

SUPREME COURT OF INDIA

M/S KSS Kssiip Consortium Thro.its Constituted Attorney Mr.Devendra Kumar

Vs.

M/S Gail (India) Ltd.

(Ranjan Gogoi JJ.)

12.02.2015

JUDGMENT

RANJAN GOGOI J.

1. Both these applications under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act") have been filed seeking appointment of a sole arbitrator to go into the disputes and differences that the petitioner claims to have arisen out of two separate contract agreements entered into by and between the parties.

2. The facts in brief may be noted at the outset.

3. The petitioner is a consortium of two companies i.e. M/s JSC OGCC KazStoryService, a company incorporated under the laws of the Republic of Kazakhstan and KazStoryService Infrastructure India Private Limited incorporated under the Companies Act, 1956. The said consortium has been formed by an agreement dated 1st July, 2010 for the purposes of executing a contract that was to be awarded by the respondent for Pipeline Laying and Terminal Works for Dabhol - Bangalore Pipeline Project.

4. According to the petitioner, the respondent had floated a Tender for the said project in the year 2010 and the entire work was divided in 10 Spreads (A,B,C,D,E,F,G,H,I,J). While Arbitration Petition (Civil) No.36 of 2014 pertain to the award of work for Spread 'J', Arbitration Petition (Civil) No.38 of 2014 relates to the work awarded for Spread 'D'.

5. Pursuant to the bid(s) made by the petitioner, detailed letter(s) of acceptance was issued by the respondent on 13th December, 2010. According to the petitioner though in terms of the contracts it had mobilized its men and machinery, the work

got jeopardized/frustrated as the respondent did not make available to the petitioner the Construction Right of use and permits in terms of Clause 28 of the Special Conditions of Contract (hereinafter referred to as "the SCC"). According to the petitioner, the respondent did not have the necessary work fronts with respect to SV station work. Furthermore, the petitioner has alleged that the respondent failed to provide necessary engineering inputs. Besides, there were frequent modifications with respect to drawings, extra work and delays in providing free issue materials. All these led to substantial delays in the execution of the works, such delay being attributable solely to the respondent.

6. According to the petitioner, on account of the delays due to the aforesaid reasons, the petitioner became entitled for extended stay compensation in terms of clause 42 of the SCC read with clause 12 of the detailed letter of acceptance. Apart from extended stay compensation, the petitioner claims to be entitled for payment for additional works undertaken during the course of execution of the contracts. On 4th January, 2013 and 5th July, 2013, the petitioner submitted its claim to the respondent for Rs.34,70,11,907/- (Rupees Thirty Four Crore Seventy Lacs Eleven thousand Nine hundred and seven only)[In Arbitration Petition (Civil) No.36 of 2014] and for Rs.1,79,23,83,208/- (Rupees One Arab Seventy Nine Crore Twenty Three Lacs Eighty Three thousand Two hundred and Eight only) [In Arbitration Petition (Civil) No.38 of 2014) respectively. The petitioner alleges that the respondent rejected the said claims which was not acceptable to the petitioner. The petitioner, thereafter, invoked clause 40.2 of the General Conditions of Contract which provides for conciliation. As the petitioner's proposal for conciliation was rejected by the respondent, the petitioner had no option but to invoke the Arbitration Clause (Clause 59) and seek appointment of a sole arbitrator in respect of the disputes arising from each of the two agreements. The said demand was repeated in several communications which were not responded to. The petitioner, therefore, has lodged the present applications under Section 11(6) of the Arbitration Act for the reliefs earlier noticed.

7. The claims made by the petitioner have been resisted by the respondent by filing separate counter affidavits in both the cases. A reading of the affidavits filed by the respondent indicate that insofar as the claim for extended stay compensation is concerned, the respondent contend that the said claim does not give rise to any arbitrable issue inasmuch as under clause 42.1.1 the bidder is required to mention the rate for extended stay compensation per month in the "Priced Part". Under Clause 42.1.2 in case the bidder did not indicate such rate it is to be presumed that no extended stay compensation is required to be paid. Under clause 42.1.4 it was expressly mentioned that "Bidder to note that in case they don't indicate the rate for

extended stay compensation as per proforma, provisions of clause No.42.0 will not be applicable to them". According to the respondent in the relevant proforma relating to "Compensation for Extended Stay", the petitioner had mentioned/quoted "NIL". Thus, according to the clauses 42.1.2 and 42.1.4, no extended stay compensation is required to be paid to the petitioner. The above position was also expressly stated in clause 12 of the detailed letter of acceptance dated 13th December, 2010, which is in the following terms:

"12.0 |COMPENSATION FOR EXTENDED STAY |
| Extended stay compensation is not |
| applicable and shall not be payable |
| to the Contractor as per clause no. |
| 42.0 of Special Conditions of |
| Contract." |

8. According to the respondent, the aforesaid clause was further amplified in Annexure -1 to the said detailed letter of acceptance which was not placed before the Court though the detailed letter of acceptance dated 13th December, 2010 formed a part of the petitions filed by the petitioner.

9. Insofar as the claim of payments for additional works is concerned, according to the respondent, clause 91.0 of the GCC deals with such claims. Clauses 91.1 and 91.2 contemplate that such claims will be verified by the Engineer-in-charge whose decision will be final. The respondent further states that the claims made by the petitioner for additional costs had been rejected by the Engineer-in-charge and in terms of clause 91.2 of the GCC such a decision(s) must be construed to be final and binding between the parties and therefore would stand excluded from arbitration.

10. There can be no manner of doubt that before exercising the power under Section 11(6) of the Arbitration Act to make appointment of an arbitrator the Court will have to decide on the existence of an arbitrable dispute/enforceable claim by and between the parties to the contract. The existence of a claim and denial thereof giving rise to a dispute is required to be determined on the basis of what the parties had agreed upon as embodied in the terms of the contract and only for the purpose of a decision on the question of arbitrability and nothing beyond. It is from the aforesaid standpoint that the issues raised in the present proceedings will have to be considered.

11. Clause 42.0 deals with "Compensation for extended stay". Under clause 42.1.1 the contractor is required to mention the rate for extended stay of compensation in the event the contract is to be prolonged/extended beyond the contemplated date of completion. Clauses 42.1.2 and 42.1.4 of the SCC contemplate that in the event the contractor/bidder does not indicate the rate of extended stay, it will be presumed that no extended stay compensation is required to be paid. In the present case, admittedly, the petitioner had quoted "NIL" against compensation for extended stay in its bid. If that is so, it must be understood that the petitioner had agreed to forego its claim to extended stay compensation in the event the period of performance of the contract is to be extended as had happened in the present case. This position was conveyed to the petitioner by the letter of acceptance dated 13th December, 2010. The petitioner did not raise any objection on the aforesaid score. If the petitioner had voluntarily and consciously agreed to the above situation, it will be difficult to accept the contrary position that has sought to be now adopted by seeking to claim extended stay compensation which was earlier agreed to be foregone. It must therefore be held that the claim against the aforesaid 'Head' i.e. 'extended stay compensation' does not give rise to an arbitrable dispute so as to permit/require reference to arbitration under clause 59.

12. The second issue i.e. claim for payment of additional works however would stand on a different footing. Clause 91.1 and 91.2 contemplate the making/raising of claims by the contractor for additional works and consideration thereof by the Engineer-in-chief. The decision of the Engineer-in-chief is final and binding. The finality attached to such a decision cannot be an unilateral act beyond the pale of further scrutiny. Such a view would negate the arbitration clause in the agreement. Justifiability of such a decision though stated to be final, must, be subject to a process of enquiry/adjudication which the parties in the present case have agreed would be by way of arbitration. The objections raised by the respondent on the aforesaid score, therefore, does not commend to the Court for acceptance and is hereby rejected.

13. Accordingly, the claims made by the petitioner for payment of additional works under both the contracts are referred to arbitration by Shri Justice M.M. Kumar, Chief Justice (Retd.), Jammu & Kashmir High Court, who is hereby appointed as the sole arbitrator. The learned sole arbitrator is requested to enter upon the reference and conclude the same at an early date. The terms of appointment of the sole arbitrator as well as the venue of arbitration will be decided by the parties in consultation with the learned Arbitrator.

14. Consequently and in the light of the above, the Arbitration Petitions are allowed to the extent indicated above.