

(2014) 02 KAR CK 0028

In the Karnataka High Court

Case No : Civil Miscellaneous Petition No. 134 of 2013

Power Gear Limited

APPELLANT

Vs

Gulbarga Electricity Supply Company Limited

RESPONDENT

Date of Decision : 12-02-2014

Acts Referred:

Arbitration Act, 1940 — Section 20

Arbitration and Conciliation Act, 1996 — Section 16(1)(a), 16(1)(b)

Citation : (2014) 3 AKR 173 : (2014) 3 ARBLR 101 : (2014) 2 KarLJ 619

Hon'ble Judges : Ram Mohan Reddy, J

Bench : Single Bench

Advocate : S. Krishnaswamy, Advocate for the Appellant; Girija Patil for Sri Ravindra Reddy, Advocate for the Respondent

Judgement

1. Petitioner and respondent-M/s. Gulbarga Electricity Supply Company Limited ("GESCOM" for short) entered into a contract for establishing a substation at Bilwara Village in Jewargi Taluk of Gulbarga District on turnkey basis, pursuant to letter of intent dated 12-5-2005 and letter of acceptance dated 23-5-2005 as recorded in the communication dated 31-1-2006, Annexure-A. The terms relating to resolution of disputes and arbitration between the parties are at Clauses 48 and 49 of the General Conditions of Contract, Annexure-C, as also, under Clause 4.0 under the nomenclature, "Settlement of Dispute" in the contract agreement dated 18-7-2005, Annexure-D, making reference to Clauses 48 and 49 of the general conditions of contract. It appears that the respondent made payment on 18-9-2010 pursuant to the final bill dated 12-9-2009 whereafterwards, petitioner is said to have addressed a letter dated 2-2-2011, Annexure-E1 over the deduction of Rs. 15,75,454/-, followed by letters, Annexures-E2, E3 and F, which when not responded to by the "Engineer" though obliged to do so under Clause 48.4 of general conditions of contract within 30 days, led to letter dated 28-9-2012, Annexure-G nominating one Sri D.V. Nagabhushan, Chartered Engineer and Arbitrator, as an Arbitrator with a request to the respondent to nominate another Arbitrator from its side in accordance with Clause 49 of the

general conditions of contract, failing which, the sole Arbitrator nominated by the petitioner would stand appointed as an Arbitrator. Nothing precious when done in response to the said letter, petitioner addressed yet another letter dated 12-12-2012, Annexure-III to which the respondent by a reply dated 26-12-2012, Annexure-H2 stated that Clause 48.2 of the general conditions of contract can be taken recourse to only during work in progress and since there is delay of five years in raising the dispute, arbitration clause cannot be invoked. That was responded to by letter dated 12-1-2013, Annexure-J1 stating that petitioner could invoke Clause 48.2 of the general conditions of contract. Respondent by letter dated 29-1-2013, Annexure-J2 declined to accept the appointment of sole Arbitrator, followed by yet another letter dated 12-4-2013, Annexure-L reiterating the same stand. Hence this petition.

2. Petition is opposed by filing statement of objections, inter alia contending that the dispute raised suffers from delay and laches, since more than five years had gone by and regard being had to the decision in Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, , sought rejection of the petition, while denying all other allegations.

3. Heard the learned Counsel for parties, perused the pleadings and examined the terms relating to settlement of dispute and arbitration under the general conditions of contract.

4. The first submission of the learned Counsel for the respondent that the petition is to be heard by the High Court Bench at Gulbarga deserves rejection in the light of Clause 49.1 of the general conditions of contract which reads thus:

49.1 xxx

The arbitration shall be conducted in accordance with the provisions of the Arbitration Act, 1940, or any statutory modification thereof. The venue of arbitration shall be Bangalore.

Therefore, the Principal Bench of the High Court, at Bangalore, can hear and dispose of the petition.

5. The submission that the petition deserves to be rejected in view of delay of more than five years in raising the dispute, is without merit. As noticed supra, the final bill was drawn on 12-9-2009 and payment effected on 18-9-2010 whence the petitioner having noticed the deduction of Rs. 15,75,454/- raised the dispute in the letter dated 2-2-2011, Annexure-E1 addressed to the Executive Engineer in terms of Clause 48.4 of the general conditions of contract. Thereafter too, letters Annexures-A2, A3 and F addressed to the Engineer was not responded to. It is useful to extract Clause 48.4 of the general conditions of contract which reads as thus:

48.4 If after the Engineer has given written notice of his decision to the parties, no claim to arbitration has been communicated to him by either party within thirty (30) days from the receipt of such notice, the said decision shall become

final and binding on the parties.

6. Therefore, petitioner having raised the dispute on 2-2-2011, it was for the Engineer to have given written notice of his decision and on such a decision, if the petitioner failed to initiate arbitration proceeding within thirty days therefrom, then perhaps, submission of learned Counsel for respondent may have had some merit. In the facts of this case, apparently, such is not the factual position.

7. Failure on the part of the Engineer to render his decision led to the notice dated 28-9-2012, Annexure-G appointing the Chartered Engineer and Arbitrator on the part of the petitioner, under Clause 49 of the general conditions of contract relating to arbitration. That nomination was not rejected hence, petitioner addressed another letter dated 12-1-2012, Annexure-H1 reiterating the nomination of the Arbitrator as the sole Arbitrator, whence the respondent, for the first time by letter dated 26-12-2012 declined to accept the said nomination. That was followed by another letter dated 12-4-2013, Annexure-L when finally there was nothing done by the respondent in the matter of appointment of Arbitrator as required by Clause 49 of the general conditions of contract leading to the filing of this petition on 26-8-2013 for appointment of an arbitrator.

8. The next submission of the learned Counsel that the dispute raised by the petitioner is not a live dispute, hence an Arbitrator cannot be appointed must also necessarily fail. The question as to whether the dispute is stale or alive is to be answered by the Arbitrator, having regard to Section 16(1)(a) and 16(1)(b) of the Arbitration and Conciliation Act, 1996.

9. The decision in Major (Retd.) Inder Singh Rekhi's case relates to work of construction of house for Delhi Development Authority which was completed on 2-4-1980 and between February 1983 to December 1985, several letters were sent by the contractor requesting to finalize the bills, the first of which was on 28-2-1983 which was not responded and in January 1986 the contractor filed an application u/s 20 of the Arbitration Act, 1940 seeking direction to the respondent to file arbitration agreement in the Court and refer the dispute to arbitration. The learned Single Judge of the High Court dismissed the application as barred by time which was confirmed by the Division Bench. The Apex Court, having regard to Article 137 of the Limitation Act, 1963 held that the application was filed within the period of limitation and High Court was in error in dismissing the petitioner as barred by time. In my considered opinion, the decision of the Apex Court supra does not aid the case of the respondent. In the result, this petition is allowed. Sri D.V. Nagabhushan, B.E., FIE, FIET (UK), Chartered Engineer and Arbitrator is appointed as sole Arbitrator to arbitrate upon the dispute between the parties pursuant to the contract, Annexure-A including the dispute over jurisdiction of the Arbitrator u/s 16(1)(a) and 16(1)(b) of the Arbitration and Conciliation Act, 1996 and conduct the proceeding at Bangalore.