

(2016) 02 DEL CK 0167

DELHI HIGH COURT

Case No: Arb. P. Nos. 319 and 320/2015

Indo Asiatic Engineers Pvt. Ltd.
and Others

APPELLANT

Vs

Ginni Global Ltd.

RESPONDENT

Date of Decision: Feb. 4, 2016

Acts Referred:

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

Hon'ble Judges: Manmohan Singh, J.

Bench: Single Bench

Advocate: Onkar Prasad, Advocate, for the Appellant; S.S. Ray, Rakhi Ray and Vaibhav Gulia, Advocates, for the Respondent

Final Decision: Dismissed

Judgement

Manmohan Singh, J.

1. The above mentioned two connected petitions have been filed against the same respondent under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrator.

2. The petitioner in Arb.P.No. 319/2015 was a successful bidder for the order for Hydro-mechanical work for Balsio HEP Project situated at District-Chamba, Himachal Pradesh at a price of Rs.150 lacs on the terms and conditions discussed and agreed with the respondent. The price of Rs.150 lacs for another contract was with M/s. Premier Thermotech Pvt. Ltd., petitioner in Arb.P.No. 320/2015. Thus, the total price of Rs.300 lacs was agreed for the completion of the scope of work.

3. During the course of erection, some additional requirement arose for which the order amount was increased by Rs.50 lacs due to which the complete order value amounted to Rs.350/- lacs for the whole contract as alleged. The work entrusted to the petitioners was completed successfully by them and subsequently plant was commissioned on 21st June, 2012.

4. The petitioners submit that the amount which is still recoverable and due from respondent till 28th February, 2015 is Rs.2,09,01,981.35/- along with interest @ 24% per annum. The details of which are as under:-

5. As the respondent failed to pay the aforesaid amount, the petitioner issued a notice dated 3rd September, 2013 to the respondent. The respondent also encashed the bank guarantee on 2nd December, 2012 which was otherwise extended upto 31st December, 2012. The petitioners are also entitled for damages to the tune of Rs.3 lacs per month since 1st January, 2012 to 30th June, 2012 plus damages, calculated as above.

6. Finally, the petitioner issued notice dated 4th March, 2015 for appointment of Arbitrator as per Clause 30 of Agreement/tender as dispute and differences had arisen between the parties which was duly replied by the respondent by its letter dated 20th March, 2015. Hence, as per the Clause 30 titled as "Resolution of Disputes" in the Tender/work order/contract, the petitioner appointed Mr. H.K. Babbar (office: 1197, Sector-IV, Gurgaon Mob. 9971281074) as Arbitrator for resolving the disputes and differences as per the Arbitration Clause 30 mentioned in the tender and work order which the respondent are not willing to adhere to as per the arbitration clause.

The relevant paras under Clause 30 reads as under:-

"30. RESOLUTION OF DISPUTE

30.1 Purchaser and contractor shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them under or in connection with Contract.

30.2 If, after thirty (30) days from the commencement of such informal negotiations, purchaser and contractor have been unable to resolve amicably a contract dispute, either party may require that the dispute be referred for resolution to the formal mechanisms specified in the special conditions of Contract. These mechanisms may include, but are not limited to conciliation mediated by a third party, adjudication in an -agreed national or international forum, and/or international arbitration. The mechanism shall be specified in the Special Conditions of Contract."

CLAUSE 30 Resolutions of Disputes

1) Add as Clauses 30.3 and 30.4 of the GCC the following:

The disputes resolution mechanism to be applied pursuant to Clause 30 of GCC shall be as follows:

a) In the case of a dispute or difference arising between Purchaser and Domestic Contractor relating to any matter arising out of or connected with this agreement, such dispute or difference shall be referred to the award of two Arbitrators, one Arbitrator to be nominated by Contractor or in the case of the said Arbitrators not

agreeing, then to the award of an Umpire to be appointed by the Arbitrators in writing before proceeding with the reference, and in case the Arbitrators cannot agree to the Umpire, he may be nominated by the President of The Institution of Engineers, India. The award of the Arbitrators, and in the event of their not agreeing, of the Umpire appointed by them or by the Institution of Engineers, India shall be final and binding on the parties.

b) In the case of a dispute between Purchaser and foreign Contractor the dispute shall be settled by arbitration in accordance with provision of sub-clause (a) above. But if this be not acceptable to Contractor, then the dispute shall be settled in accordance with the provision of the United Nations Commission on International Trade Law (UNCITRAL).

c) Arbitration and Conciliation Act, 1996, the rule thereunder and any statutory modification or enactments thereof shall apply to the arbitration proceedings.

The venue of arbitration shall be the place from where Contract is issued.

2) It is agreed between parties that parties shall continue to perform under the contract and that the existence of any dispute or difference or initiation or continuance of the arbitration proceedings shall not postpone or delay the performance by the parties of their respective obligation pursuant to this contract. If work under the contract has been completed when a dispute on any matter whatsoever is referred to arbitration, the Contractor shall not be entitled to suspend such work to which the dispute relates and payment to the contractor shall be continued to be made in terms of the contract unless and to the extent it is the subject matter of arbitration."

7. In the absence of any positive response from the respondent, the petitioner has invoked the arbitration proceedings by issuing notice dated 4th March, 2015 as per the clause 30 of the Agreement/Tender/Work order by appointing the Arbitrator namely Sh.H.K. Baggar, for the purposes of adjudicating the claims and disputes between the parties.

8. In reply it is stated by the respondent that the entire money as per the contract has already been paid to the petitioner and nothing remains to be paid. There is no dispute which exists thus, the present petitions are an abuse of process of Court and the same are liable to be rejected at the outset.

9. The petitioners admittedly submitted that the tender and contract was awarded at a firm price of Rs.300 lacs, without any escalation clause. At the request of the petitioner, a part of the contract was placed with M/s. Premier Thermotech Pvt. Ltd. by way of a purchase agreement, totalling the awarded contract being at a firm price of Rs.300 lacs. However, during execution of the contract, petitioner as per the case of the respondent withheld supplies and stopped work at site and demanded additional amount despite firm price contract. After negotiation, respondent agreed

for further payment of Rs.50 lacs (i.e. total contract amount to both the companies increased to Rs.350 lacs).

10. As per the agreement arrived between the parties as recorded in the said minutes of meeting held on 9th June, 2011, the respondent agreed to pay an extra amount of Rs.50 lacs to cover all past and future increase in cost, which was understood between the parties to mean a lump sum amount that included all past and future increases in such input cost and other charges etc., meaning thereby nothing more was to be paid.

11. As per the revised terms of payment, as reflected in the said minutes of meeting dated 9th June, 2011 held between the parties, the petitioner was to receive 10% as advance with order and balance 90% against dispatch documents. Thus, the entire 100% amount has been paid by the respondent. In order to avoid stoppage of work, the respondent had to arrange material for petitioner and also to make payment to the site workers of the petitioner, the cost of which is yet to paid by the petitioner to the respondent. The respondent has already paid a total sum of Rs.3,56,34,911/- (Rs.2,02,84,639/- to the petitioner and Rs.1,53,50,272/- to M/s. Premier Thermotech Pvt. Ltd.). The entire contract amount has already been paid, despite the fact that work was not completed satisfactorily as reflected in various correspondences as well as the minutes of the meeting dated 22nd July, 2012. A copy of the said minutes of meeting dated 22nd July, 2012 has been filed as Annexure R-2.

12. The debit amount of Rs.4,13,237/- upon the petitioner still remains outstanding to be paid by the petitioner to the respondent. Not only the contract amount has been paid but the petitioner has been in receipt of excess amount to the tune of Rs.6,34,911/-. Counsel for the respondent has argued that both the petitions are misconceived. In Arb.P. 320/2015 there is no contract between the petitioner and the respondent and hence, there can be no arbitration. It is a false petition.

13. It is clear that the petitioner is not entitled to any more payment under the head of idle charges, compensation etc as the order was placed on firm price basis even while agreeing for additional payment of Rs. 50 lacs towards all past and future increase in cost and charges. The petitioner did not rectify any defect or supply any pending material, as agreed to and recorded in the minutes dated 22nd July, 2012.

14. Pursuant to the said meeting which was attended by the petitioner and as recorded in the minutes dated 22nd July, 2012, the respondent had by its letter dated 26th July, 2012 intimated the petitioner with respect to the report from ICCS on the damage of turbine and pending erection work and efficiency and performance of H & M components. A copy of the said letter dated 26th July, 2012 along with the incident report has been filed as Annexure R-3.

15. The respondent by its intimation dated 7th December, 2012 to the petitioner recorded the numerous deficiencies in the work of the petitioner which the petitioner failed to complete and/or rectify. The petitioner was also called upon to

remit the amount of Rs.9,67,590/- towards full and final settlement of the debit notes of the respondent. A copy of the said letter dated 7th December, 2012 has been filed as Annexure R-4.

16. In view of the settled law that it is incumbent upon this Court to first examine whether or not there is any arbitrable dispute before the matter is referred for arbitration. In the present case it appears to the Court that there is no arbitrable dispute.

17. In view of the aforesaid facts and circumstances, as not only the entire contract amount has been paid to the petitioners but there is also a silence for couple of years on behalf of the petitioners who did not raise any demand and invoked the arbitration. It was only in the last week of March, 2015 after the expiry of more than 2 years, notice dated 2nd March, 2015 was issued. Counsel for the respondent has informed that his client has already been harassed by the petitioners and now his client does not want to recover any due amount from the petitioners. From the entire gamut of the matter, it appears to the Court that no dispute exists between the parties as no amount is due and payable to the petitioners. The claims mentioned in the petitions are bogus. In fact, these petitions have been filed as an afterthought with a view to extract more money.

18. The petitions are accordingly dismissed.