
(2005) 02 DEL CK 0185
In the Delhi High Court
Case No : FAO (OS) No.158 of 2003

Sushil Kumar Raut

APPELLANT

Vs

Hotel Marina and Others

RESPONDENT

Date of Decision : 22-02-2005

Acts Referred:

Citation : (2005) 121 DLT 433 : (2005) 81 DRJ 533

Hon'ble Judges : B.A. Khan, J;Anil Kumar, J

Bench : Division Bench

Advocate : Sohan Lal, for the Appellant; S.K. Maniktala, for the Respondent

Judgement

B.A. Khan, J.—An impasse has been created with two arbitrators conducting parallel arbitration proceedings. One is the appointing Authority under the arbitration clause and the other his appointee. The appointing Authority (R-3) has revoked the authority of the appointee (R-3). Whether he could do so and who out of the two is the real arbitrator is the question.

2. This interesting question arises in the following facts. The appellant is a builder/contractor whereas respondent No. 1 is a partnership concern. Respondent No. 2 is the appointing authority under the arbitration agreement and respondent No. 3 is the arbitrator appointed by him.

3. Respondent No. 1 awarded a work contract for its hotel at Agra to be executed by respondent No. 1. The contract contained an arbitration clause which reads as under:

"18. Settlement of Disputes

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. Agrawal, 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."

4. Disputes arose between the parties and appellant invoked the arbitration clause by its letter dated 08.06.2000. Second respondent Shri R.A. Agrawal was called upon to act as a sole arbitrator or to nominate and appoint any other person as arbitrator. He appointed respondent No. 3 by letter dated 04.07.2000. Respondent No. 3 accepted it and entered the reference. But later respondent No. 2 (appointing Authority) cancelled his appointment on 08.07.2000 by letter dated 04.07.2000. Respondent No. 1 disputed this by his letter dated 11.07.2000.

5. But Respondent No. 2 entered the reference all the same on 13.07.2000 and directed the parties to file their respective claims. Respondent No. 3 challenged his authority to appoint himself by a communication dated 27.07.2000. To break the deadlock, respondent No. 1 filed OMP No. 227/2000 u/s 14 of the Arbitration Act, seeking termination of the mandate of the appointing Authority (respondent No. 2). Appellant contested this, inter alia, on the ground that the remedy available to respondent No. 1 was to file objections against the award of the arbitrator (R-2) u/s 34 of the Act or to question his jurisdiction before him. The appellant also attributed bias to Respondent No. 3 (appointee) who had allegedly direct business links with the Managing Partner of respondent No. 1.

6. The learned Single Judge on consideration of the matter accepted the case of Respondent and held:-

"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. Subsection (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 none 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."

7. Appellant is aggrieved of this and has filed the present appeal to assail this order.

8. As it is, no fault can be found with the reasoning of learned Single Judge and the view taken by him in the matter on a cursory examination. Admittedly the impasse is not covered by the provision of Sections 14 and 15 of the Arbitration which envisage events for termination of the mandate of an Arbitrator. None of these events like the Arbitrator's inability to perform or his withdrawal from

office exists in the present case. Could his authority be revoked still is the question.

9. The issue will assume a new dimension altogether if it was to be examined on the touchstone of the position that the power to appoint includes the power to recall also. Similarly it could also be argued that the appointing authority had become *functus officio* after the appointment of Respondent No. 3 who had entered the reference before his appointment was cancelled a legal conundrum indeed which may require examination from different angles before any conclusive view could be taken to break the deadlock. The result would be that the decision and determination of the issue would defy arbitration for years on leaving the dispute between the parties unresolved.

10. Given regard to all this we had called upon the parties to see sense and to discard both arbitrators and to go for a new impartial arbitrator, which in our view was in the interests of both parties. The rival counsel had sought adjournment twice to seek instructions vide Court orders dated 11.3.2004 and 22.2.2005. Appellant's counsel conveyed his agreement to this but respondent did not who obviously wants to stick to respondent No. 3 with whom he is alleged to have business links.

11. We are conscious of the position that arbitration admits of least judicial intervention and the manner in which an arbitrator is to be appointed. But we are faced with an impasse which is neither covered by the provisions of the Arbitration Act, nor any precedent. This, if left unattended would have the natural consequence of leaving the disputes between the parties unresolved which would be contrary to the spirit and intent of the Arbitration Act. It would, Therefore, require to be broken which can be only done by the appointment of an impartial arbitrator. This may not be technically or strictly in tune with the provisions of the Act which do not provide for such like eventualities but it is surely dictated by the interests of justice. Therefore to promote and secure the interests of justice, it would be appropriate to set aside the impugned order and appoint an independent arbitrator. Mr. Justice (Retd.) R.P. Sethi, former Supreme Court Judge, 1, Maheshpora Chowk, Bakshi Nagar, Jammu, is appointed as Arbitrator. He shall enter reference within four weeks from receipt of this order and shall fix his own fee depending upon the nature of the arbitration. Parties to appear before him on 21.05.2005 with their respective claims. He shall publish the award within four months thereafter.