

M/S Dakshin Shelters P.Ltd

v.

Geeta S Johari

(Supreme Court Of India)

HON'BLE MR. JUSTICE R.M. LODHA HON'BLE MR. JUSTICE H.L. GOKHALE

Special Leave Petition No. 33448 Of 2011 | 21-02-2012

R.M. LODHA, J.

1. We have heard Mr. Pallav Shishodia, learned senior counsel for the petitioner and Mr. Shyam Divan, learned senior counsel for the respondent.

2. A Development Agreement-cum-General Power of Attorney (for short “Development Agreement”) was executed between the parties on February 7, 2006. Certain disputes arose out of that agreement. On December 10, 2010, the respondent issued a notice to the petitioner invoking arbitration clause in the above agreement and nominated a former Judge of the High Court of Andhra Pradesh - Justice P.L.N. Sharma -on her behalf and called upon the present petitioner to nominate its arbitrator.

3. By reply dated January 10, 2011, the petitioner communicated to the respondent that since the Development Agreement has been cancelled by her, there was no question for resolution of disputes between the parties by the Arbitrator. The reply sent by the petitioner necessitated the invocation of Section 11 of the Arbitration and Conciliation Act, 1996 (for short “the Act”) by the respondent and an application was made before the High Court of Andhra Pradesh requesting the Chief Justice or the Designate Judge to appoint the arbitrator/arbitrators to decide the disputes arising out of the above agreement.

4. On hearing the parties, the Designate Judge by his order dated September 9, 2011 appointed Mr. D.V. Seetharama Murthy, Sr. Advocate as an arbitrator on behalf of the petitioner (respondent therein). It was further observed in the order that the arbitrator nominated by the applicant (present respondent) and the arbitrator appointed by the Designate Judge on behalf of the petitioner (respondent therein) are required to appoint the third arbitrator before entering into reference.

5. The order dated September 9, 2011 is under challenge in this Special Leave Petition.

6. On December 16, 2011, a limited notice was issued by this Court to the respondent. The order issuing notice reads as follows:

“Mr. Pallav Shishodia, learned senior counsel for the petitioner submits that instead of senior advocate, who has been appointed as arbitrator by the designate Judge, a retired High Court Judge, stationed in Hyderabad, may be appointed. He further submits that the petitioner is willing to bear the expenses, if limited notice is issued to the respondent.

Issue notice limited to the above, returnable in five weeks subject to deposit of Rs. one lakh by the petitioner in the Registry towards costs. In the meanwhile, further proceedings before the arbitrators shall remain stayed. “

7. In compliance of the above order, the petitioner has deposited Rs. 1 lakh in the Registry of this Court towards the costs of the respondent.

8. After service, respondent has entered appearance through Mr. Y. Rajagopala Rao, advocate-on-record. Mr. Shyam Divan, learned senior counsel appearing for the respondent, at the outset, submitted that the respondent was not agreeable to the substitution of arbitrator appointed by the Designate Judge on behalf of the petitioner.

9. Mr. Pallav Shishodia, learned senior counsel for the petitioner vehemently contended that the Designate Judge ought to have given an opportunity to the petitioner to nominate its arbitrator. He referred to the suit filed by the petitioner against the respondent challenging the cancellation of the Development Agreement. He also submitted that the respondent made an application under Section 8 of the Act but that came to be dismissed. In backdrop of these facts, Mr. Pallav Shishodia submitted that when the petitioner received the notice dated December 10, 2012, it was communicated by the petitioner to the respondent in its reply dated January 10, 2011 that there was no question for appointment of arbitrator and the disputes between the parties could not be decided by the arbitrator. Learned senior counsel, thus, submitted that the petitioner had not failed to appoint the arbitrator as contemplated under Section 11(4) of the Act.

10. Mr. Shyam Divan, learned senior counsel for the respondent, on the other hand, submitted that once an opportunity was given to the petitioner to nominate its arbitrator by notice dated December 10, 2010 and it failed to avail of the opportunity, it ceased to have any right to appoint the arbitrator in terms of the arbitration clause in the Development Agreement. In support of his submission, Mr. Shyam Divan relied upon the decision of this Court in *Union of India vs. Bharat Battery Manufacturing Co. (P) Ltd.* ((2007) 7 SCC 684).

11. Mr. Pallav Shishodia, learned senior counsel for the petitioner, in rejoinder, referred to the decision of this Court in National Highways Authority of India and another vs. Bumihiway DDB Ltd. (JV) and others². He particularly referred to paragraphs 37 and 38 of the above decision.

12. We must immediately observe that the judgment of this Court in National Highways Authority ((2006) 10 SCC 763) relied upon by Mr. Pallav Shishodia has no application to the controversy involved in the present matter. The main question in National Highways Authority² related to the process of appointment of arbitrator to be followed on resignation or termination of mandate of an arbitrator and one of the questions framed by this Court for determination was whether on resignation of one of the arbitrators, the statutory provision that comes into play was Section 15(2) or Section 11(6) of the Act. The other three questions noted in para 20 of the Report have also no bearing on the question with which we are concerned in the present matter.

13. The arbitration clause in the Development Agreement between the parties reads as follows:

“25: Arbitration:

25.1 Tribunal: Disputes relating to this Agreement or its interpretation shall be referred to the arbitration of an arbitral tribunal, consisting of three arbitrators (Tribunal), one each to be appointed by the parties hereto and the third to be appointed by the two arbitrators so appointed. The award of the Tribunal shall be final and binding on the parties. The arbitration proceedings will be held only in Secunderabad and the courts situated in the Ranga Reddy District alone shall have the territorial jurisdiction to entertain the dispute. The provisions of Arbitration and Conciliation Act shall comply to the arbitration procedures.

25.2 Powers of Tribunal: The Tribunal shall be at liberty to (1) proceed summarily (2) avoid all rules, procedures and/or evidences that can be lawfully avoided by the mutual consent and/or directions by the parties and (3) award damages along with the final award against the party not complying with any interim award or order passed by the Tribunal. The Tribunal shall:

(a) Make the award in English and within four months from the date of appointment with the right to give extension of not more than one month at a time on emergent grounds but the total extensions shall not be more than four months.

(b) Conduct the proceedings from day-to-day and for about 5 hours per day save for initial sittings.

(c) Not grant to either of the parties any extension of time and/or adjournment except on grounds beyond their control and only for such periods as be of the abosute3 minimum.

(d) The Tribunal shall be entitled to pass interim award granting interim relief to the parties.

25.3 Mechanism and Procedure: The procedure to be followed shall be decided by the Tribunal. The directions/award of the Tribunal shall be final and binding on the parties.”

14. On the disputes having arisen between the parties, the notice was sent by the respondent to the petitioner on December 10, 2010. Paragraph 4 of the said notice reads as under:

“I do hereby invoke the Arbitration Clause in the agreement bearing Doc. No. 2778 of 2006 and appoint Hon'ble Mr. Justice P.L.N. Sharma, a retired Judge of A.P. High Court, r/o Gandhi Nagar, Hyderabad as arbitrator within a week from the date of receipt of this notice to adjudicate all claims, disputes, differences, restitutions, restorations whatsoever in law and in equity, in terms of the registered Development Agreement cum GPA document registered as Doc. No. 2778 of 2006, failing which I shall be constrained to initiate appropriate legal action under Section 11 of the Arbitration Act for appointment of arbitrator on your behalf as well as you shall be solely responsible fro all costs and consequences.”

15. The petitioner did respond to the above notice within 30 days of its receipt by sending its reply on January 10, 2011. Various pleas were raised in that reply and ultimately, the petitioner responded by stating

“it is stated that the question of appointment of Arbitrator does not raise either from your side or from our side. There is no arbitral dispute to be decided by the arbitrator.”

16. From the above response, it is clear that the petitioner declined to appoint its arbitrator as according to it there was no question of appointment of arbitrator by either of the parties and there being no arbitral dispute, there was no occasion for resolution of dispute as provided in the Development Agreement. The stance of the petitioner amounted to failure on its part to appoint its arbitrator on receipt of the request to do so from the respondent.

17. In view of the above, it cannot be said that the Designate Judge committed any error in nominating Mr. D.V. Seetharama Murthy, Sr. Advocate as an arbitrator on behalf of the petitioner. The order of the learned Single Judge is in conformity with the decision of this Court in Bharat Battery Manufacturing Co. (P) Ltd.¹ wherein this Court stated as follows:

“Once a party files an application under section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to

appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator.”

18. The petitioner's right to appoint its arbitrator in terms of clause 25 of the Development Agreement got extinguished once it failed to appoint the arbitrator on receipt of the notice dated December 10, 2010. There is no merit in the submission of the learned senior counsel for the petitioner that the Designate Judge ought to have given an opportunity to the petitioner to nominate its arbitrator.

19. The order impugned in the present Special Leave Petition does not suffer from any infirmity. Special Leave Petition is, accordingly, dismissed with costs. The amount of Rs. one lakh deposited by the petitioner in the Registry of this Court shall be paid to the respondent.

ORDER

1. We have heard Mr. Pallav Shishodia, learned senior counsel for the petitioner and Mr. Shyam Divan, learned senior counsel for the respondent.

2. A Development Agreement-cum-General Power of Attorney was executed between the parties on February 7, 2006. Certain disputes arose out of the above agreement between the parties. On December 10, 2010, the present respondent issued a notice to the petitioner invoking the arbitration clause in the above agreement and nominated a former Judge of the High Court of Andhra Pradesh - Justice P.L.N. Sharma -on her behalf calling upon the present petitioner to nominate its arbitrator.

3. By reply dated January 10, 2011, the petitioner communicated to the present respondent that since the Development Agreement itself has been cancelled by the present respondent, there is no occasion for resolution of disputes between the parties by the Arbitrator. The reply sent by the petitioner necessitated the invocation of Section 11 of the Arbitration and Conciliation Act, 1996 (for short “the Act”) by the present respondent and an application was made before the High Court of Andhra Pradesh requesting the Chief Justice or the designate Judge to appoint the arbitrator-arbitrators to decide the disputes arising out of the above agreement.

4. On hearing the parties, the designate Judge by his order dated September 9, 2011 appointed Mr. D.V. Seetharama Murthy, Sr. Advocate as an arbitrator on behalf of the petitioner (respondent therein) for adjudication of the disputes between the parties. It was further observed in the order that the arbitrator nominated by the present respondent-cum-applicant

therein and the arbitrator appointed by the designate Judge on behalf of the present petitioner are required to appoint the third arbitrator before entering into a reference.

5. It is the order dated September 9, 2011 which is under challenge in this Special Leave Petition.

6. On December 16, 2011, a limited notice was issued by this Court to the respondent. The order issuing notice reads as follows:

“Mr. Pallav Shishodia, learned senior counsel for the petitioner submits that instead of senior advocate, who has been appointed as arbitrator by the designate Judge, a retired High Court Judge, stationed in Hyderabad, may be appointed. He further submits that the petitioner is willing to bear the expenses, if limited notice is issued to the respondent.

Issue notice limited to the above, returnable in five weeks subject to deposit of Rs. one lakh by the petitioner in the Registry towards costs. In the meanwhile, further proceedings before the arbitrators shall remain stayed. “

7. In compliance of the above order, the petitioner has deposited Rs. 1 lakh in the Registry of this Court towards the costs of the respondent.

8. After service, respondent has entered appearance through Mr. Y. Rajagopala Rao, advocate-on-record and he is represented by Mr. Shyam Divan, learned senior counsel.

9. Mr. Pallav Shishodia, learned senior counsel for the petitioner refers to the suit filed by the present petitioner against the respondent cancelling the Development Agreement between the parties. He also submits that the present respondent made an application under Section 8 of the Act but that came to be dismissed.

10. In the backdrop of the above facts, when the petitioner received the notice dated December 10, 2012, by its reply dated January 10, 2011, it was communicated by the petitioner to the respondent that there was no occasion for appointment of arbitrator and the disputes between the parties could not be decided by the arbitrator. Learned senior counsel further submits that the petitioner had not failed to appoint the arbitrator as contemplated under Section 11(4) of the Act and, therefore, the Designate Judge ought to have given an opportunity to the petitioner to nominate its arbitrator.

11. Mr. Shyam Divan, learned senior counsel for the respondent, on the other hand, submitted that once an opportunity was given to the petitioner to nominate its arbitrator which it failed to do, it ceases to have any right to appoint the arbitrator in terms of the arbitration clause in the Development Agreement.

12. In support of his submissions, Mr. Shyam Divan relied upon a decision of this Court in *Union of India vs. Bharat Battery Manufacturing Co. (P) Ltd.* ((2007) 7 SCC 684) .

13. Mr. Pallav Shishodia, learned senior counsel for the petitioner, in rejoinder, referred to a decision of this Court in *National Highways Authority of India and another vs. Bumihiway DDB Ltd. (JV) and others* ((2006) 10 SCC 763). He particularly referred to the paragraphs 37 and 38 of the above decision.

14. We must immediately observe that the judgment of this Court in *National Highways Authority of India*² relied upon by Mr. Pallav Shishodia has no application to the controversy involved in the present matter. The controversy in *National Highways*² related to the process of appointment of arbitrator to be followed on resignation or termination of mandate of an arbitrator. That matter related to the appointment of substitute arbitrator which is not the present case.

15. Insofar as the present case is concerned, the arbitration clause reads as follows:

“25: Arbitration:

25.1 Tribunal: Disputes relating to this Agreement or its interpretation shall be referred to the arbitration of an arbitral tribunal, consisting of three arbitrators (Tribunal), one each to be appointed by the parties hereto and the third to be appointed by the two arbitrators so appointed. The award of the Tribunal shall be final and binding on the parties. The arbitration proceedings will be held only in Secunderabad and the courts situated in the Ranga Reddy District alone shall have the territorial jurisdiction to entertain the dispute. The provisions of Arbitration and Conciliation Act shall comply to the arbitration procedures.

25.2 Powers of Tribunal: The Tribunal shall be at liberty to (1) proceed summarily (2) avoid all rules, procedures and/or evidences that can be lawfully avoided by the mutual consent and/or directions by the parties and (3) award damages along with the final award against the party not complying with any interim award or order passed by the Tribunal. The Tribunal shall:

(a) Make the award in English and within four months from the date of appointment with the right to give extension of not more than one month at a time on emergent grounds but the total extensions shall not be more than four months.

(b) Conduct the proceedings from day-to-day and for about 5 hours per day save for initial sittings.

(c) Not grant to either of the parties any extension of time and/or adjournment except on grounds beyond their control and only for such periods as be of the absolute minimum.

(d) The Tribunal shall be entitled to pass interim award granting interim relief to the parties.

25.3 Mechanism and Procedure: The procedure to be followed shall be decided by the Tribunal. The directions/award of the Tribunal shall be final and binding on the parties.”

16. On the dispute- as having been arisen between the parties, notice was sent by the respondent to the petitioner on December 10, 2010. Paragraph 4 of the said notice reads as under:

“I do hereby invoke the Arbitration Clause in the agreement bearing Doc. No. 2778 of 2006 and appoint Hon'ble Mr. Justice P.L.N. Sharma, a retired Judge of A.P. High Court, r/o Gandhi Nagar, Hyderabad as arbitrator within a week from the date of receipt of this notice to adjudicate all claims, disputes, differences, restitutions, restorations whatsoever in law and in equity, in terms of the registered Development Agreement cum GPA document registered as Doc. No. 2778 of 2006, failing which I shall be constrained to initiate appropriate legal action under Section 11 of the Arbitration Act for appointment of arbitrator on your behalf as well as you shall be solely responsible for all costs and consequences.”

17. The petitioner did respond to the above notice by sending its reply on January 10, 2011.

18. Various pleas were raised in that reply and ultimately, the petitioner responded by stating that “it is stated that the question of appointment of Arbitrator does not arise either from your side or from our side. There is no arbitral dispute to be decided by the arbitrator.”

19. From the above response, no doubt is left that the petitioner failed to appoint its arbitrator on receipt of the request to do so from the respondent.

20. In view of the above, the designate Judge did not commit any error in nominating Mr. D.V. Seetharama Murthy, Sr. Advocate as an arbitrator on behalf of the petitioner. The order of the learned Single Judge is in conformity with the decision of this Court in Bharat Battery Manufacturing Co. (P) Ltd.¹ wherein this Court stated as follows:

“Once a party files an application under section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator in terms of the clause of the agreement thereafter. The right to appoint arbitrator under the clause of agreement ceases after Section 11(6) petition has been filed by the other party before the Court seeking appointment of an arbitrator.”

21. The order impugned in the present Special Leave Petition does not suffer from any infirmity and is dismissed. The amount of Rs. one lakh deposited by the petitioner in the Registry of this Court shall be paid to the respondent.