

(2019) 09 DEL CK 0368

In the Delhi High Court

Case No : Civil Writ Petition No. 5952 Of 2019, Civil Miscellaneous Application
No. 25748 Of 2019

Avm Oil Field Services

APPELLANT

Vs

Gail Gas Limited

RESPONDENT

Date of Decision : 16-09-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9, 11

Citation : (2020) 1 R.A.J. 196

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Rajat Wadhwa, Devanshu Chauhan, Azmat H. Amanullah

Final Decision : Disposed Of

Judgement

Navin Chawla, J

1. This petition has been filed by the petitioner challenging the order dated 08.03.2019 passed by the respondent banning the petitioner for a period of two years from the date of the order.

2. By an Agreement dated 30.11.2016 executed between the parties, the petitioner had been awarded the work of 'Hiring Services for Forecourt Management (Dispenser Operation and Associated Jobs)' at Meerut and including at Lohia Nagar.

3. It is the case of the respondent that on 11.08.2018, it came to the knowledge of the respondent through a video which was circulated on social media, a customer was seen alleging the Company to have been indulging in corrupt and fraudulent practices by tampering with the amount displayed on the CNG dispenser. The respondent alleged that the Station Manager and the Driveway Salesman (DSM) were involved in this tampering. The respondent, therefore, issued a Show Cause Notice dated 05.02.2019 to the petitioner seeking explanation as to why an action of banning should not be taken. The petitioner

submitted its response to the Show Cause Notice vide letter dated 11.02.2019 and was even provided an opportunity of personal hearing whereafter the Impugned Order was passed by the respondent.

4. The learned counsel for the petitioner submits that the Impugned Order does not disclose any reason for banning the petitioner. He further submits that the petitioner has invoked the Arbitration Agreement dated 30.11.2016 contained in the Agreement between the parties and an Application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking reference of the disputes to arbitration is pending before this Court being ARB. P. 559/2019, on which notice has been issued to the respondent. He further submits that even otherwise the Impugned Order of banning could not have been passed against the petitioner as allegations against the petitioner, neither constitute a Corrupt or a Fraudulent Practice. He relies on the Judgment of this Court in *Prakash Atlanta JV & Ors. vs. National Highways Authority of India & Ors.*, (2010) 169 DLT 664.

5. On the other hand, the learned counsel for the respondent submits that in terms of Clause 39F of Section III of the Instructions to Bidders (ITB), the order of banning is appealable before the Appellate Authority, that is the Committee of Directors. Infact, the Impugned Order itself provides for such remedy to the petitioner. He further submits that the Impugned Order discloses the reasons for banning the petitioner. He submits that the petitioner cannot escape from the acts of its employees and therefore, being responsible for the same, the acts alleged would constitute Fraudulent Practice in terms of Clause 39B2(i) of the ITB.

6. I have considered the submissions made by the learned counsels for the parties. It is noted that Clause 45 of the ITB excludes challenge to a banning order through arbitration. It is reproduced herein 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."

7. Admittedly the petitioner filed an Application under Section 9 of the Act seeking an Interim Order of protection against the Banning Order, being OMP (I) (COMM) 80/2019 titled AVM Oil Field Services vs. Gail Gas Ltd. The learned Single Judge of this Court, by an order dated 29.04.2019 and in view of Clause 45 of the ITB quoted hereinabove, allowed the petitioner to withdraw the petition with liberty to take appropriate action in accordance with law.

8. In view of the above, it cannot be said that the Impugned Order banning the petitioner could not have been passed by the respondent or deserves to be quashed only for the reason that the petitioner had invoked the Arbitration Clause in the Agreement.

9. The Judgment of this Court in Prakash Atlanta JV & Ors. (Supra) relied upon by the petitioner, cannot come to its assistance as in the said case there was no Clause similar to Clause 45 of the ITB. Even otherwise in the said case, underlining disputes between the parties had been pending for arbitration and therefore, this Court held that the respondent should have waited for the outcome of such arbitration proceedings. In the present case the arbitration is yet to begin. The Agreement itself provides a remedy to the petitioner against the Banning Order and expressly excludes arbitration as a redressal mechanism under Clause 45. The Contract executed between the parties has to be read as a whole and such a Clause should be given effect to and, therefore, merely because the petitioner has invoked the Arbitration Agreement and has filed an Application under Section 11 of the Act, it cannot be said that the respondent would be denuded of its powers under the contractual terms for banning the petitioner if the case so warrants.

10. As far as the issue whether the Impugned Order discloses any reason for banning the petitioner, paragraphs 6 and 7 records the reasoning of the Competent Authority, which infact records that in terms of Clause 36.3 of the General Conditions of Contract, the petitioner is responsible for all the acts of its employees. This Court cannot consider such reasoning on merits as the petitioner has been provided with an alternate efficacious remedy by the Contract itself in the form of an Appeal.

11. In view of the above, the present petition is disposed of granting liberty to the petitioner to avail its contractual remedy in the form of an Appeal before an Appellate Authority formed under Clause 39F of the ITB. The Appellate Authority shall consider such Appeal, remaining uninfluenced by any observation made by this Court in the present order.

12. I may only note that the counsel for the petitioner has also submitted that period of ban in the present case is disproportionate. This issue shall also be

considered by the Appellate Authority.

13. The appeal as and when filed shall be expeditiously disposed of, preferably within a period of eight weeks from the receipt of the appeal.

14. There shall be no order as to costs.