(2007) 08 DEL CK 0146

In the Delhi High Court

Case No : CS (OS) No. 292 of 2007 and IA No. 6911 of 2007

Hindustan Steels Works Construction Ltd. APPELLANT

Vs

Airports Authority of India RESPONDENT

Date of Decision : 01-08-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 16, 21, 8
Contract Act, 1872 — Section 28

Citation : (2008) 1 ILR Delhi 233

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : Pratap Venugopal with Ms. Surekha Raman, for the Appellant; S.K. Chandwani, for the Respondent

Final Decision : Disposed Off

Judgement

Vipin Sanghi, J.—This application has been filed by the defendant u/s 8(1) of the Arbitration and Conciliation Act for referring the claims of the plaintiff as made in this suit to arbitration. The applicant/defendant states that under the contract between the parties, Article 4.1 provides that all differences and disputes arising out of the agreement, shall be decided by arbitration as specified in Clause 25 of the General Conditions of Contract. Clause 25 of the General Conditions of the Contract, inter alia, provided that except in relation to those matters which are excluded from arbitration, all other matters shall be referred to the sole arbitration of the person appointed by the Chairman, National Airport Authority (NAA) (or) sic the Administrative Head of the NAA at the time of the said appointment. Counsel for the plaintiff does not dispute the existence of the arbitration agreement between the parties. However, he states that prior to the filing of the present suit, the plaintiff had repeatedly made efforts to take the disputes between the parties to arbitration. However, these efforts were thwarted by the defendant/applicant who avoided and refused to refer the disputes to arbitration.

2. My attention has been drawn to various undisputed communications between the parties. Vide communication dated 12.2.2004 issued to the Chairman of the Airport Authority of India (who is the successor in interest of the National Airport Authority) the plaintiff requested him to appoint an Arbitrator to adjudicate the claims of the plaintiff. The gist of the claims accompanied this communication and they were quantified at Rs. 1,83,58,110/-. The defendant responded on 13th March, 2004, inter alia, stating that the request made by the plaintiff could not be considered, unless proper and specific claims are made in terms of the agreement for consideration by the competent authority. On 12th January, 2005, the plaintiff gave clarification with regard to the various claims that it raised against the defendant. On 20th January, 2005, the defendant refused the request for Arbitration by stating that the plaintiff had not invoked Clause 25 of the Contract within the time limit, i.e., within 90 days and thereby waived its right to claim arbitration. It was further stated that no further correspondence excepting the demand of the amount of Rs. 10,71,995/- within the period of limitation, shall be entertained.

3. Having been shunned away by the defendant, the plaintiff sought to invoke the arbitration machinery created to resolve disputes between government bodies and public sector undertakings and enterprises. This machinery was set up as a consequence of the directions of the Hon''ble Supreme Court in the 1992 (61) ELT 3 (SC) and Oil and Natural Gas Commission and Another Vs. Collector of Central Excise, .

4. A communication was issued on 10th February, 2005 to the Secretary, Department of the Public Enterprises by the plaintiff requesting for reference of the claims to the Permanent Machinery of Arbitration (PMA). The department of Public Enterprises required the plaintiff to produce the arbitration agreement between the parties and stated that the same should be in accordance with the guidelines issued by the Government of India, Ministry of Heavy Industries and Public Enterprises, Department of Public Enterprise dated 22nd January, 2004. Since the arbitration agreement between the parties was not in terms of those guidelines, on 25th April, 2005, the plaintiff once again requested the defendant to enter into another arbitration agreement to enable the reference of its claims to the PMA. The defendant once again refused to entertain any such request for arbitration on 19th May, 2005 by stating that the adjudication of disputes in respect of the agreement had been completed long back, and the matter had been resolved by arbitration in terms of the agreement. It was stated that the claims and request for further adjudication in respect of the contract is unwarranted.

5. From the aforesaid, it is evident that the defendant repudiated the arbitration agreement with the plaintiff, and, in unequivocal terms refused to go to arbitration on the claims raised by the plaintiff. Once the notice of invocation of the arbitration agreement had been given to the defendant, whereunder the Chairman of the defendant was the appointing authority, it was for the defendant

to have made the appointment of the arbitrator. However, the defendant not only failed to so appoint an arbitrator, but also expressly refused to entertain the request of the plaintiff to refer the claims to arbitration.

6. It was only after having failed to get the defendant to agree to any kind of Arbitration, the plaintiff filed the present suit for recovery of Rs. 2,95,75,162.00, by affixing Court fee of Rs. 2,91,050/-. Now that the defendant finds itself entangled in their suit, it again wants the disputes to be referred to arbitration under Clause 25 of the General Conditions of Contract and wants to assert the right of its Chairman to nominate the arbitrator.

7. Once the defendant has itself repudiated the arbitration agreement, it does not lie in the mouth of the defendant to now seek reference of the claims of the plaintiff in the suit to arbitration under Clause 25 of the General Conditions of Contract.

8. Counsel for the defendant submits that u/s 11 (6) of the Arbitration and Conciliation Act, 1996, in the event of the failure of a party to act to constitute the Arbitral Tribunal, the aggrieved party is entitled to approach the Chief justice or any person, institution designated by him, to make an appointment of an Arbitrator. It is argued that it was open to the plaintiff to have moved the Court u/s 11(6) instead of filing the present suit.

9. The defendant also relies on Sections 21 and 16 of the Arbitration and Conciliation Act, 1996 to contend that u/s 21, the arbitration proceedings in respect of the claims of the plaintiff commenced on the date on which request for those disputes to be referred to arbitration was received by the defendant. By relying on Section 16 it is argued that it is for the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement. He submits that the issue whether the arbitration agreement stands repudiated or not would also be determinable by the Arbitral Tribunal constituted under Clause 25 of the General Conditions of the Contract.

10. In my view, once the defendant had repudiated the arbitration agreement, two options were open to the plaintiff. The plaintiff would either have accepted the repudiation and proceeded to file a suit. The other option was to invoke the jurisdiction of the Chief Justice or the person, institution designated by him to enforce the arbitration agreement u/s 11 of the Act. In the present case, the plaintiff has chosen the former option. Section 11 of the Act only enables the contracting parties to enforce the arbitration agreement between the parties, if that party chooses so to do. It does not bar the filing of a civil suit to agitate the claims arising out of the agreement, which has an arbitration clause.

11. I am not impressed by the arguments founded upon Sections 21 and 16 of the Act either. The Hon''ble Supreme Court in Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another, has held that if the appointing authority fails to makes an appointment of the arbitrator, after the invocation of the arbitration

agreement, the same could be made even after the period of 30 days but only till the time that the applicant moves an application u/s 11 of the Act before the Chief Justice or his nominee or designatee to enforce the arbitration, agreement. Consequently, there is no enviable right of a party to assert its right to appoint an arbitrator, merely because a notice of invocation of the arbitration agreement has been issued by one of the parties to the agreement. In view of the decision of the Hon''ble Supreme Court in S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, . it is for the Court to consider the issue with regard to the existence or validity of the arbitration agreement, when the issue arises before it in any proceeding where it has to consider the request of one or the other party to appoint an arbitrator, and where such a request is opposed by the other party on the ground of the non-existence or invalidity of the arbitration agreement. Section 16 does not oust the jurisdiction of the Court to decide the said issue. In a case where the reference to an arbitral tribunal is consensual, such question would, in the first instance have to be determined by the Arbitral Tribunal.

12. In this case the defendant had failed to appoint the Arbitrator even till the filing of the present suit. In fact, the defendant not only failed but even refused to make the appointment. Consequently, in my view the arbitration agreement as contained in clause 25 of the General Conditions of Contract cannot be enforced by the defendant.

13. In order to buttress his contention that no arbitrable dispute survives, or survived at the relevant time, counsel for the defendant submits that under Clause 25 the plaintiff ought to have raised its claim within 90 days of the said claims arising. However, the plaintiff did not do the needful within the stipulated time and consequently, the matters could not be referred to arbitration. Reliance has been placed on the decisions of this Court in Jai Chand Bhasin Vs. Union of India (UOI) and Another, , Ved Prakash Mittal Vs. Union of India and Others, . P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, and Agri Gold Exims Ltd. Vs. Sri Lakshmi Knits and Wovens and Others, .

14. In my view these decisions do no advance the argument of the defendant in any way. The first two decisions of this Court under the Arbitration Act, 1940 are of an era prior to the amendment of Section 28 of the Contract Act in 1997. Section 28 in so far as it is relevant, as it stands after its amendment, reads as follows:-

28. Agreements in restraint of Legal proceedings, void.-Every Agreement-

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect to any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights;

Or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights.

15. There is sufficient authority based on the amended Section 28 of the Contract Act, which states that a contractual term which seeks to limit the right to invoke the arbitration agreement within a certain period (where such period is less than the period available under Limitation Act), or which seeks to extinguish the liability of one or the other party altogether, unless raised within a specified time, is not legally enforceable. Reference may be made to Hindustan Construction Corporation Vs. Delhi Development Authority, , Union of India (UOI) Vs. Simplex Concrete Piles India (P) Ltd., and Shri J.K. Anand Vs. Delhi Development Authority and Another, .

16. The decision of the Hon''ble Supreme Court in P. Anand Gajapathi Raju (supra) observes the language of Section 8 is peremptory. It is obligatory for the Court to refer the parties to arbitration in terms of the arbitration agreement. However, the said proposition would not be applicable in cases where the defendant, who is the applicant u/s 8 of the Arbitration and Conciliation Act, has repudiated the arbitration agreement. The said decision is therefore not applicable to the facts of the present case. The decision in Agri Gold Exims Ltd. (supra) is also on the same lines and for the same reasons is not applicable in the facts of the present case.

17. The plaintiff submits that it is even now willing to go to arbitration in respect of all its claims in the suit, provided the same is under the aegis of the PMA.

18. Counsel for the plaintiff has drawn my attention to the office memorandum dated 22nd January, 2004 issued by the Department of Public Enterprises in pursuance of the directions of the Hon''ble Supreme Court. By this memorandum, the Government of India issued guidelines for creation of the PMA. The said memorandum, inter alia, states as follows:-

With a view of expedite settlement of disputes and reduce avoidable expenditure in this regard, a need was felt to institutionalize the prevailing system of arbitration Commissions/Committees like Law Commission, Central Vigilance Commission, Committee of Secretaries etc. had also examined this aspect and made certain recommendations/suggestions which were carefully examined in consultation with the Ministry of Law. The Government after due consideration of all aspects, decided to set up the PMA in the Department of Public Enterprises.

In the event of any dispute or difference relating to the interpretation and application of the provisions of commercial contracts) between CPSEs, Banks Port Trusts etc. Inter se, or CPSE and the Government Department(s) hereto (except a dispute or difference concerning the Railways, income tax, Customs and Excise duties), such dispute or difference shall be referred by either party for arbitration to the PMA in the Department of Public Enterprises through the Secretary to the Government of India incharge of the DPE.

As far as possible parties should try to resolve as many points of dispute as they could amicably by mutual consultation and only those points stating the amount involved be referred to the PMA that could not be settled mutually despite best efforts from both sides. To ensure prompt disposal of disputes(s) by the PMA, both the PSEs and the Government Departments shall refer the existing disputes(s) to the PMA at the earliest and not later than two months of arising of dispute. If any arbitrator has already been appointed in any dispute that should immediately be cancelled. Both the parties will also ensure the inclusion of an Arbitration Clause (if not already done so) in favour of PMA (as given in Annexure) in all the existing and the future contracts/supply orders between the parties. PMA shall not entertain the disputes referred to it without the proper Arbitration Clause.

(emphasis supplied)

19. Both the parties to the present suit are undoubtedly public sector enterprises. The Hon''ble Supreme Court in its decision in the ONGC case 1992 Suppl(2) SCC 432 observed:

1. This Court has on more than one occasion pointed out that Public Sector Undertakings of Central Government and the Union of India should not fight their litigations in Court by spending money on fees of counsel, court fees, procedural expenses and wasting public time. Courts are maintained for appropriate litigations. Court''s time is not to be consumed by litigations which are carried on either side at public expenses from the source. Notwithstanding these observations repeated on a number of occasions, the present cases appear to be an instance of total callousness. The letter of October 3, 1998, indicated that the Cabinet Secretary was looking into the matter. That has not obviously been followed up. As an instance of wasting public time and energy this matter involves a principle to be examined at the highest level.

2. The Cabinet Secretary is called upon to handle this matter personally and report to this Court within four weeks as to why this litigation is being conducted when the two sides are a public sector undertaking and the Union of India. The report of the Cabinet Secretary should be supported by an affidavit of a responsible officer. The matter be placed again before us on October 11.1991.

(emphasis supplied)

20. This was followed by the second order reported as Oil and Natural Gas Commission and Another Vs. Collector of Central Excise, wherein it observed as follows:-

1. We are happy to find that the Cabinet Secretary has taken the appropriate initiative as indicated in our order dated 11.9.1991 and has reported to us that the dispute between the Government Department and the public sector undertaking of the Union of India has been settled. In the view of the matter no further action is necessary on the petition.

2. In his report the Cabinet Secretary has stated:

I would also like to state that the Government respects the views expressed by this Honourable Court and has accepted them that public undertakings of Central Government and the Union of India should not fight their litigation in Court by spending money on fees on counsel, court fees, procedural expenses and wasting public time. It is in this context that the Cabinet Secretariat has issued instructions from time to time to all Departments of the Government of India as well as to public undertakings of the Central Government to the effect that all disputes, regardless of the type, should be resolved amicably by mutual consultation or through the good offices of empowered agencies of the Government or through arbitration and recourse to litigation should be eliminated.

3. We direct that the Government of India shall set up a Committee consisting of representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law, to monitor disputes between Ministry and Ministry of Government of India, Ministry and public sector undertakings of the Government of India and public sector undertakings in between themselves, to ensure that no litigation comes to Court or to a Tribunal without the matter having been first examined by the Committee and its clearance for litigation. Government may include a representative of the Ministry concerned in a specific case and one from the Ministry of Finance in the Committee. Senior officers only should be nominated so that the Committee would function with status, control and discipline.

4. It shall be the obligation of every Court and every Tribunal where such a dispute is raised hereafter to demand a clearance from the Committee in case it has not been so pleaded and in the absence of the clearance, the proceedings would not be proceeded with.

(emphasis supplied).

21. It is obvious that the directions issued by the Hon''ble Supreme Court and the consequential Office Memorandum of the Government of India, have fallen on the deaf ears of the defendant. In view of the aforesaid, and considering the facts that the fundamental agreement between the parties was to refer the dispute to arbitration and not that the arbitrator should be a nominee or appointee of one or the other party, I refer the disputes and claims made by the plaintiff in the suit to the Permanent Machinery of Arbitrators (PMA) in the department of Public Enterprises, Ministry of Heavy Industries and Public Enterprise, Government of India. The Permanent Machinery of Arbitration shall, without insisting on a written agreement of the parties in the prescribed format, proceed to entertain and resolve the claims and disputes of the plaintiff as made in the suit. Accordingly, the present suit is disposed of in the aforesaid terms. The Registry should return the original documents filed on record by the plaintiff, subject to they being replaced by photocopies.