
(2022) 10 DEL CK 0003

In the Delhi High Court

Case No : Arbitration Petition No. 792 Of 2020, I.A. No. 1807 Of 2021

M/S Janta Associates And Co. Ltd.

APPELLANT

Vs

Indian Oil Foundation & Anr.

RESPONDENT

Date of Decision : 06-10-2022

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 9, 11

Citation : (2022) 10 DEL CK 0003

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Vineet Bhagat, Mohit Gulati, Tejas Singh, Priya Puri, Rishabh Sharma

Final Decision : Disposed Of

Judgement

Vibhu Bakhru, J

1. The petitioner (hereafter 'JACL') has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act') praying that a sole arbitrator be appointed in accordance with Clause 9.0.1.1 of the General Conditions of Contract (GCC).

Factual Matrix

2. Respondent no.1 (hereafter 'IOF') appointed respondent no.2 (hereafter 'EIL') as the Engineering Project Construction Management (EPCM) to complete the work of developing infrastructure facilities at Khajekhalan Ghat, Patna Sahib, Patna (hereafter 'the Project'). Thereafter, EIL issued an Open Tender Notice dated 14.06.2018, inviting e-bids for execution of the Project.

3. Pursuant to the aforesaid tender notice, JACL submitted its bid for the contract to execute the Project. JACL's bid was the lowest (L1) and was accepted in terms of the Letter of Acceptance (LoA) dated 13.09.2018. Thereafter, on 10.10.2018, the parties entered into an agreement (hereafter 'the Contract'). The Project was to be completed within a period of twelve months from the date of issuance of

the LoA, that is, on or before 13.09.2019.

4. The Project, inter alia, entailed construction of the staircase area, which included the foundation of the staircase that was to be made below the river water level. This required building a cofferdam to prevent the water from entering the area where the construction work was to be done.

5. JACL, inter alia, claims that the respondents provided them with the structural designs and drawings for the construction of the cofferdam. The design provided was of a sandbag design cofferdam that was 0.5 meters above water level with no wall covering on the downstream side of the cofferdam.

6. JACL claims that it followed the respondents' instructions and design and made the cofferdam accordingly. However, the design was not based on sound engineering principles and was not in conformity with the standard industrial practice of using sheet pile cofferdam for alluvial river beds where discharge is unpredictable.

7. On 12.04.2019, due to heavy rainfall, there was heavy flow of water leading to a rise in the water level of the river Ganga, which resulted in the destruction of the cofferdam. Additionally, machines and equipment in the surrounding area were damaged or washed away in the river. JACL claims that it suffered losses due to this and the respondents did not reimburse them for such losses.

8. Thereafter, to make the site ready for the Project again, there was a need for dewatering of the site. JACL was granted permission for the same. JACL claims that the respondents were aware of the fact that dewatering and removal of debris were not covered under the insurance policy, as they had approved the policy. JACL claims that notwithstanding the same, the respondents refused to pay for the dewatering and related works after the same were completed. Resultantly, JACL had to bear the expenses.

9. Subsequently, a new cofferdam was required to be constructed. JACL contends that the respondents denied its suggestions to make the new cofferdam by sheet piling method or raise the height of the sandbag cofferdam to at least one meter above water level. The only change allowed was the addition of a wall on the downstream side of the cofferdam. On 04.05.2019, due to an increase in the water level, the cofferdam was again destroyed.

10. On 21.08.2019, JACL raised the Fifth Running Account (RA) Bill to the respondents for the work completed by them. On the instruction of the respondents, this bill was revised and sent to the respondents by an e-mail dated 27.08.2019. JACL claims that the respondents refused payment of the bill and denied the existence of any such claim due to JACL.

11. Thereafter, the respondents, through letters/notices dated 06.01.2020, 13.01.2020, 28.01.2020, threatened to terminate the Contract due to inaction and delay in completion of the Project on the part of JACL.

12. On 07.02.2020, a meeting was held between the parties and JACL claims that it reassured the respondents that it would complete the Project and requested for the payment of the outstanding dues.

13. Thereafter, on 24.02.2020, the respondents issued a show cause notice to JACL, alleging that it was responsible for the delay in completing the Project and calling upon JACL to show cause why the Contract should not be terminated.

14. JACL, by way of a petition under Section 9 of the A&C Act [being O.M.P. (I) (Comm) No. 74 of 2020], approached this Court seeking interim relief. By an order dated 16.03.2020, this Court ordered the parties to maintain status quo on the site.

15. JACL responded to the show cause notice through an e-mail dated 21.03.2020. It claimed that it was not responsible for the delay and demanded that the initiation of termination proceedings be withdrawn. Further, JACL offered to complete the Project subject to the condition that the amount due to them be paid by the respondents.

16. The disputes could not be resolved between the parties. On 07.11.2020, JACL issued a notice invoking arbitration in terms of Clause 9.0.1.1 of the GCC and nominated its arbitrator. JACL further requested the respondents to nominate an arbitrator and thereafter, the two nominated arbitrators would appoint the third arbitrator to constitute an arbitral tribunal.

17. EIL and IOF replied to the aforesaid notice through letters dated 01.12.2020 and 06.12.2020 respectively. It rejected the name proposed by JACL and did not nominate a panel of persons to be selected as the sole arbitrator in terms of Clause 9.0.1.1 of the GCC. Further, the respondents demanded that JACL withdraw the notice invoking arbitration.

Reasons and Conclusion

18. It is contended on behalf of IOF that the arbitration notice issued by the petitioner is pre-mature as it has not submitted the Final Bill as yet. IOF relies on Clause 9.0.1.0 of the GCC and, on the strength of the said clause, submits that only disputes arising out of the Notified Claims, which are noted in the Final Bill, can be referred to arbitration.

19. The learned counsel appearing for IOF also referred to the recent decision of the Supreme Court in Indian Oil Corporation Limited v. NCC Limited: 2022 SCC OnLine 896, in support of his aforesaid contention.

20. Mr. Bhagat, learned counsel appearing for JACL, contended that JACL had already issued the Final Bill dated 21.08.2019. At the material time, it was referred to as the Fifth RA Bill, however, the said bill ought to be treated as the Final Bill as no further work was carried out thereafter. He also submitted that JACL had, by a letter dated 25.09.2021, notified its claim in relation to the Project.

21. It is relevant to note that subsequent to the filing of the present petition, IOF had terminated the Contract by a letter dated 24.08.2021. The Chief Executive Officer of IOF had, in terms of the said letter, also called upon JACL to join in a final survey and conduct joint measurement of the work performed under the Contract up to the date of termination, for the purposes of determining the final amounts due to it. JACL was called upon to depute a representative to be present at site on 02.09.2021 for the aforesaid purpose.

22. In response to the aforesaid letter of termination, JACL sent a letter dated 25.09.2021, whereby JACL refuted the allegations made against it and further set out the summary of its claims aggregating to an amount of Rs. 1,89,95,737/-.

23. There is merit in the contention advanced on behalf of IOF that the Final Bill is yet to be prepared. JACL had submitted the Fifth RA Bill. Subsequently, it claimed that the same ought to be treated as the Final Bill. However, IOF has not processed the same and the Engineer is also required to examine the same.

24. At this stage, it is also relevant to refer to Clause 9.0.1.0 of GCC, which reads as under:

"9.0.1.0 Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.0.2.0 hereof, any dispute arising out of a Notified Claim of the CONTRACTOR included in the Final Bill of the CONTRACTOR in accordance with the provisions of Clause 6.6.3.0 hereof, and any dispute arising out of any claim(s) of the OWNER against the CONTRACTOR shall be referred to the arbitration of a Sole Arbitrator selected in accordance with the provisions of Clause 9.0.1.1 hereof. It is specifically agreed that the OWNER may prefer its claim(s) against the CONTRACTOR as counter-claim(s) if a Notified Claim of the CONTRACTOR has been referred to arbitration.

The CONTRACTOR shall not, however, be entitled to raise as a set-off defence or counterclaim any claim which is not a Notified Claim included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof."

25. The opening sentence of Clause 9.0.1.0 of the GCC indicates that disputes arising out of a Notified Claim as included in the Final Bill are required to be referred to an arbitral tribunal. In the present case, the petitioner has notified its claims by the letter dated 25.09.2021. The same are required to be considered while making the Final Bill.

26. There is merit in IOF's contention that since the Final Bill has not been finalised, the question whether the claims made by the petitioner are Notified Claims has not been determined as yet.

27. It is also material to note that the Supreme Court in Indian Oil Corporation Limited v. NCC Limited (supra) had also observed that certain matters as specified in Clause 9.0.2.0 of the GCC are specifically excluded from the scope of arbitration. This includes the dispute whether a claim is a Notified Claim.

28. In view of the above, the petitioner's request to refer the disputes to arbitration cannot be acceded to at this stage. IOF is bound down to the statement made by the learned counsel on its behalf that the General Manager or the concerned authority shall consider the question including the petitioner's claim as Notified Claims, in accordance with the Contract between the parties, within a period of two weeks. It is so directed.

29. The petitioner is at liberty to invoke arbitration in respect of such claims that are included as Notified Claims in the Final Bill in accordance with the Contract between the parties.

30. It is also clarified that the petitioner is entitled to avail its remedies in respect of claims that are not included as Notified Claims.

31. The petition is disposed of in the aforesaid terms. The pending application is also disposed of.