Pioneer Publicity Corporation Vs Delhi Transport Corporation and Others

Court: Delhi High Court

Date of Decision: Aug. 30, 2001

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 11(4), 11(5), 11(6)

Hon'ble Judges: Vinod Sagar Aggarwal, J

Bench: Single Bench

Advocate: Gaurav Duggal, for the Appellant; A.K. Wali, for the Respondent

Final Decision: Allowed

Judgement

V.S. Aggarwal, J.
By this common judgment both AA 159/2001 and 178/2001 can conveniently be disposed together. The question

involved in both the cases are identical and Therefore they are being taken up together. For sake of convenience the facts are being taken from AA

159/2001.

2. M/s Pioneer Publicity Corporation is that petitioner. Respondent M/s Delhi Transport Corporation floated a tender for awarding of sole and

exclusive rights for display of advertisement on buses being operated and run by the said corporation. Clause 5 of the terms and conditions

provided for the parameters and measurements for dimensions of the advertisement board to be displayed on the buses. The applicant applied for

the tender and was declared successful. The parties entered in to an agreement in September 2000 for purposes of display of advertisement on

buses. It was provided in the agreement that the sole and exclusive contract for display of advertisement/publicity right for display of advertisement

is being awarded to the petitioner for the back panel right hand space inside space above the window panels for West, North and East zones.

3. It is asserted that it was noticed by the applicant on taking possession of the buses and in performance of the terms and conditions that large

number of buses h ad no provision for display of advertisement on back panel and number of buses did not have the required bolts enabling the

applicant to display the advertisement on back panel. This fact was brought to the notice of the respondent corporation. It was also noticed by the

applicant that approximately 200 buses were short (out of the number of buses agreed). It was further brought to the notice of the respondent that

there were a number of buses which had ben recently inducted in the city on which ladders were placed on the rear. It made it impossible for the

applicant to display the advertisement. The petitioner continued to pay the full license fees. A notice was served and it was brought to the notice of

the respondent the said deficiency. It is asserted that disputes had arisen between the parties in this regard which have been mentioned in

paragraph 22(A) to (F) of the petition. According to the petitioner despite 30 days notice having been served the respondent had not appointed

the arbitrator and hence the prayer has been made for appointment of independent arbitrator and to refer the disputes and differences to the said

arbitrator.

4. Notice of the petition had been issued to the respondents. Learned counsel for the respondent had pointed that arbitrator has already been

appointed but according to the petitioner"s learned counsel it was not acceptable because it had been appointed after filing of the petition.

Thereupon learned counsel for the respondents without filing a formal reply was ready to address arguments and in these circumstances parties

counsel had been heard.

5. Learned counsel for the respondent had urged that the notice served is invalid because it did not mention the amount claimed by the petitioner

and consequently the plea that the arbitrator of the respondent so appointed has been appointed after 30 days, must be repelled.

6. To appreciate the said controversy reference can well be mae to the provisions of Arbitration and Conciliation Act, 1996. Sub-section (6)

Section 11 of the Act which has been pressed into service reads as under:-

(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the

appointment procedure provides other means for securing the appointment.

7. It is clear from what has been reproduced above that if procedure for appointment of an arbitrator has been agreed between the parties then it

has to be adhered to. Only if in accordance with that procedure the other party has failed to act, the other can approach the Chief Justice or his

nominee for appointment of the arbitrator.

8. In the present case in hand admittedly there is an arbitration clause which even prescribes the procedure an it reads:-

(e) ""The party invoking arbitration clause shall specify the dispute or disputes to be referred to arbitration under this clause together with the

amount claimed in respect of such disputes.

9. It is on the strength of paragraph 26(e) reproduced above that the learned counsel insisted that in the notice that amount claimed has not been

mentioned. Admittedly, in the notice that has been served the amount claimed has not been so mentioned.

10. Learned counsel for the petitioner urged that this was not a part of the procedure because the procedure only is to served the notice and for

the other party to appoint or not to appoint the arbitrator. This argument of the learned counsel for the petitioner indeed must be rejected. The

procedure has been specified and by itself is not an expression which is confined to service of the notice only. It is a part of the procedure to

inform the other party as to what is the amount claimed.

11. However, this will not put an end to the matter. The purpose of serving a notice and to mention the amount claimed in respect of each such

dispute, is that the other party should be in a position to apply the mind and if necessary even admit the claim or accordingly appoint an arbitrator.

Since it is a part of the agreement the other party indeed can waive the right by acquiescence or by the conduct.

12. In the present case admittedly on 13th August, 2001 the chairman-cum-Managing Director of respondent No. 1 had appointed an arbitrator

and copy of the order was placed on the record by the learned counsel for the respondent No. 1. It reads:-

ORDER

WHEREAS M/s Pioneer Publicity Corporation, 227, CM-I, Jhandewalan Extension, New Delhi was awarded the contract/agreement dated Sept

2000 and was appointed as a sole agent for display of advertisement for all the four regions vide letter No. Pub/2000/4(15)/655 dated 19.9.2000.

WHEREAS some dispute have arison between Delhi Transport Corporation and M/s Pioneer Publicity Corporation regarding not to display an

advertisement on any CNG Buses, to remove the Ads of Gutka, Pan Masala /Tobacco/Cigarettes and regarding the rebate of 206 buses for not

making advertisement on these buses.

AND WHEREAS, since there is a dispute between the parties and in exercise of the powers conferred upon me by virtue of clause 26 of terms

and conditions of the contract/agreement, I, Rakesh Mehta, Chairman-cum-Managing Director, Delhi Transport Corporation hereby appoint and

nominate Shri Surinder Gandotra, as Sole Arbitrator to decide the dispute between the aforesaid parties. Shri Surinder Gandotra will entertain all

claims and counter claims of the parties and complete the arbitration proceedings as per Arbitration Act and will issue a speaking award.

(RAKESH MEHTA)

Chairman-cum-Managing Director

13. Keeping in view the same it is obvious that the notice, of the petitioner has not been rejected. In fact, it has been accepted and the disputes

raised have been referred to the arbitrator. This is on basis of the notice having been served. This clearly indicates that the notice under law as such

has been served. Because no prejudice in this regard is caused, the plea of the learned counsel for the respondent keeping in view that fact that the

respondent No. 1 had accepted the notice must fail. Now respondents can not be allowed to take the same plea.

14. Confronted with this position it was still urged that in any case the arbitration has been appointed and he should be allowed to act as such. The

petitioner"s learned counsel contended that he has been appointed after the expiry of 30 days period and Therefore an independent arbitrator

should be appointed.

15. Indeed it becomes unnecessary for this court to ponder further in this controversy because this question is answered by the decision of the

Supreme Court in the case of Datar Switchgears Ltd. vs. Tata Finance Ltd. and Anr. 2000(3) ALR 447 (SC). A similar plea came up for

consideration and in paragraph 19 the Supreme Court held:

19. So far as Cases falling u/s 11(6) are concerned - such as the one before us - no time limit ha ben prescribed under the Act, whereas a period

of 30 days has been prescribed u/s 11(4) and Section 11(5) of the Act. In our view, Therefore, so far as Section 11(6) is concerned, if one party

demands the opposite party to appoint an Arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right

to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the

demand, but before the first party has moved the Court u/s 11, that would be sufficient. In other words, in cases arising u/s 11(6) if the opposite

party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has

to be made before the former files application u/s 11 seeking appointment of an Arbitrator. Section 11 seeking appointment of an Arbitrator. Only

then the right of the opposite party ceases. We do not Therefore agree with the observation in the above judgments that if the appointment is not

made within 30 days of demand, the right to appoint an Arbitrator u/s 11(6) is forfeited.

16. Keeping in view the same since arbitrator had been appointed not within 30 days, the respondent had lost the right to appoint the same and the

answer is clear and unambiguous as provided by the Supreme Court. The plea of the learned counsel for respondent No. 1 must fail.

17. For these reasons with respect to the disputes raised mentioned in paragraph 22(A) to (F) in AA 159/2001 and paragraph 17 of AA

178/2001, the matters are liable to be referred to the arbitrator. The appointment of the arbitrator by respondent No. 1 Therefore will not stand

scrutiny the consequently Hon''ble Mr. Justice N C Kochar former Judge of Rajasthan High Court and this court is appointed to go into the

abovementioned disputes. The learned arbitrator will fix his own fees.