

(2017) 03 DEL CK 0058
In the Delhi High Court
Case No : ARB.P. No. 810 of 2016

Salma Dam Joint Venture

APPELLANT

Vs

Wapcos Limited

RESPONDENT

Date of Decision : 15-03-2017

Acts Referred:

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

Citation : (2017) 239 DLT 3

Hon'ble Judges : Dr. S. Muralidhar, J.

Bench : Single Bench

Advocate : Mr. Sachin Datta, Senior Advocate with Ms. Pritya Sharma, Advocate, for the Petitioner; Mr. Sanjay Jain, Additional Solicitor General with Mr. Milanka Chaudhary, Mr. Kartik Rai and Ms. Naina Dubey, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Dr. S. Muralidhar, J.—This is a petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 ("Act") filed by the Petitioner, Salma Dam Joint Venture Through SSJV Projects Private Limited ("SDJV") seeking the appointment of an arbitrator on behalf of the Respondent, Wapcos Limited, in the dispute between the Petitioner and the Respondent arising out of the contract agreement dated 9th March 2006 entered into between them for "reconstruction, rehabilitation and completion of Salma Dam Project (3 x 14 MW), Afghanistan, Package III: Main Civil & Hydro Mechanical Works. Subsequently, an amendment of agreement was signed to the contract agreement on 9th June 2015.

2. It is stated that the claims preferred by the SDJV was first referred to the Technical Committee ("TC") constituted by the Respondent. These were in the form of "appeals" by the SDJV to the said TC. Appeal Nos. 1 to 6 dealt with the following items:

Appeal No. 1

Item 5.1 Payment of balance amount of escalation

Item 5.2 Refund of retention money recovered in excess

Item 5.3 Issue of take over certificates

Item 5.4 Revised rate for high performance concrete (HPC) M 60 Grade.

Appeal No. 2

Item 5.6 Payment towards O&M works - extra capacity D.G. Sets.

Item 5.7 Payment towards interest for the item of additional excavations in manifold area of power tunnel, due to delay in payment.

Item 5.8 Refund of interest recovered by M/s. WAPCOS towards the mobilization advance beyond the original contract period.

Item 5.9 Issue of fill material for upstream right embankment dam as per the revised drawing.

Appeal No. 3

Item 5.10 - Reimbursement of bank guarantee charges towards mobilization advance and security deposit.

Item 5.11 - Payment of interest on excess retention money deducted by M/s. WAPCOS.

Item 5.12 Payment of compensation on account of loss over overheads due to reduced turnover.

Item 5.13 Payment of interest on price escalation amount.

Item 5.14 Reimbursement of cost of underutilized and wasted infrastructure

Item 5.15 Reimbursement of insurance amount for the period beyond the original contract period.

Item 5.16 Reimbursement of infrastructure development charges in respect of Quarry No. 5 (extension of Quarry No. 1).

Appeal No. 4

Item 5.17 - Payment of idling charges of manpower and machinery - Invoice No. 01

Item 5.18 Payment of idling charges of manpower and machinery - Invoice No. 02.

Item 5.19 Payment of idling charges of manpower and machinery - Invoice No. 03.

Item 5.20 Payment of idling charges of manpower and machinery - Invoice No. 04. Item

5.21 Payment of idling charges of manpower and machinery - Invoice No. 05.

Item 5.22 Payment of idling charges of manpower and machinery - Invoice No. 06.

Item 5.23 Payment of idling charges of manpower and machinery - Invoice No. 07.

Item 5.24 Payment of idling charges of manpower and machinery - Invoice No. 08.

Item 5.25 Payment of idling charges of manpower and machinery - Invoice No. 09.

Item 5.26 Payment of idling charges of manpower and machinery - Invoice No. 10.

Item 5.27 Payment of idling charges of manpower and machinery - Invoice No. 11.

Appeal No. 5

Item No. 5.28 - The issue of making good the loss due to non- utilization of river bed material (Screened RMB)

Item 5.29 - Issue of fill material for upstream right embankment dam as per the revised drawing (previously brought out with reference to issue No. 5.9 in the Second Appeal of SDJV).

Item 5.30 - Payment towards cost of 300 mm pipes, 300 mm valves, fittings, etc. installed as per the Drawing No. Wap/afg/slm/cs/c-1039

Item 5.31 - Payment for drilling and grouting works on the right flank hillock (right abutment).

Appeal No. 6

Item 5.32 - Non-payment of running bills, approved extra item payments and escalation payments.

3. It is stated that by its report dated 28th October 2016, the TC accepted only one claim for the payment towards cost of 300 mm pipes, 300 mm valves, fittings etc. for a sum of USD 7374 and all the other claims were rejected. After the receipt of the report of the TC, the Petitioner, SDJV, addressed a notice dated 12th November 2016 to the Respondent invoking Clause 20.6 of the Conditions of Particular Application ("COPA") and seeking reference of the rejected claims to the arbitration.

4. At this stage it is necessary to refer Clause 20.6 of COPA which reads as under:

"20.6 Any dispute in respect of which the Technical Committee's decision (if any) has not become final and binding shall be finally settled through arbitral tribunal constituted for the adjudication of the dispute or difference. The arbitral tribunal shall have full power to open-up, review any decision, opinion, instruction,

determination, certificate or valuation of the Engineer and any recommendation of the Technical Committee to the dispute.

The dispute or difference shall be referred to a Board of three Arbitrators comprising one nominee each of the Employer and the Contractor and the Third to be appointed by the two arbitrators by mutual agreement in writing before entering upon the reference. The third arbitrator shall act as Presiding arbitrator.

The party while making request for referring the dispute for arbitration shall appoint his Arbitrator nominee and request the other party to appoint his Arbitrator nominee.

If, on a dispute subject to above, the two nominated arbitrators fail to select the third arbitrator within 30 (thirty) days after they have been appointed, the Employer or the Contractor may apply to the President, Indian Council of Arbitration to nominate the third arbitrator from the panel of arbitrators, for the matter in dispute.

The Arbitrator shall be subject to and in accordance with the provisions of The Indian Arbitration and Conciliation Act, 1996 and the Rules if any made there under and any statutory modification or re-enactment thereof.

The venue of the arbitration proceedings shall be New Delhi (India). The language of the arbitration proceedings and that of all documents and the communications between the parties shall be English. The Arbitrators shall give a speaking reasoned and claim wise award. Any Arbitration award made in such arbitration proceedings shall be final and binding on the parties and shall be enforceable in any court of competent jurisdiction.

Arbitration may be commenced prior to or after completion of the Works. However, during the course of arbitration proceedings, the parties hereto shall continue to execute their respective obligations.

Where the arbitration award is for payment of money, no interest shall be payable on whole or any part of the money for any period, till the award is made.

Both the parties agree that any ex-employee of the Employer or the Contractor shall not be nominated as Arbitrator.

The Parties agree to comply with the awards resulting from arbitration and waive their rights to any form of appeal insofar as such waiver can be validly made.

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 to the arbitrator appointed by such party shall be borne by each party itself.

High Court of Delhi shall alone have jurisdiction to decide any dispute arising out of or in respect of this Contract."

5. It is stated that under the above clause it was incumbent on the Respondent to nominate an arbitrator within thirty days from the receipt of the above notice dated 12th November 2016. However, the Respondent failed to do so. Consequently, the present petition was filed.

6. The Petitioner also states that SDJV comprised of M/s. SSJV Projects Private Limited (SSJV) having 95% share and M/s. Angelique International Limited ("AIL") having 5% share. It was also acknowledged by the Petitioner that the respective stakes of the aforesaid JV partners as set out in the Joint Venture Agreement (JVA) dated 9th September 2005 which forms a part of the above contract dated 9th March 2006. There are inter se disputes between the JV partners which are the subject matter of another adjudication before the Arbitral Tribunal ("AT") constituted by this Court by order dated 5th September 2016 in Arbitration Petition No. 442 of 2016. It is however contended by the Petitioner that the said inter se dispute between the JV partners has no bearing whatsoever on the disputes between SDJV and WAPCOS with regard to which the above notice dated 12th November 2016 had been issued.

7. Mr. Sachin Datta, learned Senior counsel appearing for the Petitioner, points out that AIL had specifically issued a power of attorney ("POA") dated 15th July 2005 in favour of SSJV and which POA is still in force and forms a part of the contract agreement dated 9th March 2006. Further, the said agreement dated 9th March 2006 defines "Salma Dam Joint Venture" to include its partners. However, by its letter dated 5th December 2016 the Respondent declined to refer the disputes to arbitration or nominate an Arbitrator on its behalf.

8. The stand taken by the Respondent was that a request for referring the disputes between them to arbitration had to be made by both the partners of the JV. Reference is made by the Respondent to a letter dated 11th November 2016 written by AIL in which it was inter alia informed that the Board of Directors of AIL on 21st September 2016 had revoked, with immediate effect, the authority given by AIL to SSJV for undertaking correspondence with the Respondent, to raise any dispute, make any claim, withdraw/settle any such claim etc. AIL further stated that any further communication or any other document with respect to the JV had to be duly signed by AIL in order to be legally valid and binding on the JV. Accordingly, it was contended by the Respondent that nomination of the SDJV on its behalf was not valid. It was further pointed out that Appeal No. 6 filed by the Petitioner, was still pending before the TC. It was contended by Mr. Datta that since there was failure by the Respondent to nominate their arbitrator in terms of Clause 20.6 of the COPA, this Court should appoint an Arbitrator on its behalf.

9. Mr. Datta referred to decision of this Court in Power Grid Corporation of India Limited v. Siemens Limited 2013 (134) DRJ 606 to urge that a 95% partner of the JV was entitled to seek reference of the disputes to the arbitration even without consent of the other JV partner. Mr. Datta also referred to the decision of the Supreme Court in Gayatri Project Limited v. Sai Krishna Construction (2014)

13 SCC 638 to contend that the question whether any of the claims of the Petitioner were not tenable should be examined by the AT.

10. The above submissions are resisted by Mr. Sanjay Jain, learned Additional Solicitor General of India, appearing for the Respondent who submitted as under:

(i) the decisions relied upon by Mr. Datta to the effect that 95% partners of the JV were itself entitled to seek reference of the disputes involving the Petitioner to arbitration is distinguishable inasmuch as in that case there was no letter written by one of the partners to the effect that it has withdrawn the authorization issued to the other partners.

(ii) Mr. Jain submitted that there were inter se disputes between the partners which also subject matter of the arbitration, thus the question of entertaining the reference at the instance of one of the partners did not arise.

(iii) Mr. Jain referred to the order dated 5th September 2016 in OMP (I) (COMM) No. 70 of 2016 filed by AIL under Section 9 of the Act in which it was directed that Respondent would not release the retention amount in favour of SDJV and that amount shall be deposited in this Court. Mr. Jain also referred to the amendment to the contract agreement dated 9th June 2015 which was stated expressly to form part of the original agreement dated 9th March 2006.

(iv) Mr. Jain submitted that the arbitration Clause 20.6 of COPA virtually stood effaced as far as the claims not accepted by the TC were concerned. According to him, it must be held that there was no arbitration clause qua the claims which fall outside the ambit of the agreement.

11. The above submissions have been considered. As regards the first objection about lack of consent of AIL to the reference of disputes to the arbitration, the Court is of the view that the mere existence of dispute between two partners of the JV will not per se extinguish the liability of the Respondent qua JV. In other words the arbitration of disputes between JV on the one hand and the Respondent on the other hand can continue the notwithstanding the inter se disputes between the JV partners, which forms the subject matter of separate arbitration. If any of the claims of SDJV are allowed either only or partly, the question as to which all the partners be will entitled to proportionate share thereof is a question that might arise only at the stage of enforcement of the Award.

12. The specific clause of the contract authorizes SDJV to prefer the claims on behalf of the JV. While it is true that AIL may have withdrawn its consent/ authorization of the other partners to prefer the partner, the Court is of the view that the question whether the reference of any claims to arbitration is maintainable only because of the absence of consent by AIL is a question that can also be examined in the arbitration proceedings.

13. As regards the plea of the Respondent that it should be held that after the amendment to the contract agreement dated 9th June 2015, the arbitration

clause qua the claims of the Petitioner that have been rejected by the TC should be taken to be "effaced" cannot be accepted by the Court. The arbitration agreement survives the agreement. The amendment agreement dated 9th June 2016 does not repeal the clause 20.6 of the COPA. The question, if any, as regards the claim preferred by the Petitioner is not arbitrable or already stands discharged that question too can be examined by the AT.

14. In this regard the following passage in *Gayatri Project Limited v. Sai Krishna Construction* (supra) paraphrasing the law explained in *Damodar Valley Corporation v. K.K. Kar* (1974) 1 SCC 141 is relevant:

"In that case the question arose with reference to a claim by the supplier. The purchase required the supplier to furnish a full and final receipt. But the supplier did not give such a receipt. Even though there was no discharge voucher, the purchaser contended that the payments made by it were in full and final settlement of the bills. This Court rejected that contention and held that the question whether there has been a settlement of all the claims arising in connection with the contract also postulates the existence of the contract which would mean that the arbitration clause operates. This Court held that the question whether there has been a full and final settlement of a claim under the contract is itself a dispute arising "upon" or "in relation to" or "in connection with" the contract; and where there is an arbitration clause in a contract, notwithstanding the plea that there was a full and final settlement between the parties, that dispute can be referred to arbitration. It was also observed that mere claim of accord and satisfaction may not put an end to the arbitration clause. It is significant that neither *P.K. Ramaiah and Co. v. NTPC* 1994 Supp (3) SCC 126 nor *Nathani Steels* 1995 Supp (3) SCC 324 but only distinguished it on the ground that there was no full and final discharge voucher showing accord and satisfaction in that case."

15. For all the mentioned reasons, the Court is of the view that none of the objections of the Respondent to the appointment of Arbitrator on their behalf is tenable. It is seen that the Petitioner nominated a Technical person as his arbitrator.

16. After considering the respective submissions of learned counsel for both the parties, and nature and value of the claim, the Court appoints Justice Vikramajit Sen, a former Judge of the Supreme Court (Mobile No. 9818000290) as arbitrator on behalf of the Respondent. Mr. Justice Sen will determine his own terms and fees and communicate to the parties. The two Arbitrators will now appoint a third Arbitrator within a period of four weeks from today.

17. In the event there is difficulty in implementing the above directions, it will be open to either party to apply to this Court.

18. The petition is disposed of in the above terms. Order be given dasti.