

Lufthansa German Airlines

v.

Airport Auth, of India

(Supreme Court Of India)

HON'BLE MR. JUSTICE SURINDER SINGH NIJJAR

Arbitration Petition No. 15 Of 2011 | 15-02-2012

Surinder Singh Nijjar, J.

1. I have heard learned senior counsel for the parties.
2. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 read with paragraph 2 of the Appointment of the Arbitrators by the Chief Justice of India Scheme, 1996 for appointment of a sole Arbitrator for deciding the dispute which has arisen between the parties.
3. The applicant Company, originally incorporated in Germany with its head office at Von Gablenz Street 2-6, 50679, Cologne, Germany, and having its place of business in India at 12th Floor, DLF Building No. 10, Tower B, DLF City, Phase II, Gurgaon. The parties have admittedly entered into an agreement, dated 1.12.2005 for the respondent to provide Cargo Handling Services to the applicant.
4. Mr. Tikku, learned senior counsel points out that under Article 8(1) proviso of the Agreement, the respondent - Authority was to assume liability for damages/losses which are proved to have occurred while the Cargo was in the Authority's custody and care and while discharging the functions for and on behalf of the Cargo Handling Company under the Agreement. The Authority's liability in such cases is restricted to the terms of the Airways Bill and under no circumstances shall exceed the liability of Cargo as enshrined in the Airway Bill. According to the applicant, 15 packages of Cargo were booked with the Authority at New Delhi for delivery at Frankfurt. It is claimed that one of the packages was damaged and was not shipped for delivery to Frankfurt till later. In these proceedings, it is not necessary for me to opine as to which party is responsible for the damage. Suffice it to notice that the consignor made a claim on the applicant for damage to the machinery which was contained in the package which was subsequently delivered. Mr. Tikku, points out that the claim was ultimately settled by the applicant for US Dollar 51,720. Upon settlement of the claim, the applicant sought reimbursement of the same from the respondents by letter dated 15.9.2008. This letter was responded to by the applicant on 30.1.2009. It is pointed out that the damage report of 01/15 packages pertaining to the subject consignment of the claimant

was received from M/s. Siddhartha Logistics Company Pvt. Ltd., through letter dated 22.7.2005. Upon receipt of the letter, the respondent had requested the aforesaid firm to furnish the relevant information/documents pertaining to the consignment which was allegedly damaged. However, the required information had not been supplied to the respondent. It was also pointed out that on non-receipt of the documents, the respondent - Authority was unable to process the case further. Thereafter, the respondent only received the request from the applicant for payment of US Dollar 51,720 as reimbursement.

5. Mr. Atul Nanda, learned senior counsel appearing for the non applicant, therefore, points out that the petition ought to be dismissed on the ground of limitation itself. He further points out that the matter cannot be referred to the Arbitrator in view of the specific grounds pleaded in the counter affidavit. According to the learned senior counsel, the petition is an abuse of the process of Court.

6. I have considered the submissions made by the learned senior counsel. The Arbitration Clause, which is contained in Articles 9 and 10 are as under:

"ARTICLE 9: ARBITRATION

9. Any dispute or claim concerning the scope, meaning, construction or effect of this agreement or arising there from shall be referred to any finally settled by arbitration in accordance with the procedures set forth below and if necessary, judgment on the award rendered may be entered in any court having jurisdiction there of;

(1) The parties agree to the appointment of a single arbitrator the arbitral tribunal shall consist of him alone. The arbitrator may be appointed either directly by the parties or, at their request by the International Chamber of Commerce.

(2) If they do not so agree to the appointment of a single arbitrator, the arbitral tribunal shall consist of three arbitrators appointed as follows:

(a) If only two parties are involved in the dispute each party shall appoint one of the three arbitrators should either party fail to appoint his arbitrator such appointment shall be made by the International Chamber of Commerce.

(b) If more than two parties are involved in the dispute they shall jointly agree on the appointment of two of the arbitrators. Failing unanimous agreement there on, such appointment shall be made by the International Chamber of Commerce.

(c) The two arbitrators appointed in the manner provided above shall appoint the third arbitrator, who shall act as Chairman. Should they fail to agree on the appointment of the third arbitrator, such appointment shall be made by the International Chamber of Commerce.

3. The International Chamber of Commerce, may at the request of any party concerned, fix any time limit it finds appropriate within which the parties or the arbitrators appointed by the parties, shall constitute the arbitral tribunal. Upon expiration of this time limit, the International Chamber of Commerce, shall take the action prescribed in the preceding paragraph to constitute the tribunal.

4. When the arbitral consists of three arbitrators, its decision shall be given by a majority vote.

(5) India Arbitration Laws shall be applicable.

(6) The award shall be final and conclusively binding upon the parties.

ARTICLE 10 LAWS

10.1 Laws, regulations instructions and notifications issued by Govt. of India from time to time shall be an integral part of this Agreement".

7. It is not disputed by the respondent that there was a valid agreement between the parties from 01.04.2004 to 31.03.2007. Merely because the contract which contained the Arbitration Clause has come to an end by the efflux of time would not itself put to an end the Arbitration Clause. The dispute seems to have prima facie arisen during the subsistence of the agreement. It, however, seems to have spilled over to subsequent years I.e. 2008- 2009. The notice for arbitration was sent on 12.10.2009. The respondent has admittedly failed to appoint an Arbitrator within the stipulated period. The claim made by the applicant and the grounds taken by the respondents clearly give rise to disputes that are prima facie arbitrable. The disputes raised by the petitioner are therefore required to be referred to arbitration.

Consequently, in terms of the Arbitration Clause, this Court is required to make the appointment of the sole arbitrator.

8. I have suggested to the counsel for the parties the name of Justice N.K. Sodhi, Former Chief Justice, Karnataka High Court to which the counsel for the parties have readily agreed. In exercise of my powers under Section 11(6) of the Arbitration and Conciliation Act, 1996 read with paragraph 2 of the Appointment of the Arbitrators by the Chief Justice of India Scheme, 1996, I hereby appoint Justice N.K. Sodhi, Former Chief Justice, Karnataka High Court as the Sole Arbitrator to adjudicate the disputes on such terms and conditions as the Sole Arbitrator deems fit and proper. It is made clear that all issues raised by the petitioners and the respondents in their respective pleadings are specifically kept open. The parties shall also be at liberty to raise any further/additional issues before the Sole Arbitrator. Undoubtedly, the learned Sole Arbitrator shall decide all the disputes arising between the parties without being influenced by any prima facie opinion expressed in this order, with respect to the respective claim of the parties. The Sole Arbitrator is also at liberty to fix the venue of the Arbitration at his sole discretion.

9. Registry is directed to communicate this order to Justice N.K. Sodhi, so that the sole Arbitrator can expeditiously enter upon the arbitration. The parties are directed to appear before Justice N.K. Sodhi, learned Arbitrator on 17.3.2012 at 11.30 A.M.

10. The Arbitration Petition is disposed of accordingly.