

(2010) 01 DEL CK 0251

In the Delhi High Court

Case No : Arbitration Petition 244 of 2007 and I.A. No. 12290 of 2008

TVC Sky Shop Ltd.

APPELLANT

Vs

Sahara Airlines Ltd. (Now Known as Jet Lite (India) Ltd.)

RESPONDENT

Date of Decision : 25-01-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 7(3), 7(4)

Citation : (2010) 171 DLT 10

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Vandana Sehgal and Rohan Thawani, for the Appellant; Nidhesh Gupta and Sanjay Pal, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—The application u/s 11(6) of the Arbitration and Conciliation Act, 1996 has been preferred pleading that on 21st April, 2007 an agreement was entered into between the parties, where under the petitioner agreed to supply up to 1000 quantity of gift products/vouchers to the respondent at the MRP of Rs. 10,000/- each and at the barter value back in the air tickets of the respondent airline at 60%. A copy of the said agreement which contains an arbitration clause is filed along with the petition. It is further the case of the petitioner that in pursuance to the agreement aforesaid, the petitioner supplied 850 gift vouchers of the value of Rs. 85,00,000/- to the respondent and under the terms and conditions of the agreement, the petitioner became entitled to get back from the respondent the barter value in air tickets worth Rs. 51,00,000/-; however, the respondent gave credit to the petitioner of the value of Rs. 32,40,000/- only, leaving the balance coupon credit of Rs. 18,60,000/- which the respondent avoided to give on one pretext or the other. The arbitration clause in the agreement between the parties is of a sole arbitrator to be appointed by the respondent. It is the case of the petitioner that the petitioner applied to the respondent invoking the arbitration clause but the respondent did not appoint the arbitrator, hence the Chief Justice was approached u/s 11(6).

2. The respondent contested the petition and first filed a counter affidavit dated 18th February, 2008; in the said counter affidavit, it is inter alia pleaded that the agreement containing the arbitration clause relied upon by the petitioner and filed before the court is not signed/accepted by the petitioner at the designated place marked "Acceptance" (it is signed by the respondent only); it is the case of the respondent that as per the terms of the agreement, it was to become effective only upon receipt by the respondent of signed copy of the agreement from the petitioner; that the petitioner never signed the agreement and returned the same to the respondent and hence no arbitration agreement came into being between the parties. The petitioner there upon moved IA No. 6271/2008 in this Court for permission to produce before the Court, the original agreement bearing the signatures of the petitioner also. The said application was allowed on 21st May, 2008. This Court on 18th August, 2008 directed the respondent to file an affidavit clarifying its stand on the pleading of the petitioner of the agreement having been acted. The respondent thereafter filed an additional affidavit and also filed IA No. 12290/2008 u/s 340 of the Cr.P.C. In the additional affidavit, while admitting the transactions with the petitioner, it is stated that the same were on the basis of invoices raised by the petitioner on the respondent and which did not contain an arbitration clause and contain clause regarding jurisdiction of Mumbai. The senior counsel for the respondent has urged that though the petitioner did not return the signed agreement but the parties nevertheless proceeded to transact business. The application u/s 340 of the Cr.P.C. has been filed on the ground that while the stand of the petitioner originally was that the copy of the agreement filed along with the petition was the only copy available with it, the signed copy having already been forwarded to the respondent, the petitioner forged the agreement subsequently filed and bearing the signatures of both the parties.

3. The senior counsel for the respondent has argued on the same lines. Though he had also sought to urge the aspect of limitation but subsequently did not press the same, being a question of trial. Per contra, the counsel for the petitioner has urged that no such plea as is now taken of the agreement having not been signed was taken at any point prior to filing the reply before this Court, not even in response to the notice invoking the arbitration clause. It is urged that the same is an afterthought. The conduct of the respondent of first evading to reply to the pleas of the dealings pursuant to the agreement and only subsequently setting up a case of the same being notwithstanding the non-signing of the agreement by the petitioner is also pointed out. It is urged that the parties started transacting with each other only after an agreement signed by the petitioner was returned to the respondent. Reliance is also placed on Unissi (India) Pvt. Ltd. Vs. Post Graduate Institute of Medical Education and Research, .

4. A perusal of the agreement dated 21st April, 2004 shows that the same is in pursuance to the representative/agent of the respondent selecting the petitioner to participate in the programme "Bid and Win" of the respondent. The said agreement duly signed by the respondent was forwarded to the petitioner in

confirmation of the terms already settled between the representative of the respondent and the petitioner. The agreement is in printed form and copies thereof are shown to have been also forwarded by the respondent to its various departments/officials, for implementation thereof. Though the same undoubtedly provides that the petitioner should sign a copy of the agreement and return to the respondent within 72 hours of receipt and the agreement will become effective only on receipt of such signed copy from the petitioner, but in the entirety of the facts and circumstances of the case, the preponderance of probability is in favour of the petitioner having signed the copy of the agreement and delivered the same to the respondent. The plea of the respondent of the transactions which admittedly took place thereafter, being not in pursuance to the agreement is a bald plea and unbelievable. The agreement is dated 21st April, 2004 and the invoices raised by the petitioner and admitted by the respondent are of 28th April, 2004 and pursuant to order placed by respondent on 27th April, 2004. The said invoices are in consonance with the commercial terms of the agreement. Nothing which may have happened between 21st April, 2004 and 27th April, 2004 is pleaded or shown, of the parties having opted to transact independently of the written terms of the agreement. The respondent which had marked a copy of the agreement dated 21st April, 2004 to its, as many as seven departments, has not shown that any communication was sent to the said departments intimating that the dealings with the petitioner were on terms other than as mentioned in the agreement dated 21st April, 2004. There is also no apparent reason for the parties having made such a change. There is no evidence of any fresh negotiations between 21st April, 2004 & 27th April, 2004 between the parties.

5. The argument of the senior counsel for the respondent that the claims if any of the petitioner against the respondent on the basis of the said invoices can be subject matter of a suit only to be filed by the petitioner against the respondent at Mumbai cannot be accepted. The invoices of the respondent are also in standard form and contain standard/printed conditions including, "subject to Mumbai jurisdiction". It is significant that the said invoices also do not provide for exclusive jurisdiction of Mumbai courts. The Supreme Court in *Hanil Era Textiles Ltd. Vs. Puromatic Filters (P) Ltd.*, has held that even without the use of the words only or exclusive, the intention to that effect can be shown. However, for the reason of the respondent having sent the signed agreement dated 21st April, 2004 to the petitioner from Delhi and providing for arbitration at New Delhi shows that the parties had not agreed to the exclusive jurisdiction of the Mumbai Courts.

6. In *Unissi (India) Pvt. Ltd.* (supra), the respondent i.e. PGI had floated a tender document containing an arbitration clause; the tender of the petitioner therein was accepted; in terms of the tender document, the petitioner therein signed an agreement containing an arbitration clause and forwarded the same to PGI; the said agreement however was not signed by PGI and not sent back to the petitioner as required under the tender document. The parties however

transacted some business in terms of the tender document. In these facts, the Supreme Court held that upon acceptance of materials pursuant to tender enquiry containing an arbitration clause, an arbitration agreement had come into existence between the parties.

7. The only requirement of Section 7(3) is of the arbitration agreement being in writing. Section 7(4) & (5) of the Act provide that an arbitration agreement is in writing even if it is in exchange of letters, telex, telegrams and other means of telecommunication which provide a record to the agreement and even if it is contained in a document to which reference is made in writing and the reference is such as to make that arbitration clause part of the contract. The Apex Court in *Shri Chander Nath Ojha, Jaipur Vs. Shri Suresh Jhalani and Others*, held that an arbitration agreement under the Arbitration Act, 1940 was not required to necessarily bear the signatures of the parties and the requirement is only of the same being in writing. The Division Bench of this Court in *Patanjal and Another Vs. Rawalpindi Theatres (P) Ltd.*, also held that the agreement need not necessarily be signed by the parties. To the same effect is *Bharat Steel Tubes Vs. State of Bihar*, . Under the 1996 Act also, this Court in *Unipack Industries Vs. Subhash Chand Jain and Others*, has held that an arbitration agreement need not be signed in situations contemplated u/s 7(4)(b) and (c).

8. In the present case, it is the respondent which forwarded the duly signed agreement in writing containing an arbitration clause to the petitioner, showing its willingness for arbitration of disputes if any arising between the parties. The respondent thereafter accepted the goods/services from the petitioner. Such acceptance is also in writing through invoices. There is nothing in the said invoices to indicate that the respondent had agreed to waive the provision for arbitration contained in the document forwarded by the respondent itself to the petitioner. In the opinion of this Court from such conduct of the parties, an arbitration agreement came into existence between the parties. The printed clause in the invoices of the same being subject to Mumbai jurisdiction is not found to be inconsistent to the arbitration agreement between the parties.

9. I am also of the view that the conduct of the respondent of, upon arbitration clause being invoked by the petitioner in not responding that there was no arbitration agreement between the parties and in the counter affidavit first filed not pleading that the transactions with the petitioner were on terms and conditions different from that contained in the agreement is also relevant. A party cannot be permitted to play hide and seek. If there was any iota of truth in the pleading of the respondent, the respondent immediately on arbitration clause being invoked would have denied arbitration and drawn attention of the petitioner to the fact that it had not agreed to the arbitration. Similarly, in the first instance attempt was made to not take any stand on the transactions pleaded by the petitioner under the agreement. Only when the respondent was forced to file an affidavit was an admission in that regard made and plea as an afterthought of the same being by way of independent agreement was made.

The Supreme Court in *Hiralal Kapur Vs. Prabhu Choudhury*, has held that where an assertion of facts is made in letters and no reply is given thereto, it leaves no doubt that the facts asserted were admitted to be correct.

10. Upon the aforesaid being made clear during the course of hearing, the senior counsel for the respondent contended that an opportunity be given in terms of the agreement to the respondent to appoint the arbitrator. The same cannot be allowed especially in view of the above. The respondent has forfeited the right to appoint an arbitrator.

11. I had during the hearing suggested to the counsels for arbitration by an arbitrator on the panel of Delhi High Court Arbitration Center and in consonance with rules thereof. The counsel for the petitioner has agreed to the same. The counsel for the respondent took time to obtain instructions. Subsequently, the matter was mentioned and the counsel for the respondent has stated that without prejudice to the rights and contentions of the respondent, the respondent has no objection to the arbitration of the Delhi High court Arbitration Center, without the same being treated as concession by the respondent to the pleas of the petitioner. The counsel for the respondent at this stage has also drawn attention to the order dated 24th July, 2009 of Hon'ble the Chief Justice in *Indus Airways Pvt. Ltd. v. Jet Lite (India) Ltd.* Arbitration Petition No. 297/2008 to contend that as in that case, in this case also the existence of the arbitration agreement be also left open for adjudication by the arbitrator. The same is not permissible in view of the dicta in *National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd.*, where it has been laid down that upon the Chief Justice being approached u/s 11 of the Act, it is the obligatory function to determine whether there is an arbitration clause or not. The respondent having contested the present petition and having delayed the disposal thereof by over 18 years cannot be permitted second chance on this aspect before the arbitrator. As such, the finding herein above of the existence of the arbitration agreement cannot be left open for decision by the arbitrator. The reliance on the order aforesaid is misconceived. What was left open in that case was, arbitrability of a petitioner claim.

12. Accordingly, the petition u/s 11 is allowed. Mr. Dinesh Dayal, Retd. ADJ who is on the panel of arbitrators of the Delhi High Court Arbitration Center is appointed as the arbitrator and the arbitration is directed to be held as per the rules and regulations of the Delhi High Court Arbitration Center.

13. Coming to the application preferred by the respondent u/s 340 of the Cr.P.C. I do not find any merit therein. The agreement dated 21st April, 2004 admittedly records that two copies thereof signed by the respondent were forwarded to the petitioner, the one to be retained by the petitioner and the other to be returned by the petitioner with its signature to the respondent. The petitioner had along with the petition filed a true copy of its copy of the agreement. The same was not signed on behalf of the petitioner. The petitioner in its rejoinder to the first affidavit filed by the respondent had undoubtedly stated that the copy of the

agreement attached to the petition is the only copy available with the petitioner. In the subsequent application, it was stated that the petitioner had been able to trace the original agreement and which was signed by the petitioner also. The two pleas are reconcilable and it cannot be said that any falsehood or perjury had been practiced by the respondent. IA No. 12290/2008 is accordingly dismissed.

14. The petitioner is also awarded costs of Rs. 15,000/- of these proceedings against the respondent.