Dispute Resolution Hotline

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SUPREME COURT BOOSTS CONFIDENCE IN INDIA AS THE SEAT OF ARBITRATION

The recent ruling in Antrix Corp. Ltd. v. Devas Multimedia P. Ltd[1] is yet another example of the pro-arbitration approach adopted by the Supreme Court of India ("**SC**"), where the courts, to the extent possible, deter from interfering in the arbitration process or with the arbitrators' judgment. The SC has relied upon a fairly simple proposition that once an arbitration agreement has been invoked on a particular dispute and an arbitrator has been appointed, the other party to the dispute cannot again separately invoke the provisions of the arbitration agreement. The issue revolved around a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Act**"), wherein the SC relying on the above proposition held that once the power to appoint an arbitrator has been exercised, no powers are left to refer the same dispute again to arbitration under Section 11 of the Act.

FACTUAL BACKGROUND

Antrix Corporation Ltd. ('**Petitioner**'), entered into an Agreement with Devas Multimedia P. Ltd. ('**Respondent**') on January 28, 2005 for the lease of Space Segment Capacity on ISRO/Antrix S-Band Spacecraft.

Article 19 of the Agreement empowered the Petitioner to terminate the Agreement in certain contingencies and also provided that the rights and responsibilities of the parties thereunder would be subject to and construed in accordance with the laws of India.

Article 20 of the Agreement provided that in the event any dispute or difference arises between the parties, such disputes would be referred to the senior management of both the parties to resolve the same within a period of three weeks, failing which the matter would be referred to an Arbitral Tribunal comprising of three Arbitrators. The said clause clearly provided that the seat of arbitration would be New Delhi and the arbitration was to be conducted in. accordance with the rules of the International Chamber of Commerce ('**ICC**') or UNCITRAL The ambiguity pertaining to which rules would be applicable to the arbitration proceedings was the bone of contention between the parties and led to the present petition under Section 11 of the Act.

Thereafter, on February 25, 2011, the Petitioner terminated the Agreement with immediate effect. The Respondent objected to such termination. The Petitioner requested for resolution of the disputes through mediation, in accordance with Article 20 of the Agreement, however the Respondent, without complying with the prescribed mediation process, unilaterally invoked arbitration, in accordance with the ICC Rules and nominated their arbitrator. The Petitioner was also called upon to nominate their arbitrator.

The Petitioner's attempt to mediate in accordance with Article 20 of the Agreement failed as the Respondent had already invoked the arbitration under the rules of ICC and insisted that the matter be resolved through arbitration. Thereafter, the Petitioner sought to initiate separate arbitration proceedings on the same issue and called upon the Respondent to appoint its nominee Arbitrator within a period of thirty days. The Petitioner asserted that the arbitral proceedings would be governed by Indian law, i.e., the Act, which was based on the UNCITRAL Model and that the Respondents could not have unilaterally chosen ICC as the rules governing the arbitration process.

The Respondent however did not appoint the arbitrator within the requested time period. The Petitioner, hence, filed an application under Section 11(4) read with Section 11(10) of the Act requesting a direction upon the Respondent to nominate the arbitrator as per the UNCITRAL Rules.

ISSUES

The issue before the SC was, whether, in respect of a particular dispute, the Chief Justice would have the power, under Section 11(6) of the 1996 Act, to constitute an arbitral tribunal where arbitration proceedings have already been initiated unilaterally, as regards the same dispute, under the ICC Rules and the nominee arbitrator has been appointed under the same.

JUDGMENT

Section 11(6) of the 1996 Act provides, inter alia, that the Chief Justice maybe requested to undertake necessary measures where under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure or the parties fail to reach an agreement expected of them under that procedure.

The SC relying on the finding of the Punjab and Haryana High Court in the case of Som Datt Builders Pvt. Ltd. v. State of Punjab[2] held that when the Arbitral Tribunal is already seized of the disputes between the parties to the arbitration agreement, constitution of another arbitral tribunal in respect of those same issues which are already pending before the arbitral tribunal for adjudication, would be without jurisdiction.

The SC further emphasized that non-maintainability of a separate application for appointment of an arbitrator, where

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an arbitrator had already been appointed and the intimation thereof had been conveyed to the other side was a well settled position in law and the same dispute cannot be referred to arbitration yet again under Section 11 of the Act, unless the order closing the existing arbitration proceedings is subsequently set aside.

According to the SC, the aggrieved party is free to challenge the appointment of the arbitrator in accordance with Section 13 of the Act and thereafter under Section 34 of the Act. However, the same could not be done under Section 11(6). The rationale provided was that an anomalous state of affairs would develop if the appointment of an arbitrator, once made, could be questioned in a subsequent proceeding initiated by the other party, also for the appointment of arbitrator.

The Supreme Court held that court could not interfere with the arbitration proceedings under Section 11 of the Act as arbitration under the ICC Rules had already been invoked and an arbitrator had been appointed in this regard.

Thus, the Supreme Court gave a restrictive interpretation to Section 11(6), stating that while the Chief Justice had the power to appoint an arbitrator under Section 11(6), the same could not be exercised to replace an arbitrator who had already been appointed in accordance with the provisions of the arbitration agreement.

CONCLUSION / ANALYSIS

The present decision of the apex court adds to the ever growing jurisprudence highlighting the growth of arbitration as a dispute resolution mechanism in the country and the decision should dilute any perception that Indian seated arbitrations are subjected to court interference.

However, a word of caution that this case highlights is the need for meticulous drafting of arbitration clauses. The arbitration agreement in the present case serves as an example of how ambiguity in a dispute resolution clause (applicable rules to the arbitration- ICC or UNCITRAL) could lead to unnecessary/multiplicity of proceedings. Unlike in this case, parties entering into an arbitration agreement should endeavor to settle all the necessary details of applicable laws and procedure while drafting the arbitration agreement to ensure a smooth and effective arbitration.

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You can direct your queries or comments to the authors

[1] MANU/SC/0514/2013
[2] 2006(3) Raj 144 (P&H)

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