
(2009) 10 DEL CK 0348
In the Delhi High Court
Case No : AA No. 135 of 2008

CMC Ltd.

APPELLANT

Vs

Delhi Transport Corporation and Another

RESPONDENT

Date of Decision : 06-10-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 14, 16, 8
Limitation Act, 1963 — Section 14

Citation : (2010) 7 RCR(Civil) 1502

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Shraman Singh and Bhim Raj, for the Appellant; Ajay Verma, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The petition u/s 11 of the Arbitration Act, 1996 is for consideration. The petitioner relies on an agreement dated 10th March, 2003 to which the petitioner, respondent No. 1 and the respondent No. 2 Union of India through the Secretary, Ministry of Communication and Information Technology are parties. The said agreement provides for arbitration as under:

15. ARBITRATION AND JURISDICTION

a) If any dispute or difference arises between the Parties hereto as to the construction, interpretation, effect and implementation of any provision of this Agreement including the rights or liabilities or any claim or demand of any Party against other party or its subcontractor or in regard to any matter under these presents but excluding and 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 Department of Legal Affairs, Govt. of India or that of his nominee. A reference to the arbitration under this clause shall be deemed to be submitted within the meaning of the Arbitration and Conciliation Act, 1996 and any modifications or reenactment there of and the

rules framed there under for the time being in force.

b) i) The venue of the Arbitration shall be at Delhi.

ii) Each Party shall bear and pay its own cost of the arbitration proceedings unless the arbitrator otherwise decides in the award.

iii) The provision of this clause shall not be frustrated, abrogated or become in operative, notwithstanding this Agreement expires or ceases to exist or is terminated or revoked or declared unlawful.

c) The Courts at Delhi shall have exclusive jurisdiction in all matters concerning this Agreement, including any matter arising out of the arbitration proceedings or any award made therein.

2. The respondent No. 2 Union of India did not appear in spite of service and were ordered to be proceeded against ex-parte. The respondent No. 1 DTC has contested the petition inter-alia on the ground that the disputes for adjudication whereof arbitration is sought arise not from the Tripartite Agreement dated 10th March, 2003 aforesaid but from the Bipartite Agreement dated 1st January, 2001 between the petitioner and the respondent No. 1 DTC only and to which the respondent No. 2 Union of India was not a party; the said agreement does not provide for arbitration.

3. Before adjudicating the aforesaid controversy, it may be mentioned that the arbitration agreement on the basis whereof the petition has been preferred is of a named arbitrator; of course the said named arbitrator is also empowered to nominate any other person as the arbitrator. The petitioner avers that it has prior to the institution of this petition got sent a legal notice dated 24th August, 2007 to the said named arbitrator. The petitioner by the said legal notice had invoked the arbitration agreement and called upon the named arbitrator to enter reference in the arbitration proceedings as the sole arbitrator in accordance with the arbitration agreement. The petitioner approached this Court with the contention that the named arbitrator has not taken any steps whatsoever.

4. A petition u/s 11 of the Act lies upon a party to an arbitration agreement failing to appoint arbitrator or a person including an institution failing to perform any function entrusted to him under the appointment procedure or in the case of arbitration of a sole arbitrator the parties being unable to mutually agree on an arbitrator. Section 11 is not concerned with the failure of the named arbitrator to act. The remedy therefore is provided u/s 14(i)(a) of the Act. This petition u/s 11 of the Act is not maintainable for this reason alone.

5. Coming back to the controversy raised by the respondent No. 1 DTC, the respondent No. 1 DTC was planning to implement an Automatic Fleet Management system for its fleet of buses plying in the City of Delhi; the petitioner offered to design, develop and implement the said system comprising of Automatic Vehicle Tracking and Monitoring System, implementation of Transportation Model for scheduling of buses and interfacing of Smart Card

Reader with the Vehicle Tracking System; the Bipartite Agreement dated 1st January, 2001 was executed on the said premise; it is recorded therein that the said project of the respondent No. 1 DTC shall be financially supported by the Ministry of Information Technology, Govt. of India and the petitioner; the agreement records the other terms & conditions agreed between the parties.

6. The Tripartite Agreement was executed for the same project since, as mentioned in the Bipartite Agreement, the finance was to be provided by Ministry of Information Technology, Govt. of India. However, the Tripartite Agreement varies from the Bipartite Agreement not only qua the arbitration clause but also in some other respects.

7. The correspondence exchanged between the parties shows that the project was formally completed on 31st September, 2004. The petitioner claimed that the balance payment of Rs. 13,99,596/- was due to it. All correspondence filed by the petitioner with respect to its said claim and demanding the said payment is from the respondent No. 1 DTC only and there is no letter of the petitioner demanding the said payment from the respondent No. 2 Union of India. Ultimately, a legal notice dated 11th January, 2005 was got issued by the petitioner, again to DTC only demanding the said payment. The respondent No. 1 DTC replied to the said legal notice through its advocate's letter dated 28th February, 2006. The respondent DTC though denying the claim for Rs. 13,99,596/- admitted that a balance sum of Rs. 13,03,412/- was due from it to the petitioner. However, the respondent No. 1 DTC in the said reply contended that the petitioner had in breach of its obligations failed to provide the services during the warranty period owing where to the respondent No. 1 DTC had to incur an expense of Rs. 26 lacs; it was thus stated that after adjusting Rs. 13,03,000/- admittedly due from the respondent No. 1 DTC to the petitioner, the petitioner was liable to pay a sum of Rs. 12,97,000/- to the DTC; the said amount was demanded by the respondent No. 1 DTC from the petitioner.

8. The petitioner upon receipt of the aforesaid reply from the advocate for respondent No. 1 DTC issued the letter dated 24th August, 2007 (Supra) to the named arbitrator. Though in the heading of the said letter reference is made to the arbitration between petitioner, DTC and the Union of India but in the operative paragraph No. 8 of the said letter it is stated:

8. Be that as it may, disputes and differences have arisen between DTC and my clients which are subject matter of an arbitration clause contained in Clause 15 of the said agreement dated 10.03.2003. DIT being one of the parties to the agreement is also, therefore a necessary and proper party....

It would be thus clear that in the letter invoking arbitration clause also the case of the petitioner was of disputes between petitioner and DTC only and not between petitioner, DTC and the respondent No. 2 Union of India, referred as DIT (Deptt. of Information Technology).

9. The respondent No. 1 DTC in its reply to the petition has also stated that it has

already instituted a suit in the court of the District Judge, Delhi against the petitioner for recovery of Rs. 12,97,000/- claimed in the reply aforesaid from the petitioner together with interest. A copy of the plaint in the said suit has also been filed before this Court. Though Union of India has also been impleaded as defendant No. 2 in the said suit but in the plaint itself it is stated that it is a proforma party and the claim of the DTC is against the petitioner only.

10. During the course of hearing, it was informed that the petitioner, though at the time of the agreement a Government owned company, is now in private hands. It was also informed that the petitioner has filed an application u/s 8 of the Act in the suit aforesaid instituted by DTC and the Learned Addl. District Judge before whom the suit and the applications are pending has been adjourning the hearing of the application for the reason of pendency of the present petition in this Court. It is the case of the petitioner that DTC, after the legal notices got issued by the petitioner, has mala fide instituted the aforesaid suit in an attempt to preempt the petitioner. Though the counsels had during the hearing cited dates on which the suit was instituted and on which the present petition was filed in this Court but in my view the same is not relevant for adjudication of the present controversy.

11. The counsel for the petitioner has contended that the Tripartite Agreement containing the arbitration clause, being of a subsequent date would prevail over the earlier Bipartite Agreement; that there being admittedly an arbitration clause between the parties and the named arbitrator having failed to act, the petitioner has become entitled to the appointment of the arbitrator and the suit filed by the DTC cannot also proceed. Reliance in this regard is placed on Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, to contend that even if DTC has any objection to the applicability of the arbitration clause to the facts of the case, the same has to be raised before the arbitrator. On the same proposition reference is also made to Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., On enquiry, as to why the subsequent Tripartite Agreement was executed, it was stated that though the work had started under the earlier Bipartite Agreement but the Union of India was not willing to release the funds unless Tripartite Agreement was executed. On enquiry, as to how the Union of India was concerned/involved in the disputes, it was informed that the Union of India had already released the monies which it was to contribute for the project to the DTC and DTC was illegally withholding the same. No reply was given as to what right, if any, the petitioner has, to claim the monies from Union of India. It was only submitted that Union of India was a necessary party to the disputes and had been impleaded by DTC also in the suit instituted by it.

12. I have wondered as to what objection DTC could have, to the arbitration of the Secretary of Deptt. of Legal Affairs, Govt. of India or his nominee. On a careful perusal of the two agreements, I find that the claims of DTC against the petitioner stem from clauses in the Bipartite Agreement and which are found to

be missing in the subsequent Tripartite Agreement. The fear and/or the real reason of DTC for vehemently opposing this petition appears to be that if arbitration in accordance with the clause in the Tripartite Agreement was to happen, the claims of DTC against the petitioner may not be found to be tenable under the Tripartite Agreement.

13. That brings me to the effect of the subsequent Tripartite Agreement containing the arbitration clause. A perusal of the rejoinder filed by the petitioner to the reply of the DTC to the petition shows that it is not the plea of the petitioner that the Bipartite Agreement stands novated; though it has been pleaded that the subsequent agreement would hold sway over the former, that the earlier Bipartite Agreement has been modified by the latter Tripartite Agreement; that the DTC cannot disown the Tripartite Agreement; that the subsequent Tripartite Agreement is equally effective besides being comprehensive and fixing the rights and liabilities of the Union of India which the earlier Bipartite Agreement could not and did not. The counsel for the petitioner during the hearing also did not urge that the earlier Bipartite Agreement stood novated or superseded by the latter Tripartite Agreement.

14. The counsel for DTC urged that the claim of the petitioner was based on the minutes of the meeting of the Project Review Committee. It was contended that the Project Review Committee was constituted under the Bipartite Agreement; another committee namely, the Project Review and Steering Group was constituted under the Tripartite Agreement. The contention is that the continuance of the Project Review Committee shows that the petitioner and the DTC qua their inter se relationship continued to be governed by the Bipartite Agreement and the subsequent Tripartite Agreement was only qua the role of Union of India.

15. I find that the Tripartite Agreement nowhere provides that the same is in supersession of the earlier Bipartite Agreement. In fact the minutes of the meeting held on 21st September, 2004 of the Project Review Committee in Clause 3 thereof expressly refer to the earlier Bipartite Agreement and the obligations of the petitioner there under and which do not find mention in the subsequent Tripartite Agreement. From the same, it appears that the parties were treating themselves to be bound even by the terms of the Bipartite Agreement and which had not been included in the Tripartite Agreement.

16. Thus the adjudication of the disputes in the present case would necessarily entail decision on whether the petitioner and the respondent No. 1 DTC are governed by the terms & conditions of the subsequent Tripartite Agreement alone or of the earlier Bipartite Agreement also.

17. The question which arises is which is the for a equipped to decide the said question, whether the arbitrator agreed upon in the Tripartite Agreement or the court agreed upon in the earlier Bipartite Agreement. An arbitrator is a creature of an agreement. He is required to decide the dispute in terms of the agreement

only. If the disputes in the present case are to be referred to the arbitrator, the same may be to the prejudice of DTC in as much as the arbitrator may refuse to look into the claims of DTC under Bipartite Agreement which does not provide for arbitration. However, a court would not be under any such disability. I, therefore, consider a court to be the appropriate forum for adjudicating the said disputes between the parties.

18. Yet another reason which compels me to hold that this is not an appropriate case for appointment of the arbitrator is that the arbitration clause is for adjudication of disputes between the parties; there were three parties to the arbitration agreement. That arbitration clause is intended where all three parties are involved in the dispute. From the narrative aforesaid, it is clear that the Union of India is not involved in the disputes which have arisen between the petitioner and the DTC. The counsel for the petitioner has of course contended that the adjudication of the disputes would also entail reference to minutes of the meeting of the PRSG of which Union of India is a party and for this reason, arbitration is the appropriate remedy. However, a perusal of the clause in the Tripartite Agreement Constituting the PRSG shows that PRSG was to comprise not only of representatives of the petitioner, DTC and the representatives of the Union of India but also of experts from R&D/Academic Institutions, industry, the representatives of Planning Commission & Delhi Government. Thus, merely because resolution of the disputes may entail interpretation of the minutes of the meetings of the PRSG to which Union of India was a party would not require the matter to be referred to arbitration under the Tripartite Agreement.

19. Moreover as aforesaid, it is the petitioner's own case that the disputes are between the petitioner and the DTC only. That being the position, disputes between two out of three parties to the Tripartite Agreement cannot be subject matter of arbitration under the Tripartite Agreement.

20. The arbitration clause in the Tripartite agreement of arbitration by the Secretary of the Department of Legal Affairs of the Union of India appears to have been imposed by the Union of India for its own protection and/or in accordance with its policy and is not found to be applicable to disputes to which Union of India is not a party i.e. neither as a claimant nor as a respondent and/or to disputes to which Union of India may only be a proper party.

21. As far as the judgments cited by the counsel for the petitioner are concerned, the same are of prior to the judgment of the seven judge bench of the Supreme Court in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, As per the latter dicta of the larger Bench and as clarified in National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., Chief Justice/his designate in exercise of powers u/s 11 of the Act is necessarily required to satisfy itself that the party who has applied u/s 11 of the Act is a party to such an agreement. In the present case, it has been found as aforesaid that the disputes which have arisen are not subject matter of an arbitration agreement between the parties; the said question cannot be left to be adjudicated by the Arbitral Tribunal u/s 16 of the

Act as contended.

22. Though neither of the counsels have cited any other case lie on the situation which has arisen in the present case, my research shows; (i) in M/s. Chand Chits and Finance (P) Ltd. Vs. M/s. Super Advertisers and others, where an arbitration clause contained in a subsequently signed deed of guarantee by the guarantors was held to cover the disputes between the creditor and the principal debtor also; (ii) in MMTC Ltd. Vs. Shyam Singh Chaudhary and Others another single judge faced with two agreements with one providing for arbitration and the other not, held the disputes to be arbitrable for the reason of the two agreements being intrinsically and integrally intertwined and for the reason of one being supplemental to the other.

23. Even though in the present case also the two agreements are indeed intrinsically and integrally intertwined but owing to a reason aforesaid, I have concluded the disputes raised to be not subject matter of the arbitration clause in the subsequent Tripartite Agreement.

24. The counsel for the petitioner at the fag end of the hearing, also argued that if this Court was not inclined to agree with him, benefit u/s 14 of the Limitation Act should be given to the petitioner, if the petitioner is required to institute a suit for recovery for its dues against the DTC. The power u/s 14 of the Limitation Act has to be exercised by the court before which this suit is instituted and finding in that regard cannot be returned by this Court exercising power as the designate of the Chief Justice. However, all that can be said at this stage is that the facts of the present case are such from which it cannot be said that the petitioner was not prosecuting the remedy of arbitration with due diligence. The question whether the parties are to be relegated to arbitration or to the court for the disputes aforesaid is not free from doubt and has taken considerable time of this Court also for determination.

With the aforesaid observations, the petition is dismissed.

No order as to costs.