

(2019) 01 DEL CK 0502

In the Delhi High Court

Case No : Civil Writ Petition No. 986 Of 2017, Miscellaneous Application Nos. 4588, 18798, 18799, 44836 Of 2017

GX Technology

APPELLANT

Vs

Directorate General Of Hydrocarbons & Anr

RESPONDENT

Date of Decision : 23-01-2019

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2019) 01 DEL CK 0502

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Rajiv Nayyar, Gopal Jain, Ajay Bhargava, Jeevan B. Panda, Satish Padhi, Meher Tandon, Anil Soni, Abhinav Tyagi

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petition impugning the order dated 25.01.2017 (hereafter "the impugned order") passed by respondent no.1 (Directorate General of Hydrocarbons - DGH), whereby the petitioner and its associates have been debarred from future business dealings with DGH for a period of three years with effect from 25.01.2017.
2. The petitioner is a subsidiary company of ION Geophysical Corporation - a company registered under the laws of Texas, USA having its office in Houston - and is involved in the business of providing seismic data processing services.
3. The petitioner entered into an agreement dated 21.12.2005 with respondent no.1 (DHG) to "Carry Out Speculative Geophysical Survey in West Coast and East Coast of India (SPAN I)" (hereafter "the 2005 Agreement") for the purpose of attracting foreign and Indian companies to explore and develop oil and gas fields in the areas mentioned in the said agreement.
4. Thereafter, the petitioner entered into a Master Geophysical Data Use License agreement (hereafter "the License Agreement") dated 01.06.2006 with a

company named Energy World Development Limited (EWDL) based in Honkong. In terms of the License Agreement, the petitioner granted EWDL an exclusive license to use certain data from time to time and further granted a one-time right to assign the rights conferred to EWDL under the License Agreement.

5. On the same day, that is 01.06.2006, the petitioner and EWDL also executed a supplementary agreement, whereby the petitioner granted the license to EWDL to use licensed data under the terms and conditions of the License Agreement. The said license was granted for a consideration of USD 3,016,451 at the rate of USD 373 per LKM as specified in the 2005 Agreement.

6. Thereafter, an assignment agreement dated 01.06.2006 (hereafter "the Assignment Agreement") was executed between EWDL and Oil India Limited (OIL), whereby EWDL assigned all its rights under the License Agreement to OIL. Thus, by virtue of the Assignment Agreement, OIL became the actual end-user of the licensed data under the 2005 Agreement.

7. In 2008, the petitioner entered into another agreement dated 25.09.2008 with DGH to "Carry Out Speculative Geophysical Survey in West Coast and East Coast of India (SPAN II)" (hereafter "the 2008 Agreement").

8. In the year 2015, DGH sent several letters to the petitioner alleging that the petitioner has violated the terms of the 2005 Agreement by assigning rights to EWDL through the License Agreement. In response, the petitioner also sent several letters to DGH, inter alia, explaining that no financial consideration was involved in executing the License Agreement between the petitioner and EWDL and the Assignment Agreement executed between EWDL and OIL.

9. Thereafter, DGH issued a notice of termination dated 23.10.2015, inter alia, on the ground that the petitioner had committed breach of Clause 10.1 of the 2005 Agreement, and due to the aforesaid violation, there is a loss of veracity on part of the petitioner in relation to the 2008 Agreement.

10. In response to the said termination notice, the petitioner wrote several letters to DGH, inter alia, requesting for an opportunity to be heard. DGH acceded to the petitioner's request and the petitioner was heard on 21.06.2016. The petitioner contested the allegation that it had committed any breach of the 2005 Agreement and/or the 2008 Agreement. It also disputed the allegations that it had caused any loss to the DGH.

11. Thereafter, DGH passed an order dated 03.08.2016 terminating the 2005 Agreement with effect from 04.11.2015, that is, on the expiry of a period of ten years from the date of first sale under the 2005 Agreement. Further, by way of the said termination letter, the 2008 Agreement also stood terminated with effect from 03.08.2016.

12. On 11.08.2016, DGH issued a notice, inter alia, calling upon the petitioner to show cause, within fifteen days, as to why the petitioner should not be debarred from future business dealings with the respondents for a period of ten years. The

petitioner replied the said show cause notice by a letter dated 26.08.2016.

13. Thereafter, on 29.08.2016, the petitioner preferred a writ petition -W.P.(C) 7682/2016 - before this Court, inter alia, impugning the termination order dated 03.08.2016 issued by DGH. The said petition was dismissed as withdrawn by an order dated 31.08.2016, to the extent that it challenged the termination of the 2008 Agreement and the termination order dated 03.08.2016, on the ground that the said agreement contained an arbitration clause and thus an alternate remedy was available for redressal of those disputes. Thereafter, the petitioner filed an amended petition (being OMP (I) (Comm) No. 371/2016) seeking interim relief pending the constitution of the arbitral tribunal.

14. On 20.09.2016, DGH sent another letter calling upon the petitioner to handover all the data and reports to the respondents in terms of clause 10.3 and clause 5.16 of the 2005 Agreement and the 2008 Agreement, respectively. The petitioner replied to the said letter objecting to the same. Consequently, the DGH agreed to keep the aforesaid demand in abeyance till the conclusion of the hearing of OMP (I) (Comm) No. 371/2016.

15. The said writ petition (W.P.(C) 7682/2016) was disposed of by an order dated 04.10.2016 directing DGH to adjudicate upon the show cause notice dated 11.08.2016 and pass an order. Thereafter, this Court also disposed of OMP((I) (Comm) No. 371/2016) by an order dated 29.11.2016 granting liberty to the parties to seek appropriate relief before the Arbitral Tribunal.

16. In the meanwhile, the petitioner issued a notice dated 17.11.2016 to the respondents, inter alia, invoking the arbitration clause under the 2008 Agreement and appointing its nominee arbitrator. The petitioner received no reply to the aforesaid letter. Thereafter, DGH sent letters to the petitioner again calling upon the petitioner to return all the data and further deposit certain amounts due from the petitioner.

17. On 25.01.2017, the DGH passed the impugned order debarring the petitioner from any future business dealings with DGH for a period of three years and further directing that a copy of the ban/debarment order be placed on the website of the DGH for information of stakeholders and the general public.

18. Aggrieved by the impugned order, the petitioner preferred the present petition. This petition was moved on 03.02.2017 and on that date, this Court passed an ad interim order directing that the impugned order not be uploaded on the website of DGH till the next date of hearing.

19. In the meanwhile, on 09.02.2017, the arbitral tribunal was constituted to examine the limited issue that whether there was any breach on part of the petitioner and consequent thereto whether DGH could have terminated the contract.

20. The said arbitral proceedings culminated into an arbitral award dated 25.07.2018, whereby it was, inter alia, held that the termination letter dated

03.08.2016 was illegal. The DGH's claim for damages/ loss of profits was also rejected, as the DGH had failed to prove the same.

21. It is pertinent to note that the grounds for debarment of the petitioner as set out in the show cause notice dated 11.08.2016 are identical to the grounds stated in the termination order dated 03.08.2016. The said grounds (as stated in the show cause notice dated 11.08.2016 and the termination order dated 03.08.2016) are set out below:

"(i) the purported agreement by which M/s GXT sold the Data sets to M/s EWDL allowing the letter to assign it further to a third party (M/s Oil India Limited) is found to be in clear violation of clause 5.6 and clause 6 (confidentiality) of the agreement dated 21st December 2005;

(ii) the fact that M/s Oil had actually paid a sum of US \$4.94 million in 2006 and US\$ 3.45 million in 2007, respectively, for the two datasets in question has been clearly confirmed by M/s OIL and therefore, the statement of M/s GXT that M/s EWDL assigned its rights under the License to M/s OIL without any financial consideration, is found to be clearly false;

(iii) by showing only the sums of US\$ 3,016,451.00 and LIS\$ 2,060,825.00, as respective sale considerations for these two transactions in the relevant revenue statements (i.e., as alleged sale consideration received from M/s EWDL), M/s GXT has failed to disclose revenues to the tune of US\$ 1.92 million and US \$ 1.39 million, respectively, in respect of these two transactions.

(iv) M/s GXT has suppressed information relating to the series of agreements entered into and / or approved by it for effectuating the sale of data to M/s OIL through M/s EWDL, from DGH;

(v) the Agreement dated 15th September, 2008 is an extension of the Agreement dated 21st December, 2005 and this fact has been admitted by M/s GXT and, therefore, the claim of M/s GXT that they are independent agreements is untenable;

(vi) the agreements in question carried a duty of trust and utmost good faith in carrying out sale of data entrusted / generated under the agreements and accounting for the income derived from such sale and that M/s GXT has breached this duty of trust and good faith and has acted with clear mala fide intentions in selling the data sets at prices much higher than the prices specified in the agreement by adopting certain apparently dubious and clandestine agreements (which it suppressed from DGH) and has thus proved itself to be totally unworthy of the trust and good faith which form the cornerstone of both the agreements dated 21st December, 2005 and 25th September, 2008."

22. As noticed above, the disputes in regard to the termination letter dated 03.08.2016 were referred to the Arbitral Tribunal and the Arbitral Tribunal has set aside the same as being "illegal and bad in law". The Arbitral Tribunal further did not accept the contention that the 2008 Agreement was an extension of the 2005

Agreement. It held that performance of the 2005 and 2008 Agreements were not dependent on each other; both the said Agreements were distinct and separate; and there was no reason to read them conjointly. It is seen that the termination letter dated 11.08.2016 also refers to the 2008 Agreement as an extension of the 2005 Agreement. This reason has not been accepted by the Arbitral Tribunal.

23. A plain reading of the impugned order also indicates that the concerned authority had proceeded on the basis that the petitioner had breached the duty of utmost good faith in carrying out the sale of data and not accounting for the income derived from such sale. The relevant extract of the impugned order indicating the above is set out below:-

"(ii) both the agreements in question, i.e. the first agreement dated 21.12.2005 and the second agreement dated 25.09.2008, involved the entrustment of data, which under the express terms of the agreements was the property of DGH, and, in as much as the entrustment to GXT was for the purpose of sale of such data to end users of such data on behalf of the original owner (DGH), both these agreements involved a duty of utmost food faith in carrying out such sale and accounting for the income derived from such sale and, by resorting to the purported chain of agreements between itself, M/s EWDL and M/s OIL, and by concealing all facts relating to these unauthorised (and apparently illegal transactions), M/s GXT breached this duty of utmost good faith and has acted with clear mala fide intentions in selling the data sets at prices much higher than the prices specified in the agreement, thus making both these agreements liable to termination for breach of trust;"

24. In this regard, it is important to note that the Arbitral Tribunal had not accepted that their relationship between the parties was that of Uberrima fides.

25. However, it is important to note that the Arbitral Tribunal also held that it had no jurisdiction to adjudicate the disputes relating to the 2005 Agreement and, therefore, the counter claims raised by the DGH were rejected. Thus, some of the allegations relating to the 2005 Agreement appear to remain unresolved.

26. This Court is also informed that the DGH has preferred an application under Section 34 of the Arbitration and Conciliation Act, 1996 seeking that the Arbitral Award be set aside and the same is pending.

27. Clearly, some of the conclusions in the impugned order run contrary to the arbitral award. In the aforesaid circumstances, this Court considers it apposite to set aside the impugned order, while reserving the right to the DGH to commence fresh proceedings. It is so directed. It is clarified that the DGH is not precluded from issuing fresh notice for blacklisting the petitioner specifically in relation to the petitioner"s alleged conduct in relation to the 2005 Agreement and having regard to the decision of the Arbitral Tribunal. Needless to state that if any such proceeding is initiated, the petitioner would be given full opportunity to be heard.

28. All pending applications stand disposed of.