

(2002) 05 DEL CK 0149
In the Delhi High Court
Case No : OMP No. 96 of 2002

Harcharan Das Gupta through Sh. D.R. Mittal	APPELLANT
Vs	
Shivlok C.G.H.S. Limited, Bhola Nath Nagar, Shahdara, Delhi and Designarch Consultants P. Ltd., Vikas Marg, Delhi	RESPONDENT

Date of Decision : 31-05-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(5), 11(6), 15

Citation : (2002) 98 DLT 403 : (2003) 42 SCL 128

Hon'ble Judges : Sharda Aggarwal, J

Bench : Single Bench

Advocate : V.K. Sharma, for the Appellant; Rakesh Munjal and Thampi Mathur, for the Respondent

Judgement

Sharda Aggarwal, J.—The petitioner has filed the present petition u/s 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) for directions to respondent No. 1 to appoint substitute arbitrator in place of Shri S.M. Johri (Arbitrator nominated/appointed by respondent No. 1) consequent upon the termination of the mandate of Shri S.M. Johri, who has withdrawn from the office due to some personal reasons. In the alternative, it is prayed that the Court may substitute an Arbitrator in place of Shri S.M. Johri.

2. The petitioner had entered into a contract with respondent No. 1 for construction of 120 dwelling units for Shivlok Co-operative Group Housing Society Limited at Plot No. 6, Sector-6, Dwarka, Phase-1, New Delhi vide agreement dated 20th April, 1995. Disputes arose when 29th R/A bill was submitted by the petitioner on 29th December, 1999. The net amount of the bill was Rs. 53,03,456/-. The respondent No. 1 instead of paying the bill stated that the petitioner had been paid Rs. 44.35 lakhs in excess. The agreement contained an arbitration clause, in pursuance to which, the petitioner nominated Shri Suresh Malik, Architect as his nominated Arbitrator whereas respondent No. 1 nominated Shri S.M. Johri, Architect as their Arbitrator. Two Arbitrators in turn

appointed Shri B.B. Nanda as the third Arbitrator. The Arbitral Tribunal had not even proceeded with the matter when vide letter dated 31st January, 2002, Shri S.M. Johri, Architect resigned from the arbitration stating that on account of some unavoidable personal reasons he was unable to continue to act as an Arbitrator. Thus, the necessity to substitute Arbitrator arose. The petitioner vide letter dated 5th February, 2002 addressed to respondent No. 2 with a copy to respondent No. 1 called upon them to fill the vacancy created on account of Shri S.M. Johri's declining to act as an Arbitrator. The respondents were called upon to fill up the vacancy within 15 days from the date of issue of the letter. The petitioner filed the present petition on 20th March, 2002. Respondent No.1 replied to the same stating that the respondent had already nominated one Shri Tilak Raj Takulia, Architect as an Arbitrator from their side as a substitute for Shri S.M. Johri.

3. Learned counsel for the petitioner contends that since the respondents have failed to appoint Arbitrator from their side as a substitute of Shri S.M. Johri within a reasonable period, from the date the petitioner had called upon them to appoint an Arbitrator, they have forfeited their right to appoint an Arbitrator and as such an Arbitrator in place of Shri S.M. Johri be appointed by the Court. Learned counsel for the respondent No. 1 contends that as per the arbitration clause, a Fellow of "Indian Institute of Architects" was to be appointed as an Arbitrator. Shri Tilak Raj Takulia, Architect being a Fellow of Indian Institute of Architects has already been appointed as a substitute for Shri S.M. Johri and he has even sent his acceptance vide his letter dated 1st April, 2002. The appointment of the substitute arbitrator is within a reasonable time. A copy of the letter dated 1st April, 2002 of Shri Tilak Raj Takulia, addressed to President Shivlok Co-operative Group Housing Society Limited has been placed on record to show that the Arbitrator had even given his consent for his appointment. The contention raised by the learned counsel for the petitioner is that there was no communication of the appointment of Shri Tilak Raj Takulia as a substitute Arbitrator either to the petitioner or to the two other Arbitrators and as the Arbitrator was not appointed in a reasonable time, respondent No. 1 has abdicated his right to do so. Three judgments, two of the Supreme Court and one of Delhi High Court are relied upon in this connection. The two Supreme Court judgments reported as 1993 (2) Arb.LR 359, Nandyal Co-op. Spinning Mills Ltd. v. K.V. Mohan Rao and 1994 (2) Arb.LR 61, G. Rama Chandra Reddy & Co. v. Chief Engineer, M.E.S. Madras Zone are under the Arbitration Act, 1940. The learned counsel for the respondent has distinguished the two cases contending that in both the cases the prayer was for appointment of an Arbitrator. None was the case of substitution of an Arbitrator. Under the facts of those cases, it was held that the respondent had abdicated himself of the powers to appoint an Arbitrator. The two judgments are not applicable on facts of the petitioner's case. Regarding the Delhi High Court judgment, it has been submitted that it was a case u/s 11(6) of the Act for appointment of an Arbitrator, where the respondent/DDA had failed to respond to the request of the petitioner for

appointment of an Arbitrator. The respondent had not even filed reply to the application. u/s 11(6) of the Act, under such a situation, the Court had observed that the respondent was abdicated of its powers to appoint an Arbitrator. This case is also not applicable on facts to the instant case.

4. In the instant case, an arbitrator, who has resigned, has to be substituted. Section 15 of the Act provides for termination of the mandate and substitution of Arbitrator. According to this Section, where an Arbitrator withdraws from the office for any reason, his mandate would come to an end and a substitute Arbitrator has to be appointed in his place. Such a substitution has to be in accordance with rules which were applicable to the appointment of the Arbitrator being replaced. This provision shows that while appointing a substitute Arbitrator, rules or terms applicable to the appointment of the Arbitrator sought to be replaced, have to be taken into consideration. Arbitration Clause 37, under which Shri S.M. Johri was appointed, who is now sought to be substituted, was supposed to be a Fellow of the "Indian Institute of Architects". As such the substitute Architect should also be a Fellow of the "Indian Institute of Architects". Keeping this in view, the respondent No. 1 appointed Shri Tilak Raj Takulia, Architect as a substitute Arbitrator. Since there is no time prescribed for appointment of a substitute Arbitrator either in the contract or u/s 15 of the Act, he can be appointed within a reasonable time. The petitioner had given a notice of 15 days by his letter dated 5th February, 2002 and the petition was filed on 20th March, 2002. Notice of the petition was served on the respondents on 6th April, 2002. The letter dated 1st April, 2002 of Shri Tilak Raj Takulia shows that he was appointed as an Arbitrator in place of Shri S.M. Johri much prior to the service of notice of the petition on respondent No. 1. The substitute Arbitrator was appointed within a reasonable time. The provisions of Sections 11(5) or 11(6) of the Act do not apply in the case of substitution or replacement of an already appointed Arbitrator. In any case the petitioner has neither alleged any bias against Shri Tilak Raj Takulia, nor there is any challenge to his qualifications. Thus, keeping in view the facts of this case and keeping in mind that a Fellow of "Indian Institute of Architects" was to be appointed and that the appointment of Shri Tilak Raj Takulia as an Arbitrator in place of Shri S.M. Johri by respondent No. 1 has already been made within a reasonable time, no further directions are required to be given to the respondents. The Arbitrator so substituted by the respondents would be the Arbitrator in place of Shri S.M. Johri.

5. The petition is accordingly disposed of.