

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Order: May 25, 2009

+OMP 297/2009

%

25.05.2009

M/s Spentex Industries Limited

...Petitioner

Through : Mr. Ashok Chhabra, Mr. Kartickay Mathur and Mr. Saurabh Gaur, Advocates

Versus

M/s Indo Ram Synthetics (I) Ltd.

...Respondent

Through: Mr. Anoop Bagai, Sr. Adv. with Mr. Devender Nautiyal and Mr. Surender Kumar Gupta, Advocates for R-1.

JUSTICE SHIV NARAYAN DHINGRA

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

ORAL

1. This petition under Section 14(2) of the Arbitration & Conciliation Act, 1996 (for short, "the Act") has been made by the petitioner with a prayer that the Court should terminate the mandate of the Arbitrator i.e. respondent No.2 and also respondent No.3 (nominated by respondent No.2 in pursuance of MOU dated 28th July 2005 entered between the parties).

The MOU between the parties contained following arbitration clause:

"6 Arbitration.

That in case of any dispute or differences arising out of this Agreement, unless settled amicably, the same shall be referred to the sole Arbitrator Mr. O.P. Lohia or any person nominated by him whose decision shall be final and binding on both the parties and the parties will not raise any objections with regard to the

appointment of an arbitrator at any stage.”

2. It is submitted by counsel for the petitioner that respondent No.1 and the petitioner were earlier companies of the same group. However, a demerger took place with the result that the petitioner company separated from respondent No.1 group, consequent to the approval of scheme of arrangement under the orders of Madhya Pradesh High Court dated 24th March 2003 and this Court passed order dated 25th February 2003. After demerger of two companies, the interest of two companies became different. The above arbitration clause which was contained in the MOU was entered into when the companies were under the same group. It is submitted that after demerger, the interest of companies had become different and Mr. O.P. Lohia who was appointed as arbitrator in the arbitration clause cannot act in a fair and unbiased manner. It is submitted that a dispute arose between the two companies and Mr. O.P. Lohia has nominated respondent No.3 Mr. Virender Mehta, Advocate as an Arbitrator. Since Mr. Virender Mehta, advocate was nominated by Mr. O.P. Lohia, there was every possibility that he shall not act in a fair and judicial manner and there was every likelihood that he shall act in a biased manner in favour of respondent No.1.

3. It is apparent that from the pleadings of the parties that Mr. Virender Mehta though had been nominated as arbitrator by Mr. O.P. Lohia but he had yet to start arbitration proceedings and this petition has been filed before Mr. Virender Mehta had taken any step toward arbitration on the ground of biasness.

4. 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."*

5. In view of above judgment rendered by this Court, the present petition filed by the petitioner is not maintainable and is hereby dismissed as such. No orders as to costs.

May 25, 2009
rd

SHIV NARAYAN DHINGRA J.