
(2001) 08 DEL CK 0259
In the Delhi High Court
Case No : AA No. 70 of 1996

Pyrites, Phosphates and Chemicals APPELLANT
Vs
Excel Shipping Enterprise and Others RESPONDENT

Date of Decision : 02-08-2001

Acts Referred:

Arbitration and Conciliation Ordinance, 1996 — Section 11, 2, 7, 7(2), 7(3)
Civil Procedure Code, 1908 (CPC) — Order 13 Rule 2

Citation : (2001) 08 DEL CK 0259

Hon'ble Judges : Vinod Sagar Aggarwal, J

Bench : Single Bench

Advocate : Mr. A.S. Chandhiok and Mr. Sanjay Grover, for the Appellant; Ms Neelam Kalsi, for the Respondent

Final Decision : Dismissed

Judgement

V.S. Aggarwal, J.—Petitioner, Pyrites Phosphates & Chemicals has filed the present petition u/s 11 of the Arbitration and Conciliation Ordinance, 1996 (for short the Act).

2. The petitioner is engaged in the manufacture of fertilisers and is entrusted by the government with the task of handling and distribution of imported fertilisers. In order to carry on its above business of receiving shipment of imported fertilisers, the petitioner engages the services of various freight handling agents. The petitioner enters into a long term agreement with such agents who are entrusted with the task of handling the ships entering the port and in carrying on the completing of the formalities relating to discharge of the cargo from the vessel. The petitioner had engaged the services of the respondent for that purpose at the port of Porbandur Vide agreement dated 8.10.1992. Under Article 9 of the Agreement between the petitioner and respondent 1 it was agreed that respondent no. 1 shall be responsible for payment of the demurrage. Similarly in case of discharge of the vessel is completed before the agreed time, the vessel owners are liable to pay certain amount of dispatch money. Respondent is also

responsible for the liquidated damages in terms of Article 10. It is alleged that vide Article 15 all disputes and references arising between the parties under the contract including the breach thereof shall be settled by arbitration in accordance with provisions of Indian Arbitration Act. The agreement was to be governed by Indian laws.

3. During the terms of the agreement the respondents handled a total of five vessels at the port. As a result of incompetence and inept handling of the said vessels by the respondent the said vessels could not discharge their cargo within the stipulated time. The vessels became entitled to demurrage. It is alleged that the Government of India has recovered the amount of demurrage from the petitioner in respect of the five vessels. The petitioner has called upon the respondents to make the said payments but respondents have failed to make the payment. On the contrary, respondents filed a suit before the Civil Judge at Porbandur. When the respondents did not make payment they served a legal notice and it had no effect claiming that the disputes have arisen and certain payments are due to the petitioner. It is prayed that an arbitrator should be appointed for adjudication of the disputes.

4. The petition as such as been contested. It is denied that there is any arbitration agreement between the parties. Furthermore, it is asserted that the petition is barred by time. The jurisdiction of the courts at Delhi to try the petition has also been challenged. It is pleaded that no cause of action had arisen at Delhi. None of the respondents reside or carry on business or personally work for gain within the local limits of the jurisdiction of Delhi courts. The cargo was also available for delivery at Porbandur. The other assertions regarding the amount that has been claimed has also been controverted but are not relevant for the purposes of the present order. On 17th March, 1998, this court had framed the following issues:

1. Whether there is a valid and subsisting arbitration agreement between the parties?

2. Whether disputes enumerated in the petition are liable to be referred for arbitration?

3. Relief.

5. Issue No. 1 - In support of their respective contentions, the parties were called upon and they filed their respective affidavits.

6. The main controversy herein has been as to whether there is an arbitration agreement between the parties or not. The petitioner has placed on the records the agreement purported to be containing a clause for arbitration. The contention in this regard has been that the agreement which is being put into service by the petitioner is not signed by any person on behalf of the petitioner and Therefore, it is not an agreement in writing. To appreciate the said controversy, it would be proper to reproduce the relevant portion of the agreement which runs as under:

"IN WITNESS WHEREOF the parties have signed this Agreement on the day and date first above written.

Signed and delivered Signed and delivered for and on behalf of for and on behalf of PYRITES, PHOSPHATES" & Chemicals LTD.

Shri Shri

Designation Designation in the presence of in the presence of 1. 1. 2. 2.

7. As is apparent from the perusal of the same it is clear that it is signed on behalf of the respondent and by two witnesses but on behalf of the petitioner, namely Pyrites, Phosphates 7 Chemicals Ltd. no authorised person has signed.

8. Learned counsel for the petitioner urged that the two persons, namely Shri AP Srivastava and the other person are also employees of the petitioner company and it could well be taken that they signed for an on behalf of the petitioner but the difference of signing a person as a witness and for and on behalf of the company is like the difference of the cheese and the chalk. They had not signed on basis of any resolution of the petitioner company so as to permit the court to held that they had signed on behalf of the petitioner company. They had signed as witnesses and their status would remain to be that of a witness rather than a party. Merely because they were employees of the petitioner would not give them the status to say that they signed for and on behalf of the petitioner.

9. In that event it had further been urged vehemently that respondent no. 1 had signed and consequently in terms of Section 7(3) of the Act it would be an arbitration agreement. In view of the learned counsel it need not be signed by the parties.

10. Section 2(a) defines an arbitration agreement to be an agreement referred to in Section 7. Sub-section (2) to Section 7 further provides that an arbitration can be in the form of an arbitration clause in a contract or in the form of a separate agreement but an arbitration agreement has to be in writing. Sub-section (4) to Section 7 reads:

"(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.

11. To state that sub-section (4) to Section 7 does not govern sub-section (3) to Section 7 would be inappropriate. While sub-section (3) to Section 7 provides that an agreement has to be in writing, sub-section (4) to Section 7 elucidates as to what is an agreement in writing. It is in the form of an Explanation to sub-section (3) to Section 7. Therefore, before it can be termed that there is an

agreement in writing it has to be established that the matter fall within the narrow compass of sub-section (4) to Section 7. Under sub-section (4) to Section 7, as already reproduced above, it is an agreement in writing if it is signed by both the parties or it can be inferred from exchange of letters, other means of communication or 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. In other words, under sub-section (4)(b) & (c) also if there is an exchange of letters or exchange of statements reference must be to the arbitration agreement. In the present case it is not signed by parties and Therefore it cannot be termed that it can be an arbitration agreement within Section 7(4)(a) of the Act.

12. In that event reference was made to the fact that the agreement as such had been renewed and Therefore it must be taken that it is admitted that there is an arbitration agreement. In particular, the learned counsel referred to is 7258/98 so as to urge that in the reply thereto it had been admitted that there is such an agreement. Even on that count the contention of the learned counsel must fail. The petitioner had preferred is 7258/98 which was an application under Order 13 Rule 2 of the Code of Civil Procedure. Along with it the petitioner had placed on the record certain documents. It is not in dispute that the contract had as such been renewed but does it imply that the arbitration agreement would be deemed to be admitted. In the peculiar facts the answer has to be in the negative. The exchange of letters, telegrams or settlements and defense etc. must make a reference to the arbitration agreement. In the present case it is not shown that any such arbitration agreement was admitted in the said exchange of letters etc. In that view of the matter it cannot be held that there is any arbitration clause so proved. The issue is accordingly decided against the petitioner.

13. Issue No. 2 - Keeping in view of the findings on issue no. 1 it becomes unnecessary to record any finding on this issue including the pleas about the petition being barred by time or whether this court has the jurisdiction. For the reasons arbitration application No. 70/96 is dismissed.