

(2007) 11 DEL CK 0221

In the Delhi High Court

Case No : Arbitration A. No. 198 of 2005

M.P. Trade and Investment Facilitation Corporation Ltd.
(Formerly known as Madhya Pradesh Export Corporation Ltd.)

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 22-11-2007

Acts Referred:

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

Citation : (2007) 4 ARBLR 339 : (2008) 146 DLT 557 : (2008) 1 ILR Delhi 897

Hon'ble Judges : Aruna Suresh, J

Bench : Single Bench

Advocate : Manoj Kumar, for the Appellant; Suresh Kait, for the Respondent

Final Decision : Dismissed

Judgement

Aruna Suresh, J.—Petitioner has filed the present petition u/s 11(6) & 11(8)(B) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act") for appointment of an arbitrator by the Court. Petitioner was awarded work by the respondent Union of India, Ministry of Railways, vide letter/contract dated 97/TK-II/MPW/1 dated 29.1.1997 for supply of Sal Wood Sleepers. A dispute arose inter se the parties regarding the payment claimed by the petitioner for supply of wooden sleepers. Petitioner, Therefore, sent a legal notice dated 11.7.2005 to the respondent invoking Clause 2900(a) of the Indian Railways Standard (hereinafter referred to as "IRS") condition of contract to appoint an independent person as a sole arbitrator unconnected with the respondent preferably or retired Judge of any Hon"ble High Court or the Supreme Court to resolve the dispute and differences. The said legal notice was duly received by the respondent on or before 14.7.2005. However, the respondent failed to appoint the arbitrator within thirty days from the date of receipt of the notice. Hence the present petition.

2. Respondent in its reply denied the existence of any arbitration clause in the agreement between the parties and it is pleaded that Clause 2900 (a) of the IRS condition of contract is not a part of the contract dated 29.1.1997. It is further

alleged in the reply that as per the said clause in case any dispute arises in the contract a Gazetted Railway Officer only should be appointed by the competent authority as sole arbitrator to adjudicate the dispute and in case of contract entered into by Zonal Railway, General Manager of the concerned Zonal Railway appoints the sole arbitrator and in case of Board's contract, Railway Board (concerned Member) appoints the sole arbitrator and Therefore, on the demand of the petitioner for appointment of an arbitrator unconnected with the Govt. of India or preferably a retired Judge which is contrary to the provisions of Clause 2900(a) of IRS conditions of contract, no arbitrator of the petitioner could have been appointed by the respondent.

3. Learned Counsel for the petitioner has argued that IRS conditions of contract is a part of the contract letter dated 29.1.1997 and the petitioner was asked to furnish surety in the shape of bank guarantee in terms of Clause 0501 of the IRS conditions of contract in the meeting held on 6.5.1997 in the Chamber of the Chief Engineer and Deputy Chief Engineer which was attended by the petitioner's representative as well. Therefore, IRS conditions of contract which contained Clause 2900(a) i.e. arbitration agreement is enforceable by the petitioner as the parties had entered into contract for work in terms of IRS conditions of contract. It is, Therefore, submitted that since the respondent has failed to appoint an arbitrator after receipt of notice dated 11.7.2005 petitioner rightly approached the Court u/s 11(6) of the Arbitration and Conciliation Act seeking appointment of an arbitrator by the Court.

4. Learned Counsel for the respondent has refuted these submissions and has alleged that there is no arbitration agreement inter se the parties. The terms contained in the IRS conditions of contract are not applicable to the contract which was executed between the parties vide letter dated 29.1.1997. Therefore, since there is no arbitration agreement, petition is liable to be dismissed.

5. To appreciate the submissions of the parties, it is necessary to look into the terms and conditions of the contract letter dated 29.1.1997 and also minutes of the meeting dated 6.5.1997.

6. Letter dated 27.1.1997 is written by the respondent to the petitioner vide which respondent indicated its intention to place an order on the petitioner for supply of Sal Wood Sleepers to Indian Railways as per the terms and conditions contained in the said letter. Vide letter dated 28.1.1997, petitioner accepted the offer of the respondent. This resulted into a concluded contract and contract letter dated 29.1.1997 was issued by the respondent to the petitioner. The terms and conditions contained in this contract letter are as follows:

(1) The supply of the quantity mentioned above shall be completed in 8 months from the date of issue of this supply order.

(2) The rates decided in XXIV Pricing Sub Committee of the Ministry of Environment & Forests (enclosed as Annexure-A) will be provisionally applicable for the above supplies, subject to the condition that the rates as accepted by the

Railway Board on XXVth Pricing Sub-Committee's recommendations will be finally applicable on the ordered quantity. The rates decided finally will remain fixed for the entire supplies.

(3) The supplier will procure a certificate of origin of timber from the Principal Chief Conservator of Forests of the concerned States.

(4) The sleepers will be inspected and passed/test checked by Railway Passing Officer at the nominated Depot on S.E. Railway with facility of full rake Rly. Siding. Supplier shall produce the original papers mentioned in para (3) above at the time of inspection and passing of wooden sleepers and shall furnish attested photocopy of the same Along with 75% bill.

(5) The sleeper after having been passed will be provided with approved design of clamps end binding on both ends without any extra cost, to avoid deterioration.

(6) The cost of handling and stacking of sleepers at the time of inspection will be borne by the supplier.

(7) The above ordered quantity can be enhanced or reduced by 30% at the sole discretion of the purchaser.

(8) The sleeper will remain in the custody of the supplier after inspection and passing till these are dispatched.

(9) The supplier will also shoulder the responsibility of loading the sleepers in the wagon. For all over heads and handling in procurement on behalf of the Railways including test checking/subsequent rechecking 3% of the value of the sleepers will be paid by the Railways.

(10) The supplier will ensure effective arrangements of ensuring that only the passing sleepers are loaded in Railway Wagons. Under no circumstance, any unpassed sleepers/defective sleeper shall be loaded in wagons. A serious view shall be taken for such a lapse. The supplier shall post two person (paid by the supplier) at the loading points to witness and ensure that only passed sleepers of genuine Sal Wood bearing both the property hammer mark and passing hammer mark are loaded in Railway Wagon.

(11) 75% payment of the dispatched sleepers shall be made on production of proper Inspection Certificate, B.I. And clear R.R. The balance 25% payment shall be made after the receipt of the goods at the consignee end in good condition.

(12) The supplier is required to complete the supply of full quantity within 2 months from the date of issue of authorization (Release Order) by the Railway Board.

(13) The sleepers will be booked by the suppliers against clear R.R. Along with a tally receipt.

(14) The above allotment is purely provisional and subject to revision based on the performance of the supplier which shall be reviewed regularly (every two

months or even earlier at its discretion by Railways). The Railway Ministry shall also be at liberty to cancel/reduce the supply order in case the performance is not considered or if there is no requirement on the Railways.

(15) The Railway Administration reserves the right to spread of the requirement over the period at its sole discretion.

(16) The movement of sleepers should take place strictly in accordance with the Timber Transit Rules of the respective States.

(17) Wherever "supplier" is indicated the same would mean Madhya Pradesh Export Corporation Limited, Bhopal (MPEC).

(18) The rejection of wooden sleepers (those not conforming to Indian Railways Specification), if any, would be intimated by the consignees to the suppliers and the Dy. Chief Engineer (SLC), S.E. Railway, Calcutta through regd. A.D. Letters within 30 days from the date of receipt of the sleepers by the consignee or within 120 days from the date of dispatch of the sleepers, whichever is later.

(19) On receipt of intimation or rejection at consignee end of the wooden sleepers, if the report of the consignee in respect of rejections is not acceptable to the supplier a Joint inspection of the rejected sleepers will be carried out at destination by the authorized representative of the supplier, the Dy. Chief Engineer (SLC), S.E. Railway Calcutta & the consignee within 90 days of the receipt of intimation by Registered A.D. Of the rejection. The Joint Inspection will be fixed by Dy. Chief Engineer (SLC), S.E. Railway, Calcutta under advice to all concerned.

(20) A joint statement is to be prepared by the joint inspection team of finally rejected sleepers and signed by all the members of the joint Inspection Team. The supplier would thereafter have the option to replace free of cost, the finally rejected sleepers within 90 days from the date of Joint inspection, failing which consignee is authorized to auction the finally rejected sleepers on completion of 90 days from the date of Joint Inspection and credit the amount to the account of Supplier after recovery of incidental expenses.

(21) The cost of finally rejected sleepers will be reimbursed by the supplier to the Railways.

(22) You will supply full quantity of sleepers strictly as per authorization and booking instructions issued from time to time. In case of failure, the Ministry of Railways shall be at liberty to get the materials from any other sources at its own discretion and the extra cost, if any, will have to be borne by you.

(23) You are also required to submit monthly progress report to the Railways on the proforma laid down by the Ministry of Railways (Railway Board).

7. Perusal of this contract letter makes it very clear that parties never agreed to invoke Clause 2900(a) namely arbitration clause of IRS conditions of contract in case dispute arose between them in terms of or connected with the contract

letter.

8. After the contract was concluded between the parties, a co-ordination meeting was held on 6.5.1997 which was in the chamber of Chief Engineer (West), Calcutta. This meeting was attended by Mr. A.M. Gokhle, Deputy Manager of the petitioner. Clause 15 of the minutes of meeting is relevant for the purposes of the present petition and it reads as follows:

As per Indian Railway standard condition of contract and as in practice the supplier has to deposit with FA & CRO SL/S.E. Rly/GRC Rs. One lakh in cash or approved banker's guarantee bond as a security.

9. Thus, it is clear that respondent invoked its general practice when it asked the petitioner to furnish security/bank guarantee for a sum of Rs. 1 lac. Even if the argument of the petitioner is accepted that it was asked to furnish the bank guarantee/security in terms of Clause 0501 of the IRS conditions of contract even then it cannot be accepted that because it was asked to furnish bank guarantee or security in terms of that clause the entire terms and conditions of IRS conditions of contract became part of the contract letter dated 29.1.1997. This only indicates that parties agreed to invoke Clause 2900(a) pertaining to the security furnished by the petitioner. There is no reference of Clause 2900(a) of IRS conditions of contract either in the contract letter or in the minutes of the meeting dated 6.5.1997. Therefore, submissions of the learned Counsel for the petitioner that by virtue of the said decision in the meeting asking it to furnish the bank guarantee attracts all the clauses of the IRS conditions of contract including the arbitration Clause 2900(a) are without any merits and are not acceptable.

10. Bank guarantee Therefore was asked to be furnished by the petitioner as per IRS conditions of contract and as per practice. Clause 15 of the minutes of the meeting does not make IRS conditions of contract in particular Clause 2900 (a) automatically operative and binding inter se the parties unless there is a specific contract to the effect that parties shall be bound by particular terms or clauses contained in the said IRS conditions of contract. Clause 0501 of the IRS conditions of the contract is severable from the other terms and conditions contained therein. Undisputedly, the parties are not bound by other clauses of the IRS conditions of contract.

11. Arbitration agreement has been defined in Section 7, Chapter II of the Act, 1996. It reads as follows:

7. Arbitration Agreement.--(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

- (3) An arbitration agreement shall be in writing.
- (4) An arbitration agreement is in writing if it is contained in--
- (a) a document signed by the parties;
 - (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
 - (c) an exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other.
- (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

12. Thus, to invoke the provisions of Arbitration Act, there has to be a valid subsisting agreement between the parties within the meaning of Section 7 of the Act. Arbitration agreement is an agreement whereby parties agree to submit to arbitration their disputes which have arisen or are subsisting or which may arise between them in respect of a legal relationship whether contractual or not. This arbitration agreement has to be in writing. It can form part of a contract or there can be a separate arbitration agreement. A document can be considered as an arbitration agreement if it is signed by both the parties or if there is an exchange of letters, telex, telegrams or other means of telecommunication which provided record of the agreement. An exchange of claim and defense where one party alleges existence of an arbitration agreement and the other party does not deny it also forms an arbitration agreement. If there is an reference in a contract to a document containing an arbitration clause will constitute an arbitration agreement in case the contract is in writing and the reference of such a nature has to make that arbitration clause part of the contract.

13. In the present case there is no reference of Clause 2900(a) of the IRS conditions of contract in the letter of contract dated 29.1.1997. Therefore, it cannot be said that there is an arbitration agreement inter se the parties for referring the dispute to the sole arbitrator which may arise in the contract or to the execution of the terms and conditions of the contract.

14. Since the existence of the arbitration agreement inter se the parties is not established on the record petitioner is not entitled to invoke the provisions of Section 11(6) and (8)(B) of the Act.

15. Vide letter dated 11.7.2005, petitioner called upon the respondent to appoint an arbitrator invoking Clause 2900 (a) of the IRS conditions of contract and asked for appointment of an arbitrator who should be an independent person unconnected with the Govt. of India or preferably should be a retired Judge of any Hon'ble High Court or Supreme Court of India. Even if it is deemed that there is an arbitration agreement in the form of Clause 2900(a) of the IRS conditions of contract in existence between the parties, its proper enforcement

by way of legal notice dated 11.7.2005 is disputed. Under Clause 2900(a) of IRS conditions of contract in the event of any question, dispute or difference arising under these conditions or any special conditions of contract or in connection with the IRS conditions of contract, the same shall be referred to the sole arbitration of a Gazetted Railway Officer appointed to be the arbitrator, by the General Manager in the case of contracts entered into by the Zonal Railways and Production Units by any Member of organisation in respect of contracts entered into by the other organisation under the Ministry of Railways.

16. Petitioner did not invoke this clause in its strict terms. Rather it called upon the respondent to appoint an arbitrator who should be an independent person unconnected with the Govt. of India preferably or a retired Judge of any High Court or of the Supreme Court of India. This claim of the petitioner is beyond the scope of the arbitration agreement contained in Clause 2900 (a). Therefore, the respondent has rightly refuted and denied the claim of the petitioner for appointment of an arbitrator in terms of Clause 2900 (a).

17. In para (6) of the reply respondent has averred that since the petitioner had given its consent for appointment of an arbitrator in terms of Clause 2900(a) of IRS conditions of contract as such only Gazetted Railway Officer is qualified for the appointment and not one who is unconnected with the Government of India as requested in the notice. In para 7 (L) of the reply the respondent did agree to consider appointment of a sole arbitrator as per provisions of Clause 2900(a) of IRS conditions of contract if the petitioner enters into an agreement to abide by the provisions of the said clause without any additional condition. Thus, even the notice dated 11.7.2005 served upon the respondent on or about 14.7.2005 cannot be treated as a valid notice calling upon the respondent to invoke Clause 2900(a) and appoint sole arbitrator because the petitioner put its own terms and conditions regarding the person who should be appointed as the sole arbitrator in utter disregard to the terms contained in the said clause.

18. Learned Counsel for the petitioner has referred to *Shin Satellite Public Co. Ltd. Vs. Jain Studios Limited*, . In the said case a question arose as to the validity of the agreement and the Court applied the doctrine of severability and held that part of the arbitration clause was invalid and the objectionable part regarding the behaviors of the award and not to be challenged in any court of law was ordered to be deleted and the part of the agreement for reference of the disputes to arbitrator was accepted as valid and was made enforceable. Therefore, this judgment is of no help to the petitioner.

19. *Punj Lloyed Ltd. v. Petronet MHB Ltd.* (2006) 2 SCC 638 referred to by the learned Counsel for the petitioner is again of no consequence to the facts and circumstances of this case as in this case that there was never any arbitration agreement executed inter se the parties.

20. Reliance is also placed on *Datar Switchgears Ltd. Vs. Tata Finance Ltd.* and *Another*, . This judgment is also not applicable to the facts and circumstances of

this case as it was held that as the petitioner had the right to invoke the provisions of Section 11(6) in case the respondent after receipt of the notice did not appoint an arbitrator but if an arbitrator was appointed by the respondent before filing of this petition the said appointment is valid. The facts before this Court are different in nature. Here the existence of arbitration agreement itself is disputed.

21. Similarly, Union of India and Anr. v. M.P. Gupta 2004 (10) SCC 504, Gurdeep Singh v. NDMC (137) 2007 DLT and HBHL-VKS (JV) v. Union of India and Ors. 2007 (1) ALR 252 (Delhi) have no bearing on the facts and circumstances of this case as in all these cases the existence of arbitration agreement was admitted.

22. To conclude, there is no valid and legal subsisting arbitration agreement inter se the parties and Therefore, present petition is not maintainable.

23. Hence as observed above, I find no merits in the present petition. Same is accordingly dismissed.