

(2016) 08 AHC CK 0173
In the Allahabad High Court
Case No : Misc. Bench No. 7163 of 2012

M/S Bharat Catering Corp. Lko.

APPELLANT

Vs

Indian Railway Catering

RESPONDENT

Date of Decision : 04-08-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2016) 8 ADJ 718 : (2017) 1 AllWC 432 : (2016) 118 ALR 666

Hon'ble Judges : Satyendra Singh Chauhan and Anil Kumar, JJ.

Bench : Division Bench

Advocate : Avnish Kumar Singh, Advocate, for the Petitioner; Pankaj Srivastava and Ram Raj, Advocates, for the Respondent

Final Decision : Allowed

Judgement

1. Heard Dr. L.P. Mishra and Sri Vikas Singh, learned counsel for the petitioners, Sri HG.S. Parihar Senior Advocate assisted by Sri Ram Raj, learned counsel for opposite parties no.1 to 3 Sri Pankaj Srivastava and Sri Pratish Kumar, learned counsel for opposite parties no. 4 and 5.

2. By means of present writ petition, petitioners have challenged the notice/order dated 16.12.2010, contained in Annexure no.1 to the writ petition, passed by opposite party no.2/Director/Catering Services, Indian Railway Catering and Tourism Corporation, New Delhi, by which one Sri S.B. Gosh Dastidar (Ex. Vice Chairman RCT) has been appointed as Arbitrator to decide the dispute so far it relates to outstanding dues static units at platform no.1 and platform no.2/3, Charbagh Railway Station, Northern Railway Lucknow (herein after referred to " railway station").

3. Dr. L.P. Mishra, learned counsel for the petitioners while challenging the impugned order submits that on 14.2.2003, opposite party no.5/Senior Divisional Commercial Manager, Northern Railway, Lucknow Division, Lucknow published an advertisement for award of two vending stalls at platform no.1 and Platform

nos.2/3 of railway station. In pursuance of said advertisement, petitioners submitted their offer, subsequently the same was accepted by opposite party no.5 by 19.1.2004.

4. On 25.11.2004, an agreement was entered into between the petitioners and the Indian Railways for two vending stalls on platform no.1 and Platform nos. 2/3 of the railway station and the petitioners have started their work at the railway station. Thereafter certain disputes and differences have arisen in the matter in issue. So a notice/impugned order dated 16.12.2010 has been issued by opposite party no.2/Director/Catering Services, Indian Railways Catering & Tourism Corporation (herein after referred to as "IRCTC") by which Sri S.B. Ghosh Dastidar (Ex. Vice Chairman, RCT) has been appointed as arbitrator for deciding the dispute in respect to outstanding amount (a) catering units Mobile for amounting to Rs. 1,11,62,949 (includes outstanding of TSV trains also) (b) catering units static outstanding amount 71,04,483 of two stalls at railway station.

5. Dr. L.P. Mishra, learned counsel for petitioners submits that notice/impugned order dated 16.12.2010 issued by opposite party no.2/Director/Catering Services IRCTC thereby appointing arbitrator to decide the dispute in respect to catering units static for outstanding amount 71,04,483 of two stalls at railway station is without jurisdiction as there is no agreement between petitioners and IRCTC, so the impugned action notice/order dated 16.12.2010 issued by opposite party no.2 to appoint arbitrator for the said purpose is void ab initio because the arbitrator has no jurisdiction to resolve the said dispute once there is no arbitration agreement between the parties, as such the same is liable to be set aside.

6. Sri H.G.S. Parihar, Senior Advocate assisted by Sri Ram Raj counsel appearing on behalf of opposite parties no.1 to 3 while opposing the relief as claimed by the petitioners in the instant matter submits that as per Catering Policy 2000, decision was taken in the matter that license for catering units of Mobile as well as Static Catering Units is to be run and operated by IRCTC which was previously done by Indian Railways so in view of the said fact all the rights and liabilities in respect to said catering units stood transferred to IRCTC as such IRCTC is entitled to recover the outstanding amount from the petitioner in respect to two static units at platform no.1 and platform nos. 2/3 at railway station as such the impugned notice/order dated 16.12.2010 issued by opposite party no.2 appointing arbitrator is a valid one as per the provisions of Arbitration and Conciliation Act, 1996 (herein after referred as an "Act").

7. Sri H.G.S. Parihar learned counsel for opposite parties no.1 to 3 further submits that the agreement entered between the petitioners and Indian Railways relates to static and mobile catering service to the passengers at platform no.1 and platform nos. 2/3 of railway station has been terminated by IRCTC on 6.5.2009 and in this regard petitioners have also approached for redressal of his grievance before Delhi High Court by filing a petition under Section 9 of the Act,

1996 thereby claiming damages. Keeping in view the said fact on 12.4.2001 the IRCTC and opposite party no.4 had entered into a Memorandum of Undertaking (MOU) with the Indian Railways, in order to take over catering activities from the Indian Railway and to enter into revenue sharing agreements and in pursuance to above stated Memorandum of Undertaking, the Ministry of Railway, Government of India vide circular dated 24.7.2001 informed all its General Manager that in future all new licenses of catering/vending units shall be processed and awarded by the IRCTC, so the notice/order dated 16.12.2010 is correct and writ petition is liable to be dismissed.

8. We have heard learned counsel for the parties and gone through the record.

9. The admitted position which emerge out in the present case is that agreement dated 25.11.2004 has been entered between the petitioner and Indian Railways for catering service static to the passengers at platform no.1 and platform nos. 2/3 of railway station thereafter some dispute have arisen for outstanding amount of Rs. 71,04,483/- in respect to the same and for recovery of the said amount, a notice/impugned order date 16/12/2010 passed by opposite party no.2, Sri S.B. Gosh Dastidar (Ex. Vice Chairman RCT) has been appointed as arbitrator.

10. Moreover, Sri H.G.S. Parihar, learned counsel for opposite parties no.1 to 3 during the course of arguments admits that there is no agreement between petitioner and IRCTC in respect to operation of static catering service to the passengers at platform no.1 and platform nos. 2/3 of railway station.

11. Thus, the sole question to be considered and decided in the present case whether the action on the part of opposite party/IRCTC thereby appointing Arbitrator to decide the dispute in respect to outstanding amount of static catering service to the passengers at platform no.1 and platform nos. 2/3 of railway station by notice/order dated 16.12.2010 is valid exercise or not.

12. In order to decide the said controversy, it will be appropriate to go through the certain provisions of the Act, 1996 which are as under:-

"2(a) " arbitration" means any arbitration whether or not administered by permanent arbitral institution;

2(b) " arbitration agreement" means an agreement referred to in Section 7;

2(h) "party" means a party to an arbitration agreement."

Further Section 7 of the Act no.1996 reads as under:-

"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 defence 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."

"Arbitration" , as such has not been defined under the Act, 1996. The definition in Section 2(1) (a) is merely a clarification that the Act covers both ad hoc and institutional arbitration. This definition corresponds to the definition as mentioned in clause (a) of Article 2 of UNCITRAL Model Law on International Commercial Arbitration. Arbitration is the means by which parties to a dispute get the matter settled through the intervention of the agreed third person. Arbitration is a process that is carried out pursuant to an agreement to arbitrate. The object of arbitration is to decide a dispute, which has arisen.

13. According to concise law dictionary by Mozley and Whiteley, "arbitration" means where two or more parties submit all matters in dispute to the judgment of arbitrator who is to decide the controversy. Halsbury defines "arbitration" as "the reference of dispute or difference between not less than two parties, for determination, after both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction." Taking into account the definition of arbitration by Halsbury, the following ingredients would be necessary to constitute the arbitration.

(1) there is a real dispute between two or more parties;

(2) there is arbitration clause in the agreement for reference of dispute to the arbitration

(3) according to the arbitration clause the dispute or difference is referred to person or persons other than a court of competent jurisdiction.

(4) Such person or persons constituting arbitration are obliged to hear both the parties and decide the dispute in a judicial manner.

14. Clause (h) of Section 2(1) , defines the expression "party", to mean " a party to an arbitration agreement". This clause is also new one and did not exist in the old Act of 1940. This expression is also not mentioned in UNCITRAL Model Law and is not available under English Arbitration Act, 1996. The definition makes it

clear that a party, which is not a party to an arbitration agreement, is not covered within the definition of term "Party" for the purpose of Arbitration and Conciliation Act, 1996. The definition of "party" will also include the legal representatives of such party. A person who is not a party to an arbitration agreement cannot pray for the enforcement of the agreement or the appointment of an arbitrator. The term " party" in this clause has narrowed down the scope of the word " party" as commonly understood. It has made clear that non-parties to the contract have no right under the Act for seeking arbitration and consequently an award.

15. Section 7 (1) of the Act defines the expression " arbitration agreement" to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect to a defined legal relationship whether contractual or not. Sub-Section (2) of Section 7 provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Under sub-section (4) an arbitration agreement is stated to be in writing if it is contained in a document signed by the parties ; in an exchange of letters or in an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

16. The essential ingredients of the "Arbitration Agreement" are provided in Section 2(1) read with Section 7 of the Act. To constitute a valid arbitration agreement between the parties all the essential ingredients are required to be proved. The agreement postulates the contract between the parties to submit to arbitration all or certain disputes existing between them. The disputes can be referred by the parties themselves or with the intervention of the Court only on proof of the existence of a valid arbitration agreement. " An agreement for arbitration is a sine qua non for adjudication of disputes by Arbitration. An arbitration agreement should be in writing i.e. it's term should be reduced to writing but if the agreement is not signed and it is established by another written contemporaneous document, it will be binding between the parties. (see: P. Anand Gajapathy Raju v. P.V.G. Raju, (2000) 4 SCC 539: AIR 2000 SC 1886).

17. Section 11 deals with the appointment of arbitrators. According to it a person of any nationality may be appointed as an arbitrator unless otherwise agreed. The parties can also agree on a procedure for appointment of arbitrators subject to sub-section (6). Under subsection (6) , if under the prescribed procedure the parties fail to agree for appointment under sub-section (2) , each party, in that eventuality shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator. If despite applicability of the procedure of appointment in terms of subsection (3) , a party fails to appoint an arbitrator within the time specified or the two appointed arbitrators fail to agree on the third arbitrator within the period of thirty days, the appointment then shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

18. Where an agreement provides for the appointment of a sole arbitrator and if the parties fail to agree on arbitrator within thirty days from the receipt of request by one party from the other party the appointment then shall be made on request of a party by the Chief Justice or any designated person or institution, upon request of a party. A decision on a matter entrusted by sub-section (4) or sub section (5) or sub-section (6) , to Chief Justice or the person or institution designated by him, will be final.

19. Chief Justice or a person or institution designated by him shall have due regard to any qualification required of arbitrator by the agreement of the parties and other considerations likely to secure the appointment of an independent and impartial arbitrator. In case of appointment of sole or third arbitrator in an international commercial arbitration, Chief Justice of India or a person or institution so designated, may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities. The Chief Justice may frame such scheme as he may deem appropriate for dealing with the matters entrusted to him by sub-section (4), (5) or 6.

20. In the present case there is neither any agreement between the petitioners/ M/s Bharat Catering Corporation and IRCTC nor IRCTC is a party to an agreement dated 25.11.2004 entered between the petitioners and Indian Railways for static vending stalls at platform no.1 and platform nos. 2/3 of the railway station, so the action on the part of opposite party no.2/Director/Catering Services, Indian Railway Catering and Tourism Corporation, New Delhi thereby appointing Sri S.B. Gosh Dastidar (Ex. Vice Chairman RCT) as arbitrator for deciding the outstanding amount Rs.71,04,483 in regard to static catering unit of two stalls at platform no.1 and Platform no.2/3 of railway is without jurisdiction and contrary to law. (see: Firm Ashok Traders and another v. Gurumukh Das Saluja and others, (2004)3 SCC 155 and National Insurance Company Limited v. Boghara Polyfab Private Limited, (2009) 1 SCC 267).

21. For the foregoing reasons, the writ petition is partly allowed and the notice/order dated 16.12.2010 (Annexure no.1) passed by opposite party no.2/Director/Catering Services, Indian Railway Catering and Tourism Corporation, New Delhi is set aside so far it relates to appointment of arbitrator for deciding the dispute in respect to outstanding dues amounting to Rs. 71,04,483 in regard to outstanding dues of static units at platform no.1 and platform no.2/3 at Charbagh Railway Station, Northern Railway Lucknow.

22. No order as to cost.