

(2014) 01 DEL CK 0149

In the Delhi High Court

Case No : IA No. 12367 of 2013 in CS (OS) 1535 of 2013

GKC Projects Ltd.

APPELLANT

Vs

Unitech Machines Ltd.

RESPONDENT

Date of Decision : 17-01-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11 11(5) 11(6)(c) 11(9) 13
Specific Relief Act, 1963 — Section 41

Citation : (2014) 2 ARBLR 146 : (2014) 207 DLT 620

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Atul Sharma, for the Appellant; Geeta Rani, for the Respondent

Judgement

Jayant Nath, J.

IA No. 12367/2013 (u/o 39 R 1 & 2)

1. The present application is filed by the plaintiff seeking ex parte injunction to restrain the defendant from pursuing in any manner or taking steps to pursue the arbitration initiated by the defendant before Justice J.D. Kapoor (Retd.), Sole Arbitrator. The accompanying suit is filed seeking a declaration that the Arbitration Agreement under the Contract between the plaintiff and the defendant has ceased to exist and is inoperative and that the appointment of the sole arbitrator under the Contract between the plaintiff and the defendant is non-est, null and void. Other connected reliefs are also sought.

2. The defendant was awarded a Contract in May 2010 for execution of works relating to large diameter Circulating Water and other connected work by Jindal Power Ltd. at Raipur in Chhattisgarh. Pursuant to the said order, the defendant awarded to the plaintiff a work order dated 14.05.2010 being work for loading and unloading, shifting, storage at site, fabrication, erection, testing and commissioning of piping, mechanical equipment erection, application of primer & wrapping coating, etc. and other miscellaneous work for a total value of about

Rs. 10.15 crores. Subsequently, some amendments were carried out to the original work.

3. The above order contains a dispute resolution clause which provides that in case of any differences between the parties, the same may be referred to the arbitration of the Director-in-Charge of Unitech Machines Ltd. or some other person appointed by him whether or not from the parties concerned.

4. It is stated that on 27.05.2013, the defendant invoked the arbitration clause and appointed Mr. Justice J.D. Kapoor, Former Judge of this High Court as a sole arbitrator. Vide the said communication, it was for the first time informed to the plaintiff that the Director Incharge, Unitech Machines Ltd. which is the named officer as the arbitrator in the Arbitration Clause has been re-designated as Chief Executive Officer w.e.f. August 2011. It is further stated that the person occupying the post of CEO, namely, Mr. B.K. Goel was the very same person who raised the dispute and claims and issued the Arbitration Notice and invoked the Arbitration Clause. Various other objections have been taken.

5. The defendant has filed its written statement, though the same is not record but a photocopy of the same has been placed on record. In the written statement it is averred that the change in the nomenclature of the official title was caused due to an internal arrangement of the defendant Company when the incumbent Director-in-charge left the service of the Company and a new incumbent joined the Company who took over the power and responsibilities of the Director-in-Charge but was appointed as Chief Executive Officer. It is averred that the defendant is a private limited company and unlike government departments or PSUs, there is no post creation/abolition. Reliance is placed on a Board Resolution dated 01.08.2011 in which the power to appoint arbitrator as was given to the DIC was then given to the present CEO. It is further stated that the learned Arbitrator, namely, Mr. Justice J.D. Kapoor, Retired Judge of this High Court has already entered into reference and has held a few hearings. The plaintiff has participated in the arbitration proceedings and the objection regarding maintainability of reference is to be raised before the Arbitrator.

6. I have learned counsel for the parties.

7. Learned counsel for the plaintiff has urged only one point i.e. that as per the Arbitration Clause, the Director-in-Charge, Unitech Machines Ltd. is the only person who can be the arbitrator or can nominate some other person to be an arbitrator. He relies on the judgment of the Hon"ble Supreme Court in the case of Newton Engineering and Chemicals Ltd. Vs. Indian Oil Corporation and Others, to contend that where the post ceased to exist in the Corporation, the arbitration clause does not survive and has to be treated as having worked its course. He further submits that the defendant has submitted himself to the jurisdiction of this Court as they have filed the written statement. They have not filed any application u/s 8 of the Arbitration and Conciliation Act. Hence, it is averred that this Court has the jurisdiction to try the matter and that the appointment of the

Arbitrator is wholly illegal and void. It is further stated that in case the present arbitration proceedings are not stayed, an Award would be passed and the present proceedings would be rendered infructuous.

8. Learned counsel for the defendant on the other hand submits that the post has only been re-designated and it cannot be said to be abolished. She further submits that in any case, it is for the plaintiff to approach the Arbitrator u/s 16 of the Arbitration and Conciliation Act and the appropriate forum to decide the jurisdiction would be the Arbitrator. She further submits that the plaintiff has been appearing before the Arbitrator and the said issue can be raised before the Arbitrator. Learned counsel for the defendant further submits that the judgment of the Hon'ble Supreme Court in the case of Newton Engineering and Chemicals Ltd. vs. Indian Oil Corporation & Ors. (supra) would not be applicable to the facts of this case inasmuch as in that case the arbitration clause provided that no person other than ED (NR) or other person designated by ED (NR) could act as an Arbitrator. It is stated that there is no such similarity in the Arbitration Clause which is subject matter of the present proceedings.

9. Learned counsel for the plaintiff in rebuttal submits that the plaintiff has at the initial stage filed the present suit and has been appearing before the Arbitrator as there is no stay passed by this Court.

10. The Arbitration Clause is Clause 25. The relevant portion of the Clause reads as follows:-

25.0 Disputes & Jurisdiction

All the differences of disputes arising out of this contract shall be resolved through the process of settlement of disputes and arbitration. The provisions of Arbitration and Conciliation Act, 1996 and subsequent amendments thereof shall apply. The arbitration proceeding shall be held at New Delhi and the award shall be published in ENGLISH LANGUAGE only. The sole arbitrator shall give a reasoned award. Delhi courts alone shall have the exclusive jurisdiction in the matter.

1. Any disputes or differences between the parties here to arising out of any notified claim (of the Contractor) included in the final Bill in accordance with the provisions of the contract/and/or arising out of any amount claimed by the owner (whether or not the amount claimed by the owner by any part thereof shall have been deducted from Contractor's Final bill or any amount paid by the owner to the Contractor in respect of the work), the same may be referred to the arbitration of the Director-in-Charge of Unitech Machines Limited or some other person appointment by him whether or not from the parties concerned.

11. The Hon'ble Supreme Court in the case of Newton Engineering and Chemicals Ltd. vs. Indian Oil Corporation & Ors. (supra) and others held as follows:-

8. Having regard to the express, clear and unequivocal arbitration clause

between the parties that the disputes between them shall be referred to the sole arbitration of the ED(NR) of the Corporation and, if ED(NR) was unable or unwilling to act as the sole arbitrator, the matter shall be referred to the person designated by such ED(NR) in his place who was willing to act as sole arbitrator and, if none of them is able to act as an arbitrator, no other person should act as arbitrator, the appointment of Director (Marketing) or his nominee as a sole arbitrator by the Corporation cannot be sustained. If the office of ED(NR) ceased to exist in the Corporation and the parties were unable to reach to any agreed solution, the arbitration clause did not survive and has to be treated as having worked its course. According to the arbitration clause, sole arbitrator would be ED(NR) or his nominee and no one else. In the circumstances, it was not open to either of the parties to unilaterally appoint any arbitrator for resolution of the disputes. Sections 11(6)(c), 13 and 15 of the 1996 Act have no application in light of the reasons indicated above.

That was a case in which the arbitration clause provided for reference to the sole arbitration of ED(NR) of respondent No. 1 and in case the said ED(NR) was unwilling and unavailable to act as a sole arbitrator, the matter was to be referred to the sole arbitration of some other person to be designated by the said ED(NR) in his place. The arbitration clause also provided that no person other than ED(NR) or the person designated by ED(NR) act can act as an arbitrator. In these circumstances, the Hon''ble Supreme Court made the above observations.

12. In my view the plaintiff has failed to make out sufficient grounds for grant of interim injunction to restrain the Arbitrator from proceeding with the arbitration matter.

13. Firstly, the judgment of the Hon''ble Supreme Court in the case of Newton Engineering and Chemicals Ltd. vs. Indian Oil Corporation & Ors.,(supra) which is relied upon by the learned counsel for the plaintiff prima facie is not applicable to the facts of this case. In that case, the Arbitration Clause provided that the matter should be referred to ED (NR) or to the other person designated by such ED(NR) in his place. The Arbitration Clause also provided that no person other than ED(NR) should act as an arbitrator. There is no such clause in the Arbitration Clause in the present facts. The Arbitration Clause, namely, Clause 25 provides for reference of disputes to Director-in-Charge of Unitech Machines Limited or some other person appointed by him. It does not specifically say that no person other than Director-in-Charge or the person nominated by the Director-in-Charge should act as an arbitrator. To the said extent, there is merit in the submission of the learned counsel for the defendant that the wording of the clause is quite different when compared to the Clause which was the subject matter of the above judgment of the Hon''ble Court.

14. Secondly, in my view, prima facie the present suit would not be maintainable in view of Section 5 of the Arbitration and Conciliation Act. Section 5 of the Arbitration and Conciliation Act reads as follows:-

5. Extent of judicial intervention. Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

15. Learned counsel for the plaintiff has vehemently argued that in the present case the defendant has filed the written statement and that he has not filed any application u/s 8 of the Arbitration and Conciliation Act and has submitted itself to the jurisdiction of this Court. Hence, it is urged that this Court has the power to deal with the present suit and the reliefs as sought. It is further stated that in case, the defendant had filed an application u/s 8 of the Arbitration Act, this Court would have the power to adjudicate upon the validity of the appointment of the Arbitrator.

16. The judgment of this Court in the case of Shri Roshan Lal Gupta vs. Shri Parasram Holdings Pvt. Ltd., 157 (2009) DLT 712 is a complete answer to the contentions of the learned counsel for the plaintiff. In paras 18, 21 and 23 this Court held as follows:-

18. I also do not find any merit in the plea of the petitioner/appellant that the stock broker had consented to the jurisdiction of the civil court and/or had waived/abandoned the right u/s 8. The preliminary objections in the written statement of the stock broker have already been referred to above. In the same the stock broker has unequivocally contested the jurisdiction of the civil court to proceed with the suit for the reason of the arbitration. Of course, the preliminary objections repeatedly refer to Section 5 and not to Section 8 but mere failure to cite the correct provision of law and/or referring to the wrong provision, cannot defeat the rights of the parties. It is of significance that the written statement was filed soon after the coming into force of the 1996 Act and till when there was not much clarity about the statute and the recent past has shown as to how the courts themselves have from time to time changed their interpretation of the various provisions of the statute. Thus, once the stock broker has, while submitting his first statement on the substance of the dispute, taken the plea of the jurisdiction of the civil court being barred for the reason of the existence of the arbitration agreement, it cannot be said that merely because reliance is made while taking the said plea to section 5 instead to Section 8 would tantamount to the stock broker giving up the right to apply for arbitration. It is also significant that the stock broker had prior thereto already commenced the arbitration proceedings. Recently another Single Judge of this court in Ministry of Sound International Ltd. Vs. Indus Renaissance Partners Entertainment Pvt. Ltd., held that where a suit was instituted after the plea u/s 8 of the Arbitration Act had been taken in a suit filed by other party would not tantamount to waiver/abandonment of the right under the arbitration agreement. It was further held that the case would be different where before taking a plea of arbitration, a suit is instituted. Following the same reasoning I am not only of the view that on a meaningful reading of the written statement, the stock broker had also applied for reference of the parties to arbitration within the meaning of Section 8 of the

Act but also, even if he had not so applied, having instituted the arbitration proceedings before filing the written statement cannot be said to have, by filing the written statement waived or abandoned arbitration.

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21. There is yet another reason for me to hold so and it is reflected in the substantial questions of law framed on 29th January, 2009. The relief of declaration is guided by Section 34 and the relief of permanent injunction by Section 41 of the Specific Relief Act. Grant or non-grant of declaration is in the discretion of the court. A permanent injunction cannot be granted under clause (h) of Section 41 when equally efficacious relief can be obtained by any other usual mode of proceeding except in case of breach of trust. The discretion of the court ought not to be exercised in a manner so as to adversely affect the arbitral proceedings or to negate the purport of the 1996 Act. Similarly, it is not as if, if injunction restraining the arbitration is not given, the party challenging the validity of the arbitration agreement would be rendered remediless. The said party has the equally efficacious remedy of Sections 16 and 34 of the Arbitration Act. The suit for declaration and permanent injunction is found to be barred by provisions of Specific Relief Act also.

23. In my view, the law with respect to the adjudication by the courts while dealing with an application u/s 8 or Section 11 of the Act would not apply to the suit. Firstly, the proceedings under Sections 8 and 11 are provided for by the Act itself while the suit challenging the validity of the arbitration agreement has not been provided for in the Act and is barred u/s 5 of the Act. Thus merely because while interpreting Section 8 and Section 11 it has been held that the court before referring the parties to arbitration should satisfy itself of the existence of the arbitration agreement would not justify the institution of a suit for the same relief. Section 8 application is filed when a substantive suit is already before court and the question to be determined is whether that suit is to proceed or the parties are to be referred to arbitration. Similarly, Section 11 is an application for appointment of the arbitrator. Merely, because the court when faced with such provisions as provided for under the Act is to satisfy itself of the existence of the agreement cannot be understood to lay down that it is open to a party to even where no suit for substantial relief and application u/s 11 has been filed, an independent suit only for the relief of challenging the validity of the arbitration agreement can be instituted. I, therefore, do not feel the need to refer to the judgments filed by the counsel for the petitioner/appellant alongwith the synopsis on Section 8 and Section 11 of the Act.

17. In those facts, the Court held that a suit to hold that the Arbitration Clause is forged, fabricated, unenforceable and null and void and for injunction restraining the arbitration proceedings does not lie and is barred u/s 5 of the Arbitration and Conciliation Act and under Sections 34 and 41(h) of the Specific Relief Act read with Section 16 of the Arbitration Act. The above judgment was again reiterated by the said Court in the case of Shree Krishna Vanaspati Industries (P) Ltd. Vs.

Virgoz Oils and Fats Pte Ltd. and Another .

18. Similarly, the Hon''ble Supreme Court in the case of Aurohill Global Commodities Ltd. Vs. M.S.T.C. Ltd., in para 13 held as follows:-

13. In the present case, M/s. Aurohill Global Commodities Ltd. has filed this petition u/s 11(9) read with Section 11(5) of the said Act. Section 11 falls in Part I. The alleged contract is an international transaction, therefore, this Court has the power to appoint an arbitrator in accordance with the terms of the contract. Under the said Act, the Arbitral Tribunal has very wide powers. The powers of the courts have been curtailed. The Arbitral Tribunal's authority u/s 16 of the said Act is not confined to the width of its jurisdiction but goes to the very root of its jurisdiction (see Secur Industries Ltd. vs. Godrej & Boyce Mfg. Co. Ltd.). In the present case, therefore, the question as to whether the draft purchase order acquired the character of a concluded contract or not and the question as to whether the contract was non est. can only be decided by the arbitrator. Therefore, the aforestated question have got to be decided by arbitration proceedings.....

19. In the present case, the arbitration proceedings have already commenced. In fact, the present suit has been filed after the plaintiff received a letter dated 27.05.2013 appointing the Arbitrator. The present suit is filed on 03.08.2013. Hence, it cannot be said that the defendant has given a go-by to the Arbitration Clause. Accordingly, in view of the legal position as stated above, it has to be held that prima facie the present suit would not lie in view of Section 5 of the Arbitration and Conciliation Act.

20. The third reason which persuades me not to grant injunction is that if the present interim injunction as sought is granted, it would tantamount to granting the final relief itself. In this context, reference may be had to the judgment of this Court in the case of MS Sancorp Confectionary Pvt. Ltd. and Another Vs. M/s Gumlink A/S, . In para 12 of this judgment, this Court held as follows:-

12. Situations emerge where the granting of an interim relief would tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would tantamount to dismissal of main petition itself; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour. In such cases the availability of a very strong prima facie case-of a standard much higher than just prima facie case, the considerations of balance of convenience and irreparable injury forcefully tilting the balance of case totally in favour of the applicant may persuade the Court to grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases. The Court would grant such an interim relief only if satisfied that withholding of it would prick the conscience of the Court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the Court would not be able to vindicate

the cause of justice. Obviously such would be rare cases accompanied by compelling circumstances, where the injury complained of is immediate and pressing and would cause extreme hardship. The conduct of the parties shall also have to be seen and the Court may put the parties on such terms as may be prudent.....

21. In my view, the plaintiff has not been able to put forward a strong prima facie case.

22. The objections which are raised herein, I am told, are the subject matter of the arbitration proceeding. It would be for the learned Arbitrator to take a decision on the same as a preliminary objection in terms of Section 16 of the Arbitration and Conciliation Act. Accordingly, the present application is dismissed.

CS(OS) 1535/2013

List before the Joint Registrar on 18.02.2014.