

M/S. Wexford Financial Inc Panama vs Bharat Heavy Electricals Ltd on 13 July, 2016

Equivalent citations: AIR 2016 SUPREME COURT 3447, 2016 (5) ADR 186, 2016 (3) AJR 720, AIR 2016 SC (CIVIL) 2223, 2016 (8) SCC 267, (2016) 5 ALLMR 472 (SC), (2016) 4 ARBILR 156, (2017) 1 ANDHLD 28, (2016) 3 RECCIVR 1034, (2016) 7 SCALE 232, (2017) 1 CIVLJ 864, 2016 (4) KCCR SN 496 (SC), 2017 (170) AIC (SOC) 29 (SC), (2016) 5 BOM CR 555

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Bench: Uday Umesh Lalit, R. Banumathi, T.S. Thakur

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION (CIVIL) NO.19 OF 2015

M/s. Wexford Financial Inc. Panama

...Petitioner

Versus

Bharat Heavy Electricals Ltd.

...Respondent

ORDER T.S. THAKUR, CJI.

1. In this petition under Section 11(5) read with Section 11(12) of the Arbitration and Conciliation Act, 1996, the petitioner prays for the appointment of a sole arbitrator for adjudication of disputes that have arisen between the parties in relation to a “Service Provider Agreement” executed between them. The facts in brief are as under:

2. The petitioner-company is registered under the Laws of Panama with its Registered Office at Microjacket-359003, Roll 64778, Frame 53, Panama and a representative office at C-204, LGF, Greater Kailash-I, New Delhi- 110048. The company, it appears, is engaged in providing liaison services to companies in public as well as in private sector within and outside the country including procurement of contracts from Government agencies for its clients and providing facilitation of pre and post contractual obligations and activities agreed upon by the parties. The company claims a small percentage of the value of the contract towards its fee for the Agency services rendered to its clients.

3. The petitioner's case is that M/s. Mass Global Investment Company incorporated under the Iraqi Law and engaged in power production for Kurdistan Regional Government is one of its clients. Its further case is that in January-February 2006, the petitioner introduced respondent-Bharat Heavy Electricals Limited, a public sector undertaking engaged in integrated power equipment plant manufacturing to the said M/s Mass Global Investment company in connection with a "Turnkey Supply of Arbeel Power Plant" in the State of Kurdistan. A contract was, according to the petitioner, signed between M/s Mass Global Investment Company ("the MGIC" for short) and the respondent on 6th May, 2006. The petitioner claims that the respondent had agreed to pay 1.1% of the contract value as agency fee for the services rendered by the petitioner in connection with the said Arbeel project for the respondent. The project could not, however, materialize for no fault of the petitioner. That did not deter the petitioner from using its good offices to procure another project by the name "Sulaymaniah Gas Power Project". A Memorandum of Agreement was signed between the petitioner's client and the respondent- Corporation on 20th January, 2007 for execution of the said project which was followed by signing of a Turnkey contract on 4th March, 2007. The original contract value of the project aforementioned was US \$ 117,000,000 which was later increased to US \$ 118,181,750. The petitioner asserts that as in the case of Arbeel project, the respondent had agreed to pay 1.1% of the contract value towards agency fee to the petitioner without the requirement of providing any further service.

4. The petitioner asserts that work of the execution of the project aforementioned started and was undertaken with the participation of the petitioner, in the course of which the petitioner claims to have rendered various services to the respondent for facilitating execution of the project including logistic support at Amman/Jordan. The petitioner submits that the Service Provider Agreement in respect of Sulaymaniah Gas Power Project was executed between the petitioner, on the one hand, and the respondent, on the other, on 11th May, 2010 providing for pre-contractual and post-contractual activities and for payment of a fee equivalent to 1.1% of the total contractual value within thirty days from the receipt of the payment of the respondent-BHEL. The petitioner alleges that progressive payments were received by the respondent from the company but no payment towards agency fee was realized in favour of the petitioner. After several reminders and persuasion, the respondent-BHEL is said to have disbursed a sum of US \$ 3,60,282 only to the petitioner on 22nd June, 2010 for the services so rendered. The petitioner claims the balance sum of US \$ 9,39,718 towards agency fee after adjustment of the amount of US \$ 3,60,282 towards the payment already received by it. The petitioner submits that the respondent has not responded to several e-mails sent by the petitioner seeking payment of the balance amount and that by a final communication date 21st December, 2011 the respondent has declined to make the payment of the balance on the ground that the claim of the petitioner is baseless, unfounded and untenable. The petitioner, in the above backdrop, asserts that disputes have arisen between the parties in relation to the Service Provider Agreement executed between them, Clause 7, whereof provides for adjudication of the same by way of Arbitration. Clause 7 reads as under :

"Article 7 – Arbitration 7.1 Any and all disputes arising between the PARTIES in connection with the performance and/or interpretation of this Agreement shall be settled in an amicable manner. In case the parties fail to arrive at a settlement within Sixty (60) days of the matter being referred by the aggrieved PARTY to the other,

such disputes shall be finally settled in accordance with the provisions of Indian Arbitration and Conciliation Act, 1996 and rules framed there under 7.2 The Arbitrator (s) appointed shall have its seat in New Delhi and the arbitration proceedings shall be in English. The Arbitrator (s) shall record reasons for the award. Courts at New Delhi shall have exclusive jurisdiction relating to adjudication of any dispute which may arise between the PARTIES hereto.”

5. The petitioner has, in the light of the above, approached this Court for appointment of an arbitrator and for reference of the disputes for adjudication to him.

6. The respondent-company has in its reply opposed the grant of any relief to the petitioner inter alia on the ground that the notice for arbitration served upon the respondent is not a proper one and that the claim made by the petitioner is barred by limitation. The respondent’s further case is that the main service which the petitioner was obliged to provide under the Service Provider Agreement was to ensure that there was an amicable settlement of the disputes between the respondent and the client and that the bank guarantee provided by the respondent for US \$ 15.7 million to MGIC was returned to it. The petitioner having failed to fulfill that obligation under the agreement was not entitled to claim any amount from the respondent.

7. We have heard learned counsel for the parties at some length. The material facts are not in dispute. That a Service Provider Agreement was executed between the parties is admitted. That Article 7 of the said agreement provides for settlement of the dispute in relation to the agreement by way of arbitration is also not in dispute. That disputes have actually arisen between the parties in relation to the agreement is also evident from the averments made in the pleadings. The only method for determination of such disputes is by way of arbitration. Whether or not the petitioner has provided the services envisaged under the agreement and, if so, whether the said services were adequate and satisfactory are matters that can be examined only by the Arbitrator. So also the question whether the claim made by the petitioner is time barred cannot be examined in the present proceedings and shall have to be left open to be raised before the Arbitrator. There is, in that view, no gainsaying that the present petition under Sections 11(5) and 11(12) shall have to be allowed with appropriate directions, particularly when this Court is concerned primarily with the question whether an arbitration agreement exists between the parties and if so whether the disputes falling within the scope of the agreement have arisen for determination. Our answer to both these questions being in the affirmative, the petitioner has made out a case for appointment of an Arbitrator and for reference of the disputes for adjudication to him/her.

8. In the result, we allow this petition, and appoint Ms. Justice Rekha Sharma, former Judge of the High Court of Delhi as a Sole Arbitrator for adjudication of the disputes that have arisen between the parties in relation to the Service Provider Agreement executed between them. We leave it open for the parties to make their claims and counter claims in relation to the agreement afore-mentioned before the Arbitrator. All contentions otherwise open to the parties on facts and in law shall be open to be urged before the Arbitrator. The petition, is accordingly, allowed with the above directions leaving the parties to bear their own costs.

9. Parties are directed to appear before the Arbitrator on 22nd August, 2016.

.....CJI.

[T.S. Thakur]J. [R. Banumathi]J. [Uday Umesh
Lalit] New Delhi;

July 13, 2016