
M.M. Aqua Technologies Ltd. Vs Wig Brothers Builders and Another

Civil Writ No. 3595 of 2001

Court: Delhi High Court

Date of Decision: Nov. 28, 2001

Acts Referred:

Arbitration and Conciliation Act, 1996 " Section 11(6), 2, 7(3), 7(4)#Constitution of India, 1950
" Article 226

Citation: (2002) 95 DLT 818 : (2002) 61 DRJ 682

Hon'ble Judges: S.B. Sinha, C.J; A.K. Sikri, J

Bench: Division Bench

Advocate: Ravi Gupta, for the Appellant; S.K. Taneja Rajesh Gupta and Puneet Taneja, for the Respondent

Final Decision: Dismissed

Judgement

S.B. Sinha, C.J.

This writ petition is directed against an order of learned Single of this Court on 15th November, 2000 in Arbitration

Application No. 277/00, whereby and whereunder Hon"ble Mr. Justice D.R. Khanna (a retired Judge of this Court) was appointed as an

Arbitrator to determine the disputes which arose between the petitioner herein and the first respondent. The writ petitioner herein filed an

application u/s 11 of the Arbitration and Conciliation, 1996 (hereinafter referred to as the "Act") inter alias alleging the following facts:

2. The petitioner and respondent No. 1 entered into a turnkey contract with the second respondent for construction of four Towards at Ghaziabad.

In terms of the said contract, the first respondent was required to supply certain material to the second respondent and by an agreement entered

into between the petitioner and the first respondent on 17th January, 1994 petitioner agreed to supply 7480 cubic meters of finished fill of the

specifications mentioned in the agreement. The said contract contains an arbitration agreement which is in the following terms:

Arbitration:

Disputes arising out of this supply order shall be referred to arbitrator(s) in accordance with the provision of Arbitration Act including amendments

thereto. The venue of arbitration shall be Delhi.

Delhi Courts shall have exclusive jurisdiction in all matters.

3. It is not in dispute that there does not exist any arbitration agreement between the petitioner and the second respondent. The learned Single

Judge by reason of the impugned order has arrived at a finding of fact that neither any assignment of the contract has taken place nor the records

reveal that at the instance of the first respondent the second respondent has agreed to make payment to the petitioner. It was held that there does

not exist any arbitration agreement between the petitioner and the second respondent. Neither the same can be inferred by implication nor an

arbitrator can be appointed for the purpose of determining the disputes between the parties, who are not parties to the arbitration agreement.

Learned Single Judge found that in fact the petitioner herein had also earlier filed a suit against the second respondent herein.

4. Learned counsel appearing on behalf of the petitioner submits that as the claims of his clients are required to be invoked jointly against the

respondents herein, the second respondent is a necessary party. In support of the said contention reliance has been placed on Municipal Council v.

Mani Raj and Ors. reported in 2001 III AD (S.C.) 582. Learned counsel appearing on behalf of the respondents, on the other hand submits that

having regard to the provisions contained in Section 2(e) read with Section 7 of the said Act, the learned Single Judge had no jurisdiction to

appoint an arbitrator in relation to the purported disputes and differences between the petitioner herein and the second respondent. Arbitration

agreement, the learned counsel contended, is a collateral agreement and as such, the same must answer the tests laid down in the interpretation

clause as contained in Section 2(d) of the Act. In support of the said contention, strong reliance has been placed on K. Sasidharan Vs. Kerala

State Film Development Corpn., and Tamil Nadu Electricity Board v. Sumathi and Ors. 2000 (2) Arb. LR 460 (SC).

5. The sole question having regard to the rival contentions of the parties is as to whether the learned Single Judge was justified in passing the

impugned order.

6. Before advertising to the question raised in the writ petition, we may place on record that the first respondent herein has not filed any the writ

petition questioning the impugned order. It is Therefore evident that parties to the arbitration agreement had accepted the impugned order. Section

2(b) defines an "arbitration agreement" to mean an agreement referred to in Section 7. Section 7 defines an "Arbitration Agreement" to mean an

agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined

legal relationship, whether contractual or not. Sub-section 3 of Section 7 provides that an arbitration agreement shall be in writing. Sub-section 4 of

Section 7 lays down the criteria for a valid arbitration agreement, which are set out in (a), (b) and (c) of Sub-section 4 of Section 7. In terms of

Sub-section 6 of Section 11, where under an appointment procedure agreed upon by the parties, in the event the facts are enumerated therein are

not fulfilled, a party may request the Chief Justice or any person or body designated by him to take the necessary measure. An order passed in

terms of Sub-section (6) of Section 11 of the Act has been held to be an administrative order and not a judicial one. An administrative order must

be passed having regard to the scope and purport of the statutory provision. Having regard to the fact that arbitration agreement has been defined

in Section 7, there cannot be any doubt whatsoever that before the Chief Justice or any other body designated by him take recourse to exercise

the said power the existence of an arbitration agreement is imperative. In a case K. Sasidharan Vs. Kerala State Film Development Corpn., it has

clearly been held that agreement of both parties with consensus ad idem must exist. Even if any dispute arises with regard to the obligations

undertaken therein which one party has undertaken towards the other, such a dispute must be settled by a Tribunal of their own constitution. The

Apex Court in no unmistakable terms has held that arbitration clause in a contract stands apart from rest of the contract and the same must be

construed according to its language and in the light of the circumstances in which it was made.

7. Recently in Tamil Nadu Electricity Board (supra) in no unmistakable terms the Apex Court settled law as under:

Since disputed questions of facts arose in the present appeals the High Court should not have entertained writ petitions under Article 226 of the

Constitution and then referred the matter to arbitration in violation of the provisions of the new Act. There was no arbitration agreement within the

meaning of Section 7 of the new Act. Under the new Act award can be enforced as if it is a decree of a Court and yet the High Court passed a

decree in terms of the award which is not warranted by the provisions of the new Act. The appellant had also raised the plea of bar of limitation as

in many cases if suits had been filed those would have been dismissed as having been filed beyond the period of limitation. In our opinion exercise

of jurisdiction by the High Court in entertaining the petitions was not proper and the High Court in any case could not have proceeded to have the

matter adjudicated by an Arbitrator in violation of the provisions of the new Act. Mr. Mohan also contended that the appellant did not consent to

adjudication of subject disputes by an Arbitrator. That the matter was referred to the Arbitrator without the consent of the appellant as now being

alleged cannot be taken note of the High Court specifically said that it was by consent of the parties that the reference was being made to the

Arbitrator.

8. In the afore-mentioned background the decision of the Municipal Council (supra) is required to be considered. Therein third party filed an

application in the proceedings alleging that in the event an award is passed his interest shall be adversely affected. There the third party was in

possession of the disputed property, which was the subject matter of the arbitration agreement. In the peculiar facts and circumstances of that case

the Apex Court opined that as an award which may be passed by the Arbitral Tribunal may adversely and seriously affect the valuable rights of the

appellant over the Immovable property in dispute, his right to seek intervention in the award should have been enforced. Such is not the position

here. Doctrine of necessity as propounded by the learned counsel for the writ petitioner herein in a situation of this nature, in our opinion, cannot be

said to have any relevance whatsoever. Existence of an arbitration agreement in pith and substance confers power upon the Chief Justice or a

person or body designated by him to appoint an arbitrator. In other words the jurisdiction of the learned Single Judge emanates if there was in

existence an arbitration agreement. If there was no arbitration agreement, in our opinion, the question of appointing an arbitrator would not arise

could not arise. Furthermore, in the event the learned Single Judge was required to go into the question as to whether the presence of the second

respondent herein was absolutely necessary, it was obligatory on his part to enter into the merits of the matter even for the purpose of arriving at a

prima facie decision in that regard. It could not have done so. For the reason afore-mentioned, we are of the opinion that the impugned order does

not suffer from any legal infirmity whatsoever to warrant invocation of jurisdiction of this Court under Article 226 of the Constitution of India.

9. Petition is, Therefore, dismissed with costs.