

(1997) 03 DEL CK 0014
In the Delhi High Court
Case No : C.M. (M.) No. 174 of 1976

V.K. Agnihotri and others

APPELLANT

Vs

National Small Scale Industries Corporation

RESPONDENT

Date of Decision : 21-03-1997

Acts Referred:

Citation : (1997) 03 DEL CK 0014

Hon'ble Judges : S.N. Kapoor, J

Bench : Single Bench

Advocate : Sh. Sanat Kumar, for the Appellant;

Judgement

S.N. Kapoor, J.—The petitioner challenges an opinion given by the Sub Judge, 1st Class on a reference from the Arbitrators that they could proceed with the reference.

2.1. Arbitrators moved an application u/s 13(b) read with Section 41 and Section 28 of the Arbitration Act, 1940 (hereinafter called the Act for short) for opinion. The facts giving an occasion to the said application are : Mr. V. K. Agnihotri, and Mr. Jai Prasad Aggarwal, two Advocates were appointed as Arbitrators by the two parties. Mr. P. L. Vohra, Advocate was appointed Umpire on 12-12-1973. The Arbitrators entered on the reference. Four months lapsed. Thereafter, the petitioner informed the Arbitrator that they had become "functus officio" and the petitioner also requested Mr. P. L. Vohra, Umpire to enter on the reference since time for making the award had expired.

2.2. On receipt of that letter thereafter the Arbitrator moved an application on the ground that there was no delay on the part of the Arbitrators Along with the record to the court seeking an opinion in respect of following two questions :

"(i) Can the authority of the appointed Arbitrator be removed without the leave of the Court merely because the time for making the award has expired.

(ii) Should be Arbitrators cease to act and hand over the proceedings to the

Umpire, merely because the time for making the award has expired and none of the parties has applied for extension of time, and also because the 1 Umpire or one party has asked for the file to be sent to the Umpire although there is no difference of opinion amongst the Arbitrators.

2.3. The Court gave following impugned opinion :

"In this case, one of the parties disagree with the Arbitrators and not the Arbitrators are in dis-agreement. The matter can be referred to the Arbitrator when there is difference of opinion between them. But merely by passing the time will not take away the jurisdiction of the applicants, provided the party has applied for extension of time. In my opinion, the respondent No. 1 has not shown anything under para four of schedule which takes away the jurisdiction of the applicant. I, Therefore, opine that the Arbitrators have not become functus officio. They can act and conduct proceedings as there is no disagreement between the Arbitrators".

3. The learned counsel assailed this impugned opinion of the Court on the ground that in Hari Shankar Lal Vs. Shambhunath Prasad and Others, , Supreme Court has held that :

"12. In the present case, the notice was given long after the expiry of four months from the date when the Arbitrators entered on the reference and, Therefore, they could no longer act pursuant to the notice calling upon them to act. The proper course should have been to apply to the court for extension of time u/s 28 of the Act"

4. It is evident that the above said course as had been suggested by the Supreme Court, was not adopted by the learned Arbitrators to seek extension of time; rather, opinion was sought.

5. In State of Punjab Vs. Hardy, , it is held that :

"9. A perusal of these provisions indicates that it is open to the parties to an arbitration agreement to fix the time within which the Arbitrator must give award, but it has to be so stated in the agreement itself. If per chance no time has been specified by the parties in the arbitration agreement, then by virtue or operation of Section 3 read with Clause 3 of the First Schedule the award must be given within four months of the Arbitrator entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow."

10. Sub-section (1) Section 28 is very wide and confers full discretion on the Court to enlarge time for making the award at any time. The discretion under Sub-section (1) of Section 28 should, however be exercised judiciously. Sub-section (2) of Section 28 also makes it evident that the Court alone has the power to extend time. It further provides that a clause in the arbitration agreement giving the Arbitrator power to enlarge time shall be void and of no effect except when all the parties consent to such enlargement. It is not open to

arbitrators at their own pleasure without consent of the parties to the agreement to enlarge time for making the award."

6. The above observations definitely indicate that the Arbitrator could not extend time on their own. In *N. Chellappan v. Secretary, Kerala State Electricity Board* ((1975) 1 SCC 89), the authority of the Arbitrator was revoked for they have not made the award within the time limit and that they were disqualified for bias from proceeding with the arbitration and it was prayed that the Umpire be directed to enter upon the reference and to proceed with the arbitration. Similar request was made here by the petitioner to the Umpire to proceed with the arbitration. In paras 4 and 5 of the judgment Supreme Court held that :

"4. The main point which arises for consideration is whether the Umpire as Sole Arbitrator had jurisdiction to enter upon the reference and pass the award. To decide the question it is necessary to see whether the order in O.P. No. 11 of 1972 appointing the Umpire as Sole Arbitrator was passed without jurisdiction or was vitiated by an error which made it bad in law. In paragraph 5 of that order, the court has stated :

"When the matter came up for enquiry, it was represented by both sides, that since the petitioner (appellant) has expressed in so many words his want to confidence in the Arbitrator and since the Arbitrator themselves have expressed their willingness to be relieved of their duties as Arbitrators, they must be dispensed with. In view of this agreement, it has become necessary to revoke the authority of respondent No. 2 & 3 (Arbitrators) and to appoint the fourth respondent as Umpire and to direct him to make the award."

5. We find it difficult to accept the reasoning of the High Court that the Umpire had no jurisdiction to enter upon the reference. In the first place, the order in O.P. No. 11 of 1972 was an order passed on consent of the appellant and the Board. Quite apart from this, Rule 4 in the First Schedule to the Arbitration Act authorises an Umpire to enter upon the reference in case the Arbitrators fail to make the award within the time specified. Whatever be the reason, since the Arbitrators did not make the award within the extended time, the Umpire, by virtue of the provisions of rule could have entered upon the reference and made the award. It is, no doubt, true that the Umpire expressed his unwillingness to enter upon the reference without an order of the Court. That was because the Board had filed an application for extension to time for the Arbitrators to pass the award. We do not think that the Umpire lost his jurisdiction to pass the award merely because he wanted an order from Court by way of abundant caution authorising him to enter upon the Reference."

7. In view of the above it is very much evident that the Arbitrator could not proceed after expiry of four months" time without getting extension of time. If an Umpire is appointed then the Umpire could be requested to enter on the reference and to proceed with the arbitration. As the opinion given by the learned Sub-Judge is contrary to the above view one has no other option but to

allow the revision petition. In case the Court had extended the time u/s 28 of the Act and then expected the Arbitrators to act and conduct the arbitration proceedings, the matter would have been different and this revision petition might not have arisen. But not extending the time and by giving impugned opinion the matter has been complicated.

8. Learned counsel for the petitioner has informed that in this case unfortunately the two Arbitrators as well as the Umpire have expired. Consequently, this Court is unable to rectify the situation at this stage.

9. For the foregoing reasons the revision petition is allowed. The impugned order/opinion is set aside. The only course now open for the petitioner is to move proper application to the Court to fill up the vacancies so caused, if so advised.

10. A copy of this order be sent to the learned Trial Court through the learned District Judge for information and the proceed in this matter in accordance with law.

11. Revision Petition allowed.