

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ IA NO. 2313/2009 (u/Sections 14(2) and 15(2) of the Arbitration and Conciliation Act) in CS (OS) No. 47/2005

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Reserved on: 8th September, 2011

Decided on: 13th September, 2011

M/S. CHEMICAL SALES CORPORATION
& ORS.

.....Plaintiffs

Through: Mr. Harish Malhotra, Sr.
Advocate with Ms. Nandni
Sahni, Adv.

Vs.

M/S. A & A LAXMI SALES AND SERVICE
PRIVATE LIMITED & ORS.

.....Defendants

Through: Mr. Pramod Agarwala and Mr.
Anuj P. Agarwala, Advs.

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | No |

A.K. PATHAK, J.

1. By this application under Sections 14(2) and 15(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”), plaintiffs have prayed as follows:

“(a) to appoint a substitute independent arbitrator in terms of Section 14(2) read with Section 15(2) of the Act; and direct all the parties to submit to the jurisdiction of new arbitrator or including defendant Nos. 1 and 2 hereto.

(b) allow the present suit to continue till the pendency of the IA No. 1559 of 2006 and the order dated 27th January, 2009 is maintained by this Hon’ble Court; in the interest of justice also.

(c) in the alternative if this Hon’ble Court comes to the conclusion that new arbitrator cannot be appointed, then the present suit be revived and it be tried on merits.”

2. Briefly stated facts of the case, relevant for the purpose of disposal of this application, are that the plaintiffs filed a suit for dissolution, declaration, permanent injunction and rendition of accounts against the defendants. After the service of summons, defendants appeared in Court through their counsel. Defendant No. 2 filed an application under Section 8 of the Act being IA No. 3618/2005 praying therein that the subject matter of the suit be referred for adjudication by an Arbitral Tribunal, in view of the existence of an arbitration clause governing the relationship between the parties. This application was taken up for hearing on 9th January, 2006. During the hearing counsel for the defendant No. 2 submitted that defendant Nos. 1 and 3 were neither necessary nor proper parties to the disputes arising between the parties. Counsel

for the plaintiffs conceded for deletion of names of defendant Nos. 1 and 3. Accordingly, names of these defendants were deleted.

3. After hearing the arguments of counsel for the parties, a Single Judge of this Court disposed of said application vide order dated 9th January, 2006, operative portion whereof reads as under:-

“3. The learned counsel for the parties submit that there is no difficulty if the disputes arising in the present suit are referred to the Arbitrators, namely, Hon’ble Mr. Justice Devinder Gupta (Retd.), Shri Ram K Watel, Advocate and Shri Girish Aggarwal, Advocate in terms of Section 8 of the Arbitration and Conciliation Act, 1996 without prejudice to the rights and contentions of the parties herein. It is ordered accordingly. In the meanwhile, till the Arbitrators take up the matter on merits, the order passed on 19.01.2005 with regard to protection of the property bearing No. S-479, Greater Kailash, Ground Floor, Part II, New Delhi and property No. 145, Sultanpur, Mehrauli, New Delhi shall continue. With these directions, these applications, as well as the suit, stands disposed of. The parties shall approach the Arbitral Tribunal within ten days.”

4. It is, thus, clear that application as well as suit was disposed of by the order referred above and the parties were relegated to the Arbitral Tribunal.

5. Later on plaintiffs filed an application under Section 151 CPC for modification of the order dated 9th July, 2006 praying therein that the names of defendant Nos. 1 to 3 be not deleted. This

application, however, has since been disposed of as not pressed vide order dated 23rd July, 2010.

6. Two arbitration proceedings bearing A.A. No. 23 of 2005 'Shri Aditya Goel vs. M/s. Consumer Services Corporation & Others' and A.A. No. 23 of 2005 'Shri Aditya Goel vs. M/s. Consumer Services Corporation & Others' had been pending before the same Arbitral Tribunal to which disputes involved in the present suit were referred. The said two proceedings were taken up by the Arbitral Tribunal on 8th February, 2006. Shri Suresh Goel and Shri Gautam Goel, Directors/Partners of the plaintiffs (hereinafter referred to as 'claimants') participated in the said proceedings and brought to the notice of Arbitral Tribunal that the disputes forming part of present suit had also been referred for adjudication. Counsel for the defendants confirmed this fact. A copy of the order was also produced before the Arbitral Tribunal. Accordingly, Arbitral Tribunal entered upon the reference in respect of disputes arising in the present suit as well. Whole schedule was fixed by the Arbitral Tribunal. Claimants were directed to file statement of claim with supporting documents within four weeks with an advance copy to the opposite counsel. Respondents were directed to file statement of defense and counterclaim, if any, along with supporting documents within three weeks of receipt of copies from the claimants.

Claimants were afforded opportunity to file rejoinder to the statement of defense and reply to the counterclaim, if any, within two weeks thereafter. Respondents were given opportunity to file rejoinder to the reply to the counterclaim, if any, within two weeks of receipt of the copies from the claimants. Parties were also directed to file affidavits with advance copies to the opposite party thereby admitting or denying the documents. Arbitration proceedings were adjourned to 3rd May, 2006 at 4:30 PM.

7. On 3rd May, 2006, when the matter was taken up by the Arbitral Tribunal, claimants showed their disinclination in participating in the arbitration proceedings. Claimants had even not filed the statement of claim. Claimants also flatly refused to pay their share of fee. They even disputed the correctness of proceedings dated 8th February, 2006. Consequently, Arbitral Tribunal has terminated the arbitration proceedings under Section 32(2)(c) of the Act. Relevant it would be to refer to the operative portion of the order dated 3rd May, 2006 of Arbitral Tribunal which reads as under:-

“Today, when along with the other two arbitration matters, we took up the proceedings in this case as well, Sh. Suresh Goel and Sh. Gautam Goel expressed their ignorance about the proceedings in this case. According to them on 8.2.2006 neither proceedings had commenced in this case, nor could have taken place till a certified copy of the order of the High Court was produced by them.

They also stated that we could not have entered upon reference and could not have taken cognizance merely on the basis of an uncertified copy of the order produced by the Respondent. They also stated that they were surprised to learn that not only we had entered upon reference even schedule of proceedings had been fixed by us of which they were not aware and that they were not served with a copy of the minutes of the last sitting. At that stage a copy of the proceedings was handed over to them. Without looking at this copy they expressed their ignorance about the proceedings. However, they admitted that on 8.2.2006, in their presence a copy of the order had been handed over by the Respondent to us and that they had also brought to our notice the fact of deletion of two necessary parties by the High Court, for which they had moved the High Court for modification of the order. They also admitted that they had told us we cannot proceed with the matter till their application for modification of the order is decided by the High Court in which the next date fixed by the High Court to hear arguments is 18.7.2006. They also admitted that on 8.2.2006 they had pointed out that they were unable to pay separate fees in this case and that they would not like the proceedings in this case to go on till they have produced a certified copy of the order to be passed by the High Court.

Learned counsel for the Respondent strongly objected to what the Claimants have stated before us to-day as regards the proceedings of 8.2.2006 and urged that the entire effort of the Claimant is to stall the arbitration proceedings, which has been their attitude throughout and prayed for passing an appropriate order of termination the proceedings as the claimants are not even prepared to pay their share of the fee of the arbitrators.

We have duly considered what the Claimants have stated before us and what they had stated during the last sitting held on 8.2.2006. The Claimants

are even disputing as to what exactly transpired on 8.2.2006 before us and now they do not want us to proceed in the matter till a certified copy of the order is produced by them and till their application for modification is decided by the High Court. They say that till then they would not like to appear or participate in these proceedings before us.

We may place on record our observation that the claimants in this case are not at all cooperative. They have tried to even question the factum of the proceedings recorded by us in presence of the parties. We have correctly recorded in the last proceedings what exactly had transpired in presence of the parties.

In these circumstances, we are of the considered view that it has become impossible to continue with the proceedings in which we have already taken cognizance in presence of the parties to their express knowledge and accordingly proceed to pass an order, as envisaged under Section 32(2)(c) of the Arbitration & Conciliation Act, 1996, terminating the proceedings. We have also apprised the parties of the same. The arbitration proceedings accordingly stands terminated.”

8. Sections 14 and 15 of the act reads 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 1. 3, 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.”

9. A conjoint reading of Sections 14 and 15 makes it clear that the mandate of an arbitrator shall terminate if he becomes ‘de jure’ or ‘de facto’ unable to perform his function or for any other reason

fails to act without undue delay or he withdraws from his office for any reason or the parties agree to terminate his appointment. In case, mandate of an arbitrator terminates for any of the reasons as envisaged under Sections 14 and 15 of the Act, a substitute Arbitrator shall be appointed, according to the rules that were applicable to the appointment of an arbitrator being replaced, as provided under Section 15 (2) of the Act. In other words, another arbitrator shall have to be appointed in case mandate of an arbitrator terminates for any of the reasons as provided under Section 14 (1) and 15 (1).

10. Relevant it would be to refer to Section 32 of the Act which reads as under:-

“32. Termination of proceedings.

(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub- section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where-

- (a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in, obtaining a final settlement of the dispute,
- (b) the parties agree on the termination of the proceedings, or
- (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 and sub- section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.”

11. The aforesaid provision specified the circumstances under which arbitral proceedings shall be terminated. It provides that arbitral proceedings shall stand terminated on Arbitral Tribunal making an award. Besides that, arbitral proceedings can also be terminated in case (a) claimant withdraws his claim (b) parties agree on the termination of the proceedings. For example, if parties arrive at a settlement and agree for termination of proceedings, in such an eventuality also, arbitral proceedings shall stand terminated (c) if Arbitral Tribunal finds that continuation of the proceedings have become unnecessary or impossible for any other reason. In other words, if the arbitral tribunal finds, for any reason which includes non-cooperation of the parties, making the continuation of the proceedings impossible, then it can make an order for termination of the arbitral proceedings. In case of termination of the proceedings, the mandate of Arbitral Tribunal shall also stand terminated as envisaged under Sub-Section 3 of Section 32 of the Act except in cases where Section 33 and Section 34(4) of the Act are attracted. Arbitral Tribunal has power to terminate the arbitral proceedings under Section 25(a) upon default of the claimant to communicate his

statement of claim; under Section 30(2) upon settlement of dispute by the parties and under Section 38(2) upon failure of the parties to pay the amount of deposit fixed by the Arbitral Tribunal. The termination of arbitral proceedings is different from termination of the mandate of arbitrator. The mandate of arbitrator, depending upon the facts and circumstances of a case, may come to an end but not the arbitral proceedings. For example, if the parties to the arbitration agreement had fixed a period of six months for completion of arbitral proceedings and making of an award by the Arbitral Tribunal and the Arbitral Tribunal fails to do so on or before expiry of six months, the mandate of Arbitral Tribunal shall come to an end but not the arbitration proceedings and in such an eventuality, if a substitute arbitrator is appointed than he shall have to continue with the arbitration proceedings from the stage the same had been left by the earlier arbitrator. However, in case arbitration proceedings are terminated within the meaning of Section 32 of the Act resulting in termination of mandate of arbitrator, the same cannot continue merely by appointing another arbitrator. In such a scenario, first of all, the arbitration proceedings have to be revived after setting aside the order of Arbitral Tribunal terminating the arbitral proceedings.

12. In view of the above discussions, I do not find any force in the contention of learned senior counsel for the petitioner that the

termination of arbitral proceedings, in this case on the ground of alleged non-cooperation of the claimant including the ground of non-payment of fee, tantamount to withdrawal by the arbitrators resulting in termination of mandate of Arbitral Tribunal, within the meaning of Section 15(1)(a) of the Act thereby attracting sub-Section 2 of Section 15 of the Act. In this case, arbitrators have not withdrawn from office for any reason as stipulated in Section 14 or 15 of the Act but have, in fact, terminated the arbitral proceedings under Section 32(2)(c). Thus, in my view, sub-Section 2 of Section 15 of the Act is not attracted in the facts of this case.

13. As regards, other prayer for revival of the suit is concerned, the same cannot be granted. Existence of arbitration clause was not disputed at the time of hearing of the application under Section 8 of the Act, inasmuch as, plaintiffs had agreed for referral of the disputes to the same Arbitral Tribunal, which was dealing with other cases between the parties. Section 8 of the Act provides that a judicial authority before which an action is brought in a matter which is the subject matter of an agreement shall, if a party so applies not later than submitting his first statement on the substance of the dispute, refer the parties to arbitration. After service of summons, defendant no. 2 without submitting his first statement had filed the application under Section 8 of the Act which

was disposed of vide order dated 09/01/2006 and the parties were relegated to arbitration for resolution of their disputes, in terms of the arbitration agreement and the suit having been disposed of, cannot now be revived merely because Arbitral Tribunal has terminated the arbitration proceedings.

14. For the foregoing reasons, present application is dismissed.

A.K. PATHAK, J.

September 13, 2011

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