

SUPREME COURT OF INDIA

Mears Group Inc.

Vs.

Fernas Insaat A.S.(Fernas Construction Company Inc.)

Ar.P.No.13 of 2016

(T.S.Thakur,CJI., Dr.D.Y.Chandrachud,J.,)

14.12.2016

ORDER

Dr.D.Y.Chandrachud,J.,

1. The Petitioner is a company incorporated in the US. The Respondent is incorporated in Turkey. The Respondent was awarded a contract for the construction of a pipeline by the Gas Transmission Company Ltd., Bangladesh. A Letter of Intent was issued by the Respondent to the Petitioner on 16 April 2012 for performing Horizontal Directional Drilling works for six river crossings under the above-mentioned project in Bangladesh. A detailed work order was issued on 12 June 2012 to the Petitioner for a total contract price of USD 7,225,000/-. The work to be executed by the Petitioner involved the installation of thirty inch diameter and six inch diameter gas pipelines under six rivers in Bangladesh. According to the Petitioner the effective date of the contract was 16 April 2012, while the scheduled date of completion was on 13 March 2013. The Petitioner is stated to have furnished a performance bank guarantee equivalent to ten per cent of the contract price. Clause 24 of the work order contained an Arbitration Agreement in the following terms :-

“24.0 Disputes and Arbitration 24.2 Arbitration:

In case the amicable resolution or settlement is not reached between the Parties within a period of 30 days from the day on which the dispute(s) or difference(s) arose, such dispute(s) or difference(s) shall be referred to a sole Arbitrator for settlement by way of arbitration in accordance with the provisions of the Arbitration and Conciliation Act 1996 of Government of India or any applicable law on arbitration that may be in force then, and any amendments made thereto. The sole arbitrator shall be appointed by the mutual consent of both the Parties. The decision of the Arbitrator shall be final and binding on both the Parties. The venue of such arbitration shall be at New Delhi, India. The Language of the arbitration proceeding shall be in English.

The existence of any dispute(s) or difference(s) or the initiation or continuance of the arbitration proceedings shall not permit the Parties to postpone or delay the performance by the Parties of their respective obligations under this indenture”

According to the Petitioner, four letters of credit were opened by the Respondent so as to facilitate the completion of four crossings. The remaining letter of credits, it is alleged, were not opened. According to the Petitioner, it successfully completed work under all the six crossings and its bank guarantee was allowed to lapse.

2. Disputes have arisen between the parties, resulting in an exchange of e-mails. The Petitioner has a claim for unpaid dues. The Petitioner invoked arbitration by an e-mail dated 2 November 2015 addressed by its advocate to the respondent. The Petitioner claimed an amount of USD 38,13,723.76 together with interest by its e-mail and suggested the names of two former judges of the Delhi High Court. The Petitioner sought the concurrence of the Respondent to the appointment of one of them as sole arbitrator, in terms of the arbitration agreement. Finding no response, these proceedings were instituted under Section 11(5) of the Arbitration and Conciliation Act, 1996.

3. Notice was issued in these proceedings on 8 March 2016. On 7 October 2016 the Respondent informed this Court that it was willing to negotiate an amicable settlement with the Petitioner and would either finalize a settlement or file its objections to the petition for appointment of an arbitrator within four weeks. Neither has any settlement been arrived at between the parties nor has a reply been filed to the Arbitration Petition.

4. During the course of the hearing, learned counsel have not disputed the existence of the arbitration agreement. Disputes have evidently arisen between the parties and a mutual settlement has not been possible.

5. In the circumstances, we hereby appoint Mr Justice FM Ibrahim Kalifulla, former judge of the Supreme Court of India to act as a sole Arbitrator in terms of the arbitration agreement. The learned arbitrator shall be at liberty to determine the fees payable to him for the arbitration.

6. The Arbitration Petition is accordingly disposed of in the above terms.