
(2003) 03 DEL CK 0022
In the Delhi High Court
Case No : OMP No. 227 of 2000

Hotel Marina

APPELLANT

Vs

Sushil Kumar Raut and Others

RESPONDENT

Date of Decision : 27-03-2003

Acts Referred:

Citation : (2003) 5 AD 414 : (2003) 104 DLT 588 : (2003) 2 RAJ 395

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Arvind Nigam and S.K. Maniktala, for the Appellant; J.P. Singh, Sohan Lal and Rikky Gupta, for the Respondent

Final Decision : Allowed

Judgement

Vikramajit Sen, J.—The dispute between the parties is governed by an arbitration clause which reads thus :

"Any dispute between you and owner's Project Manager /Resident Engineer regarding true interpretation of this work order/contract or about any other matter, payment, etc. will be referred to Mr. R.A. Aggarwal, Chief Engineer of the Company for his sole arbitration. He may act himself or may appoint any person to act as a Sole Arbitrator. Decision given by the Arbitration shall be final, conclusive and binding on both the parties,"

2. A request for arbitration of dispute which had arisen between the parties was made by the respondents on 24.6.2000. The request was made to Shri S.B. Mehta, Managing Partner of Hotel Marina. This request appears to have been forwarded to the Appointing Authority Shri R.A. Aggarwal as envisaged in the arbitration clause who instead of acting as an Arbitrator himself appointed Shri R.K. Mehra as the Sole Arbitrator by his letter dated 4.7.2000. Immediately thereafter by his letter dated 7.7.2000, Shri R.A. Aggarwal cancelled the said nomination and appointment of Shri R.K. Mehra, and himself entered upon the reference and issued notice to the parties hereto.

3. There is a communication dated 27.7.2000 from Shri R.K. Mehra in which he has stated that "after going through the arbitration clause in the work and the contents letters as above I find that after having appointed the undersigned as Arbitrator no authority vests in Shri R.A. Aggarwal to cancel the appointment and to act himself as Arbitrator." It appears that on 29.7.2000 Shri R.A. Aggarwal had a hearing in which the petitioners were not present. Counsel for the respondent states that this hearing was pursuant to Shri R.A. Aggarwal entering upon the reference on 13.7.2000. It is evident that both the Arbitrators are resolutely conducting separate arbitral proceedings. The petitioners have approached this Court with the prayer that this Court should decide on the termination of the mandate of Shri R.A. Aggarwal.

4. Mr. J.P. Gupta, learned Counsel appearing for the respondents relies on the decision of the Hon'ble Division Bench in Orissa Oil Industries Limited Vs. Tribal Cooperative Marketing Development Federation of India Limited (Trifed) and Others, . In that case, in the petition being filed u/s 8 of the Arbitration and Conciliation Act, 1996, this Court had appointed Shri N.L. Kakkar as the Arbitrator. Subsequent thereto the Appointing Authority contemplated in the arbitration clause, namely, the Managing Director of Trifled-Tribal Cooperative Marketing Development Federation of India Ltd. had appointed Justice Jaspal Singh, Retd. as the Arbitrator. A similar impasse, Therefore, had to be resolved by the Court. The Hon'ble Division Bench noted Sub-sections (5) and (6) of the Section 16 and observed that the petition primarily dealt with the challenge to the virus of the sundry provisions of the Act. The Court upheld these provisions. It did not direct the parties to appear before either of the Arbitrators so that they could pronounce upon the question of which of them could correctly exercise jurisdiction. It has been observed in paragraph 20 of the judgment that "there cannot be any doubt whatsoever that the petitioner can raise all such questions before the Arbitral Tribunal in terms of Section 16 of the Act." Mr. Gupta has also relied on paragraph 16 of that decision where the Hon'ble Division Bench opined that "the Arbitral Tribunal is required to decide the plea of lack of jurisdiction in terms of Sub-section (2) or Sub-section (3) and where the Arbitral Tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award." This reliance has been placed because in the case in hand Shri R.A. Aggarwal in his decision dated 29.7.2000 has ruled that he continues to have jurisdiction. Mr. Gupta also relies on Sub-sections (5) and (6) of Section 16 of the Act. It is his contention that the legal propriety of the decision dated 29.7.2000 can be appropriately assailed after the passing of the award. On the other hand Mr. Nigam on the strength of Sections 14 and 15 of the Act contends that the appointment of Shri R.K. Mehra continues, and, Therefore, the order dated 29.7.2000 has no legal basis or efficacy. To resolve the impasse before me I will deal with Sections 14 and 15 of the Arbitration and Conciliation Act, 1996. They are reproduced for facilitating for reference:

"14. Failure or impossibility to act.--(1) The mandate of an Arbitrator shall terminate if-

(a) he becomes demure 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 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 compensation of the Arbitral Tribunal."

5. Section 15 has been strongly relied upon by Shri Gupta to buttress his arguments that the mandate of Shri R.K. Mehra had been terminated u/s 15 of the Act. I am unable to find any provision which specifically empowers the Appointing Authority to recall the mandate of a duly appointed Arbitrator as has been attempted to have been done in the present case by Shri R.A. Aggarwal. Shri R.K. Mehra has not withdrawn from office of the Arbitrator for any reason. There is no power contained in the arbitration clause which permits the Appointing Authority, namely, Shri R.A. Aggarwal to recall the appointment. Sub-section (2) of Section 15 only clarifies that 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. Had Shri Mehra declined to act, this section would have come into operation. Since more of the provisions of Section 15 apply, a substitute Arbitrator in the form of Shri R.A. Aggarwal himself could not have assumed the powers of the Arbitral

Tribunal. When Section 14 of the Act is adverted to, it will be palpably clear that the mandate of Shri R.K. Mehra has not been withdrawn by any of the events mentioned in that section.

6. On a plain reading of Sub-section (2) of Section 14 it will be manifestly evident that the present petition has been filed by the petitioners to clear the controversy that has arisen by Shri R.A. Aggarwal purporting to act as the Arbitrator. As has been mentioned hereinabove Mr. Gupta has relied on the decision of the Hon'ble Division Bench in Orissa Oil Industries Ltd. (supra). The Division Bench had clearly stated that the plea of lack of jurisdiction should be properly raised before the Arbitrator himself. The Court did not answer whether this was to be done by Shri N.L. Kakkar or by Justice Jaspal Singh, Retd. in the present case since none of the events envisaged under Sections 14 and 15 had arisen I am of the view that the order of Shri R.A. Aggarwal dated 29.7.2000, in which he purports to act as the Sole Arbitrator is non est and without jurisdiction. It is accordingly struck down.

7. Mercifully, this Court does not have to decide on the conundrums of whether Shri R.A. Aggarwal had been rendered functus officio or whether arbitration clause has exhausted itself. The Court should direct its attention towards the provisions contained in Sections 13 to 15 of the Act. Pursuant to the appointment of Shri R.K. Mehra as the Arbitrator while he continues to act, or his mandate does not stand recalled by any events envisaged under Sections 14 and 15, Shri R.A. Aggarwal is incompetent to act as the Arbitrator. The application of the decision in Orissa Oil Industries Ltd. (supra) would enable either of the parties to raise the question of lack of jurisdiction before Shri R.K. Mehra.

8. The petition is accordingly allowed and the order dated 29.7.2000 is struck down. The parties are directed to appear before Shri R.K. Mehra, the Sole Arbitrator on 24.4.2003. There shall be no order as to costs. Petition disposed of in these terms.