

(1994) 12 DEL CK 0015

In the Delhi High Court

Case No : O.M.P. 81/90

Samyukta Bharat Housing Development Corporation (P) Ltd.	APPELLANT
Vs	
Smrithi Grih Nirman Sahakari Sansathan Mth. and others	RESPONDENT

Date of Decision : 12-12-1994

Acts Referred:

Citation : (1995) 1 AD 251 : (1995) 1 ARBLR 161 : (1995) 57 DLT 653

Hon'ble Judges : Usha Mehra, J

Bench : Single Bench

Advocate : M/s. R.K. Nagraja and M/s. J.K. Nayyar, for the Appellant; Mr. P.P. Singh for Mr. Subhash Oberoi, for the Respondent

Judgement

Usha Mehra, J.—In this petition, the petitioner has assailed the impugned order dated 10th November, 1989 passed by the Registrar primarily on the ground that the dispute having once referred to the sole arbitration of Additional Registrar thereafter the Registrar could not have withdrawn the reference from the said Arbitrator without the consent of the parties. Secondly, time for making and publishing the award had already expired and, Therefore, without the consent of parties arbitration proceedings could not continue.

2. In order to appreciate the contentions of the counsel for the parties, brief facts have to be understood. The petitioner vide its application dated 1st November, 1985 approached the Registrar to settle his dispute with the Society. This request was made in accordance with the provisions of the arbitration agreement entered into between the petitioner and the Society. The Registrar pursuant to the request made by the petitioner appointed his Additional Registrar as the Arbitrator. Question arose as to under what provision of law the proceedings would be governed. Parties admitted that Arbitration Act would govern the proceedings before the Arbitrator. The matter kept on proceeding before the said Arbitrator. In the meantime, the statutory period of four months for making and publishing the award expired. The Arbitrator neither made nor published his Award, nor the parties extended the said period. However, the Registrar without

the consent of the petitioner and without getting the time extended withdrew the arbitration proceedings from the Additional Registrar and assigned that same to himself. He started proceedings with the reference. It was at this stage that the petitioner raised objections which were raised vide his application dated January, 1988 Annexure-14. The authority of the Registrar was challenged and also that the time for making and publishing the Award has already expired, Therefore, the Registrar could not proceed with the reference any further, without first getting the time extended. These legal objections were contested by the respondent when it took the plea for the first time that the proceedings before the Registrar were under the Societies Act and not under the Indian Arbitration Act. Petitioner reiterated his earlier stand that the proceedings had to be conducted under the Indian Arbitration Act, because the reference was under the arbitration clause of the agreement. Therefore, the provisions of the Societies Act did not apply. Since the period of four months has elapsed, Therefore, the Registrar could not proceed with the reference.

3. This petition has been contested by the respondent inter alia, on the grounds that the Registrar could not have acted in any other manner than prescribed u/s 64 of the Act. When the authority of the Registrar was invoked, the petitioner knew that he was approaching the Registrar u/s 64 of the Act and not under the terms of the agreement. Agreement was inter se the parties i.e., petitioner and the Society, Therefore, there was no question of petitioner invoking jurisdiction of the Registrar under the terms of the arbitration agreement. Since the disputes were referred u/s 64 of the Act, hence the provisions of Sections 5, 11, 12, & 33 of the Arbitration Act are not applicable. Having invoked the jurisdiction of the Registrar under the Act, the petitioner now cannot urge that the proceedings before Registrar were to be governed under the Arbitration Act. Registrar had the power and authority to withdraw the dispute and decide those himself. Moreover, period of limitation for making and publishing the award are not applicable to a dispute referred under the Societies Act.

4. I have heard counsel for the parties and perused the record. I have also gone through carefully the impugned order dated 10th November, 1989 and the order of the Additional Registrar, dated 17th November, 1987. Perusal of the reply filed by the respondent before the Additional Registrar, Annexure 12, shows that the respondent admitted in no uncertain words that the proceedings as drawn were to be conducted as per the provisions of the Indian Arbitration Act. This order was passed after both the parties admitted the position. The request made by the petitioner vide his application dated 1st November, 1985 also shows that it was made not u/s 64 of the Act but as per the agreement entered into between the parties which contained arbitration clause. Why the petitioner approached the Registrar at the first place for setting the dispute with Society is not known. However, it was explained by the counsel for the petitioner from record as well as orally that the petitioner was under the impression that the Registrar being a man in authority may be able to settle his dispute with the Society. The said request, by no stretch of imagination can be said to have been made under the

Act nor amount to conferring of power on the Registrar as stipulated u/s 64 of the Act. Reasoning given by the Registrar that since the petitioner approached him, Therefore, the provision of Section 64 of the Act would automatically apply appears to be without merits because he has not considered that fact whether petitioner was member of the Society or not and whether his case falls under Sections 36, 37 and 38 of the Act. Once having delegated his power to Additional Registrar to act as Arbitrator, to my mind, the Registrar thereafter had no authority to withdraw the reference from the said Arbitrator and start the proceedings himself as if he was appointed under the provisions of Section 64 of the Act. By transferring the proceedings to himself without the consent of the petitioner, the Registrar not only acted contrary to law but also violated the principle of natural justice.

5. The petitioner vide his application dated January, 1988, Annexure 14 took the plea that the time for making and publishing the Award had already expired. The Arbitrator could not proceed with the reference without first getting the time extended. On the other hand, the contention of learned counsel for the respondent is that the parties could not contract out of the statute, to my mind, this argument has no force. Bare reading of various provisions of the Act shows that it is the respondent Society which is covered by the Act. The petitioner who is not a member of the Society and had no financial dealing, his dispute could not have been covered by the provisions of the Act. Petitioner had an agreement for the execution of the work with the Society and the said agreement contained an arbitration clause. Parties were to be governed by the said agreement and not by the Act. Therefore, there was no question of parties contracting out of the statute. Arbitration clause contained in the agreement reads as follows :

"All disputes and differences which may arise between the first party and the second party whether during the pendency of the agreement or after the completion of the same, and whether in the relation to the interpretation of this or any other document or any Act or omission of either party to dispute or difference, or to any Act which ought to be done by the parties in dispute or either of them in relation to any matter whatsoever touching or concerning this agreement, it shall be referred to arbitration in terms of the Arbitration Act, 1940. However, in respect of any matter touching or concerning this agreement, the jurisdiction shall be of the court in the city of New Delhi."

6. Perusal of this clause shows that any dispute or difference which had arisen between the parties to the agreement, the same were to be referred to the arbitrator in terms of the arbitration agreement. Therefore, in terms of this clause, the petitioner approached the Registrar to settle his disputes with the Society. The Additional Registrar rightly concluded vide his order dated 17th November, 1987 that proceedings were to be governed by the provisions of Arbitration Act. The impugned order of the Registrar, Therefore, is in violation of the terms of the agreement entered into between the parties. Registrar in fact had no authority under law to review the order passed by the Additional

Registrar who was appointed as the Arbitrator Power to review is not envisaged either under the terms of the arbitration clause or under the Arbitration Act. If the Society had any grievance the remedy was by way of filing objections against the same, but the Registrar had no authority to suo moto revoke the power of the appointed arbitrator and vest the same to himself without the consent of the petitioner. To arrive at this conclusion, reference can be had to Section 64 of the Act which reads as under :

"64. Dispute - (1) Notwithstanding anything contained in any other law for the time being in force any dispute touching the constitution, management or business of a society or the liquidation of a society shall be referred to the Registrar by any of the parties to the dispute if the parties thereto are among the following :

(a) a society its committee, any past committee, any past or present officer, any past or present servant or a nominee, heirs or legal representative of any deceased officer, deceased agent or deceased servant of the society or the liquidator of the society;

(b) a member, past member or a person claiming through a member, past member or deceased member of a society or of a society which is a member of the society;

(c) a person other than a member of the society who has been granted a loan by the society or with whom the society has or had business transactions and any person claiming through such a person;

(d) a surety of a member, past member or deceased member or a person other than a member, who has been granted a loan by the society, whether such a surety is or is not a member of the society;

(e) any other society or the liquidator of such a society; and

(f) a creditor of a society.

(2) For the purposes of sub-section (1), a dispute shall include :

(i) a claim by a society for any debt or demand due to it from a member, past member, or the nominee, heir or legal representative of a deceased member, whether such debt or demand be admitted or not;

(ii) a claim by a security against the principal debtor where the society has recovered from the surety and amount in respect of any debt or demand due to it from the principal debtor as a result of default of principal debtor, whether such debt or demand be admitted or not;

(iii) a claim by a society for any loss caused to it by a member, past member or deceased member, any officer, past officer or deceased officer, any agent, past agent or deceased agent, or any servant, past servant, or deceased servant or its committee, past or present, whether such loss be admitted or not;

(iv) a question regarding rights, etc. including tenancy rights between a housing society and its tenants or members; and

(v) any dispute arising in connection with the election of any officer of the society or representative of the society or of composite society;

Provided that the Registrar shall not entertain any dispute under this clause during the period commencing from the announcement of the election programme till the declaration of the results.

(3) If any question arises whether a dispute referred to the Registrar is a dispute, the decision thereon of the Registrar shall be final and shall not be called in question in any court.

7. Reading of this Section shows that the case of the plaintiff does not fall either under clause (a) (b) (e) and (f). Clause (c), however indicates that a non member can be covered under the provisions of Section 64, provided he had taken loan from the Society or had business transaction. It is an admitted case of the parties that the petitioner had not taken any loan from the Society. Therefore, we have to know what does "business transaction" mean. Can the construction activity of the petitioner be called business transaction ? The word "Business Transaction" has not been defined. However, Section 36 and 37 deal with restrictions on borrowing and loans. The said Sections are reproduced as under :

Section 36 :

Restriction on borrowing - A society shall receive deposits and loans under such conditions as the Registrar may, for such society or a class of societies prescribe or as may be specified in the bye-laws of such society."

Section 37 :

Restriction on loans - (1) No society shall make a loan to :

(a) any person who is not a member;

(b) any member on the security of its own shares ?

(c) any member on the security of a non-member

8. Reading of these sections show that business transaction mentioned u/s 64 of the Act in fact means financial dealing. Construction of the flats by the petitioner for the Society, by no stretch of imagination can be called business transaction, because as pointed out above if the construction of flat was to be considered a business transaction, then there was no need to put an arbitration clause in the agreement. The parties on that case would have mentioned in the agreement that in case of dispute they would be governed by the provisions of Section 64 of the Act. Fact remains that both the parties were aware that in the event of any dispute they were to be governed by the arbitration clause of the agreement. In arriving at this conclusion support can also be had of Rule 29 of the M.P. Co-

operative Societies Rules, 1967 which prescribes that no Society shall enter into any transaction with a person other than a member, except those referred to in Sections 36 and of the Act, unless :

- (i) the bye-laws of the Society permit it to enter into such transaction and
- (ii) previous sanction of the Registrar has been obtained by the Society.

9. In this view of the matter the construction activities of the petitioner cannot be called a business transaction as referred to in Sections 36 and 37 of the Act, nor under Rule 29. Moreover, the bye-laws of the Society do not permit such a transaction to be covered by the Act, nor previous sanction of the Registrar had been obtained in this case.

10. For the reasons stated above I find that the impugned order is without merits. Hence, liable to be set aside. Decision of the Additional Registrar dated 17th November, 1987 to whom the matter was referred for adjudication that proceedings shall be governed by Arbitration Act is a valid order. Proceedings before the arbitrator are to be governed by the provision of the Indian Arbitration Act.

11. Having held so, the next question which arises as to whether the matter be referred to the said Additional Registrar or a new arbitrator is to be appointed ? Counsel for the petitioner contended that new arbitrator be appointed because that Additional Registrar is not available any more. Moreover, as per the arbitration clause Delhi Court alone has the jurisdiction, Therefore, this court should appoint an Arbitration. Both the parties were asked to suggest name of the arbitrator. Some names were suggested. I appoint Justice H. L. Anand (retired Judge of this court) as the sole arbitrator to adjudicate the disputes between the parties. He shall be paid Rs. 5,000/- per effective hearing and Rs. 2,500/- for non-effective hearing.