
(2015) 03 DEL CK 0398

In the Delhi High Court

Case No : Arb. P. 498/2014

Mitra Guha Builders (India) Co.

APPELLANT

Vs

Air Force Naval Housing Board and Others

RESPONDENT

Date of Decision : 17-03-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 28

Citation : (2015) 152 DRJ 514

Hon'ble Judges : S. Muralidhar, J.

Bench : Single Bench

Advocate : Om Prakash and Bipin Prabhat, Advocates, for the Appellant; R.K. Handoo and Salil Maheshwari, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Dr. S. Muralidhar, J.—This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 ("Act") seeking the appointment of an Arbitrator to adjudicate the disputes between the parties.

2. There are three objections raised by Mr. R.K. Handoo, learned counsel for the Respondents. The first is that there was a Memorandum of Understanding ("MoU") entered into between the parties in terms of which certain amounts were agreed to be paid by the Respondents to the Petitioner, subject to the Petitioner complying with further requirements in terms of the MoU. It is submitted that the final bill was raised way back in 2008 and some amounts have already been released to the Petitioner in terms of the MoU. Mr. Handoo states, on instructions, that as and when the Petitioner is able to furnish a "No Dues Certificate" the balance payment will be made in terms of the MoU. Mr. Handoo points out that the Petitioner failed to disclose the fact of entering into the MoU and such suppression of a material fact, should disentitle the Petitioner to relief.

3. Secondly, it is submitted that the notice issued by the Petitioner on 10th

February 2014 is not within 28 days of the cause of action arising and therefore the procedure under Clause 19 (i.e. the Arbitration clause) has not been followed. Mr. Handoo submits that the view taken by this Court in *M/s. Chancier Kant & Co. v. Delhi Development Authority* (decision dated 26th May 2009 in Arbitration Petition No. 246 of 2005) that such clause is hit by Section 28 of the Indian Contract Act, 1872 is pending challenge before the Supreme Court in SLP (Civil) No. 23386 of 2009 (*Delhi Development Authority v. M/s. Chander Kant & Ors.*).

4. Thirdly, it is submitted that the Petitioner claims to be a partnership firm. However, it is not shown to be a registered firm. Therefore, it cannot file the present petition in its name.

5. In reply it is pointed out by Mr. Om Prakash, learned counsel for the Petitioner, on instructions, that the Petitioner is indeed a registered firm and is prepared to produce the relevant documents in the arbitration proceedings if so required by the Respondents. It is submitted that the Petitioner did not receive a copy of the reply filed by the Respondents and therefore, was not in a position to file a rejoinder. This is denied by Mr. Handoo who states that a copy was served on the previous counsel for the Petitioner.

6. Mr. Om Prakash submitted that the notice dated 10th February 2014 was properly addressed to the Chairman, Air Force Naval Housing Board invoking the arbitration clause and was in compliance with the procedure thereunder.

7. Mr. Om Prakash further submitted that the payments in terms of the MoU are yet to be received by the Petitioner. The payment against the final bill has not yet been made. On this aspect, he also refers to the Respondents' letters dated 12th February 2014 and 3rd March 2014.

8. The above submissions have been considered. The question of the MoU being in full and final settlement of the claims of the Petitioner cannot be determined at this stage since even, according to the Respondents, some payments in terms of the final bill submitted by the Petitioner are still owed to the Petitioner. Clearly, the amount that has been calculated by the Respondents as still being owed to the Petitioner in terms of the MOU, does not tally with the amount that the Petitioner claims as due to it. Therefore, the MoU does not resolve all the issues between the parties. The non-mention of the MOU does not affect the result of the present petition.

Moreover, the entire correspondence between the parties has been placed on record.

9. The question as to what extent the MoU precludes the Petitioner from raising claims and to what extent the parties have complied with the respective obligations thereunder has to be examined in the arbitration proceedings.

10. With the learned counsel for the Petitioner categorically stating on instructions that the Petitioner is a registered partnership firm, the Court does

not at this stage wish to examine this issue further. If the Respondents raise such an issue in the arbitration proceeding that too can be examined by the learned Arbitrator.

11. The Court is satisfied that the arbitration clause contained in the contract between the parties has been rightly invoked by the Petitioner. The question whether the invocation happened only after 28 days of the cause of action arising in terms of Clause 19.2 appears to be a disputed question of fact, which can be examined by the learned Arbitrator.

12. In that view of the matter, the Court is of the view that there are disputes between the parties which are referable to the arbitration in terms of the arbitration clause. With the Respondent not appointing an Arbitrator in terms of the procedure outlined in the arbitration clause, it is open to this Court to exercise its jurisdiction under Section 11(6) of the Act for appointment of an Arbitrator to adjudicate the disputes between the parties.

13. Consequently, this Court appoints Mr. Justice R.P. Gupta, a former Judge of this Court, residing at 149, Dayanand Vihar, Vikas Marg, Delhi -- 110 092 as sole Arbitrator to adjudicate the disputes between the parties, including their claims and counter-claims.

14. The arbitration shall take place under the aegis of the Delhi International Arbitration Centre CDAC). The fees of the learned Arbitrator will be in terms of the Delhi High Court Arbitration Centre (Arbitrators' Fees) Rules.

15. The petition is disposed of. A copy of this order be communicated to the learned Arbitrator as well as Additional Coordinator, DAC forthwith.