

SUPREME COURT OF INDIA

Sanghi Brothers (Indore) Pvt Ltd

Vs.

Muktinath Airlines (P) Ltd And Anr.

A.r.(Civil)No.37 of 2014

(Ranjan Gogoi,J.,)

15.10.2015

JUDGMENT

Ranjan Gogoi,J.,

1. This application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Arbitration Act”) for appointment of an arbitrator to go into the disputes and differences that the petitioner claims to have arisen between the petitioner–Company and the respondents under an Agreement/Memorandum of Understanding dated 17.07.2013.

2. According to the petitioner, the respondent No.1 - Muktinath Airlines Private Limited is the owner of a Helicopter Robinson R44 Raven II. The petitioner contends that the respondent No.1 – Company executed a power of attorney dated 20th June, 2013 authorising the respondent No.2 – Galaxy Aviation Incorporation Private Limited to sell the said Helicopter. A Memorandum of Understanding (for short “MOU”) dated 4th July, 2013 was entered into between the respondent No.1 and the respondent No.2 incorporating the terms for the sale of the Helicopter. The petitioner states that on 17th July, 2013 a MOU was executed between the petitioner and the respondent No.1 represented by its power of attorney i.e. respondent No.2 for sale of the Helicopter in question. The price was agreed upon and an advance amount of Rs. 5,00,000/- (Five Lakhs only) was paid by the petitioner to the respondent No. 1.

3. The petitioner has contended that it was agreed by and between the parties in the MOU dated 17th July, 2013 that the sale of the Helicopter would be completed within two months. The respondents failed to handover possession of the Helicopter within the aforesaid period. According to the petitioner, an addendum to the MOU dated 17th July, 2013 was executed between the petitioner and the respondent No.2 for extension of time upto 16th December, 2013 for the delivery of the Helicopter. It appears that the respondent No.2 demanded a sum of Rs.15 lakhs over and above the agreed sale price [Rs.2,04,00,000 (Rupees Two crore four lakhs)] which was responded to by the petitioner on 10th December, 2013, inter alia, informing the respondent No.2 of its failure to comply with clause 4 and clause 13 of the

MOU dated 17th July, 2013. Accordingly, legal notice was issued by the petitioner to the respondents. As the petitioner apprehended that the respondents may sell the Helicopter to a third party it had approached the Delhi High Court by means of a petition under Section 9 of the Arbitration Act. Accordingly, interim orders were passed by the Delhi High Court on 14th March, 2014. The petitioner invoked the arbitration clause (clause 24) of the MOU dated 17th July, 2013 by notice dated 13th February, 2014 and as the same had not been responded to the instant petition has been filed.

4. The respondent No.2 has chosen not to appear before the Court. The respondent No.1, who is represented, has filed an affidavit contending that in terms of MOU dated 4th July, 2013, between the respondents, it was agreed that if the respondent No.2 failed to make payment within one month from the date of the MOU (i.e. 4th July, 2013) then the said MOU would stand terminated. It was stated that the respondent No.2 had failed to make such payment and, therefore, the MOU between the respondents dated 4th July, 2013 had become non-est in law. The respondent No.1 has further contended that it is not bound by the MOU dated 17th July, 2013 as it was not a party to the same. It is the further contention of the respondent No.1 that the power of attorney was forged by the respondent No.2 and also that the MOU dated 4th July, 2013 between the respondents has been materially altered in respect of clause 12 and clause 19 thereof altering the periods specified in the said clauses from one month to three months.

5. I have heard the learned counsels for the parties and I have considered the submissions advanced. Clause 24 of the MOU dated 17th July, 2013 which provides for arbitration is in the following terms:

“24) This MOU will be governed by the provision of Indian Arbitration and Conciliation Act, 1996 and any other modification or re-enactment thereof. The arbitration proceedings shall be held in New Delhi and the language of arbitration shall be English.”

6. There is no manner of doubt that the said MOU dated 17th July, 2013 was executed by and between the petitioner on one hand and respondent No.1 represented by respondent No.2 as its power of attorney holder on the other. Clearly and evidently, sale and purchase of the Helicopter and delivery thereof in terms of the aforesaid MOU dated 17th July, 2013 has not materialized till date. Whether the petitioner is entitled to performance of the terms of the said MOU dated 17th July, 2013 is the precise dispute between the parties. Therefore, in terms of the arbitration clause contained in the said MOU dated 17th July, 2013, the dispute is liable to be referred to arbitration by appointment of an arbitrator under Section 11(6) of the Arbitration Act. The grounds on which the respondent No.1 seeks to resist the appointment of an arbitrator, namely, that the period contemplated under the MOU dated 4th July, 2013 (one month) within which payment was to be made to the respondent No.1 by the respondent No.2 is over; that clause 12 and clause 19 of the MOU dated 4th July, 2013 had been materially altered by changing the period of payment from one month to three months; and further that the power of attorney was forged by the respondent No.2 are questions that cannot be gone into by the court in exercise of jurisdiction under Section 11(6) of the

Arbitration Act. These are matters which can be raised before the learned Arbitrator and answered by the said authority. In this regard, Section 16 of the Arbitration Act may be extracted below.

“16. Competence of arbitral tribunal to rule on its jurisdiction.— (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.”

7. Consequently and in the light of the above, the court allows the present petition and appoints Shri Justice Mukul Mudgal, Chief Justice (Retd.), Punjab & Haryana High Court, as the Arbitrator.

8. All the disputes including the disputes raised in the present petition are hereby referred to the learned sole Arbitrator. The learned Arbitrator shall be at liberty to fix his own fees/ remuneration/other conditions in consultation with the parties.

9. Let this order be communicated to the learned Arbitrator so that the arbitration proceedings can commence and conclude as expeditiously as possible.

10. The Arbitration Petition is disposed of accordingly. No costs.

