

(2009) 12 DEL CK 0158
In the Delhi High Court
Case No : OMP No. 66 of 2009

Ashvika Construction Pvt. Ltd.

APPELLANT

Vs

Govt. of India and Others

RESPONDENT

Date of Decision : 22-12-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 12(3), 13, 13(3), 14

Citation : (2009) 12 DEL CK 0158

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : T.K. Ganju, Bina Gupta and Gaurav Singh, for the Appellant;
Amandeep Joshi, for Jyoti Singh, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J

1. This is a petition under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 for the termination of the mandate of the Arbitrator.

2. The facts as pleaded in the petition are that the petitioner as per the Agreement dated 19.9.1996 between it and respondent Nos. 1 and 2, i.e. the Government of India (Ministry of Road Transport & Highways) and State of Gujarat was entrusted with work of constructing a "four Lane Road Over Bridge" in lieu of the Level Crossing between 261.2 Km to 261.4 Km and in its approaches from Km 259.4 to 263.4 in the Ahmedabad-Mumbai Section of the National Highway No. 8. The said Agreement was a Build, Operate and Transfer Contract (BOT Contract). The petitioner was entitled to collect toll from the users of the "Facility" which was to be constructed by the petitioner under the BOT Contract and which users were both from the Ahmedabad end and the Mumbai end. The petitioner states that the local users refused to pay the toll and there was a civil suit filed in the Court of Civil Judge, Surat by the local users so as to prevent the collection of toll from these local users and in which suit, injunction

was granted and was finally disposed of on 30.4.05.

3. As a result of the loss of revenue to the petitioner on account of non-payment of toll by the local users a dispute arose between the parties as to the compensation payable to the petitioner and therefore on 7.9.2000 the petitioner requested the Department to refer the disputes to arbitration in terms of Clause 10 of the Contract. The respondent No. 3 was appointed as a Sole Arbitrator and he called the first meeting on 13.10.2000 which was re-scheduled to 20.10.2000. The respondent No. 3/Arbitrator vide his letter dated 30.11.2000 communicated his decision to keep the matter in abeyance till the judgment in the injunction case pending in the civil Court was received. No meeting was thereafter convened by the Arbitrator and the petitioner claimed to have sent a reminder to the Arbitrator to continue the arbitration proceedings on 19.8.02 and 1.11.02. As the proceedings were adjourned sine die the petitioner filed a petition before this Court u/s 11 and which was allowed vide order dated 27.4.04. The respondent again appointed respondent No. 3 as the sole Arbitrator vide letter dated 19.4.04. Since in the meanwhile judgment of the Civil Court at Surat came by which the suit was decreed and consequently the toll could not be collected from the local users, the sole Arbitrator/respondent No. 3 on 4.7.07 passed the following order:

On account of the judgment of Civil Judge (SD), Bardoli, in Sp. Civil case No. B/12/A.D. 1998 Exm.-93, pronounced on 30.04.2004, I find myself restrained in my powers as an Arbitrator to adjudicate the claim.

The Claimant (petitioner) may, if so desire seek appropriate relief from Higher Court of law against the judgment of Hon"ble Civil Judge Sr. Division, Surat, following due provision of law.

4. The petitioner being aggrieved by the aforesaid Award dated 4.7.07 preferred a petition u/s 34 of the Arbitration and Conciliation Act, 1996 being O.M.P. No. 560/07. In this petition on 19.11.08, this Court set aside the Award and recorded as under:

Pursuant to the order dated 1.11.2008, counsel for the respondent states that she has obtained instructions from her client and submits that the respondent has no objection to the impugned award dated 4.7.2007 being set aside on the ground that the Arbitrator committed a jurisdictional error by refusing to exercise jurisdiction vested in him for adjudicating the claims of the petitioner on the ground of a judgment rendered by the Civil Judge, Senior Division, Bardoli dated 30.4.2005. She draws the attention of this Court to a letter dated 1.10.2008 issued on behalf of the respondent conveying the approval of the competent authority to accept the name of Shri Prafulla Kumar as an Arbitrator for holding fresh arbitration proceedings.

In these circumstances, the impugned award dated 4.7.2008 is set aside. Parties state that to expedite the matter, it would be appropriated if the Arbitrator is directed to hear arguments afresh while rest of the proceedings be maintained as

they are. Ordered accordingly.

It is hoped and expected that the arbitral proceedings shall be disposed of as expeditiously as possible.

The present petition is disposed of.

5. It is, therefore, quite clear that by the order dated 19.11.2008, the respondent No. 3 was appointed again as an Arbitrator for holding fresh arbitration proceedings and which appointment was accepted by the present petitioner. Pursuant to the aforesaid order dated 19.11.08, the Arbitrator sent his letter dated 27.12.08 for holding the arbitration proceedings and fixed the date for hearing on 6.2.09. The petitioner has thereafter, on 2.2.09 filed this present petition for removal of the Arbitrator.

6. It was contended by the counsel for the petitioner that respondent No. 3 is not interested in the arbitration proceedings and since he did not conduct the same right from the year 2000 to 2008 he ought to be removed as an Arbitrator. The attention of this Court is drawn to Sections 14 and 15 of the Arbitration & Conciliation Act, 1996 which provides for termination of the mandate of the Arbitrator. Sections 14 and 15 of the Act 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 Sub-section (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.

7. It is clear that Section 15 does not apply to the case in hand because the Arbitrator has not withdrawn from his office on his own or pursuant to an agreement between the parties. In fact he has issued his letter dated 27.12.08 asking the parties to appear for the conduct of the arbitration proceedings. So far as Section 14 is concerned, the same provides for termination of the mandate of the Arbitrator if he becomes de facto or de jure unable to perform his function or fails to act without any undue delay or he withdraws from his office or the parties agree to the termination of his mandate. In the present case, parties have not agreed to the termination of the mandate of the Arbitrator nor has the Arbitrator withdrawn from his office. The only issue, therefore, to be determined in the present case is whether the mandate of the Arbitrator should be terminated by this Court because he has de facto or de jure been unable to perform his functions. So far as the de facto aspect is concerned, it is quite clear that on his fresh appointment after the order dated 19.11.08 passed in O.M.P. No. 560/07, the respondent No. 3 has in fact acted as an Arbitrator by issuing the letter dated 27.12.2008 asking the parties to appear on 06.02.2009 and therefore, it cannot be said that the Arbitrator has failed to act and hence he is de facto unable to perform his functions. So far as the de jure aspect of Section 14 is concerned, it may be noted that the present petitioner has not challenged the order dated 19.11.08 and in fact accepted the appointment of respondent No. 3 under the said order to act as an Arbitrator. The respondent No. 3, therefore, is a de jure Arbitrator and it is not as if he is acting without any authority. Therefore, in the opinion of this Court, neither de jure nor de facto the Arbitrator is unable to perform his functions and therefore there does not arise any question of the termination of the mandate of the Arbitrator.

8. At this stage, I must record that during the course of hearing, I had put it to the counsel for the petitioner that since the petitioner has not challenged the order dated 19.11.08 and has accepted the appointment of the respondent No. 3 to act as an Arbitrator again, why should not the petitioner be held to have waived all actions of the respondent No. 3 prior to the passing of the order dated 19.11.08 because by accepting the appointment of the respondent No. 3 to act as an Arbitrator again, the actions/non-action of the Arbitrator from the year 2000 to 2008 get merged in the order dated 19.11.08, and to which order as stated hereinbefore, there is no challenge and therefore which order has become final and binding between the parties. To this no answer could be given by the counsel for the petitioner.

9. For the record I may note that the counsel for the petitioner relied upon *Alcove Industries Ltd. Vs. Oriental Structural Engineers Ltd., Kurup Eng. Co. v. Bharat Heavy Elect.* 2008 VI AD (Delhi) 161; *Cinevistaas Ltd. v. Prasar Bharti* 2008 X (Delhi) 441 and *Sharma Enterprises Vs. National Building Construction Corporation Ltd. and Another*, In facts of the present case as found, and as stated above, none of the judgments apply as the arbitrator has acted de facto as an arbitrator, and he is also a de jure arbitrator as per the order dated 19.11.2008 which has become final.

10. In view of the above, I do not find any merits at all in the present petition. The present petition is, therefore, dismissed with costs of Rs. 25,000/-.