

(2016) 12 DEL CK 0112

In the Delhi High Court

Case No : ARB. P. 499 of 2015, OMP (I) 290 of 2015 & IA Nos. 16141 of 2015, 23120 of 2015, 850 of 2016

Geo Miller & Co. Pvt. Ltd.

APPELLANT

Vs

Bihar Urban Infrastructure Development Corporation Limited

RESPONDENT

Date of Decision : 06-12-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, Section 2(1)(h), Section 9, Section 9

Citation : (2017) 1 ArbILR 245 : (2017) 3 RAJ 66

Hon'ble Judges : S. Muralidhar, J.

Bench : Single Bench

Advocate : Mr. S.D. Singh, Mr. Rahul K. Singh and Mr. Jitender Singh, Advocates, for the Petitioner in ARB. P. 499 of 2015, OMP (I) 290 of 2015 and IA Nos. 16141 of 2015, 23120 of 2015, 850 of 2016.; Ms. Shilpa Singh and Mr. Rahul Madhvani, Advocates, for the Respon

Final Decision : Dismissed

Judgement

S. Muralidhar, J. - These three petitions arise out of a common set of facts and are being disposed of by this common order.

2. Arb. P. No.499/2015 is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("Act") filed by Geo Miller & Co. Pvt. Ltd. ("Geo Miller") against Bihar Urban Infrastructure Development Corporation Limited (BUIDCO) seeking appointment of an Arbitrator to adjudicate the disputes between the parties arising out of a notice inviting tender (NIT) floated by BUIDCO for design, construction, installation, commissioning, management, operation and maintenance of intake, RWPH, 220 MLD water treatment plant and water supply distribution network in Patna, Bihar.

3. OMP (I) No.290/2015 is a petition under Section 9 of the Act filed by Geo Miller against BUIDCO and its Managing Director (MD) seeking the setting aside of orders dated 26th October, 2013 and 27th May, 2015 relating to the

debarment and blacklisting of Geo Miller. It seeks other interim reliefs incidental thereto including staying the operation of the said orders.

4. OMP (I) No. 416/2015 is by Patna Water Supply Distribution Networks Pvt. Ltd. (PWSDNPL), a special purpose vehicle (SPV) constituted by the joint venture (JV)/consortium of Geo Miller and Gammon India Limited (Gammon India), which was in fulfilment of the essential condition of the said consortium being awarded the aforementioned contract. The main prayer as far as OMP (I) No. 416/2015 is concerned is to quash the invocation letter dated 7th August, 2015 issued by BUIDCO seeking to encash the bank guarantee (BG) dated 15th September, 2012 for a sum of Rs.2,48,00,950.00 issued in favour of BUIDCO. For easy reference, PWSDNPL, the Petitioner in OMP (I) No. 416/2015, will hereafter be referred to as the SPV. In the said petition by an order dated 10th August, 2015 an interim order was passed restraining the issuing bank, i.e., United Bank of India (UBI) from releasing the said BG to BUIDCO unless such payment had already been made.

5. This is effectively the second round of litigation. The background facts are that bids were invited by BUIDCO for the above project on a design, build and operate basis. Geo Miller and Gammon India formed a consortium by entering into an inter se agreement on 12th January, 2012. Under Clause 8.1 it was stated that both Geo Miller and Gammon India as members of the said consortium "shall at all times, until completion of the Project, be liable jointly and severally for all obligations under the Project to the Employer." Further they were to be individually responsible for the performance of the project and to bear all technical, commercial and financial risk involved with therein. The lead member of the consortium was Gammon India holding 74% equity and Geo Miller held 26% equity participation. The said consortium agreement spoke of the proposed SPV, i.e., PWSDNPL.

6. The consortium/JV bid for the project. Its bid was accepted by the letter dated 27th February, 2012 at the bid price of Rs.5,48,83,14,670. A Tripartite Agreement (TPA) was then entered into between BUIDCO, the consortium and Patna Nagar Nigam (PNN) on 28th March, 2012. In terms of the said TPA BGs were furnished up to the value of 10% of the contract.

7. There was a supplementary agreement (SA) that was entered into between three parties, which contained dispute resolution clause, a clause for arbitration and a separate clause regarding governing law and jurisdiction. In terms of the SA, it was agreed that arbitration would be held in accordance with the rules of arbitration of the International Centre for Alternative Dispute Resolution, New Delhi. The venue of arbitration was to be Patna. Clause 24.1 provided for "governing law and jurisdiction." It stated that the Courts at Delhi would have jurisdiction over matters arising out of or relating to the contract.

8. The earlier round of litigation witnessed BUIDCO writing to the Chief Manager of UBI invoking BG for a sum of Rs.2,48,00,950. This was followed by another

letter dated 30th July, 2014 by which BUIDCO informed UBI that it was withholding the instructions issued by its letter dated 23rd July, 2014 and requested UBI to encash the BG. However, UBI did not encash the BG. Despite another letter being sent on 9th October, 2014 by BUIDCO, UBI still did not encash the BG. Geo Miller then filed OMP No. 1247/2014 in this Court.

9. By order dated 14th October, 2014 in OMP No. 1247/2014, after noticing that the said BG had been issued by UBI at the behest of SPV, the SPV was substituted for Geo Miller as the Petitioner. By a judgment dated 27th February, 2015, this Court dismissed OMP No.1247/2014. The Court held that it was not prima facie satisfied that the two exceptional circumstances for interfering with the right of BUIDCO to encash the BG in question, viz., egregious fraud practised by BUIDCO on the Petitioner or the Petitioner being subject to irretrievable injustice in the event of encashment of the BG have been shown to exist.

10. One of the issues raised by the SPV was that the letter invoking the BG did not actually spell out the breach of the contract committed by the SPV, which was a requirement of the BG in question. The said judgment dated 27th February, 2015 was challenged by the SPV by filing FAO (OS) No. 102/2015. When the appeal was listed before the Division Bench (DB) on 3rd March, 2015, the following order was passed:

"Issue notice, returnable on 09.04.2015.

The plea of the appellant as advanced by the learned counsel is that the invocation was not in terms of the Bank Guarantee. He submitted that it was a specific condition of the Bank Guarantee that a written demand had to be made clearly stating that there was a contractor's default. No such statement is contained in the invocation letter. Consequently, the Bank Guarantee is not liable to be encashed. The learned counsel submitted that initially an injunction had been granted to the appellant by the Single Judge but the same had been vacated by virtue of the impugned order on the ground that there has been substantial compliance in the invocation.

Prima facie, we agree with the submission made by the learned counsel for the appellant and, it is for this reason, that we direct that the Bank Guarantee No.0536121ILPER0052 dated 15.09.2012 for an amount of Rs. 2,48,00,950/- shall not be encashed by the respondents unless already encashed. The learned counsel for the appellant states that the said Bank Guarantee has not been encashed as yet. We are passing this order at 12:53 pm.

Dasti under the signatures of the Court Master."

11. On 4th March, 2015, a show cause notice (SCN) was issued to the SPV asking it to explain as to why it should not be black-listed since it was not interested in carrying out the work on the project. A separate SCN was issued on 25th March, 2015 to Geo Miller. On 27th May, 2015, an order was passed placing both Gammon India and Geo Miller in the black list for five years under the

provisions of Bihar Contractor Registration Rules, 2007. This led to Geo Miller filing OMP No. 290/2015 seeking the reliefs as mentioned hereinbefore and thereafter Arbitration Petition No. 499/2015.

12. Meanwhile FAO (OS) No. 102/2015 was finally disposed of by the DB on 7th August, 2015 by the following order:

"The learned counsel for the respondent NO.2 has taken instructions and states, on instructions from Mr Mehtab Alam, Finance Officer, who has been authorised by the Managing Director, BUIDCO, that the letter of invocation dated 23.07.2014 would be withdrawn in view of the technical objection raised by the appellant, which has been noted in our order dated 03.03.2015, that the invocation is not in terms of the bank guarantee.

In view of this, the appeal does not survive any further. The parties are free to act under the bank guarantee in accordance with law. The interim order stands vacated on the express condition that the invocation letter shall be withdrawn.

The appeal stands disposed of.

Dasti."

13. On 7th August, 2015, itself, BUIDCO addressed the following letter to the UBI:

Dated 07.08.2015

"Ref No.2446

The Chief Manager

UBI Lajpatnagar Branch

New Delhi

Sub: Encashment of PBG of Patna Water Supply Distribution Network Pvt. Ltd.

For the Patna Water Supply Project, A Special Purpose Vehicle (PV) was formed between Gammon India Limited and Geo Millet having equity participation as 74% and 26% respectively. The SPV was named as Patna Water Supply Distribution Network Pvt. Ltd.

The Contract Start date was 28.02.2012 and Scheduled Completion date was 27.03.2014. However only 12.80% of the total work has been completed by the Contractor during this period. The Contractor was not showing any interest in the Project even after several intimations. Finally after giving notice to correct under clause 15.1 of Section IV condition of contract vide letter dated 08.07.2014 the Employer terminated the contract Agreement under Clause 15.2b of Section IV condition of contract vide letter dated 24.07.2014.

The Performance Bank Guarantee was taken for timely Performance of the Contractual obligations by the Contractor. As the Contractor has grossly failed to

performed its duty under the Contract, so we request you to please immediately encash the below mentioned Performance Bank Guarantee.

The details of Bank Guarantee is as below:

Sl.No. BG No. Amount

1 053612ILPER 0052 2,48,00,550.00

The Original BG has already been submitted to your bank by our Authorised Representative Mr.Md. Mahtab Alam (Manager F), he is also authorised to complete all the formalities regarding encashment of BG if any, whose signature has been attested below.

D.K. Shukla

MD"

14. The above invocation was again challenged by the SPV by filing OMP (I) No.416/2015 in which an order was passed by the Single Judge on 10th August, 2015 restraining UBI from releasing payment of the aforementioned BG to BUIDCO unless payment had already been made. That interim order has continued since.

15. A preliminary objection was raised by Ms. Shilpa Singh, learned counsel for the Respondent regarding the maintainability of OMP(I) No.290/2015 as well as Arb.P. No.499/2015 by Geo Miller. She pointed out that Geo Miller was not in its individual capacity a party to the arbitration agreement, which was essentially between SPV and BUIDCO.

16. In seeking to meet the above objection Mr S.D. Singh, learned counsel for Geo Miller, placed considerable reliance on the decision of the learned Single Judge of this Court in Automation Technologies (I) Pvt. Ltd. v. Unitech Ltd. 2009 (1) R.A.J. 444 (Del.). Since this is the main plank of the submission of Geo Miller, the Court proposes to discuss the said decision in some detail.

17.1. The facts in Automation Technologies (I) Pvt. Ltd. (supra) were that Sarvamanglam Builders & Developers Ltd. (SBDL) was the owner of land measuring 4.386 acres in Village Sikandrapur Ghoshi, District Gurgaon, Haryana. An additional parcel of land measuring 1.344 acres was owned by Continental Properties Limited (CPL), which was a 100% subsidiary of SBDL.

17.2 There were five shareholders of SBDL. They had agreed to raise its authorised capital to Rs.1 crore and for that purpose approached Automation Technologies (I) Pvt. Ltd. (AT IPL) to become a shareholder in SBDL to the extent of 5% in the post acquisition paid up capital. The purpose of the collaboration of 5 shareholders with AT IPL was to develop a multi-storeyed residential complex on the above land. Later the purpose was changed and it was decided to develop a commercial complex and service apartments.

17.3 Approvals, clearances etc were agreed to be procured in the name of SBDL

and accordingly the parties executed a Memorandum of Understanding entitled "Shareholding Agreement" on 28th January, 1998. The five shareholders of SBDL and ATIPL were collectively referred to as the RG Group. Unitech Limited was referred to as the UT Group and the third party to the MoU as the PB Group. The ratio of the share capital of the first, second and third parties in SBDL in the post acquisition paid up capital was fixed at 5% for ATIPL and 35% for the five shareholders of SBDL. Thus effectively for the party of the first part of the MoU have held 40% of SBDL. 40% was for the UT Group (second party) and 20% for the PB Group (third party).

17.4 The MoU also contained an arbitration clause. With no progress being made in the project ATIPL issued letters calling upon the MD of Unitech Limited to distribute share of profits of the ATIPL. With the Respondents failing to reply, ATIPL invoked the arbitration clause and sought the appointment of an Arbitrator by filing an arbitration petition.

17.5 One of the objections to ATIPL filing the said petition as raised by Unitech Limited was that the petition was not maintainable at the instance of ATIPL alone. The agreement was only with the party of the first part, which comprised ATIPL and the other members of the RG Group. The question that arose was whether ATIPL could alone bring forth an arbitration petition.

17.6. The Court referred to clause 16 of the Arbitration Agreement, which reads as under:

"16. Arbitration ? Any dispute or difference arising out of or in connection with this Agreement or interpretation thereof shall be referred and be finally resolved by Arbitration in accordance with the Indian Arbitration Laws as applicable from time to time."

17.7 The Court noted that the said clause did not refer to a dispute arising only between the parties to the agreement. It was held that the term "party" under Section 2(1)(h) of the Act in the absence of any covenant to the contrary in the Agreement cannot be given a restrictive meaning. It was noticed that "a perusal of arbitration clause 16 of the agreement shows that there was no reference to any party at all. Therefore, merely because the remaining six constituents of the RG Group did not participate in the arbitration or did not raise a dispute could not be a ground to foreclose the right of ATIPL."

18. As far as the instant case is concerned, the Court finds several points of distinction. The arbitration clause as far as the present case is concerned is clause 20.4, which reads as under:

"20.4 Arbitration

(a) Any Dispute which is not resolved amicably by conciliation of the Expert Committee, as provided in Clause 20.3 shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution. New

Delhi (the "Rules") or such other rules as may be mutually agreed by the Parties. And shall be subject to the provisions of the arbitration Act. The venue of such arbitration shall be Patna Bihar (India) and the language of arbitration proceedings shall be English.

(b) There shall be a board of three arbitrators of whom each Party shall select one and the third arbitrator shall be appointed by the two arbitrators so selected and in the even of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

(c) The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 20.4 shall be final and binding on the Parties as from the date it is made and the Contractor and the Employer agree and undertake to carry out such Award without delay.

(d) The Contractor and the Employer agree that an Award may be enforced against the Contractor and or the Employer as the case may and their respective assets wherever situated.

(e) This Contract and the rights and obligations of the Parties shall remain in full force and effect pending the Award in any arbitration proceedings hereunder."

19. Clearly, therefore, the arbitration clause refers to and envisages dispute only "between parties." Under Section 2(1)(h) of the Act, party is defined as "party to an arbitration agreement." The parties to the arbitration agreement in the present case are clearly the consortium and BUIDCO.

20. It was then contended that the agreement has been signed not only by Gammon India but also by Geo Miller and therefore Geo Miller could its own capacity seek to invoke the arbitration clause. The Court is unable to agree with the above submission. The wording of the agreement is clear that the consortium would be represented through M/s. Gammon India Limited, lead member of the consortium through its authorised signatory. The parties never intended that one of the members of the consortium separately invoked the arbitration agreement. Unlike the decision Automation Technologies (I) Pvt. Ltd. (supra) where there was no contrary intention expressed in the agreement in the present case the agreement in question clearly envisages the consortium acting through the lead member Gammon India.

21. It was then contended that Geo Miller is aggrieved by the SCN issued to it and the subsequent order black listing it and that since this arose out of the contract in question Geo Miller has a remedy of seeking arbitration for adjudication of the said disputes.

22. The Court is unable to agree with the above submission either. While it is true that SCN issued by BUIDCO, which led to its black listing, the remedy of Geo Miller for such action is not under the TPA between BUIDCO, Consortium and PNN, but other remedies that may be available to it in accordance with law.

23. Strangely at the beginning of the arguments Mr. S.D. Singh learned counsel appearing for Geo Miller himself produced for consideration of the Court an order passed by the learned Single Judge of this Court on 25th October, 2016 in Arb.P. No.157/2016 (Patna Water Supply Distribution Networks Private Limited v. Bihar Urban Infrastructure Corporation Limited) where the disputes arising out of the very same contract have been referred to arbitration. Mr. Singh urged that the disputes relating to the invocation of the BG should also be referred to the same Arbitral Tribunal (AT).

24. In response to a query as to why when the consortium/SPV could itself come forward to file the above petition under Section 11(6) of the Act, it could not come forward to file the Arb.P. No.499/2015, Mr. Singh stated that Gammon India was not coming forward to do so. This answer is not very convincing. Mr. Singh himself has filed OMP(I) No.416/2015 on behalf of the SPV, which is also on board today. It is inconceivable that he could file one petition for SPV with both members coming together to do so but not another under Section 11(6) of the Act. The Court is, therefore, not convinced that SPV is not in a position to come forward to file a petition which it appears to have already done by filing Arb.P. No.157/2016.

25. For all the aforementioned reasons, the Court accepts the preliminary objection of BUIDCO that Arb.P. No.499/2015 and OMP(I) No.290/2015 at the instance of Geo Miller alone are not maintainable as such. Both petitions and pending applications, if any, are accordingly dismissed.

26. Turning to OMP(I) No.416/2015, the Court notices that one of the central submissions of Mr. Singh appearing for SPV is that although the order of the DB dated 7th August, 2015 envisaged BUIDCO withdrawing the earlier invocation letter, BUIDCO, in fact, did not withdraw the earlier invocation letter.

27. A careful perusal of the order dated 7th August, 2015 reveals that the DB recorded the statement of the counsel appearing for BUIDCO that they would issue a fresh invocation letter. The DB then specifically permitted the parties to act in accordance with the BG thereby meaning that BUIDCO was free to issue a fresh invocation letter. When BUIDCO informed the DB that it would be withdrawing the earlier invocation letter, it made clear that it intended to issue a fresh one to replace it by removing the defect pointed out by the SPV, viz., that the invocation was not consistent with the BG and that is precisely what BUIDCO has done by issuing the fresh invocation letter on 7th August, 2015.

28. In any event the counsel for BUIDCO had produced before the Court another letter dated 7th August, 2015 addressed specifically to the Bank in question, which reads as under:

"Dear Sir,

This is to submit that in view of the Order passed on 07.08.2015 by Hon'ble High Court, New Delhi; we are withdrawing our earlier BG encashment letter

dated 23.07.2014 & 23.09.2014 and hereby issuing a new revocation/BG encashment letter.

Please do the immediate encashment of the Bank Guarantee as early as possible."

29. It is, therefore, plain that the fresh invocation letter was issued to the Bank by BUIDCO withdrawing the earlier invocation letter.

30. As far as the case for staying the encashment of the BG is concerned, Mr. Singh relied on the decisions in *Hindustan Construction Co. Ltd. v. State of Bihar* (1999) 8 SCC 436; *State of Haryana & Ors. v. Continental Construction Ltd.* (2002) 10 SCC 508 and the recent decision of the Supreme Court in *Gangotri Enterprises Ltd. v. Union of India* 2016 (4) SCALE 664 and urged that this was a case of special equities existing in favour of the SPV warranting a stay of encashment of the BG in question.

31. The Court is not persuaded to hold that special equities exist in favour of the Petitioner in the facts and circumstances of the case warranting any stay of encashment of the BG which clearly is unconditional. In that respect the facts of the present case are different from the facts in *Hindustan Construction Co. Ltd. v. State of Bihar* (supra). As regards the decision in *Gangotri Enterprises Ltd. v. Union of India* (supra), the circumstances which weighed with the Court in granting injunction against encashment of the BG have been set out in para 42 of the decision. The facts were that arbitration proceedings were still pending and the sum claimed did not relate to the contract for which the BG had been furnished but to some other contract for which no BG had been furnished. Thirdly, the sum claim was for damages which had not been adjudicated. Fourthly, the sum claimed was neither due in praesenti nor a sum payable. Clearly in the present case none of the above factors can be said to exist. The BG in question has been furnished for the contract in question. The purpose of invocation of the BG is the breach of the contract and the claim is not restricted to one for damages. Likewise the facts in *State of Haryana v. Continental Construction Ltd.* (supra) are clearly distinguishable.

32. None of the decisions relied upon by Mr. Singh, persuade this Court to conclude that any special equities exist in favour of the SPV. The Court is, therefore, not persuaded to continue the interim order passed by this Court on 10th August, 2015.

33. It is clarified that the observations on merits are at the interlocutory stage and shall not influence the final decision in the arbitration proceedings. It will also not come in the way of the parties seeking appropriate interim reliefs in arbitral proceedings in accordance with law.

34. The interim order dated 10th August 2015 is hereby vacated. OMP(I) No. 416/2015 is dismissed.