

(2009) 09 DEL CK 0077

In the Delhi High Court

Case No : Arbitration Petition 451 of 2008

Engineering Development Corporation

APPELLANT

Vs

Municipal Corporation of Delhi and Another

RESPONDENT

Date of Decision : 22-09-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2009) 09 DEL CK 0077

Hon'ble Judges : S.N. Dhingra, J

Bench : Single Bench

Advocate : Anusuya Salwan, for the Appellant; Divya Kapur and Shifel Trehan, for the Respondent

Final Decision : Dismissed

Judgement

Shiv Narayan Dhingra, J.—By this petition u/s 11 of the Arbitration & Conciliation Act, 1996 ("the Act", for short), the petitioner has prayed for appointment of an arbitrator alleging that disputes arose between the parties to the contract and by a letter dated 12th August, 2008, the petitioner invoked the arbitration clause. This letter was duly served upon respondent but respondent did not take any action in pursuance of this letter. It is submitted that the original agreement containing arbitration clause was in power and possession of respondent, however, a copy of the arbitration clause has been produced.

2. Respondent has taken the stand that the petition was not maintainable since there was no arbitration agreement between the parties. The relationship between the parties was governed by the work order No. WOEE(PR)SZ/TC/2005-0/132 dated 30th September 2005 and this work order does not contain any arbitration clause. It is stated that petitioner was directed to attend the office of respondent and complete execution of formal agreement within seven days of receipt of work order. The petitioner did not comply with the conditions and the present petition was not maintainable.

3. Brief facts relevant for the purpose of deciding this petition are that the petitioner was the successful bidder in respect of work regarding construction of outfall drain for disposal of storm water/ waste in Devli Village in South Zone. After petitioner became successful bidder, the work order dated 30th September 2005 was placed on the petitioner and the petitioner was asked to execute a formal agreement within seven days of receipt of letter awarding the work. It is not disputed that no formal agreement was executed between the parties. It seems that there was some stay granted by the Court in respect of the site and the work did not proceed at all. The time period for execution of work was extended by respondent in view of the stay from this Court. However, petitioner did not execute formal agreement either at the initial stage or later on. On 30th March, 2006, respondent wrote a letter to the petitioner informing that this Court while disposing of a PIL being WP(C) 12408 of 2004 titled as Jeet Ram JNCT v. JNCTD and Ors. has directed MCD to start the work of construction of the said drain via Raju Park Sainik Farm route. The petitioner was asked to make necessary arrangements like mobilization of T&P, procurement of materials, etc. so that the work may be started at site at the earliest possible as per the direction of the High Court, Delhi. In response to this letter, petitioner wrote back to respondent that the time stipulated for the work was over and during the course of the contract period the petitioner suffered losses on various counts. The petitioner informed respondent that respondent has lost right under Clause 2 of the agreement for extension of time or for renewal of the contract since the stipulated date of completion of work was over. The petitioner however stated in its letter that it was ready to start the work only if the rates were increased by 25%. Thus, this contract did not take off. Respondent did not agree for enhancement of the rates and the petitioner did not start the work.

4. It is submitted by counsel for petitioner that it was not necessary that a formal agreement should have been executed. The tender document which was filled up by the petitioner contained an arbitration clause. Since the work order was executed in favour of petitioner, respondent was bound by arbitration clause as contained in the tender document. The petitioner placed reliance on Unissi (India) Pvt. Ltd. Vs. Post Graduate Institute of Medical Education and Research, . In this case, the Supreme Court observed that where a tender document contained an arbitration clause, by reasons of acceptance of tender, a valid arbitration agreement is said to be executed between the parties.

5. The arbitration clause as relied upon by petitioner has been annexed by the petitioner along with this petition as Annexure-A. This arbitration clause provides that it was the terms of the contract that a party invoking the arbitration clause shall give a list of disputes with amount claimed in respect of each disputes with the notice for appointment of arbitrator giving a reference to the rejection by the Chief Engineer. The arbitration clause further provides that it was a term of the contract that no person other than the person appointed by Commissioner MCD should act as an Arbitrator. If for any reason that is not possible the matter should not be referred for arbitration at all.

6. A perusal of letter dated 23rd April 2006 written by petitioner to respondent shows that the petitioner told respondent to close the contract and refund the earnest money and release the bank guarantee given for performance of the contract. The petitioner had not raised a dispute in respect of losses suffered by the petitioner. It is apparent that the petitioner did not comply with the terms of the arbitration clause relied upon by the petitioner which specifically provides that every notice of arbitration shall specify the quantum of amount claimed and specify the list of disputes that the amount claimed in respect of each dispute. Moreover, the arbitration clause provides that if for any reason appointment of an arbitrator was not done by MCD, the matter shall not be referred to arbitration at all. This clause had come for consideration of this Court in Arbitration Petition 219 of 2008 Arvind Construction Company Pvt. Ltd. v. Union of India and Ors. and this Court observed that the parties are bound by the contract entered into between them, including the arbitration clause and if the clause provides that the arbitration proceedings shall be conducted only by a particular arbitrator failing which there shall not be no arbitration, the dispute can be taken up before ordinary civil Court and the petitioner does not have a right to get the an arbitrator appointed through the Court u/s 11 of the Act. The Supreme Court in Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd., held as under:

It is quite common for governments, statutory corporation and PSUs" while entering into contracts, to provide for settlement of disputes by arbitration and further provide that the Arbitrator will be one of its senior officers. If a party, with open eyes and full knowledge and comprehension of the said provision enters into a contract with a Govt./statutory corporation/PSU containing an arbitration agreement providing that one of its Secretaries/ Directors shall be arbitrator, he cannot subsequently turn around and contend that he is agreeable for settlement of disputes by arbitration, but not by the named arbitrator who is an employee of the other party. No party can say he will be bound by only one part of the agreement and not the other part, unless such other part is impossible of performance or is void being contrary to the provisions of the Act. A party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment produces relating to the named arbitrator contained in the Arbitration clause.

7. I, therefore, consider that in view of peculiar arbitration clause in case of non appointment of arbitrator by respondent, the petitioner can approach the civil court and this Court cannot appoint an arbitrator u/s 11 of the Act. The arbitration clause exhausted itself the moment respondent failed to or refused to appoint the arbitrator. The petition is hereby dismissed. No orders as to costs.