

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 108 OF 2012

1. M/s. Efkon (India) Pvt. Ltd.
a Private Limited Company Incorporated
under the Companies Act, 1956
having its registered address at 701,
Tower B. HCC 247 Park, Hinson House,
L.B.S. Marg, Vikhroli (W) Mumbai 400 083.
2. E-Logistics Pvt. Ltd.,
a Private Limited Company Incorporated
under the Companies Act, 1956 having its
registered address At No. 44, 1st Main Road,
Gandhinagar Adyar, Chennai 600 020. .. Petitioners

V/s.

1. Mr. M. B. Gajbhiye,
Asstt. Post Master General (Mails),
Office of the Chief Post Master General
Maharashtra Circle, Mumbai – 400 001.
2. Department of Post [India],
Office of the Chief Postmaster General,
Maharashtra & Goa Circle,
Mumbai 400 001.
3. The State of Maharashtra. .. Respondents

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Mr. Atul Singh a/w Mr. Amit Jajoo i/b. M/s. PKA Advocates
for applicant No. 1.

Mr. A. M. Sethna a/w Mr. P S. Gujar for Respondent Nos. 1 and 2.
Mr. D. A. Nalawade, Govt. Pleader a/w Mr. U. S. Upadhyay, AGP for
respondent No. 3.

CORAM : A. K. MENON, J.
RESERVED ON : AUGUST 24, 2015.
PRONOUNCED ON : AUGUST 27, 2015

JUDGMENT :

This Arbitration Application is filed under Section 11 of the Arbitration and Conciliation Act, 1996, and seeks the appointment of a sole Arbitrator. The petition as initially filed was by two petitioners Efkon (India) Pvt. Ltd., and E-Logistics Pvt Ltd,. The respondents are the Assistant Post Master General (Mails), the Department of Post India and the State of Maharashtra. At the request of the applicants they were allowed to delete respondent no. 3-the State, vide order dated 9th May 2012. The record reveals that a notice invoking arbitration was first issued to the respondent on 9th May 2012. Thereafter Writ Petition No. 319 of 2012 was filed by the applicant in respect of the same subject matter. This Writ Petition was withdrawn by the applicant on 23rd February 2012, with liberty to invoke the arbitration Clause. This is how the present application came to be filed. This application continued to remain pending for no apparent reason. It was taken up for hearing in June 2015. However there was a change in the Advocates representing the applicants and the present Advocates

have entered appearance recently but only on behalf of petitioner no. 1.

2. The petitioners seek the appointment of an Arbitrator pursuant to clause 23 of the Agreement dated 12th November, 2009, executed between the applicant no. 2 and Respondent No. 2 . Clause 23 reads as follows;

“23. Arbitration :

“If any difference arises concerning this Agreement, its interpretation or the payment to be made there under, the same shall be settled by mutual consultations and negotiations. If attempts for conciliation do not yield any results within a period of 30 days, either of the parties may make a request to the other party for submission of the dispute for decision by an arbitral tribunal containing a Sole Arbitrator to be appointed by mutual agreement by the DOP. The arbitration proceedings shall take place at Mumbai and shall be conducted in English. The provisions of Arbitration and Conciliation Act, 1996 and the rules framed there under and in force shall be applicable to such proceedings.”

3. The agreement is originally entered between the respondent no. 2 - Department of Posts (DOP) and Applicant no. 2- E-logistics under which applicant no.2 supplied certain GPRS based hand held devices with inbuilt thermal printers, cameras and support systems in order to record delivery of mail. The respondent No. 1 by a letter dated 4th July 2011, informed the

petitioner that a total of 70 devices supplied during the pilot project may be taken back as they were not desirous of continuing usage of the devices. In response to the said letter the applicants jointly addressed a letter dated 21st July 2011 (Exh. D) alleging arbitrary and unreasonable action on the part of the Respondent No.1. The letter records that the agreement dated 12 November, 2009, entered into between M/s. E-logistics and DOP. The Agreement does not provide for its termination.

4. The appellant contended that applicant no. 2 Efkon was awarded the contract thereafter a tendering process and being the successful tenderer the applicant jointly requested the respondents to immediately withdraw their letter of 4th July 2011, and continue usage of the hand held devices supplied by them. They also demanded payment of Rs. 16,01,437/- towards the value of invoices submitted by E-logistics to DOP as also further sums of money as compensation. They jointly requested the respondents No. 1 and 2 to comply with the Agreement failing which they reserved their right to take appropriate legal action. The applicants have jointly invoked provisions of clause 23 of the Agreement.

5. The record does not reveal any response to this letter of

21st July 2011 nor does it disclose any reason why applicant No. 1 - M/s, Efkon (India) Pvt. Ltd., (“Efkon”) was a signatory to the letter since the Agreement was admittedly awarded to applicant no. 2 - E-logistics. The reason for Efkon being a signatory to the letter becomes evident from a subsequent letter dated 9th September 2011, addressed by the Advocate for Efkon (Exh. E). In this advocate's notice Efkon contended that the discontinuation of use of the hand held devices amounts to cancellation of the modernization project itself. Efkon contended that application software for the project was developed by both the applicants and both applicants provided training to about 100 postmen for the use of the hand held devices and after this experience the DOP had requested the E-logistics to start procurement of 450 hand held devices for Phase - II of the project. It is their further case that based on such specific instruction 450 hand held devices for Phase - II of the project were procured but the DOP - respondent no. 2 for reasons best known to them, did not provide the list of post offices where the 450 hand held devices were to be deployed. Accordingly Efkon reserved their rights and reiterated that the said legal notice

should be treated as notice for arbitration under clause 23. It further recorded that failure to reply to the letter within the prescribed time would entitle the applicant No. 1 - Efkon to file a suit against the Respondent No. 2.

6. After receipt of the legal notice from Efkon on 11th October 2011, a meeting was fixed between E-logistics and the respondent no. 2. A record of the meetings is to be found in the letter dated 1st November 2011, written by E-logistics to the DOP. However there was no response to the same.

7. Mr. Atul Singh, learned counsel appearing for the applicants submitted that in the affidavit of reply filed on behalf of the respondent nos. 1 and 2 the department of post has adopted a curious stand. On the one hand they state that the agreement was not assignable and therefore the first applicant could not have filed the present application at all. Reliance is placed on clauses 16, 17 and 21 of the agreement. However, without prejudice to this contention the respondents express willingness to submit to arbitration.

8. Mr. Singh learned counsel for the applicants pointed out that the applicant no. 1 was the beneficiary of an Assets and

Business Purchase Agreement dated 15th April 2010 (ABPA), by virtue of which applicant no. 2 - E-logistics Pvt. Ltd had sold the “Transferred Business” to the present applicant no. 1 - Efkon India Pvt. Ltd., for a purchase consideration mentioned in Article 3. The expression Transferred Business is defined in the agreement of business purchase as follows;

“Transferred Business” means the VTS Business and/or Fleet Management and Transport Exchange Business and all the assets and liabilities thereof to be transferred to the Buyer as more particularly set out in the Clause 2.1.

9. Clause 2.1 which further defines transfered of business reads as follows ;

“2.1 Agreement to Sell and Purchase

Subject to the provisions of this Asset and Business Purchase Agreement on the Closing Date, the Seller sell, transfer, convey, assign and deliver as the case may be to the Buyer and the Buyer shall purchase, acquire, accept and receive as the case may be, from the Seller, all the Transferred Business free and clear from all encumbrances.”

10. It is therefore evident that the entire business including customer contracts and balance order values have been transferred by the E-logistics to Efkon. Mr. Singh learned counsel for the applicant states that by the virtue of the ABPA, Efkon stepped into

the shoes of E-logistics and therefore was entitled to the benefit of the Agreement. Even assuming specific performance of the Agreement dated 12th November 2009 cannot be enforced, by virtue of the ABPA the applicant no. 1 was still entitled to seek the benefit of the receivables. He therefore submitted that invocation of clause 23 has been made jointly by both the applicants as evident from the letter dated 21st July 2011 (Exh. D) which is signed by both the applicants.

11. Mr. Singh pressed for appointment of an arbitrator especially since the respondents have in their affidavit in reply stated that without prejudice to their rights and contentions they are willing to submit to arbitration.

12. Mr. Sethna learned counsel for the respondents submitted that although a without prejudice statement has been made that the respondent no. 2 is willing to make a reference to arbitration, his principal opposition to the application is on the basis that the agreement is not assignable. He relied upon the provisions of Clauses 16, 21 and 23 of the agreement of 12th November 2009. Mr. Sethna, pointed out that clause 16 clearly provided that the vendor E-logistics was solely responsible for the

execution of the work and that the Department of Posts would only deal with E-logistics and no other party during the contract period. Mr. Sethna relied on clause 17 of the Agreement and contended that the Agreement has not been amended in any manner since clause 17 requires that any amendment or alteration or change could be effected only by a written agreement signed by the parties. In the present case no written modification was ever requested or made and hence there was no question of applicant no. 1 - Efkon India Pvt. Ltd., claiming rights under the Agreement.

13. Mr. Sethna pointed out that the Agreement contained an express prohibition against assignment of the work or any part thereof to any person. There is no question of the assignment taking effect under the ABPA without the written consent of the Department of the posts. He therefore submits that the application is liable to be dismissed.

14. Mr. Singh in rejoinder however submitted that the definition of Vendor in the E-logistics agreement included the successors of E-logistics and its assigns where the context so permitted. He submitted that in the present case contents of clause 21 should be interpreted in the context of subletting of the work.

The claim in the impending arbitration did not pertain to assignment of the work or subletting of the work. On the other hand Mr. Singh submitted that the assignment contemplated was of the Agreement in its entirety and not only the scope of work defined in clause 2 of the agreement. He therefore submitted that assignment of the agreement in its entirety is not prohibited and the Agreement itself was assigned under the ABPA and the Efkon India Pvt. Ltd., would be entitled to benefit of clause 23 as it stepped into the shoes of E-logistics.

15. Having heard the parties at length, I am of the view that there is no merit in the contentions of the Applicants. According to me Efkon-applicant no. 1 was well aware of the serious difficulties in their path. Merely contending that the 'work' has not been sublet or assigned but the entire Agreement has been assigned is of no avail. On a reading of the correspondence and pleading of the application itself it is clear that the claim of the applicants is seek specific performance of the Agreement and in the alternative damages. On reading the demand notice dated 9th September 2011, in particular, it is clear that the applicants have not given up their case for specific performance. They seek to

enforce the E-logistics Agreement dated 12th November 2012 and/or claim damages.

16. Faced with the difficulties posed by clause 16 and 17 read with clause 21 it became evident to the applicants particularly the applicant no. 1 – Efkon that the Agreement could not have been assigned without the express written consent of the department of Post and in absence of such consent in writing there was no means by which the contract could be assigned Efkon or any benefit thereunder being assigned to Efkon. In anticipation of this road block the applicants proceeded to address a joint letter on 21st July 2010, without making any direct reference to the aspect of assignment. Whereas the letter of 21st July was a joint letter addressed by both the applicants, the demand notice dated 9th September 2011, was addressed only on behalf of Efkon. In this demand notice they contended that both the applicants E-logistics and Efkon had provided training to 100 postmen. The letter refers to the fact that the contract was awarded to E-logistics.

17. The contention that both the applicants were involved

in the training of postmen leads me to believe that the part of the work under the Agreement may have been sublet to Efkon, obviously without the consent of the respondent.

18. The provision for training is to be found in clause 13 of the Agreement which required that E-logistics would train the staff members for using the hand held devices. All training work was to be carried out by the Vendor E-logistics. There is no scope for considering a unilateral assignment of E-logistics obligations given the wording of clause 13 and therefore for this reason also it is not possible to accept the submission of the applicants that the expression Vendor and the context in which it is used would admit to the involvement of Efkon.

19. Furthermore the ABPA is dated 15th April 2010 i.e. barely 5 months after the E-logistics Agreement was entered into. The relevant correspondence starting with the letter dated 4th July 2011, reveals that even as the letter was written the assignment of the business from E-logistics Pvt. Ltd., to Efkon India Pvt. Ltd., may have taken place. This is evident from the effective date of the Assets Business Purchase Agreement i.e. 15th April 2010. The assignment of business therefore took effect more than a year

before, the correspondence was exchanged between the parties. While an assignment of the business of E-logistics in general, may have taken effect as aforesaid, under the ABPA, the contract between the Department of Posts and E-logistics could not have been assigned without the express consent of the Department of Posts.

20. In the circumstances the first applicant Efkon India Pvt. Ltd., cannot claim benefit in the Agreement dated 12th November 2009, and there is no question of their being entitled to, invoke the arbitration agreement embodied in clause 23. For the aforesaid reason, there is no merit in the above Arbitration Application and I pass the following order.

- i) The application is dismissed.
- ii) The applicants will be at liberty to adopt appropriate proceedings as may be advised without being affected by any observation in this Judgment.
- iii) There will no order as to costs.

(A. K. MENON, J.)