
(2014) 01 DEL CK 0434

In the Delhi High Court

Case No : CM (M) 576/2011, CM Nos. 9336 and 11612/2011

Bharat Heavy Electrical Ltd.

APPELLANT

Vs

Shri Ashutosh Engineering Industries and Others

RESPONDENT

Date of Decision : 08-01-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16 (2), 37, 7
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10
Constitution of India, 1950 — Article 227

Citation : (2014) 01 DEL CK 0434

Hon'ble Judges : Najmi Waziri, J

Bench : Single Bench

Advocate : Sudhir Nandrajog, Sr. Advocate and Arvind Chaudhary, Advocates for the Appellant; K.G. Sharma, Advocates for the Respondent

Judgement

Najmi Waziri, J.—This is a petition filed under Article 227 of the Constitution of India, challenging the order of 21st March, 2011 passed by the Learned Additional District Judge - 03 ("ADJ"), South District, Saket Courts ("impugned order") allowing Arb No. 131 of 2010 ("appeal"). The appeal was filed under section 37 read with section 16 (2) of the Arbitration and Conciliation Act, 1996 ("Act").

2. Shorn of irrelevant details the origin of the case can be traced to Civil Suit no. 14-B of 2009, filed by the respondent no. 1 herein in the court of the Additional District Judge, Raipur, Chhattisgarh against the petitioner and respondents no. 2 to 5 herein, for recovery ("Suit"). Admittedly, the Suit was filed by the respondent no. 1 challenging the action of the petitioner in encashing a bank guarantee issued by the respondent no. 1 to the petitioner for an amount of Rs. 5,22,611/- (Rupees five lakh twenty two thousand six hundred eleven only). The said bank guarantee was issued in respect of certain purchase orders placed by the petitioner on the respondent no. 1.

3. Admittedly, the respondents no. 2 to 5, who are employees / officers of the

petitioner, are not parties to the purchase orders. It is also admitted that the bank guarantee was not in favour of the respondents no. 2 to 5 herein and could not have been encashed by them in their personal capacity and they had only been corresponding with the respondent no. 1 qua the alleged illegal action of encashment of the bank guarantee.

4. The said amount of Rs. 5,22,611/- (Rupees five lakh twenty two thousand six hundred eleven only) is said to have been misappropriated by the petitioner and the respondents no. 2 to 5 when the petitioner invoked the bank guarantee as aforesaid; which invocation is supposed to have triggered the cause of action. It is an admitted position that the petitioner entered appearance in the Suit and raised a preliminary issue as to the jurisdiction of the Court to try the suit in view of existence of arbitral clause/s in the purchase orders. The respondent no. 1 sought to contend at that juncture that the matter is not arbitrable inasmuch as the it has raised issues of fraud against the petitioner and respondents no. 2 to 5.

5. The Suit was sent to the Lok Adalat, Raipur, Chhattisgarh. It is the case of the respondent no. 1 that before the Lok Adalat, a joint application for compromise was filed by the parties whereunder the parties agreed to refer the controversy in the suit to arbitration. The petitioner does not deny the factum of having filed the application or of having agreed to refer the controversy in the suit to arbitration. What the petitioner however denies is that the application for compromise has been filed qua the entire controversy in the suit, as is sought to be contended by the respondent no. 1. The application was allowed by the Lok Adalat by its order dated 6th September, 2009, the respondent no. 1 proceeded to file its claim before the learned Sole Arbitrator ("arbitrator"), praying for substantially the same relief as in the Suit, against the petitioner and the respondent no. 2 to 5.

6. The petitioner entered appearance in the arbitral proceedings and filed an application under Order I rule 10 of the Code of Civil Procedure, 1908 ("Code"). By the application, the petitioner sought deletion of respondents no. 2 to 5 from the array of parties in the claim. It was contended that the reference to arbitration was under the arbitral clause/s in the purchase orders and that the said respondents are neither party to the purchase orders, nor have they acted in their personal capacity in dealing with the respondent no. 1, and that in any case the proceeds from the encashment of the bank guarantee has admittedly gone only to the petitioner. In reply to the application the respondent no. 1 contended that the reference to arbitration is not under the purchase order/s, but is under the order of 6th September, 2009 of the Lok Adalat. The respondent no. 1 contended that the entire controversy in the Suit has been referred to arbitration and inasmuch as the suit included contentions and prayers against the respondents no. 2 to 5, the reference is qua not just the petitioner, but also the respondents no. 2 to 5.

7. The arbitrator, after considering the contentions of the parties, allowed the application and directed deletion of respondents no. 2 to 5 from the array of

respondents in the arbitration. He reasoned:

7(i) The Suit was filed challenging the invocation of the bank guarantee - itself issued under the purchase orders that contain the arbitral clause/s - and the appropriation of monies therefrom by the petitioner.

7(ii) The Suit was referred to Lok Adalat on the basis of an application by the Petitioner.

7(iii) The Lok Adalat, by its order of 6th September, 2009, referred the matter to arbitration.

7(iv) The claim in the arbitration is filed seeking recovery of the same amount, on the same cause of action.

7(v) For an arbitration to commence, it has to be based on an agreement between the parties who have a defined legal relationship inter se.

7(vi) In the instant case, the relevant arbitral clause is the arbitral clause found in the purchase orders, on the basis of which the Suit, as well as the claim is filed.

7(vii) The respondents no. 2 to 5 are neither a necessary parties, nor proper parties to the proceedings, inasmuch as the respondents no. 2 to 5 are not party to the said arbitration agreement; (b) inasmuch as they did not deal with the respondent no. 1 in their personal capacity; and (c) inasmuch as the proceeds of the encashment of the bank guarantee has not gone to them.

8. Impugning this decision of the arbitrator, the appeal was preferred by the respondent no. 1 as aforesaid. In the appeal, the primary ground of challenge was that the arbitral clause/s in the purchase orders are not the relevant arbitration agreement qua the instant reference and the reference has been entered into by the parties on the basis of the order of 6th September, 2009 of the Lok Adalat, which referred all the controversies between the parties including those against the respondents no. 2 to 5. The petitioner herein, in reply, contended inter alia that the compromise application was, in any case, filed only by the petitioner and the respondent no. 1 and that the respondents no. 2 to 5 were not parties to the same.

9. The appeal was allowed by the impugned order. It, inter alia, reasoned:

9(i) The Suit was filed against the respondent no. 2 to 5 as well as the petitioners.

9(ii) The contract between the parties provides for resolution of disputes by arbitration before GM/(TBG), BHEL, Bhopal or any other person the sole arbitrator may nominate.

9(iii) Upon the Suit being referred to the Lok Adalat, a joint application was filed by the parties seeking reference to arbitration before GM (TBGMM), BHEL, Integrated Office Complex, Lodhi Road, New Delhi.

9(iv) This application seeking reference to arbitration is not only of disputes arising under the contract between the parties, but also qua alleged unlawful encashment on the bank guarantee.

9(v) By the order of 6th September, 2009, the Lok Adalat allowed this application and referred the parties before it to arbitration.

9(vi) Since on the date of passing of the order of 6th September, 2009, the logical sequitur thereof is that the order of reference of 6th September, 2009 is qua all the respondents before the Lok Adalat, including the respondents no. 2 to 5.

9(vii) The Suit had allegations of fraud and prayers against respondents no. 2 to 5 as well, which cause of action still subsists against them.

9(viii) The arbitrator has clearly misconducted the proceedings by assuming that the reference was under the contracts between the parties, when it was under the order of 6th September, 2009.

9(ix) Thus, the respondents no. 2 to 5 are necessary parties to the arbitration proceedings and ought to not have been deleted.

10. Aggrieved by the same, the petitioner has preferred the instant petition as aforesaid. Mr. Sudhir Nandrajog, learned Senior Counsel for the petitioner submits that the impugned order is patently illegal and contrary to the records. He submits that the order of 6th September, 2009 of the Lok Adalat cannot bind the respondents no. 2 to 5, given that they never appeared before the Lok Adalat, nor were they party to the joint compromise application. He drew the attention of the Court to the copy of the joint compromise application wherein only the signature of the authorised representative of the petitioner is affixed on behalf of the defendants. He submits that the said authorised representative was not authorised by the respondents no. 2 to 5 to represent them in their respective personal capacities in the proceedings, and hence, in any case, the said representative could not have agreed to any consent order on their behalf. He submitted that the impugned order, to the extent that it refers to arbitration persons who are not party to the purchase orders nor to the order of 6th September, 2009, is patently illegal and without jurisdiction.

11. In reply, the learned Counsel for the respondent contended that there is no infirmity in the impugned order. He submitted that the compromise application was filed on behalf of all the parties before the Lok Adalat, including and on behalf of the respondents no. 2 to 5. He submitted that the order of 6th September, 2009, which was an order passed with the consent of the parties on the basis of the joint compromise application is binding on all parties to the Suit. It was contended that the Suit in itself had allegations of fraud and breach of trust - issues not directly arising out of the purchase orders - and hence any agreement to refer to arbitration would include such disputes over an above the issues arising out of the purchase order. Given that the order of the Lok Adalat

referred all parties to arbitration, the logical sequitur thereof is that the respondents no. 2 to 5 were also referred to arbitration. Hence, he submitted, the impugned order was not in error of law and ought not to be interfered with.

12. I have perused the impugned order, the documents on record and have considered the submissions of the parties, and I am inclined to allow the petition. The impugned order is clearly in excess of the learned ADJ's jurisdiction as it has, in effect, compelled the respondents no. 2 to 5 to resolve their disputes with respondent no. 1 by arbitration, when there was no agreement - as contemplated under section 7 of the Act - on record before it. It is a well established rule of law that the scope of a reference to arbitration has to be decided on the basis of the terms of the arbitration agreement (see Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, . The issue, in the instant matter, however, is as to which document bears the relevant arbitral clause as contemplated under section 7 of the Act.

13. It was in this background that the arbitrator, as earlier observed, had held that the relevant agreement in the reference before him as contemplated by section 7 of the Act is the arbitral clause/s found in the purchase orders. On this basis, the arbitrator held that since respondents no. 2 to 5 are not party to the same, they cannot be bound by the arbitral clause/s therein; he thus directed that respondents no. 2 to 5 be deleted from the record. The learned ADJ, reversed this finding and held that the relevant agreement for the purpose of considering the scope of reference is the order of the Lok Adalat dated 6th September, 2009. Although the petitioner contended that this finding is itself in error of law, this court does not deem it appropriate to interfere with the same in exercise of its revision / supervisory jurisdiction, being a possible interpretation, given the facts of the case.

14. However, the learned ADJ proceeded further to hold that since the respondents no. 2 to 5 were parties to the Suit, the reference by the order dated 6th September, 2009 is binding upon them as well. This, the petitioner submits, is in error of law and is contrary to the records. There is considerable force in this submission. It is evident from the records before the learned ADJ that the joint compromise application was executed on behalf of the defendants therein by a Mr. Swayam Prakash, who is admittedly the authorised representative of the petitioner. There is nothing on record to indicate that the respondents no. 2 to 5 had authorised the said Mr. Swayam Prakash to represent them before the arbitrator. In any case, the respondent no. 1 has neither contended nor produced any document to show anything to the contrary.

15. The Supreme Court, in the case of Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another, , had occasion to consider the issue of when an arbitral agreement can be said to exist between two persons. It held:

12. An analysis of sub-sections (2), (3) and (4) of Section 7 shows that an arbitration agreement will be considered to be in writing if it is contained in: (a)

a document signed by the parties; or (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other, or (d) a contract between the parties making a reference to another document containing an arbitration clause indicating a mutual intention to incorporate the arbitration clause from such other document into the contract.

13. It is fundamental that a provision for arbitration to constitute an arbitration agreement for the purpose of Section 7 should satisfy two conditions: (i) it should be between the parties to the dispute; and (ii) it should relate to or be applicable to the dispute. (See *Yogi Agarwal Vs. Inspiration Clothes and U and Others*,

16. In the present case, the respondents no. 2 to 5 are not party to any agreement embodied in a document with the respondent no. 1 agreeing to refer their disputes to arbitration. Nor is it the case of the respondent no. 1 that there has been an exchange of statements of claims and defence in which it had alleged the existence of an arbitration agreement and the same has been accepted and not denied by the respondent no. 2 to 5 in their defence statement. It is also not the case of the respondent no. 1 that any exchange of letters, telex, telegrams, or other means of telecommunications referred to provide a record of any arbitration agreement between the parties. Thus all that remains to be seen is whether there is any document signed by the parties as provided in clause (a) of sub-section 4 of section 7 of the Act.

17. Admittedly, the respondents no. 2 to 5 are not party to the purchase orders. The respondent no. 1 has not let any evidence or even pleadings to contend that the respondents no. 2 to 5 had consented - before the Lok Adalat - that the matter be referred to arbitration. Given the same, the findings of the learned ADJ that the order of 6th September, 2009 of the Lok Adalat is binding upon the respondents no. 2 to 5 is in excess of jurisdiction and patently illegal - being contrary to the records. Consequently, the impugned order deserves to be and is accordingly set aside. For the above reason, the petition is allowed; there shall be no order as to costs.