

(2009) 09 DEL CK 0376

Delhi High Court

Case No: Arbitration Petition 239 of 2009

Shivaai Industries (P) Ltd.

APPELLANT

Vs

Delhi Transport Corporation

RESPONDENT

Date of Decision: Sept. 11, 2009

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11(6), 11(8)

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: S.K. Maniktala and Alok Tripathi, for the Appellant; Avnish Ahlawat and Nitesh Kumar Singh, for the Respondent

Final Decision: Dismissed

Judgement

Rajiv Sahai Endlaw, J.

The petition is preferred u/s 11(6) of the Arbitration Act, 1996 averring the failure of the appointing authority to appoint the arbitrator. The arbitration clause in the agreement between the parties is inter alia as under:

34. ARBITRATION

There shall be a Dispute Settlement Committee which shall try to settle all disputes at the first stage. The Dispute Settlement Committee shall consist of CGM, Addl. CAO, concerned Dy CGM and Sr. Manager Law. If the Committee fails to resolve the issue, it shall be referred for arbitration. Chairman-cum-M.D. shall be the final authority in all litigation/arbitration. He can nominate any arbitrator for settlement of disputes. Chairman-cum- M.D."s decision shall be final and binding on all the parties.

All questions and disputes between the parties, the settlement of which has not been herein specifically recorded, shall be referred to the Sole arbitration of the Chairman-cum-Managing Director, Delhi Transport corporation or any other officer

so nominated and appointed by him. There shall be no bar to the reference of dispute to the arbitration of such an officer of the Corporation appointed by the Chairman-cum-Managing Director even though the said officer may have dealt with the matter and had expressed his opinion thereon.

2. It is the case of the petitioner that it had as far back as on 31st May, 2006 invoked the arbitration clause by writing to the Managing Director of the respondent and pursuant thereto a Disputes Settlement Committee was constituted which vide its Minutes dated 2nd March, 2009 resolved some of the disputes which had arisen between the parties and in the said Minutes itself, qua the unresolved disputes it is recorded "As per the contractual mechanism provided in the agreement, these disputes can now be referred to arbitrator for adjudication by appointing an arbitrator."

3. It is contended that inspite of the Minutes aforesaid, no arbitrator was appointed and hence the petitioner applied to this Court for appointment of an independent arbitrator.

4. The counsel for the respondent has appeared pursuant to notice and has stated that the Managing Director of the respondent has vide order dated 9th September, 2009 appointed Mr S.P. Marwah, IAS (Retd) as the sole arbitrator to adjudicate the disputes. The said order of the Managing Director of the respondent is admittedly of a date after the institution of this petition which came up first before this Court on 10th July, 2009. The counsel for the petitioner has contended that the aforesaid order has not been communicated to the petitioner as yet and that the appointing authority had, as on the date of the said order forfeited its rights to appoint an arbitrator. Reliance in this regard is placed on [Union of India \(UOI\) Vs. Bharat Battery Manufacturing Co. \(P\) Ltd.](#)

5. There can be no dispute with the proposition of law that on the institution of the petition u/s 11(6) of the Act the appointing authority loses the rights to appoint. However, the question which arises in this case is whether the petitioner was under the arbitration clause aforesaid, upon the disputes remaining unresolved before the Disputes Settlement Committee, required to approach the Chairman-cum-Managing Director, who besides being the appointing authority is also entitled to act as the named arbitrator. If the aforesaid clause is to be interpreted as requiring the arbitration to commence only after the disputes remain unresolved before the Disputes Settlement Committee, then admittedly the petitioner has not approached the Chairman-cum- Managing Director and the petition u/s 11(6) of the Act would then be not maintainable. However, if as contended by the counsel for the petitioner, the invocation of the arbitration prior to the reference of the matter to the Disputes Settlement Committee is enough, then undoubtedly the appointment of the arbitrator now by the Managing Director of the respondent is without any authority whatsoever.

6. Clause 34 in the agreement under the heading Arbitration does not immediately provide for arbitration. It first provides for a Disputes Settlement Committee and arbitration is provided only for those disputes which have not been settled in the said Dispute Settlement Committee. The placing of the Dispute Settlement Committee in the arbitration clause, before the said clause leads me to hold that invocation of arbitration has to be after the mechanism of the Dispute Settlement Committee has been exhausted. Admittedly in this case also several disputes have been settled in the said Committee and thus the question of seeking arbitration with respect thereto does not arise. Had the intent of the parties been that the Dispute Settlement Committee would come into play after the invocation of the arbitration, the clause could have been worded accordingly. However, the parties having provided for arbitration only of unresolved disputes, on an interpretation of the agreement, in my view the petitioner was required to approach the Chairman-cum-Managing Director after the Minutes dated 02.03.2009 of the Dispute Settlement Committee (supra) and only upon the failure of the Managing Director of the respondent to act at that stage could the cause of action for an application u/s 11(6) of the Act have accrued to the petitioner.

7. The petitioner having admittedly not done so, there is no option but to hold that the petition is premature. Once the petition is held to be premature, the Managing Director of the respondent has not forfeited his right to appoint the arbitrator and the appointment made now cannot be said to be unauthorized.

8. The Supreme Court in M/s. M.K. Shah Engineers and Contractors Vs. State of Madhya Pradesh, has held that mechanism provided in the agreement preceding the arbitration is mandatory unless waived by the parties. I have also in Sushil Kumar Bhardwaj Vs. Union of India (UOI) held Clause 25 of the contract in that case requiring the contractor to approach the Engineer Incharge, then Superintending Engineer and finally Chief Engineer for settlement of disputes, before seeking arbitration, to be mandatory. In this view of the matter also, it cannot be said that the mechanism provided of the Dispute Settlement Committee is an empty exercise.

9. Even otherwise, the Supreme court in Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited, and Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd., has held on an interpretation of Section 11(8) of the Act that even in an application u/s 11(6) of the Act the court can appoint the same arbitrator as provided under the agreement or mandate the authority to appoint the arbitrator and an independent arbitrator can be appointed only when reasons for not so abiding by the agreement of the parties are found. In this view of the matter also, it cannot be said that the petitioner will suffer any prejudice by the action of appointment of the arbitrator now.

10. The counsel for the petitioner has contended that the question of the Chairman-cum-Managing Director of the respondent appointing the arbitrator, as has been done now, could have arisen only if the letter dated 31st May, 2006 is

treated as the invocation letter. However, in my view, for the Managing Director to appoint the arbitrator, the invocation by the petitioner was not necessary in the light of the Minutes aforesaid of the Dispute Settlement Committee.

11. The petition is dismissed. No order as to costs.