

(2009) 156 DLT 572

Delhi High Court

Case No: C.R.P. 101 of 2008

General Manager
N.T.P.C. and Another

APPELLANT

Vs

Lt. Col. A.P. Singh
(retd.) and Another

RESPONDENT

Date of Decision: Dec. 15, 2008

Acts Referred:

Arbitration and Conciliation Act, 1996 " Section 8#Civil Procedure Code, 1908 (CPC) "
Section 151, 20#Contract Act, 1872 " Section 28

Citation: (2009) 156 DLT 572

Hon'ble Judges: S.N. Dhingra, J

Bench: Single Bench

Advocate: S.K. Dhingra and Shefali Dhingra, for the Appellant; O.P. Sharma, for the Respondent

Final Decision: Allowed

Judgement

Shiv Narayan Dhingra, J.

The petitioner is aggrieved by an order dated 4th June 2008 passed by learned Additional District Judge

whereby an application of the petitioners u/s 8 of Arbitration and Conciliation Act as well as u/s 151 of the CPC was dismissed.

2. Brief facts relevant for the purpose of deciding this petition are that the petitioner had hired services of respondent No. 1 herein for providing

security guards for mining department at its mining project area at Kahalgon Super Thermal Power Project, District Bhagalpur, Bihar. The

respondent No. 1 and other persons who had contested bid were sponsored by the Directorate General of Re-settlement (DGR). The contract

was awarded to respondent No. 1 on 18th July 2005 for a period of one year extendable for another period of one year. The respondent No. 1

was awarded a fresh contract on 13th December 2006 for a period of one year. This contract was extendable only for a period of four months

after its expiry in December 2007. The respondent No. 1 filed a suit before the Court below for recovery of Rs. 19,02,880/- and for mandatory

and permanent injunction in April 2008 with a prayer that the petitioners be directed to clear the statutory dues like provident fund, government

service pension to concerned departments as the petitioners had failed to clear these dues and the petitioners be restrained from terminating the

contract of the respondent No. 1 and engaging any new security agency without clearing the dues respondent No. 1. Respondent No. 1 claimed

that he had to recover a sum of Rs. 19,02,880/- from the petitioners. An ex parte interim injunction was granted by the court below restraining the

petitioners from terminating the contract of service with respondents No. 1 (plaintiff before the court below). After service of notice, the petitioners

made an application for dismissal of the suit on the ground that there was an arbitration clause in the contract and the suit filed by the plaintiff was

not maintainable. The petitioners drew attention of the trial Court to Clause 7 of the agreement between the parties wherein it was provided that all

disputes and differences arising out of the contract shall be decided by the process of settlement and arbitration as specified in Clause 56 and 57 of

the general conditions of the contract and amended provisions of Arbitration Act, 1940 shall apply. The petitioners also drew attention of the

Court to the fact that Clause 7 provided that the Court at Bhagalpur alone shall have exclusive jurisdiction in all matters arising under the contract

and the arbitrator shall give a reasoned award. The petitioners contention was that the suit was barred in view of the provisions of Arbitration and

Conciliation Act, 1996 and the matter was to be governed only by the arbitration and the suit filed by respondent No. 1 was not maintainable. This

application of the petitioners was dismissed by the impugned order of the trial court for six reasons. The learned trial court enumerated all these

reasons in the impugned order.

3. The first reason given by the trial court is that the arbitration agreement stipulates deciding of disputes as per the Arbitration Act, 1940. The

petitioner was equipped with the Law officers and battery of Lawyers and despite knowing the enactment of 2006 and that the Arbitration Act

1940 stands repealed, this Act has been mentioned as a governing Act in the agreement. The second reason given by the trial court is that the suit

was filed for recovery of an amount and prayer also included mandatory and permanent injunction. Some of the amount was for the period when

there was no contract between the parties, hence the arbitration agreement between the parties has to be ignored. The third reason given by the

trial court is that the instructions issued by DGR provided that in case of dispute, arbitration will be entertained at a request from both sides and it

was DGR who had a right to enter into the arbitration. These instructions supersede and override the contract between the parties and the

guidelines and instructions of DGR would be applicable between the parties as the same were in the nature of tripartite agreement. The fourth

reasons given by the trial court is that the respondent No. 1 had written to the petitioner that respondent No. 1 would agree and abide by those

terms, conditions and provisions of tender documents which were not violating the guidelines/instructions of the sponsor (DGR) and the fifth reason

given was that there was an arbitration meeting held in the office of DGR on 9th April 2008 between the parties and it was instructed by DGR that

fresh sponsorship shall be forwarded by the office on receipt of existing security agency and since the petitioner had not cleared the bills of the

security agency, the fault was of the petitioner. The sixth reason given by the trial court is that there was no clear and unambiguous arbitration

agreement between the parties to refer the dispute between the parties to arbitration.

4. The learned ADJ also dealt with the issue of jurisdiction and observed that the respondent was having its office in Delhi. The headquarters of the

petitioner was in Delhi and the office of the DGR was also in Delhi and, therefore, the Court had jurisdiction to try and decide the suit.

5. The counsel for the petitioner submits that all the reasons given by the trial court do not stand the scrutiny of law neither the question of

jurisdiction stands scrutiny of law in view of specific provisions in the contract between the parties. Similarly the finding given by the trial court of

non-existence of arbitration agreement does not stand the scrutiny of law. It is further submitted that neither the plaintiff/respondent No. 1 had

relied upon any tripartite agreement nor there was any written tripartite agreement between the parties. The DGR was not a necessary party either

for recovery of money or for mandatory injunction sought by the plaintiff. No relief had been sought against DGR and the DGR was only a

performa party made by the respondent just to create jurisdiction.

6. Counsel for the respondent, per contra, argued that the issue of jurisdiction cannot be raised by the petitioner before this Court since the

petitioner by the impugned application u/s 8 of the Arbitration and Conciliation Act has submitted to the jurisdiction of the court below and once

the petitioner had submitted to the jurisdiction of the court below, he cannot raise the issue of jurisdiction. The other contention is that there was no

inherent lack of jurisdiction in the court below and objection to the territorial jurisdiction can be waived and once an application u/s 8 of the

Arbitration and Conciliation Act is made before the court below, the objection to jurisdiction stands waived. Counsel for the respondent relied

upon Seth Hiralal Patni Vs. Sri Kali Nath, The respondent also argued that since the subject matter of the suit was a composite subject matter, it

was a suit for recovery of the unpaid bills and for mandatory injunction to abide by the terms of the contract, the subject matter of the suit was not

squarably covered by the arbitration and, therefore, the trial court rightly dismissed the application.

7. It is an undisputed fact that Clause 7 of the agreement between the parties under which the respondent had started providing security services to

the petitioner specifically provided that the Court at Bhagalpur shall have the jurisdiction. It is also an undisputed fact that the petitioners' office

was situated at Bhagalpur. The contract was to be given effect at Bhagalpur. The services were to be provided at Bhagalpur. There is no doubt

that the head office of petitioner is in Delhi but whether merely because the petitioner has head office at Delhi and rest of the cause of action arose

in Bhagalpur, would Delhi Courts have jurisdiction to entertain the suit, even for recovery of the amount? Section 20 of CPC makes provisions qua

corporations where the corporation has head office and branch offices. The Supreme Court had occasion to deal with the situation in New Moga

Transport Company, through its Proprietor Krishanlal Jhanwar Vs. United India Insurance Co. Ltd. and Others, . In this case, the consignment

note specifically provided that the Court at Udaipur alone would have jurisdiction. The plaintiff had filed a suit at Barnala where the consignment

was to be received and where factory of the plaintiff was situated. The Civil Court held that the Court at Barnala would not have jurisdiction and

the appropriate court having jurisdiction would be only a Court at Udaipur. However, the High Court reversed the judgment of the Civil Court and

held that the plaintiff was entitled to relief even at the Court at Barnala. The Supreme Court analyzed the provisions of Section 20 of the CPC and

observed that where two courts or more have jurisdiction under CPC to try the suit or proceedings, an agreement between the parties that dispute

between them shall be tried in any one such court is not contrary to the public policy and it in no way in contravention to Section 28 of the Indian

Contract Act which reads as under:

28. Agreements in restraint of legal proceedings, void

Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal

proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to the extent.

Exception 1 : Saving of contract to refer to arbitration dispute that may arise. This section shall not render illegal contract, by which two or more

persons agree that any dispute which may arise between them in respect of any subject or class of subject shall be referred to arbitration, and that

only and amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2: Saving of contract to refer question that have already arisen - Nor shall this section render illegal any contract in writing, by which two

or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for

the time being as to reference to arbitration.

8. A perusal of the judgment indicates that where a corporation has a subordinate office at the place where cause of action arises, it cannot be

heard to say that it cannot be sued there because of its having head office at different places. Paragraph 10 of the above judgment reads as under:

10. On a plain reading of the Explanation to Section 20 CPC it is clear that Explanation consists of two parts, (i) before the word ""or"" appearing

between the words ""office in India"" and the word ""in respect of"" and the other thereafter. The Explanation applies to a defendant which is a

Corporation which term would include even a company. The first part of the Explanation applies only to such Corporation which has its sole or

principal office at a particular place. In that event, the Court within whose jurisdiction the sole or principal office of the company is situate will also

have jurisdiction inasmuch as even if the defendant may not actually be carrying on business at that place, it will be deemed to carry on business at

that place because of the fiction created by the Explanation. The latter part of the Explanation takes care of a case where the defendant does not

have a sole office but has a principal office at one place and has also a subordinate office at another place. The expression ""at such place

appearing in the Explanation and the word ""or"" which is disjunctive clearly suggest that if the case falls within the latter part of the Explanation it is

not the Court within whose jurisdiction the principal office of the defendant is situate but the Court within whose jurisdiction it has a subordinate

office which alone have the jurisdiction ""in respect of any cause of action arising at any place where it has also a subordinate office.

9. Thus it is clear that where the cause of action takes place within the jurisdiction of the subordinate office, it is only the Court situated at that

place where the suit can be brought. I, therefore, consider that the trial court wrongly came to conclusion that the Court at Delhi had jurisdiction. In

the instance case, it was specifically provided in the Contract that the Court at Bhagalpur would have the jurisdiction. The entire cause of action

had taken place within Bhagalpur.

10. The reasoning given by the trial court about non existence of the arbitration agreement also does not stand scrutiny of law. If in an agreement

there is a mention of Arbitration Act, 1940 which stood repealed at the time agreement between the parties was entered into, it was only an

omission and the existing Arbitration & Conciliation Act, 1996 would be applicable. The arbitration clause cannot be rejected merely on the

ground that the parties mentioned Arbitration Act of 1940. The trial court itself mentioned about an Act of 2006, never enacted by the Parliament.

There is no dispute that there was an arbitration clause between the parties and the plaintiff had sought relief during the existence of the contract,

which was sought to be terminated by the petitioner. Therefore, the trial court could not have come to conclusion that there was no valid arbitration

clause.

11. In Punjab State and Others Vs. Dina Nath, , Clause 4 of the contract, between the parties read as under:- "" Clause 4:

Any dispute arising between the department and the contractor/society shall be referred to the Superintending Engineer, Anandpur Sahib, Hydrel

Construction Circle No. 1, Chandigarh for orders and his decision will be final and acceptable/binding on both parties.

The Supreme Court held that the above clause amounted to an arbitration clause and the arbitration agreement was not required to be in any

particular form. What was required to be ascertained was whether the parties had agreed that if any dispute arises between them in respect of the

subject matter of the contract, such a dispute shall be referred to the arbitrator. This agreement was clearly visible in the contract between the

parties.

12. The conclusion arrived at by the trial court that there was no arbitration clause was contrary to the material placed on record. I also consider

that making an application before the trial court u/s 8 of the Arbitration and Conciliation Act does not amount to submission to its territorial

jurisdiction. Where a defendant makes an application that the Court should dismiss the suit and it reproduces the arbitration clause as signed

between the parties, the applicant does not submit to the jurisdiction but in fact challenges the jurisdiction of the court to try the suit. In my view,

this contention of the respondent must fail. The respondent's contention that the territorial jurisdiction of the trial court was not assailed is also

belied from the fact that the trial court specifically dealt with this issue and had negated it.

13. Even if it is considered that the suit filed by the respondent was a composite suit and it was for the recovery of amount for a period during

which there was no contract, it was primarily for reliefs arising out of the contract and the court below had no jurisdiction to entertain the suit. The

recovery suit would lie in accordance with the cause of action only at the Court of Bhagalpur since the security services were provided at

Bhagalpur, the amount became due at Bhagalpur, the petitioner's office was at Bhagalpur and the place of project was also at Bhagalpur and in

view of Clause 20, only the Court at Bhagalpur was an appropriate court. The subject matter being covered by the arbitration agreement, even

disputes only could be referred to an arbitrator at Bhagalpur.

14. In view of the foregoing discussion, in my view the trial court wrongly assumed jurisdiction in this case. The trial court had no jurisdiction to

entertain the suit and the matter at the most should have been referred to the arbitrator. The petition is allowed. The application of the petitioner u/s

8 of the Arbitration and Conciliation Act regarding referring the matter to the Arbitrator in respect of the existing contract is liable to be allowed. It

is ordered accordingly. Further, since the existing contract, which is in dispute, would come to an end on 16th December 2008 and the petitioner is

already in the process of inviting fresh tenders, I consider that the existing arrangement regarding providing services up to 16th December 2008 be

not disturbed. The suit for recovery can only be filed at Bhagalpur. The plaint of the plaintiff is liable to be returned. It is ordered accordingly.