

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

+ **O.M.P. 984/2014**

Judgment reserved on: 09.12.2014

Judgment pronounced on: 14.01.2015

MUKESH AGGARWAL

..... Petitioner

Through: Mr.P.R.Agarwal and Mr.Mahendra,
Mr.Y.R.Sharma, Mrs.Anju Bhushan
and Mr.Laxman Singh, Advocates

versus

ATUL GUPTA & ANR

..... Respondents

Through: Mr.Vijay Tandon, Advocate for R-1.
Ms.Varsha Ahluwalia, Advocate for
R-2.

CORAM:

HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

1. The present petition has been filed under Section 14 of the Arbitration and Conciliation Act (hereinafter referred to as 'the Act') for terminating the mandate of the arbitrator on the grounds that the claimant/respondent no.1 Atul Gupta is an advocate and visiting the court complex in the Karkardooma Court, Delhi where the respondent no.2 i.e. the arbitrator is a practising lawyer. The respondent no.1/the claimant and the arbitration/respondent no.2 are therefore colleagues. That the petitioner has also observed during the hearing attended by his counsel Mr.Mahendra Singh, Advocate on 05.04.2014, 10.05.2014, 19.05, 2014, 24.05.2014,

31.05.2014 and 30.06.2014 that the arbitrator used to call Sh.Atul Gupta/the claimant as “*Are Atul sit by my side*” while there was no sitting arrangement for his advocate Mr.Mahendra Singh. The relationship between them is very informal. The arbitrator/respondent no.2 is nominee of respondent no.1/the claimant. It is submitted that though the claimant is not actively practicing as an advocate but he is an advocate in Karkardooma Court. The arbitrator had not been supplying copy of the various documents and orders and supplied only on a formal application. The petitioner had paid a fee of Rs.1 lakh to the arbitrator while the respondent no.2/the claimant has not paid any fee. The various orders passed by the arbitrator would show that she is biased/prejudiced against the petitioner and had also threatened to close the defence of the petitioner and also imposed heavy cost of Rs.10,000/-. The respondent no.1 is supplying the legal matters i.e. challan etc. to the arbitrator which is adding in her additional income. It is also contended that as per the settled principle of law if the arbitrator or a judge is prejudiced towards one party, then he should not try that case because no man shall be a judge in his own cause. It is further contended that the petitioner had never approached the arbitrator with any ulterior motive. It is submitted that an application had been moved before the arbitrator requesting her to recuse

from the matter on these grounds but she dismissed the said application of the petitioner and had made certain observations which were false. It is submitted that the observation made by the arbitrator that she had been approached by the petitioner for giving benefits to him, is false observation. It is submitted that an observation that the petitioner is adopting delaying tactics is also a false observation. It is submitted that the respondent no.2 is biased and he has lost faith in her and therefore her mandate be terminated as she has become *de jure* and some other person be appointed as an arbitrator.

2. The reply has been filed by the respondents to the application in which all these contentions have been denied. It submitted that the present petition is not maintainable and is liable to be dismissed. Rejoinder is also filed by the petitioner reiterating the contentions of the petition.

3. I have heard arguments and perused the record.

4. Admittedly, there exists a contractual agreement between the petitioner and the respondent no.1 which contained an arbitration clause. Pursuant to the arbitration clause the respondent no.1 appointed the respondent no.2 as an arbitrator. She had held several hearings in which the petitioner through his counsel has participated. During the hearings, the

petitioner had moved an application before the arbitrator whereby he had requested the arbitrator to recuse herself on the same ground as mentioned in this petition. The arbitrator after hearing the parties disposed of the said application of the petitioner vide her order dated 30.07.2014. This petition seems to be an appeal against said order of the arbitrator as the present petition is on same ground on which recusal of arbitrator was sought.

5. The present petition under Section 14 of the Act has been filed on the ground that the mandate of the arbitrator has become *de jure*, so be terminated.

6. This court in the case of *Shyam Telecom Ltd. vs. Arm Ltd.*: **113 (2004) DLT 778** has dealt with the expression *de jure* and *de facto* used by the legislature in Section 14 (1) (a) of the Act. This court has observed as under:

11. Before I proceed to examine the merits of the petition it seems to be necessary to consider the question of very maintainability of the present petition under the provisions of Sub-section (2) of Section 14 of the Act. Section 14 of the Arbitration and Conciliation Act, 1996, which 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 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."

12. What is the object, intent and scope of the above provision of law would decide the question of maintainability of the present petition. This section postulates the circumstances under which the mandate of the Arbitrator can be terminated. The Arbitrator's mandate can be terminated under the following situation:

(i) Automatic termination,

(ii) By the Arbitrator himself,

(iii) By the parties,

(iv) By tribunal order,

(v) By Court's order.

The mandate of an Arbitrator automatically terminates at the death of the Arbitrator or his physical incapacity to proceed with the mandate. This provision sets following three grounds that constitutes an Arbitrator's inability ; (i) his de jure, or

(ii) his *de facto* inability to perform his functions, or (iii) his failure to act without undue delay for other reasons. The first situation refers to an Arbitrator's legal incapacity to perform his functions under the law and relates to circumstances under which the Arbitrator by law is barred from continuing in office, for instance, incapacity, bankruptcy conviction for a criminal offence, etc. The second incapacity relates to factual inability, which includes factual situation, in which the Arbitrator is physically unable to perform his functions for instance, such as continuous ill-health, etc. The last situation "failure to act without undue delay" is an expiry provision according to which the mandate of the Arbitrator shall terminate if for other reasons he fails to act without undue delay.

13. The *de jure* impossibility referred to in Clause (a) of Sub-section (1) of Section 14 is the impossibility which occurs due to factor personal to Arbitrator and *de facto* occurs due to factors beyond the control of the Arbitrator. The judicial intervention of the Court is provided in Sub-section (2) only if a controversy remains concerning any of the grounds referred to in Clause (a) of Sub-section (1) of Section 14 of the Act. Sub-section (2) of Section 14 empowers the Court to decide the question of termination of the mandate if a controversy arises concerning the termination of the Arbitrator's mandate on one or the other grounds.

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15. In the opinion of this Court, the expression "*de jure*" is amply wide so as to cover a situation like the case in hand. This view is based on the settled legal position that Arbitration agreement is the fountain head of the Arbitrator's power and authority and the parties as well as the Arbitrator are governed and controlled by the terms of the said Arbitration agreement. Unless parties agree to the contrary,

the terms of Arbitration agreement must operate in full. ”

7. The petitioner is therefore required to show that the mandate of the arbitrator is liable to be dismissed because of some legal disability. The arbitrator is working under the terms of the arbitration agreement. The arbitration agreement stipulates the appointment of an arbitrator in case of arbitral dispute by the respondent no.1. Since the appointment of the arbitrator has been done by the respondent in terms of arbitral agreement, it cannot be said to be contrary to the terms of the arbitration agreement. The petitioner has failed to show to this court that the mandate of the arbitrator has become *de jure* and therefore liable to be dismissed.

8. From the petition it is apparent that only contention on which the mandate of the arbitrator is challenged is that the petitioner suspects the impartiality of the arbitrator. He suspects that respondent no.2 is favouring the respondent no.1 and thus is biased. His challenge thus falls under Section 12 of the Act. Section 12 (3) of the act reads as under:

Section 12. Grounds for challenge --

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

9. The challenge by the petitioner to the continuation of arbitrator is on the ground of her independence and impartiality. His remedy lies under Section 13 of the Act. The petitioner has availed this remedy by moving an application before the arbitrator requesting her to recuse herself. For the ready reference the relevant provision is reproduced as under:

“Section 13: Challenge procedure --

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.”

10. Under Section 13 (3) of the Act, arbitrator is required to decide on challenge unless the arbitrator withdraws from his/her office. In the present case, instead of withdrawing or recusing herself, the arbitrator passed the order on the challenge of her authority.

11. Section 13 (4) of the Act empowers the arbitrator to dismiss the challenge made under Section 12 (3) of the Act and continue with the

arbitral proceedings. Section 13 (4) of the Act reads as under:

Section 13. Challenge procedure --

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

12. In view of this legal preposition it cannot be said that continuation of the arbitral proceedings on the dismissal of the application of the petitioner, whereby he requested the arbitrator to recuse herself/himself on the ground that he suspected her/his impartiality and independence, be said to be illegal. Rather the act of the arbitrator is as per legal preposition.

13. Section 37 of the Act does not provide any appeal against such an order of arbitrator.

14. In view of the foregoing discussion, it is apparent that law does not envisages or propounds that an arbitrator becomes *de jure* or *de facto* unable to perform her/his functions on the ground that she/he has refused to recuse herself/himself where her/his impartiality or independence is suspected. But it is not that the petitioner is remediless. His remedy lies under Section 13 (5) of the Act.

15. The petition has no merit. Same is dismissed with no order as to costs.

**DEEPA SHARMA
(JUDGE)**

JANUARY 14, 2015
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