

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 04.07.2011

OMP 392/2011

DELHI CHEMICAL & PHARMACEUTICALS WORKS
PVT LTD & ORS

..... Petitioners

versus

HIMGIRI REALTORS PVT LTD

..... Respondent

Advocates who appeared in this case:

For the Petitioners : Mr Kailash Vasudev, Sr. Adv.
with Mr Rohit Kumar, Adv.

For the Respondents : Mr Anil Sapra, Sr. Adv. with
Mr Sachin Puri, Adv.

CORAM:-

HON'BLE MR JUSTICE MANMOHAN SINGH

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 ?

MANMOHAN SINGH, J.

1. The petitioner has filed the present petition under Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking following relief:

- a. call for the records of the arbitration proceedings presently before Sh. Subhash Lakhotia as the sole arbitrator titled "Himgiri Realtors Pvt. Ltd. Vs. Delhi Chemical & Pharmaceutical Works Pvt. Ltd. & 4 Ors.;

- b. terminate the mandate of Sh. Subhash Lakhotia, S-228 Greater Kailash Part-II, New Delhi – 110 048 to act as the sole arbitrator in the proceedings presently being conducted by him on the behest of the respondent titled “Himgiri Realtors Pvt. Ltd. Vs. Delhi Chemical & Pharmaceutical Works Pvt. Ltd. & 4 Ors.
- c. stay the proceedings being conducted by Sh. Subhash Lakhotia acting as a Sole Arbitrator in the matter titled “Himgiri Realtors Pvt. Ltd. Vs. Delhi Chemical & Pharmaceutical Works Pvt. Ltd. & 4 Ors. and;
- d. award costs in favour of the petitioners.
- e. Pass any other or further order/s as may be deemed fit, just and proper in the facts and circumstances of the case in favour of the petitioners.

2. The contention made by the petitioners in the case is that the petitioners had appointed one Subhash Lakhotia as a consultant for the purpose of development of a plot bearing No.A-8 (Site IV) Link Road, Sahibabad, District Ghaziabad (UP) belonging to petitioner No.1. An agreement dated 03.03.2006 was entered into for the said purpose where an assurance was given by Subhash Lakhotia that he shall identify, locate and introduce independent parties to develop the plot and further negotiate on behalf of the petitioners with the parties. It is also stated that Subhash Lakhotia introduced the petitioners to the respondent, a company belonging to Aeren Group of Companies. Subhash Lakhotia had assured the petitioners that after due diligence he has ascertained the

capability, capacity and expertise of the respondent and the group it belonged to, in the field of developing properties.

3. Subsequently, the petitioners signed the Collaboration Agreement with the respondent on 06.07.2006. The said agreement was neither registered nor stamped. It is alleged that the respondent failed to adhere to the commitments and assurances given by it and various meetings were held between the parties as well as Subhash Lakhotia to amicably resolve the disputes between the parties, however, the said meetings did not materialise between them. It is further contended that during the course of the said meetings, it came to the knowledge of the petitioners that Subhash Lakhotia, who is now arbitrator, in fact had been deeply involved in various other financial and property deals with the respondent, its group of companies, directors and their family members prior to acting as a consultant for the petitioners. It is stated that the nexus and financial involvement between Subhash Lakhotia and the respondent company came to the knowledge of the petitioner, when further financial benefits were sought to be conferred on Subhash Lakhotia by the respondent company and its directors by forcing the petitioners into agreeing to illegal and unwarranted demands of the respondent company.

4. The petitioner received the communication dated 08.02.2011 from Subhash Lakhotia alleging that he had been appointed as the sole

arbitrator in terms of the communication dated 07.02.2011 sent by the respondent appointing him as the arbitrator in terms of the arbitration agreement. Thereafter, the petitioners communicated to the arbitrator their inability to join the proceedings. Copy of the communication is on record. On 23.02.2011, the petitioners made an application under Section 13 of the Act, inter alia, setting out in detail the facts and circumstances which in terms disqualified Subhash Lakhotia to act as sole arbitrator. The relevant details of the facts in this regard spelt out are given as under:

“There were financial and pecuniary interests between Subhash Lakhotia and the respondent company which were not known to the petitioners at the time his being appointed as management consultant and named as a arbitrator in the alleged collaboration agreement dt. 6.7.2006. Sh. Subhash Lakhotia had floated partnership firms known as “First Reit” and “Second Reit” for development of commercial buildings and sites etc. in which Mr Rajesh Aeren the Manaing Director the of the respondent company and his family members were partners. The aid firms were primarily made for development of commercial buildings and sites etc. and had close relations with the Aeren group of companies. His attention was also drawn to the fact that during the course of meetings pecuniary advantages were offered to Sh. Subhash Lakhotia in the form of commercial space etc. and that it had also been learnt by the petitioners that separate agreement and arrangement had been arrived at between Sh. Subhash Lakhotia and the respondent garneting financial and material benefit to Sh. Subhash Lakhotia to prevail upon the petitioners into agreeing to the illegal demands of the

respondent company.”

5. The arbitrator, however, by undated order, which was received by the petitioners by speed post on 19.03.2011, disposed of the application of the petitioner and decided to continue with the arbitration proceedings. The allegation of the petitioner is that when the application was filed, in the presence of the petitioners No. 2 and 3 and their counsel, the arbitrator directed the respondent to file the reply to the application on or before 25.03.2011, however, in the order dated 19.03.2011 the respondent was also directed to file a claim petition on or before 25.03.2011.

6. The petitioner filed another application on 25.03.2011 for recalling the order as the order was passed contrary to the direction given by the sole arbitrator to the respondent, in the presence of the petitioners No. 2 and 3 and their counsel, to file the reply. The said application was also dismissed by the arbitrator and the same was conveyed to the petitioners on 13.04.2011. The apprehensions raised by the petitioners in their application filed under Section 13 of the Act, that they are sure that the arbitrator is biased and not acting impartially, therefore, the petitioners have filed the present petition inter alia praying and seeking direction to terminate the mandate of Sh. Subhash Lakhotia to act as sole arbitrator.

7. It is pertinent to mention, that while dismissing the application under Section 13 of the Act filed by the petitioners, wherein various allegations were made. The sole arbitrator has not specifically denied the allegations raised by the petitioners. Some of the details mentioned in his order reads as under:

“As a matter of fact the Respondent had appointed me as a Management Consultant for them. Also it is well within their knowledge that I was appointed as a Management Consultant by the Claimants on 24.04.2006 simultaneously with the execution of original Collaboration Agreement dated 27.04.2006 to which I was also one of the witnesses and Clause 37 categorically stated that the Land Owners as well as the Developer shall pay management service fee to me as per a separate agreement to this effect. Thus, entire contention to the effect that the Claimants were not aware of these factors prior to the execution of the Agreement dated 06.07.2006 is incorrect and false to their knowledge. Also as a matter of fact the two Partnerships were well within the knowledge of the Applicants/Respondents and they were formed in the year 2004 and 2005 which are till date continuing. These were not only prior to the execution of the Agreement but also are well within the knowledge of the Respondents. No information could be brought out in this Application which can be said to be withheld by me. No ground has been made out for filing of the present application at all and thus the present application is liable to be dismissed. It is important to state over here that the pecuniary interest so stated or any other interests were well within the knowledge of the parties at the time when the Agreements were signed. I had also been invited to various Meetings between the parties each time by the Respondents. The meetings were attended by me along with the parties for the reason that they wanted me in my capacity as a named Arbitrator in the Agreement

to the updated at all times about the developments taking place in the matter. Not only this, the Respondents were in constant touch with me about the various developments and various decisions were at various times referred to me when the parties were not in agreement in respect thereof. Thus, in effect the parties treated me as an ongoing Arbitrator all this while in a manner of speaking where the day-to-day developments and decisions of the project were being brought to my notice and my suggestions were incorporated in my capacity as a Consultant.”

8. During the course of hearing, the learned counsel for the petitioners has made the submission that the reason given by the learned arbitrator for rejecting the challenge to his mandate as an arbitrator on the ground of bias is that the parties were aware of the relationship between them. According to the learned counsel assuming both the parties were aware about his relations with them even then, he cannot continue with the proceedings. Therefore, in the interest of justice, equity and fair play, the prayer made by the petitioner be allowed, otherwise, the petitioners have no ray of hope to get the justice from him and the very purpose of going for arbitration would be frustrated as the apprehension expressed by the petitioners with regard to his independence and impartiality are correct in view of his admission.

9. The first point raised by Mr. Anil Sapra, learned senior counsel appearing on behalf of the respondent is that this Court has no jurisdiction to entertain the present petition as the subject matter of the

land is situated at Ghaziabad which is outside the jurisdiction of this Court. The learned counsel for the respondent has referred to the following judgments:

- i. *Amrit Lal Madan & Anr. v. K.D. Ahuja & Ors.*: CM(M) No.233/2009, dated 08.02.2010.
- ii. *M/s Era Infra Engineering Limited v. RamvirSingh & Anr.*: OMP No.307/2009, dated 29.05.2009.
- iii. *Govil Automobiles v. Hindustan Petroleum Corpn. Ltd. & Anr.*: 163 (2009) DLT 70.
- iv. *Pacific Greens Infracon Pvt. Ltd. v. Senior Builders Ltd.*: 159 (2009) DLT 130.
- v. *Pantaloon Retail India Ltd. v. DLF Limited & Ors.*: 2008 IX AD (Delhi) 606.
- vi. *Harshad Chiman Lal Modi v. DLF Universal.*: 2005 (7) Scale 533.

10. In case, the present case is covered with the decision referred to by the learned counsel for the respondent, undoubtedly in view of the dicta in *Harshad Chimanlal Modi* (supra), this court would not have jurisdiction. But the position in the present case is different. Clause 33 of the agreement provides that the seat of the arbitration shall be Delhi. The collobration agreement dated 06.07.2006 was executed in Delhi. Both the parties are also carrying on their business within the jurisdiction of this Court.

11. This Court has gone through the decisions referred to by the respondent. Most of the decisions have been discussed in case of *Bhawna Seth vs. DLF Universal Ltd. & Anr.*: 138 (2007) DLT 639. In

the said case, the legal proposition which has been culled out from these is that there is a distinction between the suits in relation to the specific performance of agreement in question without the relief of possession and in suits where additional claim for delivery of possession is prayed for. In the present case, the situation is entirely different, as the petitioners have merely sought the relief under Section 14 of the Act to terminate the mandate of the arbitrator to act as a sole arbitrator and the jurisdiction of this Court is invoked under Section 20 of the Act for the said purpose. Further, the reliefs sought by the petitioners in the present petition do not involve determination of any right in the suit property. Therefore, the decisions referred to by the respondent are not applicable in the present case and the contention of the respondent, that this Court has no jurisdiction, is accordingly rejected.

12. The next submission of the respondent is that once the challenge of the authority of the arbitrator under Section 12 by resort to Section 13 fails, the petitioners are left with no remedy, but to continue with the arbitration proceedings. The petitioners' challenge can be re-agitated, if necessary, at the stage of filing of the objections under Section 34 of the Act. Therefore, Section 14 invoked by the petitioners for termination of the mandate of an arbitrator on the ground of bias or their doubt of independence is misplaced.

13. Normally, the power under Section 14 is exercised in rare cases and with great caution. Merely on the basis of vague allegations of biasness made by the parties, the prayer cannot be allowed. The present case is a peculiar case where the arbitrator has not denied the facts stated in the application filed by the petitioners under Section 13 of the Act. In the present case, if merely apprehension had been raised by the petitioners, the position would have been different, but, the circumstances of the present case speaks for themselves about his independence and impartiality. In view of the facts of the present case, there is no doubt that the present case is a fit one where justice cannot be dispensed with by the sole arbitrator. Thus, the contention of the respondent cannot be accepted rather, I am of the considered view that even if the challenge of the aggrieved party under Sections 12 and 13 of the Act fails in the present set of circumstances, the party can still make out a case of *de jure* and *de facto* inability of the arbitrator to act, to move the court under Section 14 of the Act.

14. It was held in many cases that the power of the Court under Section 14 of the Act to decide the controversy, as to whether or not the mandate of the arbitrator stands terminated, cannot be taken away by the decision of the arbitrator under Section 13(2) of the Act nor is the same binding upon the Court.

15. In the case of National Highways Authority of India v. K.K. Sarin and others; 159 (2009) DLT 314, the same has been taken as that in Alcove Industries Ltd. v. Oriental Structural Engineers Ltd. and another; 2008 (1) ARBLR 393 (Delhi). The relevant paras of this case are reproduced as under:

“28. I have already in Sharma Enterprises Vs National Building Constructions Corporation Ltd, 2008 (3) Arb. LR 456 (Del.) held that Section 5 of the 1940 Act as interpreted in Panchu Gopal Bose finds place in the form of Section 14 of the 1996 Act. There can be no other interpretation of the power given to the court to terminate the mandate of the arbitrator when the arbitrator de jure is unable to perform his function. The de jure impossibility can be nothing but impossibility in law. Bias vitiates the entire judicial/arbitration process and renders the entire proceedings nugatory. Reference in this regard may also be made to State of West Bengal Vs Shivananda Pathak, (1998) 5 SCC 513 cited by the ASG, though in a different context, holding that all judicial functionaries have necessarily to decide a case with an unbiased mind; an essential requirement of a judicial adjudication is that judge is impartial and neutral and in a position to apply his mind objectively - if he is predisposed or suffers from prejudices or has a biased mind, he disqualifies himself from acting as a judge. This equally applies to arbitrators, as statutorily provided in Sections 12 and 13. In my opinion, if the arbitrator is biased, he is de jure unable to perform his functions within the meaning of Section 14. Thus, if the court without any detailed enquiry is able to reach a conclusion of the arbitrator for the

reason of bias is unable to perform his functions, the court is empowered to, without requiring the parties to inspite of so finding go through lengthy costly arbitration, hold that the mandate of arbitrator stands terminated. However, the said power under Section 14 has to be exercised sparingly with great caution and on the same parameters as laid down by Apex Court in *SBP & Company v Patel Engineering Limited*, 2005 8 SCC 618 = 2005 (3) Arb. LR 285 (SC) in relation to Section 11(6). Only when from the facts there is no doubt that a clear case of bias is made out, would the court be entitled to interfere. Else it would be best to leave it to be adjudicated at the stage of Section 34.

34. I have also wondered as to whether Section 13(5) leads to an inference that upon the challenge to the arbitrator under Section 13(1) being unsuccessful, the only remedy is under Section 34 of the Act inasmuch as Section 13(5) does not make any reference to Section 14. However, if we are to hold so then we would be rendering the de jure inability of the arbitrator to perform his functions otiose. To me, the scheme of the Act appears to be that the challenge has to be first made before the arbitrator in accordance with the Section 13 of the Act and upon such challenge being unsuccessful the challenging party has a remedy of either waiting for the award and if against him to apply under Section 34 of the Act or to immediately after the challenge being unsuccessful approach the court under Section 14 of the Act. The court when so approached under Section 14 of the Act will have to decide whether the case can be decided in a summary fashion. If so, and if the court finds that the case of de jure inability owing to bias is established, the court will terminate the mandate. On the contrary, if the court finds the challenge to

be frivolous and vexatious, the petition will be dismissed. But in cases where the court is unable to decide the question summarily, the court would still dismiss the petition reserving the right of the petitioner to take the requisite plea under Section 34 of the Act. This is for the reason of the difference in language in Section 14 and in Section 34 of the Act. While Section 14 provides only for the court deciding on the termination of the mandate of the arbitrator, Section 34 permits the party alleging bias to furnish proof in support thereof to the court. Section 34(2)(a) is identically worded as Section 48. The Apex Court in relation to Section 48 has in *Shin-Etsu Chemicals Co. Ltd Vs Aksh Optifibre Ltd*. MANU/SC/0488/2005 = AIR 2005 SC 3766 = 2005 (3) Arb. LR 1 (SC) held that leading of evidence is permissible. Per contra, Section 14 does not permit any opportunity to the petitioner to furnish proof. Thus, all complicated questions requiring may be trial or appreciation of evidence in support of a plea of bias are to be left open to decision under Section 34 of the Act.

35. I therefore conclude that a party alleging bias is required to first follow the procedure in Sections 12 and 13 and if unsuccessful has choice of either waiting till the stage of Section 34 or if he feels that bias can be summarily established or shown to the court, approach the court immediately under Section 14, after the challenge being unsuccessful, for the court to render a decision.”

16. In the case of *Union of India v. Singh Builders Syndicate*

(2009) 4 SCC 523 the Supreme Court has also laid as under:

“14. It was further held in *Northern Railway case* (2008) 10 SCC 240 that the Chief Justice or his designate should first ensure that the remedies provided under the arbitration

agreement are exhausted, but at the same time also ensure that the twin requirements of sub-section (8) of Section 11 of the Act are kept in view. This would mean that invariably the court should first appoint the arbitrators in the manner provided for in the arbitration agreement. But where the independence and impartiality of the arbitrator(s) appointed/nominated in terms of the arbitration agreement is in doubt, or where the Arbitral Tribunal appointed in the manner provided in the arbitration agreement has not functioned and it becomes necessary to make fresh appointment, the Chief Justice or his designate is not powerless to make appropriate alternative arrangements to give effect to the provision for arbitration.”

17. For the aforesaid discussions, I am of the considered view that the arbitrator in the present case would be unable to perform his duties impartially and independently. The continuation of the arbitral proceedings before the learned arbitrator Sh. Subhash Lakhota would be a completely futile exercise if the Court would allow the proceedings to continue before him.

18. Therefore, I allow the present petition and terminate the mandate of Sh. Subhash Lakhota as the arbitrator in the proceedings in question.

19. Considering the nature of the disputes, the disputes are referred to the arbitration, to be conducted under the aegis of Delhi High Court Arbitration Centre and its rules. Parties shall appear before the Delhi High Court Arbitration Centre on 12.07.2011.

20. The Arbitrator appointed by the Delhi High Court Arbitration Centre shall give prior notice before commencing the proceedings.

21. The petition stands disposed of.

22. A copy of the order be sent to Delhi High Court Arbitration Centre. Dasti.

MANMOHAN SINGH, J

JULY 04, 2011/jk