

Virender Khanna And Associates vs Airports Authority Of India on 28 March, 2025

Author: Sachin Datta

Bench: Sachin Datta

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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment pronounced on:

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ARB.P. 1265/2024

VIRENDER KHANNA AND ASSOCIATES

..... Petiti

Through: Mr. Ramesh Singh, Sr. Advocate

along with Mr. Ranjay, Advocate.

versus

AIRPORTS AUTHORITY OF INDIA

..... Respond

Through: Mr. Udit Gupta and Mr. Amarnath D

Sahoo, Advocates.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the A&C Act') seeks appointment of a sole arbitrator to adjudicate the disputes between the parties.

2. The petitioner, Virender Khanna and Associates (VKA), in collaboration with Aeroport de Paris Ingenierie (ADPi), [a French consultancy specializing in aviation design], participated in an international design competition floated by the Airports Authority of India (AAI) for the International Terminal Component of NSCBI Airport, Kolkata.

3. The petitioner's design proposal was accepted, and a contract was executed on 11.07.2005 between the Airports Authority of India (AAI), referred to as the "Authority" in the agreement and M/s Virender Khanna & Associates (VKA), New Delhi, referred to as the "Consultant". In terms of the agreement, the "Consultant" is represented by Mr. Virender Khanna.

4. Additionally, the agreement acknowledges that the "Consultant" i.e., M/s Virender Khanna & Associates is part of a consortium with M/s APDi of Paris. The relevant portion of the agreement dated 11.07.2005 is reproduced as under -

"AGREEMENT This agreement is made and executed at New Delhi on this day of 11th June 2005 between Airports Authority of India a body constituted under the Act of Parliament i.e. Airports Authority of India Act, 1994 (hereinafter called the

Authority) represented by Airports Authority of India and the term Authority shall mean and include its administrator, executors and assigns and M/s Virender Khanna & Associates (hereinafter called the Consultant) and which term shall mean and include its administrator, executors and assign to be represented by Mr. Virender Khanna. The consultant consists of the consortium as per the MOU enclosed and forming part of this agreement.

Whereas the Authority is desirous of getting the work of Architectural / engineering consultant services for the proposed International Terminal Building (Departure -----) at Kolkata Airport in West Bengal in India (hereinafter called the Work) done on the term and conditions hereinafter appearing."

5. The agreement dated 11.07.2005 was followed by a fresh / subsequent agreement dated 27.08.2007. The relevant portion of the agreement dated 27.08.2007 is reproduced as under -

"AGREEMENT This agreement is made and executed at New Delhi on this day of th 27 August 2007 between Airports Authority of India a body constituted under the Act of Parliament i.e. Airports Authority of India Act, 1994 (hereinafter called the Authority) and the term Authority shall mean and include its administrator, executors and assigns and M/s Virender Khanna and Associates, New Delhi (hereinafter called the Consultant) and which term shall mean and include its administrator, executors and assign to be represented by Mr. Virender Khanna. The consultant consist of the consortium as per the MOU with M/s ADPi of Paris, France (for International portion) and forming part of the agreement.

Whereas, the Authority is desirous of getting the work of Architectural / engineering consultancy services for the proposed new Integrated Passenger Terminal Building at NSCBI Airport, Kolkata in West Bengal in India (hereinafter called the Work) done on the terms and conditions hereinafter appearing."

6. Disputes arose regarding this second agreement dated 27.08.2007, prompting the petitioner to invoke the arbitration clause of the agreement.

7. As a result, the petitioner filed Arbitration Petition No. 11 of 2012 before this Court on 02.01.2012, seeking the appointment of an arbitrator. The petition was disposed of on 29.03.2012, following the appointment of Mr. S.K. Gupta as the arbitrator by the respondent.

8. However, the petitioner later discovered that Mr. S.K. Gupta had previously served as a consultant on the very same project. In light of this apparent conflict of interest, the petitioner formally raised objections, which ultimately led to Mr. S.K. Gupta's resignation on 27.09.2012.

9. Following Mr. S.K. Gupta's resignation, AAI appointed Mr. P.K. Gupta as the new arbitrator on 23.10.2012. However, the petitioner once again raised objections, citing serious concerns regarding Mr. P.K. Gupta's impartiality and potential conflict of interest.

10. To address these concerns, the petitioner filed an application seeking the termination of Mr. P.K. Gupta's mandate. However, the same was dismissed by the arbitrator on 02.03.2015. The petitioner challenged this decision in OMP(T) 29 of 2017 before this Court. However, the petition was withdrawn on 21.05.2018 with liberty to challenge the arbitrator's impartiality at an appropriate stage.

11. Subsequently, on 11.10.2019, Mr. P.K. Gupta delivered an arbitral award, deciding on the claims and counterclaims of both parties. However, both the petitioner and the respondent challenged the award in separate petitions: OMP (COMM) 40 of 2020 (filed by the petitioner) and OMP (COMM) 327 of 2021 (filed by respondent).

12. After hearing both parties, this Court, on 16.02.2024, set aside the arbitral award, finding it to be unsustainable. The Court further granted liberty to invoke arbitration afresh and allowed the parties to take benefit of Section 43(4) of the Arbitration and Conciliation Act, 1996.

13. The relevant portion of the judgment dated 16.02.2024 is reduced as under -

"41. Having regard to the above position, I am of the view that the impugned award dated 11.10.2019 is wholly unsustainable. Both petitions are therefore allowed, and the impugned award is set aside in its entirety. The parties are free to take steps in accordance with law for invocation of arbitration afresh. In such an event, parties will be at liberty to take the benefit of Section 43(4) of the Act."

14. Subsequently, the petitioner again invoked arbitration by sending a notice dated 23.03.2024. In response, the respondent, through an email dated 03.07.2024, proposed a panel of three arbitrators for the petitioner's consideration. However, on 15.07.2024, the petitioner declined to consent to any of the proposed names, citing the history of disputes between the parties.

15. In the above backdrop, the present petition has been filed by the petitioner seeking appointment of a sole arbitrator to adjudicate the disputes between the parties. These disputes arise out of and relate to the Agreement dated 27.08.2007, which governed the Architectural and Engineering Consultancy Services for the International Terminal Component of the proposed New Integrated Passenger Terminal Building at NSCBI Airport, Kolkata.

16. The central bone of contention is as regards the fee payable under the agreement. The initial agreement, dated 11.07.2005, stipulated a consultancy fee of 5% of the actual cost of work or the tendered cost, whichever was lower. The subsequent agreement dated 27.08.2007, in clause 2.3, provided as under -

"2.3 In consideration of the professional services rendered by the Consultant, he shall be paid a professional fee of 5% of the actual cost of the work or the awarded cost whichever is lower of the subhead of the works for which consultant has rendered Professional services. In addition to the professional fee, service tax will be paid as per the Act in vogue at the time of the payment of the bill. The initial payment shall

be made on approved preliminary estimated cost. The cost of the work shall not include costs of aerobridges, in-line Baggage handling Conveyor system, Baggage claim Belts, telephone exchange equipment, Specialized hand/Baggage security-scanning items, DG Sets, FIDs, CCTV, Surveillance CCTV, check-in counters, custom and immigration counters and dust bins. For effecting stage wise payments the cost of works shall be as specified in clause 4.1. Nothing extra shall be paid to the Consultant on account of Soil Investigation, site survey, vetting from IIT, presentations, model, computer simulation, presentation drawings etc. Items like travellers, escalators, elevators, counters, concourse and security hold chairs and furniture would be included towards payment till stage 4.

The payment to State Electricity Board for dedicated power supply may be included in the cost estimate of the project but not to be included/or payment to Consultant."

(emphasis supplied)

17. The dispute emerged following a communication from AAI, dated 24.01.2011, addressed to petitioner, which identified "discrepancies" in the agreement dated 27.08.2007. AAI claimed that the fee for professional services stated in the agreement differed from what had been authorized by its Board. According to AAI, the consultancy fee was to be calculated as 5% of the estimated cost or awarded cost, whichever was lower, as opposed to the actual cost of work.

18. The Consulting Agreement dated 27.08.2007 between the petitioner and the respondent contains an arbitration clause (Clause 12), which provides for resolution of disputes under the agreement. The same is reproduced as under -

"12.0. DISPUTE REDRESSAL In the event of any dispute, difference or question arising out of or concerning the agreement for the execution of work herein specified which can not be settled mutually the same shall be referred to the sole arbitrator appointed by Chairman, AAI. The arbitration proceedings will be governed by the provision contained in the Arbitration and Conciliation Act 1996 at New Delhi. The decision of the Arbitrator shall be final and binding for both the parties. Even in case of any dispute, difference or question arising out of this contract and the same is referred to arbitration, the Consultant shall continue to perform his duties under this agreement with due diligence and Authority will make the payment to the Consultant to the extent incorporated in the Agreement.

Action to appoint an Arbitrator shall be taken within two month from the date of communication made in writing by any party to the Chairman Airports Authority of India, Authority stating that a dispute has arisen and that the matter be referred to arbitration in accordance with this Agreement along with the list of quantified dispute to be referred for arbitration.

In all cases where the total amount of claims in dispute is Rs.75,000/- (rupees seventy five thousand only) and above, the arbitrator shall give reasons for the award.

Subject as aforesaid the provision of the Arbitration & Conciliation Act 1996 or any statutory modification or re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause."

19. Learned counsel for the respondent has sought to oppose the present petition on the following grounds :-

i. It is submitted that the petitioner, referred to as the "Consultant" in the contracts, entered into agreements with the respondent both as a "Partner" and as a "Proprietor." It is submitted that the petitioner has not provided authorization from its partner, M/s APDi of Paris, for invoking arbitration. Citing a judgment of the Bombay High Court in the case of Shailesh Ranka v. Windsor Machines Limited, 2023 SCC Online Bom 2704, the respondent argues that a partner cannot unilaterally initiate arbitration proceedings without the consent of the other partner(s), as per Section 19(2) of the Partnership Act, 1932.

ii. The respondent contends that the petitioner's application for the appointment of an arbitrator under Section 11(6) is premature. It is submitted that the respondent is open to refer the matter to mediation under the AAI Mediation Policy, and the petitioner's request to invoke arbitration bypasses the option for mutual settlement.

iii. It is submitted that the dispute resolution clause specifies that the arbitration proceedings will be governed by the A&C Act, and the arbitrator will be appointed by the AAI. The Respondent maintains that given the technical nature of the dispute, particularly in the field of Architectural/Engineering Consultancy Services, it would be appropriate for an arbitrator from the respondent's panel to be appointed. It is also submitted that, if the Court is inclined to appoint an arbitrator, it should consider the names provided by the respondent, who are suitably qualified to adjudicate the dispute.

20. For the purpose of the present petition, I find no merit in the aforesaid objections raised on behalf of the respondent.

21. The first objection raised by the respondent is that the petitioner has no authorisation from its "partner", M/s APDi of Paris, to invoke arbitration.

In support of this contention, the respondent relies upon Shailesh Ranka (supra) which was rendered in the context of Section 19(2)(a) of the Partnership Act, 1932. The Court in that case held that the notice invoking arbitration was defective inasmuch as the same had not been issued by/or on behalf of all the partners of the concerned partnership firm.

22. In the present case, the description of the parties in the agreement itself makes it unambiguously clear that the contract was awarded to a "consortium" [and not to a partnership firm, unlike in the case of Shailesh Ranka (supra)], of which the petitioner is the "lead consultant". In several judicial pronouncements, distinction has been made between a consortium and a partnership firm 1.

23. In Automation Technologies (I) P. Ltd v. Unitech Ltd. & Ors, 2008 SCC OnLine Del 315, this Court recognised the right of a party (which was referred to in concerned agreement as part of a 'group') to independently invoke the arbitration agreement for the purpose of adjudication of disputes arising thereunder. The relevant observations are as under:-

24. "14. Taking the first objection raised by the respondents as to the maintainability of the present petition on the ground that the petitioner being only one constituent from amongst seven constituents who collectively form a part of the "party of the first part" as described in the Agreement dated 28th January, 1998 is disentitled from invoking the arbitration clause, it is necessary to examine the Agreement. It is pertinent to note that the Agreement starts by describing all the three parties by referring to them individually. Thus the RG Group which has been collectively described as the 'party of the first part' comprises seven persons from item Nos. 1(a) to M/S I.S. Enterprises vs Jamia Millia Islamia & Anr, 2021:DHC:3259-DB 1(g), the name of the petitioner finding place at item No. 1(f). However, although all the aforesaid constituents are collectively described as the 'RG Group' and as Directors/Shareholders in respondent No. 8 company and M/s. Continental Properties (P) Ltd., it is not as if the constituents of the party of the first part decided to form an association of persons and designated one from amongst them as authorized to deal for and on behalf of all the constituents, with the remaining parties to the Agreement, namely, party of the second and the third part respectively. This is not only borne out by a perusal of the Agreement, but also by glancing at the last page of the Agreement where signatures of the parties are affixed. In the column of the "party of the first part", all the seven constituents of the RG Group are independent signatories. It is also pertinent to note that respondent No. 8 company of which all the rest of the six constituents are stated to be the Directors/Shareholders, etc., is represented in its own right, through its Director, Mr. Ramnik Agarwal, duly authorized by the Board of Directors to sign and execute the Agreement on its behalf."

25. Furthermore, it is germane to note that the respondent, while responding to the arbitration notice dated 23.03.2024, did not deny either the existence of the arbitration agreement or the arbitrability of the dispute sought to be raised, or the capacity of the petitioner herein to invoke arbitration. Instead, the respondent proposed a panel of three arbitrators and suggested that a sole arbitrator be appointed from the said panel. Since the same was not acceptable to the petitioner, the present petition came to be filed.

26. Thus, it is evident that in the response to the notice of invocation of arbitration dated 23.03.2024, the respondent has acceded to the appointment of a sole arbitrator. The only point of difference between the parties was as regards the choice/selection of the sole arbitrator to adjudicate the disputes between the parties.

27. In the above circumstances, the objection raised by the respondent in the present proceedings to the constitution of an Arbitral Tribunal is belied by the stand taken by the respondent in its reply to the notice invoking arbitration.

28. In any event, for the purpose of the present proceedings only a prima facie view has to be taken by this Court as regards the existence of the arbitration agreement. This is now conclusively settled by the Supreme Court in *In Re: Interplay between Arbitration Agreement under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act, 1899*, 2023 SCC OnLine SC 1666 and *SBI General Insurance Co. Ltd. v. Krish Spinning* 2024 INSC 532. Any objection/s as regards the capacity/ locus of the petitioner to invoke arbitration or any objection/s as regards absence of capacity/authorisation in favour of the petitioner, are aspects which will necessarily be considered by a duly constituted Arbitral Tribunal. Since, prima facie, the existence of the arbitration agreement is established, there is no impediment to constituting an Arbitral Tribunal in these proceedings.

29. The second objection of the respondent is to the effect that the parties must be relegated to mediation prior to the invocation of arbitration. The same is also without merit. In this regard, the legal position has been reiterated in numerous judgments to the effect that a pre-arbitral mechanism for amicable resolution (including mediation) is directory in nature and does not necessarily preclude invocation of arbitration without taking recourse thereto.

30. In the case of *Oasis Projects Ltd. v. National Highway & Infrastructure Development Corporation Limited* 2023 SCC OnLine Del 645, it was held as under:-

"12. The primary issue to be decided in the present petition is, therefore, as to whether it was mandatory for the petitioner to resort to the Conciliation process by the Committee before invoking arbitration. Though Article 26.2 clearly states that before resorting to arbitration, the parties agree to explore Conciliation by the Committee, in my opinion, the same cannot be held to be mandatory in nature. It needs no emphasis that Conciliation as a Dispute Resolution Mechanism must be encouraged and should be one of the first endeavours of the parties when a dispute arises between them. However, having said that, Conciliation expresses a broad notion of a voluntary process, controlled by the parties and conducted with the assistance of a neutral third person or persons. It can be terminated by the parties at any time as per their free will. Therefore, while interpreting Article 26.2, the basic concept of Conciliation would have to be kept in mind."

31. In *Kunwar Narayan v. Ozone Overseas Pvt. Ltd.* 2021: DHC: 496, it was held as under:-

"5. Ms. Pahwa, learned Counsel for the respondents submitted that her only objection, to the petition, was that the petitioner has not exhausted the avenue of amicable resolution, contemplated by Clause 12 of the Share Buyback Agreement. I am not inclined to agree with this submission. The recital of facts, as set out in the petition, indicate that efforts at trying to resolve the disputes, amicably were made,

but did not succeed. Even otherwise, the Supreme Court in Demarara Distilleries Pvt. Ltd. v. Demerara Distilleries Ltd. and this Court, in its judgment in Ravindra Kumar Verma v. BPTP Ltd., opined that relegation of the parties to the avenue of amicable resolution, when the Court is moved under Section 11(6) of the 1996 Act, would be unjustified, where such relegation would merely be in the nature of an empty formality. The arbitration clause in the present case does not envisage any formal regimen or protocol for amicable resolution, such as issuance of a notice in that regard and completion of any stipulated time period thereafter, before which arbitral proceedings could be invoked. In the absence of any such stipulation, I am of the opinion, following the law laid down in Demarara Distilleries Pvt. Ltd. and Ravindra Kumar Verma v. BPTP Ltd. nothing worthwhile would be achieved, by relegating the parties to explore any avenue of amicable resolution. Besides, the appointment of an arbitrator by this Court would not act as an impediment in the parties resolving their disputes amicably, should it be possible at any point of time."

32. This Court, in *Pele Khezhie v. National Highways and Infrastructure Development Corporation Limited*, 2023:DHC:6221, while relying upon the observations of the Court in *Oasis Projects Ltd.* (supra), observed as under -

"12. In the present case, grave urgency has been expressed by the petitioner in seeking reference of the disputes to the arbitration inasmuch the respondent has issued a notice of intention to terminate the contract. In the circumstances, in view of the urgent adjudication sought by the petitioner, it would be unwarranted to relegate the petitioner to conciliation. As held in *Oasis Projects* (supra) and *Subhash Infraengineers* (supra), Section 77 of the A&C Act itself contemplates that notwithstanding any conciliation proceedings, it is open to a party to initiate arbitration proceedings where such proceedings are necessary for preserving its rights.

13. As such, there is no merit in the contentions raised by learned counsel for the respondent that it is not open to the petitioner to seek arbitration till the conciliation process, contemplated in Article 26.2 (supra) is exhausted.

17. It may also be noted that constituting an arbitral tribunal does not preclude the possibility of the parties pursuing a settlement of the inter se disputes. Section 30 of the A&C Act specifically provides that an arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitration proceedings to encourage settlement."

33. The aforesaid observations of the Court are squarely applicable to the present case, wherein the disputes between the parties have already been the subject of earlier arbitral proceedings, and the resultant award pursuant thereto has been set aside by this Court. At this stage, it will be utterly futile to subject the parties to mediation. As held in the aforesaid judgments, the same is not legally

mandatory. Also, in any event, it shall be open to the arbitrator to take recourse to Section 30 of the A&C Act to encourage settlement through mediation; conciliation or other procedures.

34. There is also no merit in the third objection of the respondent viz that given the technical nature of the disputes, a technical arbitrator from the respondent's panel should be appointed. It is now well settled that an appointment procedure mandating appointment/s from a panel unilaterally maintained by the respondent is no longer a valid procedure. In this regard reference may be made to Perkins Eastman Architects DPC v. HSCC (India) Ltd (2020) 20 SCC 760, TRF Limited v. Energo Engineering Projects Ltd, (2017) 8 SCC 377 Bharat Broadband Network Limited v. United Telecoms Limited, 2019 SCC OnLine SC 547 and Central Organisation for Railway Electrification Vs. ECI SPIC SMO MCML (JV) A Joint Venture Company, MANU/SC/1190/2024.

35. In the circumstances, there is no impediment to this Court appointing an independent arbitrator to adjudicate the disputes between the parties.

36. Accordingly, Ms. Justice (Retd.) Rekha Palli, Former Judge, Delhi High Court (Mobile No. 9810012120) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

37. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties the requisite disclosure as required under Section 12 of the A&C Act.

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

39. Both parties shall be at liberty to raise preliminary objections as regards arbitrability/jurisdiction, if any, which shall be decided by the arbitrator, in accordance with law.

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

41. Needless to say, nothing in this order shall be construed as an expression of opinion of this court on the merits of the case.

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

SACHIN DATTA, J MARCH 28, 2025/uk/sv