
(2017) 09 DEL CK 0196

In the Delhi High Court

Case No : Arbitration Petition No. 296 Of 2017

Prize Petroleum Company Ltd

APPELLANT

Vs

ABG Energy Limited & Anr.

RESPONDENT

Date of Decision : 22-09-2017

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 11, 12, 12(5)

Citation : (2017) 09 DEL CK 0196

Hon'ble Judges : Sanjeev Sachdeva, J

Bench : Single Bench

Advocate : Ashish Rana, Surekh Baxy, Rajiv Tyagi, Varun Singh

Final Decision : Disposed Of

Judgement

Sanjeev Sachdeva, J

1. The petitioner, by this petition under Section 11 of the Arbitration & Conciliation Act, 1996 seeks appointment of Arbitrators in terms of Clause

16(b) of the Agreement dated 03.03.2011 between the parties.

2. As per the petitioner, around October 2010, the Government of India invited bids under NELP IX round for exploration of oil and natural gas.

3. The petitioner as well as respondent no. 1, being desirous of exploring the possibility of bidding jointly or in association with other companies, had

entered into a Joint Study and Bidding Agreement dated 03.03.2011 and petitioner and respondent no. 1 applied on 28.03.2011 for exploration of oil

and natural gas of a particular block.

4. Application of the consortium was accepted and the said consortium was awarded exploration block vide order dated 28.04.2012.

5. In terms of the allotment of exploration they entered into a Production Sharing

Contract with the Government of India on 30.08.2012.

6. It is the case of the petitioner that in terms of the Joint Study and Bidding Agreement dated 03.03.2011, respondent no. 1 had undertaken to bear all the expenditure, inter-alia, including furnishing of the bank guarantee on behalf of the petitioner.

7. It is contended that by letter dated 27.08.2012, respondent no. 1 had agreed to submit 100% bank guarantee to the Government or issue a 20% back to back guarantee to the petitioner to enable the petitioner to furnish its share of the bank guarantee.

8. Further it is contended that by letter dated 27.08.2012, respondent no. 1 agreed to bear liquidated damages if any imposed by the Government on account of breach of the Production Sharing Contract to be entered with the Government.

9. It is further contended that since respondent No. 1 failed to furnish 100% guarantee or 20% back to back guarantee, the requirement of submission of the bank guarantee in terms of the Production Sharing Contract could not be met and accordingly the said contract was terminated.

10. It is contended that the Director General of Hydrocarbons, Ministry of Petroleum and Natural Gas has issued a show cause notice both to the petitioner and respondent no. 1, the members of the consortium as to why the contract be not terminated and liquidated damages be not recovered as stipulated in the Production Sharing Contract.

11. As per the petitioner, respondent no. 1 has breached its obligations under the joint study and bidding agreement dated 03.03.2011. It is further contented that respondent no. 2 which is the parent holding company of respondent no. 1 had also by its letter dated 24.03.2011 and 29.08.2012 agreed to step in to meet the obligations of respondent no. 1. It is contended that accordingly respondent no. 2 is also liable under the Joint Study and Bidding Agreement dated 03.03.2011 entered into between the petitioner and respondent no. 1.

12. Per contra, learned counsel for respondents, at the outset, contends that respondent no. 2 is not a signatory of any arbitration agreement or the said Joint Study and Bidding Agreement dated 03.03.2011 and the Production Sharing Contract signed on 30.08.2012.

13. It is further contended that there is no agreement between the petitioner and

respondent no. 2 to refer any disputes to arbitration. It is submitted that the letter dated 24.03.2011 relied on by the petitioner was written to Director General of Hydrocarbons and only stated that in case of any default by respondent no. 1, respondent no. 2 would step in.

14. It is contended that the said document does not constitute an agreement between the petitioner and respondent No. 2 agreeing to refer any disputes to arbitration.

15. With regard to respondent no. 1, it is contended that the Joint Study and Bidding Agreement dated 03.03.2011 specifically stipulated that the obligations there under would terminate automatically upon the parties entering into any further agreement.

16. It is contended that thereafter as the parties entered into the Production Sharing Contract dated 30.08.2012, all the obligations under the said Joint Study and Bidding Agreement dated 03.03.2011 stood terminated.

17. It is further contended that there are no dispute arising out of Joint Study and Bidding Agreement dated 03.03.2011 entered between the parties which could be referred to arbitration.

18. It is further contended that as the Joint Study and Bidding Agreement dated 03.03.2011 stood terminated by the execution of the Production Sharing Contract on 30.08.2012 and the notice invoking arbitration was issued on 10.10.2016, the invocation would be barred by limitation.

19. It is further contended that clause 15 of the Joint Study and Bidding Agreement dated 03.03.2011 stipulated that the obligations were to terminate on expiry of two years from the date of the said agreement, which as per learned counsel expired on 03.03.2013. It is contended that even if is calculated from 03.03.2013, the invocation would be barred by limitation.

20. It is further contended that in terms of Clause 29.1 of the production sharing contract, the responsibility to furnish bank guarantee was both on the petitioner and the respondent no. 1 who had to furnish the bank guarantees for their respective participating interest which was 20% and 80% respectively.

21. The arbitration clause as contained in the Joint Study and Bidding Agreement dated 03.03.2011 reads as under:-

â??Clause 16

16. a) This Agreement shall be governed by and Interpreted in accordance with the laws of India and courts of New Delhi shall have the exclusive jurisdiction.

b) In the event of any dispute arising out of or in relation to this Agreement the matter shall be referred to an Arbitration Tribunal. The

Arbitration Tribunal shall consist of three Arbitrators. Each Party shall appoint one Arbitrator and the two Arbitrators appointed shall

appoint the Presiding Arbitrator. The Arbitration proceeding shall be held under the provisions of Indian Arbitration & Conciliation Act

1996. The venue of the Arbitration shall be New Delhi.â??

22. Clause 16 stipulates that all disputes arising out of or in relation to the said Joint Study and Bidding Agreement are liable to be referred to an

Arbitration Tribunal. So what is to be determined is as to whether the disputes raised are arising out of or relate to the said Joint Study and Bidding

Agreement dated 03.03.2011. The other question to be determined is as to whether the invocation is barred by limitation.

23. Clauses 8, 12 and 15 of the agreement dated 03.03.2011 read as under:-

â??8. For all blocks identified for joint bidding, Prize shall have a participating interest of 20% & ABG shall carry Prize during the

exploration phase for the 20% participating interest. During exploration phase, ABG will bear the entire expenditure (including 20% share

of Prize). In the event of entering the next phase i.e. development phase, Prize shall pay for its share of expenditure towards development

phase and thereafter for its 20% share. The exploration expenditure incurred on behalf of Prize by ABG as per carry for its 10%

participating interest would be totally borne by ABG while exploration expenditure for the balance 10% participating interest would be first

recovered by ABG out of Cost and Profit Petroleum attributable to Prize after start of commercial production.â??

12. The Parties, its Affiliates and their employees, officers and directors shall have no liability whatsoever with respect to the use of or

reliance upon the Confidential Information by the Receiving Party or any other person.

15. The obligations hereunder shall terminate automatically upon the parties entering into a further agreement which contains provisions

covering the confidentiality of the Confidential Information. Otherwise the obligations of confidentiality in this Agreement shall terminate on

the earlier of (i) two years after the date of this Agreement and (ii) the date on which disclosure is no longer restricted either under the law

applicable to the Blocks or under the terms of any concession, license, contract or permit applicable to the Blocks or any of them. The

Disclosing Party shall use all reasonable endeavors to advise the Receiving Party of the existence of any contractual restrictions on

disclosure which shall apply to the Blocks which are relevant to the Confidential Information, including any such restrictions that come into

force following the making of the disclosure under this Agreement.â??

24. In terms of clause 8, it was agreed that petitioner shall have participating interest of 20% and respondent no. 1 was to carry on the petitioner

during the exploration phase for the 20% participating interest.

25. It was agreed by clause 8 that respondent no. 1 shall bear the entire expenditure including 20% share of the petitioner. Further it is stipulated that

in the event of entering the next phase i.e. development phase, the petitioner shall pay the expenditure towards development phase and thereafter for

its 20% share.

26. It was further agreed that the exploration expenditure incurred on behalf of petitioner would be initially borne by respondent no. 1 and thereafter

would be recovered by respondent no. 1 out of Cost and Profit Petroleum attributable to the petitioner after the start of commercial production. As per

the petitioner, the entire expenditure of exploration phase was to be borne by respondent no. 1.

27. On 27.08.2012, the petitioner wrote to respondent no. 1 as under:

â??Dear Sirs.

You will be pleased to know that DGH has informed us that our consortium has been awarded the NELP IX Block, AA-ONN-2010/1. They

have asked us to initial the draft Production Sharing Contract (PSC) on 28.8.2012.

In order to comply with the DGH requirement. we require the following confirmation from ABG Energy Ltd. As was agreed at the time of

bidding, all expenditures during the exploration phase shall be borne by ABG Energy Ltd, which also includes share of Prize Petroleum.

1. In the event DGH agrees, ABG Energy shall provide 100%, of the Bank Guarantee (of 7.5% of the value of the Committed and

Mandatory Work Program). If Prize is required to submit Bank Guarantee amounting to its 20% share, then ABG shall provide a back to

back bank guarantee to Prize.

2. In the event of non-completion of the Work Program 100% of the Liquidated Damages which includes share of Prize also, imposed by

DGH /Government of India, shall be borne by ABG Energy Ltd. However, we confirm that Prize remains committed to effectively discharge

its obligations as Lead Operator in the Block and in case the non completion of Work Program is due to failure from Prize. ABG Energy will

not be liable for Prize's share of Liquidated Damages.

We look forward to your confirmation, as above, and a long and fruitful association.

28. In response to letter of the Petitioner, the Respondent No. 1 by its reply dated 27.08.2012 stated as under:

Dear Sir,

ABG Energy Ltd also received the information from DGH for the initialing the production Sharing Contract.

In response to the letter no: Prize: Tripura: 01 dated 27th August 2012. ABG Energy confirms that, as agreed earlier. The entire

expenditure is to be borne by ABG energy during the Exploration phase ABG agrees to submit the Bank Guarantee for the Block of 100%

to DGH or 20% as the back to back guarantee to Prize. In case Prize is required to submit the Bank Guarantee for its share.

As ABG Energy is committed to complete the work program and wanted to bring the production of hydrocarbons as early as possible. In

such case the non compliance may not arise. In case it arises. The liquidated damages towards the left over work program shall be

completely born by ABG Energy Ltd.

Hope for the good support in respect of the completion of the work programs and to obtain success in the future exploration work.

29. By its letter dated 27.08.2012, the petitioner had put the respondent no. 1 to

notice that in case the Director General of Hydrocarbons agreed, respondent no. 1 would be required to furnish 100% bank guarantee or in the alternative issue a back to back guarantee to petitioner for its 20% share. It further put respondent no. 1 to notice that in the event of non compliance of work programme 100% liquidated damages including the share of the petitioner would be borne by respondent no. 1. The letter specifically refers to award of NELP IX Block to the consortium.

30. It is an admitted position that the consortium was formed by the Joint Study and Bidding Agreement dated 03.03.2011 and independent of the Joint Study and Bidding Agreement dated 03.03.2011, there is no other contract between the petitioner and respondent no. 1 constituting the joint venture.

31. By letter dated 27.08.2012, respondent no. 1 in response to the letter of the petitioner agreed to furnish 100% of the bank guarantee or issue a 20% back to back guarantee to the petitioner. Respondent no. 1 further agreed to pay 100% liquidated damages if imposed.

32. The claim raised by the petitioner is that consequent to the Joint Study and Bidding Agreement dated 03.03.2011 and the letter dated 27.08.2012, respondent no. 1 failed to furnish the bank guarantee as agreed, leading to termination of the contract and consequent to which liquidated damages have been threatened to be imposed by the Director General of Hydrocarbons.

33. It is contended by learned counsel for the petitioner that as petitioner is a wholly owned subsidiary of a Government Corporation, it would be mandatory for it to comply with the direction of the Government to pay the liquidated damages.

34. Perusal of the Joint Study and Bidding Agreement dated 03.03.2011 and the respective letters dated 27.08.2012 show that the dispute that is being raised by the petitioner arises out of the paragraph 8 of the Joint Study and Bidding Agreement dated 03.03.2011. It cannot be said that the disputes being raised by the petitioner are independent of the Joint Study and Bidding Agreement dated 03.03.2011.

35. Clearly, the said disputes arise out the said agreement and in relation to the obligations of the parties as contained in agreement dated 03.03.2011.

36. Further, the contention of the respondents that in terms clause 15 of the Joint Study and Bidding Agreement the obligation stood terminated on execution of the Production Sharing Contract or at the outset on expiry of two

years from the date of the said agreement, is not sustainable.

37. Perusal of Clause 15 as extracted herein above shows that what is contemplated to be terminated is the obligation of the parties with regard to the confidential information. Clause 15 stipulates that the obligations would stand terminated upon the parties entered into a further agreement containing

the provisions â??covering the confidentiality of confidential informationâ?. It further stipulates that â??otherwise the obligation of confidentialityâ? in

the agreement shall terminate on the earlier of: (i) two years of the date of the Agreement and (ii) the date on which the disclosure is no longer

restricted either under the law applicable to the Blocks or under the terms of any concession, etc.

38. First of all Clause 15 with regard to termination of obligations as therein would be with regard to confidentiality of Confidential Information only.

Secondly, even if assuming all the obligations under the agreement were to be terminated, the same would be independent of the agreement of the

parties to refer the disputes to arbitration.

39. Even if the parties are discharged from performing their respective obligations, the same does not discharge/terminate the Arbitration Agreement,

which is independent of the agreement. The arbitration agreement survives the termination of the underline contract, as the same is an independent

contract between the parties.

40. Even if Clause 15 were to be read as suggested by learned counsel for the respondent, the same would not entail termination of the arbitration

agreement between the parties as contained in clause 16 of the said Agreement.

41. The plea, raised by learned counsel for respondent that the invocation is barred by limitation, is also not sustainable. As noticed above, the

contention of learned counsel for the respondent is based on the reading of clause 15 of the agreement dated 03.03.2011. Since it has been held that

the arbitration clause survives even the termination of the corresponding obligations of the parties, the invocation would not be beyond time.

42. The notice of termination has been issued to the petitioner and respondent no. 1 by Director General of Hydrocarbons on 15.10.2013 and the

demand of liquidated damages has been raised by the Director General of Hydrocarbons on 07.01.2014.

43. The petitioner has invoked arbitration vide notice dated 10.10.2016 which is

within a period of three years from the date of the notice of

termination (dated 15.10.2013) and the demand of liquidated damages raised on 07.01.2014.

44. The right to seek invocation of the arbitration clause would arise when disputes arise between the parties. The period of 3 years prescribed

between under Article 137 starts when the right to apply accrued. [Major (Retd.) Inder Singh Rekhi vs Delhi Development Authority (1988) 2 SCC

338] So long as there was no termination and demand by the Director General of Hydrocarbons, the right of the petitioner to seek invocation would

not accrue. Accordingly, the contention of learned counsel for respondent that the invocation is barred by limitation is not sustainable.

45. As far as the respondent no. 2 is concerned, it is an admitted position that there is no agreement between the petitioner and respondent no. 2

agreeing to refer disputes to arbitration. The letters dated 24.03.2011 relied on by the learned counsel for the petitioner is written by respondent no. 2

to Director General of Hydrocarbons confirming that should it be required, respondent no. 2 would step in to meet the obligations and commitments of

respondent no. 1 for the exploration phase of the work programme for its participating interest and carried participating interest. It also undertook that

if required, they shall furnish a financial and performance guarantee on the effective date.

46. Perusal of letter shows that it is only addressed to Director General of Hydrocarbons. The said letter does not refer to any agreement that disputes

between the petitioner and respondent no. 2 shall be referred to arbitration.

47. Letter dated 29.08.2012 is written by respondent no. 2 to the petitioner that it has undertaken to ensure that commitment given by respondent no. 1

by its letter dated 29.02.2012 shall be adhered to, also cannot be construed as a letter agreeing to refer the disputes between the petitioner and

respondent no. 2 to arbitration. The letter neither refers to the arbitration agreement as contained in Joint Study and Bidding Agreement dated

03.03.2011 nor does it specify that any disputes between the petitioner and respondent no. 2 are agreed to be referred to arbitration.

48. Accordingly, in so far as the respondent no. 2 is concerned, as there is no Arbitration Agreement between the petitioner and respondent no. 2,

disputes if any between the petitioner and respondent no. 2 cannot be referred

to arbitration.

49. In view of the above, only the disputes between the petitioner and respondent no. 1 are liable to be referred to arbitration in terms of Clause 16 of the Joint Study and Bidding Agreement dated 03.03.2011.

50. In terms of Clause 16 of the Joint Study and Bidding Agreement dated 03.03.2011, an Arbitral Tribunal consisting of three Arbitrators is to be appointed. The petitioner by its letter dated 10.10.2012 has already exercised its option and nominated Mr. Justice Nagendra Rai, retired Judge as the nominee Arbitrator.

51. Since the respondent no. 1 has failed to appoint its nominee Arbitrator, the nominee Arbitrator on behalf of respondent is to be appointed by Court.

52. Accordingly, Mr. Justice Mukul Mudgal (Former Chief Justice Punjab and Haryana High Court) is appointed as the nominee Arbitrator for the respondent. The two Arbitrators shall appoint the Presiding Arbitrator in accordance with law. This is subject to the Arbitrators making the necessary disclosures under Section 12 of the Act of not being ineligible under Section 12(5) of the Act.

53. The Arbitral Tribunal shall examine the claims of the petitioner and the counter claims, if any of respondent No. 1.

54. The Arbitrators shall fix their fee in consultation with learned counsel for the parties.

55. The parties are at liberty to approach learned Arbitrators for elucidating the necessary disclosures and for further proceedings.

56. The petition is accordingly disposed of.

57. Order Dasti under signatures of the Court Master.