Dheeraj Rastogi vs Dnata International Pvt Ltd. on 29 August, 2022

Author: Anup Jairam Bhambhani

Bench: Anup Jairam Bhambhani

NEUTRAL CITATION NO: 2022/DHC/003727

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
Date of decision: 29th August 2022
+ ARB.P. 408/2020
DHEERAJ RASTOGI ..... Petitioner

Through: Mr. Sandeep Kumar, Advocate.
versus
DNATA INTERNATIONAL PVT. LTD. ..... Respondent
Through: Mr. Nishant Menon & Mr. Vikram Bajaj, Advocates.

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

(Judgment released on 19.09.2022) ANUP JAIRAM BHAMBHANI, J.

By way of the present petition under section 11 of the Arbitration & Conciliation Act 1996 („A&C Act), the petitioner seeks appointment of an arbitrator to adjudicate upon the disputes that are stated to have arisen with the respondent from Employment Contract dated 14.09.2011.

Contentions

2. Learned counsel for the petitioner has drawn the attention of this court to clause „U of the Employment Agreement, which comprises the arbitration agreement between the parties; and contemplates reference of disputes between them to arbitration in accordance with the A&C Act; and also stipulates that arbitration proceedings will take place in Delhi.

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3. As per the record, the petitioner invoked arbitration vide notice dated 26.03.2020; to which the respondent sent a reply dated 21.04.2020.

4. Pursuant to notice issued on this petition on 22.09.2020, the respondent has filed reply dated 23.10.2020; to which reply the petitioner has also filed rejoinder dated 10.12.2020.

5. The principal objection taken by the respondent to the appointment of an arbitrator is that communication dated 26.03.2020, which purports to be an „invocation notice , does not fulfil the ingredients of a notice as contemplated under section 21 of the A&C Act, inasmuch as the procedure agreed to in the contract for referring disputes to arbitration has not been followed. It is the respondent s contention that either the petitioner should have proposed a name, or should have been called- upon the respondent to propose a name for appointment as arbitrator; but since the said procedure was not complied with and no name was either proposed or called-for, there is no „failure of consensus ; and therefore, a petition under section 11 will not lie. It is argued that a petition under section 11 can be entertained only upon expiry of thirty days after a notice as contemplated under section 21 of the A&C Act has been served upon the other side; but not otherwise.

6. In support of the above contention, learned counsel for the respondent has drawn the attention of this court to the following decisions: Indus Towers Ltd vs. Sistema Shyam Teleservices Ltd.1; M/s KP Buildcon Pvt Ltd vs. Indus Towers2; M/s DP Construction vs. M/s Vishvaraj (2016) 3 Arb LR 375 (Delhi) at para 30.

Arb P 455/2014 dated 09.05.2016 (Delhi High Court) at paras 27, 30 & 32 This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/003727 Environment Pvt Ltd3 and Alupro Building Systems Pvt Ltd vs. Ozone Overseas Pvt Ltd.4

7. Responding to the objection so raised, learned counsel for the petitioner has urged that communication dated 26.03.2020, is in fact a valid invocation notice as contemplated under section 21 of the A&C Act. In support of this submission, it is pointed-out that not only did that communication mention clause „O , which is the clause from which the dispute arises, but it also contained a specific reference to clause „U , viz. the arbitration clause itself, specifically stating as under:

> "...on combined reading of clause O(3) and U...it is absolutely clear that any dispute between the company and its employee...would first require such dispute to be independently adjudicated by Arbitrator appointed under Clause U of the employment contract...
>
> * * * * * "We hope that wiser counsel shall prevail and you will comply with this notice within one week of its receipt, failing which we have clear instructions to initiate appropriate legal action against you, which please note shall be at your sole risk and cost."

It is thus submitted that the notice not only indicated the dispute in question but also clearly said that the dispute would have to be referred to arbitration in terms of the contract. The argument therefore is, that the "appropriate legal action" as mentioned in the concluding Misc. Civil Appln. (Arbn.) No. 31/2021 dated 06.07.2022 (Bombay High Court, Nagpur Bench) at paras 25 & 26 2017 SCC OnLine Del 7228 This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/003727 part of the notice, was in fact a reference to legal action by way of arbitration.

8. Attention is also invited to the arbitration clause in the employment contract, which reads as follows:

> "U. Arbitration All disputes relating to this Employment Contract shall be settled through arbitration in accordance with the Arbitration and Conciliation Act, 1996 and conducted by a single arbitrator appointed by the Company. Arbitration will take place in Delhi and in the English language. The award will be binding on the Employee and the Company. The Company however shall be entitled (without limitation to other rights and remedies available under law) to obtain injunctive relief or equitable relief from any court of competent jurisdiction."

(emphasis supplied)

9. It is further argued on behalf of the petitioner, that the respondent s reply dated 21.04.2020, by which it inter-alia opposed arbitration, also amounts to an acknowledgement on the respondent s part that by communication dated 26.03.2020 the petitioner had indeed called for reference to arbitration. The portion of the reply referred to by counsel for the petitioner is as follows:

> "With regard to your reference to the arbitration clause, please note that the termination of your client s employment with Our Client is not a "dispute", therefore, the same is not arbitrable."

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10. In support of his contention, the petitioner has cited the following decisions: Badri Singh Vinimay Private Limited vs. MMTC Limited5 and RIICO Ltd & Ors vs. Manoj Ajmera& Ors.6

11. It is submitted that the so-called mandatory procedure, of which the respondent demands compliance, is untenable in law inasmuch as after the decision of the Hon ble Supreme Court inter-alia in Perkins Eastman Architect DPC & Anr. vs. HSCC (India) Ltd.,7 the arbitration clause in the contract to the extent that it contemplates unilateral appointment of an arbitrator by the respondent cannot be complied with ipso jure; and therefore, the respondent cannot demand compliance with it. It is argued, that there was no question of proposal of a name by either party,

and the only recourse for the petitioner was to seek appointment of an arbitrator by this court, which is why the present petition has been filed.

Discussion

12. Proceeding now to address and deal with the rival contentions of the parties, there are two distinct facets of the respondent s objection to notice dated 26.03.2020. These are:

> a) That the notice does not fulfil the ingredients of a valid request for „reference to arbitration under section 21 of the A&C Act;

and MANU/DE/0036/2020 at para 13 MANU/RH/0601/2007 at para 9 (2020) 20 SCC 760 This is a digitally signed Judgement.

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b) That the notice does not fulfil the ingredients for „seeking appointment of an arbitrator as required under section 11 of the A&C Act.

13. A valid request for reference under section 21 marks the commencement of arbitral proceeding. A valid request for appointment of an arbitrator under section 11, if met with omission, failure or refusal by the opposing party, is the foundation for an application to court for appointment of an arbitral tribunal.

14. It would therefore be in order, at this point, to extract the relevant portions of the aforesaid statutory provisions:

> Section 21:
>
> "21. Commencement of arbitral proceedings.--Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

Section 11:

> "11. Appointment of arbitrators--(1)...
>
> (2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
>
> (3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and --

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(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court;

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

(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 Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

(emphasis supplied)

15. To deal first with the question of whether notice dated 26.03.2020 was a valid request for reference to arbitration that is to say for invocation of arbitration, though parties have cited several decisions This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/003727 on the extent, scope, meaning and purport of section 21, for purposes of elucidating the necessary ingredients for a valid notice of invocation, the decision of a Co-ordinate Bench of this court in Alupro Building Systems Pvt Ltd (supra) would be sufficient. In that case, while analyzing section 21 of the A&C Act inter-alia from the standpoint of an application filed under section 11(6) of the A&C Act, it was held as follows:

"25. A plain reading of the above provision indicates that except where the parties have agreed to the contrary, the date of commencement of arbitration proceedings would be the date on which the recipient of the notice (the Petitioner herein) receives from the claimant a request for referring the dispute to arbitration. The object behind the provision is not difficult to discern. The party to the arbitration agreement against whom a claim is made, should know what the claims are. It is possible that in response to the notice, the recipient of the notice may accept some of the claims either wholly or in part, and the disputes between the parties may thus get narrowed down. That is one aspect of the matter. The other is that such a notice provides an opportunity to the recipient of the notice to point out if some of the claims are time barred, or barred by any law or untenable in fact and/or that there are counter-claims and so on.

"26. Thirdly, and importantly, where the parties have agreed on a procedure for the appointment of an arbitrator, unless there is such a notice invoking the arbitration clause, it will not be possible to know whether the procedure as envisaged in the arbitration clause has been followed. Invariably, arbitration clauses do not contemplate the unilateral appointment of an arbitrator by one of the parties. There has to be a consensus. The notice under Section 21 serves an important purpose of facilitating a consensus on the appointment of an arbitrator.

* * * * * This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/003727 "29. Of course, as noticed earlier, parties may agree to waive the requirement of such notice under Section 21. However, in the absence of such express waiver, the provision must be given full effect to. The legislature should not be presumed to have inserted a provision that serves a limited purpose of only determining, for the purposes of limitation, when arbitration proceedings commenced. For a moment, even assuming that the provision serves only that purpose viz. fixing the date of commencement of arbitration proceedings for the purpose of Section 43(1) of the Act, how is such date of commencement to be fixed if the notice under Section 21 is not issued? The provision talks of the „Respondent receiving a notice containing a request for the dispute "to be referred to arbitration". Those words have been carefully chosen. They indicate an event that is yet to happen viz. the reference of the disputes to arbitration. By overlooking this important step, and straightaway filing claims before an arbitrator appointed by it, a party would be violating the requirement of Section 21, thus frustrating an important element of the parties consenting to the appointment of an arbitrator.

"30.... Thus, the inescapable conclusion on a proper interpretation of Section 21 of the Act is that in the absence of an agreement to the contrary, the notice under Section 21 of the Act by the claimant invoking the arbitration clause, preceding the reference of disputes to arbitration, is mandatory. In other words, without such

> notice, the arbitration proceedings that are commenced would be unsustainable in law."

(emphasis supplied)

16. In the present case, on a objective and meaningful reading of notice dated 26.03.2020, it is seen that in the notice, the petitioner has said that he "would first require such dispute to be independently adjudicated by Arbitrator appointed under Clause U of the employment contract". It is further the petitioner s case as expressed in the notice, that the respondent could only have terminated the This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/003727 petitioner s services "upon a conclusive finding of fact" which would require "referring any disputes in this regard to arbitration". Lastly, the petitioner has said that, failing compliance by the respondent, counsel for the petitioner had clear instructions to initiate "appropriate legal action" against the respondent.

17. Since the law does not mandate any specific form, format, template or verbiage for a notice under section 21, what is to be examined is, whether in essence and substance, the notice contained a „request for a „dispute to be „referred to arbitration. In the opinion of this court in doing so, the court cannot adopt a pedantic approach to what must be said in a section 21 notice. Needless to say, that whether or not the ingredients of section 21 are met must be examined on a case-to-case basis, on a fair, objective and non-doctrinaire interpretation of the contents of a notice.

18. In Bharat Chugh vs. MC Agrawal HUF,8 a Co-ordinate Bench of this court discussed the requirements of when a notice amounts to one under section 21, in the following words:

> "31. A notice invoking arbitration, to my mind, must necessarily do that. It has to invoke arbitration. At the very least, it has to refer to the clause in the contract which envisages reference of the dispute to arbitration. Merely sending a notice, setting out the disputes between the parties and informing the addressee that civil and criminal legal remedies would be availed in the event of failure, cannot, in my view, constitute a notice invoking arbitration."

(emphasis supplied) 2021 SCC OnLine Del 5373 This is a digitally signed Judgement.

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19. In view of the contents of the notice dated 26.03.2020 as highlighted above, while there is no cavil with the position that the petitioner did not make any specific or direct request in that notice to the respondent to refer the disputes between them to arbitration, but in reply dated 21.04.2020 issued to that notice, the respondent itself clearly acknowledged that it read the contents of the notice as a reference to the arbitration clause; and in fact, the respondent went ahead to contend that the dispute relating to termination of the petitioner s employment is not a dispute at all, and is therefore not arbitrable. The ambiguity or vagueness in notice dated 26.03.2020 was therefore

answered by the respondent with a specific refusal of reference of the disputes to arbitration.

20. In the present case therefore, this court is of the opinion that, in essence and substance, the petitioner s notice dated 26.03.2020 did fulfil the ingredients of section 21, and did amount to a request for the disputes to be referred to arbitration, not least because the respondent also read the notice as such. If the intent and purpose of a section 21 notice is to put the other party on notice as to the disputes and claims, and of the intention to seek reference to arbitration, notice dated 26.03.2022 did amount to a valid „invocation notice.

21. The next issue that needs to be addressed is whether notice dated 26.03.2020 also fulfils the foundational ingredients for a petition under section 11, seeking the intervention of the court for appointment of an arbitrator.

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22. The observation in Alupro Building Systems Pvt Ltd (supra), are once again germane to the present case:

> "27. Fourthly, even assuming that the clause permits one of the parties to choose the arbitrator, even then it is necessary for the party making such appointment to let the other party know in advance the name of the person it proposes to appoint. It is quite possible that such person may be „disqualified to act an arbitrator for various reasons. On receiving such notice, the recipient of the notice may be able to point out this defect and the claimant may be persuaded to appoint a qualified person. This will avoid needless wastage of time in arbitration proceedings being conducted by a person not qualified to do so. The second, third and fourth reasons outlined above are consistent with the requirements of natural justice which, in any event, govern arbitral proceedings.
>
> "28. Lastly, for the purposes of Section 11(6) of the Act, without the notice under Section 21 of the Act, a party seeking reference of disputes to arbitration will be unable to demonstrate that there was a failure by one party to adhere to the procedure and accede to the request for the appointment of an arbitrator. The trigger for the Court's jurisdiction under Section 11 of the Act is such failure by one party to respond."

(emphasis supplied)

23. In order to test the validity of notice dated 26.03.2020 in the context of section 11, it is also necessary to analyse the arbitration clause contained in the employment contract, as extracted hereinbefore.

24. It is clear that in clause „U parties have not agreed to any procedure that derogates from the provisions of section 11; and the petitioner was bound therefore, to issue a notice to the respondent fulfilling the ingredients of section 11.

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25. Though clause „U provides that disputes between the parties shall be referred to arbitration "by a single arbitrator appointed by the Company" i.e. the respondent, as per the extant position of law, unilateral appointment by the respondent would be invalid9 and to that extent the wording of clause „U is inoperable, unenforceable, of no consequence and must therefore be severed. To be fair, the respondent has not even asserted its right to appoint an arbitrator unilaterally under clause U; and has therefore fairly conceded that the petitioner was not required to accept that part of the putative agreed appointment procedure.

26. The requirement of law is that under section 11(5), the petitioner should have issued a „request to the respondent, to agree to the appointment of an arbitrator, and should have given to the respondent 30-days to respond to such request. Only if the respondent has refused or failed to respond within the said period of 30 days, would the petitioner be entitled to move court under section 11(5) of the A&C Act seeking appointment of an arbitrator.

27. What is also required for a section 11(6) petition to be maintainable, is for the parties to substantiate that it has not been possible to obtain the constitution of an arbitral tribunal (with one or more members) in accordance with the provisions of that section.

28. In this behalf, it must first be seen if the parties had, or had not, agreed upon any procedure for appointment of the arbitral tribunal. The reason this is important is, that depending on whether there was, cf. Perkins Eastman Architects DPC (supra) This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/003727 or was not, an agreed appointment procedure would decide the pre- conditions required for a section 11 petition to be maintainable before court.

29. Since in the present case, clause „U contemplated that arbitration would be conducted „by a single arbitrator appointed by the Company , in the opinion of this court, the parties did have an agreed appointment procedure; though, by the subsequent decision of the Hon ble Supreme Court in Perkins Eastman Architects DPC (supra), such appointment procedure stood invalidated in law, the present case would fall within the ambit of section 11(6), and more particularly within section 11(6)(a).

30. The above position is founded upon the exposition of the law, as recently re-iterated by the Hon ble Supreme Court in Swadesh Kumar Agarwal vs Dinesh Kumar Agarwal and Ors.,10 to say that sections 11(5) and 11(6) contemplate two different scenarios, which are not inter-changeable, as follows:

"44. In view of the aforesaid discussion and for the reasons stated above, it is observed and held as under:--

(i) That there is a difference and distinction between section 11(5) and section 11 (6) of the Act, 1996;

(ii) In a case where there is no written agreement between the parties on the procedure for appointing an arbitrator or arbitrators, parties are free to agree on a procedure by mutual consent and/or agreement and the dispute can be referred to a sole arbitrator/arbitrators who can be appointed by mutual consent and failing any agreement referred to section 11(2), section 11(5) of the Act shall be attracted and in such a situation, the application for 2022 SCC OnLine SC 556 This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/003727 appointment of arbitrator or arbitrators shall be maintainable under section 11(5) of the Act and not under section 11(6) of the Act;

(iii) In a case where there is a written agreement and/or contract containing the arbitration agreement and the appointment or procedure is agreed upon by the parties, an application under section 11(6) of the Act shall be maintainable and the High Court or its nominee can appoint an arbitrator or arbitrators in case any of the eventualities occurring under section 11(6)(a) to (c) of the Act; ..."

(emphasis supplied)

31. In the present case, the respondent has „failed to act as required under the agreed procedure for appointment of an arbitrator on two counts. Firstly, the respondent declined to appoint an arbitrator in response to notice dated 26.03.2020, when, by its reply dated 21.04.2020, the respondent took the stand that the dispute relating to termination of the petitioner s employment was not a „dispute at all and was therefore not arbitrable; and secondly, when the respondent „failed to act by operation of law inasmuch as the arbitral mechanism of unilateral appointment by the respondent as contained in clause „U was rendered inoperable by virtue of the decision in Perkins Eastman Architects DPC (supra). To be sure, „failure to act remains as much a failure on the respondent s part even if it arises from impermissibility to act by reason of change or re-enunciation of law, as in the present case, by reason of the decision of Perkins Eastman Architects DPC.

32. In law, failure does not necessarily imply voluntary failure; but equally includes failure for involuntary reasons, in this case, the This is a digitally signed Judgement.

NEUTRAL CITATION NO: 2022/DHC/003727 action having been proscribed by law.11 This court has also recently held in Ms. Nidhi Jain vs. M/s G and B Fashions Private Ltd,12 that when prima-facie a dispute as canvassed by a party is made- out, merely because the other party denies the existence of such dispute, that itself is a dispute to be decided by an arbitrator.

33. In view of the above, this court is of the opinion that upon a fair, objective, meaningful and non-doctrinaire reading of petitioner s notice dated 26.03.2020, and respondent s reply dated 21.04.2020, it is clear that the petitioner had sought, but the respondent had declined, reference of their disputes to arbitration.

34. The petitioner was accordingly faced with the position contemplated under 11(6)(a); and was therefore entitled to file the present petition seeking appointment of an arbitrator through court.

35. Upon a conspectus of the averments contained in the petition and the submissions made, this court is satisfied that there is a valid and subsisting arbitration agreement between the parties; that this court has territorial jurisdiction to entertain and decide the present petition; and also that the disputes that are stated to have arisen between the parties as set-out inter-alia in invocation notice dated 26.03.2020 do not appear ex-facie to be non-arbitrable.

Maestas vs. American Metal Co., 20P. 2d 924:

> "However, we think that "fail" is distinguished from "refuse" which latter involves an act of the will, while the former may be an act of inevitable necessity. Taylor v. Mason, 9 Wheat. (U.S.) 325, 344, 6 L. Ed. 101; Bouvier's Law Dictionary."

Arb P 1168/2021 dated 23.08.2022 (Delhi High Court) This is a digitally signed Judgement.

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36. Accordingly, the present petition is allowed and Hon ble Mr. Justice A.K. Pathak, former Judge of the Delhi High Court (Cellphone No.:

> +91 9910384602) is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties.

37. The learned Sole Arbitrator may proceed with the arbitral proceedings subject to furnishing to the parties requisite disclosures as required under section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.

38. The learned Sole Arbitrator shall be entitled to fee in accordance with the Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

39. Parties shall share the arbitrator s fee and arbitral costs, equally.

40. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.

41. Parties are directed to approach the learned Sole Arbitrator appointed within 10 days.

42. The petition stands disposed of in the above terms.

43. Other pending applications, if any, also stand disposed of.

ANUP JAIRAM BHAMBHANI, J.

AUGUST 29, 2022 Ne/uj This is a digitally signed Judgement.