
(2016) 09 RAJ CK 0114

In the Rajasthan High Court

Case No : Arbitration Application No. 32 of 2008

Girraj Ji Stone Crushers Private Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 02-09-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, Section 11

Citation : (2017) AIR(Raj) 9 : (2017) 2 WLC 120

Hon'ble Judges : Mr. Mohammad Rafiq, J.

Bench : Single Bench

Advocate : Mr. Ganesh Gupta for Mr. Shailesh Prakash Sharma, Advocates, for the Non-applicants; Mr. D.D. Sharma, Advocate, for the Applicant

Final Decision : Allowed

Judgement

Mr. Mohammad Rafiq, J. - This application under Sections 10 and 11 of the Arbitration and Conciliation Act, 1996 has been filed by applicant Girraj Ji Stone Crushers Private Limited through its Director Shri Sunil Kumar Agrawal against non-applicants, namely, Union of India through General Manager, North Western Railway, and its Deputy Chief Engineer (Construction-III), praying for appointment of an independent arbitral tribunal, to resolve the dispute between the parties.

2. Facts, as stated in the memo of application, are that the applicant is an approved contractor by the railway administration and has been working as contractor satisfactorily for last several years. Applicant was awarded work of supply and stacking of 50mm gauge machine crushed stone ballast as per railway specification between Rai Bha-Bichpuri Station in connection with Agra fort-Bandikui Gauge conversion project, vide tender dated 21.07.2003. An agreement in this regard was signed between the parties on 04.12.2003. Clauses 63 and 64 of General Conditions of Contract of the agreement have been reproduced in the application, which provides for the manner of resolution of dispute. Clause 64 in particular provides that in case of any dispute or difference

between the parties, save with "excepted matters", referred to in Clause 63 of the conditions, the contractor after 90 days but within 180 days of presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration. If he fails to do so, then it shall be deemed to have waived its claim and the Railway shall be discharged of its liability. Clause 64(3)(a)(i) provides that a sole Arbitrator, who shall be the General Manager or a Gazetted Railway Officer, nominated by him in that behalf in cases where the claim in question is below Rs.5,00,000/- and in cases where the issues involved are not of a complicated nature, the General Manager shall be the Sole Judge to decide whether or not the issue involved are of a complicated nature. Clause 64(3)(a)(ii) provides for appointment of two arbitrators, who shall be gazetted railway officers of equal status in the manner laid in Clause 64(3)(b) for all claims of Rs.5,00,000/- and above.

3. According to the applicant, the estimated costs of the work was Rs.74,72,000/- and quantity required to be supplied was estimated 16000 cum. The period of the work initially fixed was from 12.10.2003 to 11.05.2004. The applicant was asked to supply additional quantity of ballast as there was provision in the General Conditions of Contract and in the agreement to supply additional quantity of 25% of actual quantity. The supplementary work order was issued in this regard. The applicant thus supplied total quantity of 19488.91 cum ballast.

4. Mr. D.D. Sharma, learned counsel for applicant, argued that there occasioned certain delay owing to various reasons, which were all known to the non-applicants. The applicant explained the same in various letters and requested for time extension. Even though, the applicant was not responsible for such delay, the non-applicants illegally imposed penalty/compensation on the applicant after expiry of time period. They deducted a sum of Rs.30,000/- from fifth running bill and Rs.10,000/- from sixth running bill. The time for completion of work was fixed from 12.10.2003 to 11.05.2004 by letter dated 07.02.2005, which was extended from time to time. The applicant completed the work on or before 15.02.2005. Even though, the applicant completed 25% extra work on the direction of the non-applicants, but no extra time period has been allowed to the applicant for such extra supply. In all nine running bills were prepared by the non-applicants but payment up to 8th running bill has been released and that too in part, and payment of 9th bill was not made. Yet, the non-applicants have illegally not released the above bank guarantee of the applicant. Payment of 9th running bill of Rs.5,38,876/- has been withheld illegally. The applicant raised his objection without any delay by its letter dated 05.06.2005 claiming damages on delayed payment, and also informed the non-applicants on 21.10.2005 thereabout. No response was given by the non-applicants. It is therefore prayed that since the non-applicants have not acted in accordance with the conditions of the agreement by referring the dispute to arbitration, they have in view of Section 11(6) of the Arbitration and Conciliation Act, 1996, forfeited their right to appoint the arbitrator. The application be therefore allowed and independent

arbitrator be appointed for resolving the dispute as prescribed in Clauses 63 and 64 of the General Conditions of Contract.

5. Mr. D.D. Sharma, learned counsel for applicant, submitted that despite query of this court made vide order dated 10.04.2009 that so far as the work executed by the applicant is concerned, the record has been seized by the vigilance and the investigation with regard to his work is being done by the vigilance and under such circumstances, whether the Arbitrator can be appointed, it was open to the non-applicants to appoint the independent arbitrator and refer the dispute to the said arbitrator. It is submitted that vigilance enquiry was initiated with regard to two similar contracts between the applicant and non-applicant-Railway, yet this court made the reference of dispute to the arbitrator. Learned counsel for the applicant has relied on a recent judgment of the Supreme Court in *Swiss Timing Limited v. Commonwealth Games 2010 Organising Committee* - (2014) 6 SCC 677, and argued that this issue stands covered by the aforesaid judgment and pendency of vigilance enquiry can be no impediment for appointing arbitrator. Clearly, the non-applicants having not acted in accordance with the conditions of the agreement and not referred the dispute to the Arbitrator as per the agreement mechanism in view of Section 11(6) of the Arbitration and Conciliation Act, 1996, have now forfeited their right to do so.

6. Mr. Ganesh Gupta, brief holder of Mr. Shailesh Prakash Sharma, learned counsel for non-applicants, opposed the application and submitted that prayer of the applicant seeking reference to the independent arbitrator is wholly unreasonable and unjustified. The applicant has not completed the work within stipulated period of seven months. The applicant was reminded in this regard, vide letters dated 17.11.2003, 19.12.2003 and 11.06.2004, from time to time to inform the progress of the work. On account of poor supply, as against required quantity of 16000 cum., the applicant could supply only 10140 cum ballast within the aforesaid period, which would be evident from the measurement taken in the fourth running bill dated 03.03.2004. The non-applicants extended the period under Clause 17(B) of the General Conditions of Contract, with penalty of Rs.10,000/- per month and in this regard letters dated 06.07.2004 and 11.08.2004 were sent to the applicant. Extension of time was also granted from 26.11.2004 to 15.02.2005 under Clause 17(A)(ii) of the General Condition of Contract without levy of any penalty for extra quantity of ballast. In between, there was vigilance enquiry and original record of the applicant was seized and therefore payment of final bill could not be released. In the circumstances, no reference to the arbitrator can be made.

7. I have given my anxious consideration to rival submissions and perused the material on record.

8. The Supreme Court in *Swiss Timing Limited*, supra, was dealing with the case where objection was raised against reference of dispute as to non-payment of contractual amount or service rendered, to the arbitration by the non-applicant on the ground that agreement had been rendered void as per terms of the

contract, upon registration of criminal case regarding execution of said agreement and CBI was ceased of the investigation against the Chairman of the Organizing Committee. It was held that it is mandatory for courts to refer disputes to arbitration, if agreement between parties provides for reference to arbitration. Registration of criminal case would not be an absolute bar to refer the dispute to arbitration. There is no inherent risk of prejudice to any party in permitting arbitration to proceed simultaneously with criminal proceedings since findings recorded by Arbitral Tribunal are not binding in criminal proceedings.

9. In the present case also, there can be no impediment in making reference of the dispute to the arbitrator particularly with regard to two other cases between the same parties where also the vigilance enquiry was pending, reference to arbitration was made. Nothing has been informed about the outcome of the enquiry despite lapse of eight years despite specific query made by this court vide order dated 10.04.2009 and despite pendency of this matter before this court for last more than eight years. There can therefore be no reason not to refer the dispute to the independent arbitrator.

10. Necessary measures are the steps, which are reasonably required to be taken, one of which is to secure appointment of an independent and impartial arbitrator, which aspect has been emphasised by the Parliament even in the newly introduced the Arbitration and Conciliation (Amendment) Act, 2015, especially in Clauses 1 and 5 of the Fifth Schedule with reference to explanation to Section 12(1)(b) and Clauses 1 and 5 of Seventh Schedule with reference to Section 12(5) of the Act. Section 12(1) of the Act provides that when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances, (a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality and (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months. Section 12(5) of the Act provides that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule, shall be ineligible to be appointed as an arbitrator. Clauses 1 of both Schedule Fifth and Seventh are similarly worded which provide that if the arbitrator is an employee, consultant, advisor or has other past or present business relationship with a party, it would give rise to justifiable doubts as to his independence or impartiality. Clauses 5 of both Schedule Fifth and Seventh also provide that for a similar consequence, if any arbitrator happens to be manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties, if the affiliate is directly involved in the matters in dispute in the arbitration. Subsection (5) of Section 12 of the Act has been given overriding effect over any prior agreement to the contrary. Therefore, independence and

impartiality of arbitrator as mandated by Amending Act of 2015 has now been made paramount consideration for appointment of arbitrator.

11. In view of the above, present application deserves to succeed and same is allowed. Hon"ble Mr. Justice M.A.A. Khan, (former Judge of Rajasthan High Court), R/o A-19, Raghunath Puri, Kalwar Road, Jhotwara, Jaipur (Cell No.9414318794) hereby appointed as an independent sole arbitrator to resolve the disputes between the parties. The costs of arbitration proceedings and the arbitration fees shall be as per the Manual of Procedure for Alternative Dispute Resolution, 2009, of this Court, as amended from time to time.

12. A copy of this order be sent to Hon"ble Mr. Justice M.A.A. Khan, (former Judge of Rajasthan High Court), R/o A-19, Raghunath Puri, Kalwar Road, Jhotwara, Jaipur (Cell No.9414318794).