement, dated 19.08.2014.

6. Article 10.1 of the agreement, which specifies the termination procedure, is, being relevant, reproduced herein below:

"10.1 Termination Procedure (a) Upon the expiration of the respective remedial period set forth in Article VIII, the Company or the Operator, as the case may be, may issue a Notice of Intention to Terminate. Such Notice shall specify in reasonable details the Operator's Even of Default or the Company's Events of Default, as the case may be, giving rise to the Notice of Intention to terminate.

(b) Following the issuance of a Notice of Intention to Terminate, the Parties shall consult for a period of 30 days or such longer period as the Parties may agree to in writing (Cure Period), as to what steps shall be taken in order to prevent the termination of this Agreement and/or to cure the relevant Event of Default.

(c) Upon the expiration of the Cure period under this Article and unless the Parties shall have agreed otherwise, or unless the underlying causes giving rise to the Notice of Intention to Terminate has been cured, the Party that gave the Notice of Intention to Terminate may terminate this Agreement by delivering a Notice of Termination to the other Party whereupon this Agreement shall

immediately terminate, subject to the rights of the Parties set forth in this Agreement."

7. Mr. Nilanjan Chatterjee, learned Counsel, appearing on behalf of the petitioner, also submits that the petitioner served a notice, dated 19.01.2016, in terms of Article 12.3.2, thereby invoking the arbitration clause of the agreement and nominated Mr. Justice Prabhat Kumar Sinha, a former Judge of the Patna High Court, to be the sole Arbitrator for resolution of the dispute between the parties.

8. As the respondents did not respond to the notice for appointment of arbitrator, the petitioner, in terms of Article 10.1 of the agreement, terminated the agreement, dated 19.08.2014, calling upon the respondents to comply with the post termination obligation. The petitioner seeks resolution of the dispute in terms of Article 12.3.2 of the agreement, which makes provisions for arbitration. Article 12.3.2 of the agreement aforementioned reads thus:

"12.3.2 Arbitration

(a) Arbitrators

Operation & Maintenance Agreement-Intra-City Bus Service in Patna in Bihar on the event the dispute or difference or claim, as the case may be, is not resolved, as evidenced by the signing of the written terms of settlement by the Parties, within 30 (thirty) days of reference for amicable settlement and/or settlement by the representatives, the same shall be finally settled by binding arbitration under the arbitration and Conciliation Act, 1996.

(b) Place of Arbitration

The place of arbitration shall be Patna but by agreement of the Parties, the arbitration hearings, if required, can be held elsewhere from time to time.

(c) English Language

The request for arbitration, the answer to the request, the terms of reference, any written submissions, any orders and rulings shall be in English and, if oral hearings take place, English shall be the language to be used in the hearings.

(d) Procedure

The procedure to be followed within the arbitration including appointment of arbitrator, the rules of evidence which are to apply shall be in accordance with the Arbitration and Conciliation Act, 1996.

(e) Enforcement of Award

Any decision or award resulting from arbitration shall be final and binding upon the Parties: The Parties hereto hereby waive, to the extent permitted by law, any rights to appeal or to review of such award by any court or tribunal . The Parties hereto agree that the arbitral award may be enforced against the Parties to the arbitration proceeding or their assets wherever they may be found and that a

judgment upon the arbitral award may be entered in any court having jurisdiction thereof.

(f) Fees and Expenses

The fees and expenses of the arbitrator and all other expenses of the arbitration shall be initially borne and paid by respective Parties subject to determination by the arbitrator. The arbitrator may provide in the arbitral award for the reimbursement to the prevailing Party of its costs and expenses in bringing or defending the arbitration claim, including legal fees and expenses incurred by such Party."

9. The petitioner, being aggrieved by the alleged inaction of the respondents to give reply to the petitioner's notice, dated 19.01.2016, aforementioned for appointment of Arbitrator, has, as already indicated above, approached this Court with the present petition.

10. Mr. Rabindra Priyadarshi, learned Counsel, appearing for the respondents, did not deny that there are disputes, which need to be resolved. What has, however, been contended by the respondents is that Section 9 read with Section 22 of the Bihar Public Contract Arbitration Tribunal Act, 2008 (hereinafter referred to as "the 2008 Act"), provide for reference of the dispute between the parties to the Tribunal.

11. Mr. Rabindra Priyadarshi, learned Counsel, appearing for the respondents, has vehemently denied the allegations of material breach of the agreement by respondents.

12. The fact that in the agreement, which had been entered into between the parties, there has been an arbitration clause, which has been reproduced herein above, is not denied by the respondents.

13. The question, therefore, is : Whether the disputes, which have arisen in the present case, are to be adjudicated upon by the Tribunal, which has been constituted under 2008 Act, or whether disputes at hand are to be resolved in terms of the provisions of the Arbitration and Conciliation Act, 1996.

14. The question, posed above, brings us to yet another question and the question is : Whether 2008 Act is applicable only to works contract or other contracts as well?

15. While considering the question posed above, it needs to be pointed out that Section 2(b) of 2008 Act defines an arbitration clause to mean a clause, in the works contract, to submit present or future differences to arbitration. The definition, so given, clearly shows that the 2008 Act applies to only works contract and not to other contracts. The word "dispute", as defined by Section 2(e) of 2008 Act, means any difference, relating to any claim arising out of the execution or non-execution of the whole or part of a contract for works or services or both including the rescission thereof. This definition of dispute

necessarily means that the differences, relating to arbitration, must have arisen out of works contract or such services, which relate to works contract.

16. Thus, neither the definition of arbitration clause nor the definition of the dispute, as contained in 2008 Act, makes it possible for the Tribunal, constituted under the 2008 Act, to become arbitrator of differences or dispute that relates to a work, which is not a works contract.

17. At this stage it is appropriate to reproduce Clause (k) of Section 2 of 2008 Act, which defines works contract in the following words:

"Works contract" means a contract made by the State Government or a public undertaking with any other person for the execution of any of its works relating to construction, repairs or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, all types of bridge, culvert, factory or work shops or of such other work of the State Government or, as the case may be, of the public undertaking, as the State government may, by notification in the official Gazette, specify and includes-

(i) a contract made for the supply of goods relating to the execution of any of such works or for supply of any other goods irrespective of whether it is required for any specific project or work or any type of consultancy services/service providers.

(ii) Contracts made for the supply of services relating to the execution of any of such works; including consultancy services for preparation of DPR's supervision; project advisory, quality assurance, Project Management or any other management services.

(iii) Words and expressions used and not defined in this Act, but defined in the Arbitration Act, shall have the meanings assigned to them in the Arbitration Act."

18. From a bare reading of the definition of the works contract, it becomes abundantly clear that the works contract, under the 2008 Act, means a contract, which the State Government or a public undertaking may make with any other person for execution of any of its works relating to construction, repairs or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, all types of bridge, culvert, factory or work shops or of such other work of the State Government or, as the case may be, of the public undertaking, as the State government may, by notification in the Official Gazette, specify and includes a contract made for the supply of goods relating to the execution of any of such works or for supply of any other goods irrespective of whether it is required for any specific project or work or any type of consultancy services/service providers, contracts made for the supply of services relating to the execution of any of such works; including consultancy services for preparation of DPR's supervision; project advisory, quality assurance, Project Management or any other management services and Words and expressions used and not defined in this Act, but defined in the Arbitration Act, shall have the meanings

assigned to them in the Arbitration Act, 1996.

19. When dispassionately considered, it becomes abundantly clear that Section 2(k) of 2008 Act can be applied only to works contract and to only such services, which relate to work contract. This apart, the contracts, which may fall within the term 'works contract', will be those contracts, which the State Government or the Public Sector Undertaking, as the case may be, specify, by notification, in the official gazette, as a works contract.

20. The scope of the work, in the present case, is, admittedly, for operating and plying of buses in Patna and also maintenance thereof, which, by no means, fall within the purview of the definition of a works contract as given in Section 2(k) of 2008 Act.

21. It is, therefore, clear that the disputes, in the present case, are not the ones, which can be adjudicated upon and resolved by Bihar Public Works Contract Dispute Arbitration Tribunal, but only by taking recourse to sub-Section (5) of Section 12 of the Arbitration and Conciliation Act, 1996.

22. In the case at hand, there is, admittedly, no such notification as contemplated by Section 2(k). Consequently, the contract between the parties, for operationalizing and managing intra-city bus services, cannot be said to fall within the term 'works contract' and, therefore, Section 2(k) will not apply to the case at hand.

23. In other words, in the case at hand, the contract was not a works contract and, therefore, the services, provided by the petitioner, could not have been treated as a contract falling within the jurisdiction of the Tribunal constituted under 2008 Act.

24. Because of what have been discussed and pointed out above, there is no room for doubt, in my mind, that 2008 Act applies only to the works contract and since the contract, which the present parties have entered into, is not a works contract, the Tribunal, constituted under the Act of 2008, has no jurisdiction to decide the kind of disputes, which have arisen between the parties concerned.

25. What crystallizes from the above discussion is that 2008 Act is not applicable to the disputes, which have arisen between the parties concerned, and that Sub-section (5) of Section 12 of the Arbitration Act, 1996, does not create any impediment in law to the resolution of the disputes by an Arbitrator.

26. In the result and for the reasons discussed above, this petition succeeds and the prayer for appointment of Arbitrator for resolution of the disputes, in accordance with the provisions of the Arbitration and Conciliation Act, 1996, is hereby allowed. It is ordered accordingly and as the respondents have not objected to the name of Mr. Justice Prabhat Kumar Sinha, a former Judge of the Patna High Court, who has been suggested by the petitioner herein to be appointed as an Arbitrator coupled with the fact that the respondents have not suggested the name of anyone to be made as an Arbitrator, this Court, in the

facts and attending circumstances of the present case and in the interest of justice, appoints hereby Mr. Justice Prabhat Kumar Sinha, a former Judge of the Patna High Court, as the sole Arbitrator.

27. If any of the parties to the contract agreements is aggrieved by the decision of the sole arbitrator, such a decision can be impugned, in terms of Section 34 of the Arbitration Act, 1996, provided that the facts and circumstances of the present case justify application of Section 34 of the Arbitration and Conciliation Act, 1996, and it will also remain open to the parties concerned to apply for interim measures as prescribed by Section 9 of the Arbitration Act, 1996.

28. There shall, however, be no order as to costs.