
(2013) 12 DEL CK 0132

In the Delhi High Court

Case No : Writ Petition (C) 7918 of 2013 and CM No. 16777 of 2013

Traxpo Enterprises Pvt. Ltd.

APPELLANT

Vs

PEC Limited and Another

RESPONDENT

Date of Decision : 17-12-2013

Acts Referred:

Citation : (2013) 12 DEL CK 0132

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Kuljeet Rawal and Mr. Jagjit Singh, for the Appellant; Arvind Chaudhary, Adv for R-1, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Jain, J.—The petitioner before this Court entered into an agreement with respondent No. 1-PEC Limited, which is a public sector undertaking. The agreement between the said parties contained the following arbitration clause:-

Any dispute or difference in respect of may matter relating to or arising out of the Associateship Agreement between PEC and ASSOCIATE, if

the same is not resolved amicably, will be settled at New Delhi by arbitration in accordance with Rules of Arbitration of Indian Council of

Arbitration, New Delhi and the Award made in pursuance thereof shall be final and binding on the parties. The Arbitrator will give a reasoned

Award. The venue of arbitration will be New Delhi.

As per the rules of Arbitration of ICA, since the claim raised by respondent No. 1 amounted to Rs. 13,22,55,637/-, it was required to be decided

by the Tribunal of three arbitrators, one each to be nominated by the parties and

the third or the presiding arbitrator to be nominated by the Council unless the parties to the dispute mutually agreed to refer the dispute to a sole arbitrator.

The disputes arose between the parties and respondent No. 1 raised a claim of Rs. 13,22,55,637/- against the petitioner and approached

respondent No. 2-Indian Council of Arbitration. Vide letter dated 24.04.2013, the said Council, referring to the claim of respondent No. 1,

required the petitioner to forward the name of its nominee arbitrator from the ICA panel of arbitrators which was available on its website, on or

before 25.05.2013. The petitioner was also required to deposit a sum of Rs. 14,45,490/- towards its share of the advance deposit of the tentative

arbitration cost and expenses of arbitration, in terms of Rule 28 of the ICA Rules of Arbitration, on or before 25.05.2013.

The petitioner responded to the letter of respondent No. 2 dated 25.04.2013 by way of reply dated 23.05.2013. In its reply, the petitioner denied

the claim raised by respondent No. 1, but neither did it appoint an arbitrator from the panel of ICA nor did it deposit its share towards the cost of

tentative cost of arbitration. In fact, no request was made in the reply dated 23.05.2013 for extension of time for nominating the arbitrator of the

petitioner and/or depositing its share towards the tentative cost of arbitration.

2. Vide letter dated 30.05.2013, respondent No. 2 Indian Council of Arbitration, extended time till 21.06.2013 for compliance of the directions,

contained in its letter dated 25.04.2013. The petitioner responded to the letter of ICA dated 30.05.2013, by way of reply dated 13.06.2013. The

stand taken in the reply was that it was not bound to pay to ICA towards the deposit for arbitration. No request was made in this letter for

extension of time either for appointment of an arbitrator on behalf of the petitioner or for depositing the share of the petitioner in the tentative cost

of arbitration.

3. Vide letter dated 18.06.2013, ICA informed the petitioner that in view of their refusal to make payment of arbitral fee, they could, under Rule

28, realize the share of the petitioner from the claimant/respondent No. 1. The petitioner was further informed that the claimant had forwarded the

name of Shri P.C. Markanda, Senior Advocate and had proposed to resolve the dispute through his sole arbitration instead of resolving it through

the panel of three arbitrators. The petitioner was asked to convey its consent in case the proposal was acceptable to it. The petitioner responded

to the said letter vide reply dated 27.06.2013, objecting to the proposal of the claimant/respondent No. 1 for resolving the dispute by sole

arbitrator instead of a panel of three arbitrator and also informed ICA that they would convey the name of their arbitrator within three weeks. ICA

was requested to grant three weeks time for the purpose. However, despite having sought time for three weeks for appointing its arbitrator,

admittedly, the petitioner failed to do so.

4. Vide letter dated 03.07.2013, the ICA again asked the respondent No. 1/ claimant to make payment of Rs. 14,45,490/- towards the

petitioner's share of the arbitral cost and expenses. The respondent No. 1 was also asked whether it would like to retain the name of Shri P.C.

Markanda as its nominee arbitrator.

Vide letter dated 03.07.2013, referring to the request which the petitioner had made for extension of time for nominating its arbitrator, ICA

informed the petitioner that they had not appointed an arbitrator despite repeated opportunities. Hence, a final opportunity was granted to the

petitioner for this purpose till 15.07.2013. It was further stated in the said letter that if the petitioner failed to comply with the said directions, the

matter shall be referred to the arbitration committee for appointment of its nominee arbitrator. Admittedly, the petitioner did not nominate an

arbitrator on its behalf even till 15.07.2013.

Vide letter dated 15.07.2013, the petitioner, instead of nominating an arbitrator, informed ICA that they were still awaiting the consent of the

arbitrator whom they proposed to appoint and as soon as the same is received, they would send the name and contact details of their arbitrator.

Further three weeks time was sought by the petitioner for appointment of its arbitrator.

Vide letter dated 19.07.2013, the ICA responding to the letter of the petitioner dated 15.07.2013, informed it that the ICA could not grant more

than 10 days time for the purpose and required the petitioner to forward the name of its nominee arbitrator by 29.07.2013. Admittedly, the

petitioner did not nominate an arbitrator by 29.07.2013 and in fact not even within three weeks, computed with effect from 15.07.2013.

5. Vide letter dated 25.07.2013, the petitioner again sought two weeks time for appointment of arbitrator by them. Vide letter dated 06.08.2013,

the petitioner again sought three more weeks time for appointment of an arbitrator. It would be pertinent to note here that no arbitrator was

appointed by the petitioner even within two weeks, computed from 25.07.2013 though on that date also it had sought two weeks time for this

purpose. Vide letter dated 06.08.2013, the ICA informed the petitioner that Rule 22 (c) of ICA Rules of Arbitrator enables the Registrar to go

ahead and appoint claimant's nominee arbitrator as the sole arbitrator in the situation prevailing in the case and, therefore, they shall pursuing the

matter in accordance with the aforesaid rule. It was, thereafter, that vide letter dated 16.08.2013, the petitioner appointed a former Judge of this

Court, as the arbitrator on its behalf. The aforesaid nomination was, however, not accepted by the ICA and vide letter dated 03.10.2013, the ICA

informed the petitioner as well as respondent No. 1 that Shri P.C. Markanda, Senior Advocate had been appointed as arbitrator under Rule 22

(c) of ICA Rules of Arbitrator. Being aggrieved from the decision of the ICA to go ahead with arbitration, without constituting a panel of three

arbitrator, including the nominee of the petitioner, this writ petition has been filed claiming the following reliefs:-

a. issue writ of mandamus and any other order or writ or direction whereby calling upon the records of arbitration proceeding relating and

pertaining to its titled as PEC Limited (claimant) versus Traxpo Enterprises Pvt. Ltd. (respondent) as pending before the office of Indian Council of

Arbitration (ICA) with No. AC/1888;

b. writ of certiorari or any other writ or direction or order whereby quashing and setting aside directions issued by respondent no. 2 vide their

letters dated 6/8/2013, 16/08/2013 & 3/10/2013 and while quashing and setting aside the above directions or all other direction of respondent no.

2 & whereby be pleased to constitute Arbitral Tribunal constituting of 3 Arbitrators one each to be the nominee Arbitrator of each i.e. Petitioner &

Respondent No. 1 & umpire thereto all proceeding be proceed with denove by the said Arbitral Tribunal in accordance with law.

6. Rule 22(c) of ICA Rules of Arbitration reads as under:-

(c) Where three arbitrators have to be appointed as per the above sub-rule and

any of the parties to the dispute fails to make the necessary deposit towards the costs and expenses of arbitration, instead of three arbitrators, the Registrar shall request the arbitrator appointed by any of the parties to act as sole arbitrator irrespective of the claim exceeding Rs. one crore. In the event the agreement provides for appointment of three arbitrators, the Registrar in consultation with the Chairman of the Arbitration Committee may appoint arbitrators on behalf of Claimant or Respondent, as the case may be, as well as presiding arbitrator.

The contention of the learned counsel for the petitioner is that the first part of the aforesaid rule applies to a situation where the fee is not deposited at all by one of the parties to the agreement and will not apply to a situation where the one party commits default in deposit of its share of the cost of arbitration and the other party deposits the share of the party in default. I, however, find myself unable to accept the said contention. A careful scrutiny of the aforesaid rule would show that it applies to a situation where one of the parties to the agreement fails to deposit the cost and expenses of arbitration and once that situation has arisen, it would make no difference if the share of the party in default is deposited by the other party to the arbitration agreement. The purpose of the claimant depositing the share of the petitioner in the cost and expenses of arbitration is to enable the Council to go ahead with the arbitration, since, without deposit of the share of both the parties, the Council may not go ahead with the arbitration. The second part of the aforesaid clause, in my view, would not apply to a situation where one of the parties commits default in depositing its share towards the cost and expenses of arbitration. It would apply to a situation, where the fee is deposited by all the parties, but any of the parties fails to nominate his arbitrator. The contention of Mr. Rawal is that even in the event one of the parties commits the default in nominating an arbitrator and depositing its share towards the cost and expenses of arbitration, ICA has to nominate an arbitrator on its behalf, instead of referring the matter to the sole arbitrator. I, however, cannot accept the contention since accepting the said contention would make the first part of the aforesaid report absolutely redundant.

7. Mr. Rawal states that in view of the letter dated 06.08.2013 sent by ICA to the respondent No. 1 with copy endorsed to the petitioner, they

ought to have waited till 13.08.2013. Firstly, the contention cannot be accepted since the Council had already decided to proceed under Rule

22(c) on account of default committed by the petitioner; secondly, admittedly, the petitioner did not nominate its arbitrators even by 13.08.2013.

I find no illegality in the procedure adopted by the Indian Council of Arbitration. The conduct of the petitioner to say the least was highly

undesirable. The petitioner was given repeated opportunities to nominate its arbitrator from the panel of arbitrators of ICA. The petitioner not only

failed to avail the opportunities given from time to time, it also failed to appoint an arbitrator even within the time it sought from ICA, firstly vide

letter dated 27.06.2013 and then vide letter date 15.07.2013. Obviously, the petitioner was trying to delay the initiation of arbitration proceedings,

thereby defeating the very purpose behind having an arbitration clause.

For the reasons stated hereinabove, I find no merit in the writ petition and the same is hereby dismissed.