

(1999) 01 SHI CK 0005

In the High Court Of Himachal Pradesh

Case No : OMP No's. 442 and 538/98 in OMP (M) No. 48 of 1998

State of H.P.

APPELLANT

Vs

D.P. Communications Systems (P) Ltd.

RESPONDENT

Date of Decision : 05-01-1999

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(5), 11(6), 34, 36, 5
Civil Procedure Code, 1908 (CPC) — Order 3 Rule 2, 151

Citation : (1999) 1 ShimLC 486

Hon'ble Judges : R.L. Khurana, J

Bench : Single Bench

Advocate : A.K. Ganguli and D.D. Sood, Sanjay Karol, General and Ankush Sood, for the Appellant; R.K. Anand and Ajay K. Sood, Gagan Anand, Arun Birbal and Kanchan Singh, for the Respondent

Final Decision : Dismissed

Judgement

R.L. Khurana, J.—This order will dispose of the abovenoted two applications. O.M.P. No. 442 of 1998 has been made by the Petitioner, State of Himachal Pradesh, u/s 151, Code of Civil Procedure, for the stay of operation of the interim award dated 29.5.1998 and further proceedings pending before the Arbitrator. OMP No. 538 of 1998 has been made by the Respondent, M/s. D.P. Communication System (P) Ltd., u/s 5 of the Arbitration and Conciliation Act, 1996, (for short, the Act) for recalling and vacation the interim order dated 5.11.1998 of this Court.

2. Briefly, the facts of the case leading to the present two applications may be thus stated. The parties entered into an agreement dated 31.1.1995, for running "on line lotteries". Such lotteries were to commence within eighteen months from the date of the agreement. The start date thus was 1.8.1996. The Respondent requested for six months' extension in the start date. The Petitioner, as a goodwill gesture, accepted the request of the Respondent subject to the condition that a supplementary agreement be executed. The Defendant

failed to respond and ultimately the agreement dated 31.1.1995 was terminated by the Petitioner on 2.1.1997.

3. The Respondent feeling aggrieved by the action of the Petitioner and by raising a dispute regarding the agreement dated 31.1.1995, approached this Court by way of a petition u/s 11(5) and (6) of the Act for appointment of an Arbitrator and for reference of the dispute to such Arbitrator. Vide order dated 3.5.1997 passed in Arbitration Petition No. 19 of 1997, the Hon'ble the Chief Justice appointed Mr. Justice Sushil Kumar Jain (Retd.) as the sole Arbitrator to go into the dispute between the parties and make his award.

4. The parties having put in appearance before the learned Arbitrator, filed their claims and counter-claims. On the basis of such claims and counter-claims, the following issues were framed by the learned Arbitrator:-

1. Whether the termination of the contract dated 31.1.1995 by the Respondent is valid? OP DPC.

2(a) If issue No. 1 is proved, whether the claimant is entitled to restoration of the original contract with damages for the intervening period and if so, what is the quantum of damages? OP DPC.

2(b) If restoration of agreement is not possible or viable on the date of the award, whether the claimant is entitled to the claims as laid down in the claim petition? OP DPC.

3. If issue No. 1 is not proved, whether the claimant is entitled to the refund of the deposit of Rs. 5.00 crores deposited in terms of clause 4 of the agreement and to payment of interest thereon, and if so, its quantum? OP DPC.

4. Whether the claim of the Respondent is beyond the scope of the arbitration reference, and if so, its effect? OP DPC.

5. If issues No. 4 and 1 are not proved, whether the claimant has committed a breach of the contract dated 31.1.1995? If so, whether the Respondent is entitled to damages, and if so, what is its quantum? OP HPSL.

6. If issue No. 1 is proved, whether the Respondent has adversely affected the claimant's ability to perform its part of the obligation under the agreement? OP DPC.

7. Whether at the time of negotiations and subsequent thereto Dr. Manmohan Singh Palli and Mr. Davey Baldev Raj, who were Directors of D.P. Communications System Private Limited, Amritsar, at the relevant time, had personally held out that they had the entrepreneurial skill to manage the ON-LINE LOTTERY SYSTEM, and if so, whether they are necessary and proper parties to the claim petition? OP HPSL.

8. Whether the claim petition is not maintainable as alleged in the reply, additional reply and rejoinder? OP HPSL.

9. Whether time was the essence of the contract and the claimant failed to start the ON LINE LOTTERY within the time schedule, and if so, its effect? OP HPSL.

5. The learned Arbitrator having considered the material placed before him and having heard the parties gave an interim award on 29.5.1998.

Under such interim award Issues No. 1, 2(a), 3, 7, 8 and 9 were finally disposed of as under:

Issue No. Findings by the learned Arbitrator.

1. The termination of contract dated 31.1.1995 by the Petitioner-State was not valid.

2(a) The Respondent is not entitled to restoration of the contract-agreement dated 31.1.1995. It is now optional for the Petitioner State to proceed with the global tender keeping in view the orders of the High Court.

3. The Respondent is entitled to the refund of cash deposit amount of Rupees five crores. The Petitioner-State is directed to pay such amount to the Respondent. (The question as to whether the Respondent is entitled to interest on this amount of Rupees five crores and if so, at what rate and from which date, was left open by the learned Arbitrator to be decided at the time of final award).

7. S/Shri Manmohan Singh and Davey Baldev Raj are neither necessary nor proper parties to the arbitral proceedings.

8. The claim of the Respondent is maintainable.

9. Time was not the essence of the contract. There was no failure on the part of the Respondent to start the "on line lottery" within the time schedule.

6. Insofar as the remaining issues are concerned, it was observed by the learned Arbitrator as under:

Issue No. Observations by the learned Arbitrator.

2(b) The restoration of the contract agreement is not possible. The question whether the Respondent is entitled to the claim as laid down in the claim petition will be decided at the time of Final Award.

4. The claim of the Petitioner-State is within the scope of arbitration reference. The point as to what is the effect of the claim of the Petitioner-State not being beyond the scope of this arbitration reference will also be decided at the time of final award.

5. Since Issue No. 5 involves the question of entitlement and award of damages, if any, I propose to decide it at the time of final award.

6. I propose to decide Issue No. 6 at the time of final award.

7. Feeling aggrieved by the interim award dated 29.5.1998 the Petitioner, State

of Himachal Pradesh, has approached this Court u/s 34 of the Act for the quashing and setting aside of the interim award. Along with the petition u/s 34 of the Act, an application, being OMP No. 442 of 1998 has been made by the Plaintiff for the stay of:

(a) the operation of the interim award; and

(b) further proceedings pending before the learned Arbitrator.

8. On 23.10.1998 while directing the issuance of notice to the Respondent in respect of this application for stay, further proceedings were ordered to be stayed. The interim order dated 23.10.1998 was further extended on 5.11.1998.

9. Along with the reply to O.M.P. No. 442/1998, the Respondent also made an application, being O.M.P. No. 538 of 1998, u/s 5 of the Act for recalling and vacating the interim order dated 5.11.1998.

10. I have heard the learned Counsel for the parties and have also gone through the record of the case.

11. At the very outset, an objection was raised on behalf of the Plaintiff regarding the competency of Shri Jatin Chawla and Ms. Alinna Arora to file the reply and to move the application on behalf of the Respondent. It was contended that both these persons having not been properly appointed and/or authorised cannot be termed as "Recognised agents" within the meaning of Rule-2 of Order 3, Code of Civil Procedure.

12. The learned Counsel for the Respondent without conceding the objection as to the authority and competency of Shri Jatin Chawla and Ms. Alinna Arora and without prejudice to the rights of the Respondent has contended that the reply filed by the Respondent to OMP No. 442 of 1998 as well as the application made by the Respondent, being OMP No. 538 of 1998, u/s 5 of the Act may be ordered to be taken off the record and the application made by the Petitioner, being OMP No. 442 of 1998 be heard and disposed of.

13. As stated above by virtue of the application being OMP No. 442 of 1998, the Petitioner has sought the stay of the operation of the impugned interim award dated 29.5.1998, and the further arbitral proceedings pending before the learned Arbitrator.

14. Insofar as the stay of operation of the impugned award is concerned, no stay is called for under the law in view of the provisions contained in Section 36 of the Act. Section 36 provides:

Where the time for making an application to set aside the arbitral award u/s 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908, (5 of 1908) in the same manner as if it were a decree of the Court.

15. Thus, a bare reading of the above provisions shows that an arbitral award

has been made enforceable as a decree of the Court. However, it can be enforced only:

(a) after the time for filing an application u/s 34 to set aside the award has expired, or

(b) after such application, if made, has been refused.

16. Therefore, in terms of Section 36 of the Act, so long as the application made u/s 34 of the Act to set aside an arbitral award, is pending, such award cannot be enforced and no stay for its enforcement is called for.

17. Next comes the question of stay of pending further arbitral proceedings. Section 9 of the Act deals with interim measures, etc. by the court. It reads:

Interim measures, etc. by Court.-A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it becomes decree of a Court, apply to a Court:

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:

(a) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction the appointment of a Receiver,

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

18. The stay of pending arbitral proceedings, prima facie, does not fall within the ambit of Section 9 of the Act. The interim injunction contemplated under Clause (d) of Section 9 of the Act is the injunction which the Court can issue against a party to the arbitral proceedings for the preservation and/or protection of the subject matter of the dispute. This clause does not contemplate an injunction

against the Arbitrator for restraining him from proceeding with the arbitral proceedings.

19. It was contended on behalf of the Petitioner that since the learned Arbitrator has recorded his findings on some of the issues, as detailed above, such findings will have bearing on the remaining issues while making the final award, therefore, in the interest of justice further proceedings before the learned Arbitrator may be stayed in exercise of inherent powers of the Court u/s 151, Code of Civil Procedure.

20. I do not find force in the contention of the learned Counsel for the Petitioner. No prejudice is likely to cause to the Petitioner in case the arbitral proceedings continue. The findings, if any, recorded by the learned Arbitrator on the remaining issues at the time of final award would be subject to the decision of this Court on the application made by the Petitioner , u/s 34 of the Act to set aside the interim award.

21. Resultantly, there being no merit in the application being O.M.P. No. 442 of 1998, the same is dismissed. The interim order stands vacated.

22. O.M.P. No. 538 of 1998 made by the Respondent and reply filed by it to O.M.P. No. 442 of 1998 shall be treated to have been taken off the record and the same stand disposed of accordingly.