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Court : Delhi

Decided On : Jul-10-2006

Reported in : 131(2006)DLT105; 2006(92)DRJ73

Judge : Vikramajit Sen, J.

Acts : Arbitration and Conciliation Act, 1996 - Sections 2, 11, 11(2) and 11(9)

Appeal No. : Arbitration Application No. 217 of 2003

Appellant : Sharon Solution (India) Pvt. Ltd.

Respondent : Ericsson India Pvt. Ltd.

Advocate for Def. : Anil K. Kher, Adv.

Advocate for Pet/Ap. : Suhail Dutt, Adv

Judgement :

Vikramajit Sen, J.

1. This application under Section 11 of the Arbitration and Conciliation Act, 1996 has been pending in this Court for almost three years; it was filed in October, 2003. The notice for initiation of arbitration proceedings was issued in terms of legal notice dated 23rd December, 2002, indubitably on behalf of the Applicant and Oberthur Card Systems Asia Pacific Pvt. Limited (hereafter referred to as

`Oberthur') who has been imp leaded as a Respondent vide Orders of this Court dated February 14, 2005. In the said legal notice, reference has been made to the Agreement between the Applicant and the original sole respondent namely, Ericsson India Private Limited (Ericsson for brevity). Mr. Kher, learned Counsel appearing for Ericsson has filed the original Purchase Agreement which contains the Arbitration clause and it has been emphasised that this document has been deliberately withheld by the Applicant. There can be no two opinions that the Applicant has committed a lapse in not filing it, but no oblique motives can be attributed to it since the present legal action continues to be maintainable. What is relevant is that the Agreement is only between the Applicant and Ericsson.

2. Mr. Kher relies on the letter dated 13th August, 2002 authored by the freshly imp leaded Respondent No. 2, namely, Oberthur in which it had informed Ericsson that the former would jointly and severely accept liability on behalf of the Applicant. It was this document that persuaded my Learned Brother T.S. Thakur, J. to order the impleadment of Respondent No. 2, especially since the appointment of the Arbitrator had purportedly been done on behalf of Respondent No. 2 also. It would not be justified to ignore the fact that the question at that stage was the appointment of the third/Presiding Arbitrator. The contention of Ericsson today is totally different viz. that no appointment can be made because the arbitration partakes an international character.

3. The Applicant as well as Ericsson had, prior to the filing of this Petition appointed their respective Arbitrators although the Purchase Agreement contemplates the appointment of a sole Arbitrator. The Petition was necessitated because of the failure to arrive at a consensus on the appointment of the Third or Presiding Officer.

4. Subsequent to the passing of the Orders dated 14.2.2005 notices have issued to Oberthur but it has failed to file any Objections after entering appearance earlier.

5. On the hearings held on July 03, 2006 there appeared to be consensus on the appointment of a Sole Arbitrator. In these circumstances a letter from Justice Vijay Bahuguna (Retd.) has been handed over by the learned Counsel for the Applicant

in which the learned Arbitrator has expressed that he has no objection if a sole Arbitrator is appointed instead.

6. Mr. Kher, learned Counsel appearing for Ericsson now stresses upon Section 2(f) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as `the Act') which contains the definition of an `international commercial arbitration', and on Section 11(9) which stipulates that in the case of an international commercial arbitration the power of appointment vests in the Chief Justice of India. He contends that no further Orders should be passed by this Court and the matter should be placed before the Hon'ble Chief Justice of India. This imparts a totally different complexion to the impleadment of Oberthur.

7. The significant point in this dispute is that till date Ericsson has not taken any steps in the way of raising a claim in arbitration. No doubt, in its correspondence it has quantified a sum of Rs. 9,06,381/- towards liquidated damages till the issuance of the said notice i.e. 13.12.2002. The plea pertaining to the dispute raising an international commercial arbitration, coming in the wake of the Applicant's agreement for the appointment of a sole Arbitrator leaves an unsavory taste that the intention and efforts of Ericsson althroughout is to delay and protract litigation.

8. I am unable to accept the argument of Mr.Kher, learned Counsel appearing for Ericsson to the effect that the present dispute is an international commercial arbitration. The contract between the parties is executed by the Applicant Sharon Solutions (India) Pvt. Ltd. and not by Oberthur. The underwriting of the Applicant debt or liability by Oberthur is significantly separate, in terms of the aforementioned letter dated 13.8.2002. Oberthur expressed a guarantee and warranty for the GSM Sim Card and Scratch Card. The letter does not contain any compact to arbitrate upon disputes. In this context it should not be forgotten that only a liquidated money claim has been made by Ericsson. If Ericsson has a right to make any claims against Oberthur under the said letter it would not be by way of arbitration, as there is no subsisting arbitration clause between Ericsson and Oberthur.

9. It is imperative that the present application under Section 11 should be decided at the very earliest. International trade cannot flourish if the adjudication of disputes even to the extent of appointment of Arbitrators is held at bay for several years. I hold that since there is no agreement between Oberthur and Ericsson to submit their disputes to arbitration and thereforee Section 2(f) of the Act is not attracted. The fact that Justice Vijay Bahuguna (Retd.) was appointed/nominated on behalf of Oberthur also, would not create or constitute an agreement between the parties to submit their disputes to arbitration. As has already been seen above, this is also the understanding of the Applicant since Oberthur was not imp leaded by it.

10. There is no alternative but for this Court to appoint a presiding Arbitrator as the Applicant as well as Ericsson have separately made their own appointments/nominations, namely, Justice Vijay Bahuguna (Retd.) and Justice Sat Pal (Retd.), obviously under Section 11(2) of the Act. This would of course increase the expenses that will be incurred by the parties. The no objection of Justice Vijay Bahuguna (Retd.) is of no consequence in view of the failure of Ericsson to agree to the appointment of a sole Arbitrator. His appointment is not disturbed.

11. In these circumstances, I appoint Justice Arun Kumar (Retd.), Judge of the Supreme Court of India as the Presiding Arbitrator. He will fix his own remuneration.

12. The Arbitration Application is disposed of in the above terms. Parties to bear their respective costs.

13. A copy of this Order be sent to the Presiding Arbitrator forthwith.

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