

(2011) 08 DEL CK 0165

In the Delhi High Court

Case No : Arbitration Petition No. 62 of 2011

APL Polyfab Pvt. Ltd.

APPELLANT

Vs

Technology Information, Forecasting and Assessment Council
(TIFAC)

RESPONDENT

Date of Decision : 16-08-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 15(2), 8, 8(1), 8(3)
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11

Citation : (2012) 1 AD 485 : (2011) 4 ARBLR 199 : (2011) 125 DRJ 376

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Lalit Gupta, Deepak Aggarwal and M.H. Khan, for the Appellant; R.P. Aggarwal and Priyadarshani Verma, for the Respondent

Judgement

Manmohan Singh, J.—The present petition has been filed by the Petitioner u/s 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the Act") for appointment of the Secretary Department of Science and Technology, Government of India, New Delhi as the sole arbitrator to adjudicate upon all the disputes and differences between the parties.

2. The brief facts of the case are that the Petitioner is engaged in the business of manufacturing POLYFAB brand cotton stiffened/coated fabric/sheets, Toe Puff and Counter stiffeners and marketing them to the footwear manufacturers all over the country.

3. The Respondent is a registered society which assists in implementation, inter alia of Technology Projects In the Mission Mode on Advanced Composites, development of technologies / processes from "concept to utilisation" and "until Commercial Exploitation" as one of its activities.

4. It is averred in the petition that on 10.08.2000 the Petitioner and Respondent entered into a Technological Development Assistance (TDA) Agreement. Under

the said agreement, the Respondent was to provide financial assistance to the Petitioner for the purpose of development of new viable technologies, use, exploit and practice the know how using the jute composites components for use in footwear "until commercial exploitation", with technical support from the Indian Jute Industries Research Association (IJIRA) Kolkata. The amount required for the said project was Rs. 1,37,63,500.00 out of which the Respondent agreed to finance Rs. 67,11,500.00 and the remaining amount of Rs. 70,52,000.00 was to be paid by the Petitioner itself.

5. The agreement dated 10.08.2000 contained an arbitration clause i.e. clause xi (a) of the agreement which reads as under:

If any dispute or difference arises between the parties hereto as to the construction, interpretation, effect and implication of any provision of this Agreement including the rights or liability or any claim or demand of any party against other or in regard to any matter under these presents but excluding any matters, decisions of determination of which is expressly provided for in this agreement, such disputes or differences shall be referred to the sole arbitration of the secretary of the department of Science and Technology, Government of India or that of his nominee and his decision shall be binding on all parties.

6. It was agreed that the Petitioner shall pay an amount of Rs. 80,53,800 as per the repayment schedule of the agreement and it was payable in five annual installments of Rs. 16,10,760/- each, commencing from February 2003 to February 2007. The agreement also provided for an Advisory & Monitoring Committee to be appointed by the Respondent in consultation with other parties for reviewing and monitoring the progress of the project and to inspect the work. The said project was to be completed within a period of 18 months.

7. It is stated by the Petitioner that vide Deed of Hypothecation dated 10.08.2000, the Petitioner created the first charge in favour of the Respondent by way of hypothecation. The Respondent released a sum of Rs. 67,11,500/- in favour of the Petitioner and the same was utilized by the Petitioner for purchasing plant and machinery to set up a project at 48/C Matheswartolla Road, Kolkata.

8. It stated by the Petitioner that due to a number of reasons the Petitioner could not create the viable technology of four products and complete the project. Therefore the Petitioner requested the Respondent to reschedule the payment of TDA and explained it to the Respondent that due to acute financial hardships the Petitioner needed further time for realization of the post dated cheques given to the Respondent and requested the Respondent not to present the old cheques, as the bank accounts of the same had been closed. The Petitioner further clarified the issue of post dated cheques was not a part of the agreement, and the cheques were only issued by the Petitioner on the request of the Respondent.

9. Vide letters dated 16.01.2004, 18.09.2006, 25.08.2006 and 16.03.2004 the Petitioner requested the Respondent not to present the cheques to the Bank.

Further, the Petitioner also made repayments of Rs. 3,00,000/- and 400,000/- during 2003-2004 and Rs. 17,16,140/- in six installments of Rs. 2,00,000/-, Rs. 2,00,000/-, Rs. 6,00,000/-, Rs. 3,00,000/-, Rs. 3,00,000/-, and Rs. 1,16,140/- respectively during 2005-2006.

10. It is further stated by the Petitioner that despite knowing the financial constraints of the Petitioner, the Respondents still filed various criminal cases against the Petitioner in different courts of Delhi and has also foiled a recovery suit for recovering Rs. 82,19,533/- before this Court.

11. By letter dated 07.12.2010 the Petitioner requested the Secretary, Department of Science and Technology, Government of India, New Delhi to act as an Arbitrator and resolve the disputed between the parties. But vide letter dated 21.12.2010 the Respondent refused to appoint any Arbitrator. Therefore the Petitioner filed the present petition.

12. The main contention of the Respondent is that its civil suit No. 1580/2009 for recovery of Rs. 82,19,533.00 along with interest against the Petitioner is pending before this Court. The Petitioner herein has filed the written statement in support of its case instead of filing of an application u/s 8 of the Arbitration and Conciliation Act, 1996 by invoking the clause of arbitration. In view thereof, the Petitioner has lost its right to invoke arbitration. Thus, the present petition is not maintainable. The following decisions have been referred to by the learned Counsel for the Respondent regarding the objection of waiver:

a. Orchid Electronics v. Vinitec Electronics Pvt. Ltd. 2007 VI AD (Del 538).

b. Ardy International (P) Ltd. and Another Vs. Inspiration Clothes and U and Another,

c. Eastern Medikit Ltd. v. R.S. Sales Corporation and Anr. 137 (2007) DLT 626.

13. On the other hand, learned Counsel for the Petitioner has referred to the written-statement filed by the Petitioner in the suit filed by the Respondent. It appears from the written-statement that in fact the Petitioner has taken a specific plea of existence of agreement between the parties which provides arbitration clause. Para 5 of the preliminary objections reads as under:

5. That the suit of the Plaintiff is not maintainable as the same is barred by the provisions of Section 8 Arbitration & Conciliation Act 1996 Categorically provides that where an action is a subject matter of arbitration is brought before a judicial authority, the matter should be referred to the arbitration. The agreement entered between the parties in the present matter provides for an Arbitration clause in case of dispute between the parties. Clause XVI(a) of the agreement dated 10/08/2000 provides "If any dispute or difference arises between the parties hereto as to the construction, interpretation, effect and implication of any provision of this Agreement including the rights or liability or any claim or demand of any party against other or in regard to any matter under these presents but excluding any matters, decisions of determination of which is

expressly provided for in this Agreement, such disputes or differences shall be referred to the sole arbitration of the secretary of the department of Science & Technology, Government of India or that of his nominee and his decision will be final and shall be binding on all the parties.

14. The said written-statement was filed in the month of February 2010. Later on, the Petitioner also filed an application for reference to the arbitration and stay of proceedings. The said application is pending for disposal.

15. So admittedly, in the written statement, it was pleaded by the Petitioner that there arbitration clause and the Petitioner also filed a separate application for reference. In view of the latest decisions passed by the Supreme Court and the facts of the present case I feel that there is no force in the submission of the Respondent that even if the application in civil suit is filed for invoking the arbitration clause and specific averment made in the statement which was filed earlier to the said application, the Court has no power to appoint the arbitrator as per arbitration clause and refer the matter to the arbitration for adjudication of the disputes between the parties. In the similar situation, the Supreme Court in the case of Vijay Kumar Sharma @ Manju Vs. Raghunandan Sharma @ Baburam and Others, has dealt with almost same issue in para 9 of the judgment which reads as under:

9. It is evident from Sub-section (3) of Section 8 that the pendency of an application u/s 8 before any court will not come in the way of an arbitration being commenced or continued and an arbitral award being made. The obvious intention of this provision is that neither the filing of any suit by any party to the arbitration agreement nor any application being made by the other party u/s 8 to the court, should obstruct or preclude a party from initiating any proceedings for appointment of an arbitrator or proceeding with the arbitration before the Arbitral Tribunal. Having regard to the specific provision in Section 8(3) providing that the pendency of an application u/s 8(1) will not come in the way of an arbitration being commenced or continued, we are of the view that an application u/s 11 or Section 15(2) of the Act, for appointment of an arbitrator, will not be barred by pendency of an application u/s 8 of the Act in any suit, nor will the Designate of the Chief Justice be precluded from considering and disposing of an application u/s 11 or 15(2) of the Act. It follows that if an arbitrator is appointed by the Designate of the Chief Justice u/s 11 of the Act, nothing prevents the arbitrator from proceeding with the arbitration. It also therefore follows that the mere fact that an appeal from an order dismissing the suit under Order 7 Rule 11 CPC (on the ground that the disputes require to be settled by Arbitration) is pending before the High Court, will not come in the way of the appointment of an arbitrator u/s 11 read with Section 15(2) of the Act, if the Authority u/s 11 finds it necessary to appoint an Arbitrator. Therefore the first contention of the Appellant is liable to be rejected.

16. In view of above, the present petition is allowed and consequently the Secretary Department of Science and Technology, Government of India, New

Delhi, is appointed as sole Arbitrator to adjudicate the disputes and differences between the parties arising out of or in connection with agreement dated 10.08.2000 as per the provisions of the Arbitration and Conciliation Act, 1996.

17. He shall commence the proceedings as per the terms and conditions of the agreement after serving the proper notice to the parties.

18. The present petition is disposed of with these directions.