

(2018) 05 DEL CK 0150
In the Delhi High Court
Case No : ARB.P. 366 of 2017

GAURAV ENTERPRISES

APPELLANT

Vs

GURU TEG BAHADUR HOSPITAL & ANR

RESPONDENT

Date of Decision : 14-05-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 12, 12(5)

Citation : (2018) 05 DEL CK 0150

Hon'ble Judges : BAKHRU

Bench : Single Bench

Advocate : Tarkeshwar Nath, Saurabh Kumar Tuteja, Ramesh Singh, Chirayu Jain, Pushp Raj Yadav

Final Decision : Disposed Of

Judgement

@GMENTTAG-JUDGMENT

VIBHU BAKHRU, J.

Introduction

1.The petitioner has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereafter "the Act"). The learned

counsel appearing for the petitioner prays that a sole arbitrator be appointed to adjudicate the disputes that have arisen between the parties in relation

to the award of contract for providing watch and ward/door keeping services in Guru Teg Bahadur Hospital (hereafter "GTB Hospital").

2. Mr Ramesh Singh, learned counsel appearing for respondent no.1 submitted that although the said contract was awarded to the petitioner, the

parties had not executed the agreement containing the arbitration clause and, therefore, there was no arbitration agreement between the parties. The

petitioner disputes the same and contends that the Arbitration Clause, as included in the Terms and Conditions of the Contract forming a part of the tender documents, is incorporated by reference in the contract between the parties.

3. The questions that fall for consideration of this Court are (i) whether the parties have entered into a contract, and (ii) whether in the given facts, the arbitration clause included in the Terms and Conditions of the Contract is incorporated by reference in the contract between the parties.

Background facts

4. In August 2012, respondent no.1 issued a Notice Inviting Tender (hereafter the NIT) inviting offers from reputed agencies to provide the required number of uniformed trained manpower for the security services at GTB Hospital, Dilshad Garden, Shahdara, New Delhi. The tenders were invited through an e-tendering process. The Tender Documents included the Terms and Conditions of the Contract and the said terms included an arbitration clause, which is set out below:-

(a) Any dispute and or difference arising out of or relating to this contract shall be resolved through joint discussion of the authorities representatives of the concerned parties. However, if the disputes are not resolved by joint discussions, then the matter shall be referred for adjudication to a sole

Arbitrator appointed by the Principal Secretary, Health & Family Welfare Deptt., Government of NCT of Delhi.

(b) The award of the sole Arbitrator will be final and binding on all the parties. The arbitration proceedings will be governed by Indian Arbitration and Conciliation Act 1996 as amended from time to time.

(c) The cost of Arbitration will be borne by the respective parties in equal proportions. During the pendency of the arbitration proceeding and currency of contract, neither party will be entitled to suspend the work/service to which the dispute relates on account of the arbitration and payment to the contractor will continue to be made in terms of the contract. Arbitration proceedings shall be held at Delhi/New Delhi only.

5. The petitioner submitted its bid pursuant to the NIT. It is stated that five other bidders also submitted their offers. The bids received were evaluated by the Tendering Committee. The petitioner's bid was found the lowest and he was declared to be the lowest bidder (L-1). Thereafter, respondent

no.1 issued a letter dated 24.06.2013, the subject of which was stated as,â?? Provisional offer of Award of Contract for providing Watch &

Ward/Door Keeping Services in GTB Hospital for a period of two yearsâ?. The said letter is, hereafter, referred to as â??Provisional Award of

Contractâ?). In terms of the Provisional Award of Contract, the petitioner?s bid for providing services of 205 security guards was accepted and the

petitioner was asked to submit his acceptance to the said letter within a period of seven days. The petitioner was also informed that thereafter he

would be required to submit the stamp paper for execution of â??Agreement Deed of the Contractâ? and the performance security of ₹ 50,00,000/- in

favour of respondent no.1. The petitioner was also called upon to deploy guards in consultation with the concerned officer. Â

6.As required by respondent no.1, the petitioner accepted the award of contract by a letter dated 25.06.2013. Thereafter, the petitioner also submitted

the performance security of ₹ 50,00,000/- in the form of a Fixed Deposit Receipt. The petitioner also submitted a non-judicial stamp paper of ₹ 100/- as

required for execution of the â??Agreement Deed of the Contractâ?After the petitioner had complied with the aforesaid requirement, respondent

no.1 issued a letter dated 19.07.2013, the subject of which read as â??Final award of contract for providing Watch & ward/Door Keeping Services in

GTB Hospital for a period of two years w.e.f. 01.08.2013â??. The said letter is, hereafter, referred to as â??Final Award of Contract?. Â

7.The petitioner accepted the Final Award of Contract by a letter dated 27.07.2013 and informed respondent no.1 that it was ready to take over

charge for providing security services with effect from midnight of 31.07.2013. Thereafter, the petitioner received a letter dated 30.07.2013 from

respondent no.1 informing the petitioner that the Final Award of Contract was kept in abeyance for approval of respondent no.2 (Secretary (H &

FW), Government of NCT of Delhi) till further orders. Â

8.The petitioner caused a legal notice to be sent to respondent no.1 calling upon the said respondent to permit the petitioner to take charge of the

security of the GTB Hospital and to deploy the security guards in terms of the Final Award of Contract. Â

9.Thereafter, the petitioner filed a writ petition being Gaurav Enterprises v. Guru Teg Bahadur Hospital & Anr.: W.P.(C) 1276/2014.

The said petition was disposed of by this Court by an order dated 28.01.2016, which reads as under:- Present writ petition has been filed with the following prayers:-

- (i) Quash and set aside the letter dated 30.07.2013 issued by the respondent.
- (ii) Direct the respondent to allow the petitioner to work in terms of final letter of award dated 19.07.2013.
- (iii) Pass any other order that is deemed fit and proper under the facts and circumstances of the case. By the final Award dated 19th July, 2013, the petitioner had been awarded contract for providing Watch and Ward/Door Keeping Services in GTB Hospital for a period of two years w.e.f. 01st August, 2013. Admittedly, the period of the said contract has expired on 01st August, 2015. Consequently, in the opinion of this Court, present writ petition and application are infructuous and they accordingly stand disposed of. Petitioner's bank guarantee is directed to be released within a period of two weeks. However, the petitioner is given liberty to file a claim for damages, if so available, in accordance with law.

10. Thereafter, the petitioner invoked the arbitration clause (Clause 59 of the Terms and Conditions of Contract) as quoted above. The learned counsel appearing for the petitioner states that the petitioner did not receive any response to the aforesaid letter and, therefore, was constrained to file the present petition. Submissions

11. Mr Ramesh Singh, learned counsel appearing for respondent no.1 has submitted that the Tender Documents also included the format of the agreement to be executed by the parties: Form of the Agreement. Clause 2 of the said Form of the Agreement specified the documents that would be deemed to be forming a part of the agreement and the same included Terms and Conditions, which as noticed above included the arbitration clause. He submitted that the parties were obliged to execute an agreement in the said form after the contract was awarded to the petitioner and as the said agreement had not been executed, there was no arbitration agreement between the parties. He earnestly contended that it is only on execution of the said agreement that the arbitration clause would become operative.

12. Mr Singh relied on the decisions of the Supreme Court in Dressar Rand S.A. v. Bindal Agro Chem Ltd. and Anr.: (2006) 1 SCC 751 and Bharat

Sanchar Nigam Limited v. Telephone Cables Limited: (2010) 5 SCC 213 in support of his contentions. Â

13.Mr Tarkeshwar Nath, learned counsel appearing for the petitioner countered the submissions advanced by Mr Singh. He submitted that since the petitioner's bid was accepted, a valid contract had come into existence. The terms of the said contract was specified in the Tender Documents and that included the arbitration clause. He relied upon the decision of a Coordinate Bench of this Court in National Highway Authority of India v. R.S.B.

Projects Ltd.: 2012 (1) ArbLR 516 (Delhi) in support of his contention.Reasons and Conclusion

14.The respondent no.1 had issued an NIT for inviting offers from service providers. The petitioner had submitted its bid, pursuant to the NIT, offering to provide services of 205 security guards at the rate of ₹ 72,002.15/- plus service tax, per day. The said bid was, essentially, an offer. The said offer, being the lowest, was accepted by respondent no.1 by issuing the Provisional Award of Contract. The same clearly indicated that respondent no.1 had accepted the offer made by the petitioner and, indisputably, acceptance of an offer results in a contract. However, the Provisional Award of Contract also expressed that the same was provisional inasmuch as the letter stated that respondent no.1 was "pleased to provisionally Award the Contract for providing Watch & Ward/Door Keeping Services." The petitioner was called upon to submit its acceptance to the Provisional Award of Contract, which the petitioner admittedly did by a letter dated 25.06.2013. The petitioner also submitted the performance security as required. Thereafter, respondent no.1 issued the Final Award of Contract, which was also accepted by the petitioner.

15.It is relevant to note that the Final Award of Contract expressly stated that the award of contract was for period of two years w.e.f. 01.08.2013.

There is little doubt that with the issuance of the Final Award of Contract, a binding contract came into existence between the parties.Since the petitioner's bid was based on the Terms and Conditions of the Contract as provided under the Tender Documents, the said terms and conditions clearly formed a part of the contract between the parties.

16.It is also relevant to mention that Clause 7.1 of the Instructions to Bidders provided for the contents of the Tender Documents. Clause 7.1.1 of the

Instructions to Bidders clearly listed out the Tender Documents. The relevant extract of the said clause 7.1.1 is set out below:-

7.1.1 The Tender Invitation Document has been prepared for the purpose of Inviting tenders for providing Security Services. The Tender document comprises of:

- (a) Notice of Invitation of Tender.
- (b) Terms and Conditions.
- (c) Tender form for providing security services (Annexure-I)
- (d) Scope of Work (Annexure-II)
- (e) Details of Manpower required (Annexure-III)
- (f) Method of award of work (Annexure-IV)
- (g) Check list for Pre-qualification/Technical Bid (Annexure-V)
- (h) Check list for Technical Evaluation (Annexure-VI)
- (i) Undertaking (Annexure-VII)
- (j) Form of Bank Guarantee for Bid Security (Annexure-VIII)
- (k) Form of Agreement (Annexure-IX)
- (l) Form of Bank Guarantee of Performance Security (Annexure-X)
- (m) Price Bid for Security Services (Annexure-XI)

17. Clause 8.2 of the Instructions to Bidders expressly provided that Tender Documents issued for the purposes of tendering as listed under Clause 7.1

would be deemed as incorporated in the bid. Clause 8.2 of the Instructions to Bidders reads as under:-

8.2. Documents Comprising the Bid Tender document issued for the purposes of tendering as described in Clause 7.1 and any amendments issued will be deemed as incorporated in the Bid.

18. In view of the above, this Court finds no merit in the contention that the Terms and Conditions of the Contract did not form a part of the contract

between the parties. The petitioner's bid included the said terms and the acceptance of the said bid resulted in the contract of which the Terms and

Conditions were an integral part. The Arbitration Clause also formed a part of the contract.

19. This Court is unable to accept that merely because the formal agreement was not executed, the terms and conditions of the contract did not form a

part of the contract between the parties. The execution of a formal agreement

was only a ministerial act and merely because respondent no.1 had failed to execute the same, cannot detract from the fact that the contract between the parties had come into existence. Â

20.In *National Highway Authority of India v. R.S.B. Projects Ltd.* (supra), a Coordinate Bench of this Court had considered a similar issue and had

observed as under:- â??26. The letter dated 21st December 2000 itself is an acknowledgment by NHAI that there was in fact an award of work to

the Respondent. Otherwise, there was no need to cancel such award of work in the first place. Even otherwise, there could be no manner of doubt

that a concluded contract did come into existence. The absence of the signing of formal agreement in terms of Clause 34.1 of the bid document would

make no difference to that position. In coming to the above conclusion in the impugned Award, the Arbitral Tribunal placed reliance on the decision of

the Supreme Court in *Banarsi Das v. Cane Commissioner*, UP AIR 1963 SC 1417 and the decision of this Court in *Progressive Constructions Limited*

v. Bharat Hydro Power Corporation Limited AIR 1996 Del 1992. This Court finds no error having been committed by the Arbitral Tribunal in this

regard.â??

21.In view of the above, this Court finds no merit in the contention that the Terms and Conditions of the Contract did not form a part of the contract

between the parties. Â

22.The decision of the Supreme Court in *Dressar Rand S.A.* (supra) is of little assistance, as it is not applicable in the facts of this case. In that case,

the letters issued by respondent no.2 therein, K.G. Khosla, only confirmed its intention to place an order on Dressar Rand S.A. The Supreme Court

considered the above and concluded that the issuance of letters of intent did not result in a binding contract as that would arise only on placement of a

purchase order. The Court held that the person issuing letters of intent only desired the concurrence of Dressar Rand S.A. to the terms contained in

the letters of intent so that it could place an order on the terms and conditions as mentioned therein. In the present case, respondent no.1 has

unequivocally accepted the bid and had called upon the petitioner to confirm the same. The Final Award of Contract clearly resulted in a contract

between the parties.

23.Similarly, the decision in the case of *Bharat Sanchar Nigam Limited* (supra) is

also not applicable as, in that case, the Instructions to Bidders

expressly provided that the purchase order would be deemed to be a contract and since the purchase order had not been issued, the Court held that

the contract had not come into existence. Â

24. In view of the above, the contention that an arbitration agreement does not exist between the parties is rejected. There is no dispute that the

petitioner had invoked the arbitration clause and the concerned authority had not appointed an arbitrator. In the circumstances, a sole arbitrator is

required to be appointed to adjudicate the disputes falling within the scope of the arbitration clause. Â

25. Accordingly, this Court appoints Justice R.C. Jain (Retired), Delhi High Court (Mobile No. 9818000380) as the Sole Arbitrator to adjudicate all the

disputes falling within the scope of the arbitration clause as quoted above. This is subject to the Arbitrator making the necessary disclosure under

Section 12 of the Act and not being ineligible under Section 12(5) of the Act. 26. The Arbitrator shall fix his fees in consultation with the learned

counsel for the parties and having regard to Fourth Schedule of the Act. The parties are at liberty to approach to the Arbitrator for further

proceedings.

27. The petition is disposed of.