

(2004) 07 BOM CK 0136

In the Bombay High Court

Case No : Arbitration Petition (LDG.) No. 377 of 2004

Hyderabad Industries Ltd.

APPELLANT

Vs

Nuclear Power Corpn. of India Ltd.

RESPONDENT

Date of Decision : 15-07-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2005) 1 ARBLR 352 : (2005) 1 BomCR 833

Hon'ble Judges : Vazifdar S.J., J

Bench : Single Bench

Advocate : Iqbal Chagla and C. Kapadia, instructed by Khaitan and Co, for the Appellant; K.F. Presswala and S.B. Jijina, instructed by Mulla and Mulla and C.B. and C., for the Respondent

Final Decision : Dismissed

Judgement

Vazifdar S.J., J.—Leave to amend as per the draft amendments tendered in Court. The amendments shall be carried out within four weeks from today.

2. This is a petition u/s 9 of the Arbitration and Conciliation Act, 1996. The petitioner seeks orders restraining the respondent from in any manner giving any effect and/or further effect to its notice dated 10th June, 2004 and from insisting on the performance of any part or portion of the contracts entered into between the parties through a sub-contractor and from in any manner preventing the petitioner from doing the same by itself. By the amendment the petitioner has sought an injunction restraining the respondent from invoking the bank guarantees issued at the petitioner's instance under the terms of the contracts. The interim reliefs are in terms of the aforesaid reliefs.

3. The petitioner and the respondent entered into four agreements for the supply by the petitioner to the respondent of heavy water upgrading and waste management plants in respect of two sites of the respondent. In respect of each site, one contract was for supply and other was for erection of the equipment.

4. Counsel proceeded on the basis that the essential terms and conditions in each of the contracts are identical. I will, therefore, refer to the relevant terms from the contract dated 22nd August, 2003 (Exhibit "A" to the petition). Clause 15 incorporates the tender documents and various documents including the Commercial terms and conditions. Clauses 5 and 18 of the purchase orders, read as under : -

"5.0 Contractual delivery schedule

5.1 The completion of composite package for heavy water upgrading and waste management plants comprising of design, balance, engineering, supply, erection, per-commissioning and handing over in acceptable condition covered in this purchase order shall be done in a phased manner and shall be completed as below :

5.2 In case the contractor fails to apply and secure extension of contractual delivery period before effecting delivery of the supplies against this purchase order acceptance of such stores by the purchaser will in no way prejudice the right of the purchaser to levy liquidated damages for the delayed deliveries nor will it entitle the contractor for payment of statutory levies that comes into force after the expiry of the contractual delivery period.

5.3 A time schedule showing major milestones is enclosed as section D"

"18.0 Sub-contract

18.1 The contractor shall not subcontract any or all of the work without written consent of the purchaser. The contractor shall solely be responsible to the purchaser for all the work including that of the subcontractor, if allowed by the purchaser.

18.2 A list of approved vendors/sub-vendors/sub-contractors is shown as section-E to this purchase order. In the event the contractor desires inclusion of additional vendors sub-vendors/sub-contractors in the above list, the qualification and approval of the suggested vendors/ sub-vendors/sub-contractors shall be done as per the conditions mentioned in the tender specification."

Clause 3.2 of the commercial terms and conditions reads as under :

"3.0 Site Work

3.1

.....

3.2 The contractor shall prepare and submit all erection schedules, procedures, drawings, quality plans as specified in the tender specification for approval to :-

Chief Construction Engineer."

Clause 2.7.2 of the General Information and Instructions to tenderers reads as under :-

"2.7 Qualification of sub-contractors

2.7.1

.....

2.7.2 It is preferable that sub-contracting of any or part of the work by the TENDERER be kept minimum. In their bid, Tenderer must clearly identify the extent and scope of work they propose to subcontract, and identify the sub-contractor. In their bid, TENDERER may identify more than one sub-contractor for a given scope of work. All sub-contractors/ sub-vendors selected by TENDERER, for major or minor items, shall be subject to the approval of PURCHASER. This approval of subcontractors)/sub-vendors will be given by PURCHASER to successful TENDERER after award of the contract. If for any reason, a sub-contractor/sub-vendor selected by TENDERER is not found to be acceptable to PURCHASER, alternative sub-contractor(s)/sub-vendors acceptable to purchaser, shall be selected without any cost or commercial implications. Requirements of Clause 18.2.1. of sub-section C-18 shall also be noted in this regard."

5. The dispute between the parties leading to the issuance of the letter dated 10th June, 2004 was the alleged failure on the part of the petitioner in appointing a sub-contractor for fabrication and supply of one of the items viz. a distillation column assembly.

6. Mr. Chagla submitted that the petitioner was given an option whether or not to sub-contract any part of the work. Moreover, relying on Clause 2.7.2 of the General Information And Instructions To Tenderers, he submitted that sub-contracting was to be kept to a minimum.

He submitted, that the respondent insisted on the petitioner appointing a sub-contractor for the distillation column assembly. Indeed he relied upon paragraph 5 of the letter dated 10th June, 2004 wherein the respondent gave a last and final opportunity to the petitioner to finalise placement of an order on any one of the vendors approved by the respondent on or before 21st June, 2004 as per the terms and conditions of the contract. The letter states that in the event of the petitioner failing to do so, it would be presumed that the petitioner was not interested in the contracts and the same shall be deemed to have been terminated in that event from 22nd June, 2004, Mr. Chagla submitted that under the contracts, the petitioner was entitled to execute the entire work itself and that the respondent was not entitled to compel the petitioner to sub-contract any part of the work. Despite this, the respondent had sought to terminate the contracts only on the ground that the petitioner had failed to sub-contract the work.

7. The submission had appealed to me when an application for urgent ad interim reliefs was made on 22nd June, 2004. The submission, however, is not well

founded. It is founded on an erroneous presumption. It is true that under the provisions of the contracts, the petitioner was entitled to execute the entire work itself. The fact, however, is that the fabrication and supply of the distillation column was from inception never intended to be executed by the petitioner. When the agreements were entered into, the petitioner quite clearly intended sub-contracting this part of the work. The correspondence annexed to the petition is sufficient to establish this.

8(a). The respondent by its fax message dated 7th January, 2004 complained that no progress had been made on the distillation column and that the agency for fabrication of the column had not even been decided. The petitioner by its letter dated 9th January, 2004 stated "we internally took a review of the possibility of manufacturing the item ourselves knowing fully well that our stainless steel manufacturing experience will come in fore front in terms of our capability to manufacture the item". Had the petitioner intended fabricating and supplying the distillation column itself, there would have been no question of its taking a "review of the possibility of manufacturing" the item itself five months after the contract was entered into.

(b). The respondent in its letter dated 24th February, 2004 referred to the discussions between the parties including the point that it was indicated that in-house fabrication of the distillation column was under consideration by the petitioner "and necessary upgradations for the same are being worked out". The fact that the plaintiff was only considering upgrading its facilities six months into the contract for fabricating the distillation column itself establishes that it never intended doing so itself when the contracts were entered into. It is even more important to note that it was stated that the petitioner's proposal to fabricate and supply the distillation column was considered to be "as an alternate source".

(c). The petitioner in its letter dated 25th February, 2004 confirmed the contents of the letter dated 24th February, 2004 including its "agreement to carry out augmentation" of its facilities for the proposed in-house manufacturing of the distillation column implying thereby that its existing facilities were not adequate for the same.

(d). Any doubt on this question is set at rest by the schedule of sub-vendors. At serial No. 1.11 the names of six suggested vendors/makers are specified in respect of the distillation column assembly. Thus it is clear that from inception the work of fabricating and supplying the distillation column assembly was to be sub-contracted.

9. The argument that the respondent in breach of the contracts compelled the petitioner to appoint a sub-contractor is therefore baseless. Let me assume that despite the petitioner's intention at the time of entering into the contract to sub-contract the work it was entitled to execute the same itself. The argument may have had some substance had this change been implemented soon after the contracts were entered into. The fact however, is that the petitioner did no such

thing even till the date of the filing of the petition. The matter was merely under its consideration. It was taken up for consideration itself after considerable time.

10. In the course of the correspondence that ensued between the parties, the respondent admittedly raised a grievance about the petitioner's failure to appoint a sub-contractor for the distillation column assembly. It is not something that can be easily procured in the market over-night. The respondent's contention in its fax dated 7th February, 2004 is that as per the tender, the delivery of the first column was to be completed within twelve months of the release of the purchase order i.e. by 22nd August, 2004; that the same was due for delivery by September, 2004; that procurement of the material for the column and its fabrication takes a minimum of twelve months and that thereafter packing and the performance test at B.A.R.C. would take about two months. Despite the same from 22nd August, 2003, the sub-contractor had not been finalised till at least January, 2004.

11. It appears that from the petitioner's letter dated 9th January, 2004 that the petitioner ran into difficulty in as much as the approved vendors for the distillation column had increased their prices due to an increase in the prices of raw material. The petitioner made several attempts to reduce its losses. The net result however, was that as a matter of fact the petitioner did not finalise the sub-contractor for the distillation column.

There is nothing on record that suggests any default on the part of the respondent in this regard. It was the petitioner's responsibility to supply the distillation column. For one reason or the other, the petitioner had not finalised the sub-contractor for the same. It is clear that the matter was being delayed though only after evidence is led will the final picture emerge, if at all, as to whether the petitioner was in breach of its obligations in this regard. The least that must be said in favour of the respondent at this stage is that prima facie it does not appear that the respondent was in default and that its contention that the petitioner had committed a breach of the contract by delaying the appointment of a sub-contractor cannot be said to be totally unfounded.

12. Mr. Chagla's submission, relying upon Clause 5, that the date for completion had not arrived and that therefore the exercise of the right of termination was premature is also not well founded. Clause 5 does stipulate the final delivery schedule. That by itself would not disentitle the respondent from terminating the contracts in advance if it is of the view that the stipulated dates are not likely to be met. The respondent is not bound to wait till the final scheduled dates for completion of the contracts. It is necessary in contracts of this nature to ensure that the progress of the work from time to time is not slow. It is for this reason that the time schedule showing major mile tones is enclosed alongwith the orders as stated in Clause 5.3. Such clauses are provided even in less sensitive construction contracts. It is not possible at this stage to conclude that the respondent's assessment that the petitioner would not be able to meet the scheduled completion date is arbitrary, absurd and unfounded.

13. Prima facie, I am of the view that the petitioner would not be entitled to specific performance of contract of this nature. The petitioner's remedy will be to seek damages in the event of it being held that the respondent wrongly terminated the contract.

14. I have already held that prima facie it does not appear that the petitioner is entitled to specific performance of the contracts. The interim relief sought in this petition can only be in aid of a claim of specific performance. For this reason, the petitioner is not entitled to interlocutory relief in aid of such a final relief.

15. The balance of convenience is clearly in favour of the respondent. That contracts are not merely sensitive in nature. They are of national importance. To grant interim reliefs will in effect stall the entire project of the respondent. It is not necessary to elaborate the spiralling effect, an injunction of the nature sought would have no the entire project of the respondent. On the other hand, to reiterate, if the petitioner succeeds in establishing that the respondent wrongly terminated the contract, it has its remedy by way of damages.

16. The petitioner has, by the amendment, sought an injunction restraining the respondent from invoking the bank guarantee furnished by the petitioner pursuant to the said agreements. I have already come to the conclusion that it is not possible to hold at this stage at least that the respondent's contentions are unfounded. It is not possible to state that the petitioner has made out a clear and undisputed case on merits establishing compliance on its part of all the terms and conditions of the contract and a breach on the part of the respondent. In the circumstances, on merits, the petitioner is not entitled to any injunction restraining the invocation of payment under the said guarantees.

17. Clause 5 of the bank guarantees reads as under :-

"5. We, State Bank of Mysore, Banjara Hills branch, Hyderabad 500 033 (A.P.) (Bank) do hereby undertake to pay the amount due and payable under this guarantee without any demur merely on a demand from on behalf of M/s. Nuclear Power Corporation of India Ltd. stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the purchaser by reason of breach by the said contractor of any of the terms and the conditions contained in the said agreement or by reason of the contractor's failure to perform the said agreement. Any such demand made on the bank shall be conclusive as regards the amount due and payable by bank under this guarantee. However, our liability under this guarantee, shall be restricted to an amount not exceeding Rs. 74,67,500/- (Rupees seventy four lacs sixty seven thousand five hundred only)."

18. One of the letters of invocation reads as under :-

"This refers the aforesaid bank guarantee executed by your bank on behalf of your client M/s. Hyderabad Industries Limited, Kolkata.

Accordingly, in terms of paras 5 to 7 of the bank guarantee No. 1110 dated

12-9-03 valid upto 30-3-06, we do hereby invoke the said bank guarantee and lodge our claim with a request to remit a sum of Rs. 82,46,500/- (Rupees eighty two lakhs forty six thousand five hundred only) by way of demand draft drawn on any nationalised bank, in favour of Manager (F & A), Nuclear Power Corpn. of India Limited, Mumbai 400 094. A duly attested photocopy of the said bank guarantee is enclosed herewith for your ready reference."

19. The respondent has validly invoked the guarantees in terms thereof. Instead of setting out the ingredients of Clause 5 of the guarantees, the respondent has expressly stated that it has invoked the guarantees in terms of Clauses 5 to 7 thereof. The conditions for invocation are not mutually exclusive. Each of them indicate a breach on the part of the petitioner of a similar nature viz. breach of contract. The preconditions are not contrary to each other.

20. In these circumstances, the invocation cannot be said to be contrary to the terms of the guarantees. Mr. Presswala conceded that two guarantees bearing Nos. 1112 and 1113 were in part not validly invoked and stated on instructions that they would be invoked again after necessary rectification.

21. On 24th June, 2004, at the request of the petitioner, I did not pass the order to enable the petitioner to approach the respondent to settle the matter. Thereafter again at the request of the petitioner, the matter was not kept on board on 5th July, 2004 for orders, again to enable the petitioner to approach the respondent for a settlement. Mr. Chagla had stated that the petitioner was willing to appoint the sub-contractor as per the respondent's requirement and to execute the work accordingly. The matter was accordingly placed on board today for orders. Today Mr. Kapadia appearing on behalf of the petitioner sought to tender an affidavit to place on record what transpired between the parties between 24th June, 2004 till date. A settlement, though desirable, is a matter between the parties inter se. Affidavit are filed in support of an application and not merely to place on record what may have transpired between the parties pursuant to negotiations. Mr. Kapadia then contended that he desires to support the present application on the basis of the contents of the affidavit. If there has been any change in the circumstance or if the petitioner's case is that the petitioner is entitled to an injunction on any other grounds, it is for the petitioner to adopt appropriate proceedings for the same. For this reason, I did not think it necessary to take the affidavit on record. In fairness to Mr. Kapadia, I must clarify that nor have I considered the contents of this affidavit in this order.

22. In the circumstances, the application for interim reliefs is rejected.

At the request of Mr. Chagla, the operation of this order is stayed till 22nd July, 2004.

All the concerned parties to act on an ordinary copy of this order duly authenticated by the Associate/Court Stenographer of this Court.