

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Judgment reserved on : 26.11.2014
% Judgment delivered on: 01.12.2014

+ **ARB. P. 109/2013**

**REAL IMAGE MEDIA TECHNOLOGIES
PVT. LTD. PETITIONER**

Versus

DLF UTILITIES LTD. RESPONDENT

Advocates who appeared in this case:

For the Petitioner : Mr. Amol Chitale, Advocate

For the Respondent : Mr. Sandeep Sethi, Sr. Advocate with Mr. Ankur
Khandelwal, Advocate

**CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER**

RAJIV SHAKDHER,J

1. This is a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short the Act). The reliefs prayed for, broadly, are : (i). appoint an independent arbitrator (ii). declare null and void the appointment of the person appointed by the respondent as an arbitrator; (iii). stay further proceedings before the arbitrator appointed by the respondent, till final adjudication of the instant matter; and (iv). lastly, cost of proceedings be awarded in favour of the petitioner.

2. For the purposes of adjudicating upon the present petition, I only intend to touch upon those facts, which are necessary for dealing with the reliefs sought in the matter:-

2.1 I may indicate, at the very outset, that the existence and the validity of

the arbitration agreement is not in dispute. The parties herein are in lis only with respect to (as is evident from the reliefs sought in the petition, which are paraphrased above), whether the respondent's right to appoint an independent arbitrator, subsisted on the date on which, the said right, was exercised by it.

2.2 The petitioner, evidently, had entered into an equipment services agreement (in short agreement) with the respondent on 10.10.2011. It appears that disputes arose between the parties, which led to exchange of correspondence; culminating with the respondent issuing an e-mail dated 28.11.2012 whereby, the aforementioned agreement was terminated. While terminating the agreement, a 30 days notice was served upon the petitioner. Furthermore, the petitioner, was also called upon to clear the outstanding debt in the sum of Rs.40,51,242/-, emanating, purportedly, from the aforementioned agreement towards, what is termed as, VPF Sharing Services.

2.3 In response, the petitioner shot off a letter dated 07.12.2012 wherein, it questioned the legal validity of the e-mail dated 28.11.2012 as, according to it, it was not in consonance with clause 16 of the agreement. Briefly, clause 16 of the agreement requires, the aggrieved party to issue a notice of 30 days to the defaulting party in order to enable it to cure the breach. The said clause further requires that, in case, the breach is not cured, the aggrieved party can then proceed to terminate the agreement by giving a 30 days written notice, in that behalf.

2.4 The petitioner, while giving its response to each of the allegations made in e-mail dated 28.11.2012, also refuted that a sum of Rs.40,51,248/-, as on 31.10.2012, was due and payable by it, towards VPF Sharing Services.

2.5 Evidently, for the next two months, there was no exchange of any

correspondence between the parties herein. However, on 08.02.2013, a communication was sent in the form of a letter to the respondent wherein, while reiterating the contents of its earlier communication dated 07.12.2012, the petitioner, in no uncertain terms stated that, a dispute had arisen between them regarding the validity of the termination of the agreement carried out by the respondent.

2.6 The petitioner, while stating so brought to the notice of the respondent the provisions of clause 17.5 of the agreement. The said clause in the agreement contains the arbitration agreement obtaining between the parties. The clause, however, mandates that before parties proceed to arbitration, an attempt should be made to resolve inter se disputes, amicably.

2.7 It is in this context, that the petitioner by the very same letter i.e., letter dated 08.02.2013, called upon the respondent to attempt an amicable resolution of the dispute, regarding the validity of the purported termination of the agreement within a period of 30 days from its receipt, failing which, it conveyed, that it would be constrained to take further action in accordance with clause 17.5 of the agreement.

2.8 The respondent, evidently reacted with alacrity and by a communication dated 21.02.2013, sent through its lawyers, inter alia, indicated that the parties attempt at resolving the dispute had failed, and therefore, it had proceeded to appoint an arbitrator, in the matter, to adjudicate the disputes, which had arisen between the parties herein.

2.9 I must note here that perhaps a part of the reason why, the respondent acted with such speed was that in the interregnum the petitioner had instituted a petition under Section 9 of the Act, in which, notice had been issued, and that notice, had got served upon the respondent on 11.02.2013. To complete the narration, one may only note that the said petition is

numbered as : OMP 1177/2012. In this petition, notice was issued on 17.12.2012.

3. Notably, no interim orders have been passed to date in the said petition, though, pleadings in that petition are also complete. Consequently, judgment in the said case was also reserved after arguments were heard alongwith the captioned petition. It was indicated to the counsels, to which they agreed, that either way, OMP No. 1177/2012 will be placed before the arbitrator for disposal.

SUBMISSIONS OF COUNSELS

4. It is in the background of the aforesaid brief facts that, arguments have been advanced by Mr. Amol Chitale on behalf of the petitioner, while on behalf of the respondent, submissions have been made by Mr. Sandeep Sethi, the learned senior counsel assisted by Mr. Ankur Khandelwal.

5. Mr. Chitale's submissions can be summarised, broadly, as follows :-

5.1 The respondent had lost its right to appoint an arbitrator in the matter in view of the fact that upon disputes having arisen between the parties, it was incumbent upon parties in the first instance to endeavour to settle the dispute amicably, and if, parties failed to resolve the dispute, amicably, within 30 days from the date when the dispute arose, the dispute had to be referred to arbitration. In terms of clause 17.5 of the agreement, the respondent could appoint a third party independent arbitrator only, within 30 days from the date the 30 days period for attempting an amicable resolution of the dispute, ended.

5.2 In consonance with the above, it was contended that if, the court were to accept 07.12.2012 as the date when the disputes arose between the parties, the 30 days period for amicable resolution of the dispute would end on 06.01.2013, and therefore, the window available to the respondent to appoint

an arbitrator got closed after 30 days thereafter i.e., 05.02.2013.

5.3 In the instant case the respondent had appointed an arbitrator on 21.02.2013, which was clearly, beyond the time prescribed in clause 17.5 of the agreement.

5.4 In the alternative, it was argued that if the court were to accept that the disputes arose between the parties only on 08.12.2013, even then, the appointment of the arbitrator made by the respondent was not in consonance with clause 17.5 of the agreement as, it had not allowed expiration of the 30 days period provided for amicable resolution of the disputes, which had arisen between the parties.

5.5 Therefore, in line with what was submitted above, it was contended that the respondent had even by this yardstick lost the right to appoint an arbitrator as, in the meanwhile, the captioned petition had been lodged with this court, for appointment of an arbitrator.

6. Mr. Sethi, on the other hand, submitted that while, clause 17.5 of the agreement provided for a time frame within which parties had to attempt an amicable resolution of the disputes, there was no time frame provided in the said clause for referring the disputes to arbitration. It was thus, submitted, that upon an intimation being received from the petitioner on 08.02.2013, an arbitrator was appointed within a period of less than 30 days. Mr. Sethi, contended that the respondent cannot be faulted for acting with due expedition in the appointment of an arbitrator, in the matter.

6.1 It was further contended that respondent could not have lost its right, to appoint an arbitrator even if, it had not acted within the 30 days period as long as the appointment was made before a petition was lodged in this court for the said purpose.

6.2 In support of his submission, Mr. Sethi relied upon the judgment of

the Supreme Court in *Datar Switchgears Ltd. Vs. Tata Finance Ltd. and Anr. (2000) 8 SCC 151*.

REASONS

7. I have heard the learned counsels for the parties and perused the record.

8. The arguments advanced by both parties principally turn on the construction of clause 17.5 of the agreement. For the sake of convenience, the same is extracted hereinafter :-

“17.5 Arbitration - If any dispute arises between the parties during the subsistence of this Agreement or thereafter, in connection with the validity, interpretation, implementation or alleged material breach of any provision of this Agreement the parties shall endeavour to settle such dispute amicably.

In case of failure by the parties to resolve the dispute in the matter set out above within 30 days from the date when the dispute arose, the dispute shall be referred to arbitration, and the arbitration proceedings shall be conducted in accordance with the India Arbitration and Conciliation Act, 1996 or any statutory modifications or re-enactment thereof (Act) for the time being in force. The arbitration shall be held at a mutually agreed place, and all the proceedings shall be conducted in English. The arbitral tribunal shall consist of a sole arbitrator appointed by DUL who shall be a third party and an independent person (other than a current or a former employee of DUL). In the event such an arbitrator has not been appointed by DUL within 30 days from the date of reference to an arbitration, the parties agree to a sole arbitrator to be appointed in accordance with the provisions contained in the Act.”

8.1. A close reading of the said clause would show that it can, broadly, be sub divided (for the sake of convenience, and in order to appreciate the time lines fixed therein), into three parts.

8.2 The **first part** of the clause provides if any **dispute arises between parties during the subsistence of the agreement or thereafter, parties**

shall endeavour to settle such dispute amicably. The disputes to which the clause applies is, widely worded, and therefore, quite correctly, there is no quarrel as to the fact that the disputes qua parties herein, are arbitrable.

8.3 The **second part** of the clause provides that **in case parties fail to resolve the dispute amicably within 30 days from the date when the dispute arose, the dispute shall be referred to arbitration** and the arbitration proceedings will be conducted in accordance with the provisions of the Act.

8.4 The **third part** of the clause, comprises of two sub-parts. First, it confers a power on the respondent to appoint an arbitrator. Second, if there is a reference, the power, has to be exercised within 30 days from that date. The two sub-parts, to my mind, are mutually exclusive. The necessary consequences of such a failure as provided in the clause is that, the sole arbitrator, will be appointed in accordance with the provisions of the Act.

8.5 In so far as the first part is concerned, there is no difficulty as admittedly, even according to the petitioner, the disputes arose on 07.12.2012. This is so stated, by the petitioner, in its letter dated 08.02.2013, while alluding to the fact that it had not received a response to its earlier communication dated 07.12.2012 whereby, it had challenged the validity of the respondent's e-mail dated 28.11.2012, terminating the agreement. The relevant extract from the letter dated 08.02.2013, is set out below, for the sake of convenience

“We refer to your e-mail dated 28th November 2012 terminating the Equipment Service Agreement dated 10th October, 2011 (Agreement), entered into between us. In this regard, we had sent our response letter dated 7th December, 2012 vide which we had communicated that the purported notice sent by you vide your aforementioned e-mail is unsubstantiated and not in consonance with the Agreement and cannot form a basis for

seeking a termination of the Agreement. Further that the Agreement continues to be valid and subsisting and any action on the side of either party needs to be strictly in accordance with the provisions therein.

We have till date not received any response to our aforementioned letter and therefore, a dispute has arisen between us on the validity of the purported termination...”

(emphasis is mine)

8.6 If the first part of clause 17.5 were to be applied, from this date **parties were at liberty to “endeavour” an amicable settlement of their inter se disputes.** Clearly, no formal communication in that behalf was issued by either party till, the petitioner, despatched the letter dated 08.02.2013.

8.7 By this letter, inter alia, the petitioner sought amicable resolution of disputes within a period of 30 days.

8.8 The respondent, on the other hand, appointed an arbitrator vide communication dated 21.02.2013. The first question which arises while applying the second part of clause 17.5 whether, that part was operable in view of the fact that the 30 days period from the date of the dispute had already elapsed, and none of the parties had chosen to take recourse to the amicable resolution route; the window for which was, a 30 days period from the date when the dispute arose.

8.9 Therefore, the letter dated 08.02.2013, which was issued by the petitioner was clearly inefficacious, and perhaps, issued only to extend the time line provided in the said clause for an amicable resolution of the disputes, which expired on 06.01.2013.

9. In this context, necessarily, the disputes in terms of the third part of clause 17.5 had to be referred to arbitration. Reference, requires a positive act. Admittedly, the petitioner had made no request for appointment of an

arbitrator. By letter dated 08.02.2013, as indicated above, it only sought amicable resolution of disputes within a period of 30 days, failing which, it threatened to take further action in accordance with clause 17.5 of the agreement.

9.1 The question then arises, can the respondent be hemmed-in within a 30 days time frame, commencing from a notional date, i.e., 06.01.2013 when, factually, there was no request by the petitioner for appointment of an arbitrator.

9.2 The submission of Mr. Chitale that respondent should have suo motu appointed an arbitrator and that too prior to 05.02.2013, is an aspect which does not emanate from a plain reading of clause 17.5 of the agreement. In this case, there was no request made or reference sought by either party. Common ground though was disputes had arisen. Period provided for amicable resolution was over. The respondent was, as would sequentially follow, well within its right to appoint an arbitrator; which it did, vide letter dated 21.02.2013. The respondent wears two hats, in a manner of speech; one as an aggrieved party, the other as the appointing authority. It is the latter role which it sought to fulfill on 21.02.2013.

9.3 Therefore, the appointment of the arbitrator by the respondent on 21.02.2013, according to me, was in consonance with clause 17.5 of the agreement.

10. There is another aspect of the matter, which is that, in the interregnum, the petitioner had moved, as indicated above, a petition under Section 9 of the Act. Notice in that petition was issued on 17.12.2012. This petition, in a sense, put paid to any possibility of the matter being settled amicably between the parties herein. The reliefs sought in this petition was to stay the effect and operation of e-mail dated 28.11.2012, issued by the

respondent and, to restrain it, from terminating the agreement.

10.1 In any event, dehors this aspect, as indicated by me hereinabove, the window available for amicable resolution for disputes came to an end on 06.01.2013.

11. For the reasons given above, the petition is dismissed. The interim order dated 15.03.2013, which has been continued to date, shall stand vacated. The arbitrator appointed by the respondent can now, consequently, proceed to adjudicate upon the disputes; which have arisen between the parties.

RAJIV SHAKDHER, J

DECEMBER 01, 2014

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