

(2008) 05 DEL CK 0027
In the Delhi High Court
Case No : OMP 258 of 2008

Earthtech Enterprises Ltd.

APPELLANT

Vs

National Agricultural Co-operative Marketing Federation of
India Ltd. (NAFED)

RESPONDENT

Date of Decision : 12-05-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 12(3), 13, 13(3), 14, 14(1)

Citation : AIR 2008 Delhi 155 : (2008) 2 ARBLR 267 : (2008) 150 DLT 182 :
(2008) 103 DRJ 601

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : Satinder Kapur and Pramod Kumar, for the Appellant;

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—This petition has been filed purportedly u/s 14(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "said Act") for termination of the arbitration proceedings before the learned sole arbitrator.

2. An application had been filed by the petitioner u/s 32(2)(c) of the said Act before the learned arbitrator for termination of the arbitration proceedings before him. It was contended that the arbitration proceedings were founded on a Memorandum of Understanding dated 16.10.2003 which had been allegedly entered into between the petitioner and the respondent. It was further contended that on 15.10.2007 the respondent had filed a criminal complaint with the CBI against the petitioner. In that complaint, the respondent is said to have denied having entered into the said Memorandum of Understanding. In fact, it is allegedly stated in the complaint that the Managing Director of the respondent played a fraud upon the respondent and he had no authority to enter into the said Memorandum of Understanding. It was the case of the petitioner before the learned arbitrator that since the respondent had denied the existence of the Memorandum of Understanding, the arbitration proceedings which were founded

on the same, cannot be continued any further. The provisions of Section 32(2)(c) were invoked by the petitioner for an order for termination of the arbitral proceedings on the ground that the continuation of the proceedings had become "impossible".

3. By an order dated 10.03.2008, the learned arbitrator disagreed with the petitioner and rejected the said application. It is against this order passed by the learned arbitrator that the present petition u/s 14(2) has been filed seeking the setting aside of the said order and the termination of the arbitration proceedings altogether on the ground that continuation of the proceedings has become impossible.

4. I have heard the learned Counsel for the petitioner at some length. It must be stated, at the outset, that an order passed u/s 32(2)(c) of the said Act is not an appealable order as set out in Section 37 thereof. Secondly, Section 14 has to be read along with Section 15 of the said Act as they deal with the situation where the mandate of an arbitrator terminates and a substitute arbitrator has to be appointed. The learned Counsel for the petitioner strenuously argued that Section 14(1)(a) read with Section 14(2) would be applicable in the facts and circumstances of the present case. Sections 14 and 15 of the said 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 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.

A plain reading of the above provisions makes it clear that, *inter alia*, the mandate of an arbitrator shall terminate if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay. It was the contention of the learned Counsel for the petitioner that the circumstances which arose in the present case amount to the arbitrator becoming *de jure* unable to perform his functions. He submitted that since a controversy had been raised by the petitioner before the arbitrator and the same could not be resolved satisfactorily by the learned arbitrator, the provisions of Section 14(2) of the said Act would be attracted and, Therefore, the petitioner was well within his rights to approach this Court for having that controversy, with regard to termination of the mandate, determined in accordance with law. I am unable to agree with the submissions made by the learned Counsel for the petitioner. This is primarily because Section 14 of the said Act deals with the mandate of an arbitrator and not with the jurisdiction of an arbitrator or the existence or non-existence of an arbitration agreement. Assuming that Section 14(1)(a) became applicable and the mandate of the present arbitrator terminated, the only remedy available in such a situation would be to appoint a substitute arbitrator in terms of Section 15(2) of the said Act. But, that is not what the petitioner wants. The petitioner is seeking a declaration by this Court that there does not exist any arbitration clause at all and not just that the mandate of the arbitrator has terminated. Such a question cannot be dealt with u/s 14 read with Section 15 of the said Act. Consequently, this petition is not maintainable.

5. It is, however, open to the petitioner to question the jurisdiction of the arbitral tribunal u/s 16 of the said Act. Normally, by virtue of the provisions of Section 16(2) of the said Act, a plea that the arbitral tribunal does not have jurisdiction is to be raised not later than the date of submission of the statement of defense. However, in exceptional circumstances such a plea can be raised even subsequently by virtue of the provisions of Section 16(4) of the said Act provided the delay is justified. Apparently, the learned arbitrator had taken into consideration the fact that the petitioner had not raised any plea u/s 16 of the said Act in the following manner:

It may be stated that it was open to the respondent to challenge the existence of the arbitration agreement u/s 16 of the Act of 1996. It raised no such objection.

To this, the learned Counsel for the petitioner submitted that such a plea could not have been raised earlier inasmuch as the knowledge about the respondent's criminal complaint with the CBI against the petitioner dated 15.10.2007 was a subsequent event.

6. In these circumstances, while this petition is dismissed as not being maintainable, it shall be open to the petitioner to take the plea that the tribunal does not have jurisdiction u/s 16 of the said Act provided he makes out a case u/s 16(4) to justify the delay in approaching the tribunal with this plea.

This petition as well as accompanying IAs stand disposed of with the aforesaid directions.

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