
(2019) 02 J&K CK 0038

In the Jammu And Kashmir High Court

Case No : Arbitration Petition (AP) No. 02, 03, 04 Of 2019

Ircon International Ltd Others

APPELLANT

Vs

State Of Jammu & Kashmir And Ors

RESPONDENT

Date of Decision : 13-02-2019

Acts Referred:

Jammu And Kashmir Arbitration And Conciliation Act, 1997 — Section 11, 11(6)

Citation : (2019) 02 J&K CK 0038

Hon'ble Judges : Dhiraj Singh Thakur, J

Bench : Single Bench

Advocate : Sunil Sethi, Paras Gupta, Aseem Sawhney

Final Decision : Disposed Off

Judgement

1. Since in all the petitions, the parties are the same and also involve common questions of facts and law, I propose to dispose of the same by way of a common judgment.

2. All these petitions are filed in terms of Section 11 of the Jammu and Kashmir Arbitration and Conciliation Act, 1997 for appointment of an independent arbitral tribunal to adjudicate upon the disputes arising between the parties.

3. M/s Ircon International Limited is a Government of India Undertaking, which claims to be possessed of expertise in various types of construction activities in the infrastructure sector.

The Chief Engineer, Planning and Design, JKPDD floated the following three tenders for the design, supply, test, transport, survey, construction erection, testing and commissioning of 66/11 KV, 33/11 KV sub-transmission sub-station, augmentation of existing sub-transmission sub-station lines etc.

(a) e-NIT No. CE/P&D/RAPDRP/JMU/01 of 2013.

(b) e-NIT No. CE/P&D/RAPDRP/JMU/02 of 2013.

(c) e-NIT No. CE/P&D/RAPDRP/JMU/04 of 2013.

4. The petitioner emerged as the successful bidder in regard to all the contracts aforementioned. Besides the letters of allotment, which were issued in favour of the petitioner, the following three agreements came to be executed:

(a) Agreement dt. 11.3.2014 :in regard to e-NIT No. CE/P&D/RAPDRP/JMU/01 of 2013

(b) Agreement dt. 11.3.2014 : in regard to e-NIT No. CE/P&D/RAPDRP/JMU/02 of 2013

(c) Agreement dt. 23.3.2014 : in regard to e-NIT No. CE/P&D/RAPDRP/JMU/04 of 2013

5. It was urged that the work commenced pursuant to letter of allotment so issued. Extensions were also granted by the respondents to the petitioners on various occasions for the completion of the projects. It is stated that separate agreements were executed between the parties in that regard. The extensions granted purportedly were necessitated on account of factors beyond the control of the petitioner and attributable to the respondents one way or the other.

6. The petitioners have taken pains to highlight the various factors, actions and omissions, which prevented the petitioners from completing the projects in the time specified as per the agreement as also the losses suffered by the petitioners' company. These factors have elaborately been dealt with in the petitions.

7. It is stated that on account of the delay, which is attributable to the respondents and because of the inaction and omissions, the petitioners' company suffered huge losses, blockage of money, which further tarnished the petitioners' reputation in the construction field.

8. It appears that the parties had agreed that in the event of a dispute arising between them, the same would be first settled through an in house mechanism by referring the same to the Disputes Resolution Committee in terms of Clause 19.1 read with Clause 19.3 of the General Conditions of Contract. Clause 19.3(b) of the General Conditions of Contract is relevant and envisaged thus:

"19.3 b Dispute Resolution Committee The dispute resolution committee shall be constituted with one member each representing the bidder and the JKPDD. In case the Dispute resolution committee fails to resolve the dispute, the matter shall be resolved by arbitration as stipulated under the Arbitration act 1996.

19.4.2 Obligation during pendency of Arbitration:

Work under the contract shall, unless otherwise directed by the Engineer-in-charge continue during the arbitration proceedings, and no payment due or payable by the JKPDD shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide

whether or not such work should be continued during arbitration proceedings.

(i) In cases where the total value of all claims in question added together does not exceed Rs. 1,00,00,000/- (Rupees One Crore) the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be either the C.E of the JKPDD or serving or retired officer of the JKPDD/Government not below the grade of C.E or equivalent nominated by the Chief of the in that behalf. The Sole Arbitrator shall be appointed within 60 days

from the day when a written and valid demand for arbitration is received by the JKPDD.

(ii) In cases the value of the claim exceeds Rs. 1,00,00,000/- (Rupees One Crore) as above, the Arbitral Tribunal shall consist of panel of 3 serving or retired officers of JKPDD/Govt. not below the grade of C.E/C.A.O as the Arbitrators. For this purpose, the JKPDD will send a panel of more than 3 names of arbitrators of one ore more departments of the JKPDD/Govt. to the contractor who will be asked to suggest to the Chief Engineer of JKPDD at least 2 names for appointment as contractor's nominee. The Chief of JKPDD shall appoint at least one of them as the Contractor's nominee and will also appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the presiding arbitrator from amongst the three (3) arbitrators so appointed. While nominating arbitrators, it will be necessary to ensure that one of them is or has worked in Accounts department.

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9. Following the terms and conditions agreed upon as reflected in the General Conditions of Contract, the following notices were issued, requesting the respondents for constitution of a Dispute Resolution Committee:

- a. Notice dt. 12.10.2017 :in regard to e-NIT No. CE/P&D/RAPDRP/JMU/01 of 2013
- b. Notice dt. 13.11.2017 : in regard to e-NIT No. CE/P&D/RAPDRP/JMU/02 of 2013
- c. Notice dt. 29.11.2017 : in regard to e-NIT No. CE/P&D/RAPDRP/JMU/04 of 2013

10. It is further stated that the respondents on 29.12.2017 issued a Government Order informing the petitioners' company regarding the constitution of a Dispute Resolution Committee consisting of one member of JKPDD namely Sh. Muzaffar Mattoo, Chief Engineer, P&D. The petitioners' company appointed their nominee Sh. Harsh Khare, CGM/Electric in the Resolution Committee. It is urged that even when there were some deliberations, which were conducted between the members of the committee, yet the final resolution was not achieved inasmuch

as one of the members of the committee nominated by the State, Sh. Muzaffar Mattoo refused to sign the committee's meeting held on 04.07.2018 to 06.07.2018.

11. According to clause 19.4.1 of the General Conditions of Contract read with Clause 23 of the Agreement dated 11.3.2014, which is common in all the three agreements, notwithstanding there was a provision for resolution of the disputes through a Dispute Resolution Committee, parties agreed that in the event of a difference or a dispute arising between the parties, the same would be resolved through adjudication by an arbitrator nominated by the Govt. under the Jammu and Kashmir Arbitration Act. Clause 19.4.1 of the General Conditions of Contract is reproduced hereunder for facility of reference:

"If at any time doubt, question, dispute or difference whatsoever shall arise between the Contractor and the department, upon or in relation to or in connection with this contract, either of the parties may give the notice in writing of existence of such doubt, question, dispute or difference and if not resolved, the same shall be referred to J&K State Government for nominating the arbitrator under J&K Arbitration Act. The decision of the arbitrator shall be final, conclusive and binding upon the concerned parties. Provided that Arbitration Tribunal shall not have any right/jurisdictions to award any interest on claim which is determined by it in arbitration proceedings conducted by the tribunal....."

12. Failure on the part of the Dispute Resolution Committee to resolve the disputes, forced the petitioners to once again issue notices dated 26.11.2018, requesting the respondents to appoint an Arbitral Tribunal for adjudication of the disputes. Failure on the part of the respondents to take necessary action has resulted in filing of the present petitions.

13. In response to the petitions, the State has taken a stand that this court did not have the jurisdiction to entertain the present petitions in view of the fact that according to clause 19.3 (b) of the GCC. In the event of failure of the Committee as per the mechanism prescribed under Clause 19.3 (b), the disputes could be resolved only through arbitration as stipulated under the Arbitration Act, 1996, which does not extend to the State of Jammu and Kashmir.

14. It cannot be denied that the General Conditions of Contract did envisage an in house procedure for resolution of disputes through the Dispute Resolution Committee. It is also clear that the efforts of the committee to resolve the disputes had not yielded any results at all.

Admittedly, disputes have arisen between the parties, which need to be resolved. It is not denied that agreements have been executed between the parties. According to clause 23 of the Agreement, in the event of disputes between the parties, the same had to be resolved as per the mechanism prescribed therein under the J&K Arbitration Act. Clause 23 of the agreement envisages thus:-

"Arbitration: If any time doubt, dispute or differences whatsoever shall arise between the Contractor and the Employer, upon or in relation to or in connection with this contract, either of the parties may give the notice in writing of existence of such doubt, question, dispute or difference and if not resolved, the same shall be referred to J&K State Government for nominating the Arbitrator under the J&K Arbitration Act. The decision of the arbitrator shall be final, conclusive and binding upon the concerned parties. Provided that Arbitration Tribunal shall not have any right/jurisdiction to award any interest on claim which is determined by it in arbitration proceedings conducted by the Tribunal."

15. Another clause which may be relevant for the present controversy is clause 24, which envisages thus:-

"Court of Competent jurisdiction: The Courts of J&K State at Jammu shall have the jurisdiction of deciding any dispute between the parties. Laws of J&K State shall prevail upon the laws of India."

16. According to Clause 3 (g) of the Agreement, the General Conditions of Contract have to be deemed and to be construed as a part of the agreement executed between the parties. The dominant intention of the parties as reflected not only in the agreements executed between them but also as per the general conditions of contract, thus, appears to be that the disputes had to be adjudicated in accordance with the provisions of the J&K Arbitration Act notwithstanding the fact that clause 19.3 talked about the resolution of the disputes under the Act of 1996 failing a resolution by the Disputes Resolution Committee.

17. The intention to apply the provisions of the J&K Arbitration and Conciliation Act is loud and clear as is reflected in the agreement executed between the parties, in particular, reference to clause 23. Even clause 19.4.1 of the General Conditions of Contract does not appear to be subject to the provisions of 19.3 inasmuch clause 19.4.1 allowed any party to raise a dispute at any point of time and have the same resolved through the mechanism as provided under the State Act. The said clause is neither controlled nor subject to the operation of clause 19.3 (b) or 19.4.2 of the General Conditions of Contract.

18. In view of the above, it is, therefore, clear that the present petitions insofar as they invoke the jurisdiction of this Court for appointment of an Independent Arbitral Tribunal in terms of the State Act are certainly maintainable. The objection raised by the State to that extent is rejected.

19. The next question that arises for determination is whether the petitioners are entitled to seek appointment of an independent Arbitral Tribunal in terms of 11 (6) of the State Act or not. Admittedly, the petitioner had served the notices on the respondents, invoking the Arbitration clause and sought the appointment of an Arbitrator, which did not happen. The period of 30 days as prescribed in the Act has also since expired.

20. Failure on the part of the official respondents to appoint an arbitrator in accordance with the prescribed procedure within thirty days from the date of notices, entitle the petitioner to seek the appointment of an independent arbitrator in accordance with law as has been laid in Datar Switchgears Ltd. Vs. Tata Finance Ltd. and anr. (2000) 8 SCC 151 and subsequently followed in M/s Deep Trading Company Vs. M/S Indian Oil Corporation & ors. AIR 2013 SC 1479 decided on 22.3.2013.

"19.....In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator....."

21. In view of the above, these petitions are allowed. The disputes as mentioned in the petitions are referred for adjudication to the Arbitral Tribunal consisting of (i) Justice Kurian Joseph, Former Judge of the Supreme Court of India and (ii) Justice Mansoor Ahmed Mir, Former Chief Justice of the High Court of Himachal Pradesh as Arbitrators and Justice F.M. Ibrahim Kalifulla, Former Judge of the Supreme Court of India, who shall act as a presiding arbitrator. Parties shall be at liberty to file detailed claims and counter claims before the learned arbitrator. Registrar Judicial shall intimate the learned arbitrators accordingly.

22. Disposed of accordingly.