

(1994) 03 DEL CK 0011

In the Delhi High Court

Case No : Original Miscellaneous Petition No. 64 of 1902

Lucky Home Co-operative Group Housing Society Ltd.

APPELLANT

Vs

Shanti Developers and Promoters (India) Pvt. Ltd. and
Another

RESPONDENT

Date of Decision : 04-03-1994

Acts Referred:

Citation : (1994) 1 AD 1014 : (1994) 1 ARBLR 370 : (1994) 54 DLT 465 :
(1994) 29 DRJ 117

Hon'ble Judges : Sat Pal, J

Bench : Single Bench

Advocate : Mukul Rohatagi, B.K. Divan, Arun Jaitley, S.K. Mittal and Sharad Aggarwal, for the Appellant;

Judgement

Sat Pal, J.

(1) This is a petition filed on behalf of M/s. Lucky Home Co-operative Group Housing Society (hereinafter referred to as "the petitioner society") under Sections 5, 8, 11, 12 and 31 of the Arbitration Act, 1940 against M/s. Shanti Developers & Promoters (India) Private Limited (hereinafter referred to as "the contractor") and Shri A. Sankaran, the arbitrator and in this petition it has been prayed that the authority of the arbitrator be revoked and another arbitrator, preferably a retired judge of this Court be appointed for adjudication of the claims and counter claims of the parties. Along with the aforesaid petition, the petitioner society had also filed an application bearing No. 9548/92 and after hearing the learned counsel for the parties on 31st July, 1992, it was directed that the arbitrator would not make and publish the award and he would proceed with the matter and the petitioner society may also participate in such proceedings. Notice of this petition was given to the respondents and a detailed reply has been filed on behalf of the contractor wherein averments and allegations made by the petitioner society have been controverted. The petitioner society has filed a rejoinder also.

(2) Briefly stated, the facts of the case are that respondent No.2. who was a retired Additional Director General of Works, was appointed as the sole arbitrator in terms of orders dated 18th February, 1991 passed by a learned Judge of this Court in Suit No.749/ 91 for adjudication of the disputes between the parties. The fee of the arbitrator was fixed at Rs.10,000.00 to be paid by the parties equally. In terms of the orders of the same date passed in is 1045/91, Mr. S.P. Kapil, retired Chief Engineer of

(3) Delhi Development Authority, was appointed as a local commissioner to carry out the measurements at the site in the presence of the parties or their representatives and his fee was fixed at Rs. 5000.00 to be shared equally by the parties. The arbitrator entered into the reference on 9th March, 1991. The contractor filed its statement of facts on 25th March, 1991 and the petitioner society filed its statement of facts on 3rd June, 1991. The first hearing before the arbitrator was held on 3rd July, 1991. The time for making the award was extended by mutual consent up to 26th December, 1991.

(4) Thereafter, the contractor filed an application bearing is No. 1520/91 in Suit No.479/91 which came up for hearing on 11th February, 1991 and on that date the time for making the award was extended by this Court for further four months from the date of first hearing given by the arbitrator to the parties by mutual consent of the parties. Pursuant to this order the first date of hearing was fixed by the arbitrator as 20th April, 1992. Meanwhile, the local commissioner filed his report in this Court on 20th April, 1992 and the (India) Pvt. Ltd. & Anr. Petitioner society agreed to supply true copy of the local commissioner "s day order sheet and on the same day the arbitrator directed the parties to the objections to the report of the local commissioner on or before 15th May, 1992 and further directed that reply to these objections be filed before 25th May, 1992 and rejoinder to the reply before 5th June, 1992. The parties were also directed to pay Rs.300.00 each for getting photocopies of the measurement book and the case was adjourned for 13th July, 1992 to be continued on 14th and 15th July, 1992.

(5) The objections to the report of the local commissioner on behalf of the contractor were received on 26th May, 1992 but objections on behalf of the petitioner society were not filed till 5th June, 1992 and accordingly the arbitrator by his letter dated 5th June, 1992 directed the petitioner to file their objections to the report of the local commissioner as also reply to the objections filed by the contractor before 19th June, 1992.

(6) It may be pointed out here that the petitioner society in their letter dated 9th May, 1992 referred to an alleged observation given by the arbitrator that he had stated on 20th April, 1992 that, " the claimants shall get award of several lakha of rupees, they should pay Rs.300.00 more on behalf of the respondents." In support of this letter the petitioner society had also Filed affidavits of S/Shri V. K. Rastogi, Rajesh Aggarwal engineer of the petitioner society and B.K. Dewan advocate of the petitioner society. The alleged. observations were. however,

controverted by the contractor vide their letter dated 30th May, 1992 and in support of this letter the affidavits of S/Shri R.A. Mittal arbitration consultant, Suresh Gupta and Surinder Gupta directors of the contractor company were Filed. These allegations made on behalf of the petitioner society were also denied by the arbitrator and it was stated by him that, "it is supercilious to expect the arbitrator to be so demented and gullible as to make any oral pronouncement as stated. "

(7) By letter dated 6th July. 1992 the petitioner society asked the arbitrator to resign but this request was opposed on behalf of the contractor. The petitioner society, however, filed reply to the objections raised by the contractor against the report of the local commissioner dated 18th June, 1992. On 14th July .1992 the petitioner society Filed an application before the arbitrator for summoning of seven witnesses. On 15th July, 1992 the arbitrator held that there was no compelling reasons for calling the local commissioner or any of the other persons as a witness on behalf of the respondents as the statement of facts, counter statement of facts and the rejoinder had extensively brought out the pleadings of the parties. The arbitrator in the proceedings conducted on 15th July, 1992 also observed that the prayer of the petitioner society to the arbitrator to resign was not in conformity of the courts mandate and was more humiliating and insulting to the office of the arbitrator. After the arbitrator rejected the request of the petitioner society for summoning the witnesses and refused to resign, the present petition was filed by the petitioner society for revoking the authority of the arbitrator and for appointment of another arbitrator in his place.

(8) Mr. Rohatgi, learned Senior Counsel appearing on behalf of the petitioner society drew my attention to the order passed by this court on 18th February, 1991 in Suit No.479/91 and submitted that the fee of the arbitrator was fixed as Rs.10,000.00 to be shared equally by the parties. He further submitted that the arbitrator was residing at Madras and the schedule of fees of the arbitrator was received by the petitioner for the first time on 9th July, 1991 and from this schedule it is not clear as to how much fees will be charged by the arbitrator and how much amount on account of Ta and Da will have to be paid by the parties. He further submitted that on 18th February. 1991 when the petitioner society had agreed for appointment of respondent No.2 as an arbitrator on the assumption that he was a resident of Delhi and since later on i.e. on 9th July, 1991 the petitioner society had come to know that the arbitrator is a resident of Madras, the petitioner society was not in a position to hear fees and amount of Ta and Da payable to the arbitrator which will be much more than Rs.10,000.00 fixed by this Court on 18th February, 1991. He, Therefore, contended that a new arbitrator preferably a retired judge of this Court who will be a resident of Delhi, be appointed as an arbitrator in his place.

(9) The learned counsel further submitted that the rejection of the application filed on behalf of the petitioner society for summoning of witnesses who were relevant for the adjudication of the disputes, amounts to legal misconduct on the

part of the arbitrator. He submitted that the local commissioner and the other witnesses were necessary and relevant and the petitioner society ought to have been permitted to summon these witnesses. In support of this submission the learned counsel placed reliance on a judgment of this Court in *Mehta Teja Singh and Co. Vs. Union of India and Another*, .

(10) The learned counsel also drew my attention to the observations made by the arbitrator on 20th April, 1992 that, "the claimants shall get award of several lakhs of rupees, they should pay Rs.300.00 more on behalf of the respondents." He submitted that from these observations it was found that the arbitrator was biased against the petitioner society. He further submitted that regarding these observations the petitioner society had filed three affidavits including the affidavit of their counsel before the arbitrator. He. Therefore, contended that such an observation amounted to misconduct on the part of the arbitrator. In support of this submission the learned counsel placed reliance on a judgment of Jammu & Kashmir High Court in the case of *M/s. Mohinder Singh and Co. vs. The Union of India and others*, Air 1972 J&K 63 . He further submitted that bias need not be established but existence of circumstance which is likely to bias the arbitrator is enough for revoking title authority of the arbitrator. In support of this submission he placed reliance on a judgment of Kerala High Court in the case of *Koshy Vs. K.S.E. Board*, . Learned counsel also referred to Russell on Arbitration Twentieth Edition at pages 143, 146, 152, 153, 155 and 157. The learned counsel also referred to page 10 of the said book and submitted that if a party discovers misconduct on the part of the arbitrator after his appointment, such a party could approach the court for revocation of his authority before the award was made. the learned counsel also submitted that the arbitrator was bound to follow and apply the law and if he does not, he can be set right by the Court. He further submitted that since the arbitrator has rejected the application filed on behalf of the petitioner society to summon its witnesses, his authority should be revoked by this Court. In support of this contention he relied on a judgment of the Supreme Court in *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, .

(11) Mr. Jaitley, learned Senior Counsel appearing on behalf of the contractor submitted that no party can seek a right to remove the arbitrator in the absence of substantive grounds. He submitted that in the present case the petitioner society had failed to prove any miscarriage of justice. He submitted that the allegations regarding oral observations made by the arbitrator had been controverted by the contractor and three affidavits were filed on their behalf before the arbitrator and the learned arbitrator himself (*India*) Pvt. Ltd. & Anr. had denied having made such oral observations. He submitted that in any case such remarks were not indicative of any bias. He, Therefore, contended that no case had been made out for revocation of the authority of the arbitrator. In support of this contention learned counsel placed reliance on two judgments of the Supreme court in *Amarchand Lalitkumar Vs. Shree Ambica Jute Mills Ltd.*, and *International Airports Authority of India Vs. K.D. Bali and Anr*, and a judgment of this Court in *Sohan Lal vs. M/s. Krishan Chander Ramesh Chander &*

(12) The learned counsel further submitted that all allegations made by the petitioner prior to 11th February, 1992. the date on which by mutual consent, the time for making the award was extended by this Court for further four months from the date of the first hearing given by the arbitrator, are deemed to have been waived. He submitted that before 11th February, 1992 admittedly the petitioner society had received the schedule of fees of the arbitrator and were also aware of the fact that the arbitrator was based at Madras. He. Therefore, contended that the petitioner society could not be permitted to make the allegations prior to 11th February, 1992 including the allegations regarding high fees and substantial amount on account of Ta and Da payable to the arbitrator. He also submitted that even if interested arbitrator is appointed with the consent of the parties and the parties were aware of his interest before his appointment, the parties cannot be permitted to raise objection against his appointment at a later stage. In support of his contention he placed reliance on three judgment of the Supreme Court in N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another, , Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another, and Reserve Bank of India Vs. S.S. Investments and others, .

(13) As regards the rejection of the application of the petitioner society for summoning of title witnesses the learned counsel submitted that it was within the jurisdiction of the arbitrator to reject such a request particularly when in the present case the report of the local commissioner and other documents were already on record and the parties could argue their case by referring to those documents. He further submitted that in any case objections could be filed against the award in case any party was aggrieved by any of the finding of the arbitrator. In support of this contention the learned counsel placed reliance on a judgment of Madhya Pradesh High Court in the case of Rustomjee Dorabsha and Another Vs. Manmal Prabhudayal, and a judgment of Patna High Court in the case of Union of India vs. Messrs Ranjan Brothers, Air 1969 Patna 124. Without prejudice to his contention contractor would have no objection in case the petitioner society was allowed to examine its witnesses before the arbitrator.

(14) As regards the alleged bias on the part of the arbitrator the learned counsel submitted that the only allegation made by the petitioner society with regard to the period after 11th February, 1992 is about the alleged oral remarks made by the arbitrator on 20th April, 1992. He submitted that the aforesaid allegation had been denied not only on behalf of the contractor but also by the arbitrator himself in his letter dated 5th June. 1992. He also submitted that it was not every suspicion felt by a party which may lead to the conclusion that the authority hearing the proceedings was biased and the apprehension must be judged from a reasonable and average point of view and not on mere apprehension of any whimsical ground. In support of his contention the learned counsel placed reliance in the case of International 83 Airport Authority of India. (supra).

(15) Lastly the learned counsel contended that in any case the objections could be filed by the petitioner society against the award in case the petitioner society was aggrieved of any finding of the arbitrator. He. Therefore, submitted that the petition filed on behalf of the petitioner society being devoid of any merit be dismissed.

(16) I have given my thoughtful consideration to the submissions made by the learned counsel for the parties and have also perused the recorder .From the order passed by Mohd. Shamim J., in is 15217/91 in Suit No. 479/91 it is evident that on that date the time for making the award was extended by further four months from the date of first hearing given by the arbitrator to the parties, by mutual consent of the parties. From this, it is thus clear that the parties cannot be permitted to make any allegation against the arbitrator for the period prior to 11th February, 1992. Admittedly the schedule of fees of the arbitrator was received by title petitioner society on 9th July, 1991 and on that date the petitioner society had come to know that the arbitrator was a resident of Madras.

1. Therefore, find no merit in the contention urged on behalf of the petitioner society that the authority of the arbitrator should be revoked on the ground that the petitioner society would not be in a position to hear the fees and amount of Ta and Da payable to the arbitrator. In any case the petitioner society can approach the Court u/s 38 of the Arbitration Act, 1940 in case it is aggrieved that the fees and expenses claimed by the arbitrator are unreasonable. The view I have taken finds support from the judgments of the Supreme Court relied upon by the learned counsel for title respondents in the cases of N. Chellappan (supra), Prasun Roy (supra) and and S.S. Investments (supra).

(17) I also do not find any substance in the contention urged on behalf of the petitioner society that the arbitrator has misconducted himself by making an observation on 20th April, 1992 that, "the claimants shall get award of several lakhs of rupees, they should pay Rs. 300.00 more on behalf of the respondent."

(18) Firstly, the alleged observation has been categorically denied by the arbitrator in his letter dated 5th June, 1992. Further the alleged observation has also been denied on behalf of the contractor. Besides this alleged observation does not appear to be of much relevance particularly in the present case a local commissioner was appointed by mutual consent of the parties for carrying out the measurement of the work done by the contractor and the report of the local commissioner will be a material document for making the award by the arbitrator. The Supreme Court in the case of Amarchand Lalit Kumar (supra) held that before the Court exercises its discretion to grant leave to p73 revoke an arbitrator's authority, it should be satisfied that substantial miscarriage of justice will take place in the event of its refusal. Having regard to the facts and circumstances of the present case, I do not find that the present case is of this nature that a substantial miscarriage of justice will take place in case the authority of the arbitrator is not revoked. Further as held by the Supreme Court in the case of International Airport Authority of India (supra), it is not every

suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased. The allegation of the petitioner society regarding observation of the arbitrator appears to be a mere suspicion that is the reason that the petitioner society did not approach this Court for revoking the authority of the said arbitrator after the said allegation was denied by the arbitrator and approach this Court only when its application for summoning of the witnesses was rejected as discussed hereinafter.

(19) From the record I find that the petitioner society has filed this petition only after its application for summoning the witnesses was rejected by the arbitrator. It is true that in the present case the report of the local commissioner will be a material document before the arbitrator to give his findings on various claims but. I am of the view that it will be in the interests of justice that the petitioner society is permitted to examine its witnesses. Even the learned counsel for the respondents has also conceded that the respondents will have no objection in case the petitioner society is permitted to summon its witnesses. I am also of the view that it will be in the interests of justice that the arbitrator should be directed to give a reasoned award particularly when the measurements of the work done by the contractor have been carried out by a local commissioner appointed by this Court. The learned counsel for the contractor at the end of his arguments had submitted that the contractor had no objection if a speaking award was made by the arbitrator.

(20) In view of the above discussion I direct the arbitrator to permit the petitioner society to examine its witnesses and also to give a reasoned award within four months from the date of first hearing to be given by the arbitrator to the parties. With this order the petition stands disposed of. The parties are, however, left to bear their own costs.