
(2015) 03 DEL CK 0188
In the Delhi High Court
Case No : Arb. Pet. 21/2015

DMG Consulting Pvt. Limited

APPELLANT

Vs

Telecommunication Consultants India Limited

RESPONDENT

Date of Decision : 05-03-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 11(8), 12

Citation : (2015) 03 DEL CK 0188

Hon'ble Judges : V. Kameswar Rao, J.

Bench : Single Bench

Advocate : Arjun Krishnan, for the Appellant; P.K. Bansal, Advocates for the Respondent

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J.—The present petition has been filed by the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("Act", in short) for appointment of a Sole Arbitrator to decide the disputes that have arisen between the parties.

2. It is the case set up by the petitioner that pursuant to a Notice Inviting Tender (NIT) to appoint Survey Agency for conducting Base Line Survey under Sample Registration System in all the States/Union Territories across the country, the petitioner having been found successful bidder in four groups i.e. Group No. 1, 6, 8 and 9, a composite purchase order dated July 11, 2011 was issued.

3. As per clause 13 of the purchase order, all other terms and conditions including arbitration clause were to be as per the tender document dated May 5, 2014. The respondent vide its letter dated September 26, 2014 cancelled the work order and forfeited the EMD. This action of the respondent was objected to by the petitioner. Since disputes have arisen between the parties, the petitioner, vide its letter dated November 12, 2014 invoked the arbitration clause and requested the Chairman and Managing Director (CMD, in short) of the

respondent company to act as or to appoint an Arbitrator to adjudicate the disputes between the parties. It was also the case of the petitioner that the statutory limit of 30 days has expired and within the said period, the CMD has failed to appoint an Arbitrator.

4. The present petition was filed on December 18, 2014.

5. When the matter was listed on January 14, 2015, Mr. Arjun Krishnan, learned counsel appearing for the petitioner has brought to the notice of this Court a communication dated December 17, 2014 received by the petitioner from the respondent, whereby the respondent company has communicated the decision of the CMD to appoint Mr. M.K.Yadav, GGM (HRD) , TCIL as the Sole Arbitrator.

6. It was the case set up by Mr. Krishnan, since the communication dated December 17, 2014 was received only on December 22, 2014 after the petition was filed in this Court on December 18, 2014, the order passed by CMD cannot be said to have taken effect unless the same was communicated to the petitioner before filing of the petition, the respondent deemed to have forfeited its right. He relied upon the judgments of the Supreme Court reported as *Bipromasz Bipron Trading SA Vs. Bharat Electronics Limited (BEL)*, , *B.S.N.L. and Others Vs. Subash Chandra Kanchan and Another*, to contend that it is only when the letter appointing Arbitrator is communicated, that it can be said that, the Arbitrator has been appointed. He would also rely upon the judgment of the Supreme Court in *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd.*, to contend that the scheme of Section 11 shows that the emphasis is on the terms of the agreement being adhered to or given effect to as closely as possible and it is not mandatory for the Chief Justice or any person or institution designated by him, to appoint the named Arbitrator, except due regard has to be given to the qualifications required by the agreement and other considerations.

7. Mr.P.K.Bansal, Advocate appeared for the respondent on February 23, 2014 and contested the stand taken on behalf of the petitioner that Mr. M.K.Yadav cannot act as an Arbitrator.

8. Mr.Bansal has stated that he would orally argue this objection raised by the learned counsel for the petitioner.

9. Mr. Bansal would state that the position of law is well settled in terms of the judgments of the Supreme Court in the case of *Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited*, , *Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd.*, and *Intuitive Tech Solutions Private Ltd. Vs. DLF Limited*, and contended that on failure of the other party to act within 30 days, will give a cause of action to the party seeking arbitration to approach the Chief Justice or his designate by way of a petition under Section 11(6) of the Act, still, the Chief Justice or his designate i.e. this Court, while exercising power under Section 11(6) of the Act shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause. It is only in the eventuality, where

circumstances exist giving rise to justifiable doubts as to the independence and impartiality of the person nominated or the circumstances warrant appointment of an independent Arbitrator this Court, after recording the reasons, ignore the designated Arbitrator and appoint someone else. He states that a perusal of the petition would show that no foundation has been laid by the petitioner to doubt the independence and impartiality of Mr. M.K.Yadav and hence, the petition is liable to be dismissed. He would also state that the judgment of the Supreme Court in *Bipromasz Bipron Trading SA* (supra) would not be applicable in the facts of this case inasmuch as the conclusion of the Supreme Court for appointment of an independent Arbitrator was not based only on the ground that the order of appointment of Arbitrator in that case, having been communicated after the petitioner in the said case had filed the petition before the High Court but was also premised on the fact that the apprehension of the petitioner that the Arbitrator would not be impartial was found as reasonable.

10. Having considered the submissions made by the learned counsel for the parties, the issue whether failure on the part of the respondent to communicate the order of appointment of the Arbitrator before the petitioner approached this Court would enable this Court to deviate, from the procedure laid down in the Arbitration clause and appoint an independent Arbitrator is no more *res integra* in view of the judgments of the Supreme Court in *Indian Oil Corporation Limited and Ors.* (supra) and *Bipromasz Bipron Trading SA* (supra) inasmuch the Supreme Court in *Indian Oil Corporation Limited and Ors.* has held that the time bound requirement as found in Sub-Section (4) and (5) is not found in Sub-Section (6) to Section 11. The failure to act as per the agreed procedure within time limit prescribed by the arbitration agreement or in the absence of any prescribed time limit within a reasonable time, will enable the party to file a petition under Section 11(6) of the Act and the Chief Justice or his designate i.e. this Court, while exercising power under Sub-Section (6) of Section 11, shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause. The deviation from the arbitration clause must be for certain reasons to be recorded if doubt arises on the independence and impartiality of the person nominated. In the present case, no such foundation has been laid down in the petition by the petitioner. The relevant paras of the judgment of the Supreme Court in *Indian Oil Corporation Limited and Ors.* (supra) are reproduced as under:-

"48.....

(vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded

ignore the designated arbitrator and appoint someone else."

11. Insofar as the submission of Mr.Arjun Krishnan, that, there was no occasion for the petitioner to lay such a foundation in the petition as the appointment of Mr. M.K.Yadav was communicated only after the filing of the petition, is concerned, no doubt, during the submission, he sought an opportunity to file an affidavit in that regard, which was declined by this Court, as it was noted, no allegations with regard to independence and impartiality of the CMD was made even in the letter of invocation. Further, it was the petitioner who sought reference to arbitration in terms of the arbitration agreement. Pursuant to such a request, Mr.M.K.Yadav was appointed. In any case, in terms of Section 12, if the circumstances exist during the conduct of the proceedings, the petitioner would be within its right to challenge the independence and impartiality of the learned Arbitrator.

12. Insofar as the reliance placed by Mr. Krishnan, learned counsel for the petitioner on the judgment of the Supreme Court in Bipromasz Bipron Trading SA (supra) is concerned, I agree with the submission of the learned counsel for the respondent that the Supreme Court considered, relied and followed its judgment in the case of Indian Oil Corporation (supra) in Bipromasz Bipron Trading SA (supra). In Bipromasz Bipron Trading SA (supra) , the Supreme Court had considered two issues; the first one being whether the order of appointment of Arbitrator made before the other party approached the Court under Section 11(6) of the Act but communicated after the filing of the petition, would be still effective and whether, when, doubt exists on the independence and impartiality of the Arbitrator, the Chief Justice or his designate can deviate from the procedure of appointment.

13. On the first issue, the Supreme Court was of the view that order passed by an authority cannot be said to take effect unless the same is communicated to the party effected, and thereby rejected the submission made for upholding the appointment of Mr.R. Chandra Kumar in that case. The Supreme Court further had on fact situation, doubted the independence and impartiality of Mr.R.Chandra Kumar to arbitrate the disputes arisen between the parties and appointed Justice Ashok C. Aggarwal as the learned Arbitrator, in exercise of its power under Section 11(6) of the Act. In this regard, I reproduce the following paras of the judgment, wherein the Supreme Court agreed with the conclusion in Indian Oil Corporation Ltd. (supra) :

"47. In Indian Oil Corporation Limited and Ors. Vs. Raja Transport Private Limited (supra) , this Court whilst emphasizing that normally the Court shall make the appointment in terms of the agreed procedure, has observed that the Chief Justice or his designate may deviate from the same after recording reasons for the same. In Paragraph 45 of the aforesaid judgment, it is observed as follows:-

"45. If the arbitration agreement provides for arbitration by a named arbitrator, the courts should normally give effect to the provisions of the arbitration

agreement. But as clarified by Northern Railway Admn., where there is material to create a reasonable apprehension that the person mentioned in the arbitration agreement as the arbitrator is not likely to act independently or impartially, or if the named person is not available, then the Chief Justice or his designate may, after recording reasons for not following the agreed procedure of referring the dispute to the named arbitrator, appoint an independent arbitrator in accordance with Section 11(8) of the Act. In other words, referring the disputes to the named arbitrator shall be the rule. The Chief Justice or his designate will have to merely reiterate the arbitration agreement by referring the parties to the named arbitrator or named Arbitral Tribunal. Ignoring the named arbitrator/Arbitral Tribunal and nominating an independent arbitrator shall be the exception to the rule, to be resorted for valid reasons".

48. In view of the aforesaid observations, it would not be possible to reject the petition merely on the ground that this Court would have no power to make an appointment of an arbitrator other than the Chairman-cum- Managing Director or his designate. This Court would have the power to appoint a person other than the named arbitrator, upon examination of the relevant facts, which would tend to indicate that the named arbitrator is not likely to be impartial".

14. Further, reliance placed by Mr.Krishnan on the judgment of the Supreme Court in Northern Railway Administration, Ministry of Railway (supra) is concerned, suffice to state, the same would also not help Mr. Krishnan as the said judgment was also considered and referred to by the Supreme Court in Bipromasz Bipron Trading SA (supra).

15. In view of the above, I do not think that this Court need to interfere with the appointment made by CMD of Mr. M.K.Yadav. Suffice to state, as observed above, if the petitioner has any doubt on the independence and impartiality of the Arbitrator, would be within its right to raise such an issue before the learned Arbitrator in terms of Section 12 of the Act.

16. The petition is accordingly dismissed.