
(2016) 05 DEL CK 0187
In the Delhi High Court
Case No : Arb.P. No. 272 of 2016

Indus Towers Limited

APPELLANT

Vs

Sistema Shyam Teleservices Ltd.

RESPONDENT

Date of Decision : 23-05-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(4)

Citation : (2016) 3 ArbILR 375 : (2016) 6 RAJ 302

Hon'ble Judges : Manmohan Singh, J.

Bench : Single Bench

Advocate : Mr. Rajiv Nayar, Sr. Advocate with Mr. L.K. Bhushan, Mr. Saurabh Seth & Ms. Raashi Beri, Advocates, for the Appellant; Mr. Akhil Sibal with Mr. Shivek Trehan, Ms. Fareha Ahmad Khan, Mr. Utkarsh Saxena, Ms. Nidhima Sareen, Mr. Nikhil Chawla & Ms. Jhanavi M

Final Decision : Dismissed

Judgement

Manmohan Singh, J.—The petitioner has filed the present petition under Section 11(4) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") seeking to appoint the nominee Arbitrator on behalf of the respondent as according to the petitioner, the respondent has rejected the reference of the disputes to arbitration who has also failed to appoint its nominee Arbitrator as required under the Dispute Resolution Clause under the Master Services Agreement (in short, called the "MSA") dated 25th February, 2009 signed between the petitioner and the respondent.

2. The brief facts of the case as per the petition are that the parties admittedly had entered into the MSA, whereby the respondent availed of the passive infrastructure services provided by the petitioner in various telecom circles throughout India, in consideration for fees to be paid to the petitioner as stipulated under the MSA. The petitioner raised invoices on the respondent-Company for the same, but the said amount remained unpaid by the respondent-Company.

3. The MSA stipulates that the respondent is liable to pay to the petitioner "Exit Amount" as prescribed under Clause 19.2 and Schedule 5 of the MSA, in the event that it terminates the MSA or exits from the telecom sites under the MSA prior to the expiry of its term.

The petitioner received a letter dated 21st February, 2013 from the respondent whereby the respondent terminated its services in 10 service areas/telecom circles, out of which the petitioner was providing passive infrastructure services to the respondent at 133 sites in 3 telecom circles, namely Punjab, Haryana and Andhra Pradesh.

4. In the above said letter, the respondent stated that pursuant to the 2G judgment (judgment of Supreme Court in Centre for Public Interest Litigation v. Union of India (2012) 3 SCC 1), 21 of its licenses were cancelled and hence, it was terminating its services with effect from 23rd March, 2013 in the said 3 circles. It was also stated that this circumstance was beyond its control, falling under Force Majeure, thus, the respondent is not liable to pay the lock-in charges/Exit Amount consequent to the early termination of the services. The petitioner rejected the stand of the respondent.

5. After the expiry of couple of years, the petitioner sent a demand letter dated 10th March, 2016 to the respondent, asking it to make payment of the outstanding amounts to the petitioner within two days.

6. Thereafter, the petitioner sent letters dated 7th March, 2016 and 11th March, 2016 to the respondent, thereby invoking Clause 21.1.1 of the MSA and referring the disputes between the parties to the Relationship Managers of both petitioner and respondent, as contemplated under the Dispute Resolution Clause under the MSA. The Relationship Manager of the petitioner also sent a letter dated 11th March, 2016 to the respondent vide e-mail of even date, sent at 1.56 p.m. to the Relationship Manager of the respondent who agreed to meet with the Relationship Manager of the petitioner on the same day at 3.00 p.m. in the office of the respondent.

7. It is alleged by the petitioner that the Relationship Manager of the petitioner left for meeting and went to the office of the respondent where he was informed that due to some change in plan, the scheduled meeting cannot take place. The petitioner's Relationship Manager was also informed that an email has been sent by Relationship Manager of the respondent about his inability to meet due to some sudden urgent engagement and next suitable meeting time would be informed by the respondent to the petitioner shortly. It is averred in the petition that the petitioner at around 5.00 p.m. on the same day, i.e., 11th March, 2016, the respondent sent another email to the petitioner, wherein the respondent, instead of trying to resolve the disputes through discussion and scheduling a meeting between the Relationship Managers, did not eager or made any efforts to resolve the disputes through the Internal Escalation mechanism as provided under Clause 21.1.1 of the MSA.

8. It is submitted by the petitioner that though from the aforesaid conduct of the respondent, the entire Internal Escalation mechanism provided under Clause 21.1 of the MSA stood failed, still in order to settle the disputes between the parties amicably, the petitioner wrote a letter dated 11th March, 2016 to the respondent, invoking Clause 21.1.2 of the MSA and referring the disputes between the parties to the Chief Technical Officers of both the parties asking them to resolve the said disputes.

9. It is not in dispute that Clause 21.2 of the MSA stipulates that if the Chief Technical Officers of the petitioner and the respondent are unable to resolve the disputes referred to them within 5 business days of the disputes having been referred to them, then either party may, in writing refer the disputes to Arbitration. The petitioner says that as the disputes referred to the Chief Technical Officers could not be resolved within 5 business days despite of all efforts by the petitioner. As the stipulated period for informal dispute resolution as prescribed in MSA had expired, the petitioner on 19th March, 2016, sent a notice invoking arbitration to the respondent, referring all disputes between the parties arising out of the MSA to arbitration and nominating Justice (Retd.) Vikramajit Sen as its Nominee Arbitrator.

10. The main case of the petitioner now is that in response to the letter dated 25th March, 2016 to the notice invoking arbitration dated 19th March, 2016, the respondent has without any cogent reasons rejected the reference of the disputes to arbitration in order to avoid payment of the outstanding amount due by rejecting the reference of disputes to arbitration, who also failed to appoint a nominee Arbitrator, as required under Clause 21.3.1 (ii) of the MSA.

Therefore, the respondent has lost its right to appoint its nominee Arbitrator for adjudication of the disputes between the parties by the Arbitration Panel. Thus, the prayer is made in the present petition to appoint a suitable Arbitrator by this Court under Section 11(4) of the Act to arbitrate upon the disputes between the parties arising from the MSA dated 25th February, 2009.

11. Clause 21 of the MSA dated 25th February, 2009 prescribes for Dispute Resolution Procedure and provides for an internal escalation mechanism to be employed by the parties to attempt to settle disputes arising out of the MSA, failing which the disputes are to be referred to Arbitration. The relevant Clauses of the MSA are reproduced herein below:

"21. Dispute Resolution Procedure

xxx xxx xxx

21.2 Dispute Remedies-If, within five Business Days of a Dispute having been referred to the individuals specified in Clause 21. 1.2 no agreement has been reached (or such longer period as the parties may agree in writing), then either party may by notice in writing to the other Party refer the disputes to binding arbitration in accordance with the Arbitration and Conciliation Act, 1996, as

amended.

21.3 Arbitration

xxx xxx xxx

(ii) the arbitration shall be conducted in English by an arbitral tribunal consisting of three arbitrators. For the purpose of such arbitration, each Party shall appoint one arbitrator and the third arbitrator shall be appointed by mutual agreement by the two arbitrators so appointed (the "Arbitration Panel")"

12. The petitioner is claiming inter alia the following reliefs as mentioned in the notice for invocation dated 19th March, 2016:

"(i) An order directing SSTL to pay outstanding Exit Amount of around Rs. 87,80,51,993/- (Rupees Eighty Seven Crores Eighty Lakhs Fifty One Thousand and-Nine Hundred and Ninety Three Only) account of the termination of the MSA in 6 circles prior to the expiry of its term,

(ii) An order directing SSTL to pay the outstanding amount of Rs. 4 Crores on account of services availed by SSTL in the 6 circles from which it exited from the MSA prior to the expiry of its term, which includes Rs. 1.1 Crore as principle outstanding amount and Rs. 2.9 crore as interest billed for delayed payments.

(iii) An order directing SSTL to pay the outstanding amount of Rs. 23,83,22,374/- (Rupees Twenty Three Crores Eighty Three Lakhs Twenty Two Thousand Three Hundred and Seventy Four Only) payable by SSTL to Indus on account of services availed by SSTL in the 10 circles wherein SSTL continues to avail services under the MSA, which includes Rs. 14,55,75,484/- (Rupees Fourteen Crore Fifty Five Lakhs Seventy Five Thousand Four Hundred and Eight Four Only) as principle outstanding amount and Rs. 9,27,46,890/- (Rupees Nine Crore Twenty Seven Lakhs Forty Six Thousand Eight Hundred Ninety) as interest billed for delayed payments.

(iv) Pendente lite and future Interest

(v) Costs."

13. It is pertinent to mention that the petitioner while invoking the arbitration under clause 21.2 of the agreement in para 13 of the notice dated 19th March, 2016 has informed to the respondent that the petitioner has nominated its nominee arbitrator and called upon the respondent to nominate its nominee Arbitrator within 30 days of receipt of this notice.

14. No formal reply to the present petition is on record on behalf of the respondent. Counsel for the respondent, however, referred the reply to notice of invocation of arbitration issued by the petitioner. In reply dated 25th March, 2016 to invocation of arbitration, the specific plea is taken that the petitioner has failed to act in accordance with the Dispute Resolution Procedure prescribed under the MSA. The said communications, which pertain to purported claims having arisen

in the year 2013 or prior thereto, have been hastily issued by the petitioner within a span of two weeks without giving the respondent adequate time to respond to the same. The same were highlighted from the series of following correspondences issued by the petitioner as referred by the respondent in its reply. The details taken from the reply are mentioned as below:-

07/03/16

Communication dated 07.03.2016 issued by petitioner calling upon respondent to pay Exit Charges and other purported amounts relating to 6 (six) exited circles within a period of two days.

10/03/16

Communication dated 10.03.2016 issued by petitioner calling upon respondent to pay forthwith, the demands raised in the communication dated 07.03.2016 along with an additional demand for Rs.23,83,22,374/- (Rupees twenty three crores eighty three lakhs twenty two thousand three hundred and seventy four only).

11/03/16

Without giving adequate time to respondent to revert on the purported disputes raised by petitioner who vide communication dated 11.03.2016, invoked clause 21.11 of the MSA and thereby, referred the purported disputes to the Relationship Managers of the parties.

11.03.2016 Sent at 1356 Hours

Immediately upon the issuance of the communication dated 11.03.2016, the petitioner vide an email dated 11.03.2016 sent at 1356 hours unilaterally fixed a meeting for 11.03.2016 itself at 1500 hours to discuss the purported demands.

11.03.2016 sent at 1427

Respondent replied to the aforesaid email on 11.03.2016 at 1427 hours expressing its unavailability to meet petitioner's representative Hours on account of prior engagements. Vide the said email, petitioner were assured that respondent shall be responding to the communication shortly.

1500 hours

Despite respondent's email sent at 1427 hours expressing inability to meet the petitioner's representative at such short notice, petitioner representative unilaterally arrived at SSTL's office.

11.03.2016 2004 Hours

The undue and excessive haste shown by you is evident from the issuance of communication dated 11.03.2016 wherein petitioner proceeded to invoke clause 21.1.2 of the MSA thereby referring the purported disputes to the Chief Technical Officer of the parties on the same day as clause 21.1.1 was invoked by petitioner.

The MSA, it may be noted, provides 5 (five) business days to the Relationship Managers of the Parties to resolve purported disputes.

14.03.2016

The respondent vide its communication dated 14.03.2016 informed the petitioner that it was in the process of examining the validity of the purported claims raised by petitioner. In view of the fact that the purported claims related to a period of 2012 as also due to the unavailability of the concerned person handling the account, the respondent sought a period of 10(ten) days to respond to petitioner's communications.

19.03.2016

Without any effective discussion on the purported disputes raised by the petitioner as mandated under Clauses 21.1.1 and 21.1.2 of the MSA, petitioner issued a notice invoking arbitration under clause 21.2 of the MSA.

15. It is mentioned by the respondent in its reply that the petitioner has failed to raise its claims for the past several years and now the petitioner is attempting to re-agitate time barred and other abandoned claims without complying with the mechanism prescribed under the Dispute Resolution Clause of the MSA. The demands as raised in paragraph 14(i) and (ii) of notice are arbitrary demands. As far as the purported demand at paragraph No.14(i) with respect to payment of Exit Charges under the MSA is concerned, it is stated that the same is patently time barred and same is not liable to be paid in view of the 2G judgement passed by Supreme Court of India.

With regard to purported claim referred to in paragraph 14(ii) of the notice under reply, the same is disputed by the respondent. The principal amount of Rs. 1.1 crores claimed by the petitioner towards services purportedly provided by the petitioner prior to the termination of the MSA is also time barred and is not liable to pay the same. The demand raised for an amount of Rs. 2.9 crores as interest billed for delayed payments has never been raised prior to the communications issued in March, 2016. The said demand is also barred by limitation. As regards the claim referred to in paragraph 14(iii), the respondent asked the petitioner to furnish details and full particulars along with supporting documents including copy of the invoices, proof of submission of the invoices, in order to examine the purported claim by the respondent.

16. In a nut shell, it was mentioned in the reply to the notice of invocation that the demand was unlawful and arbitrary in reference to the purported claims raised by the petitioner at para 14(i) and (ii) in the communication under reply. In so far as the purported claim at para 14(iii) is concerned, the petitioner was requested to furnish necessary details of the claim.

17. It is the admitted position that the notice of invocation was issued on 19th March, 2016 wherein 30 days time was given to nominate the respondent's Arbitrator, the reply was given by the respondent on 25th March, 2016 which is

less than a period of one week.

18. The argument of the learned Senior counsel appearing for the petitioner is that once respondent has rejected the reference, it has lost its right of 30 days time mentioned by the petitioner in its notice. Therefore, the petitioner is entitled to file the petition even before expiry of 30 days. And once the petition is filed, the respondent (who has lost its right because of rejection of reference) has no right to appoint its own nominee Arbitrator even within the period of 30 days time granted by the petitioner in its notice. Learned counsel says that even if any appointment is made within 30 days by the respondent, no effect can be given. It is now for the Court to appoint the nominee Arbitrator on behalf of the respondent. Counsel, however, has not denied the fact that the respondent has nominated its nominee within 30 days period within the time period mentioned in the notice of invocation of arbitration. He says that such appointment was bad and contrary to the settled law although his client has highest regard and respect to the learned Arbitrator who has been appointed by the respondent on 8th April, 2016. He further submits that in view of amendment of Act, now the order passed under Section 11 is not to be treated as judicial order thus strict provision of the law is to be applied. Liberal approach cannot be taken. He has referred the decision of this Court passed on 7th January, 2011 in Arb.P. No. 24/2010, titled as Indian Potash Limited v. Bohra Industries Ltd.

19. Counsel further submits that even under Section 11(6) of the Act, no time is prescribed, therefore no advantage can be derived by the respondent of 30 days period even if the said period of time is mentioned in the notice of invocation of arbitration on behalf of the petitioner. The said averment in para 13 of the notice is immaterial once the reference is rejected by the respondent as per the decision of Indian Potash Limited (supra). Thus, the prayer made in the petition is liable to be allowed.

20. As far as merit of the case is concerned, I do not wish to express any opinion. Even otherwise, both the parties have made their submissions in another petition filed under Section 9 of the Act. The order has been reserved in the said matter.

21. There is also no dispute about the right of extinguishment that once 30 days period has expired and a petition under Section 11 of the Act is filed, the appointing authority loses its right to make the appointment of Arbitrator.

22. In the present case, it is not disputed fact that the respondent has appointed an Arbitrator after filing the present petition but on the same day within thirty days from receipt of request to do so from the petitioner.

Now, it is to be decided whether the present petition is prematured or is maintainable within the scope of Section 11 of the Act as the same is filed before the expiry of thirty days.

23. The period of limitation of thirty days is only provided under subsections (4)

and (5) of Section 11 of the Act. As per the statute, the period of limitation of thirty days cannot be invoked under sub-Section (6) of Section 11 of the Act. It is merely a practise and the convention is being followed for the last many years as appears from the various decisions passed by the Supreme Court and High Courts.

24. There is no doubt that as far as the cases falling under Section 11(6) of the Act are concerned, no limit of time has been prescribed under the Act whereas a period of 30 days has been prescribed under Section 11(4) and (5) of the Act. The present petition is filed under Section 11(4) of the Act wherein 30 days time is prescribed. It is settled law that if one party demands the opposite party to appoint an Arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appoint does not get automatically forfeited after the expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand and before the first party has moved the Court under Section 11 of the Act, the same would be sufficient. Reliance is placed on *Datar Switchgears Ltd. v. Tata Finance Ltd. and another*, (2000) 8 Supreme Court Cases 151.

25. The judgment referred by the counsel for the petitioner has no bearing to the facts of the present case as the facts in the case of *Indian Potash Limited* (supra) were that the notice invoking the arbitration agreement was sent by the respondent and not the petitioner who filed a petition under Section 11 of the Act before expiry of thirty days from the date of issuance of the notice of invocation of arbitration agreement. It was argued by the respondent that the petition was premature when filed. The name was suggested by the respondent in its letter of invocation. The case of the respondent before Court was that even if the petitioner did not agree to the name of the proposed arbitrator as suggested by the respondent, the petitioner ought to have made a suggestion of its own, to which the respondent might have agreed. Therefore, the petitioner could not have prematurely approached the Court by filing the petition.

In para 12 of the said judgment, it was specifically recorded that the arbitration agreement does not prescribe any procedure for appointment of the arbitrator. Upon receipt of the said communication, the petitioner vide communication dated 18th January, 2010, rejected the unilateral appointment of Shri Sunder Lal Mehta as the arbitrator who stated that it shall be moving the Court for appointment of an arbitrator. The petitioner thereafter filed the petition before the Court on 21st January, 2010. In para 29, it was noticed by the Court that the appointment of the arbitrator had to be done mutually and there was no procedure prescribed for that purpose, however, the position in the present case is distinct. In para 30, it was observed by the Court while recording the submission of the respondent that it was not obliged on the part of the petitioner to have on its own proposed the name of any other person to act as an arbitrator. Once the disagreement on the proposed name had surfaced, either party could have moved the Chief Justice or his designate for appointment of the arbitrator and the respondent had on

receipt of reply filed its petition before Rajasthan High Court under Section 11 of the Act, prior to the petition filed by the petitioner in the matter.

It is apparent that the facts in the present case are materially different as such situation has not happened in the present case. The petitioner in the present petition has requested the Court to appoint the arbitrator. The petitioner did not appoint the Arbitrator on behalf of the respondent as it was in the case referred above. There was no procedure prescribed in the agreement. Therefore, the judgment referred by the counsel does not help the case of the petitioner.

26. In the present case, in the reply to the invocation notice the respondent has not wholly refused the arbitration specifically. If the reply is read in a meaningful manner, the respondent intended to reject the claim of the petitioner raised in the invocation notice. The respondent has also asked the petitioner to produce the documents so that the accounts may be verified by the respondent. Admittedly, while invoking the arbitration, the petitioner asked the respondent to appoint the nominee Arbitrator on its behalf within 30 days. Within one week from the date of receiving the notice, the respondent on 25th March, 2016 gave the reply and admittedly, within the period of 20 days, the respondent appointed its nominee Arbitrator being a Retired Judge of the Hon"ble Supreme Court.

27. There is no force in the argument of the petitioner that once the respondent has rejected the reference on various reasons, it is not entitled to appoint the Arbitrator even within 30 days time granted by the petitioner after changing its mind. This Court is of the considered view that within 30 days time, as given by the petitioner in the present case, the respondent was entitled to appoint the nominee Arbitrator, if good sense prevails upon, it even after rejection of reference prior to such appointment within thirty days. Even, during this period of 30 days time, the respondent can change its mind to appoint the nominee Arbitrator.

28. I am clear in my mind that if the nominee Arbitrator is not appointed before filing of the petition, the party loses its right. In the present case, facts speak for themselves as the respondent has appointed its arbitrator within the period of thirty days given by the petitioner itself though after filing of the petition.

29. It would be appropriate to refer the list of dates and events supplied by the learned counsel for the respondent:-

19.03.2016

Petitioner issued notice invoking arbitration under Clause 21.2 of the MSA and appointed retired Judge of Supreme Court as its nominee Arbitrator. Vide said notice, petitioner called upon the respondent to appoint its nominee Arbitrator within 30 days.

25.03.2016

Respondent replied to the petitioner's notice dated 19.03.2016 stating that the

invocation of arbitration was premature and disputing two out of three claims raised. Further, with respect to the petitioner's third claim, respondent requested details along with supporting documents in order to examine the claim.

07/04/16

In the hearing held in a petition under Section 9 of the Arbitration and Conciliation Act, 1996 bearing OMP (I) (COMM.) No.103 of 2016 listed before this Court, the respondent submitted that it shall be taking steps to appoint its nominee arbitrator by 11.04.2016.

08/04/16

Accordingly, the respondent appointed retired Judge of Supreme Court as its nominee Arbitrator with his consent which was orally given on the same day.

09/04/16

Respondent received an email from Hon''ble Judge accepting appointment as respondent's nominee Arbitrator.

18.04.2016

Respondent informed the petitioner that it had appointed Hon''ble Judge as its nominee Arbitrator on 08.04.2016.

21.04.2016

Respondent received an email from Hon''ble Judge stating that the Arbitrators appointed by the parties have mutually appointed Hon''ble Judge of Supreme Court as the Presiding Arbitrator.

23.05.2016

The matter is fixed before Hon''ble Tribunal.

30. Although there is no time limit prescribed under Section 11(6) of the Act, but I am of the view that in case the entire scheme of Section 11 along with judgments delivered by the Supreme Court and High Courts is read in a meaningful manner, by implication, thirty days time is minimum period of time, otherwise one of the parties could misuse the due process of procedure by simply approaching the Court that the notice was given, even before the expiry of thirty days period, since the respondent is not agreeable to the reference (whether any arbitrable claim(s) is alive or not). Therefore, the petition under Section 11 of the Act cannot be entertained before expiry of thirty days on behalf of any party, once the notice is served, unless with the consent of the parties to the agreement. No doubt, needless to mention that after expiry of thirty days if a petition is filed in the Court, the appointing authority loses its right to make the appointment.

31. In the present case, the respondent has appointed the nominee Arbitrator

within the period of 30 days. Therefore, the present petition is pre-mature and is not maintainable. The same is accordingly dismissed.

32. No costs.

33. Copy of the order be given dasti to both the parties under the signatures of the Court Master and order also be communicated to the Arbitral Tribunal without any delay.