



\$~13

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ O.M.P. (T) (COMM.) 77/2019 & I.A. 14014/2019

VIKRAM SOLAR LIMITED

..... Petitioner

Through: Mr. Manoj K. Singh, Adv. with
Mr. Rajdutt Shekhar Singh,
Mr. Anmol and Mr. Rishab Khare,
Advs.

versus

IIC LIMITED

..... Respondent

Through: Mr. Rajat Navet, Adv.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

%

07.11.2019

1. This petition has been filed by the petitioner under Section 14 & 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'Act of 1996') with the following prayers:-

"In view of the above facts and circumstances it is humbly prayed that this Hon'ble Court may be pleased to:

(a) Terminate the mandate of Mr. Vishwa Jeet Talwar, a sole arbitrator appointed by the Respondent;

(b) Substitute Mr. Vishwa Jeet Talwar by appointing an independent and impartial arbitrator;

(c) Pass such further order(s) in favor of the Applicant and against the Respondent as this Hon'ble Court may deem fit in the facts and circumstances of the present case."

2. Some of the facts as noted from the petition are that in September

2015 the respondent issued a tender and General Conditions of the Contract (in short 'GCC') for Roof Top Solar Project at Bhopal, Indore and Jabalpur. On September 18, 2015 the letter of intent issued by the respondent to the petitioner for design, engineering, procurement, manufacturing, supply of all material and equipment including solar PV module, transportation transit insurance delivery at site, unloading, material handling at site, erection, testing and commissioning of 4.717 MWp Roof Top PV Power Plant in Bhopal, Jabalpur and Indore in Madhya Pradesh.

3. It is the case of the petitioner that working of the project was impacted due to various hindrances / hurdles viz. delay in providing approvals, non-availability and / or delay in handing over of sites, delay in providing inverters, delays in making payments, changes in evacuation points, etc. According to the petitioner, despite hindrances / hurdles faced by the petitioner, the petitioner successfully commissioned the Project at 57 sites out of 64 sites.

4. It is also the case of the petitioner that all such sites, which were made available by the respondent to the petitioner, had been handed over to the respondent after commissioning of the Project. Subsequently, the petitioner repeatedly requested the respondent to release the overdue payments of the petitioner, which requests were unsuccessful.

5. Since the petitioner did not receive any response from the respondent, it was compelled to issue a notice of default to the respondent on December 07, 2016 followed by another letter dated March 09, 2017 for payment of Rs. 7.93 Crores due to the petitioner. It is the case of the petitioner that the respondent despite acknowledging the liability, did not pay the amounts due to the petitioner. Consequently, the petitioner invoked arbitration vide

notice invoking arbitration dated May 02, 2017 as per Clause 11 of the GCC. The said Clause reads as under:

“11.0 ARBITRATION

11.1 If any dispute or difference of any kind whatsoever shall arise between

the purchaser/Employer and the Supplier/Contractor, arising out of the Contract for the performance of the/Facility/Works whether during the progress of the Facility/Works or after its completion or whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place, be referred to and settled by the Purchaser, who, within a period of 30 (thirty) days after being requested to do so, shall give written notice of his decision to the Supplier.

11.2 Save as hereinafter provided, such decision in respect of every matter

so referred shall be final and binding upon the parties until the completion of the entire work under the Contract and shall forthwith be given effect to by the Supplier who shall comply with all such decisions, with all due diligence, whether he requires conciliation and/or arbitration as hereinafter provided or not.

11.3 If after the Purchaser/Employer has given written notice of his decision to the Supplier/Contractor and no claim to conciliation and/or arbitration has been communicated to him by the Supplier within 30 (thirty) days from the receipt of such notice, the said decision shall become final and binding on the

Supplier.

11.4 In the event of the Purchaser/Employer failing to notify his decision,

as aforesaid, within 30(thirty) days after being requested, or in the event of the Supplier/Contractor being dissatisfied with any such decision, or within 30 (thirty) days after dispute be referred to arbitration as hereinafter provided.

11.5 Subject to as specified in this Clause, all disputes or difference in respect of which the decision, if any, of the Purchaser/Employer has not become final or binding as aforesaid, shall be settled by arbitration, under and in accordance with the provisions of The Arbitration and Conciliation Act, 1996 or any statutory modification, in the manner hereinafter provided. The venue of arbitration shall be New Delhi, India.

11.6 The arbitration shall be conducted by a sole arbitrator appointed by the Purchaser/Employer.

11.7 The decision of the sole arbitrator shall be final and binding upon the parties. The expense of the arbitration shall be paid as may be determined by the arbitrator. The arbitrator may, from time to time, with the consent of both the parties increase the time for making the award.

11.8 During settlement of disputes and arbitration proceedings, both parties shall be obliged to carry out their

respective obligations under the Contract.

11.9 Parties agree that the party invoking arbitration shall specify all disputes to be referred to arbitration at the time of invocation of arbitration and not thereafter.”

6. The petitioner vide aforesaid notice invoking the arbitration had called upon the respondent to appoint a sole Arbitrator as per Clause 11.6 of the GCC. In its notice, the petitioner requested the respondent to provide a panel of three Arbitrators. The respondent instead of providing a panel of three Arbitrators had vide its letter dated June 06, 2017 appointed one Vishwa Jeet Talwar as the sole Arbitrator.

7. It is the case of the petitioner that it vide letter dated July 28, 2017 had informed the respondent that it did not agree with the unilateral appointment of Mr. Vishwa Jeet Talwar, and in fact proposed three names of Retd. Judges of the Supreme Court for appointing one, as the sole Arbitrator. The respondent vide letter dated August 28, 2017 did not agree with the proposal made by the petitioner, as Mr. Vishwa Jeet Talwar has been appointed by the respondent as the sole Arbitrator.

8. A reply to the petition has been filed by the respondent to contend that the petitioner, though by this petition, is seeking termination of the mandate of the sole Arbitrator, it had not approached the Arbitrator even once after his appointment. In other words, the petitioner has suddenly woken up to agitate its right. It is a mala fide attempt to overreach the process of law.

9. It is also stated that the petition has failed to disclose any circumstance which falls within the provisions of Section 14 and 15 of the Act of 1996 inasmuch as neither has the Arbitrator become *de jure* or *de*

facto unable to perform his functions nor has he withdrawn from his office. The so-called delay has been occasioned purely on account of inaction on the part of the petitioner to approach the learned Sole Arbitrator to initiate the proceedings and / or file its statement of claim before the learned Sole Arbitrator. He seeks dismissal of the petition.

10. Mr. Manoj K. Singh, learned counsel appearing for the petitioner submits that the respondent having reiterated the appointment of Mr. Vishwa Jeet Talwar vide its letter dated August 28, 2017, it was required for Mr. Vishwa Jeet Talwar to issue notice to the parties including the petitioner herein holding a preliminary hearing to enable the petitioner file its statement of claim. According to him, Mr. Vishwa Jeet Talwar despite his appointment as an Arbitrator failed to act and did not send any correspondence / notice to the petitioner which shows clear inactiveness on his part to initiate the arbitration proceedings.

11. He states, it there is a settled position of law in case an Arbitrator fails to proceed with the arbitration, a party shall be justified in approaching the Court seeking termination of the mandate of the Arbitrator on the ground that he has failed to act without undue delay. In this regard, he has drawn my attention to Section 14(1) of the Act of 1996.

12. In substance, it is his submission that as the learned Arbitrator Mr. Vishwa Jeet Talwar has failed to act for the last two years, his mandate be terminated. In support of his submission, he has relied upon the judgment of a Coordinate Bench of this Court in the case reported as ***MANU/DE/1347/2017 International Engineers and Project Consultants Limited (IEPC) v. Union of India & Anr.***, to contend that this Court while considering the petition under Section 14 and 15 of the Act of 1996, can by

terminating the mandate of the Arbitrator appoint a substitute Arbitrator in his place.

13. On the other hand, Mr. Rajat Navet, learned counsel appearing for the respondent by conceding to the fact that Mr. Vishwa Jeet Talwar after his appointment as an Arbitrator did not make / issue correspondence / notice to the parties for holding preliminary hearing in the proceedings, states that surely onus is on the parties, more particularly the petitioner to send its claim petition to the Arbitrator and calling upon him to initiate the proceedings by holding a preliminary hearing. Concedingly, such recourse has not been adopted by the petitioner and hence, the petitioner cannot now seek the termination of the mandate of the Arbitrator on the ground that the same was delayed. He seeks the dismissal of the petition.

14. Having heard the learned counsel for the parties, the only question which arises for consideration is whether the mandate of the Arbitrator for not initiating the arbitration proceedings, shall stand terminated. In this regard, I may state that Section 14(1)(a) of the Act of 1996 contemplates, the mandate of an Arbitrator shall be terminated, if, he, for reasons fail to act without undue delay. In the case in hand, the Arbitrator was appointed on June 06, 2017 by the respondent vide a communication made with the petitioner. The said communication also encloses the consent of the Arbitrator by way of a disclosure statement made by him under Section 12 of the Act of 1996 on June 05, 2017 to the respondent. But thereafter, there is no communication by the Arbitrator to the parties calling upon them to appear before him or calling upon them, more particularly, the petitioner to file its claim.

15. In this case, it is on June 06, 2017 that the learned Arbitrator

Mr. Vishwa Jeet Talwar was appointed. It is the plea of Mr. Navet, as the petitioner has failed to file the claim, it has abandoned the proceedings. The question that would arise is, whether failure on the part of the petitioner to file the claim petition, the petitioner is said to have abandoned the proceedings.

16. At the relevant time, in the year 2017 the requirement of filing the claim in six months was not in existence. But Section 23(1) stipulates the period of time agreed upon by the parties or determined by the learned Arbitrator, the claimant shall file the claim. In this case, there is no time period agreed between the parties. If that be so, the learned Arbitrator was required to determine within which time, the petitioner was required to file the claim petition. He has not done so. So, there is a failure on the part of the learned Arbitrator to discharge its obligation. Mr. Manoj Singh is right in contending that in the absence of any communication from the learned Arbitrator, the petitioner could not have filed the claim petition. I may note here that the Supreme Court, in its opinion in the case of *Srei Infrastructure Finance Limited vs. Tuff Drilling Pvt. Ltd. (2018) 11 SCC 470* has held, there is an equal obligation on the part of the learned Arbitrator to issue show cause notice to the party, not filing the claim petition, as to why, on failure to file a claim petition, the mandate of the learned Arbitrator shall not be terminated. This is so, when in terms of Section 29(A)(1) of the Act of 1996 as it stood at the relevant time stipulated, the award shall be made within a period of twelve months from the date the Arbitral Tribunal enters upon reference. So, it must follow, the learned Arbitrator having failed to issue notice to the petitioner to file the claim petition for over a period of two years, (which is more than 12 months) he has failed to act without undue

delay in accordance with Section 14(1)(a) of the Act of 1996 and the mandate of the learned Arbitrator should stand terminated.

17. Having said that the question is whether the Court must remand the matter to the party concerned to appoint the Arbitrator in terms of the provisions of the contract. There cannot be any dispute on the said proposition that in normal circumstances, upon termination of the mandate of an Arbitrator, the same rules and procedure for appointment of an Arbitrator would be applicable as was applicable for the initial appointment of the Arbitrator. However, as held by the Supreme Court in *Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Ltd.*, (2008) 10 SCC 240, *Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523 and *Indian Oil Corporation Ltd. & Others v. Raja Transport Pvt. Ltd.*, (2009) 8 SCC 520, in exceptional cases, for reasons to be recorded, the Court may deviate from the appointment procedure prescribed in the agreement, and appoint an independent arbitrator on its own so as to achieve the ultimate aim of a fair, swift and cost effective resolution of the disputes between the parties.

18. In the case in hand, the respondent, in their reply instead of stating that they shall call upon the learned Arbitrator to initiate the proceedings or appoint a substitute Arbitrator, has contested the claim made by the petitioner on the ground that the petitioner has abandoned the proceedings. I am of the view, in the facts of this case, noting the stand of the respondent and there is no specific qualification stated in the arbitration clause, this Court should appoint a substitute Arbitrator in place of Mr. Vishwa Jeet Talwar. Accordingly, this court appoints Justice D.K. Jain, a retired Judge of the Supreme Court of India as the Sole Arbitrator who shall adjudicate the

disputes between the parties. The appointment of the Ld. Arbitrator shall be regulated by the rules of DIAC. The petition is disposed of.

Let a copy of this order along with the petition be sent to Justice D.K. Jain for information.

IA 14014/2019

Dismissed as infructuous.

V. KAMESWAR RAO, J

NOVEMBER 07, 2019/aky