

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

+ **O.M.P. 1259/2014 & I.A.20298/2014**

% Judgement reserved on: 04.12.2014

Judgement pronounced on: 13.01.2015

DEPARTMENT OF TRANSPORT GOVERNEMENT OF NCT OF
DELHI Petitioner

Through: Mr.Amiet Andley and Mr.Arun
K.Sharma, Advocates

versus

M/ STAR BUS SERVICES PVT LTD. Respondent

Through: Mr.Sandeep Sethi, Senior Advocate
with Mr.Somiran Sharma, Advocate

CORAM:

HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

1. Vide this present petition filed under Section 12, 14 and 15 of the Arbitration and Conciliation Act, the petitioner has challenged the appointment of Arbitrator Sh. M.K.S. Menon, Advocate who has been working as a sole Arbitrator.

2. The facts necessary for determination of the present disputes between the parties are as under:-

3. The petitioner and the respondent no. 1 had entered into a Concession Agreement dated 10th March, 2010. Certain dispute had arisen between them under this Agreement. The Agreement also contained an Arbitration

Clause 22.2. Respondent no. 1 sent a legal notice dated 3rd April 2014 and raised the claim for the refund of certain sum. Respondent no. 1 thereafter vide its notice dated 2nd May, 2014 (which was received by the petitioner on 5th May, 2014) invoked the Arbitration Clause no. 22.2 of the Concession Agreement and intimated the appointment of respondent no. 2, Sh. M.K.S. Menon, Advocate as an Arbitrator and called upon the petitioner to appoint second Arbitrator within 30 days of the receipt of the notice failing which the Arbitrator nominated by respondent no. 1 shall act as a sole Arbitrator. The petitioner did not appoint the second Arbitrator rather wrote a letter dated 4th June, 2014 to respondent no.1, informing that the petitioner had not agreed with the sole Arbitrator and was in the process of appointing its own Arbitrator.

4. Vide communication dated 5th June, 2014, the respondent no.2, the Arbitrator informed the petitioner that since the petitioner had failed to appoint the second Arbitrator within 30 days, in terms of Arbitration Clause 22.2, he was to act as the sole Arbitrator to adjudicate the disputes and asked the petitioner to attend the proceedings on 5th July, 2014.

5. The petitioner wrote a letter dated 6th June, 2014 to the Arbitrator whereby again showing their disagreement to his appointment as a sole

Arbitrator. They also informed the Arbitrator that the appointment of the Arbitrator on behalf of the petitioner will be sent to him as soon as the approval of the Government was obtained. The said communication of the petitioner was replied by the Arbitrator vide its letter No. MKSM/14/415 dated 21st May, 2014 which was received by the petitioner on 2nd July, 2014 wherein the Arbitrator had reiterated that he had the jurisdiction to initiate the proceedings and the petitioner was free to challenge his jurisdiction before him which was to be considered by him independently. Subsequently, vide its letter dated 2nd July, 2014, the petitioner informed the respondent no. 2 that they had appointed Sh. G.K. Marwah as the Arbitrator on behalf of the petitioner and requested the Arbitrator (respondent no.2) for a new convenient date of proceedings in consultation with the Arbitrator of the petitioner.

6. Thereafter, the letter dated 3rd July, 2014 was received by the petitioner. This letter was issued by respondent no.1 to respondent no.2 requesting him to proceed with the hearing fixed on 5th July, 2014. The petitioner again vide its letter dated 10th July, 2014 reiterated the appointment of Mr. M.K.S. Menon, Senior Advocate as Arbitrator on behalf of the petitioner. The Arbitrator i.e. the respondent no.2 passed an order

dated 5th July, 2014 whereby the Arbitrator has opined that since the petitioner had failed to appoint the Arbitrator within 30 days in terms of Clause 22.2 of the Agreement, he was proceeding to deal with the claim of the respondent no.1.

7. The case of the petitioner is that thereafter he had sought the legal advice. On the basis of the legal advice, it is contended by the petitioner that the appointment of the Arbitrator was to be done under the aegis of International Centre for Alternative Dispute Resolution, Delhi (hereinafter called ICADR).

8. It is submitted that the Arbitration Clause clearly stipulates that the appointment of the Arbitrator was to be done under ICADR and since the present sole Arbitrator was not a member of ICADR, he cannot enter into the reference and thus has no jurisdiction and the order dated 5th July, 2014 passed by him was without jurisdiction and null and void an initio.

9. It is submitted that vide letter dated 29th August, 2014, respondent no.2 was informed that since he was not a member of ICADR and his name does not appear in the list of empanelled arbitrators, the order dated 5th July, 2014 passed by him was null and void, but the arbitrator kept quiet and did not respond to the said letter. The letter dated 15th September, 2014

however received from the Advocate of respondent no.1 whereby the stand taken by the respondent no.1 was that provisions of the ICADR were not applicable in view of the Clause 22.2 dealing with the arbitration agreement between the parties.

10. Subsequently, the communication has been received from the Arbitrator whereby he abstains from expressing any opinion on the merit of the objections raised by the petitioner.

11. On these facts, the petitioner has prayed that the mandate of Arbitrator Mr.M.K.S. Menon, as sole Arbitrator be terminated. Another prayer of the petitioner is that the Arbitral Tribunal from the arbitrators empanelled with the ICADR be constituted and alternatively refer the dispute to Delhi International Arbitration Centre, Delhi High Court, New Delhi or to pass any other order which the Court may deem fit and proper in the facts and circumstances of the case.

12. The respondent no.1 has filed their counter affidavit. It is contended that the appointment of the sole Arbitrator i.e. respondent no.2 is in terms of the Arbitration Agreement between the parties i.e. Clause 22.2 of the Concession Agreement.

13. It is submitted that this Clause clearly stipulates that the provisions of

International Centre for Alternative Dispute Resolution, Delhi comes into operation only on expiry of 30 days from the invocation of the Arbitration Clause and the Arbitration Agreement does not stipulates the appointment of the arbitrators by the ICADR or from the list of empanelled arbitrators.

14. It is submitted that Arbitration Clause clearly stipulates that the arbitrators has to be appointed by the parties. The parties could resort to the provisions of the ICADR only on expiry of 30 days from the date of the invocation of the Arbitration Agreement. It is further argued that this Clause clearly stipulates the appointment of the sole Arbitrator if the other party fails to appoint the second arbitrator within 30 days. It is contended that pursuant to the arbitration agreement on the expiry of 30 days and if the other party also appoints his arbitrator within 30 days, the third arbitrator could be appointed under the International Centre for Alternative Dispute Resolution (ICADR) Arbitration Rules-1996.

15. It is submitted that in this case the petitioner has failed to appoint his arbitrator within 30 days and therefore that occasion has not arisen. It is submitted that the petitioner has not yet submitted himself to the jurisdiction of the Arbitrator. He has not once attended the arbitral proceedings. It is submitted that if the petitioner had any objection regarding the validity of

the jurisdiction of the Arbitrator, the course open to him was to challenge the jurisdiction of the Arbitrator under Section 16 of the Arbitration and Conciliation Act which gives power to the Arbitral Tribunal to rule on its jurisdiction. It is further submitted that the challenge had to be done within 15 days after becoming aware of the constitution of the arbitral tribunal but since that right has not been exercised by the petitioner, he cannot challenge the jurisdiction of the Arbitrator before this court. It is further contended that since the appointment of the Arbitrator is as per the Agreement between the parties, it cannot be said that the Arbitrator has become *de jure* or *de facto*. It is submitted that the petition has no merit and is liable to be dismissed.

16. I have heard the arguments and perused the record.

17. It is apparent that the dispute relates to the interpretation of the Arbitration Clause 22.2 which forms part of the Concession Agreement.

18. For the purpose of ready reference, the said Clause is reproduced as under:-

“22.2. Arbitration

(a) Arbitrators

Failing amicable settlement and/or settlement with assistance of Expert appointed by the Parties by mutual consent, the dispute or difference or claims as the case may be shall be finally settled by binding arbitration

under the Arbitration and Conciliation Act, 1996. Unless the Parties mutually agree otherwise, within 30(thirty) Days of invocation of the arbitration as mentioned below, the rules of arbitration prescribed by the International Centre for Alternative Dispute Resolution, Delhi shall apply to the arbitration. The arbitration shall be by a panel of three arbitrators, one each to be appointed by each party and the third, who shall act as presiding arbitrator, to be appointed by the two arbitrators appointed by the Parties. The arbitration shall be invoked by one party issuing to the other a notice in writing invoking the arbitration and appointing an Arbitrator. Upon receipt of the notice, the other party shall appoint the second arbitrator. The two Arbitrators so appointed shall appoint the third Arbitrator who shall act as the 'Presiding Arbitrator'. If the other party fails to appoint a second Arbitrator within 30(thirty) Days from the receipt of request to do so, then the Arbitrator so appointed by the first party shall adjudicate the dispute as 'Sole Arbitrator'.

19. From the bare reading of this clause, it is apparent that parties had agreed that their Arbitration shall be by a panel of three arbitrators. Each party to appoint one Arbitrator and the third, who shall act as presiding arbitrator, to be appointed by the two arbitrators appointed by the parties. This Clause further states that “*the arbitration shall be invoked by one party issuing to the other a notice in writing invoking the arbitration and appointing an Arbitrator*”.

20. In the present case, it is respondent no.1 who had invoked the

Arbitration Clause and admittedly while invoking the Arbitration Clause, he had appointed Sh. M.K.S. Menon, respondent no. 2 as an Arbitrator.

21. The Clause further reads “*Upon receipt of the notice, the other party shall appoint the second arbitrator. The two Arbitrators so appointed shall appoint the third Arbitrator who shall act as the ‘Presiding Arbitrator’.* If the other party fails to appoint a second Arbitrator within 30(thirty) Days from the receipt of request to do so, then the Arbitrator so appointed by the first party shall adjudicate the dispute as ‘Sole Arbitrator’.

22. This para of the Clause envisages that the other party shall appoint the second arbitrator on receipt of the notice of invocation of Arbitration and this has to be done within 30 days from the receipt of the notice from the first party.

23. In the present case, admittedly the petitioner has failed to appoint the second arbitrator within 30 days from the receipt of the notice of invocation.

24. The petitioner appointed his second arbitrator only by 2nd July, 2014 which fact is clear from the letter dated 02.07.2014 written to respondent no. 2, i.e the arbitrator. Admittedly, the respondent had invoked the arbitration clause vide its letter dated 2nd May, 2014 which was duly received by the petitioner on 5th May, 2014. Factually, therefore the petitioners did not in

terms of the arbitration clause appointed the second arbitrator within 30 days. The arbitration clause as is clear from its unequivocal terms, clearly stipulates that in the eventuality of failure by the second party to appoint the second arbitrator within 30 days, the arbitrator so appointed by the first party would adjudicate the dispute as sole arbitrator.

25. Both the parties had voluntarily agreed to the terms of Arbitration Agreement and thus this Clause is binding on them. Thus, in terms of this Clause, the petitioner, on expiry of 30 days, lost its right to appoint the second arbitrator. Therefore, subsequent appointment of Mr. G.K. Marwah by the petitioner as the second arbitrator is of no consequence.

26. The arbitrator draws his mandate and the jurisdiction from the arbitration agreement between the parties. In the present case, the respondent no. 2 who is acting as a sole arbitrator has thus drawn his mandate from Clause 22.2 which clearly stipulates that he shall act as a sole arbitrator.

27. From the above discussion, it follows that appointment of respondent no. 2 as a sole arbitrator was as per the arbitration agreement.

28. Another contention of the petitioner is since the respondent no. 2 is not empanelled with International Centre for Alternative Dispute Resolution,

Arbitration Rules-1996, his appointment has become *de jure* and his mandate be terminated and this proposition dawned upon them on the legal advice they sought after receiving order dated 05.07.2014. Now, the question for consideration therefore is whether the appointment of arbitrator is contrary to terms of Arbitration Agreement on the ground that he is not a member of ICADR or does the Arbitration Agreement stipulates that each party was required to appoint the Arbitrator from panel of Arbitrators maintained by ICADR.

29. For this purpose, it is essential to read the arbitration agreement clause 22.2 again. This Clause stipulates that *“unless the parties mutually agree otherwise, within 30 days of invocation of arbitration as mentioned below, the rules of arbitration prescribed by the International Centre for Alternative Dispute Resolution, Delhi shall apply to the arbitration”*.

30. From the reading of this clause it is apparent that there is no agreement between the parties that the arbitrators to be appointed by them have to be drawn from the panels of ICADR, Delhi. The parties had agreed that unless the parties otherwise agree within 30 days of invocation of arbitration as mentioned below, the rules of ICADR Arbitration Rules, 1996 would apply.

The methodology of invocation of Arbitration has been mentioned in the Clause itself as under:-

“The arbitration shall be by a panel of three arbitrators, one each to be appointed by each party and the third, who shall act as presiding arbitrator, to be appointed by the two arbitrators appointed by the Parties. The arbitration shall be invoked by one party issuing to the other a notice in writing invoking the arbitration and appointing an Arbitrator. Upon receipt of the notice, the other party shall appoint the second arbitrator. The two Arbitrators so appointed shall appoint the third Arbitrator who shall act as the ‘Presiding Arbitrator’. If the other party fails to appoint a second Arbitrator within 30(thirty) Days from the receipt of request to do so, then the Arbitrator so appointed by the first party shall adjudicate the dispute as ‘Sole Arbitrator’.

31. It is clear that though rules of ICADR Arbitration Rules-1996 have been made applicable but the Arbitration Agreement provides the methodology of invoking the Arbitration Clause and appointment of Arbitrator.

32. Section 2 of the ICADR Arbitration Rules 1996 deals with definitions of various terminologies.

*“2. **Definitions**- In these rules, unless the context otherwise requires,-*

(d) “arbitrator” means a person appointed as arbitrator and includes a presiding arbitrator;

33. Even this Clause does not defines an ‘Arbitrator’ as a person enrolled with ICADR.

34. Various provisions of this rule deals with power and role of ICADR in private Arbitration.

35. Section 5 of the ICADR Arbitration Rule deals with the appointment of the arbitrator.

36. The relevant clause is reproduced as under:-

“Sec 5. Appointment of arbitrators-

(1) Unless otherwise agreed by the parties, a person of any nationality may be an arbitrator.

(2) Where the arbitration agreement provides that each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the presiding arbitrator, and-

(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 appointed arbitrators fail to agree on the presiding arbitrator within thirty days from the date of their appointment,

The appointment shall be made, upon request of a party, by the ICADR.

(3) 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

ICADR.

(4) A decision by the ICADR on a matter entrusted to it by sub-rule (2) or sub rule (3) will be final and binding on the parties.

(5) Upon receipt of a request under sub-rule (2) or sub-rule (3), the ICADR will-

(a) make the appointment as promptly as possible.

(b) follow the procedure specified in rule 35.

(c) have regard to-

(i) any qualifications required of the arbitrator by the agreement of the parties;

(ii) such considerations as are likely to secure the appointment of an independent and impartial arbitrator; and

(iii) in the case of appointment of a sole or presiding arbitrator in an international commercial arbitration, the advisability of appointing a person of a nationality other than the nationalities of the parties.

(6) A substitute arbitrator will be appointed in the same manner in which his predecessor had been appointed.

(7) The ICADR, before appointing a person as arbitrator or the presiding arbitrator, will obtain confirmation from such person that-

(i) no circumstances exist that give rise to justifiable doubts as to his independence or impartiality, and

(ii) where any qualifications are required of an arbitrator by the agreement of the parties, he possesses those qualifications.”

37. This clause clearly stipulates that ICADR shall appoint the arbitrator only on request of a party.

38. A party may request the ICADR for appointment of an arbitrator in Section 2(a) or (b) i.e. where a party fails to appoint the arbitrator within 30 days from the receipt of request to do so from the other party. Therefore, in

a case where under the arbitration agreement, the arbitration has to be conducted by the panel of three arbitrators and the one party after appointing his arbitrator calls upon the second party to appoint his arbitrator but if the second party fails to appoint his arbitrator within 30 days, the first party can make a request to ICADR under Rule 5 (2) (a) of the ICADR Arbitration Rules-1996.

39. The second situation is where the arbitration was to be conducted by the arbitral tribunal consisting of three arbitrators and each party had appointed their Arbitrator, but both the arbitrators so appointed fails to appoint the presiding or third Arbitrator in term of Arbitral Agreement. In such eventuality also, the provision of Rule 5 of International Centre for Alternative Dispute Resolution could be invoked by either of the party. Resort to provision of International Centre for Alternative Dispute Resolution can be taken by parties if they have mutually agree that these rules will govern their arbitration.

40 In the present case, by way of the arbitration agreement, the parties had agreed to the arbitration by a panel of three arbitrators. Both the parties were required to appoint one arbitrator and then both the arbitrators were required to appoint the presiding arbitrator.

41. The petitioner has failed to appoint the second Arbitrator. Now, since ICADR Arbitration Rules-1996 were made applicable by mutual agreement by the parties, the question arises if the respondent was required to approach the ICADR under Rule 5 for appointment of second Arbitrator. To my mind, this situation has not arisen in this case. The arbitration Clause 22.2 itself prescribes the remedy to this situation, where the second party fails to appoint the second arbitrator within 30 days from the date of service of invocation notice. In this eventuality, the clause clearly stipulates “*the arbitrator so appointed by the first party shall adjudicate the dispute as sole arbitrator*”.

42. In these circumstances, there was no occasion for the petitioner to approach the ICADR under Section 5 for the appointment of the arbitrator.

43. The contention of the petitioner is that since arbitrator i.e. respondent no.2 is not enrolled on the panel of ICADR as the arbitrator, he has become *de jure* and therefore his mandate be terminated. Since the parties under Clause 22.2 have agreed that Rules of ICADR be applicable unless parties otherwise agree within 30 days, these rules are applicable.

44. Rule 10 of the ICADR Rule deals with the termination of mandate of an arbitrator:-

“10. Failure or impossibility to act-

- (1) The mandate of an arbitrator shall terminate if-*
(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and
(b) he withdraws from his office or the parties agree to the termination of his mandate.
(2) If, under this rule or sub-rule (2) of rule 9, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this rule or sub-rule(1) of rule 8.”

45. This Section is at par with Section 14 of the Arbitration and Conciliation Act.

45. For the purpose of ready reference, the relevant portion is reproduced as under:-

“14. Failure or impossibility to act-(1) The mandate of an arbitrator shall terminate if-
(a) He becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and
(b) He withdrawn from his office or the parties agree to the termination of his mandate.
(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.
(3) If, under this section or sub-section (3) of Section 13, an arbitrator withdrawn from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of Section 12.”

46. The expression *de jure* and *de facto* have been discussed by this court

in the case of *Shyam Telecom Ltd vs. Arm Ltd reported in 113(2004) Delhi Law Times 778 Delhi High Court.*

This court in relevant paragraph held as under:-

11. Before I proceed to examine the merits of the petition it seems to be necessary to consider the question of very maintainability of the present petition under the provisions of Sub-section (2) of Section 14 of the Act. Section 14 of the Arbitration and Conciliation Act, 1996, which reads as under:

"14. Failure or Impossibility to act--

(1) The mandate of an Arbitrator shall terminate if :

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay ; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in Clause (a) of Sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or Sub-section (3) of Section 13, an Arbitrator withdraws from his office or a party agrees to the termination of the mandate of an Arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or Sub-section (3) of Section 12."

12. What is the object, intent and scope of the above provision of law would decide the question of

maintainability of the present petition. This section postulates the circumstances under which the mandate of the Arbitrator can be terminated. The Arbitrator's mandate can be terminated under the following situation:

- (i) Automatic termination,*
- (ii) By the Arbitrator himself,*
- (iii) By the parties,*
- (iv) By tribunal order,*
- (v) By Court's order.*

The mandate of an Arbitrator automatically terminates at the death of the Arbitrator or his physical incapacity to proceed with the mandate. This provision sets following three grounds that constitutes an Arbitrator's inability ; (i) his de jure, or (ii) his de facto inability to perform his functions, or (iii) his failure to act without undue delay for other reasons. The first situation refers to an Arbitrator's legal incapacity to perform his functions under the law and relates to circumstances under which the Arbitrator by law is barred from continuing in office, for instance, incapacity, bankruptcy conviction for a criminal offence, etc. The second incapacity relates to factual inability, which includes factual situation, in which the Arbitrator is physically unable to perform his functions for instance, such as continuous ill-health, etc. The last situation "failure to act without undue delay" is an expiry provision according to which the mandate of the Arbitrator shall terminate if for other reasons he fails to act without undue delay.

13. The de jure impossibility referred to in Clause (a) of Sub-section (1) of Section 14 is the impossibility which

occurs due to factor personal to Arbitrator and de facto occurs due to factors beyond the control of the Arbitrator. The judicial intervention of the Court is provided in Sub-section (2) only if a controversy remains concerning any of the grounds referred to in Clause (a) of Sub-section (1) of Section 14 of the Act. Sub-section (2) of Section 14 empowers the Court to decide the question of termination of the mandate if a controversy arises concerning the termination of the Arbitrator's mandate on one or the other grounds.

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15. In the opinion of this Court, the expression "de jure" is amply wide so as to cover a situation like the case in hand. This view is based on the settled legal position that Arbitration agreement is the fountain head of the Arbitrator's power and authority and the parties as well as the Arbitrator are governed and controlled by the terms of the said Arbitration agreement. Unless parties agree to the contrary, the terms of Arbitration agreement must operate in full.”

47. It therefore is clear that the arbitrator will become *de jure* and thus unable to act only when he loses his authority to act under the agreement.

48. In the present case, as discussed above, the appointment of the arbitrator is within four corners of the arbitration agreement and he thus derives his mandate from the arbitration agreement between the parties.

49. From the bare perusal of Section 5 (2) of the ICADR Arbitration Rules-1996, it is apparent that this section is at par with Section 11(4) and Section 11(7) of the Arbitration and Conciliation Act and Section 5(c) is at

par with Section 11(8) and Section 11(9) of the Arbitration and Conciliation Act.

50. The rules do not create any substantive rights in favour of either party. The rules nowhere states that its rules would be applicable only in the cases where the Arbitrator was appointed by the parties from the panels of Arbitrators maintained by it. In view of Rule 35, it is the ICADR who is bound to appoint an arbitrator from the panel. Under the terms of the Arbitration Agreement, neither party was bound to appoint their arbitrator from panel of Arbitrators maintained u/s 9(3) of ICADR Arbitration Rules-1996. The Arbitration agreement also does not stipulate that the parties need to approach the ICADR for appointment of their Arbitrator nor does it stipulates that on failure of the other party to appoint his arbitrator within 30 days, the first party is to approach ICADR under Rule 5 for appointment of an Arbitrator on behalf of second party. The parties had agreed under the Arbitration agreement that in such eventuality, it is the arbitrator, appointed by first party, who shall act as sole Arbitrator.

51. The petitioner has totally failed to convince this court that the Sole Arbitrator, the respondent no.2, has no mandate under the Arbitration Agreement to act as a 'Sole Arbitrator'.

52. There exists no ground to terminate the mandate of Arbitrator, Sh. M.K.S. Menon. The petition has no merit and is dismissed.

**DEEPA SHARMA
(JUDGE)**

JANUARY 13, 2015
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