
(2013) 04 BOM CK 0169

In the Bombay High Court

Case No : Arbitration Application No. 131 of 2012

National Commodity and Derivatives Exchange Ltd.

APPELLANT

Vs

Indian Exchange of Metal Ltd.

RESPONDENT

Date of Decision : 18-04-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 9

Citation : (2013) 04 BOM CK 0169

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Vijay Thorat, with Mr. Vaibhav Sugdare and Mr. Prasad Sapre instructed by K. Ashar and Co, for the Appellant; G.B. Kedia, for the Respondent

Judgement

Anoop V. Mohta, J.—The Applicant/Petitioner, National Commodity and Derivatives Exchange Ltd. (NCDEL), a stock exchange, has invoked Section 11 of the Arbitration and Conciliation Act, 1996 (for short, the Arbitration Act). The relevant clauses of the agreement dated 18 July 2008 between the parties are as under:

Clause I (14) [.....] Any disputes arising out of variation in quality or quantity of commodities at the time of delivery shall be solved between the holder and the Warehouse themselves.

Clause IV (12) ARBITRATION AND JURISDICTION

(i) In the case of any dispute or any difference between the parties arising out of or in relation to this agreement including but not limited to disputes or differences as to the validity of this agreement or interpretation of any of the provisions of this agreement or losses or damages arising under this agreement or assaying or indemnity, the same shall be resolved by mutual discussion. In the event that the dispute or event is not resolved by mutual discussion, the same shall be referred to an Arbitral Tribunal wherein, each party shall nominate an arbitrator and such arbitrators shall appoint a third presiding arbitrator. Such

arbitration shall be governed under the provisions of the Arbitration and Conciliation Act 1996 including its amendments for the time being in force. The venue of Arbitration shall be Mumbai and all matters arising out of such arbitration shall be subject to the jurisdiction of Mumbai Courts only.

(ii) The provisions of this clause shall survive the termination of this agreement.

The Respondent has filed reply and resisted the Application on all counts. There is no dispute with regard to the agreement which provides arbitration clause. There is no specific issue with regard to the Court's jurisdiction. The arbitration clauses so reproduced above itself provide that this Court has exclusive jurisdiction to deal with "All matters arising out of such arbitration shall be subject to the jurisdiction of Mumbai Courts only". The existence of above clause, in my view, crystallise the issue so far as the existence of arbitration agreement between the parties and so also the jurisdiction of this Court to entertain this Application.

2. This Court in Arbitration Petition (Lodging) No. 280 of 2012 on 9 March 2012 [2012 (6) LJSOFT 366], in a Petition u/s 9 of Arbitration Act, between the same parties, filed by the Petitioner, based on the agreement in question, while disposing of the matter, has noted as under:

23 The receipt/delivery of goods in accordance with law:

It is made clear both the parties are bound by the provisions of laws, therefore, delivery or receipt of goods are always subject to those provisions and statutory liabilities and obligations. The Court cannot grant any order to release those good/goods without complying with the laws and the bye-laws, if any.

23 Order:

Resultantly, the petition is allowed in terms of prayer clause 26(i) which reads thus:

(i) Pending the arbitration between the Petitioner and the Respondent, an order directing the Respondent to release the goods stored in the said Warehouse viz. Warehouse situate at AN-37 to AN-38, AN-123 to AN-132, Massori Gulawati Road, UPSDIC Industrial Area, Ghaziabad in favour of the participants who have a valid and lawful claim for such release and list whereof is annexed and marked as Exhibit "FF".

However, it is subject to the following conditions:

(a) Both the parties shall perform their respective obligations including as per the subsequent agreement/letter dated 12th December, 2011. The amount if already paid, will be adjusted and so also the delivery of goods, if any.

(b) The parties are at liberty to exchange the delivery schedule and/or respective time-table.

(c) The dispute including of monetary claims be settled by the arbitral tribunal.

All points are kept open.

(d) The parties are at liberty to settle the matter and apply for appropriate order/direction before the tribunal and/or the Court.

(e) The petition is accordingly allowed. No costs.

The issue with regard to the jurisdiction was also decided against the Respondent. The learned counsel appearing for the Respondent makes statement that the Appeal against this order is pending. There is no stay of any kind. The statement is made that the contempt Petition is also pending against the Respondent for want of non-compliance of the operative part as reproduced above. Both these proceedings, in any way, as rightly contended by the learned senior counsel appearing for the Petitioner, no way sufficient to deny the right/the prayer so made in this Section 11 Application.

3. Based upon the correspondences between the parties, it is clear that the monetary claim was raised and disputed by the Respondent. They failed to settle the matter inspite of their endeavour to resolve by mutual discussion. The Petition u/s 9, as referred above, was an another example to show the existence of dispute between the parties, which they failed to resolve by mutual discussion so also the pendency of the litigation as referred above.

4. The Applicant, therefore, invoked arbitration clause by letter dated 6 March 2012 in view of clause 12 of the agreement and nominated their Arbitrator. A request was also made to confirm the said appointment. The Respondent resisted the same by reply dated 7 April 2012. In paragraph 5, the Respondent expressed their disagreement for the appointment of a named Arbitrator. However, they submitted to appoint any other retired Bombay High Court Judge from the panel of Judges maintained by the High Court.

5. The submission of the learned counsel appearing for the Respondent that invocation of arbitration clause by the letter was quite a vague and not sufficient to invoke the arbitration for want of specific disputes and differences. It is relevant to note that it is necessary to consider the correspondences and the understanding between the parties before deciding any dispute or difference so raised specifically, when the agreement itself provides to resolve the disputes by the mutual discussion. The correspondences and even the reply filed by the Respondent apart from the litigation so referred above, in my view, sufficient to hold that there exists dispute and difference between the parties which need to be adjudicated as per the provisions of the arbitration clause.

6. Clause 12 as read and referred just cannot be overlooked merely because in clause 14 the parties have agreed to settle any disputes arising out of variation in quality and/or quantity of commodities at the time of delivery and as they agreed to solve by and between the holder and the warehouse themselves. It is necessary to consider the nature of basic agreement dated 18 July 2008 between the parties. The warehouse services so agreed to be provided along with other

essential services, based upon this agreement itself means the involvement of third person and the parties, who take interest and participate in the transaction and/or entered into transaction on the Exchange. The Applicant's obligation and/or responsibility in any way just cannot be dissected as, ultimately, in view of this agreement, the Respondent and/or such warehouse is permitted to provide the facilities for the investors or the third person. The dispute arising out of variation in quality and/or quantity of commodities in view of above clause, if unable to solve by the Respondent and/or for some other reason, the dispute persists, it is ultimately the Applicant who would be responsible for the damages and/or compensation, along with the Respondent/warehouse. The submission that the Applicant in no way concern with the dispute and/or differences arising out of variation of quality and/or quantity of commodities, is unacceptable. I am inclined to observe that all these disputes and/or differences are interlinked and interconnected. It is difficult to dissect merely at the instance of Respondent, based on the part of clause 14 so quoted and relied upon. So far as third party is concerned, including the holder in a given case and/or the warehouse like the Respondent, if failed to resolve the dispute/the liability and/or the claim for damages and/or compensation by such party just even against the Applicant/Petitioner cannot be overlooked. Therefore, to say that in view of above part of clause 14, the dispute so raised in the present matter and/or between the parties is non-arbitrable is unacceptable.

7. Clause 12, so read and referred by the parties take care of any dispute and/or differences between the parties arising out of or in relation to this agreement. This definitely cover and include the dispute and difference between the Applicant and the Respondent. As noted, there is difference and dispute between the parties, including of monetary claims as raised and denied by the Respondent and as recorded in the earlier proceedings.

8. The procedure so prescribed to appoint the Arbitrator, if one party fails to follow and/or accept it, inspite of clear notice given, the Court, u/s 11, based upon the facts and circumstances and considering the terms of the contract, has no choice, unless the parties agreed to nominate by consent, but to nominate and/or appoint the Arbitrator and/or Arbitral Tribunal to resolve the dispute arising out of the dispute between the parties.

9. In the present case, the Applicant has invoked arbitration clause on 6 March 2012, immediately after the order passed by the Court in Arbitration Petition (Lodging) No. 280/2012, dated 9 March 2012. The Respondent, though resisted/denied the named Arbitrator by its reply dated 7 April 2012, not appointed and/or nominated any Arbitrator from his side as contemplated under the agreement.

10. In view of this admitted position on record and in view of the Supreme Court decision in *Dakshin Shelters P. Ltd. Vs. Geeta S. Johari*, , the Respondent loses its right to appoint their Arbitrator. Now there is no question to give further opportunity. "The order of the learned Single Judge is in conformity with the decision of this Court in *Union of India (UOI) Vs. Bharat Battery Manufacturing*

Co. (P) Ltd., wherein this Court stated as follows: (SCC p. 689, para 12) - "12 ... Once a party files an application u/s 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the court seeking appointment of an arbitrator."

In such circumstances, as there exists arbitration agreement between the parties and/or also the dispute and as this Court has jurisdiction, I am inclined to allow this Arbitration Application as prayed. However, both the learned counsel appearing for the parties submit that in view of the specific provisions as provided under the agreement, the nomination/sole Arbitrator appointed by the Applicant, be treated as their nominee/Arbitrator and as the Respondent failed to appoint, therefore, appoint any other retired Judge of the High Court as their nominee/Arbitrator. In view of this, I am inclined to nominate Mr. Justice J.P. Devadhar (Retd.) on behalf of the Respondent.

11. Resultantly, the following order;

ORDER

- (i) The Arbitration Application is allowed.
- (ii) Mr. Justice S.N. Variava (Retd.) is nominated as an Arbitrator on behalf of the Applicant.
- (iii) Mr. Justice J.P. Devadhar (Retd.) is nominated as an Arbitrator on behalf of the Respondent.
- (iv) Both the Arbitrators to proceed to appoint the third Presiding Arbitrator as per the agreement, to complete the constitution of Arbitral Tribunal and to adjudicate the dispute between the parties.
- (v) The Office to communicate this order to the learned Arbitrators.
- (vi) The parties to take steps accordingly.

The learned counsel appearing for the Respondent submitted to stay the effect and operation of this order. The learned counsel appearing for the Applicant, however, opposed the same. However, as this Court has granted this Application for the first time, I am inclined to stay the effect and operation for a period of four weeks.

There shall be no order as to costs.