
(1999) 09 DEL CK 0028

In the Delhi High Court

Case No : A.A. No. 12/98 & A.A.No. 12/98

Engineering Development Corporation

APPELLANT

Vs

Municipal Corporation of Delhi

RESPONDENT

Date of Decision : 24-09-1999

Acts Referred:

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

Citation : (2001) 1 ARBLR 269(1)

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

Bench : Single Bench

Advocate : Ms. Anusuya Salwan, for the Appellant; Mr. P.D. Gupta and Ms. Bharti Pawar, for the Respondent

Judgement

S.N. Kapoor, J.—Heard learned counsel for the parties at length. Two short questions are required to be considered: one relates to fact of existence of arbitration agreement in between the parties and the other relates to interpretation of subsection (6) of Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act" for short). There is no dispute in between the parties that the following work relating to:

"construction of 15.3 ML capacity additional clear water underground reservoir at 3rd 40 MGD W.T.P. at Wzd @ 88.40% above the scheduled rate at a cost of Rs. 5102726/- (Rupees Fifty One lacs Two Thousand Seven Hundred Twenty Six Only) and at a total cost of Rs. 9598489.20 (Rupees Ninety Five lacs Ninety Eight Thousand Four Hundred Eighty Nine & Paisa Twenty only) excluding rebates subject to terms & conditions contained in offer dt. 4.1.94 and approved by DWS & SD Committee vide its decision No. 2118/DWS & SDC dt. 16.8.94 as per proposal contained in Para 18(1) of the Commissioner letter No. 1853/DWS & SDC dt. 12.8.94."

Was to be performed and was performed to a certain disputed extent by the petitioner after acceptance of petitioner's tender.

2. It is also an undisputed fact that the parties have not signed the formal agreement. However, from the conduct of the parties, it is virtually an admitted case of the respondent that the petitioner was allowed to take the work as is apparent from the letters dated 24th August, 1994 and 12th September, 1994 and from similar other letters.

3. The arbitration clause contained in conditions of contract Annexed with the tender document provides as :-

"The parties further agree to settle the dispute of any nature by arbitration in terms of the arbitration clause reproduced herein :-

"Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used or as to any other questions claims, rights, matters, things, whatsoever in any way arising out, relating to the contract, designs, drawings, specifications, estimates, instructions, orders or conditions of contract or otherwise concerning the work or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof, shall be referred to the sole arbitration of the Commissioner, Municipal Corporation of Delhi. The award of the arbitrator shall be final, conclusive and binding on all parties to this contract."

4. Since the arbitration agreement is not required to be signed separately, it is only required that it should be in writing and it is in writing. Further since the parties have acted upon the said agreement contained in the conditions of the contract annexed with the tender document, the respondent cannot claim that there was no arbitration agreement. It may be mentioned that an arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a definite legal relationship whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a formal or informal agreement but in writing. Subsection (4) of Section 7 of the Act clarifies that an arbitration agreement is in writing if it is contained in: (a) a document signed by the parties; (b) an exchange of letters, telex, telegram or other means of telecommunication which provide a record of the agreement or (c) an exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and non denial by the other. Besides, subsection (5) of Section 7 provides that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, if the contract is in writing and the reference is such to make that arbitration clause part of the contract. Here, though no formal agreement has been executed but tender document indicating certain conditions of contract contains arbitration clause. On the basis of these conditions in tenderer tender was given by the petitioner, was accepted and the petitioner was allowed to go ahead to perform the contract. Since at least general conditions of the tender provide for the arbitration clause,

coupled with exchange of letters allowed the petitioner to perform the contract, it has to be held that there was an arbitration agreement in between the parties even in absence of formally signed agreement.

5. Insofar as the second point relating to the interpretation of subsection (6) of Section 11 is concerned, learned counsel for the petitioner vehemently argued that the Court can appoint an arbitrator itself and is not required to direct the Commissioner of the M.C.D. to appoint a person. In this connection, it would be relevant to refer to subsections (2), (5), (6) and (8) of Section 11. They read as under :

"Appointment of arbitrators - (1)

(2) Subject to subsection (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3)...

(4).....

(5) Failing any agreement referred to in subsection (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties, __-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure.

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointments.

(7)

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to-

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

6. It would be evident that subsection (2) gives the freedom to parties to agree

on a procedure for appointing the arbitrator or arbitrators. It has been made subject to subsection (6). From the scheme of Section 11, it is apparent that Section 11 now, divides the arbitration agreement in two classes: (i) which does not provide the procedure for appointing the arbitrator or arbitrators, and (ii) which provides the procedure for appointing the arbitrator or arbitrators.

7. Insofar as the arbitration clause which does not provide any procedure for appointing the arbitrator or arbitrators, subsection (5) would be applicable. It authorises the Chief Justice or any person to entertain a prayer about the appointment of the arbitrator subject to conditions laid down in subsection (8) of section 11. However, subsection (6) is slightly differently worded. Like subsection (5), subsection (6) does not incorporate the phrase ".... the appointment shall be made upon request of the parties by the Chief Justice or any person or institution designated by him." Instead subsection (6) provides where under an appointment procedure agreed upon by the parties and on failure of the parties to act as required under that procedure. "a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointments." Secondly, subsection (6) does not allow the Chief Justice or any person to accept the prayer for appointment of arbitration at the first sight. However, one has to see what the Chief Justice or any other person or institution designated by him is supposed to take the necessary measure for the purpose of arbitration. In view of the distinct and different language used in subsections (5) and (6), it becomes apparent that the first attempt shall be to keep the parties bound by the agreement in so far the procedure is concerned. The purpose of subsection (6) is to take the measure to ensure compliance with the agreed procedure to appoint arbitrator by issuing necessary direction to the defaulting party. In case the party defaults again, after having been given an opportunity, then that would not be the end of the matter in view of the object of the Act. In such circumstances, the Chief Justice or any person or institution designated by him to take necessary measure, shall certainly be justified in appointing the arbitrator accordingly, on its own, without any further waiting for the appointment by the concerned authority.

8. In view of the disputes mentioned in the petition, it appears that in terms of the arbitration agreement, the respondent should be given time to appoint the arbitrator after taking their consent within a period of four weeks. In case the respondents fails to appoint an arbitrator, then the petitioner shall certainly be at liberty to ask for the appointment of an arbitrator under subsection (6) of Section 11 itself by moving an appropriate application in this very matter. Of course, at that time the Court is supposed to take into consideration the qualifications required under subsection (8) of Section 11. Accordingly, I, direct the respondent to appoint an arbitrator within four weeks. The petition is allowed accordingly subject to payment of cost of Rs. 5000/-.