
(2019) 11 DEL CK 0585

In the Delhi High Court

Case No : Arbitration Petition No. 559 Of 2019

Avm Oil Field Services

APPELLANT

Vs

Gail Gas Limited

RESPONDENT

Date of Decision : 19-11-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 11(5), 11(6), 11(6A)

Citation : (2019) 11 DEL CK 0585

Hon'ble Judges : Jyoti Singh, J

Bench : Single Bench

Advocate : Rajat Wadhwa, Devanshu Chauhan, A.C. Mishra, Ankit Chaturvedi

Final Decision : Dismissed

Judgement

Jyoti Singh, J

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('the Act') for the appointment of an Arbitrator.

2. The prayer made in the petition reads as under:-

"a. Allow the present Petition and appoint a Sole Arbitrator to adjudicate the disputes and differences inter-alia in respect of suspension and termination of the contract, forfeiting of the Bank Guarantee and withholding of the payments due and payable to the Petitioner under the contract and other arbitral disputes which have arisen between the parties.

b. Pass such other order as may deemed fair and equitable in the facts of the case and in the interest of justice."

3. The respondent has filed reply to the petition. Categorical stand has been taken in the reply that owing to the alleged fraudulent practices of the petitioner, it has been banned for a period of two years and thus the petitioner is barred from invoking the Arbitration Clause by virtue of Clause 45. The relevant para of the reply reads as under:-

"9.18. Therefore, in light of the forgoing paras, it is submitted that since the Petitioner has been banned on account of corrupt/ fraudulent practices during the execution of the contract, the Petitioner is barred from availing/ invoking the Arbitration Clause as per Clause 45 of Section-III, ITB which states as follows:...."

4. Banning order has been placed on record. It is submitted that in Clause 39 B.2 (i) of Section III of the tender document, a detailed procedure is laid down for banning, which reads as under:-

"B.2 Irregularities noticed after award of contract:

(i) During execution of contract:

If an agency, is found to have indulged in corrupt/fraudulent/collusive/coercive practices, during execution of contract, the agency shall be banned for future business with GAIL GAS LIMITED for a period specified in para B 2.2 below from the date of issue of banning order.

The concerned order (s)/ contract(s) where corrupt/fraudulent/collusive/coercive practices is observed, shall be suspended with immediate effect by Engineer-in charge (EIC)/ Employer whereby the supply/ work/ service and payment etc. will be suspended. The action shall be initiated for putting the agency on banning.

After conclusion of process, the order(s)/ contract(s) where it is concluded that such irregularities have been committed shall be terminated and Contract cum Performance Bank Guarantee (CPBG) submitted by agency against such order (s)/ contract (s) shall also be forfeited. The amount that may have become due to the contractor on account of work already executed by him shall be payable to the contractor on account of work already executed by him shall be payable to the contractor and this amount shall be subject to adjustment against any amounts due from the contractor under the terms of the contract.

No risk and cost provision will be enforced in such cases. "

5. Reliance has been placed on Clause 45 of Section III of the tender document, which reads as under:-

"45. Applicability of Arbitration clause in case of banning of Vendors/ supplies/ contractors/ bidders/ consultants indulged in fraudulent/ coercive practices

Notwithstanding anything contained contrary in GCC and other "CONTRACT DOCUMENTS", in case it found that the Vendors/Suppliers/ Contractors/ Bidders/ Consultants indulged in fraudulent/ coercive practices at the time of bidding, during execution of the contract etc., and/ or on other grounds as mentioned in GAIL Gas's "Procedure for action in case Corrupt/ Fraudulent/ Collusive/ Coercive Practices", the contractor/ bidder shall be banned (in terms of aforesaid procedure) from the date of issuance of such order by GAIL Gas Ltd., to such Vendors/ Suppliers/ Contractors/ Bidders/ Consultants.

The Vendor/ Supplier/ Contractor/ Bidder/ Consultant understands and agrees

that in such cases where Vendor/Supplier/ Contractor/ Bidder/ Consultant has been banned (in terms of aforesaid procedure) from the date of issuance of such order by GAIL Gas Limited, such decision of GAIL Gas Limited shall be final and binding on such Vendor/ Supplier/ Contractor/ Bidder/ Consultant and the Arbitration clause' in GCC and other "CONTRACT DOCUMENTS" shall not be applicable for any consequential issue/ dispute arising in the matter."

6. Learned counsel for the respondent submits that in view of Clause 45, the Arbitration Clause between the parties would no longer be applicable for any consequential issue/dispute, relating to banning.

7. Learned counsel for the petitioner on the other hand submits that his claims are with respect to damages and recovery of the amounts due to the petitioner, which has nothing to do with the banning order. Reliance is placed on the judgment in the case of M/s. Mayavati Trading Pvt. Ltd. vs. Pradyut Deb Burman, (Civil Appeal No.7023/2019, decided on 05.09.2019), to contend that this Court can only examine the existence of Arbitration Clause and nothing more.

8. It is undisputed between the parties that banning order has been challenged by the petitioner before the Competent Authority in terms of Clause 39 F of Section III of the tender document and is pending consideration.

9. There can be no quarrel with the proposition that in view of Section 11(6A) of the Act and the judgment of the Apex Court in M/s. Mayavati Trading Pvt. Ltd. (supra), the scope of jurisdiction of this Court while dealing with petition under Section 11(5) or 11(6) is limited only to examination of the existence of the Arbitration Clause and no more.

10. A perusal of Clause 45 clearly shows that any claim relating to banning or any consequential issue cannot be raised by the petitioner as the Arbitration Clause in terms of the said Clause under the GCC, is no longer applicable till such time the banning order is in operation.

11. The claims sought to be referred to Arbitration in the present petition are relating to suspension, termination and Bank Guarantee. It is clear that all these are interlinked to the banning order and thus cannot be referred to Arbitration for the present. There is no merit in the contention that these claims have nothing to do with banning.

12. In view of the above, the present petition is dismissed.

13. Petitioner is, however, at liberty to invoke the Arbitration Clause if and when it succeeds in his challenge to the banning order.