
(2002) 05 DEL CK 0035

In the Delhi High Court

Case No : AA 191 of 2000

D.S. Gupta Contracts Pvt. Ltd.

APPELLANT

Vs

Unison Hotels Ltd. and Another

RESPONDENT

Date of Decision : 31-05-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 15(2), 9

Citation : (2002) 98 DLT 369

Hon'ble Judges : D.K. Jain, J

Bench : Single Bench

Advocate : R.K. Watel, for the Appellant; Rajiv Dutta Ritu Bhullar and Aziza Syed, for the Respondent

Final Decision : Dismissed

Judgement

D.K. Jain, J.—The applicant being a building contractor, was awarded a works contract by the respondents for installation of fire suppression system in Grand Hyatt Hotel, New Delhi. A formal agreement was signed between the parties on 12 February 1997. The contract contained an arbitration agreement in the form of Clause 16.2. Some disputes having arisen between the parties, the applicant filed OMP No. 312/99, u/s 9 of the Arbitration and Conciliation Act, 1996 (for short the Act), in this Court, for appointment of a local commissioner to record measurements of the work executed by it. The local commissioner filed his report and the matter was disposed of by the Court on 23 December 1999 thus:

"Learned senior counsel for the respondents states that the arbitrator shall be appointed within ninety days from today as per the arbitration clause 16.3.

Parties will be entitled to raise claims and counter-claims before the arbitrator.

The petition stands disposed of in view of above statement given by the learned counsel for the respondents."

2. Subsequently, on 11 August 1999, the present application was filed u/s 11 of

the Act by the contractor for appointment of an independent arbitrator on the plea that despite order dated 23 December 1999, respondent No.2 namely, the Managing Director of respondent No. 1 company, the persona designata, had failed to appoint the arbitrator.

3. The application is resisted by the respondents on the ground that as per clause 16.2 of the contract, and the afore-extracted order, it was obligatory for the application to send the list of its claims to the persona designate, where after only the appointment could be made; the respondents in fact reminded the applicant vide their letter dated 7 February 2000 about it; the applicant in their reply dated 28 February 2000 declined to do so, but later, Realizing the true position, with their letter dated 7 September 2000 sent the list of claims to the persona designata requesting him to appoint an arbitrator, whereupon, on 18 September 2000, the latter appointed Shri Sanjeev Garg as the arbitrator and on his resigning on 26 September 2000, appointed Shri M.D. Sharma as the arbitrator; the said arbitrator entered upon reference; called upon the applicant to file its statement of claims but, ignoring it, the applicant filed a miscellaneous application (IA 11227/00) in the present application and by concealing the material facts the application got the proceedings before the arbitrator stayed vide order dated 31 October 2000. The Stand of the respondents, Therefore, is that on the appointment of Shri M.D. Sharma within thirty days of the applicant's letter dated 7 September 2000, the present application is rendered infructuous.

4. I have heard learned counsel for the parties.

5. To appreciate the controversy between the parties, it is necessary at this stage to have an idea of the arbitration clause 16.2 and the correspondence exchanged between the parties. Clause 16.2 reads as follows:

"In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract of the respective rights and liabilities of the parties on any matter in question dispute or difference on certificate to which the contractor may claim to be entitled or if the owner/employer fails to make a decision within reasonable time, then and in any such case, but except in any of the excepted matters referred to elsewhere in these General Conditions, the contractor, after 90 days of his presenting his final claim on the disputed matters, may demand in writing that the dispute or difference be referred to arbitration. Such in question, dispute or difference and only such dispute or difference other than excepted matters of which the demand has been made and no other dispute or difference shall be referred to the arbitration of an officer of the owner/ employer to be nominated by the Managing Director at the relevant time (sic) then by the Board of Directors of the owner/employer and the provision of the Indian Arbitration Act, 1940 for the time being in force, shall apply to such arbitration."

6. After this Court making the aforementioned order on 23 December 1999, the

respondents wrote a letter to the applicant on 7 February 2000 drawing its attention to the aforementioned clause, requested it to send their final claim on the disputed matters so that an arbitrator could be appointed and the due compliance was made with the order passed by this Court.

7. The applicant replied back on 28 February 2000 as under:

"In this connection, we would like to bring to your kind notice that the order dated 23.12.99 passed by the Hon"ble High Court of Delhi in the subject matter clearly states that "Parties will be entitled to raise claims and counter claims before the arbitrator". Therefore, we request you to appoint the arbitrator in terms of the orders passed by the Hon"ble High Court of Delhi, without further loss of time. The claims be submitted to the learned arbitrator in terms of the court order dated 23.12.99."

8. On this conflicting stand of the parties and on respondents' not appointing an arbitrator, the applicant filed the present application u/s 11 of the Act on 11 August 2000. However, during the pendency of this application and presumably Realizing its erroneous understandings of this Court's order, the applicant wrote a letter dated 7 September 2000 to the respondents stating thus:

"Without Prejudice"

"In continuation of our letter No. DSG/Arb-GH-F/2000 dated 28th February 2000 (copy enclosed for your ready reference) we once again request you to appoint an arbitrator in terms of the order dated 23.12.99 Passed by the Hon"ble High Court of Delhi.

We are also enclosing herewith our statement/list of claims for your reference and hope that you will appoint an arbitrator within the shortest period."

9. As is evident from the above, with the said letter the applicant sent the list of claims to the persona designata. Acting exactly in terms thereof, the respondents appointed the arbitrator as noted above.

10. Mr. R.K. Watel, learned counsel for the applicant still insists on appointment of an independent arbitrator on the plea that the persona designata had forfeited his right to appoint the arbitrator on 21 March 2000, after the expiry of 90 days from the date of this Court's order dated 23 December 1999; that the letter of the applicant dated 7 September 2000, written "in continuation" of their earlier letter dated 28 February 2000, enclosing the list of claims was "without prejudice", not meant to be acted upon; that the persona designata acted illegally in acting on the request contained in applicant's letter dated 7 September 2000 and making the appointment and in any case he was not competent to nominate a substitute in place of the earlier arbitrator who had resigned.

11. The question for consideration is whether the persona designata has failed to carry out its contractual obligation under the arbitration agreement and thus,

attracting Section 11(6) of the Act.

12. In my view, on the facts of the present case, answer to the question has to be in the negative, against the applicant. The requirement of the applicant sending a list of its claims along with its request for appointment of an arbitrator, contained in clause 16.2, read in the context of this court's order dated 23 December 1999 and the conflicting stand of the parties thereon, could be debatable. But the applicant themselves, ultimately in their letter dated 7 September 2000, subscribed to the stand of the respondents and put the doubt as to is at rest. If the letter dated 7 September 2000 was not meant to be acted upon, it is difficult to comprehend as to why did the applicant write if, enclosing the list of claims with the request to appoint an arbitrator- clearly in contradiction to the stand in their letter dated 28 February 2000 and after filing the instant arbitration application. They were, thus, blowing hot and cold and when the appointment made, presumably did not suit them, they again swerved. No ostensible reason for it is spelt out or indicated. The appointment was made on the applicant's positive stand and request contained in the said letter and mere adding a caption "without prejudice" on this letter was otiose and meaningless. It leaves little doubt in my mind that Realizing the true purport of this Court's order dated 23 December 1999, the applicant did submit their claim in terms of arbitration clause. it is also clear from the said order that the Court never intended to give a go-by to the arbitration agreement between the parties. It is well settled that when the parties have entered into contract and settled on a procedure, the Court has to respect the terms of the contract entered into by the parties and endeavor to give importance and effect to it. When the party has not disputed the arbitration clause, normally it is bound by it and obliged to comply with the procedure laid down under the said clause (See: Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, . This is what exactly the court did while passing the order dated 23 December 1999.

13. In my opinion, Therefore, the applicant having not initially complied with the procedure laid down in terms of the arbitration agreement between the parties, it cannot be said that there was failure on the part of the persona designate to appoint an arbitrator, attracting Section 11(6) of the Act. As noted above, when the applicant later, in its letter dated 7 September 2000 complied with the said procedure, the persona designate appointed the arbitrator within the statutory period.

14. As regards the contention of learned counsel for the applicant that the persona designate could not appoint shri M.D. Sharma as the arbitrator in place of Shri Sanjeev Garg, it is pointed out by learned counsel for the respondents that the appointment of Shri Sanjeev Garg factually was in respect of another contract and not the contract, subject matter of the present application. This fact is not disputed by the applicant. It was, Therefore, not a case of substitution of an arbitrator. In view of the said clarification, it is unnecessary to go into the question about the power of the persona designata to appoint a substitute in

place of someone withdrawing from the office, though, prima facie, he was competent to do so in terms of Section 15(2) of the Act.

15. For the foregoing reasons, the present application is rendered infructuous and is accordingly dismissed.