

(2001) 10 DEL CK 0159

In the Delhi High Court

Case No : OMP No. 34 of 2001 and is 4752 of 2001

Consulting Engineering Services (India) Ltd.

APPELLANT

Vs

Department of Agriculture and Co-operation

RESPONDENT

Date of Decision : 17-10-2001

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4

Citation : (2001) 63 DRJ 276 : (2002) 1 RCR(Civil) 646

Hon'ble Judges : Jiwan Dass Kapoor, J

Bench : Single Bench

Advocate : Rajiv Nayar, Kum Kum Sen, Avimukt Dar and Dipti Chowdhary, for the Appellant; R.D. Agarwal Sameer Agarwal and Rajiv Aneja, for the Respondent

Judgement

J.D. Kapoor, J.—By this order, main petition u/s 9 of the Arbitration & Conciliation Act, 1996 as well as application under Order 39 Rule 4 CPC seeking setting aside of the ex-parte order shall stand disposed of as the application under Order 39 Rule 4 CPC is deemed as reply to the main petition.

2. Ex parte order was passed on 19.2.2001 restraining the respondents, its servants, employees and/or agents from giving effect to its impugned letter of termination dated 12th February, 2001 and also encashing the bank guarantee No. 25/89 dated 16th August, 2000 on the representation that contact has not been terminated in terms of Clause 7.4 read with Clause 3.0 of the agreement nor has Clause 11.1 of the agreement been complied with by the respondent.

3. Relevant facts need to be recapitulated in brief. These are as under:-

4. A project for Early warning System (EWS) for monitoring of Indian Agriculture was given to the petitioner M/s. Consulting Engineering Services (India) Ltd. (CESL) in September, 1999 on the basis of competitive bidding. The main objective of EWS is to carry out close and regular monitoring of the agricultural sector by covering major crops of wheat, paddy, pulses, potato, onion, oil seeds,

ground nut etc. The agreement was signed between the parties on 29.10.1999. As per the agreement CESL was required to provide the following services to the respondent :-

- i) Collection of ground level information on major crops.
- ii) Translation of qualitative information into reliable quantitative inferences.
- iii) Regular and close monitoring of status of major crops on real time basis.
- iv) Providing weekly feedback on developing situations district-wise, state-wise and at the national level for making appropriate interventions/policy decisions.
- v) In addition, they are required to submit report more frequently or on daily basis for any abnormal situation such as flood, drought and pest infection, for any affected area for speedy intervention.
- vi) To build historical data base/warehouse and its updating.

5. The total cost of the project was Rs. 16,63,25,000/- and the life of the project was up to 31.3.2002. The payment was to be made in 11 Installments from October, 1999 to 31.3.2002. The petitioner also furnished a bank guarantee from a Nationalised Bank in order to cover the amount to be paid as advance and empowered the respondent to demand the amount of the guarantee in case of any default in service by the petitioner. However, there was no problem up to 5th Installment.

6. In order to examine the reports furnished by the petitioner, the respondent constituted a Monitoring team comprising of (i) Joint Secretary (IT), (ii) Director/DS (IT), (iii) Director/ASA, National Crops Forecasting Centre (NCFC), (iv) Director, Natural Disaster Management (NDM) and (v) Addl. Commissioner (Crops), as per Clause 1.0B of the agreement. The project commenced in October, 1999 and report from the petitioner started flowing to the respondent from January, 2000. Meetings of Monitoring Committee were held from time to time and the deficiencies noted in the weekly reports of the petitioner were conveyed either in person or through minutes of the meeting. One such communication is D.O. letter dated 16.3.2000 from the Joint Secretary (IT) of the respondent. However, the respondent released payments and gave some time to the petitioner to make improvement.

7. It is alleged that the required improvements in the quality of the weekly reports were not carried out in spite of the advice and suggestions given by the Monitoring Team. A review meeting on EWS took place on 9.10.2000 which was presided over by the Secretary of the respondent. It was noted that the attempts made by the petitioner to undertake modeling for crops forecasting and data warehousing were not at all satisfactory. It was noted that although the project has been in place for nearly one year, the EWS reports have not been commensurate with the objectives. Consequently, show cause notice for terminations of agreement was issued on 25.10.2000 and the petitioner was

asked to stop forthwith sending the weekly reports on monitoring the Indian agriculture.

8. As many as three replies/communications dated 30.10.2000, 14.11.2000 and 16.12.2000 were sent by the petitioner. However, Explanation did not come up to the satisfaction nor the averments made in these replies satisfied the respondent. The agreement was terminated on 12.2.2001 in terms of Clause 7.4 read with Clause 3.0 and the petitioner was directed to refund the payment of Rs. 9.34 crores made hitherto by the respondent. The validity of the show cause notice as well as notice terminating the agreement has been vehemently challenged by the petitioner apart from denying the allegations that there were heavy deficiencies or defaults in executing the projects as pointed out by the Monitoring Team.

9. Mr. Rajiv Nayar, learned senior counsel for the petitioner has first touched upon the allegations of deficiencies or defaults in executing the project as pointed out by the Monitoring Team. According to Mr. Nayar in terms of the agreement between the parties, Clause 1.0(A)(f) required the petitioner to process the data and submit weekly reports to the respondent for all the said major crops district wise, state wise and at the national level. In furtherance of this obligation cast on the petitioner all weekly reports were submitted every week since the inception of the agreement.

10. Mr. Nayar pointed out that in response to any of the weekly reports no deficiencies or clarifications were sought by the respondent except on one occasion i.e. 16.3.2000 which query was according to the petitioner satisfactorily explained and consistent with the stand of the petitioner that there was no deficiency payment in terms of Clause 2.2 i.e. payments stages No. 3rd, 4th and 5th falling due in February, 2000 and May, 2000 and August, 2000 were actually paid to the petitioner without any demur. Mr. Nayar contends that the show cause notice Annexure-E for the first time alleged deficiencies and defaults in the performance of the obligations by the petitioner and 60 days time was given to the petitioner to show cause as to why the agreement should not be terminated and it was for the first time on 25.10.2000 that the petitioner was advised to stop sending weekly reports.

11. According to Mr. Nayar in reply dated 14.11.2000, 30.10.2000 and 16.12.2000 the petitioner has explained each and every allegation of deficiencies or defaults satisfactorily and, Therefore, there was not occasion for terminating the contract or agreement. By the impugned communication of 12.2.2001 the respondent sought to terminate the agreement with the petitioner with immediate effect. This letter was also replied by the petitioner by its communication dated 14.2.2001 wherein reference was made to the continuous supply of weekly reports and that till that date 55 such weekly reports had been submitted regularly and also that payments of all bills raised from " time to time in accordance with the terms of the contract had been paid prior to the show cause notice as well as the termination notice. In the said letter of 14.2.2001 the

petitioner had invoked the mechanism of amicable solution between the parties as prescribed by Clause 11.0 of the agreement.

Clause 3.0 of the agreement provides as under:-

"This agreement may be terminated by the client by giving 60 days written notice."

While challenging the validity of the notice Mr. Nayar contended that the show cause notice dated 25.10.2000 only asked the petitioner to respond as to why the agreement should not be terminated, Therefore, that show cause notice cannot be said to be the notice in terms of Clause 3.0. Similarly the impugned communication dated 12.2.2001 whereby the agreement was terminated with immediate effect is also contrary to Clause 3.0.

Mr. Nayar contended vehemently that the language used in the communication dated 25.10. is not in consonance with or in terms of Clause 3 as the respondent has by virtue of this notice asked the petitioner as to why the agreement should not be terminated which in other words mean that if the reply to the allegations made in the said communication is found satisfactory the agreement will not be terminated. In the opinion of Mr. Nayar the language to be used in 60 days notice for termination of the tenancy should have been to the effect that "this notice should be deemed as a notice for termination of the agreement which would be effective after 60 days."

12. It is further contended by Mr. Nayar that Clause 11.0 provides for resolution of disputes by arbitration and it enjoins upon the parties to make every effort to resolve amicably by direct informal negotiations any difference or dispute between them. Clause 11.1 provides that "for all disputes arising out of and or in relation to the contract which cannot be settled by mutual negotiations within 60 days the matter shall be referred to arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996."

13. Thus according to Mr. Nayar the joint reading of the clause is that 60 days time provided in the show cause notice of 25.10.2000 was in terms of expression of resolution of disputes in terms of Clause 11.0 and 11.1 and it is only after the mutual negotiations between the parties failed either in response to the show cause in response to the reply that the dispute arises as is contemplated in Clause 11.2.

14. According to Mr. Nayar certain states have to be crossed by the respondent before the contract is terminated.

15. It is provided under the contract that the payment to the petitioner are to be made only after corrective measures have been taken to the entire satisfaction of the respondent. It is contended that since in the present case right from the first Installment starting from October, 1999 till August, 2000 except for stray incident of 16.3.2000 no observations or suggestions for modifications were given in response to the weekly reports submitted by the petitioner, Therefore it

should be presumed that prior to 25.10.2000 at least no observations or suggestions were made to the petitioner in the light of Clause 1.0(b) and payments were actually made in terms of Clause 2.5 of the contract. The next stage was the stage subsequent to 25.10.2000 where it should be presumed that the time was given to rectify. It is further contended that since the letter dated 14.2.2001 terminating the agreement is result of the communication dated 25.10.2001 so this termination is not only bad in law but also not in terms of Clause 7 or for that purpose Clause 3.

16. Thus according to Mr. Nayar the validity of the show cause notice when tested on the aforesaid terms of the agreement shows that neither of this notice satisfies the requirements of the terms of the agreement and even if it is assumed that show cause notice was a 60 days notice for termination of the agreement the fact remains that weekly reports in terms of Clause 1.0(A)(f) were being furnished to the respondent thereby suggesting that the work being executed by the petitioner under the agreement was continuing and the respondent never objected to the continuation of work by the petitioner. According to Mr. Nayar this also entitles the petitioner to receive payments under stages 6 & 7 falling due on November, 2000 and February, 2001.

17. However in order to justify the interim protection as contemplated u/s 9 of the Arbitration Act in spite of the fact that the loss suffered by the petitioner is quantifiable Mr. Nayar has tried to distinguish the instant contract from the ordinary contracts. According to Mr. Nayar there is no ready-made market for the services to be rendered by the petitioner and that there is only one consumer for the services to be provided by the petitioner i.e. the respondent. The petitioner has incurred huge infrastructure expenditure for the setting up of the project which involves the generation of live information from all over the country by collecting ground data as well as data from the satellite.

18. According to Mr. Nayar the petitioner incurred the expenses and set up this project on the representation that the petitioner would carry on its services till 31.3.2002. Had it not been so the petitioner would not have incurred huge expenses in procuring this equipment knowing it that this equipment would be of no use to any other party except the respondent and the action of the respondent as would be apparent from the impugned show cause notice and termination notice suggests that the agreement has been mala fide terminated without any cause or justification and without there actually being any deficiencies or shortcomings entitling them to terminate the contract and if the petitioner is not granted interim relief as sought for it is likely to suffer irreparable loss and injury which may not even be quantified.

19. Mr. Nayar contends that even if it is assumed for the sake of arguments that the interim measure amounts to specific performance of the agreement the petitioner would still be entitled to payments under 6th and 7th stages for services rendered by him up to date of termination.

20. In support of the concept of huge expenditure causing irreparable loss or injury Mr. Nayar has placed reliance upon Wellman Hindustan Limited Vs. N.C.R. Corporation, wherein a party had expended considerable amount and the company tried to induce a third party as partner. Company was restrained from signing any agreement with third party on the ground that the aggrieved party shall suffer irreparable loss and injury.

21. Similar view was taken in Vijay Minerals Pvt. Ltd. Vs. Bikash Chandra Deb, wherein the defendant has agreed to sell the entirety of the Manganese and Iron ore from his mines to the plaintiff. It was held that whenever there is negative covenant in the contract the question of balance of convenience and whether damages would be adequate remedy or not becomes immaterial.

22. As a last report, Mr. Nayar contended that in view of the fact that in respect of the weekly reports no clarifications were sought in accordance with the procedure laid down in the contract and since these are such disputes that need to be arbitrated upon, the petitioner is at least entitled to the protection of 6th and 7th Installments till the date of termination.

23. On the contrary Mr. R.D. Aggarwal, Sr. Advocate appearing for the respondent has succinctly put across the scope of Section 9 as well as the requirement of Clauses 3 & 7 of the Contract. According to Mr. Aggarwal from the petition there is no intention demonstrable for seeking appointment of an Arbitrator let alone manifest intention and if the petitioner had any intention to appoint the Arbitrator it was well within its power to invoke Section 11 first.

24. Mr. Aggarwal contended with vehemence that the main relief to be sought by the petitioner in arbitration proceedings would be the repudiation of the termination of the agreement by the respondent and the specific enforcement of contract between the parties but nowhere it is stated that the petitioner is interested in getting disputes settled through arbitration. However the letter dated 24.5.2001 set by the petitioner after the instant injunction was obtained postulates that for the first time it invoked the provisions of the Arbitration Act in terms of Clause 11.3 of the agreement which means that they intended to invoke arbitration only from May.

25. Thus according to Mr. Aggarwal if the petitioner indeed wanted to invoke such arbitration, it would have been invoked either before the present petition or immediately after the petition and as such this petition is nothing but an application under Order 39 Rule 1 & 2 filed in a suit without bringing any declaratory suit or suit for specific performance and not a petition under the Arbitration Act.

26. As regards the allegation that the respondent continued accepting the weekly reports even after the show cause notice as well as after terminating the contract Mr. Aggarwal contends that it is factually incorrect as in the show cause notice dated 25.10.2000 it was specifically mentioned in para 6 that "as CEL have defaulted in providing contractual services and as there is no prospect of

satisfactory future performance M/s CESL is also advised to stop sending the weekly reports on monitoring Indian Agricultural Forthwith". Respondent wrote another letter to the petitioner on 1.5.2000. The attention of the petitioner was invited to para 4 & 6 of the letter dated 25.10.2000 and was informed that "we do not agree to your request for continuing the submission of weekly reports under the EWS project. In this connection, your attention is also invited to para 6 of the show cause notice issued by this Ministry".

27. According to Mr. Aggarwal the so called submission of weekly report was forced upon the respondent and there was no other option for the respondent than to receive these reports under protest and no presumption can be drawn that the respondent continued accepting these reports. It was a unilateral act which was of no consequence.

28. As regards the show cause notice dated 25.10.2000 Mr. Aggarwal contended that the petitioner was given an opportunity to mend its functioning and given 60 days" time to show results in the hope that they would rectify the breaches and this shows that the respondent was not only generous but transparent enough not to cause any loss to the petitioner though there was no such requirement in the contract as under Clause 7 the contract could have been terminated with immediate effect.

29. According to Mr. Aggarwal had it not been so the question of considering the Explanation or response of the petitioner would not have arisen. The respondent while terminating the contract vide letter dated 12.2.2001 specifically stated that after carefully considering the above replies this department has come to the conclusion that M/s CESL have defaulted in providing contractual services as per the agreement and, accordingly, the respondent terminates the agreement entered into with M/s CESL with immediate effect as per Clause 7.4 read with Clause 3 of the agreement. Thus according to Mr. Aggarwal the provision of 60 days in Clause 3.1 is not for the termination of the contract but it was only for giving a chance to the petitioner to rectify the breaches or remove the deficiencies and the defaults and if the Explanation of the petitioner would have been found satisfactory the respondent could have continued the contract.

30. As regards the element of balance of convenience sought to be in favor of the petitioner on account of having expended considerable amount in procuring the equipments for the use of respondent alone and having no other customer of these services Mr. Aggarwal has vehemently contended that in the first instance this factor is not of much relevance and secondly the investments made by the petitioner for infrastructural purpose were out of the funds provided by the Government in advance which amounted to Rs. 9.6 crores though this payment was made in Installments commencing from October whereas the work was to start from January.

31. Last but not the least Mr. Aggarwal contended that even if the termination of the contract is found to be illegal and the loss suffered by the petitioner is

quantifiable the plea of huge amount expended in providing services to the respondent is not at all available and it is more so when major contribution is made by the respondent.

32. In support of this concept Mr. Aggarwal has relied upon Escotel Mobile Communications Ltd. Vs. Union of India and Others, wherein it was held that "huge investments made in disputed territory cannot shift the balance of convenience". In another case relied upon in Rajasthan Breweries Ltd. Vs. The Stroh Brewery Company, wherein similar plea was set up, it was held that at the most in case the termination is held bad in law or contrary to the terms of the agreement the party can seek specific performance of the agreement. Next, regarding bank guarantees Mr. Aggarwal relied upon M/s. National Telecom of India Ltd. Vs. Union of India and Another, wherein beneficiary was held to be sole Judge as to the question whether or not there has been breach of underlying contract by party on whose behalf bank guarantee was furnished. It was held that Bank is under obligation to pay amount covered under bank guarantee on demand by the beneficiary without raising any objection.

33. Unless bank guarantee is vitiated by fraud or irretrievable injury, there is no other option than to act upon it.

34. Mr. Aggarwal invited attention to the letter dated 19th May 2000 written by the respondent to the managing director of the petitioner pointing out the deficiencies found by the technical members of the monitoring team. Along with this, minutes of the meeting of the monitoring team which took place on 11th May were also enclosed. As many as six deficiencies were observed by the team.

35. After careful consideration of rival contentions, I find that contention of Mr. Nayar is difficult to accept. It is a feeble attempt to withhold the national project.

36. All the prayers made in the petition are very much within the scope of the arbitrator. The authority of the arbitrator which is based on alternative dispute mechanism and which further derives sustenance from UNICTRAL cannot in any manner be decimated or fettered by this court. If the arbitrator can do complete and full justice all the ingredients of injunction viz. balance of convenience and irreparable loss or injury get dwindled down. In Buddha Films Pvt. Ltd. v. Prasar Bharti 2001(2) Arb. LR 422 Delhi, this Court has taken almost the same view which is as follows:-

"if the channel is allowed to continue as encrypted channel and the appellant ultimately succeeds in the arbitration, the Arbitral Tribunal can suitably compensate the appellant. Considerations regarding balance of convenience and irreparable loss and injury persuade us not to pass any order for interim relief. In the facts of the case we are confident that the Arbitral Tribunal will be able to ultimately do complete justice. At this stage no interim directions are called for."

37. However, in the instant case a retired Judge of this Court is one of the arbitrators. There is a provision for three arbitrators. Everything should be left to

the wisdom of the arbitrators. If ultimately the petitioner succeeds in the arbitration, the Tribunal can suitably compensate the petitioner. The petitioner has no prima facie case in his favor inasmuch as that the petitioner can well be compensated whereas if the respondents are restrained, it would cause irretrievable national loss. If such a plea is allowed it will tantamount to making a defaulting or breaching party an overlord and holding the other party at ransom. If the project as is the instant case happens to be a national project the poor quality of service or goods will result in colossal national loss and unimaginable public hardships.

38. Merely because a party expends huge and considerable amount in arranging or commissioning equipment to execute the contract, it does not necessarily tilt the sale of balance of convenience in its favor nor does it give a license or right to flout the contract or breach its obligations or violate the terms of the agreement. It is particularly so where public interest and public funds are involved. A party cannot seek interim injunction under the refuge of having expended considerable or huge amount in procuring the equipments to execute the obligation of the agreement.

39. Agriculture is the back bone of our economy. EWS is the life and breath of agriculture. It is a national project. Element of public interest is pre-dominant and Therefore the amount of expenses or investment incurred by the petitioner is immaterial and cannot shift the balance of convenience in its favor.

40. In *Oriental Insurance Co. v. Lakhanpal P. Ltd.* 2001 RLR 202 and in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, following elements were held to be of public interest: 1) contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfillment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tendered. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay wither in correcting mistakes or in rectifying defects or even at times in redoing the entire work - thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g. a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

41. With reference to letter dated 1.11.2000 the petitioner wrote back to the respondent that even though the DAC in their letter No. 11015/7/99 - I.T. dated 25.10.2000 had advised CES to discontinue the submission of the weekly reports, they are submitting the same to maintain the continuity of monitoring the Indian Agriculture in respect of eleven mandated crops under EWS project at their own risk. This letter itself clinches the relief sought by the petitioner. The petitioner is not entitled for 6th and 7th Installments merely on the ground that

they had submitted weekly reports even after the show cause notice may be for continuity of monitoring the Indian Agriculture as they admittedly did so at their own risk. The moment the respondent advised the petitioner not to send the weekly reports and first rectify the deficiencies or defaults, the petitioner was not supposed to continue sending the weekly reports. It is an act of forcing oneself upon to extract unjust benefit which otherwise it won't be entitled to receive.

42. Contentions of Mr. Aggarwal far outweigh the contentions of Mr. Nayar. Petitioner is on a very sticky wicket. Neither has he made out a prima facie case nor does the balance of convenience lie in its favor. Element of irreparable loss or injury also cannot come to its rescue. It is result, the petition being wholly devoid of merits is dismissed. Application under Order 39 Rule 4 CPC is allowed. Ex-parte injunction stands vacated.

43. Since the counsel for the respondents has conceded that they have not opposed the reference of dispute to the arbitration, respondent will not raise objection before the learned Arbitrator that the arbitration agreement has become redundant and inoperable and Therefore cannot be subjected to arbitration.