
(2012) 11 DEL CK 0236
In the Delhi High Court
Case No : O.M.P. 569 of 2012

M.L. Dalmiya and Company Ltd.

APPELLANT

Vs

The Chairman and Managing Director, National Building
Construction Corporation Limited and Others

RESPONDENT

Date of Decision : 05-11-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 14, 14(1)(a), 14(2)

Citation : (2012) 10 AD 74 : (2012) 4 ARBLR 434

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Ram K. Watel, for the Appellant; Sagar Bhatia, for the Respondent

Final Decision : Disposed Off

Judgement

Justice S. Muralidhar

1. This is a petition u/s 14 of the Arbitration and Conciliation Act, 1996 ("Act") for a direction to terminate the mandate of the Respondent No. 4, who has been appointed by the Respondent, National Building Construction Corporation Limited ("NBCC") (represented by Respondents 1 to 3) to act as sole Arbitrator to adjudicate the disputes between the Petitioner, M.L. Dalmiya & Company Ltd. and NBCC arising out of the work of expansion and modification of the terminal building and allied works at Patna Airport which was awarded to the Petitioner by a letter dated 31st December 1993 and 3rd January 1994. According to the Petitioner, it completed the work in all respects by 31st October 1998 but there were disputes concerning the payment of the final bill, the security deposit and performance bank guarantee ("PBG"). The Petitioner invoked the arbitration clause by a letter dated 25th April 2002.

2. In terms of the arbitration clause, the Arbitrator was to be appointed by the Chairman-cum-Managing Director ("CMD"), NBCC. By a letter dated 18th June 2002, the CMD first appointed one Mr. S.K. Chatterjee, Additional General

Manager ("AGM"), NBCC as sole Arbitrator. The Petitioner filed its statement of claim before Mr. Chatterjee. However, NBCC failed to file its written statement despite several opportunities. In anticipation of his retirement on 31st January 2004, Mr. Chatterjee had resigned on 12th January 2004. He noted that the hearing in the arbitral proceedings could not commence since NBCC had failed to submit its counter claims.

3. Mr. Chatterjee was replaced by one Mr. A.K. Gupta, Deputy General Manager ("DGM") on 1st May 2004. It is stated that without any significant progress being made in the arbitral proceedings, Mr. Gupta also resigned on 28th September 2007 stating that he was pre-occupied with other commitments. The CMD, NBCC thereafter appointed one Mr. S.K. Basandra, DGM, NBCC (Respondent No. 4 herein) as sole Arbitrator by a letter dated 26th October 2007.

4. It is averred in the petition that after his appointment Mr. Basandra held one hearing on 3rd June 2008 and for more than two years thereafter he failed to fix any date for hearing. The copies of the letters dated 9th December 2009 and 23rd February 2010 written by the Petitioner to Respondent No. 4 have been placed on record. The Petitioner by a letter dated 28th May 2010 informed Respondent No. 4 that since he had failed to act without undue delay, his mandate stood terminated. A copy of the said letter was also marked to NBCC. In response thereto by a letter dated 9th/10th August 2010, Respondent No. 4 informed the parties that a hearing had been fixed on 17th September 2010. At the request of the Petitioner, Respondent No. 4 re-fixed the hearing date as 21st October 2010. On that date, the Arbitrator suggested that both parties should try and reconcile their differences. At the instance of the Respondent No. 4, the Petitioner by a letter dated 4th November 2010 sent the learned Arbitrator a copy of the letter dated 14th January 1998 written by the Chief Project Manager, NBCC to the Petitioner extending the time. It is stated that thereafter no hearing was held by Respondent No. 4. By a letter dated 12th May 2011, the Petitioner asked Respondent No. 4 to fix a date for hearing. However, Respondent No. 4 failed to do so.

5. It is in the above circumstances that a letter was addressed by the Petitioner to Respondent No. 4 on 27th April 2012 asking him to fix a date for hearing within fifteen days failing which the Petitioner would approach the Court. It is submitted by Mr. Ram K. Watel, learned counsel appearing for the Petitioner that Respondent No. 4 having failed to act without undue delay, he had lost his mandate in terms of Section 14(1)(a) of the Act. He further submits that the CMD, NBCC should also be held to have forfeited his right to appoint an Arbitrator. Reliance is placed on the decisions in *Ariba India Private Ltd Vs. ISPAT Industries Ltd.*, ; *Union of India v. Singh Builders Syndicate* 2009(2) Arb. LR 1 (SC) ; *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd.*, ; *Bipromasz Bipron Trading SA Vs. Bharat Electronics Limited (BEL)*, and *N.B.C.C. Ltd. v. J.G. Engineering Pvt. Ltd.* 2010 (1) Arb. LR 165 (SC).

6. Mr. Sagar Bhatia, learned counsel appearing on behalf of the Respondents 1 to 3 at the outset stated that the Respondents do not wish to file any reply to the petition. He relied on the decision dated 4th August 2009 of the Supreme Court in Civil Appeal No. 5075 of 2009 (Union of India v. Premier Files Ltd.) and a decision dated 23rd December 2009 of this Court in OMP No. 451 of 2006 (Executive Engineer v. M/s Nav Nirman Construction Co.). He submitted that since the arbitration clause required the CMD to appoint an Arbitrator then the choice of the Arbitrator had to be that of the CMD, NBCC. He submitted that alternatively a time-frame may be fixed by the Court for conclusion of the arbitral proceedings by Respondent No. 4.

7. The above submissions have been considered. This Court is satisfied that the Respondent No. 4 has failed to act without undue delay resulting in the termination of his mandate in terms of Section 14(1)(a) of the Act. Despite letters written by the Petitioner to Respondent No. 4 requesting him to expedite the arbitral proceedings as noted hereinbefore, the Arbitrator has failed to do so. With the Respondents choosing not to file any counter affidavit, the averments by the Petitioner on the failure of the Arbitrator to act expeditiously remain uncontroverted. He has brought about a situation where the "controversy remains" concerning his failure to act without undue delay. Therefore, u/s 14(2) of the Act, the Petitioner is entitled to approach this Court seeking termination of the mandate of Respondent No. 4.

8. In Union of India v. Singh Builders Syndicate, the Supreme Court observed that if the arbitral Tribunal is made non-functional on account of the delay of one of the serving officers either by the frequent transfer or by failure to take steps expeditiously then the Court should step in, and appoint an Arbitrator. Again in Northern Railway Administration v. Patel Engineering Company Ltd., the Supreme Court observed that it was not powerless to make appropriate alternative arrangements where the arbitral Tribunal is not functional. As regards appointing the named Arbitrator, the Supreme Court in Bipromasz Bipron Trading SA v. Bharat Electronics Limited, observed that if the facts so warrant, the Court can appoint another person where it is of the view that the named Arbitrator is not likely to be impartial. In N.B.C.C. Ltd. v. J.G. Engineering Pvt. Ltd., the Supreme Court terminated the mandate of the Arbitrator as there was undue delay in completing the arbitral proceedings.

9. In the present case, the uncontroverted facts are that the arbitral proceedings which commenced with the Petitioner invoking the arbitration clause way back on 25th April 2002 are yet to conclude. There have been three Arbitrators appointed by the CMD, NBCC in this long period of over ten years with no significant progress being made in the arbitral proceedings. The Court is, therefore satisfied that permitting the CMD, NBCC to further appoint another Arbitrator to replace Respondent No. 4 would be a futile exercise as the Arbitrators so far appointed have not been able to carry on with the arbitral proceedings without undue delay. This Court, therefore holds that in the facts and circumstances of the case, the

CMD, NBCC should be held to have forfeited his right to appoint an Arbitrator in terms of the arbitration clause.

10. In the above circumstances, this Court terminates the mandate of Respondent No. 4 as an Arbitrator.

11. Consequently, in exercise of its powers u/s 11 read with Section 14(1)(a) and Section 14(2) of the Act, this Court appoints Mr. Justice P.K. Bahri, a former Judge of this Court, residing at 171, Jor Bagh, New Delhi-3 (Mob. 9818542737) as sole Arbitrator to adjudicate the disputes between the parties. The learned Arbitrator will proceed from the stage at which the arbitral proceedings were before Respondent No. 4.

12. It will be the responsibility of the NBCC to ensure that the entire arbitral record is collected from Respondent No. 4 within the next ten days and placed before the learned Arbitrator appointed by this Court forthwith. The fees of the learned Arbitrator would be in terms of the Delhi High Court Arbitration Centre (Arbitrators' Fees) Rules. The petition is disposed of in the above terms. A copy of this order be delivered to the learned Arbitrator forthwith.