
(2008) 02 DEL CK 0004

In the Delhi High Court

Case No : Arbitration Petition No. 471 of 2006

TVC India Pvt. Ltd.

APPELLANT

Vs

ABN Amro Bank N.V.

RESPONDENT

Date of Decision : 13-02-2008

Acts Referred:

Citation : (2008) 1 ARBLR 579 : (2008) 148 DLT 262 : (2008) 101 DRJ 710

Hon'ble Judges : S.N. Aggarwal, J

Bench : Single Bench

Advocate : Ajay Verma, for the Appellant; Samrat Nigam, for the Respondent

Judgement

S.N. Aggarwal, J.—The petitioner has filed this petition against the respondent seeking appointment of an Arbitrator u/s 11(6) of the Arbitration & Conciliation Act, 1996.

2. Briefly stated the facts of the case are as follows:

3. The petitioner is engaged in the business of establishing, maintaining and operating the closed users group domestic 64 kbps Network via INSAT satellite system using VSATs (Very Small Aperture Terminals) throughout India. The parties entered into an agreement dated 17.5.1999 whereby the petitioner agreed to provide the agreed services to the respondent at its various sites in India using the equipment leased to respondent on the basis of the terms and conditions contained in the agreement. The said agreement executed between the parties contained an arbitration clause for adjudication of dispute that may arise between the parties under the contract through arbitration. Clause 9.3 is the relevant clause in the agreement which provide for dispute resolution mechanism agreed upon between the parties and the same is extracted below:

9.3 Dispute Resolution

9.3.1 All disputes arising directly under the express terms of this Agreement or grounds for termination thereof shall be resolved as follows:

a) The nominated representatives of both parties shall meet to attempt to resolve such disputes. If disputes cannot be resolved by the nominated representatives, either party may make a written demand for formal dispute resolution. Within thirty (30) days after such written notification, the parties agree to meet for one day with an impartial mediator and consider dispute resolution alternatives other than by way of arbitration.

b) If an alternative method of dispute resolution is not agreed upon within thirty (30) days after the one day mediation, either party may begin arbitration proceedings.

9.3.2 Any disputes submitted for arbitration in accordance with the provisions of Sub-clause 9.3.1 hereinabove shall be settled within a period of two (2) months from the date of submissions of such disputes. Arbitration shall be in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

9.3.3 The Courts of Delhi shall have jurisdiction for the purposes of the implementation of any arbitral award given under the provisions of this Clause 9.3.2.

9.3.4 The decision of the arbitrator under Sub-clause 9.3.2 shall be final, binding and incontestable and may be used as a basis for judgment thereon.

9.3.5 No party shall be entitled to commence or maintain any action in court of law upon any matter in dispute until such matter shall have been submitted and determined as hereinabove before provided and then only for the enforcement of the amount found due on such arbitration.

9.3.6 Pending the submission to arbitration and thereafter until the Arbitrator publishes his award, the parties shall, except in the event of termination, continue to perform all their obligations under this Agreement without prejudice to a final adjustment in accordance with the said award. Provided that in the event of termination of this Agreement, Telestra V-Comm will be entitled to forthwith possess or repossess the Equipment owned by Telestra V-Comm, notwithstanding the continuance or otherwise of the any arbitration or other proceeding. Similarly, Subscriber will be entitled to refund of advance fee paid for the balance period from the date of termination arising out of any of the reasons as contained in 5.4 above, notwithstanding the continuance or otherwise of any arbitration or any other proceeding.

4. Certain disputes and differences are alleged to have arisen between the parties under the above-referred agreement. The petitioner in terms of Clause 9.3 of the agreement, vide its letter dated 25.9.2003 had nominated its representative to resolve the dispute and also called upon the respondent to nominate its representative for the said purpose. However, the respondent failed to nominate its representative and, Therefore, the petitioner vide its letter dated 27.3.2004 made a written demand on the respondent for formal dispute resolution by nominating Justice K. Ramamoorthy (a former Judge of this Court)

as an impartial mediator. The respondent vide its letter dated 12.4.2004 agreed to the appointment of Justice Ramamoorthy as a mediator in terms of Clause 9.3 of the agreement. The proceedings before the Mediator continued till 30.6.2006 when the respondent allegedly withdrew itself from the mediation proceedings. Thereafter, the petitioner vide its letter dated 17.8.2006 called upon the respondent to inform which alternative method of dispute resolution it was agreeable to so that the same could be considered. It was further clarified that in the event respondent fail to do so, the petitioner would be constrained to initiate appropriate proceedings under the contract. Since the respondent did not respond to the petitioner's letter dated 17.8.2006, the petitioner filed the present petition seeking appointment of an Arbitrator in terms of arbitration agreement between the parties on 13.11.2006.

5. Mr. Nigam appearing on behalf of the respondent has raised a preliminary objection to the maintainability of the present petition on the ground of limitation. Mr. Nigam has contended that the contract between the parties was terminated by the respondent on 30.11.2002 to be effective from 31.12.2002. Mr. Nigam has contended that the cause of action in favor of the petitioner for demanding arbitration arose on the date when the contract was terminated on 30.11.2002. According to Mr. Nigam, provisions of Article 137 of the Limitation Act are applicable to the present case and according to him, this petition could have been filed by the petitioner within three years to be reckoned from 30.11.2002. It is contended that since the present petition was filed by the petitioner beyond three years reckoned from 30.11.2002, the present petition is liable to be dismissed as barred by limitation.

6. Upon hearing the learned Counsel for the parties and on perusal of the relevant documents, this Court could not persuade itself to agree with the contentions on the point of limitation urged on behalf of the respondent. A perusal of Clause 9.3 of the agreement extracted above would show that the parties had agreed for an inbuilt dispute resolution mechanism while they had entered into the contract in question. This inbuilt dispute resolution mechanism provided in the contract refers for resolution of dispute in the first instance through the representatives to be nominated by both the parties and thereafter in case it was not possible for the representatives of the parties to resolve the dispute, the aggrieved party could demand appointment of a mediator for one day mediation which was agreed to be appointed within thirty days of such demand. Further perusal of Clause 9.3 would show that no time limit was fixed in the said clause for demanding appointment of a mediator for one day mediation. What was provided in Clause 9.3 is that the mediator for one day mediation was to be appointed within thirty days of such demand being made by the aggrieved party. In the present case Hon'ble Mr. Justice K. Ramamoorthy (a former Judge of this Court) was appointed as a mediator with the consent of both the parties. However, instead of one day mediation agreed by the parties in the agreement, the proceedings before the mediator went on for about two years when the respondent admittedly withdrew itself from the mediation proceedings on

30.6.2006. It shall be significant to mention that the respondent acquiesced itself in the mediation proceedings by continuing in the mediation proceedings till 30.6.2006. It was only after the mediation failed or could not work, the petitioner has to file the present petition for appointment of an Arbitrator for resolving the dispute that have arisen between the parties under the contract. In the opinion of this Court the cause of action for appointment of Arbitrator has arisen in favor of the petitioner when the mediation did not work out as a result of withdrawal by the respondent on 30.6.2006. In case the limitation for filing of the present petition is reckoned from the said date of 30.6.2006, the present petition filed by the petitioner on 13.11.2006 cannot be said to be beyond limitation prescribed in Article 137 of the Limitation Act.

7. In Hari Shankar Singhania and Others Vs. Gaur Hari Singhania and Others, the Hon''ble Supreme Court has held in Para 24 of the said judgment as under:

Where a settlement with or without conciliation is not possible, then comes the stage of adjudication by way of arbitration. Article 137, as construed in this sense, then as long as parties are in dialogue and even the differences would have surfaced it cannot be asserted that a limitation under Article 137 has commenced. Such an interpretation will compel the parties to resort to litigation/arbitration even where there is serious hope of the parties themselves resolving the issues.

8. The above-referred judgment of the Hon''ble Supreme Court lend support to the view of this Court that the cause of action for seeking appointment of an Arbitrator arose to the petitioner only when the disputes could not be resolved through mediation or other alternative dispute resolution mechanism provided in the agreement. Hence, this Court does not find any merit in the contention on the point of limitation urged on behalf of the respondent.

9. Mr. Nigam appearing on behalf of the respondent has very fairly submitted that all contentions raised by the respondent on merits of the case may be examined by the Arbitrator to be appointed by the Court. The existence of arbitration agreement and the dispute under the contract between the parties is not denied by the counsel appearing on behalf of the respondent.

10. In view of the above and having regard to the facts and circumstances of the case and the submissions made by the learned Counsel for the parties, Hon''ble Mr. Justice Satpal, a former Judge of this Court (SFS, 53, DDA Flats, East Mukherjee Nagar, Delhi-9; 27653129, 27654302) is hereby appointed as the sole Arbitrator to decide the disputes and differences between the parties that have arisen between them under the contract in question. The fees of the learned Arbitrator, to be shared initially by both the parties equally, is left to be decided by the learned Arbitrator himself. The parties are directed to appear before the learned Arbitrator for further directions at 5.00 pm on 14.3.2008.

11. A copy of this order be sent to the learned Arbitrator for information forthwith.