
(2010) 09 MP CK 0009
In the Madhya Pradesh High Court
Case No : A.C. No. 17 of 2010

ITI Limited

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 23-09-2010

Acts Referred:

Citation : (2010) ILR (MP) 2399

Hon'ble Judges : Rajendra Menon, J

Bench : Single Bench

Advocate : Piyush Dharmadhikari, for the Appellant; Yogesh Dhande, for the Respondent

Final Decision : Allowed

Judgement

Rajendra Menon, J.—This is an application filed by the Petitioner u/s 11(6) of the Arbitration and Conciliation Act. 1996 seeking appointment of an Arbitrator. Petitioner is an undertaking of Government of India functioning under the Ministry of Communication and Information Technology. The Respondent State of M.P. and Inspector General of Registration and Superintendent of Stamp floated tenders for appointment of various agencies for the purpose of providing Turnkey Solution towards Commissioning, Management and maintenance of data centres in various places in the State of M.P. through a wide area network including supply and installation of services, desktop systems and Peripheral for implementation of Property Administration System in the department or Registration and Stamps. Tender of the Petitioner having been accepted, an agreement was entered into as is evident from Annexure A/1. Clause 13 of the said agreement contemplates an arbitration clause for resolution of dispute in case of difference or any other matter connected with the agreement.

2. Record indicates that due to. non performance of the contract and on the ground of delay in execution of work, various show cause notices were given to the Petitioner, Petitioner submitted the reply and finally vide order Annexure A/9 dated 12.5.2009, the contract in question was cancelled. The Performance Bank

Guarantee to the tune of Rs. 2,04,50,472/- was forfeited and further a penalty of 20% of the gross bid value amounting to Rs. 4,09,00,945/- was imposed, Petitioner has filed this application seeking appointment of Arbitrator as the Respondents refused to respond to the claim made by the Petitioner for appointment of Arbitrator made vide Annexure A/10.

3. On notice being issued, Respondents have filed a reply and three objections are raised in the reply. The first objection pertains to existence of the remedy of adjudication to the Petitioner under the M.P. Madhyastham Adhikaran Adhiniyam, 1983. (herein after referred to as "Adhiniyam of 1983") and therefore, non maintainability of this application. The second objection pertains to certain concealment of fact by the Petitioner before entering into agreement. It is stated in the order Annexure A/9 and in the reply to this application u/s 11(6) of the Arbitration and Conciliation Act that before entering into the agreement Petitioner's company was facing proceedings to be declared as a Sick Industry under the Sick Industrial Company (Special) Provisions Act, 1985. As the agreement was entered into by concealment of this fact, no arbitrator can be appointed. The third objection is with regard to merit of the dispute and justification of the Respondents in terminating the agreement.

4. Having heard learned Counsel for the parties and on perusal of the record, this Court is of the considered view that at this stage for the purpose of appointment of an Arbitrator exercising jurisdiction in a proceeding u/s 11(6) of the Arbitration and Reconciliation Act, 1996 all the objections are unsustainable.

5. As far as first objection with regard to availability of remedy under the Adhiniyam of 1983 is concerned, records indicates that under Clause 13 of the Agreement there is a provision for resolution of dispute by appointing an Arbitrator. Supreme Court in the case of VA Tech Escher Wyass Flovel Ltd. v. M.P.S.E. Board and Anr. 2010 (2) MPHT 13 has laid down the principle that if an agreement provides for an Arbitration clause then the provisions of M.P. Madhyastham Adhikaran Adhiniyam 1983 will not apply. In the said case it is held by the Supreme Court that the provisions of Adhiniyam 1983 stands superseded by virtue of Act of 1996 i.e. the Arbitration and Conciliation Act, 1996. To that effect it is held by the Supreme Court that the Adhiniyam of 1983 stands repealed impliedly by virtue of Act of 1996. In view of the availability of arbitration clause in the agreement in question, first objection raised by the Respondents is unsustainable.

6. The second objection pertains to concealment of certain facts with regard to establishment of Petitioner being the Sick Industry. As far as termination of the contract is concerned, a perusal of the order Annexure A/9 indicates that termination is on various grounds particularly with regard to non performance and on the ground of delay in execution of work committed, breach of various provisions of the agreement, for the said default apart from terminating the agreement in question penalty is also imposed. In that view of the matter, it is a case where the contract is basically terminated for the breach of agreement and

non performance of the contract and therefore, the dispute has to be resolved by resolution through an arbitrator and therefore, it cannot be said that agreement was cancelled only on the ground of concealment of facts. It is seen from the order that the agreement in question and the work is cancelled mainly on the ground of breach of contract and non performance of the agreement and therefore, second objection raised is also unsustainable.

7. As far as the third objection is concerned, it is beyond the jurisdiction of this Court to go into the said area on merit of the dispute in these proceeding u/s 11(6) of the Arbitration and Conciliation Act, 1996. That apart it is also pointed out that with regard to recovery of penalty amount of Rs. 4,09,00,945/- by way of issuance of RRC under the M.P. Land Revenue Code, 1959, Petitioner has filed a writ petition. Shn Piyush Dharmadhikari points out that writ petition is not filed for challenging the imposition of penalty. It is stated by Shri Dharmadhikari that the manner of recovery being contrary to certain judgments of a Full Bench of this Court, on the mode of recovery is challenged in the said writ petition The power of the Respondents to impose the penalty and justification for Imposing the same is not subjudice in the writ petition. I am of the considered view that Shri Dharmadhikari is right in contending so, in the writ petition the only question which is being considered is as to whether the recovery ordered without adjudication of the question with regard to propriety, legality and justification for imposing penalty by way of issuance of RRC is not involved. The manner in which the recovery is made is only to be adjudicated in the writ petition. The legality or otherwise of the penalty imposed is to be decided by an arbitrator and therefore on this ground the claim for appointment of Arbitrator cannot be rejected.

8. Keeping in view the totality of the circumstances and finding the dispute to have arising between the parties and there being a provision to resolve the dispute by constituting an arbitral tribunal, this application is allowed. Justice S. P. Khare, a Retired Judge of this Court and stationed at Bhopal is appointed as an Arbitrator. Registry is directed to forward a copy of this order to Hon''ble Shri S.P. Khare, Retired Judge. Parties shall also appear and file a copy of this order before Hon''ble Shri S.P. Khare, Retired Judge

9. With the aforesaid, petition stands allowed and disposed of.