

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 09.04.2008

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ARB. P. 64/2002

MR BRAITHWAITE & CO. LTD.

...Petitioner

- versus -

**CENTRAL ORGANISATION FOR
MODERNISATION OF WORKSHOPS**

...Respondent

Advocates who appeared in this case:

For the Petitioner : Mr D. Ray Chaudhuri, Sr. Advocate with Mr S. S. Jauhar
For the Respondent : Sanat Kumar with Mr Sanjay Sharma

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in Digest ?

BADAR DURREZ AHMED, J (ORAL)

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'said Act') whereby the petitioner has sought the appointment of a retired judge of this Court or any other person as this Court may deem fit to act as presiding third arbitrator in the Arbitral Tribunal including the two nominated arbitrators nominated by the parties. The alternative prayer is that this Court may

appoint a sole arbitrator to decide the disputes and claims of the parties arising out of the said contract.

2. The counsel for the parties have been heard at length. The very foundation of this application is without substance. The application has been filed on the premise that there was an arbitration agreement between the parties for referring the matter for arbitration by three arbitrators. The original contract between the parties contained the arbitration clause, namely, Clause 3200. It is admitted by the parties that the said arbitration clause had reference only to a sole arbitrator being appointed. However, it is the case of the petitioner that during the pendency of the arbitration proceedings before the sole arbitrator (Mr Arun Bhatnagar) there was an agreement between the parties that the arbitration proceedings be conducted not under the old Act but under the 1996 Act. It is also the petitioner's case that at the same time the parties had agreed that the arbitration was to be conducted by a Tribunal comprising of three arbitrators and not by the sole arbitrator.

3. Insofar as the first point is concerned, there is no difficulty inasmuch as the counsel for the respondent concedes that the parties had

agreed that the arbitration proceedings shall be deemed to have been conducted under the new Act and not under the old Act. However, insofar as the constitution of a Tribunal comprising of three arbitrators is concerned, there is no agreement between the parties. On a pointed question put to the learned counsel for the petitioner as to whether there was any written agreement between the parties for the constitution of a three-member Arbitration Tribunal, he clearly stated that there was no such written agreement. However, he submitted that such an agreement can be discerned from the arbitrator's letter dated 12.02.2001. The said letter, on examination, reveals that the said Mr Arun Bhatnagar had been appointed as the sole arbitrator. Subsequently, the parties made a joint request that the Arbitration and Conciliation Act, 1996 may be made applicable to the proceedings before him. The letter also reveals that the petitioner had thereafter made a request for arbitration proceedings to be conducted by a panel of three arbitrators as per the Arbitration and Conciliation Act, 1996. After noting the aforesaid, the learned arbitrator concluded the letter with the following sentence:-

“Therefore, fresh Arbitrator (s) may be appointed as per law.”

According to the learned counsel for the petitioner this sentence clearly indicates that the parties had acknowledged that the arbitration was to be conducted by a Tribunal comprising of three arbitrators.

4. Unfortunately, it cannot be so concluded. This is because earlier, on 21.01.2000, the proceedings recorded by the arbitrator disclosed that:-

“The parties have jointly made a request that Arbitration & Conciliation Act, 1996 may be made applicable to proceedings before me and I have agreed to such a request.”

(underlining added)

A copy of the above proceedings was sent to both the parties and had been accepted by them without any demur. It is clear that the parties had agreed that arbitration would be conducted under the new Act and that it would be conducted before the arbitrator already appointed. Hence the expression “before me”. It is only as an afterthought that the petitioner sent the letter dated 15.03.2000 and also moved an application to the same effect. The prayer made in the letter as well as in the application was that an Arbitral Tribunal of three arbitrators requires to be constituted and that the petitioner had nominated its arbitrator (one Mr S. Bhomik), the other arbitrator being Mr Arun Bhatnagar (purported

nominee of the respondent). The request made by the letter dated 15.03.2000 was that the two nominees should appoint the presiding officer of the Arbitral Tribunal. The prayer made in the application was that the newly nominated arbitrator (S. Bhomik) be permitted to proceed with this arbitration and both the arbitrators should jointly nominate and appoint the third arbitrator and the arbitration proceedings be conducted by the said Tribunal in accordance with the Arbitration and Conciliation Act, 1996. This application was ultimately disposed of by Mr Arun Bhatnagar on 06.12.2001 whereby he gave his opinion that the number of arbitrators shall be only one and the sole arbitrator shall be appointed by the Chief Administrative Officer of the respondent. By virtue of the said order dated 06.12.2001 the said Mr Arun Bhatnagar stated that his authority to continue as an arbitrator would be deemed to have been terminated in view of the fact that he was appointed under the old Act and the new arbitrator ought to be appointed under the new Act. Thereafter, it appears that on 08.04.2002 the Chief Administrative Officer of the respondent appointed one Mr Narottam Dass as the sole arbitrator in place of the said Mr Arun Bhatnagar. This is where the matter rests.

5. This petition has been founded on the premise, as noted above, that there is an agreement between the parties that arbitration is to be conducted by a Tribunal comprising of three arbitrators. But there is nothing on record to show that such an agreement existed between the parties. In fact, what the parties had agreed was that the proceedings be conducted under the new Act and, that is it. They did not have any agreement with regard to the change in the constitution of the Arbitral Tribunal. Since there is no agreement with regard to the constitution of the Arbitral Tribunal comprising of three arbitrators. The invocation of Section 11 (6) of the said Act would be bad. As per the arbitration clause, which still governs the parties, the arbitration is to be conducted by a sole arbitrator. The sole arbitrator is to be appointed by the Chief Executive Officer, MCD. Mr Arun Bhatnagar had earlier been appointed and, on termination of his mandate, Mr Narottam Dass has been appointed by the persona designata. Since the arbitrator is already in place, the question of invoking the provisions of Section 11 (6) of the said Act does not arise. This petition is not maintainable. It is dismissed.

6. In case the petitioner has any grievance with regard to the authority of Mr Narottam Dass to continue as an arbitrator, it is open to him to take recourse to the provisions of the said Act which allow him to challenge the authority of an arbitrator.

**BADAR DURREZ AHMED
(JUDGE)**

**April 09, 2008
SR**