
(2007) 11 DEL CK 0042

Delhi High Court

Case No: AA No. 359 of 2007

Sh. Om Prakash Singla

APPELLANT

Vs

Municipal Corporation
of Delhi and Another

RESPONDENT

Date of Decision: Nov. 2, 2007

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 11(6)

Citation: (2007) 11 DEL CK 0042

Hon'ble Judges: Anil Kumar, J

Bench: Single Bench

Advocate: B.P. Singh, for the Appellant; Sanjeev Sabharwal, for the Respondent

Judgement

Anil Kumar, J.

AA No.359/2007

1. This is a petition u/s 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator.
2. The petitioner has contended that he is a proprietor of M/s. Singhla Construction Company duly enrolled with the defendant no.1 as Municipal Contractor and is engaged in the business of contract work, building material supply and other related contract business. The respondents invited tender for Improvement of different lanes along H.No. 192 to latrine in village Baharolla C-105/CLZ. The petitioner succeeded in the tender bid and Therefore the work was awarded to him by a work order no. 329 dated 28th September, 2001 for a tender amount of Rs.3,02,071/- and a contractual value of Rs.3,15,930/-. According to the petitioner the work was completed within a stipulated period of four months in terms of the tender document and after inspection of site the first running bill was prepared, passed and released by the respondents but the final amount was withheld despite the completion of work in all respect as per the tender document. An

amount of Rs.3000/- towards remaining bill was withheld by the respondents by reason of which the earnest money and the security amounts have also not been released.

3. According to the petitioner there is an arbitration agreement between the parties and that the work in issue is the subject matter of the arbitration clause (Clause 25). The arbitration agreement between the parties is under:

Clause 25

Settlement of Disputes and Arbitration

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials as used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract designs, drawings, specifications, estimates instructions orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination completion or abandonment thereof shall be dealt with as mentioned hereinafter:

1. If the contract considers any work demanded of him to be outside the requirement of the contract, or disputes any drawings, record or decision given in writing by the Engineer in charge on any matter in connection with or arising out of the contract of carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instructions or decision. Thereupon, the Superintending engineer shall give his written instructions or decision within a period of one month from the receipt of contractor's letter.

If the Superintending engineer fails to give his instructions or decision in writing within the aforesaid period or if the contract are is dissatisfied with the instructions or decision of the Superintending engineer, the contract may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the chief engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The chief engineer shall give his decision within 30 days of the receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Commissioner MCD for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

2). Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above disputes or differences shall be referred for adjudication through arbitration a sole arbitrator appointed by the Commissioner MCD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid.

Such personal shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the chief engineer of the appeal. It is also a term of this contract that no person other than a person appointed by such Commissioner MCD as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer in charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and MCD be shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceedings under this clause

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000 the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator these shall be paid equally by both the parties. It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the day he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitration shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the Arbitrator) shall be in the discretion of the arbitrator who made direct to any by whom and in what manner, such cost or any part thereof shall be paid and fix or settle the amount of cost to be so paid.

4. Despite repeated requests as no amount was forthcoming, the petitioner issued a legal notice dated 12th June, 2007 to the respondents, thereby invoking the arbitration agreement between the parties, which notice was served on 13th June, 2007. By way of legal notice dated 12th June, 2007 the respondents were called upon to appoint an arbitrator for adjudication of the disputes which has arisen between the parties which was served on the respondents. However despite service of legal notice no arbitrator was

appointed by the respondents.

5. Notice of the petition was issued and three weeks time was given to the respondents for filing the reply from the date of service of notice by order dated 20th August, 2007. A copy of the order directing the respondents to file the reply within three weeks was also served on the respondents along with the notice of the petition. However no reply has been filed nor any cogent reason has been stated by the learned Counsel for the respondents for not filing the reply except that he has received the copy of the petition a few days back. The right of the respondent to file the reply is, Therefore, closed.

6. The learned Counsel for the respondent however, has produced in Court a copy of letter dated 24th October, 2007 issued by the respondent no.1, Municipal Commissioner of Delhi, appointing Mr. Ashok Kumar, Commissioner, Municipal Commissioner of Delhi, as an Arbitrator in terms of Clause 25 of the Arbitration Agreement.

7. The existence of arbitration agreement has not been disputed by the parties. The respondents have admitted in the letter dated 24th October, 2007 that in terms of Clause-25 of the Agreement the disputes which have arisen between the parties were to be referred to the sole arbitrator yet the arbitrator was not appointed

8. A learned Single Judge in Haryana Telecom Ltd. v. Union of India and Anr. 112 (2004) DLT 339 : 2004 (3) RAJ 147 , had held that if the respondent fails to appoint an Arbitrator within the stipulated time of 30 days of the notice, and even after filing of the petition u/s 11 of the Act, it is for the Court to appoint an Arbitrator. A Division Bench of this Court in [Delkon \(India\) Pvt. Ltd. Vs. The General Manager, Bharat Heavy Electricals Ltd.](#), , relying on Datar Switchgears Ltd v. Tata Finance Ltd. has held paras 4 is as under:

4. We have given our careful consideration to the arguments advanced by learned Counsel for both the parties. In view of the law laid down in the case of Datar Switchgears Ltd. v. Tata Finance Ltd. and Anr. 4 (2000) CLT 191 (SC) : (2000) 7 SLT 543 : JT 2000 Supp. 2 SC 226 it is no more rest integra that the vacancy can be supplied by a party pursuant to the arbitration agreement even after thirty days of the receipt of the notice. However, once a party approaches the Court and files a petition for appointment by the designated authority of the Chief Justice of that Court u/s 11(6) of the Arbitration and Conciliation Act, the right to supply vacancy by the opposite party is extinguished. If that right stood extinguished on filing of the petition u/s 11(6) of the Arbitration and Conciliation Act, in September 1998 the appointment of an Arbitrator on 3rd May, 1999 could not be made, Therefore in our view, the order passed by the learned Single Judge on 7th May, 1999 suffers from patent illegality. Therefore, the submission of the respondent that the petitioner had appeared before the Arbitrator and the application of the petitioner raising preliminary objections is pending adjudication which inter alias challenges the jurisdiction of the Arbitrator to decide the dispute is of no consequence as from the order reproduced above it was pursuant to the directions passed by the learned Single Judge that the parties were directed to appear before the Arbitrator. The petitioner

had no other option but to appear before the Arbitrator and after appearing before the Arbitrator the petitioner has not submitted to the jurisdiction of the Arbitrator, rather has at first opportunity taken the objection that the Arbitrator had no jurisdiction to proceed with the matter.

9. In [Union of India \(UOI\) Vs. RR Industries, Shri R.K. Jain, Sole Proprietor of RR Industries, Mr. B.L. Garg, Arbitrator and Shri A.S. Yadav, Addl. Distt. and Sessions Judge](#), also it was held that once a party does not supply the vacancy or fails to supply the vacancy before filing of a petition u/s 11(6) of the Arbitration and Conciliation Act, such a party forfeits the right to supply the vacancy in terms of the arbitration clause and what remains is only the arbitration clause, i.e. the dispute has to be resolved under the mechanism of alternative dispute redressal scheme but no right survives to the respondent to supply the named Arbitrator in the arbitration clause. Thus the arbitrator was to be appointed before the filing of the petition and not after the filing of the petition.

10. In totality of facts and circumstances, it is inevitable to infer that there is arbitration agreement between the parties which is reproduced hereinabove. The respondent failed to appoint an arbitrator within four weeks of notice being given by the petitioner for appointment of an arbitrator. Even before filing of the petition the arbitrator has not been appointed. Thus the right of the respondents to appoint the arbitrator was forfeited and the arbitrator appointed by the respondents after forfeiture of their right to appoint an arbitrator cannot be agreed to in the facts and circumstances of the case.

11. Consequently, I appoint Mr. S.M. Chopra, Retired Additional District Judge 181, Deshbandhu Apartment, Kalkaji, New Delhi-110019 (Mob: 9213230349, Res.:26484158) as an arbitrator to adjudicate all the disputes between the parties arising out of the above noted agreement between the petitioner and the respondents. Parties shall appear before him on 3rd December, 2007 at 4.30 PM. Considering the amount involved, the fee of the Arbitrator shall only be Rs.10,000/- to be paid by the petitioner. A copy of this order be sent forthwith to the learned Arbitrator. Learned Counsel for the parties are also directed to give the copy of the order to the Arbitrator. dusty.