
(2001) 01 DEL CK 0005

In the Delhi High Court

Case No : Arbitration Application No. 111 of 2000 and O.M.P. No. 63 of 2000

International Amusement Ltd.

APPELLANT

Vs

Indian Trade Promotion Organization

RESPONDENT

Date of Decision : 23-01-2001

Acts Referred:

Citation : (2001) 01 DEL CK 0005

Hon'ble Judges : Madan B. Lokur, J

Bench : Single Bench

Advocate : Ashok H. Desai and Pratibha M. Singh, for the Appellant; Mukul Rohtagi, Addl. Solicitor General, Ravinder Sethi Ravi Sikri, Piyush Sharma and V.K. Rao, for the Respondent

Judgement

Madan B. Lokur, J.—The Petitioner has filed two petitions. A.A.No.111 of 2000 is a petition u/s 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) for the appointment of an Arbitrator to resolve the disputes that have arisen between the parties. O.M.P.No.63 of 2000 is a petition filed under the provisions of Section 9 of the Act praying for interim measures.

2. It appears that the Respondent decided to set up an amusement park on land which was leased out to the Respondent by the Government of India. The Petitioner gave its proposal to the Respondent which was accepted. According to the Petitioner, the Respondent agreed to lease out the plot of land in which the amusement park was to be situated on a permanent basis.

3. In view of the representations said to have been made by the respondent the Petitioner did the spade work and set up an amusement park sometime in the mid 1980s in Pragati Maidan, New Delhi. This amusement park is known as Appu Ghar.

4. A license agreement in respect of the land was entered into between the Petitioner and the Respondent for the first time on 10th November, 1987. The period of the license was from 14th November, 1984 to 13th November, 1987. In

other words, the agreement was executed just three days before it was to expire. The parties executed another license agreement but this time for a period of five years with effect from 14th November, 1987 to 13th November, 1992. On this occasion, the Respondent acted a little more speedily because the agreement was executed on 5th September, 1989. The parties entered into a third license agreement on 6th November, 1995. This was for the period 14th November, 1992 to 13th November, 1999.

5. According to the Petitioner, it had always been given to understand that the allotment was on a permanent basis and the mere use of the word license was not intended to alter the relationship between the parties. The Petitioner, on this basis, made huge investments running into crores of rupees to upgrade and improve the quality of the amusements available in Appu Ghar. The Petitioner says that as recently as in 1998 it invested about Rs.5 crores to have a water park called Oysters which has a large number of rides for the amusement of the visitors.

6. The license agreement dated 6th November, 1995 contains an arbitration clause being Clause No.28 which reads as follows:-

"In case of any dispute arising out of or in connection with this agreement the dispute shall be referred to the sole Arbitration of the Chairman, India Trade Promotion Organisation, or his nominee whose decision/award shall be final conclusive and binding on the parties. Application for reference to arbitration shall be made by either party within 2 months of arising of the dispute."

The Petitioner says that it was suddenly told by a letter dated 2nd September, 1999 that the license agreement is coming to an end on 13th November, 1999 and the Petitioner was called upon to vacate the premises on the expiry of the license deed. The Petitioner sent a detailed representation dated 27th October, 1999 requesting for permission to continue operating and running the amusement park Appu Ghar and Oysters on a long term basis. This request was rejected by the Respondent by a letter dated 10th November, 1999.

7. In view of the rejection of the Petitioner's request, a letter dated 11th November, 1999 was sent by the Petitioner to the Chairman of the Respondent stating that they had invested huge amounts in the amusement park and just about a year ago they had started a water park called Oysters which was with the approval and knowledge of the Respondent. The Petitioner stated that it had always been assured that it was a permanent allottee of the premises. In this view of the matter, since serious disputes had arisen between the parties, a request was made to the Chairman of the Respondent to enter upon a reference as per Clause 28 of the agreement between the parties. The Petitioner also sent a letter dated 15th November, 1999 specifying various disputes that have arisen between the parties. Although this letter was received by the respondent yet it appears that it could not be considered in time because by a letter dated 16th November, 1999 the Respondent informed the Petitioner that there were no

disputes between the parties and in any case no disputes had even been spelt out. In response, the Petitioner sent a letter dated 17th November, 1999 bringing to the notice of the Respondent its letter dated 15th November, 1999.

8. On 22nd December, 1999, the Respondent wrote to the Petitioner that the license agreement had come to an end and the Petitioner was in unauthorized occupation of the premises and that they were required to vacate the same. It was reiterated that there were no disputes between the parties and as such the question of referring any disputes to arbitration did not arise.

9. Subsequently, proceedings were initiated against the Petitioner under the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and I am told that the same are pending before the Estate Officer.

10. It is on the basis of these facts that the Petitioner has sought the appointment of an Arbitrator and for interim measures.

11. Learned counsel for the parties made their submissions on 15th December, 2000 when judgment was reserved.

12. A perusal of the arbitration clause shows that it is extremely widely worded. In fact, the words "in connection with" used in the arbitration clause were considered by the Supreme Court in *Renusagar Power Co. Ltd. Vs. General Electric Company and Another*, . While interpreting these words, the Supreme Court held in paragraph 25 of the Report as follows:-

"Four propositions emerge very clearly from the authorities discussed above:

(1) xxx xxx xxx (2) Expressions such as "arising out of" or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relating to" the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement.

(3) Ordinarily as a rule an arbitrator cannot clothe himself with power to decide the questions of his own jurisdiction (and it will be for the court to decide those questions) but there is nothing to prevent the parties from investing him with power to decide those questions, as for instance, by a collateral or separate agreement which will be effective and operative.

(4) xxx xxx xxx

It, Therefore, appears to be quite clear that even though the license agreement between the parties has come to an end, the arbitration clause is of the widest amplitude and it survives the expiry of the license agreement and can be invoked by the Petitioner. In any case, the request for the appointment of an Arbitrator was made by the Petitioner on 11th November, 1999, that is, during the currency of the agreement.

13. Learned counsel for the Petitioner relied upon *Konkan Railway Corpn. Ltd.*

and Others Vs. M/s. Mehul Construction Co., to contend that under the provisions of Section 11(6) of the Act, it is imperative for the Chief Justice or his nominee "to bear in mind the legislative intent that the arbitral process should be set in motion without any delay whatsoever and all contentious issues are left to be raised before the arbitral Tribunal itself".

14. Reliance was also placed upon another passage in the same Report where the Supreme Court, after discussing the legislative intent of the Act, stated that "it would be proper for the Chief Justice or his nominee just to appoint an Arbitrator without wasting any time or without entertaining any contentious issues at that stage, by a party objecting to the appointment of an Arbitrator. If this approach is adhered to, then there would be no grievance of any party and in the arbitral proceeding, it would be open to raise any objection, under the Act".

15. It has further been stated by the Supreme Court that "as has been explained earlier in the earlier part of this judgment, the duty of the Chief Justice or his nominee being to set the arbitral process in motion it is expected that invariably the Chief Justice or his nominee would make an appointment of Arbitrator so that the arbitral proceeding would start as expeditiously as possible and the dispute itself could be resolved and the objective of the Act can be achieved".

16. The contention of learned counsel for the Petitioner was that whether any disputes have or have not arisen, is a matter which is entirely for the Arbitrator to decide. He submitted that it is not as if the disputes raised by the Petitioner are so patently and ex facie frivolous that there would be no reason to make a reference to the Arbitrator. This is also the view expressed by the Supreme Court in *Nimet Resources Inc. and Another Vs. Essar Steels Ltd.*, . In paragraph 7 of the Report, it has been stated as follows:-

"In such a case, unless the Chief Justice of India or his nominee can be absolutely sure that there exist no arbitration agreement between the parties it would be difficult to state that there should be no reference to arbitration. Further such a view may not be conclusive in view of the nature of the powers that are exercised u/s 11(6) of the Act".

In the present case, the existence of an arbitration agreement is not in dispute. Therefore, it is "difficult to state that there should be no reference to arbitration." Apart from this, the Petitioner has indicated the disputes which have arisen between the parties in its letters dated 11th November, 1999 and 15th November, 1999. The Petitioner has also listed a large number of disputes in the petition. According to the Petitioner most, if not all, these disputes arise for resolution. It cannot be said with absolute certainty that the disputes stated by the Petitioner are so patently frivolous that there should be no reference to arbitration. Nor can it be said with absolute certainty that no disputes have arisen between the parties.

17. Following the decisions of the Supreme Court referred to above, I think the disputes said to have arisen between the parties ought to be referred to

arbitration. If no genuine dispute has arisen, the learned Arbitrator can always give such a finding.

18. The question that then arises is about who should be appointed as the Arbitrator. In terms of the license agreement, the Petitioner had requested the Chairman of the Respondent to enter upon a reference because it was the Chairman of the Respondent or his nominee who would have to arbitrate the disputes between the parties. An opportunity was, Therefore, given by the Petitioner to the Chairman of the Respondent but he declined to act under Clause 28 of the Agreement.

19. Section 11(6) of the Act reads as follows:-

"11. Appointment of arbitrators. -

(1) to (5) xxx xxx xxx (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 appointment.

(7) to (12) xxx xxx xxx

A perusal of Clause (a) of Section 11(6) of the Act makes it clear that if a party fails to act as required by the agreed upon procedure, the Chief Justice or his nominee may appoint an Arbitrator. There are no words of limitation that the Arbitrator to be appointed has to be the person agreed upon by the parties. The appointment of an Arbitrator is left to the discretion of the Chief Justice or his nominee and it may be the Arbitrator agreed upon by the parties or some other person.

20. A somewhat similar situation arose in *Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao*, where the Arbitrator had not been appointed in terms of the contract between the parties. The Supreme Court held that the administrative head who was to make the appointment had abdicated his power to appoint an Arbitrator under the contract. Under these circumstances, the Court gets the jurisdiction to appoint an Arbitrator in place of the person mentioned in the contract. Of course, *Nandyal Co-op. Spinning Mills Ltd.* was decided under the provisions of the Arbitration Act, 1940 but I think the principle laid down therein would apply equally to Section 11(6) of the Act.

21. Accordingly, I am of the view that an arbitrator should be appointed to

resolve the disputes between the parties. I would, Therefore, appoint Mr. Justice S. Ranganathan, a retired Hon"ble Judge of the Supreme Court to resolve the disputes between the parties.

22. Insofar as the question of interim protection to the Petitioner is concerned, the Respondent has not taken any precipitate action to evict the Petitioner from the premises. This position has continued for more than a year because the Petitioner allegedly became an unauthorized occupant with effect from 14th November, 1999. Proceedings under the Public Premises (Eviction of Unauthorised Occupants), Act, 1971 are pending against the Petitioner. On the conclusion of these proceedings, the Petitioner (if it does not succeed before the Estate Officer) may well file an appeal. Under these circumstances, it appears to me that the Petitioner is not likely to be evicted from the premises in a hurry. Therefore, there does not seem to be any necessity of granting any interim protection to the Petitioner. However, should the need arise, the Petitioner may move an application for interim protection u/s 17 of the Act before the learned Arbitrator.

23. I must, however, record that the learned Additional Solicitor General who appeared on behalf of the Respondent had contended that the Petitioner had no right to stay on in the premises nor could the Petitioner be thrust upon the Respondent. It was contended that the Petitioner can always be compensated in terms of money if it is eventually found that the Petitioner is entitled to continue in the premises. It was also contended that the arrangement between the parties was nothing more than a simple commercial contract which could be determined. In the present case, the contract has not been determined but has come to an end by efflux of time and the issue whether the Petitioner can continue to remain in the suit premises cannot be decided by the Arbitrator.

24. As a result of the view that I have taken, it will be appropriate if the parties address themselves on the merits of the case and the question of interim measures (should the need arise) before the learned Arbitrator.

25. Both the petitions stand disposed of in the light of the above. No costs.