

(2011) 03 AP CK 0012

Andhra Pradesh High Court

Case No: Arbitration Application No. 82 of 2010

Andhra Pradesh
Beverages
Corporation Ltd.

APPELLANT

Vs

IBM Global Services
India Ltd.

RESPONDENT

Date of Decision: March 14, 2011

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 11(5)
- Limitation Act, 1963 - Article 137

Citation: AIR 2011 AP 122 : (2012) 4 ALT 235 : (2011) 3 ARBLR 457

Hon'ble Judges: G. Rohini, J

Bench: Single Bench

Advocate: B. Harshavardhan Reddy, for the Appellant; T.S. Praveen Kumar, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

G. Rohini, J.

This application is filed u/s 11(5) of the Arbitration and Conciliation Act, 1996 (for short, "the Act") for appointment of an Arbitrator for adjudicating the disputes arising out of an agreement dated 16.06.1999.

2. The applicant is A.P. Beverages Corporation Limited. It is not in dispute that the applicant and the Respondent company entered into an agreement dated 16.6.1999 where under the applicant agreed to acquire and the Respondent agreed to furnish product and service for the MFG/PRO Depot Management System for system integration in accordance with the terms and conditions stipulated there under.

3. Alleging that in spite of several reminders by the applicant, the Respondent failed to get the software programmes functioned in accordance with the terms and conditions agreed upon, the applicant issued a termination notice dated 3.1.2003 in terms of Article 8 of the agreement and called upon the Respondent to refund a sum of Rs. 43 Lakhs within 30 days. The Respondent gave a belated reply dated 20.3.2003 denying the alleged breach of terms and conditions. Thereafter, the applicant issued a notice dated 21.6.2005 invoking the arbitration clause under the agreement for resolution of the disputes arising under the said agreement and proposing the name of N.J. Indra Kumar, Former District Judge & Registrar of Karnataka Lokayukta as the Arbitrator.

4. It is also pleaded by the applicant that as there was no response from the Respondent within 30 days from the date of receipt of notice dated 3.1.2003, the agreement dated 16.6.1999 stood terminated. It is claimed by the applicant that having received the notice dated 21.06.2005, the Respondent started negotiating with the applicant and promised to rectify the defects in the software provided by it. However there was no progress, though two years had elapsed. Hence the present application u/s 11(5) of the Act for appointment of Arbitrator.

5. In the counter-affidavit filed by the Respondent while denying the receipt of the notice dated 21.6.2005, it is also contended that the said notice dated 21.6.2005 said to have been issued by the applicant was not a valid request for arbitration since it was not issued to the proper address furnished for correspondence by the parties under the agreement. It is further contended that the purported notice for arbitration is liable to be declared as invalid and nullity since the nominated Arbitrator had not consented to act as an Arbitrator. It is also contended that the application is barred by limitation since even according to the applicant, the agreement was terminated on expiry of 30 days from the date of receipt of notice dated 3.1.2003. On merits, it is contended that the allegation that the Respondent committed breach of the agreement was incorrect and baseless. It is further contended that in fact it was the obligation of the applicant to deliver all deliverable items before claiming any refund from the Respondent, however the applicant failed to return the deliverable items and continued to utilize the same. Therefore the question of any refund as claimed by the applicant did not arise at all.

6. I have heard the learned Counsel for both the parties and perused the material available on record.

7. As noticed above, there is no dispute as to the execution of the agreement dated 16.6.1999 between the parties and the said agreement contained an arbitration clause as under:

ARTICLE 14. ARBITRATION

Any dispute or difference whatsoever between the parties which cannot be settled mutually, shall be settled finally by arbitration in Bangalore, India under and in

accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof.

8. Alleging that the Respondent committed breach of terms and conditions of the said agreement, the applicant issued a termination notice dated 3.1.2003.

9. It is pleaded by the applicant that in the said notice the Respondent was called upon to refund Rs. 43 Lakhs out of Rs. 79.08 Lakhs paid by the applicant towards the cost of hardware, software, service charges and etc., within 30 days. The Respondent gave a reply dated 20.03.2003 denying breach of terms and conditions as alleged by the applicant. Since the said reply was received beyond the 30 days time prescribed in the notice dated 3.1.2003, according to the applicant the agreement stood terminated. Subsequently, the arbitration clause was invoked by issuing notice dated 21.6.2005 and the present application for appointment of arbitrator u/s 11(5) of the Act came to be filed on 14.6.2010.

10. Having regard to the above said admitted facts, it is contended by the learned Counsel for the applicant that the application u/s 11(5) of the Act is barred by limitation.

11. It is not disputed before this Court that Article 137 of the Limitation Act, 1963 applies to the application for arbitration and thus the period of limitation is 3 years from the date when the right to apply accrued. It is also a well-settled principle of law that the right to apply accrues for seeking reference to arbitration when the differences or disputes arise between the parties i.e., when the claim made by one party is denied by the other party. In the instant case, even according to the applicant, a dispute out of the contract dated 16.6.1999 was raised by notice dated 3.1.2003 whereunder the applicant demanded the Respondent company to refund Rs. 43 Lakhs within 30 days.

12. Admittedly the applicant's claim was denied by the Respondent by its reply dated 20.03.2003. Hence the right to apply accrued to the applicant for seeking reference to arbitration on receipt of the Respondent's reply notice dated 20.03.2003. Thus the period of limitation of three years under Article 137 of the Limitation Act starts running from March, 2003 and the present application filed u/s 11 of the Act on 5.7.2010 is clearly barred by limitation.

13. Even if the notice dated 27.6.2005 whereunder the applicant invoked the arbitration clause and proposed the name of an arbitrator is taken to be the date on which the cause of action arose, the present application filed almost five years after the said arbitration notice is barred by limitation.

14. As a matter of fact, it is the specific case of the Respondent that the arbitration notice dated 21.06.2005 was never received by it. Thus it is contended by the Respondent that the applicant cannot be granted any relief u/s 11(5) of the Act.

15. Except pleading that the notice dated 21.06.2005 was issued by registered post with acknowledgement due, the applicant could not produce any acknowledgement to show that the said notice was actually served on the Respondent. However the learned Counsel for the applicant while placing reliance upon Article 13 of the Agreement dated 16.6.1999 contended that service of a notice addressed by registered post with acknowledgement due shall be deemed to have been effected on the expiry of the fourth day after the date of such posting. The said Article 13 to the extent it is relevant reads as under:

All notice required to be served by either of the parties hereto upon the other shall be deemed to have been duly and effectively served if delivered by hand or addressed by Registered A/D post at the following addresses and such service shall be deemed to have been effected in the case of delivery by hand on the date on which it is so delivered and in the case of delivery by registered A/D post on the expiry of the fourth day after date of such posting.

16. However the learned Counsel for the Respondent while pointing out that the notice dated 21.6.2005 was not issued to the address of the Respondent furnished in Article 13, vehemently contended that it is not open to draw a presumption as provided under Article 13.

17. A perusal of Article 13 makes it clear that service of notices by either of the parties upon the other shall be deemed to have been effected if delivered by hand or addressed by registered post with acknowledgement due at the addresses specified therein. The address of the Respondent was shown as "TATA IBM Limited, Golden Towers, Airport Road, Bangalore-560 017" in Article 13 of the agreement. However the notice dated 21.6.2005 was admittedly issued to the Respondent to a different address namely M/s. IBM Global Services India Limited (formerly TATA IBM Limited), Prestige Towers, 2nd Floor, 99, Residency Road, Bangalore. According to the Respondents, the said notice was not received by them. No acknowledgment could be placed before this Court by the applicant to show that the said notice was actually served on the Respondent.

18. Having regard to the admitted fact that the notice dated 21.6.2005 was not issued to the address of the Respondent specified in Article 13, the presumption as to service of notice cannot be drawn. Thus it is clear that there was no valid request for arbitration.

19. An arbitrator has to be appointed u/s 11(5) of the Act where the parties failed to agree on the arbitrator within 30 days from the receipt of a request by one party. Since no case could be made out by the applicant to show that its request for arbitration was actually served on the Respondent, the requirement of Section 11(5) of the Act has not been satisfied. Therefore, on that ground also, the applicant is not entitled to any relief.

20. Accordingly, the Arbitration Application is dismissed. No costs.