
(2007) 12 DEL CK 0064
In the Delhi High Court
Case No : AA No. 408 of 2007

Naresh Maheshwari

APPELLANT

Vs

Delhi Development Authority

RESPONDENT

Date of Decision : 05-12-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(5), 11(6)

Citation : (2007) 12 DEL CK 0064

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : S.K. Goyal, for the Appellant; Gaurav Kanth, for the Respondent

Judgement

Anil Kumar, J.—This is a petition u/s 11(5) read with Section 11(6) of the Arbitration and Conciliation Act, 1996 for the appointment of an arbitrator in terms of arbitration agreement between the parties as the disputes have arisen.

2. The petitioner contended that the tender for running an 'Idle Truck Parking Site at Azadpur, Sabzi Mandi, Delhi' was awarded to the petitioner

and the parking site was allotted for a period of three years commencing from 27th September, 2004 till 26th September, 2007 at a license fee of

Rs. 81,000/- per month subject to increase of 10% per year as per the terms and conditions enumerated in the acceptance letter and license deed.

Pursuant thereto a sum of Rs. 2,43,000/- was deposited as three months advance license fee and license deed and bank guarantee of Rs.

7,29,000/- was executed by the petitioner. Subsequently the period of allotment was extended till 6th January, 2008 by respondent's letter dated

F-99(24)2004/LPC/Parking/406 dated 16th August, 2007 as the possession of the parking site was given on 7th January, 2005.

3. According to the petitioner by letter dated 23rd September, 2004, the respondent called upon the petitioner to take vacant physical possession of the parking site on 27th September, 2004 when it transpired that the site was not fit for operation as the same was under illegal encroachments and was also undeveloped being full of pot holes, water logging, garbage, waste material etc. which fact was acknowledged by the respondent who gave an assurance that site would be made available to the respondents after the hindrances are removed and necessary development work is carried out. However, no steps were taken by the respondents to remove the encroachments and to develop the site despite several representations made by the petitioner to the respondent to carry on the development work at the parking site by its letters dated 9th November, 2004 and 18th November, 2004

4. It is the case of the petitioner that on 7th January, 2005 the petitioner was forced by the respondent to either take the possession of the parking site even though only 50% of the parking site could be operated else the agreement would be cancelled and entire deposit would be forfeited. Thereafter, the petitioner made various representations apprising the respondent of the hardship faced and also the heavy losses suffered by the petitioner on account of the illegal occupants covering 50% of the parking site under allotment and poor condition of the parking site since the date on which the possession of the parking site was taken over by the petitioner. The grievance of the petitioner is that no attention was paid by the respondent DDA, to the various representations made by the petitioner nor the matter was referred to the remission committee.

5. Consequently, disputes arose between the parties. The petitioner has also detailed the disputes which have arisen between the parties in para (h) of the petition. There is an arbitration agreement between the parties for adjudication of the disputes by an arbitrator in terms of Clause 23 of the license deed. Clause 23 of the License deed containing the arbitration clause is as under:

23. That in case of any dispute arising between the licensor and the licensee in respect of interpretation or performance of any terms or conditions of the license, the same shall be referred to the sole arbitrator of the Vice-chairman DDA, whose decision thereon, shall be final and binding on

both the parties. The licensee shall not object to the Vice-Chairman of the Delhi development authority's action as a sole arbitration on the ground

that he had dealt with case or has at some stage of expressed opinion in any matter connecting herewith.

6. In the facts and circumstances, the petitioner was constrained to invoke the arbitration clause contained in Clause 23 of the license deed dated

16th September, 2004 and issued a notice dated 18th June, 2007 to the respondent demanding appointment of an arbitrator in terms of arbitration

clause contained in Clause 23 of the license deed to adjudicate the disputes between the parties. No reply to this letter was given by the

respondent nor any arbitrator was appointed within 30 days of the receipt of notice invoking the arbitration agreement.

7. Consequently, the petitioner has filed the present petition. Notice was issued to the respondent and reply has been filed by the respondent

objecting to the appointment of the arbitrator on the ground that the respondent has always co-operated and acted on the request and

representations of the petitioner and necessary steps have been taken by the respondent to facilitate the full use of the parking site by the petitioner

during the license period by freeing it from unauthorized and illegal encroachments etc. on various representations made by the petitioner. The

respondent submitted that the vacant possession of the parking site was handed over to the petitioner on 7th January, 2005 free from all the

encroachments after removing all the encumbrances and denied the allegation of the petitioner that only 50% of the site was vacated as on 7th

January, 2005. The respondent objected to the appointment of the arbitrator on the ground that there is no dispute between the parties in respect

of interpretation or performance of any terms or conditions of the license, thus Clause 23 of the License deed would not be attracted. The

respondent also submitted that on the date of receipt of notice dated 18th June, 2007 a status report dated 4th June, 2007 prepared by the

AE(CE) after inspection of the parking site was forwarded to AD/LPC, executive engineer/ND-2, DDA for immediate necessary action in the

matter of unauthorized occupation at Idle Truck Parking Site at Azadpur, Sabzi Mandi, Delhi and that the respondents are taking all the steps to

remove all the encroachments from the parking site in view of the status report.

8. Whether steps were taken by the respondent to facilitate the use of the parking site by the petitioner or not and whether there exists a dispute between the parties, this is not for this Court to decide and it is the arbitrator only who can adjudicate on the same. Once the parties have willfully opted for adjudication of dispute by an alternative redressal mechanism then in such a case the jurisdiction of this Court is limited and the Court cannot make any observation in respect of any dispute therein or adjudicate on the point of law or fact. The jurisdiction of Courts is confined only to the extent of referring the matter for adjudication to an independent arbitrator on request of the parties on being satisfied that there exists an arbitration agreement between the parties containing an arbitration clause and the respondent has failed to appoint an arbitrator in terms of arbitration agreement despite invocation of arbitration agreement by one of the party.

9. The respondent has not denied the existence of an arbitration clause in terms of Clause 23 of the license deed. Thus there exists a valid arbitration agreement between the parties. The respondent has failed to appoint an arbitrator within 30 days from the receipt of the notice invoking the arbitration agreement and even before filing the present petition and no cogent reason has been given by the respondent for not appointing the arbitrator within the stipulated time. The learned Counsel for the respondent is unable to explain as to how appointment of an arbitrator could be withheld on the grounds raised in the reply to the petition by the respondent. Therefore, it will be just and appropriate to appoint an arbitrator to adjudicate disputes between the parties.

10. A learned Single Judge in *Haryana Telecom Ltd. v. Union of India* and Anr. 112 (2004) DLT 339 : 2004 (3) RAJ 147, had held that if the respondent fails to appoint an Arbitrator within the stipulated time of 30 days of the notice, and even before filing of the petition u/s 11 of the Act, it is for the Court to appoint an Arbitrator. A Division Bench of this Court in *Delkon (India) Pvt. Ltd. Vs. The General Manager, Bharat Heavy Electricals Ltd.*, , relying on *Datar Switchgears Ltd v. Tata Finance Ltd* has held in para 4 is as under:

4. We have given our careful consideration to the arguments advanced by learned Counsel for both the parties. In view of the law laid down in the

case of Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr. IV (2000) CLT 191 (SC) : VII (2000) SLT 543 : JT 2000 Supp. 2 SC 226 it is no

more rest integra that the vacancy can be supplied by a party pursuant to the arbitration agreement even after thirty days of the receipt of the

notice. However, once a party approaches the Court and files a petition for appointment by the designated authority of the Chief Justice of that

Court u/s 11(6) of the Arbitration and Conciliation Act, the right to supply vacancy by the opposite party is extinguished. If that right stood

extinguished on filing of the petition u/s 11(6) of the Arbitration and Conciliation Act, in September 1998 the appointment of an Arbitrator on 3rd

May, 1999 could not be made, Therefore in our view, the order passed by the learned Single Judge on 7th May, 1999 suffers from patent

illegality. Therefore, the submission of the respondent that the petitioner had appeared before the Arbitrator and the application of the petitioner

raising preliminary objections is pending adjudication which inter alias challenges the jurisdiction of the Arbitrator to decide the dispute is of no

consequence as from the order reproduced above it was pursuant to the directions passed by the learned Single Judge that the parties were

directed to appear before the Arbitrator. The petitioner had no other option but to appear before the Arbitrator and after appearing before the

Arbitrator the petitioner has not submitted to the jurisdiction of the Arbitrator, rather has at first opportunity taken the objection that the Arbitrator

had no jurisdiction to proceed with the matter.

11. In Union of India (UOI) Vs. RR Industries, Shri R.K. Jain, Sole Proprietor of RR Industries, Mr. B.L. Garg, Arbitrator and Shri A.S.

Yadav, Addl. Distt. and Sessions Judge, also it was held that once a party does not supply the vacancy or fails to supply the vacancy before filing

of a petition u/s 11(6) of the Arbitration and Conciliation Act, such a party forfeits the right to supply the vacancy in terms of the arbitration clause

and what remains is only the arbitration clause, i.e. the dispute has to be resolved under the mechanism of alternative dispute redressal scheme but

no right survives to the respondent to supply the named Arbitrator in the arbitration clause. Thus the arbitrator was to be appointed before the filing

of the petition and since no arbitrator has been appointed by the respondent consequently, the respondent has lost its right to appoint the arbitrator

in terms of Clause 13 of the arbitration agreement. The disputes which have been raised by the petitioner are also within the arbitration agreement

and there is no reason that all the disputes which have arisen between the parties can not be adjudicated by the arbitrator.

12. Considering the facts and circumstances, I appoint, Shri Prem Kumar, Retired Additional District Judge, C-12, Chirag Enclave, New Delhi-

110048, (Phone No. 9313783914) as an Arbitrator. The fees of the arbitrator shall be Rs. 10,000/- per hearing subject to a maximum amount of

Rs. 1 lakh. The fees shall be borne equally by the parties. Parties shall appear before the Arbitrator on 2nd January, 2008 at 4.30 PM. Registry to

send a copy of this order to the Arbitrator forthwith. Parties are also directed to intimate the Arbitrator about the order. Copies of this order be

also given to the parties dusty.