
(2009) 09 DEL CK 0381
In the Delhi High Court
Case No : Arb.P. No. 191 of 2009

Ms. Pooja Gambhir and Others

APPELLANT

Vs

Mr. Parveen Jain and Others

RESPONDENT

Date of Decision : 22-09-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 10(1), 11, 11(8), 34

Citation : (2009) 09 DEL CK 0381

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Harish Malhotra, Vipul Gupta and Naveen R. Nath, for the Appellant; Ashish Aggarwal, for Respondent Nos. 1, 4, 5 and 7 and Rajesh Rattan, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—The petition has been preferred u/s 11 of the Arbitration Act, 1996. A petition u/s 9 of the Act qua the same agreement being OMP No. 74/2009 is also listed today. In that OMP the Counsel for the respondents No. 3&6 herein has moved an application for transfer of that OMP to the court of Justice S.N. Dhingra before whom another petition u/s 9 of the Act arising from the same agreement is stated to have been listed. The Counsel for the respondents No. 3&6 at the outset sought transfer of this petition also to the court of Justice S.N. Dhingra. The same has been opposed by the senior Counsel for the petitioner. I do not find any ground for transfer of this petition as orally sought. The matter of appointment of an arbitrator is different from the interim measures. As such, the counsels have been heard.

2. The parties hereto were parties to an MOU dated 6th September, 2008. The same was between the petitioner on the one hand and the respondents on the other hand. Clause 17 thereof provided for arbitration as under:

17. Arbitration: That in case of any dispute, the matter will be referred to arbitration and provisions of Indian Arbitration Act will be applicable. It has been mutually decided to appoint (1) Mr. R.K. Tuli CA (2) Mr. Rattan Ji (3) Rishi Ji (4)

Mangilal Bishnoi CA, to act as arbitrators and decision of the arbitrators will be final and binding on the parties. However in case of any dispute amongst the arbitrators on any of the Clauses of this MOU, the matter will be referred to court of law and same will fall under the jurisdiction of Delhi Court.

3. It is the admitted position that of the four named arbitrators Mr. R.K. Tuli, Chartered Accountant and Mr. Rishi Ji have refused to act as arbitrator. Mr. Rattan Ji and Mr. Mangilal Bishnoi, Chartered Accountant, have agreed to act as arbitrators.

4. The Counsel for the respondents No. 3&6 has contended that the Arbitrator Tribunal be constituted of the said two arbitrators with a retired judge of this Court being appointed as the presiding arbitrator. The Counsel for the respondents No. 1, 4, 5 & 7 has contended that an Arbitral Tribunal of three independent arbitrators, one of them being Chartered Accountant, be constituted since the matter requires disputes as to accounting. The senior Counsel for the petitioner has contended that Mr. Mangilal Bishnoi is the Chartered Accountant of the respondents No. 3&6. The Counsel for the respondents No. 3&6 states that he has no instructions in this regard.

5. The respondent No. 2 had been served and has failed to appear. Though there is no order in this petition for proceeding ex-parte against him, the Counsel for the respondents No. 3&6 states that the respondent No. 2 has retired from the Board of Directors of the company in dispute and is no longer interested in the present disputes.

6. Attention of the counsels for the appearing respondents was drawn to Section 10 of the Act. This court in (i) Marine Container Services (South) Pvt. Ltd. Vs. Atma Steels Ltd. (ii) Dr. Deepashree Vs. Sultan Chand and Sons, (iii) Rapti Contractors Vs. Reliance Energy Ltd. and Others and the Andhra Pradesh High Court also in (i) Ashok Engineering Company Engineers and Contractors Vs. General Manager, South Central Railway, Secunderabad and another, and (ii) North East Securities Limited, Hyd. Vs. Sri Nageswara Chemicals and Drugs Pvt., Ltd., Hyd. and another, has held that an agreement for appointment of an even number of arbitrators is not an agreement within the meaning of Section 10(1) of the Act and hence will constitute an agreement for appointment of a sole arbitrator. The Counsel for the respondents No. 1,4,5&7 has drawn attention to Narayan Prasad Lohia v. Nikunj Kumar Lohia AIR 2003 SC 1065 in para 17 whereof it has been held that Section 10 is a derogable provision and can be waived. Though that was a case of an even number of arbitrators, however, challenge to the award on that ground u/s 34 of the Act was for consideration. It was in that context that the aforesaid observation came to be made. However, in the present case since the senior Counsel for the petitioner has opposed the claim of the respondents No. 3 & 6 for the Arbitral Tribunal to comprise of the two arbitrators who have agreed to act and of claim of other respondents of an arbitral tribunal of three arbitrators, the question of waiver does not arise at all.

7. The Counsel for the respondents No. 1, 4, 5 & 7 has also referred to Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Co. Ltd. 2008(4) Raj 113 (SC). However, that was a case concerning the qualifications of an arbitrator within the meaning of Section 11(8) of the Act. The agreement in the present case does not prescribe any qualifications. Merely because two of the arbitrators are Chartered Accountants does not mean that the parties had agreed to such a qualification of the members of the Arbitral Tribunal. The other two arbitrators agreed upon by the parties are admittedly not Chartered Accountants. The senior Counsel for the petitioner has also contended that merely because determination of a dispute entails determination of accounts is no ground for a retired judge of this Court being not appointed as the sole arbitrator.

8. In my view, the contention of the Counsel for the respondents No. 3 & 6 of including two out of the four arbitrators in the Arbitral Tribunal cannot be accepted also for the reason that when the parties have agreed upon four arbitrators, two of whom have refused to act, the parties cannot be permitted to insist upon the other two to continue in the Tribunal in as much as the agreement was for those persons together to act as the Tribunal and not to some of them only being in the Arbitral Tribunal. Though, it is not so recorded in the agreement, ordinarily when the agreement is of appointment of Arbitral Tribunal in such manner, the different members of the Arbitral Tribunal are nominated by the different parties to the agreement and in case of some of them refusing to act, allowing others to act would amount to giving unfair advantage to the parties whose nominees agree to act as the arbitrator.

9. I also do not find that the parties had in the present case agreed to any qualifications of the arbitrator. Constituting a Tribunal of three arbitrators with one of them being a Chartered Accountant as suggested would not only be too expensive but also may delay the arbitration proceedings. More so, when the provisions of Section 10 are clear and the agreement is found to be of a sole arbitrator only.

10. Justice R.C. Chopra (Retd.) is appointed as sole arbitrator to adjudicate the disputes arising out of the arbitration Clause in the MOU dated 6th September, 2008 (Supra). His fee is to be shared equally by the petitioner Constituting one group and the respondents Constituting the other group, subject to award as to costs. The Arbitral Tribunal to fix its remuneration in consultation with the counsels for the parties. All counsels agree that they will cooperate in the arbitration and will assist the Arbitral Tribunal in concluding the arbitration within six months from the date of first appearance before the Arbitral Tribunal. The parties to appear before the Arbitral Tribunal with prior appointment on 10th October, 2009.

Dasti under the signatures of Court Master to Counsel for parties.