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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: May 18, 2009
Date of Order: May 25, 2009

+OMP 305/2008

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25.05.2009

**Delhi State Industrial & Infrastructure
Development Corp. Ltd.**

...Petitioner

Through : Mr. Raman Kapur, Mr. Rahul Kumar & Ms. Neha Khera,
Advocates

Versus

**M/s Integrated Techno System
Pvt. Ltd. & Anr.**

...Respondents

Through: Mr. Shiv Khorana, Advocate

JUSTICE SHIV NARAYAN DHINGRA

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

1. This petition under Sections 14 and 15 of the Arbitration & Conciliation Act, 1996 (for short, "the Act") has been made by the petitioner with a prayer that the mandate of the Arbitrator viz. respondent No.2 be terminated by the Court and the Court should hold that the Arbitrator has become de-facto and de-jure unable to perform and conduct the arbitral proceedings pending between the petitioner and the respondent no.1. It is also prayed that this Court should appoint another independent and impartial Arbitrator in terms of Clause 25 of the agreement to adjudicate the disputes pending between the parties.

2. Brief facts relevant for the purpose of deciding this petition are that the

respondent No.1 raised disputes regarding final bill against the petitioner for a sum of Rs.20,87,570/-. This claim was rejected by the petitioner. The respondent No.1 then wrote to Chief Engineer for referring his claim to arbitration, however, in this letter he enhanced his claim to Rs.21,55,757/-. In terms of the arbitration clause, this claim was referred to the Arbitrator. It is contended by the counsel for the petitioner that the scope of reference of the arbitrator was adjudication of this claim of Rs.21,55,757/- as referred to him by the Chief Engineer. The learned Arbitrator however exceeded his jurisdiction by allowing the respondent to amend his statement of claim and raise the claim to the tune of Rs.47, 50, 774/-. The petitioner raised objections against entertaining additional claim and filed an application under Section 16 of the Act. This application was dismissed by the Arbitrator. The petitioner also filed counter claim to the tune of Rs.19, 15,000/- against respondent. The respondent after completion of pleadings made another application under Section 23 for amending claim statement and enhancing his claim to the tune of Rs.52,78,516/-. The learned Arbitrator took this application also on record and without deciding this application of the respondent of seeking enhancement of claim, fixed a schedule for filing written arguments on the claims made by claimant, reply arguments by respondent and rejoinder thereto by the claimant. The petitioner again moved an application under Section 16(1) and 13(2) of the Act before the Arbitrator questioning the authority of the Arbitrator in entertaining application for amendment of claim at the stage when pleadings had already been completed. The learned Arbitrator rejected the application of the petitioner. It is submitted that the Arbitrator in this case was acting in an erratic manner and contrary to Section 25 of the agreement between the parties. The agreement was unambiguous and gave authority to Arbitrator to decide only those claims as are referred to

him. It is further submitted that the conduct of the arbitrator raised justifiable doubts in the mind of the petitioner about impartiality and independence of the arbitrator. The Arbitrator did not even consider the contentions raised by the petitioner in its application and allowed enhancement of the claim by the respondent even after pleadings were completed. It is also submitted that the learned Arbitrator had been allowing respondent to file documents at every stage and the documents had been filed by the respondent along with statement of claims, subsequently with rejoinder, then with the application for enhancement of the counter claim, again with the second application for enhancement of the claim and then with the written submissions. The learned Arbitrator had not even asked the parties to admit and deny document filed by each other. It was pointed out by the petitioner that the documents filed by respondent No.1 were not mentioned by the respondent No.1 in any of the earlier proceedings and they were all forged and fabricated documents. It is further submitted that the Arbitrator had earlier allowed an application of respondent No.1 for going to the office of the petitioner and directed petitioner to show its records to respondent No.1. However, respondent No.1 did not comply with the order passed by the Arbitrator of visiting the office and inspecting the record. The petitioner filed an application before the Arbitrator about this conduct and the Arbitrator did not dispose of the application on the ground that respondent No.1 had filed an application under the provisions of the Rights to Information Act. It is contended that Respondent No.1 had been filing one application after another, deliberately and malafidely in order to mislead the Arbitrator and had been adding documents along with each application. It is submitted that the petitioner received four applications moved by respondent No.1 on 16th August 2006, 21st November 2006, 10th February 2007 and 12th April 2007 and the

Arbitrator did not pass any order on these applications but had been allowing respondent to rely on the documents which have been filed along with these applications.

3. In the application, the petitioner gave several similar instances to show conduct of the proceedings by the Arbitrator in a haphazard manner and a lack of judicial discipline, and to plead incompetency. It is submitted that the Arbitrator had been conducting the arbitral proceedings in an arbitrary and biased manner showing favoritism to respondent No.1. The petitioner had lost faith in him, therefore, the mandate of the Arbitrator be terminated.

4. Counsel for the petitioner relied upon *OPBK Construction Pvt. Ltd. v Punjab Small Industries & Export* 2008 (3) *Arbitration Law Reporter* 189, a judgment of Hon'ble High Court of Punjab & Haryana and also placed on record a copy of order passed in Special Leave Petition No.19998-19999 of 2008 whereby the judgment rendered by the Punjab & Haryana High Court was upheld by the Supreme Court.

5. In the judgment above referred, the mandate of the Arbitrator was terminated by the Court observing as under:-

"18. In contract between the parties, when one party is a private person and the other party is either government or instrumentality of the State, normally the persona designata is the government officer. But once a persona designata who happens to be a government officer, enters the role of an arbitrator, parties to the contract would like such person to be fair and impartial. The letters written by the Chief Engineer who was the arbitrator could have been justified if the same were written by him prior

to entering of the reference. After he has entered the reference, the kind of views expressed by him are not only sweeping but gives an expression, particularly with reference to pages 101 and 103 of the paper book that he has made up his mind that any independent arbitrator would go against the respondent-Corporation, I would have still justified his continuation as an arbitrator but for the impugned order passed by him. Normally people functioning under fiduciary capacity by virtue of their official responsibilities have to take decisions. But when a person is acting as an Arbitrator and an application has been placed before him confronting his order questioning his bias and he does not record in the order that these observations contained in letters written by him will not prejudice his mind in his role as an arbitrator, except saying that he will remain impartial, to my mind, has made him unfit to act as an arbitrator. He has disqualified himself to act as an arbitrator in given facts. In this regard, court will not be powerless and silent spectator for travesty of justice. Parties cannot be left at the mercy of such an arbitrator whose mind is pre-set. It will be unnecessarily continuing the proceedings. Under these circumstances, it would be appropriate for this court to appoint another arbitrator."

6. It is apparent that the circumstances brought out before the Court in the above case are altogether different from the circumstances brought out in the present case. The Arbitrator in that case had already expressed his view showing that he had made up his mind by writing letters. His views were not only sweeping but showed that he had made up his mind. The Court observed that he had disqualified himself to act as an Arbitrator. In the present case, there is no such situation. The petitioner is aggrieved by the way in which proceedings are being conducted by the arbitrator and because of

entertainment of applications for enhancement of claim by the Claimant.

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.

11. In view of foregoing discussion, I consider that this petition is not maintainable and is hereby dismissed as such. No orders as to costs.

May 25, 2009
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SHIV NARAYAN DHINGRA J.