

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

Date of Reserve: 25.5.2009
Date of Order: 29th May, 2009

OMP No. 42/2009

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29.05.2009

Neeru Walia

... Petitioner

Through: Mr. Harish Malhotra, Sr. Advocate with
Mr. Rajesh Kumar, Advocate

Versus

Inderbir Singh Uppal & Anr.

... Respondents

Through: Mr. S.S.Parashar, Advocate

JUSTICE SHIV NARAYAN DHINGRA

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

JUDGMENT

This petition has been filed by the petitioner under Section 14 & 15 of the Arbitration & Conciliation Act, 1996 with a prayer that the mandate of Arbitrator viz. Mr. Ghan Shyam Sunder Arora be terminated.

2. The petitioner had first moved an application under Section 12 & 13 of the Arbitration & Conciliation Act before the Arbitrator raising following issues before the Arbitrator:

1. *That despite two hearings which had been held, this Forum has failed to disclose in writing that he has acted as broker for and on behalf of the*

Claimant in the transaction in dispute and hence this Forum is not an independent and impartial Arbitrator.

2. *That this Forum has signed the Agreements which were executed between the parties on dated. 3rd May, 2006 and on 14th July, 2006 as a witness on the instance of the petitioner.*
3. *That the Agreements are not valid and Respondent kept her right reserved to raise the objection in this regard at a proper stage.*
4. *That this Forum had acted as broker on behalf of the Claimant and has to get his brokerage/commission from the Claimant therefore, this Forum is not an unbiased or impartial person to act as an Arbitrator and therefore Respondent has no faith in this Arbitral Tribunal.*

3. The petitioner herein made a prayer to the Arbitrator that the Arbitrator should recuse himself on the ground that the Arbitrator had acted as a broker of the respondent in respect of the property in dispute and the petitioner had no faith in the Arbitrator and there was every possibility that Arbitrator will act in a biased manner since the Arbitrator would receive brokerage even in this deal if he passes an award in favour of respondent. This application of the petitioner was dismissed by the learned Arbitrator on 9th December, 2008 observing that Section 12 & 13 of the Act were not applicable in this case because the Arbitrator was not appointed as envisaged under Section 12 of the Act but Arbitrator was a named Arbitrator in the arbitration agreement and the Arbitrator though was a broker but was having equal distance from both the parties. The petitioner thereafter filed the present application for terminating the mandate of the Arbitrator on the same ground on which the petitioner made application before the learned Arbitrator.

4. The arbitration clause between the parties reads as under:

7. *That both the parties hereto mutually agree that in the eventuality of any dispute or differences at any stage in between then on any matter relating to the said portion of the said property or any matter incidental thereto, shall be referred to the sole arbitration of Mr. Ghan Shyam Arora, son of Shri C.D.Arora R/o B-*

94, Sharda Puri, Ramesh Nagar, New Delhi-110015, the mutually appointed Arbitrator, whose decision shall be final and binding on both the parties.

5. It is submitted by the learned Counsel for the petitioner that the learned Arbitrator was going to gain directly from the transaction and in case the award was held in favour of the respondent, the Arbitrator would be a direct beneficiary, he being a broker of the respondent. He submitted that this fact has not been denied by the Arbitrator that he was a broker of the respondent in his order. He also submitted that the Arbitrator was conducting proceedings in a very fishy manner. Earlier he was not recording order sheets in presence of the parties and now he has appointed an advocate for recording evidence of the parties. The Arbitrator had no knowledge of law, but the order passed by the Arbitrator on application of the petitioner shows that this order was passed by an expert in law. He submitted that the Arbitrator was not acting independently and was acting probably under the advice of the Counsel for the respondent and therefore the mandate of the Arbitrator should be terminated. The Counsel relied on OPBK Construction Pvt. Ltd. v. Punjab Small Industries & Export Corporation Ltd. and Anr. 2008(3) Arb. L.R. 189 (P&H) and Indira Rai & Anr.(Mrs.) v. M/s Vatika Plantations (P) Ltd. & Ors. 2006 IV AD (Delhi) 92.

6. A perusal of the Arbitration & Conciliation Act, 1996 would show that the Act had provided a challenge procedure under Section 13 of the Act. While Section 12 puts a responsibility on the Arbitrator to disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence, Section 13 provides that in case a party intends to challenge the mandate of an Arbitrator, it shall file an application before the Arbitrator within 15 days after becoming aware of the constitution of the Arbitral

Tribunal regarding the interest of the Arbitrator. Section 13(3) provides that the Arbitral Tribunal shall decide about the challenge made to its appointment or functioning. Section 13(4) provides that in case the challenge made by the party to the functioning of the Arbitrator Tribunal fails, the Arbitral Tribunal has to continue the proceedings and make an award. Sub Section 5 of Section 13 gives right to the aggrieved party to challenge such an award passed by the Arbitrator, under Section 34 of the Act on the ground which the party had made out in its application before the Tribunal asking the Tribunal to recuse itself.

7. It is obvious that where the bias is alleged against the Arbitrator, an application is to be made to the Arbitrator himself asking him to recuse on the ground of bias and in case the Arbitrator rules that he was not biased, the party has no option but to continue with the arbitration proceedings before the same Arbitrator and the Arbitrator has to pass an award. Such an award however, can be challenged under Section 34 of the Act on the ground of bias of the Arbitrator, apart from the other ground available under Section 34.

8. This Court had considered the powers granted to the Courts under Section 14 and 15 of the Arbitration & Conciliation Act regarding termination of mandate of an arbitrator in *Delhi State Industrial & Infrastructure Development Corp. Ltd. v M/s Integrated Techno System Pvt. Ltd. & Anr.* OMP No.305 of 2008 decided on 25th May 2009 and held as under:

“7. It may be that the grievance of the petitioner was justified or it may be that the Arbitrator was acting beyond the scope of reference or he was not conducting the proceedings in a proper manner and was acting arbitrarily and was entertaining applications for enhancement of claim which he could not have. However, all these happenings do not give a right to the Court to interfere in the arbitral proceedings. Section

5 puts a blanket injunction on the Courts in interfering in the arbitral proceedings except in those circumstances which have been provided in Part-I of the Arbitration & Conciliation Act, 1996. The mandate of an Arbitrator can be terminated under Section 14 and 15. Sections 14 and 15 read 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.

15. Termination of mandate and substitution of arbitrator. -

(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate

a) Where he withdraws from office for any reason; or

(b) By or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under subsection (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."

8. *It is apparent from the provisions of Sections 14 and 15 that the mandate of an Arbitrator cannot be terminated on the ground that he was acting in a biased manner or he was not*

conducting proceedings in an improper manner or that he was not following the judicial discipline or he was acting arbitrarily by allowing an application for amendment of the claim or amendment of the written statement or the arbitrator was acting in a biased manner and transgressing his jurisdiction. These may be good grounds for challenging an award but these cannot be the grounds for interfering during arbitral proceedings by the Court.

9. *This Court in Newton Engineering & Chemicals Ltd. v Indian Oil Corporation Ltd. Ors. 136 (2007) DLT 73, held as under:*

“To conclude, I have no hesitation in holding that there is no provision in the Act empowering this Court to terminate the mandate of the Arbitrator who has entered upon the reference and/or to substitute the same with an Arbitrator appointed by this Court. The necessary corollary is that the challenge to the appointment of the Arbitrator must be raised by the petitioner before the Arbitral Tribunal itself. If such challenge succeeds, the petitioner shall have no cause for grievance left. If, however, the petitioner is unable to succeed before the Arbitral Tribunal, it shall have no option except to participate in the arbitral proceedings and if aggrieved by the arbitral award, to challenge the same in accordance with the provisions of Section 34 of the Act.”

10. *In Bharat Heavy Electricals Ltd. v C.N. Garg & Ors. 2001(2) Arb. LR 545(SC) the challenge was made to the continuation of arbitrator on the ground of his being biased. The Supreme Court observed that the remedy available to the petitioner was to file a petition under Section 34, including his challenge to the award on the ground of biasness and unfairness, if he is aggrieved by the arbitral award which may be pronounced by the arbitrator after completing arbitral proceedings before him.”*

7. In view of my above discussions, I find that the present petition filed by the petitioner for change of Arbitrator is not maintainable and is liable to be dismissed and is hereby dismissed.

8. However, since it has been brought to the notice of the Court that the learned Arbitrator was not recording proceedings and in fact had asked for recording of evidence by an Advocate. I consider that the Arbitrator has to proceed in accordance with

the Arbitration and Conciliation Act, 1996. He has to arbitrate personally between the parties and he cannot appoint his agents for doing the arbitration proceedings it is therefore directed that all proceedings of arbitration shall be recorded by the Arbitrator in presence of the parties and order-sheets be got signed from the parties. The Arbitrator shall record evidence himself and shall not assign the work of recording the evidence or any other work regarding arbitration to his agent or assignee.

With these directions this petition is dismissed.

May 29, 2009
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SHIV NARAYAN DHINGRA, J.