

(2017) 11 MAN CK 0001
In the Manipur High Court
Case No : 1 of 2017

IRCON International Ltd.

APPELLANT

Vs

Central Agricultural University Iroisemba, Imphal, Manipur
represented by its Vice-Chancellor

RESPONDENT

Date of Decision : 06-11-2017

Acts Referred:

[Arbitration and Conciliation Act, 1996](#), [Section 11](#) - Appointment of arbitrators

Citation : (2017) 11 MAN CK 0001

Hon'ble Judges : N.Kotiswar Singh

Bench : Single Bench

Advocate : Debabarta Roy Choudhury, Momota Devi Oinam, BP Sahu, Phungyo Zingkhei

Final Decision : Allowed

Judgement

1. Heard Mr. Debabarta Roy Choudhury, Sr. Counsel assisted by Ms. Momota Devi Oinam, learned counsel for the petitioner. Heard also Mr. BP Sahu, learned Sr. Counsel assisted by Mr. Phungyo Zingkhei, learned counsel for the Respondents.
2. The present petition has been filed by IRCON International Ltd., a Public Sector Undertaking, Government of India, engaged in the construction and engineering activities, seeking for appointment of a sole Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 to decide alleged disputes arising between the petitioner and the Central Agricultural University (CAU), Respondent herein, in terms of an agreement entered between the parties on 01.04.2009 for designing and construction of the College of Veterinary Science & Animal Husbandry at Selesih in Aizawl, Mizoram.
3. The stated case of the petitioner is that the petitioner entered into a contract with the Central Agricultural University, Imphal for construction of College of Veterinary Science & Animal Husbandry at Selesih in Aizawl, Mizoram which involved planning and designing, site surveying, soil/geotechnical investigations

including preparation of layout plans, preliminary and detailed architectural drawings, structural designs and drawings as defined in the agreement. The agreement provided that the cost of all works and supplies carried out by the sub-contractors and suppliers employed by IRCON would be subject to recoveries being affected for the materials issued to them by owner, if any. The terms of payment etc. have been provided in the agreement to the effect that the entire funds for the construction of project shall be released in a phased manner as of work advance as per schedule and progress of the work, bills for works executed shall be adjusted subsequently after submission of bills along with supporting documents, vouchers, etc. by IRCON to the Dean of the concerned college for scrutiny, verification and certification of works for onward submission to CAU, Imphal for adjustment against work advance.

It has been also stated that penalty/compensation in case of delay has been stipulated in the agreement. If such delay is attributable to IRCON then the penalty/compensation @ 0.25% per month subject to ceiling as defined in the agreement is to be paid by IRCON.

It has been provided in the agreement that IRCON shall be paid 9.25% of the actual cost limited to the ceiling cost as defined in Para 2.4.2 of the agreement to cover the related overhead and other expenses.

4. It is the case of the petitioner that in view of the contract completion schedule mentioned in the agreement and provision for payment of liquidated damages by IRCON in case of any delay in completion of the project in all respects, IRCON duly mobilized its resources, tools, tackles, machineries through the Sub-contractors/self in terms of the contract and also deputed Engineers Technicians for completion of the works in time. It has been also alleged that the CAU authorities for reasons best known to them changed the site of work of two major buildings, comprising substantial portions of work to be executed, i.e. covering nearly 75% of the contract value, to a distant place upsetting the IRCON planning of works and necessitating redesigning of the two major buildings. It has been also alleged that during the construction phase, CAU authorities have included many additions/alternative/modifications from time to time resulting insubstantial variation in cost, which in turn affected the progress schedule also. It has been claimed by the petitioner that in spite of such inclusions/additions, IRCON could complete the entire work within the extended time and to the utmost satisfaction of the Respondent.

5. It has been also claimed by the petitioner that because of satisfactory completion of the work, the CAU awarded additional works valued at Rs. 16.3 Crores under the XIIth Plan on the same terms & conditions as under the earlier plan.

6. It has been stated that the Bills against work done were submitted from time to time and interim payments were also made but substantial amount were not being paid by the Respondent on the ground that either the sanctioned limit has

been exceeded or for reasons best known to them which were never been informed to the petitioner in writing.

7. It has been also alleged that though the petitioner had requested from time to time for payment of the outstanding balance amount from the owner and submitted detailed financial status as per records and demanded the amount in terms of the agreement, the Respondent had failed to make such payment.

8. It has been further stated that because of the satisfactory work executed by the petitioner, the Respondents offered another work vide letter dated 29.01.2015. However, though the petitioner made all the necessary arrangements, the Respondents have not taken any further action towards the execution of the additional work.

9. The petitioner claims that as the Respondent did not make payment of the entire outstanding bills due to the petitioner, the petitioner wrote to the Respondent for appointment of an Arbitrator in terms of the agreement as the power of appointment of Arbitrator was assigned to the Respondent. The petitioner sought to refer to the following disputes and claims to arbitration in accordance with terms of agreement :

a) Realization of outstanding amounts as per verification & certification of the bills by concerned college authority.

b) Realization of interest on such amounts.

c) Realization of the money deployed by IRCON although the agreement did not contemplate deployment of funds by IRCON as the owner was to deploy the funds towards the materials labour, and all costs for the works and IRCON was supposed to get only 9.25% of the value of the worked executed.

d) The cost of time over run as the site of works for two major buildings and allied development works was shifted by the owner/respondent to a distant place as also the consequential losses suffered by IRCON due to change of location.

e) The cost of deployment of funds by IRCON as the owner/respondent failed to advance the amount as required under the agreement.

f) Costs to additional works done by IRCON at prevailing market rate during the execution.

g) The interest implications due to non-payment of IRCON dues in time sequence and manner as provided in the agreement.

h) The cost of fund invested in the works by IRCON and interest thereon till date.

i) The claim for over stay period which can be computed by taking the base fact of 9.25% for the period of 30 (thirty) months and additional stay of another 42 (forty two) months on the same basis and same rate.

j) IRCON is also entitled to get additional amount in respect of the value of the

work done after expiry of the contractual period of 30 (thirty) months to be calculated at the market/actual cost incurred, if not paid.

k) The loss of profit for additional period.

l) Sub-Contractor's claims for abnormal delay in releasing payments against work done, interest on funds arranged by sub-contractors for timely completion of works awarded to them and any additional cost consequential to realization of the due amount.

m) Residuary acclaims, including interest cost of arbitration and other ancillary costs.

n) Interest at the rate of 18% per annum on all outstanding bills, claims and entitlement as aforesaid from the date of accrual i.e. pre reference period, interim period during continuation of arbitration as also post arbitration award till the entire amount is paid.

o) Disputes concerning additional works for Rs. 1630 lakhs in respect of which addl. works have been directed to be executed on same terms, conditions and remuneration as provided in the agreement but the execution of the works was not allowed to be performed though all mobilization were made at site with tools, tackles, men, engineers since March, 05, 2015 and all consequential losses being incurred by IRCON till now.

10. The petitioner contends that though the petitioner served the statutory legal notice dated 25.07.2016 to the Respondent in terms of the agreement, for appointment of a sole Arbitrator and for referring all the disputes mentioned therein, the Respondent failed to appoint the sole Arbitrator compelling the petitioner to approach this Court by filing this application.

11. This petition has been resisted by the Respondent claiming inter alia that no dispute has been raised in the application. Mr. BP Sahu, learned Sr. Counsel for the Respondent submits that existence of a dispute is sine qua non for invoking the arbitration clause. He submits that the entire outstanding amounts payable to the petitioner had been paid to the petitioner. He submits that as regards the escalation cost claimed by the petitioner as per the agreement, it is the Respondent University which is entitled to receive liquidated damages from the petitioner in the event the agency does not complete the work. As regards the insurance it is to be undertaken by the agency and there is no liability of the Respondent towards it. VAT is also to be paid by the agency. As per the agreement all the taxes are to be paid by the agency and as such, there is no liability on the part of the Respondent towards the petitioner on account of tax.

12. Mr. BP Sahu, learned Sr. Counsel submits that the agency Petitioner has received the final bill without any objection. It has been stated that the points of dispute raised by the petitioner have been fully covered in the final bills submitted by the petitioner to the University vide their letter dated 18.06.2016 and as such, the claim made by IRCON had been fully taken care of and there is

no pending amount liable to be paid by the University to the petitioner.

13. It has been submitted that the University has accepted the actual value of work done amounting to Rs. 56,57,81,000.00 against the full and final bill of IRCON amounting to Rs. 63,78,42,419.00 and the total accepted amount has been released to IRCON and as such the question of part payment does not arise. It has been also claimed that the only amount which the University declined to release was the cost of escalation, VAT, CAR and certain other revised bill. It has been further submitted by Mr. BP Sahu, learned Sr. Counsel that the claim made by the petitioner is beyond the agreement.

14. It has been also submitted on behalf of the Respondent that the petitioner is basing the claim only on the lawyer's notice and have not annexed any document to substantiate their claim and it is the Respondent which has annexed the relevant documents to show that there is no liability on the part of the University. Mr. BP Sahu, learned Sr. Counsel has specifically referred to the letter dated 3rd September, 2016 sent by the University to the petitioner and the final expenditure statement of College of Veterinary Sciences & Animal Husbandry at Selesih, Aizawl under XI Plan and XII Plan (Part) in which the detail statement of accounts have been mentioned. The final bill submitted by IRCON is Rs. 63,78,42,419.00 and the final bill amount admitted by CAU is Rs. 56,57,81,000.00 and as regards the claim made by the petitioner towards the cost of escalation, CAR, VAT, insurance policy, etc. it has been shown that these are either beyond the scope of agreement or are to be borne by the agency. Accordingly, it has been submitted that as the entire liability has been discharged, there is no dispute to be settled and as such, the question of appointment of Arbitrator does not arise and hence, the petition is liable to be dismissed.

15. In support of his contention, Mr. BP Sahu, learned Sr. Counsel has relied on the following decisions of the Hon''ble Supreme Court:

i) M/s P.K. Ramaiah and Company Vs. Chairman & Managing Director, National Thermal Power Corpn., 1994 Supp (3) SCC 126 wherein the Hon''ble Supreme Court held that there must exist a subsisting dispute and where the contractor acknowledges in writing accepting the correctness of the measurements as well as the final statement and received the amount, it cannot be said that there is any arbitral dispute for reference.

ii) Nathani Steels Ltd. Vs. Associated Constructions, 1995 Supp (3) SCC 324 in which the Hon''ble Supreme Court held that once there is a full and final settlement in respect of any particular dispute or difference in relation to a matter covered under the arbitration clause in the contract and that dispute or difference is finally settled by and between the parties, such a dispute or difference does not remain to be an arbitrable dispute and the arbitration clause cannot be invoked.

iii) State of Maharashtra Vs. Nav Bharat Builders, 1994 Supp(3) SCC 83 wherein

the contractor acknowledged the receipt of the amount paid to him and stated that he was unconditionally withdrawing his claim in the suit in respect of labour escalation. Thus, there was full and final settlement of the claim and thereby there was no arbitrable dispute in respect of labour escalation.

iv) Jammu and Kashmir State Forest Corporation Vs. Abdul Karim Wani and Others, (1989) 2 SCC 701 wherein it was held that where "work to be executed" already executed without any dispute, the arbitral clause cannot be invoked.

v) National Insurance Company Limited Vs. Boghara Polyfab Private Limited, (2009) 1 SCC 267, wherein the Hon"ble Supreme Court held that where both the parties to a contract confirmed in writing that the contract has been fully and finally discharged by performance of all obligations and there are no outstanding claims or disputes, courts will not refer any subsequent claim or dispute to arbitration. Similarly, where one of the parties to the contract issues a full and final discharge voucher (or no-dues certificate, as the case may be) confirming that he has received the payment in full and final satisfaction of all claims, and he has no outstanding claim, that amounts to discharge of the contract by acceptance of performance and the party issuing the discharge voucher/certificate cannot thereafter make any fresh claim or revive any settled claim nor can it seek reference to arbitration in respect of the claim.

16. The contentions of the Respondent has been vehemently objected by Mr. Debabarta Roy Choudhury, learned Sr. Counsel for the petitioner. Mr. Debabarta Roy Choudhury, learned Sr. Counsel submits that the petitioners had never admitted to any final settlement of any bill. In fact, the letter dated 3rd September, 2016 relied on by the Respondent in which it has been stated that the final bill amount of Rs. 63,78,42,419.00 was submitted by IRCON has been paid, has been disputed by the petitioner stating that no such bill amount had been submitted by IRCON and he further submits that the said letter is a document of the CAU and the Respondent has not produced any document executed by the petitioner showing or acknowledging final settlement of the entire bill. That apart, the said letter dated 3rd September, 2016 itself indicates that there are disputes as regards costs of escalation, CAR, VAT and other costs relating to academic block. He therefore, submits that the letter dated 03.09.2016 issued by the Respondent cannot be said to be the basis for asserting that the claim of the petitioner IRCON has been finally settled without any dispute.

17. Mr. Debabarta Roy Choudhury, learned Sr. Counsel further submits that the legal notice sent by the petitioner dated 25.07.2016 raising various claims and disputes mentioned in the legal notice has not been denied by the Respondents which itself would suggest that there are surviving disputes which are yet to be settled.

18. Mr. Debabarta Roy Choudhury, learned Sr. Counsel submits that the Court is not at this stage expected to go into detail about as to whether the disputes have

been settled. The applicant is not expected to justify claim or plead extensively by producing documents to demonstrate that there is a subsisting claim. He submits that the Court while exercising jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996 can decide on the basis of admitted documents that no subsisting disputes exists and in the present case, no such document of the petitioner has been produced by the Respondent to show that the petitioner had admitted to or agreed to a full and final settlement of the outstanding amounts and that there is no dispute about the final payment. On the contrary, the petitioner has raised various disputes as mentioned in the legal notice which has not been denied by the Respondent and the so called letter dated 03.09.2016 relied on by the Respondent to show that the petitioner had submitted a final bill which had been paid, is a document of the Respondent, not admitted by the petitioner, which does not demonstrate that the petitioner had acknowledged the full and final settlement of the liabilities of the accounts.

19. Mr. Debabarta Roy Choudhury, learned Sr. Counsel in support of his contention has relied on the decision of the Hon''ble Supreme Court in EmmEnn Associates Vs. Commander Works Engineer and Others, (2016) 13 SCC 61 in which the Hon''ble Supreme Court held that the Chief Justice while passing an order under Section 11 of the Act exercises judicial power and can examine the question as to whether the claim which has been raised before him survives and needs to be adjudicated and it goes without saying that if the Chief Justice finds that the claim is a dead claim, he can exercise jurisdiction in rejecting the applicant. In the said judgment, the Hon''ble Supreme Court explained as to the meaning "live claim" within the meaning of Section 11 of the Act. The Hon''ble Supreme Court held that any application under Section 11 of the Act is expected to contain pleading about the existence of a dispute and the applicant is not expected to justify the claim or plead extensively in regard to limitation or production of document to demonstrate that claim is within time in proceeding under Section 11 of the Act and that issue should be normally left to be decided by the Arbitral Tribunal.

20. Mr. Debabarta Roy Choudhury, learned Sr. Counsel submits that in the present case it cannot be said that there is no arbitration agreement and also that the petitioner has not raised certain disputes, existence of which has not been denied. Further, the respondent has also not raised any issue about delay and submits that the objection raised by the Respondent is liable to be rejected and accordingly, allow this petition by appointing an Arbitrator.

21. Heard learned counsel for the parties and perused the materials on record.

22. The petitioner has filed this petition invoking Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of a sole Arbitrator. It is now well settled that for invoking Section 11 of the Act, the existence of an arbitration agreement between the parties and existence of subsisting dispute to be referred to the arbitrator are conditions precedent for appointment of an Arbitrator under Section 11 of the Act. The Hon''ble Supreme Court in Deutsche Post Bank Home

Finance Limited Vs. Taduri Sridhar & Another, (2011) 11 SCC 375 held as follows:

"18. The existence of an arbitration agreement between the parties to the petition under section 11 of the Act and existence of dispute/s to be referred to arbitration are conditions precedent for appointing an Arbitrator under section 11 of the Act. A dispute can be said to arise only when one party to the arbitration agreement makes or asserts a claim/demand against the other party to the arbitration agreement and the other party refuses/denies such claim or demand."

23. In the present case, what is not in dispute is that there is an arbitration agreement as contained in Clause 8.0 in the agreement dated 01.04.2009 which forms the basis of the contract between the parties, which reads as follows :

"8.0 ARBITRATION OF DISPUTE

8.1 All disputes between owner and Agency in connection with these works shall be referred to the sole Arbitrator to be appointed by Vice-Chancellor, Central Agricultural University. The decision of the sole Arbitrator shall be final and binding on both the parties."

24. Therefore, the fact that there is an arbitration clause in the contract agreement is not disputed. The next issue to be decided is whether there is any existing, subsisting or live dispute to be decided. As regards this crucial issue, the petitioner has stated in the petition in paras No. 13, 14, 15 thereof that in spite of repeated demands for clearing outstanding bills and other related dues, the University has failed and neglected to pay the same causing huge loss to IRCON and University also not denied the liability to pay the outstanding dues. The petitioner also stated in detail in the petition the various claims made by the petitioner as also mentioned in the statutory notice dated 25.07.2016. It has been stated that on receipt of such statutory notice, the Respondent made part payment of dues but has not made the entire claim of the petitioner. It is to be noted that as regards the averments and claims made by the petitioner in the petition raising certain claims, the respondent has categorically stated that the CAU shall not consider the cost of escalation as it is beyond the scope of agreement signed between the parties and also that the CAU never agreed to the quantum of subsisting balance amount as claimed by IRCON and the CAU stated that the cost of escalation and VAT shall not be considered as per the agreement entered between CAU and IRCON and the Respondent has also stated that the University had accepted actual work value amounting to Rs. 56,57,81,000.00 against the full and final bill of IRCON amounting to Rs. 63,78,42,419.00 which had been paid and as such, there is no question of any part payment, and the amount which the University is declining to release relates to cost of escalation, CAR, VAT which are not liable to be paid by the University.

25. This Court after considering the materials on record, is of the view that it cannot be said that the petitioner had acknowledged that the final bill claimed by the petitioner has been fully paid. There is nothing on record to show that the

petitioner had agreed to finally accept the offer given by the Respondent towards full discharge of liability by the Respondent. The fact that the Respondent themselves have stated in the affidavit-in-opposition that the cost of escalation was beyond the scope of agreement, is a matter which is to be examined by the Arbitral Tribunal and not by this Court. Any such exercise on the part of this Court to decide whether the escalation cost is beyond the scope of agreement or not will amount to usurping the jurisdiction of the Arbitral Tribunal, which cannot be undertaken by this Court in exercise of the power under Section 11 of the Arbitration and Conciliation Act, 1996. The scope of Section 11 of the Act does not extend to decide any disputed claim as to whether any claim is within the scope of the contract or not. It is limited to decide whether there is any indisputable material to show that the claim has been fully satisfied or not. In the present case, there is no document or material produced by the Respondent to show that the petitioner has executed any document to show that the petitioner has acknowledged the full and satisfactory discharge of the liabilities and to show voluntary and unconditional acceptance of payment in full and final settlement of the contract. Therefore, it cannot be said that there is no "live dispute" between the parties.

26. The Chief Justice in exercise of power under Section 11 of the Act would be entitled to examine the issue as to whether there is "live dispute" or not for which the Court would be entitled to look into the materials produced by the respective parties. Only when it is found based on undisputed materials before the Court that there is no "live dispute" between the parties that the Court would be entitled to decline to appoint any arbitrator. However, while deciding whether any "live issue" remains between the parties for appointment of arbitrator, the Court will not be expected to go into detailed examination by referring to various documents or appreciating evidences that there exists "live dispute" or "subsisting dispute" between the parties. Though the Court may refer to documents or materials to examine as to whether any "live dispute" remains it cannot undertake a detailed scrutiny of the conflicting claims which would require weighing of evidences, in which event it would be stepping into the shoes of an arbitrator. If there be no undisputed or prima facie material to hold that the claim has been fully satisfied, the Court ought not reject any application under Section 11 of the Act. In the present case, as mentioned above, the case of the respondent is that there is no liability at all in as much as all the dues have been paid to the petitioner and as such, no dispute remains to be settled. However, the Respondent has failed to produce any indisputable material to show that all the liabilities of the University towards the petitioner has been discharged fully and satisfactorily. There is no document executed by the petitioner which is produced by the respondent which would show that the petitioner had acknowledged receipt of full and final payment of all liabilities. In fact, the document i.e. letter dated 03.09.2016 relied upon by the respondent clearly indicates that the claim of the petitioner on certain items have been rejected on the ground that these claims are beyond the scope of the agreement or these

were not the liability of the University but that of the petitioner thereby, clearly indicating that there are differences to be resolved. Whether such disputes are legitimate or not is to be examined by the arbitral tribunal or not by this Court in exercise of power under Section 11 of the Arbitration and Conciliation Act, 1996.

27. As per the arbitration agreement as quoted above, it was the Respondent which was to appoint the sole Arbitrator, which however, was not done, though requested by the petitioner. Accordingly, the petitioner has the right to move this Court under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator.

28. Accordingly, for the reasons discussed above, the petition is allowed and Hon"ble Mr. Justice Mutum Binoykumar Singh, Retired Judge of the Gauhati High Court, resident of Keishampat Mutum Leirak, Imphal, Manipur, Mobile No. 9436025346 Phone No. 0385-2450611 is appointed as sole Arbitrator to adjudicate all the disputes between the petitioner and respondent and to proceed with the arbitration in accordance with law. The parties are directed to appear before the Ld. Arbitrator on 20th November, 2017. Copies of the order may be furnished to the Ld. Arbitrator as well as the learned counsel for the parties.