
(2009) 02 DEL CK 0137

In the Delhi High Court

Case No : Arbitration A. 356 of 2008

Madhava Hytech Engineers Pvt. Ltd.

APPELLANT

Vs

Airports Authority of India

RESPONDENT

Date of Decision : 17-02-2009

Acts Referred:

Arbitration Act, 1940 — Section 20

Arbitration and Conciliation Act, 1996 — Section 11(6), 7, 8

Citation : (2009) 02 DEL CK 0137

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Jayant K. Mehta and Sandeep Phogat, for the Appellant; S.S. Lingwal, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—The agreement between the parties contains an arbitration clause as under:

Except where otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitrator as may be appointed by the authority mentioned at Serial No. 32 in Schedule E. There will be no objection if the arbitrator so appointed is an employee of AAI and that he had to deal with the matters to which the contracts relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason the

appointing authority for arbitrator, as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by the authority mentioned in schedule E, should act as arbitrator and if for any reason, that is not possible, the matter is not to be referred to arbitration at all.

2. The petitioner applied u/s 11(6) of the Arbitration Act, 1996 averring that though the petitioner pursuant to the agreement mobilized all resources to undertake the awarded work but there was delays on the part of the respondent; on the contrary, the respondent made only part payment to the petitioner and that too belatedly; that disputes and differences having arisen between the parties, the petitioner vide its letter dated 11th June, 2007 to the Member Planning of the respondent being the appointing authority under the agreement requesting for appointment of arbitrator within a period of 30 days from the receipt of the letter. A copy of the letter dated 11th June 2007 together with a copy of the postal receipt vide which the same was pleaded to have been dispatched were filed alongwith the petition.

3. The respondent upon being served with the notice of the application filed a short reply stating, inter alia, that the respondent had already vide order dated 18th November, 2008 of the competent authority, in terms of the agreement, appointed an arbitrator and thus the petition u/s 11(6) of the Act had become infructuous. Copy of the letter dated 18th November, 2008 of the Member Planning of the respondent appointing Shri Dandage W.D. as a sole arbitrator to adjudicate the disputes was also filed alongwith the reply. It was also stated that the arbitrator had already entered upon reference and started functioning and the subject matter of the petition u/s 11(6) was sub judice before the arbitrator.

4. When the matter was listed on 23rd January, 2009 it was observed that the petition u/s 11(6) of the Act had been instituted on 5th September, 2008 and the arbitrator had been appointed by the respondent on 18th November, 2008 i.e., after the institution of the petition. Thus, in view of the dicta in *Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Another*, the respondent had forfeited the right to appoint the arbitrator and the petitioner had become entitled to appointment of an independent arbitrator from this Court. The counsel for the respondent had, however, contended that since the arbitrator had been appointed and there was no averment of the petitioner of any bias, against the said arbitrator, this Court instead of appointing an independent arbitrator, as sought by the petitioner, should not exercise the power u/s 11(6) and/or confirm the appointment of the arbitrator already appointed by the respondent. However, it was felt on that date that in contracts by authorities such as the respondent and on the award of works by whom business of persons as the petitioner is dependent, there is normally no negotiation on such terms of the contract which

are contained in the General Conditions. It was further observed that no person, if free to contract, would of his own agree to adjudication of disputes by nominee / appointee of others; such clauses are rarely found in arbitration agreements between the private parties and are to be generally found in General Conditions of contract of State authorities only and who are the largest employers.

5. I may notice that the Apex Court recently in United India Insurance Company Limited Vs. Manubhai Dharmasinhbhai Gajera and Others, has also observed that the principle of the State being required to act fairly operates also in contractual fields and more in a case where bargaining power is unequal or where the contract is not negotiated one and/or is based on the standard form contracts between the unequals.

6. It was thus felt on 23rd January, 2009 that upon default by the agreed appointing authority to appoint the arbitrator, and the Apex Court having held that the right to appoint then stands forfeited and further, the right of adjudication of disputes by independent arbitrator being an important right which had accrued to the petitioner could not be defeated merely because the arbitrator had been appointed after the institution of the petition. It cannot be said that without any plea of bias against the said arbitrator, the right of the petitioner to have an independent arbitrator could be interfered with.

7. However, in view of the arbitration clause aforesaid between the parties providing that no person other than a person appointed by the competent authority of the respondent should act as arbitrator and if for any reason that is not possible, the matter is not to be referred to arbitration at all, it was felt on that day that the petitioner should not be left remediless and would necessarily have to then file a suit for its claims. However, upon the said proposition being put to the counsel for the petitioner, the counsel for the petitioner had contended that the petitioner was ready to institute a suit but upon such suit being instituted, the respondent ought not to take the plea of the suit being barred by Section 8 of the Arbitration Act. In the circumstances, the counsel for the respondent was asked to take instructions.

8. The counsel for the respondent on next date i.e., 6th February, 2009 stated that the respondent also did not want the petitioner to approach the civil court and wanted the disputes to be adjudicated by arbitration only. However, the counsel for the respondent contended that if the arbitrator already appointed by the respondent was not agreeable to the petitioner, any arbitrator from the panel of arbitrators of the respondent be appointed. The counsel for the petitioner was asked to take instructions on the said offer of the respondent.

9. The counsel for the petitioner has today stated that the petitioner is not agreeable to appoint any arbitrator from the panel of the respondent and relying upon Datar Switchgears aforesaid has argued that the retired judge of this Court or of the Apex Court be appointed as the arbitrator to adjudicate the disputes

between the parties.

10. In *Wellington Associates Ltd. Vs. Mr. Kirit Mehta*, , though on an application u/s 11(6) of the Act it has been held that an arbitration clause, to constitute an arbitration agreement within the meaning of Section 7, the arbitration should be agreed to be resorted to mandatorily and as a sole remedy without requiring any fresh consent of the parties.

11. A literal interpretation of the arbitration clause in the present case would mean that though the parties had agreed for arbitration and with which the petitioner was bound but upon disputes arising between the parties, it was open to the respondent to either appoint an arbitrator and if not willing for arbitration, to by not appointing an arbitrator compel the petitioner to the ordinary remedy of civil suit.

12. A Division Bench of this Court in *Union of India Vs. Bharat Engineering Corporation*, also held that a contingent arbitration agreement is no arbitration agreement within the meaning of law. *Wellington Associates Ltd. together with Bharat Engineering Ltd.* would thus lead to a conclusion that the arbitration clause aforesaid in the contract is not an arbitration agreement within the meaning of Section 7 of the Act and thus the question of this Court appointing an arbitrator u/s 11(6) would not arise.

13. However, I have since also come across a Full Bench of this Court in *Ved Prakash Mittal Vs. Union of India and Others*, where a similar clause as in the present case fell for consideration. The Full Bench, without of course referring to *Bharat Engineering Ltd.* held that the purpose of Section 20 of the 1940 Act was to effectuate the intention of the parties of arbitration of disputes and the parties could not have agreed to exclude the power of court u/s 20.

14. I do not find any change in the 1996 Act, to make the dicta of the Full Bench inapplicable.

15. The counsel for the petitioner, during the course of hearing, also drew attention to the arbitration clause in *Union of India v. Bharat Battery Manufacturing Co. (P) Ltd.* (2007) 27 SCC 684 wherein also an arbitration clause to the same effect as herein existed and though there is no discussion in the judgment on this aspect but the Apex Court appointed the arbitrator in that case also.

16. In view of the aforesaid, it has to be held that notwithstanding the agreement providing that no person other than a person appointed by the competent authority of the respondent should act as arbitrator and if for any reason that is not possible, the matter is not to be referred to arbitration at all, the power u/s 11(6) of the Act can be exercised. I may also notice that the Apex Court in *The Union of India (UOI) Vs. D.N. Revri and Co. and Others*, laid down that a contract must be interpreted in such a manner as to give efficacy to the contract rather than invalidate it.

17. The next question is whether the arbitrator from the panel of the respondent only is to be appointed in view of the dicta of the Apex Court in Northern Railway Administration, Ministry of Railways, New Delhi v. Patel Engineering Company Ltd. VII (2008) SLT 432 or an independent arbitrator as sought by the petitioner can be appointed. The arbitration agreement does not prescribe any qualification for the arbitrator. Thus, in my view, there is no impediment to the appointment of an independent arbitrator.

18. The counsel for the respondent next contends that no notice for appointment of arbitrator was served on the respondent. The service of such notice is a condition precedent to the exercise of power u/s 11(6) as aforesaid. The petitioner has relied upon the notice dated 11th June, 2007. Not only has the respondent in the reply filed by it not denied the said fact but it has also not been explained as to why, if the said notice had not been served, did the respondent on 18th November, 2008 appoint the arbitrator. I, therefore, do not find any merit in the said contention of the respondent.

19. The petitioner has thus become entitle to appointment of an independent arbitrator. The counsel for the petitioner states that the works subject matter of the agreement were to be carried out at Hyderabad, (even though the agreement was executed at Delhi) and that the entire records and evidence would be available at Hyderabad and it would be convenient if the arbitration proceedings are held at Hyderabad. It may be noticed that the arbitrator appointed by the respondent is a resident of Pune and from his letter dated 23rd November, 2008 filed alongwith the reply of the respondent it appears that he intended to hold the arbitration proceedings in Pune only. No agreement between the parties as to the place of arbitration has been shown. The counsel for the respondent has not controverted the request of the petitioner for arbitrator based at Hyderabad to be appointed.

20. Accordingly Justice M Jagannadha Rao, retired judge of the Apex Court (C/o Sri M Krishan Mohan Rao, 3-6-281, Himayat Nagar, Opp. Old MLA Qts. Hyderabad - 500029) is appointed as the arbitrator to adjudicate the disputes, claims and counter claims of the parties. The arbitrator to fix his own fee in consultation with the counsel for the parties. The application is disposed of. The parties to appear before the appointed arbitrator with prior appointment on 16th March, 2009. A copy of this order be also forwarded to the appointed arbitrator. Copy of this order be given dasti under the signature of the Court Master to the counsel for both the parties.