
(2014) 10 MP CK 0079

In the Madhya Pradesh High Court

Case No : Arbitration Case Nos. 08, 09 and 10/2014

Shree Agencies Pvt. Ltd.

APPELLANT

Vs

M.P. State Mining Corporation

RESPONDENT

Date of Decision : 15-10-2014

Acts Referred:

Right to Information Act, 2005 — Section 11(6)

Citation : (2015) 5 ARBLR 198 : (2015) 1 MPLJ 186

Hon'ble Judges : Sujoy Paul, J

Bench : Single Bench

Advocate : V.R. Rao, Sr. Advocate and Shreyas Dharmadhikari, Advocate for the Appellant; Arvind Dudawat, Advocate for the Respondent

Judgement

Sujoy Paul, J.—These applications were analogous heard on the joint request of the parties. It is agreed by learned counsel for the parties that the legal questions involved in these matters are similar.

2. The facts are taken from A.C. No. 8/2014.

The petitioner, a registered company submitted bid for quarry lease, namely, the "Shivpuri Flag Stone Quarry Lease". The Notice Inviting Tender (NIT) was issued for ten years (2011-2021) for auctioning the excavation and sale of mineral flag stones from Shivpuri Khada Flag Stone Quarry Lease. In the NIT, the Corporation laid down the quantity of flag stone to be excavated yearwise from Khada quarry. The NIT is placed on record as Annexure P-1.

3. Shri V.R. Rao, learned senior counsel assisted by Shri Shreyas Dharmadhikari, submits that the petitioner obtained the information under the RTI Act (Annexure P-2), which shows that the capacity of Khada quarry lease of mineral flag stone is 54000/135000 Tons. per annum, which clearly indicates that there was limited availability of stone in the said mine. The applicant submitted his bid and after due process, the petitioner's bid was approved and finalised by respondent No. 1. The applicant was awarded tender by approval letter dated 23.5.2011,

Annexure P-3. Thereafter, an agreement is entered into between the applicant and respondents on 18.5.2011 (Annexure P-4). It is urged that as per clause 6 of the agreement, it was agreed by the parties that the quantity of mineral to be lifted in a specified time period, which was fixed by the respondent No. 1, is to the tune of 30000 Cu. Mtrs. every year. The applicant company was also required to give its working plan as to how and in which interval the mineral would be lifted by the applicant. The working plan submitted by the applicant is approved by the respondents (Annexure P/5).

4. Shri Rao, learned senior counsel further submits that after approval of working plan, the site of quarry lease was handed over to the applicant company. He submits that 90.650 Hect. area was handed over to the applicant for the purpose of said mining. The applicant expected that the entire area of 90.650 Hect. would be minable/fit for excavation purpose. It is contended that the applicant was shocked when the area of restriction as specified under rule 5 of M.P. Minor Mineral Rules, 1996 (for brevity, the "1996 Rules") was deducted from the aforesaid actual minable area for the reason of existence of pond, electric poles, lakes, railway lines and nalas, etc. After deducting the aforesaid area, the available minable area remained only 19.75 hect. It is further urged that the applicant can achieve the target only when the entire minable area is permitted to be used for the purpose of excavation. The applicant submitted his representations dated 16.11.2011 and 6.3.2012 before the respondent No. 1 (Annexure P/6). In turn, the respondent No. 1 informed the applicant that working plan can be amended but quantity and price of same cannot be changed. The reply dates 23.4.2012 and 4.6.2012 are filed as Annexure P/7. The applicant again made effort to achieve the target but could not do so and, therefore, preferred representation, which was rejected by respondent No. 1 on 23.3.2013 (Annexure P/8).

5. Shri Rao submits that the repeated representations of applicant could not fetch any result. All went in vain. In the aforesaid factual backdrop, the applicant company although was ready and willing to lift the material as per working plan, is not able to excavate the said quantity, as the same is not available to be lifted. Considering the aforesaid, representations dated 9.4.2014 (Annexure P/10), 10.8.2014 and 5.7.2014 (Annexure P/11) were filed. It is pointed out that these representations were rejected by order dated 14.7.2014, Annexure P/12.

6. Shri Rao, learned senior counsel by taking this Court to the representations dated 5.7.2014, submits that the minable area is limited from where 30000 Cu. Mtr. stone cannot be produced. The applicant made a genuine request to appoint a geological surveyor for ascertaining the availability of stone in the area in question. It is further prayed in the representation dated 5.7.2014 to appoint an arbitrator. Criticizing the rejection order dated 30.7.2014, Annexure P/12, it is submitted that the respondents have erred in holding that there exists no dispute which can be referred to arbitration. Learned senior counsel submits that the word "dispute" is neither defined in the Arbitration and Conciliation Act, 1996 (for

short, the "1996 Act") nor in the present contract agreement. In absence thereto, the meaning which is taken in common parlance be accepted. Claim of one party and denial by other side itself amounts to a dispute between the parties. He submits that reduction in minable area amounts to a dispute. By placing reliance on (2006) 2 SCC 638 (Punjab Lloyd Ltd. Vs. Petronet), Union of India (UOI) Vs. Bharat Battery Manufacturing Co. (P) Ltd., and Denel (Proprietary Limited) Vs. Govt. of India, Ministry of Defence, , it is urged that once respondents failed to appoint arbitrator within the stipulated time under the agreement and applicant moved the Court for appointment of arbitrator, right of respondents to appoint arbitrator is forfeited.

7. Shri Arvind Dudawat, on the other hand, supported the stand of the respondents. By taking this Court to the return and Annexures filed by the respondents, it is urged that the applicant has not chosen to challenge the rejection order dated 30.7.2014, Annexure P/12. In absence of specific challenge to this order, no relief is due to the applicant. It is submitted that as per condition No. 11 of NIT, all tenderers were required to make inspection of the spot themselves and were further required to file a certificate in this respect. The applicant himself visited the spot and certified about his inspection by filing certificate (page 29). The applicant had full knowledge about the area which is clear from his certification. Once the applicant has shown his satisfaction about the ground situation and total area of quarry, it is no more open to him to later on take a different stand by preferring representations and this petition. Shri Dudawat submits that the existence of electric poles, nalas, water ponds etc. were very much there when the applicant had inspected and filed the certificate. Thus, it cannot be a ground to treat the same as a dispute. By taking this Court to the relevant clause, which deals with appointment of arbitrator, it is submitted that the alleged controversy does not fall within the ambit of "dispute" and, therefore, no flaw can be found in the rejection order. By taking this Court to clause 6.5 of the agreement, it is stated that total quantity to be excavated and removed cannot be reduced in any circumstances. Thus, the applicant's request runs contrary to the agreement and, therefore, it cannot be treated as dispute. He relied on unreported orders of Supreme Court in case of Container Corp. of India Ltd. Vs. M/S. Shivhare Road Lines (Civil Appeal No. 6029/2014 decided on 07.07.2014) and M.D., M.P. State Mining Corp. Vs. Abhijeet Singh (Civil Appeal No. 3945-3946 of 2010 decided on 28.04.2010). He also relied on the judgment of this Court reported in M/s. Dharmendra Singh Vs. Bharat Sanchar Nigam Ltd., and Diamond Agencies Vs. Union of India, .

8. No other point is pressed by learned counsel for the parties.

9. I have bestowed my anxious consideration on rival contentions and perused the record.

10. In view of aforesaid submissions made by the parties, the core issue is whether there exists a "dispute" which needs to be referred to arbitrator. The applicant made request for appointment of arbitrator by communication dated

05.07.2014 (Annexure P/11). A minute reading of this letter shows that on the request of applicant, original working plan was modified by respondents to some extent. The applicant stated that despite modification of working plan, the applicant is not getting expected quantity of stone. Accordingly a prayer was made to reduce the quantity from 3,00,000 cubic meters to 1,50,000 cubic meters. It is further prayed that a geological surveyor be appointed to determine the availability of stone underneath. Lastly, it is prayed that arbitrator be appointed.

11. This is settled in law that existence of "dispute" is sine qua non of exercise of power under Section 11(6) of the Act. It is true that the word "dispute" is neither defined in the Act nor in the agreement in question. However, clause 10 of the agreement (dispute resolution) makes it clear that only such disputes which are related with the terms of the contract can be referred for arbitration. Clause 10 of the agreement reads as under :-

"Dispute Resolution :-

If any dispute arises between the MPSMCL and the Contractor with regard to any terms of the contract, then for the disposal of the disputes the contractor will formally inform the Managing Director of the MPSMCL in writing the main cause of dispute within 7 days from the date on which the dispute arose. The Managing Director of the MPSMCL will decide the dispute within 30 days of the receipt of the notice. If the Managing Director of the MPSMCL is not able to decide the dispute in the above said 30 days time then the Managing Director will refer the dispute for arbitration. The Managing Director shall have the exclusive authority to appoint the arbitrator under the Arbitration and Conciliation Act, 1996 for deciding disputes and the decision given by the arbitrator will be binding to both the parties. For any dispute, either of the party shall not approach the court which is not covered under the aforesaid Arbitration and Conciliation Act, 1996 prior to referring the dispute before the arbitrator."

(Emphasis supplied)

12. In the considered opinion of this court, whether the grievance of the applicant falls within the ambit of "dispute" needs to be examined on the anvil of clause 10 aforesaid. The applicant needs to establish that there exists a dispute with regard to the terms of the contract. During the course of argument, learned counsel for the applicant were unable to draw attention of this court to any clause of the contract which is allegedly violated or because of which any dispute has arisen. On the contrary, clause 6.5 of the agreement makes it clear that in no circumstances total quantity to be excavated and removed can be reduced. Clause 6.5 reads as under :-

"6.5. The Managing Director of the MPSMCL may at his sole discretion and on the written request of the Contractor on justifiable grounds may revise the work plan, however the agreed total quantity to be excavated & removed will not be reduced under any circumstances"

13. If applicant's request made in Annexure P/11 is examined as per clause 6.5, it will be clear that total quantity to be excavated and removed cannot be reduced in any circumstances. Thus, in no uncertain terms it was made clear in the agreement that total quantity cannot be reduced. The prayer for appointment of geological surveyor is not arising out of any term of the contract. Respondents have denied the allegations that before issuing the NIT, the proper survey was not made. Pond, electricity poles, nallas, railway line etc. must be there when applicant had inspected the spot and deposited the aforesaid certificate. In any case, this grievance is not arising out of any term of the contract.

14. As per Section 11(6) of the Act, if a party fails to act as required under the procedure agreed upon or fails to perform any function entrusted to him under the said procedure, the Chief Justice or his designate can appoint an arbitrator. Thus, the party seeking appointment of arbitrator needs to establish that the agreed procedure between the parties is not followed. This is settled in law that court can examine whether a particular dispute falls within the purview of arbitration clause (See: *Diamond Agencies Vs. Union of India*, . The Apex court in *Deepak Kumar Bansal Vs. Union of India (UOI)* and *Another*, prohibited reference to arbitrator in a case where claim was more than 20% of the value of the contract. This was done because clause 11 of the arbitration clause in the said case makes it clear that disputes for value less than or equal to 20% of the value of the contract can be referred for arbitration. Thus, litmus test is whether as per agreed procedure and arbitration clause applicant's grievance amounts to dispute. As analyzed above, in my opinion, the said grievance cannot be treated as dispute as per clause 10 of the dispute resolution procedure.

15. Shri Rao cited the judgments which are on the point that if arbitrator is not appointed within the stipulated time under the agreement and applicant has approached the court for appointment of arbitrator, right of respondents to appoint arbitrator is forfeited. In view of finding that there exists no dispute as per agreement which can be referred, the said judgment are of no assistance to the applicant.

16. In the result, in absence of "dispute" the question of direction for appointment of arbitrator does not arise. The applications fail and are hereby dismissed. No costs.