
Gail (India) Private Ltd. Vs Sravanthi Energy Private Ltd. and Others

O.M.P. (T) (Comm) Nos. 11, 12 and 14/2016

Court: DELHI HIGH COURT

Date of Decision: March 15, 2016

Acts Referred:

Arbitration and Conciliation Act, 1996 - Section 11(6), Section 12, Section 12(1) (a), Section 13 (2), Section 15, Section 15 (2), Section 15(1), Section 9

Citation: (2016) 229 DLT 20

Hon'ble Judges: Manmohan Singh, J.

Bench: Single Bench

Advocate: Balbir Singh, Sr. Adv., Ravi Shankar and Angad Sandhu, Advocates, for the Appellant; Piyush Joshi, Uttara Babbar and Akanksha Choudhary, Advocates, for the Respondent

Final Decision: Disposed off

Judgement

Manmohan Singh, J.

1. The petitioner has filed the abovementioned petitions under Section 15(1) read with 15 (2) of the Arbitration and

Conciliation Act, 1996 for appointment of a substitute sole arbitrator.

2. Brief facts as per the petitions are that the petitioner is a Public Sector undertaking engaged in the business of supply, marketing and distribution

of Gas in India. The respondent is a company incorporated under the Companies Act, 1956 and is engaged in the field of infrastructure

development in India.

3. In the year 2010, the respondents intended to set-up a 225 MW Gas- based Power Plant at Kashipur in the State of Uttarakhand at an

estimated cost of more than 850 crore, pursuant to which the respondents entered into three separate Gas Transmission Agreements (hereinafter

referred to as "GTA") with the petitioner on 11th November, 2010, 18th November, 2010 and 19th October, 2010 respectively whereby the

petitioner were required to provide the required infrastructure for transmission of gas from a point in Gujarat to the respondents' delivery point at

Kashipur on Uttarakhand Industrial Park, Mohua Khera Ganj in Kashipur. Some disputes arose between the parties in respect of certain invoices

raised from time to time by the petitioner since 21st October, 2014.

4. Clause 16 of the said agreement provides for arbitration clause which reads as follows:

CLAUSE 16- DISPUTE RESOLUTION

16.1.....

16.2 Referral for Settlement: (applicable to shippers other than central public sector enterprises)

i. In the event of failure of a settlement under Clause 16.1 of any such Dispute, the Dispute shall be referred to and finally resolved by arbitration

under the Indian Arbitration and Conciliation Act, 1996 (Act 1996) in force at the time such arbitration is commenced.

ii. If a Dispute is to be settled by arbitration pursuant to clause 16.2 i, then an arbitral tribunal (the "Tribunal") shall be established in accordance

with the provisions of this Clause 16.2 ii. The number of arbitrators shall be 3 (three). Each party shall nominate an arbitrator within 30 (thirty)

Days of the date of a request for arbitration, and the two nominated arbitrators shall with 30(thirty) days of the date of the nomination of the

second arbitrator jointly nominate a third arbitrator to act as Chairman of the Tribunal.

5. The petitioner issued a notice dated 5th May, 2015 to the respondents notifying its nomination of retired Chief Justice of India of the Supreme

Court, as an Arbitrator on behalf of the petitioner and requested the respondents to appoint/nominate its Arbitrator to the Arbitral panel. The

aforesaid letter was duly served on the respondents and a reply letter dated 7th May, 2015 was sent by the respondents to the petitioner. In the

said reply, the respondents stated that it was not agreeable to the Arbitration Proceedings initiated between the parties as there has been no mutual

consent by the parties for appointment of any Arbitrator. Consequently, the petitioner in OMP(T) (Comm) No. 11/2016, on 26th May, 2015 filed

an arbitration petition bearing No. 359/2015 before this Court, together with two other similar petitions being petition Nos. 351/2015 and

360/2015 against two other separate third parties, which involved adjudication of identical contractual disputes on similar factual matrix.

6. By order dated 23rd December, 2015, this Court in Arb.P Nos. 351/2015, 359/2015 and 360/2015 appointed sole Arbitrator i.e. Hon"ble

retired Judge of Supreme Court to adjudicate upon all three identical contractual disputes between the parties. The extract of the said order read

as under:-

1. The petitioner is seeking appointment of an arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996.

2. Learned senior counsel for the petitioner submitted that the parties entered into three Gas Transmission Agreements dated 19th October, 2010

in Arb. P. 351/2015, 11th November, 2010 in Arb. P. 359/2015 and 18th November, 2010 in Arb. P. 360/2015. There is a valid arbitration

agreement between the parties contained in clause 16 of the aforesaid agreements. The disputes have arisen between the parties whereupon the

petitioner invoked the arbitration vide letters dated 05th May, 2015.

3. Learned counsel for the respondent did not dispute the existence of valid arbitration agreements and disputes between the parties. Learned

counsel for the respondent however opposed the petition on the ground that the respondent has made a complaint against the petitioner before the

Petroleum and Natural Gas Regulatory Board for indulging in a restrictive trade practice. It was submitted that the said complaint is pending before

the Petroleum and Natural Gas Regulatory Board and, therefore, the petitions for appointment of arbitrator are not maintainable.

4. Learned senior counsel for the petitioner submitted that the complaint filed by the respondent before the Petroleum and Natural Gas Regulatory

Board would not in any manner bar the arbitration proceedings being invoked by the petitioner under the valid arbitration agreements between the

parties. It is further submitted that the Petroleum and Natural Gas Regulatory Board's jurisdiction to adjudicate the disputes agreed to be resolved

by arbitration is specifically excluded by Section 12(1) (a) of the Act which is reproduced hereunder:-

Section 12-Powers regarding complaints and resolution of disputes by the Board:

The Board shall have jurisdiction to-

(a) adjudicate upon and decide any dispute or matter arising amongst entities or between an entity and any other person on issues relating to

refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas according to the

provisions of Chapter V, unless the parties have agreed for arbitration"".

(Emphasis supplied)

5. Learned senior counsel for the petitioner further submitted that the petitioner invoked Section 9 of the Arbitration and Conciliation Act by filing

O.M.P. No. 1385/2014, 1386/2014 & 1387/2014 before this Court for seeking injunction against the petitioner from invoking bank guarantee

and security deposit till the issue of termination of agreements was settled through arbitration in which vide orders dated 10th November, 2014,

this Court directed the parties to take recourse to amicable settlement as contemplated in clause 16.1 of the Gas Transmission Agreement. It was

submitted that having invoked Section 9 of the Arbitration and Conciliation Act, the respondent is estopped from opposing this petition for

appointment for arbitrator.

6. Learned senior counsel for petitioner further submitted that a sole arbitrator be appointed by this Court to adjudicate the disputes between the

parties. Learned senior counsel for the petitioner submitted that arbitration proceedings in similar matters are pending.

7. This Court is satisfied that there is a valid arbitration agreement between the parties contained in clause 16.2 of the Gas Transmission

agreements dated 19th October, 2010, 11th November, 2010 and 18th November, 2010. Disputes have arisen between the parties whereupon

the petitioner validly invoked the arbitration agreement.

8. There is no merit in the respondent's objection to the maintainability of this petition. The pendency of the complaint filed by the respondent

before Petroleum and Natural Gas Regulatory Board would not bar the jurisdiction of the arbitral tribunal to adjudicate the disputes between the

parties. The Petroleum and Natural Gas Regulatory Board is dealing with the complaint of the respondent. The petitioner has admittedly not raised

its claims against the respondent before Petroleum and Natural Gas Regulatory Board. The Petroleum and Natural Gas Regulatory Board is not

dealing with the claims raised by the petitioner in this petition and therefore, the petitioner would not get any relief with respect to its claims. The

petitioner's legal remedy to agitate the claims against the respondent is within the exclusive jurisdiction of the arbitral tribunal by invoking the

arbitration agreement between the parties.

8. The respondent itself took recourse of Section 9 of the Arbitration and Conciliation Act in O.M.P. No. 1385/2014, 1386/2014 & 1387/2014

and sought interim relief till the conclusion of the arbitration. Having invoked Section 9 of the Arbitration and Conciliation Act, the respondent

cannot object to the arbitration proceedings.

9. The petitions are allowed and Justice R.V. Raveendran (Retd.) is appointed as the sole arbitrator to adjudicate the disputes between the parties

including their claims and counter claims. The learned arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation Act

(Amendment) Ordinance, 2015 before commencing the arbitration.

10. Copy of this judgment be given dasti to counsels for the parties under signature of Court Master. Copy of this judgment be sent to the learned

arbitrator.

7. The learned sole Arbitrator vide letter dated 17th January, 2016 addressed to the parties, had indicated his inability to devote sufficient time to

the arbitration and in particular his inability to finish the entire arbitration within twenty four months.

8. The petitioner thereafter on 29th January, 2016 filed an application under Section 13 (2) of the Act, requesting the Tribunal to withdraw its

consent to preside over the dispute in order for claimant to seek appointment of a substitute Arbitrator.

9. The sole Arbitrator had issued his consent to withdraw from the office of the Arbitrator vide letter dated 30th January, 2016, and requested the

petitioner to inform the Court accordingly. A copy of the same has been placed on record.

10. In view of the aforesaid reasons, the petitioner has filed the present petition to substitute sole Arbitrator under Section 15 (2) of the Act, to

adjudicate the disputes from amongst the named panel members.

11. The petitioner is a Public Sector Undertaking and has already obtained consent from a panel of eminent Arbitrators to preside over such

disputes for nominal lump sum fees. The details of the members of the said panel are mentioned in para 14 of the petitions.

12. Learned counsel for the respondents has opposed the prayer mainly on two grounds. Firstly, the original procedure as per the Arbitration

Clause would revive once the sole Arbitrator has shown his inability to complete the proceedings. Secondly, he submitted, that under the new

amendment in the Arbitration Act, the suggestion of nominee Arbitrator by any of the parties should not be considered, although he has the highest

regard for each member of the panel. He submits that once the sole Arbitrator has withdrawn from the arbitration proceedings, the prayer for

appointment of a substitute Arbitrator under Section 15 of the Act be confined to only as provided under the Arbitration Agreement. The

petitioner, under these circumstances, lost its right to suggest any name for the purpose of sole Arbitrator.

13. As far as the first objection is concerned, counsel for the respondents has not denied the fact that when the sole Arbitrator was substituted by

order dated 23rd December, 2015, the said order was not challenged by the respondents. With regard to the second objection, I agree with the

submissions of the learned counsel for the respondents that the petitioner should suggest the name of substitute Arbitrator, however, I do not agree

with the submission of the learned counsel for the respondents that after the withdrawal by the sole Arbitrator, the fresh procedure as per

agreement to be followed, once after hearing of the parties, sole Arbitrator was appointed by the learned Predecessor Bench. However, the

submissions of the learned counsel for the respondents is that this Court should not appoint sole Arbitrator from the list of panel arbitrator(s) as per

the scheme mentioned in the petitions though he has highest respect for each member who are very able and competent names.

14. In order to avoid controversy, by allowing the prayers in the petitions, except this Court appoints Mr. K.S.P. Radhakrishnan (Retired Judge of

the Supreme Court, R/o 87 Anand Lok, Second Floor, New Delhi, Mob. 9560013636) as substitute sole Arbitrator to adjudicate the disputes

arising out of the agreement in question between the parties as mentioned in the present petitions. The parties are also allowed to file their

respective claims and counter-claims before the Arbitrator.

15. The Arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the

arbitration. The fees of the learned Arbitrator shall be in terms of the schedule of Arbitration and Conciliation (Amendment) Act, 2015.

16. The petitions are accordingly disposed of. No costs.

17. Copy of this order be given dasti to the learned counsel for the parties and a copy thereof be communicated to the learned sole Arbitrator

forthwith.