(2007) 02 RAJ CK 0030

In the Rajasthan High Court

Case No : Arbitration Application No. 100 of 2006

Marco Cables Pvt. Ltd. APPELLANT

Vs

Jaipur Vidhyut Vitran Nigam Ltd. RESPONDENT

Date of Decision : 23-02-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6)

Citation : (2007) 1 WLN 219

Hon'ble Judges : Shiv Kumar Sharma, J

Bench : Single Bench

Judgement

Shiv Kumar Sharma, J.—Heard learned Counsel for the parties on the application filed by the applicant company u/s 11(6) of the Arbitration and Conciliation Act, 1956 seeking appointment of independent Arbitral Tribunal.

2. The applicant company entered into a contract with respondent Jaipur Vidyut Vitran Nigam Ltd. (JVVN) for supply of LT PVC cable. A purchase order for supply of I.T. (I.T. KV) PVC Cable 3.54/Core Armoured or Unarmoured cable was placed by JVVN to applicant wherein it was stipulated that the purchase order shall be governed by the terms and conditions incorporated in the bidding package No. RJ-WB PSR JR 108. It is contended by applicant that JVVN failed to comply with the terms and conditions of the contract. Abnormal delays were caused in conducting inspection of the offered material and issuance of dispatch instructions. JVVN consumed abnormal period in accepting the supply of offered material. Due to delay caused by respondent JVVN stipulated delivery schedule of the purchase order had expired. During this period prices soared high. Consequently the applicant was not bound to supply the matter as per the quoted price. Therefore, the applicant claimed compensation for breach of the contract vide letter dt. October 16, 2005. The claim comes to Rs. 62.5 lacs alongwith the interest at that rate of 12% per annum. According, to Clause 28 of the Bidding contract on dispute or difference of any kind the parties shall make efforts to resolve the same amicably and on failure to resolve the dispute by

mutual consultation within thirty days, either party may give notice to the other party. Accordingly the applicant through letter dt. February 1, 2006 made request to settle the claim within a period of 30 days in accordance with Clause 28 of the general conditions of the contract. After the period of 30 days had elapsed a notice dt. September 16, 2006 was served through Counsel wherein the applicant suggested the name of Sh. P.N. Bhandari as sole arbitrator and requested the respondent to give their consent or appoint their own arbitrator and the two arbitrators may thereafter by common consent appoint a Presiding Arbitrator and thus Arbitral Tribunal could be appointed to settle the dispute. The respondent however did not sent any reply to the notice.

3. In the return filed by the respondent it was stated that no delay was caused by JVVN. The delivery was rescheduled and regularized at the request of the applicant. Purchase orders were on the firm price based on the World Bank guidelines and no price variation is admissible under the contract. During the period of contract the applicant did not pause any claim for escalation or price validity. After accepting the payment of last bill No. 2240B dt. December, 10, 2004 for Rs. 68,206/-, the applicant had laid ingenuity claim. After the contract being completed and concluded and after the payment against entire supply being received, one has no right to claim an escalation or price variation. Once the applicant supplied the material as per the quoted price and received payment against the bills raised by it, it has no merit in its claim. The respondent further stated that the purchase was against World Bank Loan, having time bound programme, which elapsed long before, therefore, at this juncture no liability could be incurred by JVVN. It is further contended that the instant application was not maintainable unless the Institutions of Engineers was first approached under Clause 15 of the Special Condition of Contract (for short ''SCC'') read with Clause 28 of the Bidding Document.

4. Clause 28 of the Bidding document envisages that the arbitration proceeding shall be conducted in accordance with the rule of procedure specified in the SCC. Clause 15 of the SCC reads as under:

15. Resolution of Disputes (Clause 28)

28.3. The dispute resolution mechanism to be applied pursuant to GCC Clause 28 shall be as follows:

(a) xxx

(b) xxx

(c) If one of the parties fails to appoint its arbitrator in pursuance of sub Clause (a) and (b) above, within 30 days after receipt of the notice of the appointment of its arbitrator of its arbitrator by the other party, then the President of the Institution of Engineers (India) both in case of the foreign supplier as well as Indian supplier, shall appoint the arbitrator. A certified copy of the order of the President of Institute of Engineers (India), making such an appointment shall be furnished to each of the parties.

(d) Arbitration proceedings shall be held at Jaipur (India), and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(e) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation etc. of its proceedings as also the fees, and expenses paid to the arbitrator appointed by such party or on its behalf shall be borne by each party itself.

(f) Where the value of the contract is Rs. 10 million and below, the disputes or differences arising shall be referred to the sole arbitrator. The sole arbitrator should be appointed by agreement between the parties, failing such agreement, by the appointing authority namely the President of the Institution of Engineers (India).

5. In the case on hand, undeniably, the respondent failed to appoint their Arbitrator within 30 days after receipt of the notice of appointment of its arbitrator by the applicant company. In such a situation Clauses 15 of SCC read with 28.3 (c) ought to have been invoked and the President of the Institutions of Engineers (India) ought to have been approached.

6. In National Highways Authority of India and Another Vs. Bumihiway DDB Ltd. (JV) and Others, their Lordships of the Supreme Court indicated in para 42 thus:

...the parties have entered into a contract after fully understanding the import of the terms so agreed to from which there cannot be any deviation. The Courts have held that the parties are required to comply with the procedure of appointment as agreed to and the defaulting party cannot be allowed to take advantage of its own wrong.

7. This Court has jurisdiction to appoint Arbitral Tribunal u/s 11(6) only when the person including an institution fails to perform any function entrusted to it under the appointment procedure Section 11(6) reads as under:

(6) Where, under an appointment procedure agreed upon by the parties:

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure. a party may request the Chief Justice or any person or institution designated by him to take a necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

8. I am of the opinion that the procedure contemplated under Clauses 15 of the SCC read with 28 of the Bidding Document has to be followed and President of the Institute of Engineers (India) should be approached. Without invoking relevant Clauses of the appointment procedure, instant application is not maintainable.

9. Resultantly, the application stands dismissed without any order as to costs.

