

SUPREME COURT OF INDIA

Denel(Proprietary Limited)

Vs.

Bharat Electronics Ltd.

Arbitration Petition No.16 of 2009

(H.L.Dattu JJ.)

30.04.2010

JUDGEMENT

H.L.Dattu, J.

1. The Petitioner has filed the present Arbitration Petition under sub-section (6) of Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act"). It is prayed in the petition to appoint a sole arbitrator to adjudicate the dispute between the parties.
2. The Petitioner is a company wholly owned by the Government of the Republic of South Africa, duly incorporated as per the laws of the Republic of South Africa, with its main business address at Denel Head Office, Nelmapius Drive, Irene, Pretoria, Republic of South Africa.
3. The Respondent is a Corporation duly registered under the Companies Act, 1956, having its registered office at Pune, Maharashtra. It is a Government of India Enterprise, Ministry of Defence, Government of India.
4. The Petitioner - company had several internal divisions, one of them being Denel Eloptro at the time when the contracts between Petitioner and Respondent were entered into. The name of the said division was changed from Delnel Eloptro to Denel Ptonics with effect from 1st April, 2004. The Optronics division was not a separate legal entity, but was only a business unit of the Petitioner.
5. The Respondent in the year 2004, placed certain purchase orders with Denel Eloptro for supply of various electronic equipments which are listed as under:

“1. PUR/PN/C1/621977 dated 28th July 2004

2. PUR/PN/CN/621973 dated 28th July 2004

3. PUR/PN/C1/622029 dated 11th December 2004”

6. The `General Terms and Conditions of the Purchase Order (Foreign) contains an Arbitration Clause. Clause 10 of the Purchase Order, inter-alia, provides for arbitration in case of dispute arising from the interpretation or from any matter relating to the rights and obligations of the parties. It also refers to the appointment of the `Managing Director or his nominee' of the respondent as the arbitrator. It is not in dispute that the said Clause in the Purchase Order is a valid arbitration agreement in terms of Section 2(b) read with Section 7 of the Act. The Petitioner before the delivery of the goods to the Respondent as per the orders placed by them entered into a credit insurance policy with one Credit Guarantee Insurance Corporation of Africa Ltd. (hereinafter referred to as "Corporation") in respect of the said Purchase Orders.

7. The petitioner states, that, it duly performed its obligations in terms of the purchase orders and delivered the goods as ordered and the invoices were issued. The said delivery of goods was also accepted by the respondent without raising any objection. It is further stated, that, as the goods were accepted and utilized, the respondent was liable to pay the value of the goods in a sum of GBP 34,894.75(Thirty Four Thousand Eight Hundred and Ninety Four and 75 Pence Pound Sterling).

8. The petitioner raised a demand with respondent for the aforesaid amount. However, the respondent vide letter dated 4th May 2005, refused to pay the said amount, only on the ground that it is a "Government Company" under the Ministry of Defence, Government of India and in view of the direction issued by the Ministry to withhold payment of the said invoices, it is unable to settle the amounts due to the petitioner.

9. The Insurance Corporation also requested, vide its letter dated 29th May 2006, to pay the amount raised against them. The respondent by its reply letter dated 8th June 2006 addressed to the Corporation - insurer, inter alia contended, that, as per the guide- lines issued by the Ministry of Defence, Government of India, to discontinue dealings with M/s DENEL (PYT) LTD., and withhold payment due if any, it is unable to satisfy its liability to the petitioner.

10. Petitioner through its Advocate addressed a letter dated 29th November, 2006, inter-alia, requesting them to make payments towards three Purchase Orders - PUR/PN/CI/621977 dated 28.07.2004, PUR/PN/CN/621973 dated 28.07.2004 and PUR/PN/CI/622029 dated 11.12.2004.

11. The respondent through its Advocates and Solicitors, vide their letter dated 18th December, 2006, though admitted their liability towards the aforesaid Purchase Orders, refuse to settle the amounts due only on the ground, that, they are prohibited from making any payments to the petitioner by the Ministry of Defence, Government of India vide its letter/communication dated 21st April, 2005.

12. The petitioner was constrained to issue notice dated 30th May, 2009 to the respondent which was served on the respondent and its Managing Director through fax on 30th May 2009 and through speed post and courier on 2nd June 2009 and 6th June 2009, respectively. In the said notice, the petitioner cited Clause 10 of the General Terms and Conditions of the Purchase Orders which provides for reference of disputes to arbitration and accordingly requested the respondent, to refer the disputes for adjudication in accordance with Arbitration and Conciliation Act, 1996. It was also stated, that, since the arbitration clause provides only for the appointment of Managing Director or his nominee, instead of mutually agreed independent arbitrator, the said clause is invalid and accordingly requested the respondent for appointment of mutually agreed independent arbitrator to adjudicate the disputes which have arisen between the petitioner and respondent.

13. In response to the notice issued by the petitioner, the respondent by its letter dated 24th June 2009 for the first time disputed its liability for the payment of the amount demanded by the petitioner. It was also stated, that the names proposed by the petitioner for the appointment of the arbitrator was not acceptable, as Clause 10 of the General Terms and Conditions of the Purchase Order does not permit the same and, further they are not willing to refer the dispute to the arbitrator, since the direction issued by the Ministry of defence is in full force and effect, and they are protected under Section 56 of the Indian Contract Act, 1872.

14. In the light of the aforesaid factual background, the petitioner has invoked the jurisdiction of this Court by filing the petition under Section 11(6) of the Arbitration and Conciliation Act 1996, to appoint an arbitrator to resolve the dispute between the parties.

15. After service of the notice, the parties have exchanged their pleadings.

16. The learned senior counsel for the petitioner, Sri V. Giri would submit, that, in view of the specific clause for referring the disputes between the parties for arbitration, the respondent was not justified in refusing to refer the dispute to sole independent arbitrator on the only ground, that, they are prohibited from making any payment to the petitioner by the Ministry of Defence, Government of India. It is further contended, that, Clause-10 of the Purchase Order provides for referral of disputes between the parties to the Managing Director or his nominee and since the Managing Director being the appointee of the Central Government, the petitioner genuinely apprehends that it may not get any justice in the hands of the Managing Director, since he cannot go against the directions issued by the Ministry of Defence, Government of India and, therefore, it would be appropriate to appoint independent sole arbitrator. In aid of his submission, reliance is placed on the observations made by this Court in the case of¹. At paras 34 to 37, this Court has observed as under:

“34. The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing

authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other Department) to the officer whose decision is the subject-matter of the dispute.

35. Where however the named arbitrator though a senior officer of the Government/statutory body/government company, had nothing to do with the execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer(s) (usually Heads of Department or equivalent) of a Government/statutory corporation/public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as arbitrators merely because their employer is a party to the contract.

36. The position may be different where the person named as the arbitrator is an employee of a company or body or individual other than the State and its instrumentalities.

For example, if the Director of a private company (which is a party to the arbitration agreement), is named as the arbitrator, there may be a valid and reasonable apprehension of bias in view of his position and interest, and he may be unsuitable to act as an arbitrator in an arbitration involving his company. If any circumstance exists to create a reasonable apprehension about the impartiality or independence of the agreed or named arbitrator, then the court has the discretion not to appoint such a person.

37. Subject to the said clarifications, we hold that a person being an employee of one of the parties (which is the State or its instrumentality) cannot per se be a bar to his acting as an arbitrator. Accordingly, the answer to the first question is that the learned Chief Justice was not justified in his assumption of bias.”

17. Sri S.N. Bhat, learned counsel for the respondent would submit, that the petition filed by the petitioner is premature, since respondent though stated in its notice that there is arbitration clause in the Purchase Order which provides for referral of the disputes to its Managing Director or its nominee, the petitioner had suggested that the disputes need not be referred to the `named arbitrator', since he is not mutually agreed independent arbitrator and, therefore, there was no failure on the part of the respondent in responding to the request made by the petitioner. It is further contended, that, in view of Clause-10 of the Purchase Order which provides for appointment of the arbitrator, only the `named person' in the Clause-10 can be appointed and, therefore, the petitioner- company cannot request for appointment of independent arbitrator for resolving disputes, if any, between the parties. The learned counsel relies on the observations made by this Court in the case of *National Highways Authority of India (NHAI)*². It is stated in the said decision:

“Although the learned counsel for the petitioners contended that this is a situation falling within the contemplation of clause (c) of Section 11(6) of the Act, namely, that the institution i.e. IRC failing to perform the function entrusted to it under the appointment procedure, I am not satisfied. Under the appointment procedure agreed to under clause 67.3, each of the parties to the dispute is required to nominate its arbitrator and the third arbitrator is to be chosen by the two arbitrators appointed by the parties and he shall act as the presiding arbitrator. Clause 67.3(ii) provides that in case of the failure of the two arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the presiding arbitrator shall be appointed by the President of the Indian Roads Congress.”

18. The petitioner has prayed before this Court for the appointment of the sole arbitrator. The petitioner has submitted, that, it is clear from the invoices and the correspondence between the parties particularly dated 4th May 2005 and 8th June 2006, that the respondent has not disputed the liability of payment due to the petitioner. Therefore, as the respondent now seeks to avoid the payment of the amount due to the petitioner, there is dispute between the parties which requires to be referred for arbitration before the arbitrator.

19. Clause 10 of the 'General Terms and Conditions to Purchase Order' does constitute a valid arbitration clause as it shows the intention of the parties to appoint an arbitrator and refer the dispute between the parties for the arbitration proceedings under the Arbitration and Conciliation Act 1996. The wordings of Clause 10 are as follows:

“ARBITRATION: All disputes regarding this order shall be referred to our Managing Director or his nominee for arbitration who shall have all powers conferred by Indian Arbitration and Conciliation Bill, 1996 for the time in force.”

20. Section 11 of the Act provides for the appointment of arbitrators and sub-section (6) of Section 11 of the Act under which the present petition is before this Court 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”

21. Sub-section (6) of Section 11 of the Act provides, that, when the parties fail to reach to an agreement as regards the appointment of the arbitrator, can request the Chief Justice or any person or institution designated by him to come to the rescue of the parties. Therefore, petitioner in the present case has sought the appointment of the arbitrator by this Court so that the dispute between the parties can be resolved.

22. In the case of *Datar Switchgears Ltd. v. Tata Finance Ltd. & Anr.*³, this Court while considering the powers of the Court to appoint arbitrator under Section 8 of the Arbitration Act, 1940, cited the decision of this Court in the case of *Bhupinder Singh Bindra v. Union of India and Anr.*⁴. It was held in that case that "It is settled law that court cannot interpose and interdict the appointment of an arbitrator, whom the parties have chosen under the terms of the contract unless legal misconduct of the arbitrator, fraud, disqualification etc. is pleaded and proved. It is not in the power of the party at his own will or pleasure to revoke the authority of the arbitrator appointed with his consent. There must be just and sufficient cause for revocation." The said principle has to abide by in the normal course. However, considering the peculiar conditions in the present case, whereby the arbitrator sought to be appointed under the arbitration clause, is the Managing Director of the company against whom the dispute is raised (the Respondents). In addition to that, the said Managing Director of Bharat Electronics Ltd which is a 'Government Company', is also bound by the direction/instruction issued by his superior authorities. It is also the case of the respondent in the reply to the notice issued by the respondent, though it is liable to pay the amount due under the Purchase Orders, it is not in a position to settle the dues only because of the directions issued by Ministry of Defence, Government of India. It only shows that the Managing Director may not be in a position to independently decide the dispute between the parties.

23. The facts narrated by me would clearly demonstrate that there is a dispute between the parties in regard to payment of certain amounts towards Purchase Orders/Invoice. Since, there is a failure on the part of the respondent in making appointment of an arbitrator for resolving the dispute in accordance with the understanding of the parties which is reflected in the Purchase Order, the prayer of the petitioner requires to be granted.

24. Before parting with the case, in my considered opinion, the decision on which reliance is placed by Shri S.N. Bhat, learned counsel for the respondent, would not assist him to drive home his point.

25. Therefore, in the light of the peculiar facts and circumstances of this case, it would be in the interest of both parties and to do complete justice, an arbitrator other than the Managing Director of the Respondent requires to be appointed to settle the dispute.

26. For the foregoing reasons, the Arbitration Petition is allowed. Hon'ble Dr. Justice Arijit Pasayat (Retired) is appointed as the sole arbitrator.

27. The Arbitrator will be at liberty to fix his own remuneration and other terms and conditions with regard to holding of the arbitration proceedings.

¹(2009) 8 SCC 520

²(2006) 4 SCC 372

³(2000) 8 SCC 151

⁴AIR 1995 SC 2464