

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment delivered on: April 15, 2014*

+ **O.M.P No. 10/2011**

YACHIYO INDIA PVT LTD Petitioner
Through Mr. Jagat Rana, Advocate

versus

K.T HOLIDAYS PVT LTD & ANR Respondents
Through Mr. Nikhil Rohtagi, Advocate

+ **O.M.P No. 11/2011**

YACHIYO INDIA PVT LTD Petitioner
Through Mr. Jagat Rana, Advocate

versus

K.T HOLIDAYS PVT LTD & ANR Respondents
Through Mr. Nikhil Rohtagi, Advocate

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By this judgment I propose to decide the above mentioned two petitions filed by the petitioner who has assailed the award dated 30th September, 2010 passed by the sole Arbitrator N.N. Goswami, J., retired Judge of this Court. Since the facts and law in both the matters are common, therefore both the petitions are being decided by one judgment.

2. Brief facts of the case are as under :-

- (i) Petitioner, a Pvt. Ltd. company, is incorporated in India but controlled by the parent company in Japan. The respondent No.1 is a company duly incorporated under the Indian Companies Act, 1956. The Managing Director of the petitioner's company entered into an agreement with the respondents company dated 16th October 2008 for hiring (i) a chauffeur driven Honda Accord car for monthly rental of Rs.68,000/- plus service tax and VAT w.e.f 1st December 2008 to 30th November 2011 (ii) a chauffeur driven Toyota Innova at monthly rental of Rs.40,000/- plus service tax and VAT w.e.f 1st November 2008 to 31st October 2011. Petitioner had even deposited vide cheques of Rs.2,54,714/- and Rs.1,49,832/- as security money for hiring of Honda Accord and Toyota Innova cars respectively.
- (ii) Petitioner paid the hiring charges regularly to the respondents till March 2009. Thereafter, due to unforeseen slump in the economy, the petitioner company had to suspend its Indian operations and all its employees were called back to Japan. The petitioner terminated the agreement with the respondent vide e-mail notice dated 30th March 2009 w.e.f. 1st April 2009 and requested them to remove the cars from parking lots of Sun City Heights, Sector 54, Gurgaon, Haryana where drivers of respondents used to park the vehicles.
- (iii) The respondents protested against the said termination letter and even the legal notice for damages/compensation. Since the petitioner did not respond favorably, the respondents invoked the Arbitration clause in the agreement and appointed Sole Arbitrator to resolve the disputes between the parties.

- (iv) The petitioner filed application under Section 11, 12 and 13 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”) wherein it was stated that this tribunal had no jurisdiction to entertain the reference of arbitration as petitioner company is controlled by company based in Japan and Mr. Kobayashi is of Japanese nationality. The copy of the application was duly served on respondents. The response to the application was filed and the application was set down for arguments. In the meanwhile the respondents filed statement of claim and it was agreed by the counsel for the parties that since no oral evidence was necessary, the whole matter could be decided together.
- (v) The case of the respondents is that the petitioner had asked for Honda Accord and Toyota Innova and both these models were available with the respondent in his fleet of cars. However, the petitioner insisted on brand new cars with colours of their choice and white number plates. Initially the respondents were hesitant to invest such a large amount but the petitioner gave guarantee in writing that it would enter into contract for a minimum period of three years and it would not terminate the contract for atleast three years. It is thus pleaded by the respondent that the unilateral action of the petitioner in terminating the agreement is illegal and dishonest and cannot be sustained. As a result has claimed a sum of Rs.26,72,128/- minus the security deposit of Rs. 2,54,715/- for Honda car and Rs.15,22,720/- minus the security deposit of Rs.1,49,832/- for Innova car. These figures include the rental for

the remaining period along with all taxes such as service tax and VAT. In addition the claim is for legal costs and interest.

- (vi) In the counter statement, the petitioner raised preliminary objections that the vehicles were fraudulently hired out by the respondents against Motor Vehicle Act. The arbitrator has no jurisdiction to entertain the reference of arbitration as petitioner's company is controlled by company based in Japan and Mr. Kobayashi is of Japanese nationality. The petitioner was fraudulently induced by the respondents to sign the illegal agreement. It is stated that the petitioner never insisted on being provided with brand new cars or of particular colour. It is also pleaded that the petitioner has paid for the cars for the period it used and due to unforeseen slump in the economy/international market which affected its business the petitioner was forced to suspend its operations in India and Mr. Kobayashi was directed to report back to Japan. According to the petitioner, the respondent had accepted the termination and had called back its drivers.

3. Aggrieved thereof by award dated September 30, 2010 present petition has been filed.

4. Though the award has been challenged by raising many grounds on merit, however, at the time of hearing of the petitions, Mr. Jagat Rana, learned counsel appearing on behalf of the petitioner, has mainly argued both the petitions on the issue that the learned Arbitrator by passing the award has completely ignored the challenge of his appointment and jurisdiction raised by the petitioner in its application dated 8th May, 2009. According to him, the award is void ab-initio. He argued that the application

of the petitioner under Sections 11, 12 and 13 of the Act was not decided by the learned Arbitrator despite of raising objections about his appointment by the petitioner. The respondent in the present case has failed to comply the procedure for the appointment of the Arbitrator under Section 11 of the Act. The appointment of sole Arbitrator was unilateral by referring the disputes without consent of the petitioner. The same was illegal. Thus, the award is liable to be set aside. He has also opposed the findings of the Arbitrator for granting 50% of the rent of the vehicles, his argument is that the said finding of the learned Arbitrator was without any basis or giving any cogent reason to grant such 50% rent claimed by the respondent and even the finding of the learned Arbitrator for grant of the exorbitant interest @ 12% per annum is completely misplaced. The learned counsel in support of his submissions has referred to the following two decisions:

- i) ***Dharma Prathishthanam vs. M/s. Madhok Construction Pvt. Ltd.***, AIR 2005 SC 214.
- ii) ***Bhartia Cutler Hammer Ltd. vs. AVN Tubes Ltd.***, 1995 (33) DRJ 672.

5. Mr.Nikhil Rohtagi, learned counsel appearing on behalf of the respondent, before dealing with the submissions of the learned counsel for the petitioner, briefly narrated the facts that the petitioner persuaded and prevailed upon the respondent to buy a brand new Honda Accord car (Elegance model) and a Toyota Innova of their choice for use and also to arrange chauffeurs with mobile phones etc. The petitioner was fully aware that huge expenditure was involved. Therefore, the petitioner had promised that they shall keep the vehicles for a minimum guaranteed period of three years. In view thereof, the respondent entered into a written agreement dated 16th October, 2008 which stipulated that the contract shall not be

terminated by the petitioner company during the contracted period of three years starting from 1st December, 2008 and ending on 30th November, 2011. Despite that, the petitioner terminated the contract in four months time on 30th March, 2009 contrary to the written agreement. In view thereof, the respondent had suffered heavy loss. Therefore, the respondent as per the agreement was entitled to recover the damages for expenditure and loss of profits occasioned by the breach of written contract.

6. In order to counter the argument of Mr.Jagat Rana, Mr.Rohtagi has referred the arbitration clause which stipulated that in case of any dispute, a retired judge of Delhi High Court was to be appointed by the respondent and the award of the Arbitrator shall be final and binding. His argument is that the petitioner itself agreed in the agreement that the right to appoint the Arbitrator was conferred with the respondent who accordingly appointed late Mr.Justice N.N. Goswami, retired Judge of this Court as sole Arbitrator to adjudicate the disputes between the parties. The agreement permits the respondent to appoint an Arbitrator. The appointment of the learned Arbitrator was as per agreement. His client has rightly appointed the retired Judge of this Court. Thus, the filing of the application by the petitioner under Sections 11, 12 and 13 of the Act was totally baseless and it was filed for the purpose of delaying the proceedings.

7. He argues that the main averment made in the application filed by the petitioner was made in para 7. Mr.Masami Kobayashi, on whose behalf the application was filed, stated that he is Japanese national and covered by international arbitration and if Arbitrator is to be appointed, his nationality has to be other than Indian and he does not submit to the jurisdiction of the Arbitrator already appointed by the respondent. Mr.Rohtagi states that

contents of the application filed by the petitioner on behalf of Mr.Masami Kobayashi were totally against the terms of agreement.

8. As far as reliance on two decisions by the petitioner is concerned, his argument is that both the decisions were rendered under the old Act i.e. Arbitration Act, 1940. With regard to the decision of ***Dharma Prathishthanam vs. M/s. Madhok Construction Pvt. Ltd.*** (supra), his argument is that the facts and circumstances in the referred case are materially different. The arbitration clause 35 of the agreement was totally distinct than the arbitration clause in the present matter. The same is referred and reads as under:

“Settlement of disputes shall be through arbitration as per the Indian Arbitration Act.”

His submission is that in case the said clause would have been existed arbitration agreement in the case in hand, then the position would have been different and decision referred would be applicable. In the present matter, the arbitration clause permits the respondent only to appoint the sole arbitrator as retired Judge of this Court. Therefore, the arguments of the petitioner are totally misplaced in the present case. Similar is his submission with regard to the other decision referred in the case of ***Bhartia Cutler Hammer Ltd. vs. AVN Tubes Ltd.*** (supra). Mr.Rohtagi argues that both the decisions are rendered under the old Act. With the consent of the parties such clause is permissible. Therefore, there is hardly any force in the submission of the petitioner. Both the cases referred are distinguishable. His argument is that the objections filed by the petitioner under Section 34 of the Act have no force because of the reason that the arbitration agreement is based on the consent given by the petitioner at the time of entering into the contracts. Under the new Act, it is permissible to the parties to make

appointment of the Arbitrator as per agreement and the parties are bound by them. The arguments of the petitioner are misplaced. He relied upon the decision in the case of *Indian Oil Corporation Ltd. vs. Raja Transport (P) Ltd.*, (2009) 8 SCC 520, and submitted that the petitioner, of its own free will and accord, with open eyes and full knowledge entered into the contract dated 16th October, 2008 providing that a retired Judge of the Delhi High Court appointed by the respondent shall be the Arbitrator and therefore, the petitioner cannot challenge the appointment of the Arbitrator on the ground that the Arbitrator is not impartial or independent. The said challenge of the petitioner is not covered under Section 34 of the Act.

9. With regard to the next submission of the petitioner's counsel that the petitioner's application under Sections 11, 12 and 13 of the Act is not disposed of before passing of the award, his submission is that after filing the application, the petitioner has already proceeded with the proceedings raising no objection to decide the disputes between the parties. Therefore, even if the pending application is not decided, implicitly the objection of the petitioner is merged with the award passed by the learned sole Arbitrator in the absence of passing of pressing the application at the appropriate stage. In fact, the petitioner has given its consent to continue with the arbitration proceedings after filing the said application. Thus, under the new Act the petitioner is not entitled to raise the said objection again by filing of the frivolous objections under Section 34 of the Act.

10. After hearing the rival submissions of the parties and from the facts and circumstances of the present case, I am of the view that the questions which arise in the matter are: whether in a situation where the parties have agreed that the Arbitrator is to be a retired Delhi High Court Judge and as

per the arbitration agreement one party shall appoint the Arbitrator, can challenge to his appointment be made on the grounds that Arbitrator is not impartial and independent because he is appointed by one party, and whether under the facts and circumstances of the present case, the objections under Section 34 of the Act are maintainable. Before dealing with the objections raised by the petitioner, it is necessary to refer the arbitration clause in the matter. The same reads as under:

“Arbitration: All disputes arising out of this agreement shall be referred to an Arbitrator, a retired judge of the Delhi High Court, appointed by the owner and the award of the Arbitrator shall be final and binding. This agreement shall be subject to Delhi jurisdiction only. The proper law of the agreement will be Indian law and the courts at Delhi alone shall have exclusive jurisdiction. The venue for the settlement of disputes shall be Delhi. The parties shall bear their own costs.”

11. Learned counsel for the petitioner did not dispute that as per arbitration clause, it was agreed between the parties at the time of signing the contract that the respondent was at liberty to appoint the Arbitrator and as per clause, the learned Arbitrator was admittedly a retired Judge of Delhi High Court. In case the award rendered by the learned Arbitrator is read carefully, it is clearly mentioned in the award that the respondent filed an application under Sections 11, 12 and 13 of the Act. It was recorded by the learned Arbitrator that the response to the said application was filed and the application was set down for arguments. In the meanwhile, the respondent filed the statement of claim and it was agreed by the learned counsel for the parties that since no oral evidence was necessary, the whole matter could be decided together.

12. In the award, the objection of the petitioner which was mentioned in last para of the application under Sections 11, 12 and 13 of the Act was

considered by the learned Arbitrator at page 10 of the award wherein the objection was decided on merit and the findings of the learned Arbitrator read as under:

“The next objection is that this Tribunal has no jurisdiction as the respondent is controlled by company in Japan and Mr.Kobayashi is a Japanese National. The reliance is on Section 2(1)(f) of the Act, which is as under:-

(f) “International commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-

- (i) An individual who is a national of, or habitually resident in, any country other than India; or
- (ii) A body corporate which is incorporated in any country other than India; or
- (iii) A company or an association or a body of individuals whose central management and control is exercised in any country than India; or
- (iv) The government of a foreign country;

The first question is as to whether this can be said to be an “International commercial Arbitration”. The answer can only be in the negative. The agreement does not relate to any trade or commerce as it is a simple agreement for hiring of cars for a limited period and for personal use of the officers concerned.

In any case the place of Arbitrator and the mode of the appointment of the Arbitrator stand determined in the Agreement and the parties are bound by the same. The objection has therefore no merit and is rejected.”

13. Even otherwise, the following judgments are necessary in order to deal with the arguments of the petitioner:

- i) ***M/s Neelakantan & Bros. Construction vs. Superintending Engineer, National Highways, Salem and Ors.***, (1988) 4 SCC 462.

“2. Shri A.K. Sen, learned counsel for the petitioners, urged before us that once an arbitrator had entered into reference, the next incumbent could not conclude the said arbitration proceeding without a fresh agreement. In the facts of this case, as the petitioner had knowledge of the alleged defect and had acquiesced in the proceedings before the successor, namely, Thiru Cornelius; we are of the opinion, that this contention of Shri Sen cannot be entertained. It was contended that there was violation of the principles of natural justice. This objection cannot be entertained. If the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiescence in the appointment made with full knowledge of all the circumstances. they will be precluded from objection to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence, explains Russell on Arbitration. 18th Edition at page 105. This was stated by the Judicial Committee long ago in Chowdhury Murtaza Hossein v. Mussumat Bibi Bechunnissa, 3 I.A. 209. See also the observations of P.B. Mukherji, J. in the decision of the Calcutta High Court Calcutta, A.I.R. 1456 Calcutta 470 at 472. This Court held in N. Challappan v. Secretary, Kerala State Electricity Board and another, [1975] 1 S.C.C. 289 that acquiescence defeated the right of the appellant at a latter stage. See also the observations of this Court in Prasun Roy v. The Calcutta Metropolitan Development Authority and another, [1982] 2 Scale 125. See Russell on Arbitration, 20th Edition, pages 432-435. Shri Sen contended that no notice was issued after the appointment of the new arbitrator. This was factually incorrect, as mentioned before. Then, it was said that the award was bad as it did not consider all the claims. This also cannot be entertained. It must be assumed that the arbitrator had considered all the evidence adduced before him. There was no disregard of any principle of law. There was nothing to indicate that the arbitrator had not considered all the evidence. Unless there was a patent mistake of law and gross misstatement of facts resulting in miscarriage of justice or of equity, the award remains unassailable. In this

case the arbitrator gave no reason for the award. There is no legal proposition which is the basis of the award, far less any legal proposition which is erroneous. There is no appeal from the verdict of the arbitrator. The Court cannot review, in such circumstances, the award and correct any mistake in the adjudication by the arbitrator-See *Champsey Bhara B Company v. Jivray Ballo Spinning and Weaving Company Ltd.*, 50 I.A. 324 and the observations of Bachawat, J. in *Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd.*, Indore, (1967) 1 S. C. R. 105 of this Court.”

- ii) *M/s. Construction India vs. Secretary, Works Department, Government of Orissa and Ors.*, (1998) 2 SCC 89.

“12. The jurisdiction which is conferred on an Arbitrator is on account of the consent of the parties to the arbitration agreement. Before the Arbitrator, the objection as to jurisdiction of the Arbitrator was withdrawn by the respondents. It shows acquiescence on the part of the respondents in the continued jurisdiction of the Arbitrator to decide the dispute. The minutes recorded show that after raising the objection, the respondents have withdrawn the same. This would indicate a conscious acquiescence on the part of the respondents in the continued jurisdiction of the Arbitrator. In the case of **N. Chellappan v. Secretary, Kerala State Electricity Board & Anr.** (1975 [2] SCR 811 at 817), this Court on similar grounds held that the State Electricity Board was precluded from challenging the jurisdiction of the umpire. A passage from Russell on Arbitration, 17th Edition at page 215 was relied upon. It is to the following effect:

"If the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence."

- iii) *D.Ranganayakulu vs. Superintendent Engineer, NSCR O & M and Anr.*, (2010) 13 SCC 113.

“10. In view of the notice issued by this Court limited to the question as to whether the parties participated before the arbitrator without any demur would have effect of waiver of the parties to raise an objection about the jurisdiction of the arbitrator is the sole question to be determined in these appeals. In this connection, Mr. L. Nageswara Rao has referred to a decision of this Court rendered in *Sathyanarayana Brothers (P) Ltd. Vs. T.N. Water Supply & Drainage Board*, (2004) 5 SCC 314. This Court in the said decision considered a similar question and pointed out in paragraph 9 as under:-

"9. ...We find that the stage to have raised such an objection as to whether the dispute was liable to be decided by two arbitrators or a Board of three arbitrators had passed long before. The two arbitrators were appointed in accordance with the provisions of the arbitration clause as well as the third arbitrator called umpire. The mode of hearing was adopted in the manner that the dispute was heard by two arbitrators appointed by the respective parties. The matter was referred to the umpire since there was no agreement between the two arbitrators. There is no justification now at this stage to raise such an objection that the Board of three arbitrators should have decided the matter. Such a plea contradicts its own action, and it seems to be taken now to wriggle out of the award ultimately given by the umpire, but it would not be permissible at this stage. Shri Nageswara Rao, learned senior counsel, has placed reliance upon *Russell on Arbitration* -- "Loss of right to object". It states as under:

"A party who objects to the award on the ground that the Tribunal lacks substantive jurisdiction, should not only act promptly, but should also take care not to lose his right to object. A party who takes part or continues to take part in the

proceedings is in a different position from someone who takes no part in the proceedings. The latter cannot lose his right to object as long as he acts promptly to challenge the award once it is published. The former must, however, state his objection to the Tribunal's jurisdiction 'either forthwith or within such time as is allowed by the arbitration agreement or the Tribunal'. That statement, which should be recorded in writing and sent to the Tribunal and the other parties, should not only mention the jurisdiction objection but also make clear that any further participation in the arbitration will be without prejudice to the objection. If that is not done, the party concerned may not be able to raise that objection before the court 'unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know or could not with reasonable diligence have discovered the grounds for the objection'. A person alleged to be a party to arbitral proceedings but who takes no part in those proceedings may at any time apply to the court for a declaration, an injunction or other relief concerning the validity of the arbitration agreement, the proper constitution of the Arbitral Tribunal and any matter submitted to arbitration in accordance with the arbitration agreement".

- iv) *Societe Pepper Grenoble S.A.R.L. vs. Union of India & Ors.*, AIR 2004 Del 376.

“13. Although I find the contentions and the preliminary objections on the maintainability of the writ petition by the respondents well founded, I am of the view that in the instant case the petitioner has failed to make out any case for interference in the exercise of writ jurisdiction. The

whole case of the petitioner is proceeding on the basis that by one party having a right to nominate an Arbitrator, it is becoming a judge on in its own cause. The said assumption as rightly observed by the Arbitral Tribunal is wholly misplaced. The petitioner has also completely misconstrued the judgment of the Supreme Court in the case of Executive Engineer, Irrigation Division, Puri (Supra). The Supreme Court in the said case had upheld the appointment by the Chief Engineer, who had appointed Shri D. Sahu, Superintending Engineer (Irrigation), as an Arbitrator. The Court noticed that the term "State Public Works Department" would include within its ambit several departments including Department of Irrigation. This did not mean that the Superintending Engineer (Irrigation) was not competent to adjudicate upon the disputes. All that was required was that he should not be connected with the actual work in question viz. Excavation of Satanka Distributory. In the instant case, even the appointment of first Arbitrator had nothing to do with the actual supply under the purchase contract. The submission of the counsel that the said judgment was distinguishable, in as much as, it recognizes the expertise of the Arbitrator which was required, does not flow from any observation or facts as given in the judgment. The learned Arbitrator has rightly held that no adjudicatory function was involved by the mere nomination of the Arbitrator. The challenge to the said nomination has also been negated by the Supreme Court in the case of Secretary to the Government, Transport Department Mashas Vs. Munuswamy, International Airport Authority of India Vs. K.D. Bali , S. Rajan Vs. State of Kerala and Bhupinder Singh Vs. Union of India 1995 SC 2464.

- v) ***Datar Switchgears Ltd. vs. Tata Finance Ltd. and Anr.***, (2000) 8 SCC 151.

“21. We need not decide whether for purposes of sub-clauses (4) and (5) of Section 11, which expressly prescribe 30 days, the period of 30 days is mandatory or not.

22. While interpreting the power of the Court to appoint arbitrator under Section 8 of the Arbitration Act, 1940, this Court in *Bhupinder Singh Bindra Vs. Union of India and Another* (1995) 5 SCC 329, in para 3 held as under:-

"It is settled law that court cannot interpose and interdict the appointment of an arbitrator, whom the parties have chosen under the terms of the contract unless legal misconduct of the arbitrator, fraud, disqualification etc. is pleaded and proved. It is not in the power of the party at his own will or pleasure to revoke the authority of the arbitrator appointed with his consent. There must be just and sufficient cause for revocation."

23. When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigor of the doctrine of "freedom of contract" has been whittled down by various labour and social welfare legislation, still the court has to respect the terms of the contract entered into by parties and endeavor to give importance and effect to it. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause."

14. As far as merit of the case is concerned, despite of claim raised by the respondent as per agreement, the learned Arbitrator, considering all the facts and circumstances of the case, had only awarded 50% of the basic rent in respect of both the cars for unexpired period in order to meet the ends of justice. Therefore, the objection of the petitioner, that his application was not specifically decided, is totally without any substance. It is evident from the award that the learned Arbitrator has dealt with the objection raised in its application filed under Sections 11, 12 and 13 of the Act.

15. In view of abovesaid reasons and facts and circumstances in the present case, I am of the considered opinion that the decisions referred by the petitioner do not help the case of the petitioner. Thus, the submissions of the petitioner cannot be accepted.

16. Under the circumstances of the present case and specific findings arrived at by the learned Arbitrator with regard to the objection raised by the petitioner about his appointment, the award cannot be treated as invalid. The objections filed by the petitioner are without any substance. There is not even an iota of evidence that the arbitrator was partial or not independent. None of the objections raised by the petitioner comes within the purview of the Act. As far as the objection of the petitioner that the petitioner's application under Sections 11, 12 and 13 of the Act is not decided is concerned, the same is totally misconceived. In case the award is read as a whole, the said objection is already recorded in the award and has been duly decided by the learned Arbitrator.

17. Both the petitions are accordingly dismissed.

18. No costs.

(MANMOHAN SINGH)
JUDGE

APRIL 15, 2014