

(2009) 09 DEL CK 0353
In the Delhi High Court
Case No : Arb.P. 150 of 2009

Jyoti Construction Co.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-09-2009

Acts Referred:

Arbitration Act, 1940 — Section 8, 8(1)

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

Citation : (2009) 09 DEL CK 0353

Hon'ble Judges : A.P. Shah, C.J

Bench : Single Bench

Advocate : Raman Kapur and Honey Taneja, for the Appellant; Mini Pushkarna, for MCD, for the Respondent

Final Decision : Disposed Off

Judgement

Ajit Prakash Shah, C.J.—This is a petition u/s 11(6) of the Arbitration and Conciliation Act, 1996. The facts are that the respondents invited tender for "I/S of Mehrauli Gurgaon Road from Andheria More to Delhi Haryana Border in South Zone." The petitioner firm also submitted its tender and the same was accepted and contract was awarded to the petitioner vide Work Order No. EE(pr.)SZ/TC/2003/2004/65 dated 18th August, 2003. But as certain disputes have arisen between the parties, the petitioner invoked arbitration clause, i.e. Clause 25. Commissioner, MCD failed to respond to the notice, and, therefore, the petitioner approached this Court u/s 11(6) of the Arbitration and Conciliation Act, 1996.

2. It is not disputed that the petitioner demanded arbitration of the disputes. It is necessary, however, to reproduce Clause 25:

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 of materials used on the work or as to any other questions claim, right, matter of thing whatsoever in any way arising out of or relating to the contract designs, drawings

specifications, estimates , instructions orders or these conditions of otherwise concerning the work or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, competition or abandonment thereof shall be dealt with as mentioned hereinafter.

i. If the contractor considers any work demanded of him to be outside the requirements of the contract or disputes any drawings, record or decision given in writing by the Engineer-in-charge on any matter in connection with or arising out of the work, to be unacceptable, he shall promptly within 15 days request the superintending Engineer in writing for written instructions or decision. Thereupon the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter. If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied within the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal, if the contractor is dissatisfied with the decision, the contractor shall within a period of 30 days from the receipt of the decision, give notice to the Commissioner M.C.D. For appointment of arbitrator failing which the said decision shall be final, binding and conclusive and not referable to adjudication by the arbitrator.

ii. Except where the decision had become final, binding and conclusive in terms of Sub Para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Commissioner M.C.D., if the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such disputes with amounts claimed in respect of each such disputes along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of the contract that no person other than a person appointed by such Commissioner, MCD as aforesaid should act as arbitrator and if for any reason that it is not possible, the matter shall not be referred to arbitration at all.

It is also a term of the contract that the contractor does not make any demand for appointment of arbitrator in respect of any claim(s) in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment the claim of the contractor shall be deemed to have

been waived and absolutely barred and the MCD shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modification or reenactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and gives separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceed Rs. 1,00,000/- the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator these shall be paid equally by both the parties.

It is also a terms of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitration) shall be in discretion of the arbitrator who may direct to any by who, and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.

3. It appears that the petitioner had earlier moved this Court u/s 11(6) of the Arbitration and Conciliation Act, 1996 by Arb.P. No. 323/2008 which came to be disposed of by this Court vide order dated 9th July, 2007 which reads as follows:

In view of the afore-noticed facts, this petition is dismissed as withdrawn with liberty to the petitioner to exhaust the remedies under Clause 25 of the agreement between the parties in case the same are still available in accordance with law and the contract between the parties.

As per the above mentioned order, the petitioner followed the procedure as mentioned under Clause 25 of the agreement and served the respondent with letters dated 24th August, 2007, 9th November, 2007, 20th December, 2007 and finally a notice dated 29th January, 2008 u/s 11 of the Arbitration and Conciliation Act, 1996 was served upon the respondent. The respondent did not reply to any of these correspondence.

4. It is the argument of the petitioner that since the Commissioner, MCD failed to act within the statutory period, he has lost his right to appoint an arbitrator and an independent arbitrator is required to be appointed in view of the decision of the Supreme Court in Datar Switchgear v. Tata Finance Limited (2002) 8 SCC 151.

5. A similar Clause was considered by S. Ravindra Bhat, J in Ansal Buildwell Limited v. Centre for Development of Telecom Arb.P. 318/2008, decided on 1st September, 2008) wherein it was held as follows:

4. Learned Counsel for the petitioner relied upon the text of Section 11 and a decision of the Bombay High Court in Smt. Satya Sahu and others Vs. M/s. Vidarbha Distillers and others, . It was argued that when an arbitration agreement provides for appointment of a named person or persons as Arbitrator and when they refuse to act, the procedure require to be followed is as provided in Section 11. It was argued analogically, where the process containing the Agreement, envisions appointment by one of the parties and also provides for contingency, a similar inference has to be drawn, that upon the happening of that contingency, the power to appoint an Arbitrator stands exhausted.

5. The Court is un-persuaded by the submission of the petitioner. The Arbitration Agreement, i.e. Clause 67.1 is no doubt unusually worded. That does not detract from its real effect. The contracting parties categorically agreed that no person other than one appointed by the Executive Director, C-DOT, could act as Arbitrator and that if for any reason that was not possible, there could not be any reference for arbitration at all. In essence what the condition says is that the foundation of the Arbitration Agreement itself is appointment by the Executive Director, in the manner contemplated. If this condition which is fundamental to the Arbitration Agreement itself, were to be seen with the preceding terms, it would be apparent that the C-DOT, (subject to other provisions of law such as Section 11, i.e. fixing time limits etc., as interpreted by the Supreme Court in Datar Switch Gear v. Tata Finance Ltd. 2002 (8) SCC 151, retained the right to appoint Arbitrator at all times. This condition is unlike the one which the Bombay High Court had occasioned to deal with in Satya Kailashchadras case (supra).

6. It is interesting to also note that the Bombay High Court had relied upon a previous decision of the Supreme Court in State of West Bengal Vs. M/s. Naional Builders, . The Supreme Court was generally speaking about the right of the Court to appoint Arbitrators, u/s 8 of the 1940 Act. The Court held as follows:

It is for the Court to intervene and appoint another arbitrator u/s 8(1)(b), if arbitration agreement does not show that it was intended that the vacancy shall not be supplied.

7. From the above discussion, it is apparent that the right of the C-DOT to appoint an Arbitrator in the manner contemplated in Clause 67.1.4 did not get exhausted upon the named Arbitrator refusing to act further. Mr. J.C. Seth, learned Counsel appearing for C-DOT, submits that by an office order dated 26.8.2008, Mr. P.S. Saran (Retd.), Secretary, Department of Telecom Services, and Member (Services) Telecom Commission, has been since appointed as Arbitrator.

7. In the light of the above decision, it is not possible to accede to the request of the petitioner for appointment of an independent arbitrator. However,

Commissioner, MCD is directed to nominate an arbitrator in terms of Clause 25 within four weeks from today.

The petition stands disposed of.