
(1996) 07 DEL CK 0083

In the Delhi High Court

Case No : Interim Application No. 10687 of 1994 and Suit No. 1311 of 1994

Applied Electronics Limited

APPELLANT

Vs

Mahanagar Telephone Nigam Ltd. and Another

RESPONDENT

Date of Decision : 01-07-1996

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : (1996) 3 AD 709 : (1996) 64 DLT 133

Hon'ble Judges : Manmohan Sarin, J

Bench : Single Bench

Advocate : A.K. Verma and A.K. Sikri, for the Appellant;

Judgement

Manmohan Sarin, J.

(1) The defendant No. I M/s. Mahanagar Telephone Nigam Limited (MTNL) has moved the above application in the suit, u/s 34 of the Arbitration Act, 1940, for staying proceedings in the suit, in view of their being an arbitration agreement in the contract dated 28.2.1995, which is the subject matter of the aforesaid suit.

(2) The defendant's case is that Clause 2 of the aforesaid contract contains an arbitration Clause, categorically providing for reference of disputes and differences to the sole arbitration of the Chief Managing Director of Mtnl or his nominee.

(3) The present suit has been filed by the plaintiff for recovery of Rs. 1,97,11,751 .00 (Rs. One crore ninety seven lakh eleven thousand seven hundred and fifty one only) against Mtnl as defendant No. I and U.O.I as defendant No. 2. In addition, the plaintiff sought an injunction restraining the defendants from disconnecting the existing pay phones. A further declaration is sought that the defendants are not entitled to reduce the commission payable. The plaintiff also claims compensation for the losses suffered on account of excessive metering and billing and wrongful disconnection of telephone connections and downward revision in the commission.

(4) The reply to the application u/s 34 of the Arbitration Act has been filed by the plaintiff and rejoinder thereto has been filed by the defendant No. 1. The plaintiff does not dispute the arbitration agreement contained in the contract dated 28.2.1991. It is also not disputed that the subject matter of claims in the suit would also come within the ambit of the arbitration agreement. The plaintiff opposes the application u/s 34 of the Arbitration Act 1940 on the following grounds:

(I) Arbitration agreement is not valid and binding being opposed to public policy and hit by the Provisions of Indian Contract Act. (ii) Parties to the suit are not the parties to the arbitration agreement. The plaintiff has impleaded Union of India as one of the parties in the suit and Union of India is not a party to the arbitration agreement. (iii) The suit involves complex question of law which should not be decided by the Arbitrator. (iv) The defendant No. 1 was not ready and willing toward the conduct of arbitration. (v) Likelihood of bias in the mind of Arbitrator appointed by the Cmtl and there being no right to fill the vacancy of the Arbitrator successively.

(5) Let us examine each of the grounds put forth by the plaintiff.

(I) Arbitration agreement is not valid and binding being opposed to public policy and hit by the Provisions of Indian Contract Act.

Counsel for the plaintiff submitted that the plaintiff had not agreed to the inclusion of the arbitration agreement and the contract was got signed by the defendant by using undue influence. It is stated that it was a case of unconscionable bargain. The defendant Mtnl being in superior and more powerful position than the plaintiff, exploited the situation. Learned Counsel Mr. Arun Verma narrated the background in which the contract was entered into. He submitted that the plaintiff had protested against the inclusion of an arbitration clause in its proposal. However, the agreement was signed after a period of one year by which time the plaintiff had made huge financial commitment and the defendant No. 1 exploited the predicament of the plaintiff by misusing its superior and the dominant bargaining position. Learned Counsel relied on Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, and LIC of India and Another Vs. Consumer Education and Research center and Others, in support of his contention.

I find from the record that in the tender submitted, the plaintiff had only canvassed for a detailed comprehensive and fair agreement, which would avoid cause for any dispute or reference for arbitration. The plaintiff also suggested that arbitration, if it all needed, be done by an independent agency as both plaintiff and Mtnl would be interested parties. There was thus no categorical refusal to have an arbitration agreement. In the event, on 28.2.1991, the contract was signed, which included an arbitration agreement. Accordingly, reference to pro-contract negotiations is really of no avail. Learned Counsel for the defendant has described this plea of the defendant as an afterthought. It is

significant to notice, even in the suit filed by the plaintiff, there is not any averment that the contract dated 28.2.1991, which included the arbitration agreement had been entered into by exercise of undue influence or exercise of dominant bargaining power by the defendant. It was not the case of the plaintiff even in the suit that the said agreement was unconscionable. It is the admitted position of the parties that the agreement has been acted upon. The present plea which was not even taken in the suit filed on 7.11.1994, but taken in the reply dated 28.10.1994 to the present I.A. is obviously an after thought and a futile attempt to assail the arbitration agreement. I may also notice the contention of the defendant that it is not open to the defendant to challenge the existence or validity of the arbitration agreement, even in Section 34 proceedings after the substantive remedy of plaintiff u/s 33 has become barred by limitation, agreement having been entered into on 28.2.1991, it would not be open to the defendant to take this even by way of defense to an application u/s 34 of the Arbitration Act. It is not necessary for me to go into this question in view of the finding being returned by me. I hold that the above plea of the plaintiff of the arbitration agreement not being binding is without any merit and deserves no credence and is rejected. It is not necessary in this view of the matter to refer to the authorities cited. (ii) Parties to the suit are not the parties to the arbitration agreement. The plaintiff has imp leaded Union of India a", one of the parties in the suit and Union of India is not a party to the arbitration agreement.

The plaintiff's contention is that the suit has been filed against Mtnl as well as Union of India. Union of India is admittedly not a party to the arbitration agreement, which the defendant is trying to enforce. The plaintiff inter alias claims in suit commission allegedly short paid by the defendant-MTNL. The commission the plaintiff contends was reduced as per the direction of defendant No. 2 i.e. Union of India. Accordingly, the plaintiff contends that the Union of India was a necessary and proper part to the suit. The plaintiff relies on Apollo Tyres Limited v. National Insurance Limited and Others 1987 (1) A R 45. The present contract dated 28.2.1991, is between the plaintiff and MTNL. The defendant MTNL's contention is that it is empowered under the terms of the contract to vary the commission payable. There is no financial transaction between the plaintiff and the Union of India. No claim will lie against the Union of India, simply because it issued a circular for reduction in commission which was acted upon by the defendant-MTNL. The same would not make the Union of India a necessary party. The presence of Union of India does not appear to be necessary for adjudication or determination of the matters in controversy, and it cannot be said that the arbitration cannot proceed or decided in the absence of Union of India. This is specially so when it is not disputed that the subject matter of the suit and the claims therein are within the ambit of the arbitration agreement. The case relied on by the plaintiff M/s.Apollo Tyres Limited v. National Insurance Limited and Others, (Supra) is clearly distinguishable on facts and does not advance the plaintiff's case. In the said case, the Court had reached a conclusion that apart from the parties to the suit not being parties to

the agreement, the scope of the arbitration was limited as against the scope of the suit. Further there were complicated questions of law and facts that require to be determined by a Court of Law. It was difficult to separate and split up the case of the parties and the presence of all of them was required for adjudication of the matter in arbitration. The present case appears to be one, where the Union of India is not a necessary party and cause of action is against defendant No. 1. The plaintiff is not entitled to stay as it would otherwise amount to circumventing the arbitration agreement. Reference may usefully be made to *Srivenkateswara Constructions and Others Vs. The Union of India*, . Accordingly, this ground is also without merit.

(III) The suit involves complex questions of law and fact which should not be decided by the Arbitrator. Mr. Arun Verma, learned Counsel argued that there was likelihood of complex legal questions arising in the arbitration proceedings, which would not be easy for the Arbitrator to decide and it would necessitate bringing back disputes to the Court. Learned Counsel contends that the action of defendants in reducing the commission had been assailed in Writ Petitions by some of the parties, which were dismissed. In the case of the plaintiff, the Writ petition was dismissed for non prosecution. A question may arise whether the bar of res-judicata would apply or not? I am unable to appreciate this contention. Simply because the defendant-MTNL may seek to rely upon a decision of the Division Bench in Writ Petition, in support of their contention that revision of commission was permissible under the Contract, it would not make the same a complex matter. It would be open to the plaintiff to argue that the said judgment would not be applicable in the instant case. These are not the kind of questions of law or fact because of which arbitration should be given of go bye. It goes without saying that in every arbitration case, questions regarding the interpretation of the provisions of contract or same question of law arise. It is only in those rare cases, which involve complex questions of law that discretion is exercised not to stay the suit. I do not find the present case to be one of that class. (iv) The defendant No. I was not ready and willing towards the conduct of arbitration.

Learned Counsel for the plaintiff submitted that the plaintiff had raised the question of short payment and breach of contract by the defendant time and again. Learned Counsel has drawn my attention to the various communications addressed to the defendants culminating in the legal notice dated 19.10.1993 sent for the plaintiff appearing at page 219 of the Paper Book. By this notice, after setting out the plaintiff's case, a demand was made for a sum of Rs. 1,48,58,392.00 . It was stated that if the amount was not paid within 30 days, the plaintiff would claim interest at the rate of 18%. The notice further stated that in case of failure to comply with the demand made, the plaintiff would be constrained to resort to legal action to enforce its claim. The defendant sent its reply through its Counsels letter dated 30.12.1993 refuting the allegations. It was claimed that the plaintiff among other breaches, had instead of operating the P.C.OS themselves, sublet the same to private individuals. Various

malpractices being practiced were set out. The defendant reiterated that it was permissible under the contract to reduce the commission from 20 paise to 10 paise and that the plaintiff from 1.6.1991 was being paid commission on the revised basis. The agreement had been acted upon for over two and a half years. The allegations of excessive billing were denied. The defendants claim that a sum of Rs. 61.55 lacs is due on account of the call charges for which the money had already been collected by the plaintiff from the public. The plaintiff was called upon to withdraw the notice and pay the sum of Rs. 61.55 lacs Along with interest. By the mere inaction of the defendant in not demanding arbitration in response to the notice, an inference of defendant not being willing for arbitration cannot be drawn.

IT is pertinent that in the notice of demand, the plaintiff did not specify that a suit for recovery would be instituted or that the arbitration agreement was not binding. The suit was instituted in June, 1994 while the defendants were served on 12.8.1994. The defendant-MTNL thereupon made a request to the Cmd for appointment of an Arbitrator in respect of its claims of Rs. 61.55 lacs plus interest and one Sh. G.R. Gupta was appointed as Arbitrator for adjudicating upon the claims of the defendant. The plaintiff protested against the said appointment on 6.2.1995. On 1.3.1995, Sh. Mahender Kumar, was appointed Arbitrator in place of Sh. G.R. Gupta. The plaintiff again protested against the said appointment. It is thereafter that Ms. Sang Khumi, the present Arbitrator was appointed.

THE defendant had moved the present application u/s 34 of the Arbitration Act in December, 1994 i.e. before filing of the written statement or taking any steps or proceedings in the suit. In the application, the defendant had clearly averred that it has been ready and willing to participate in the arbitration proceedings. From the foregoing facts, it is clear that the defendant No. I was ready and willing to participate in the arbitration at the commence merit of the suit. On the other hand, the plaintiff had never questioned the arbitration agreement hit her to before. No reference was made in the suit. Even in the notice of demand, it was not stated that a suit is to be instituted for recovery. The defendant at the first available opportunity had taken the objection and moved the application for stay of the suit. It is further noticed that in the correspondence referred to, the plaintiff had really been protesting against revision of commission which it termed as illegal and had been seeking redress from the defendant. The plaintiff had at no stage made any demand for reference of disputes or claims to arbitration. In this view of the matter, it cannot be said that the defendant was not willing to refer the matter to arbitration. The defendants have demonstrated their readiness and willingness to refer the matter to the arbitration. The application contains an averment to this effect. This ground also is devoid of merit. (v) Likelihood a bias in the mind of Arbitrator appointed by the Cmd Mtnl and there being no right to fill the vacancy of the Arbitrator successively.

The plaintiff's contention is that the subject-matter of the claims have been

raised time and again before officers of defendant No. 1 up to the level of Cmd Mtnl and they have expressed their opinion in one way or the other against the plaintiff. The Arbitrator appointed, being a nominee or an official of the Mtnl, would not be able to do complete justice. The plaintiff has a reasonable apprehension of bias on the part of the Arbitrator the inability to do justice. Further it is argued that the arbitration clause provided that in case the nominated Arbitrator is unable to act for any reason whatsoever then there shall be no arbitration. Simply because various representation of the plaintiff made during the currency of the contract, for relief and against the revision in commission were not acceded to, is no ground for a reasonable apprehension of bias or inability to do justice as the plaintiff claims to nurture. No material has been produced or placed on record to show any bias or any reasonable apprehension for the same as against the nominated Arbitrator. The plaintiff had accepted the arbitration agreement with open eyes and the clause cannot be given a go bye on the basis of misgivings expressed by the plaintiff.

AS regards the power of the Cmd to nominate the Arbitrator being exhausted after having exercised once, the same is without merit. Reference maybe made to Clause 2.1 which runs as follows. "It is further a term of this agreement that no person other than the person appointed by the Cmd Mtnl as aforesaid should act as Arbitrator and if for any reasons that is not possible the matter is not to be referred to Arbitration at all."

This Clause is intended to provide that only person appointed by the Cmd are to act as an Arbitrator and no other person. It does not limit the power of Cmd of Mtnl to appoint the Arbitrator more than once. Therefore, if an appointed Arbitrator is unable to act for some reason, the Md has a right to appoint another person as Arbitrator. The clause does not cease to have effect. This plea of the plaintiff is also without any merit.

(6) In view of the foregoing discussions, I find that the grounds raised by the plaintiff in opposing the application u/s 34 of the Arbitration Act are without any merit. The arbitration agreement is not in dispute. The subject-matter of the suit, falls within the ambit of the arbitration agreement. The defendant has demonstrated its readiness and willingness to proceed with arbitration. There is thus no sufficient reason not to refer the matter to the arbitration. The suit is liable to be stayed. I accordingly, allow the application u/s 34 of the Arbitration Act and stay the suit.