
(2011) 05 DEL CK 0095

In the Delhi High Court

Case No : Arbitration Petition 364 of 2010

Mahagun (India) Pvt. Ltd.

APPELLANT

Vs

Infiniti Retail Limited

RESPONDENT

Date of Decision : 20-05-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 11, 11(5), 11(6), 11(8)
Companies Act, 1956 — Section 433, 434

Citation : (2011) 2 ARBLR 312 : (2011) 180 DLT 490 : (2011) 5 RCR(Civil) 718

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Atul Nigam, for the Appellant; Mohit Chaudhary and Rashi Bansal, for the Respondent

Judgement

Manmohan Singh, J.—By this order I propose to decide the arbitration petition filed u/s 10 and 11(5) & (6) of the Arbitration and Conciliation Act, 1996, praying to make an order of appointment of an independent person as a sole arbitrator for adjudication of the disputes in view of high cost likely to be incurred by referring the claim/dispute to the Arbitral Tribunal or refer it to the Delhi High Court Arbitration Centre for appointment of a sole arbitrator.

2. It was submitted by the learned Counsel for the Petitioner that in view of the high cost involved in the entire dispute resolving mechanism through the constitution of an Arbitral Tribunal of three arbitrators, it would be in the interest of the parties that a sole arbitrator be appointed which was the intention of the parties but could not be agreed to in respect of the choice of the sole arbitrator. It was further submitted that as per the nature of the dispute which involves determination of damages, it is likely to take many hearings leading to high cost of arbitral proceedings and incidental expenses which cannot be borne by the Petitioner.

3. As per the parties, the following are the brief facts:

i. The Petitioner company is carrying on business of real estate and construction etc. The Respondent was desirous of opening one of its retail showrooms in the Mahagun Metro Mall. The Petitioner and Respondent company had entered into an MOU dated 07.08.2007 for the purpose of leasing out the premises by the Petitioner to the Respondent. It is specifically mentioned in the MOU that both the parties shall be bound by the terms and conditions thereof. As per Article III of the MOU, it was specifically provided that if the terms and conditions of the would be breached by the Petitioner company, then the Respondent shall be at liberty to terminate the agreement by giving notice and in the said eventuality, the security deposit (deposited by the Respondent with the Petitioner) shall be refunded by the Petitioner to the Respondent.

ii. The Article X of the MOU deals with the dispute clause.

The same is reproduced below:

Any divergence of opinion or dispute on the interpretation or application of the present MOU shall be resolved amicably by means of consultation or negotiation between the contracting parties.

In the event where the dispute cannot be resolved in the manner aforementioned, the parties will present the dispute to an arbitration tribunal in accordance with the following provisions: each of the parties designate a member and the two designated members will in turn, by consensus, elect a third member, who will act as president of the tribunal of arbitration.

iii. According to the Respondent, the Petitioner had breached various terms and conditions of the MOU and the Respondent terminated the same vide letter dated 11.08.2008 and by reminder letter dated 04.02.2009, the Petitioner was asked to refund the security amount within 15 days. The Petitioner, on the other hand, stated that MOU can only be terminated as per conditions stated in Article III of the MOU. It was also stated that the Petitioner carried out massive alterations and change of design keeping in view that the expense would be recovered through the lease rent and therefore, refused to refund the security deposit.

iv. The Respondent thereafter issued notice u/s 433 and 434 of the Companies Act, 1956 dated 15.04.2009 and demanded payment of Rs. 8,25,000/- from the Petitioner on account of refund of security deposit within 21 days of the receipt of the notice failing which the Respondent will file the petition for liquidation of the Petitioner company.

v. The Petitioner replied to the notice by reply dated 08.05.2009 by stating that the Petitioner had incurred heavy expenses on massive alterations, redesigning and modification of the mall as per the requirements of the Respondent and if the Respondent terminated the MOU, then the Respondent would be liable to damage to the tune of Rs. 5,04,74,100/- and the security deposit had to be adjusted in the said claim. The Respondent, on the other hand, by letter dated 11.06.2009, denied any liability towards any amount of damages as according to

the Respondent, the Respondent had never asked the Petitioner to incur any extra cost for modification or redesigning the premises.

vi. Vide letter dated 18.08.2010, the Petitioner company sent a notice for appointment of an arbitrator as per Article X of the MOU wherein the Petitioner company had informed the Respondent company that the Petitioner nominated Mr Justice R.C. Chopra (retd. Judge of Delhi High Court) as a member of the Arbitral Tribunal and asked the Respondent company to appoint its arbitrator. Consequently, vide letter dated 29.09.2010, the Respondent informed the Petitioner that the Respondent nominated Justice M.R. Calla (retd. Judge of Gujarat High Court) as a member of the Arbitral Tribunal.

vii. It is a matter of fact that both the members of the Arbitral Tribunal, i.e., Justice R.C. Chopra (retd.) and Justice M.R. Calla (retd.), nominated and appointed Justice Ajit Prakash Shah (former Chief Justice of Delhi High Court) as the Presiding Arbitrator. It was intimated to both, the Petitioner and the Respondent, that the preliminary meeting of the Arbitral Tribunal had been fixed on 13.12.2010 at 5:30 p.m.

viii. According to the Petitioner's counsel, the Petitioner, via an e-mail to the Respondent's counsel, proposed to the Respondent that instead of appointment of arbitrators by both sides, let a sole Arbitrator be appointed by the Delhi High Court Arbitration Centre instead of Arbitral Tribunal, considering the high cost of the Arbitral Tribunal and its incidental cost. The Petitioner has received the letter dated 02.11.2010 from Justice A.P. Shah (retired Chief Justice) informing the constitution of the Arbitral Tribunal which was dispatched on 12.11.2010 and by letter dated 18.11.2010, the Petitioner informed the members of the Arbitral Tribunal and the Respondent's counsel about the inability to meet the high cost of the Arbitral Tribunal and seeking to refer the matter to the Delhi High Court Arbitration Centre for appointment of a sole arbitrator to which no reply was received from the Respondent side.

4. As per the record, on 13.12.2010, a preliminary meeting was held as per schedule wherein the Advocate of the Respondent informed the Arbitral Tribunal that the suggestion given by the Petitioner to have dispute adjudicated by the Single Arbitrator under the aegis of Delhi High Court Arbitration Centre was not agreeable to his client. According to him, the dispute between the parties had to be adjudicated by this Arbitral Tribunal. He further made the statement before the Arbitral Tribunal that the said information had been communicated to the Petitioner as well as Petitioner's counsel Mr Atul Nigam. The Arbitral Tribunal through their secretariat contacted Mr Atul Nigam on phone who informed that he intended to move Delhi High Court for obtaining orders for reference of the disputes to the single arbitrator and therefore, he had not appeared in the meeting. The Arbitral Tribunal felt that as it was already constituted the proceedings have to be continued in the absence of any stay orders, thus, the following dates were appointed for taking the steps by the parties:

On or Before

Steps to be Taken

10th January, 2011

Statement of Claim/s to be filed by the Claimant

7th February, 2011

Reply to the Statement of Claim and Counter Claim, if any, to be filed by the Respondent

7th March, 2011

Reply to the Counter Claim and Rejoinder to the reply of the Respondent to be filed by the Claimant.

21st March, 2011

Rejoinder to the reply to the Counter Claim to be filed by the Respondent.

5. The Tribunal had also directed to the parties to complete on or before 31.03.2011 the process of seeking any inspection or production of documents in possession of the opposite party and they would also file the draft/proposed issues on the next date of hearing, i.e., 15.04.2011 at 5:30 p.m. for settlement of issues and issuing the directions in the matter of mode and procedure for trial of the issues arising for determination. As regard the fees and expenses were concerned, an order was passed that an amount of Rs. 1,00,000/- be deposited on account with each of the member of the Tribunal for the time being on or before 13.01.2011. The amount was to be shared in equal proportion by both the parties.

6. The above mentioned order was passed on 13.12.2010. The Petitioner thereafter on 20.12.2010 filed the present u/s 10 and 11(5) and (6) of the Arbitration and Conciliation Act which was listed first time before Court on 23.12.2010. On 23.12.2010 the Court issued notice to the Respondent while observing that though the MOU containing the arbitration clause which had been relied upon by the Petitioner was not signed by the Respondent but, from the letters of the Respondent dated 20.09.2010 and 29.09.2010 it was clear that the Respondent had given its consent for adjudication of the dispute in view of the Article X of the MOU. Thereafter, the reply was filed on 11.04.2011 by the Respondent and Petitioner filed the rejoinder on 29.04.2011.

7. In rejoinder, it has been alleged by the Petitioner that there are no justified reasons for opposition by the Respondent to the prayer made by the Petitioner for appointment of a sole arbitrator in view of the fact that the Respondent's claim is limited to Rs. 8,25,000/- for which the Respondent had already instituted a winding up petition before this Court bearing Company Petition No. 03/2010. As far as the Petitioner is concerned, no ceiling arbitration cost had been disclosed by the Arbitral Tribunal constituted of three retired High Court Judges

and it shows that the Respondent has no justified defense over the substantive claim of the Petitioner and wants to non-suit the Petitioner or otherwise, being a public limited company, has scant regard for public funds and is ready to spent unknown fund of money. It is the Petitioner who since appointment of its nominee has been concerned of high cost of dispute redressal for which it has been making repeated inquiries and on assumption of high cost is not shirking from the dispute redressal through arbitration but simply praying for appointment of a sole arbitrator in view of expected high arbitration cost as the Petitioner is not in a position to bear the same as it suffering losses on account of termination/rescission of the memorandum of understanding by the Respondent.

8. In support of submission, the learned Counsel for the Petitioner has referred to the following judgments:

(i) Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd.,

(ii) Union of India (UOI) Vs. Singh Builders Syndicate,

(iii) Abdul Gaffar v. Sri Jaichandlal Ashok Kumar and Co. Pvt. Ltd. and Anr. JT 2000 (8) SC 152.

9. It is a matter of fact that as per the minutes of the meeting held on 13.12.2010, the Petitioner was required to file the statement of claim on or before 10.01.2011. But till date, the Petitioner did not file any statement of claim before the Tribunal. It is apparent that the same is not done as the Petitioner has approached this Court for appointment of a sole arbitrator despite the fact that the Arbitral Tribunal had already been constituted. It is also a matter of fact that there is no order by the Court for stay of the proceedings pending before the Tribunal. Tribunal had again issued the direction at the hearing held on 15.04.2011 and after having considered the submissions of the parties, they inclined to grant further time to the Petitioner till 16.05.2011 as a last chance to file the statement of claim. The Tribunal has also modified the schedule

On or Before

Steps to be Taken

16.05.2011

Statement of Claim(s) to be filed by the Claimant

20.06.2011

Reply to the Statement of Claim and Counter Claim to be filed by the Respondent

20.07.2011

Reply to the Counter claim and Rejoinder to the reply to the Statement of Claim to be filed by the Claimant.

08.08.2011

Rejoinder to the reply to the Counter claim to be filed by the Respondent.

22.08.2011

Process of admission/denial of documents to be completed by the parties.

25.08.2011

Draft/proposed issues to be filed by the counsel for the parties.

10. The next date of hearing fixed by the Arbitral Tribunal is 26.08.2011 at 4:00 p.m.

11. It is true that the Arbitral Tribunal should be constituted in the manner laid down in the arbitration agreement. Such an arrangement has to be given effect subject to requirements of independence and impartiality and in a particular case, there could be exception and in case the present case falls under such exception, then the prayer made in the petition can be allowed.

12. It was held in the case of Northern Railway Administration (supra) that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration agreement are exhausted, but at the same time also ensure that the twin requirements of Sub-section (8) of Section 11 of the Act are kept in view. Thus, in view of settled law, it is to be considered as to whether the Petitioner's case as per the facts is covered under both requirements of Sub-Section 8 of Section 11 of the Act.

13. The Supreme Court in the case of SVG Molasses Co. B.V. v. Mysore Mercantile Co. Ltd. and Ors. reported in 2007 (5) R.A.J. 1 (SC) dealt with the issue of the alternation of terms of the agreement by the Hon'ble Court and held that "the parties entered into the arbitration agreement with their eyes wide open. They knew the terms thereof. The Court in exercise of its jurisdiction u/s 11(6) of the 1999 Act cannot alter the terms of the contract".

14. In the present case, it is undisputed fact that the procedure for appointment of the arbitrators is already settled in the agreement which was agreed by the parties. It is also undisputed fact that the Petitioner, vide letter dated 18.08.2010, itself had appointed Justice R.C. Chopra (retd.) as a member of the Arbitral Tribunal and asked the Respondent to appoint a member within the statutory period and itself initiated the arbitration proceedings. Hence, as on 18.08.2010, the Petitioner had full intention to follow the procedure to appoint the arbitrator which was already settled in the agreement and had virtually agreed for the same. If that is the position, it appears that after one and half years of the said knowledge, the Petitioner has now changed its stand which prima facie appears to be an afterthought and is not proper. It is the Petitioner who is claiming the damages for more than Rs. 5 crores and the procedure of appointing the Arbitral Tribunal is already settled in the memorandum of understanding which was agreed by the Petitioner itself. The Petitioner itself

initiated the arbitration proceedings as per the agreement and now the Petitioner cannot step back from the proceedings and take the different lead and ask the Court to appoint the sole arbitrator. The intention of the Petitioner is not bonafide. It is the admitted position that the disputes between the parties first time arose in August 2008. It appears from the material available on record that up to August, 2010 was agreeable to appoint the Arbitrator as per the arbitration clause of the MOU.

15. Hence, the Petitioner's case is not covered within the two requirements of Sub-Section 8 of Section 11 of the Act. Therefore, the request of the Petitioner cannot be allowed. As far as the judgments referred to by the Petitioner are concerned; in the first judgment of Northern Railway Administration (supra) it has been specifically held that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration agreement are exhausted. There is only exception that if the Court feels that exceptions, i.e., requirement of independence and impartiality, which does not appear to be possible in this case. Therefore, the said judgment of Northern Railway Administration (supra) does not help the case of the Petitioner; in the second case Union of India v. Singh Builders Syndicate (supra), the Court has given its finding due to peculiar facts of the case and held that the case falls under the exceptions because it had chequered history, but in the present case, the facts are materially different. The relevant paras 4 to 10 of the judgment in this regard read as under:

4. Let us refer to the facts briefly:

The Respondent made a request for arbitration in the year 1999. As the Appellant failed to take necessary steps as mandated by Clause 64, the Respondent filed an application u/s 11 of the Arbitration and Conciliation Act, 1996 ("the Act" for short) in AA No. 202/2000.

5. In pursuance of the directions issued on 11.11.2002 by the designate of the Chief Justice of the Delhi High Court, an Arbitral Tribunal was constituted in terms of Clause 64, consisting of Shri A.K. Mishra, (Chief Engineer/TPS) nominated by the contractor, Shri S.P. Viridi (Dy. F.A. & CEO) nominated by the Appellant, and Shri H.K. Jaggi (Chief Bridge Engineer) as the Umpire. But even before the proceedings could commence before the Arbitral Tribunal, Shri A.K. Mishra, one of the Arbitrators, was transferred and consequently he tendered resignation in May, 2004.

6. As the Appellant failed to provide a fresh panel to enable the Respondent to make a fresh nomination, the Respondent again approached the High Court by filing AA No. 240/2004. A fresh panel was made available thereafter from which the Respondent nominated Shri Ashok Gupta as its Arbitrator. Hardly after one sitting of the Arbitral Tribunal, Shri Ashok Gupta was also transferred and he tendered his resignation on 21.7.2005.

7. As the Appellant again failed to take steps for filling the vacancy, the

Respondent approached the Court again by filing IA No. 6511/2005 in AA 240/2004. In pursuance of an order dated 24.8.2005 passed by the High Court, again a panel was made available and the Respondent made its choice on 9.9.2005.

8. As no steps were taken in pursuance of it by the Appellant, the Respondent sent a reminder on 14.10.2005. There was no response. In this background, the Respondent again approached the High Court on 10.11.2005 in Arbitration Petition No. 256 of 2005 for appointment of an independent sole arbitrator. During the pendency of the said petition, the General Manager of Northern Railways appointed Sri Ved Pal as the contractor's nominee arbitrator on 22.11.2005.

9. The High Court was of the view that no useful purpose will be served by again reconstituting a three Member Arbitral Tribunal in accordance with Clause 64. The High Court found that the matter has been pending from 1999 when the Respondent first made the request for reference to Arbitration and that the cumbersome process of constituting an Arbitral Tribunal in terms of the Arbitration agreement and the delays on the part of Railways in complying with the provisions of the arbitration agreement, led to the arbitration becoming virtually a non-starter.

10. Therefore, the High Court allowed the petition on 27.3.2006 and appointed Justice Jaspal Singh, a retired Judge of the Delhi High Court as the arbitrator. Justice Jaspal Singh recused himself and the High Court on 19.7.2006, appointed Justice R.C. Chopra, another retired Judge of the Delhi High Court as the arbitrator. The said order is challenged in this appeal by special leave. On 6.11.2006, this Court stayed the arbitration proceedings before the sole Arbitrator.

16. After considering the case of Northern Railway Administration (supra) and Union of India v. M.P. Gupta (2004) 10 SCC 504, the Hon'ble Supreme Court in para 15 of the judgment observed as under:

15. The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of parties' choice. If the Arbitral Tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such Tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members of the Arbitral Tribunal or by failing to take steps expeditiously to replace the arbitrators in terms of the Arbitration Agreement, the Chief Justice or his designate, required to exercise power u/s 11 of the Act, can step in and pass appropriate orders.

17. If the entire judgment is read carefully, one can easily come to the conclusion that the present case is not a case where any finding can be averred to the effect that the Arbitral Tribunal has failed to take steps expeditiously to replace the arbitrators in terms of the arbitration agreement. The present case is

not a fit case wherein the Court should exercise power u/s 11 of the Act or the Court can step in and pass appropriate orders. The facts in the present case are very straight and simple. There is no delay on the part of the Respondent or by the Arbitral Tribunal in any manner whatsoever. The case referred to above had a chequered history and this Court respectfully is in agreement with the judgment passed by the Supreme Court which fell under those exceptions which are referred to in the judgment. But the present case is not in the nature of such exceptions. Therefore, the decision referred to by the Petitioner does not help the case of the Petitioner. As regard the third judgment *Abdul Gaffar v. Sri Jaichandlal Ashok Kumar and Co. Pvt. Ltd. and Anr.* (supra) is concerned, the order in the said matter was passed with the consent of the parties as no objection was raised by the Respondent qua replacing the earlier arbitrator in the arbitration proceedings. In the present case, the prayer of the Petitioner is strongly opposed by the Respondent and it appears prima facie that the opposition of the Respondent is bonafide and the Respondent is justified for the same and the procedure for appointment of arbitrator is already settled in the agreement. Therefore, the third case referred to is also not applicable in the facts and circumstances of the present case.

18. The present petition devoid any merit and the same is dismissed with cost of Rs. 10,000/-.

19. Since the Arbitral Tribunal has granted the Petitioner time till 16.05.2011 as last chance to file the statement of claim and admittedly the Petitioner has not file the statement of claim, the said period is extended for two weeks as a last opportunity to file the statement of claim. The reply to the statement of claim and counter claim has to be filed by the Respondent by 20.06.2011. The rest of the schedule shall remain as maintained by the Arbitral Tribunal. The parties shall appear before the Arbitral Tribunal on 26.08.2011 at 4:00 p.m., the date already fixed at A-384, Lower Ground Floor, Defense Colony, New Delhi. As far as the apprehension of the Petitioner about high cost likely to be incurred as alleged in the petition which is the main submission of the Petitioner, he is granted liberty to approach the Arbitral Tribunal with a request to charge the fee as per the schedule maintained by the Delhi High Court Arbitration Centre. This Court is very hopeful that such request would be considered positively.

20. The petition stands disposed of.