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Calcutta High Court

Case No: A.P. No"s. 140-142 of 2003

Decon India Private Ltd.	APPELLANT
Vs	
Union of India (UOI) and Others	RESPONDENT

Date of Decision: Sept. 11, 2003

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11(6), 12, 12(3), 13, 13(3)

Citation: (2005) 2 ARBLR 361 : (2005) 2 CHN 260 : 108 CWN 44

Hon'ble Judges: Subhro Kamal Mukherjee, J

Bench: Single Bench

Judgement

Subhro Kamal Mukherjee, J.
All these applications are filed for termination of the mandate of the arbitrators and for appointment of the arbitrators instead and in place of the present arbitrators.

2. Since similar questions of fact and law are involved in all the matters, by consent of the parties, all these applications are taken up for hearing together.

3. In order to decide the said applications, I think that the circumstances in which the application in A.P. No. 140 of 2003 has been filed are required to be stated.

4. The petitioner was awarded the work for construction of a road and a formal agreement was executed by and between the parties for the aforesaid purpose. Admittedly, the agreement contained an arbitration clause. The Chief Engineer, Central Public Works Department, in charge of the work at the time of dispute, has been the authority to appoint the sole arbitrator to deal with the matters. As the disputes and differences arose, the petitioner requested the Chief Engineer concerned to constitute the arbitral tribunal in terms of the arbitration agreement.

5. The Chief Engineer by his order dated September 14, 1998 appointed Shri B.K. Biswas as the sole arbitrator to decide the matters and to make and publish his award regarding the claims of the contractor. The said Chief Engineer, however, by his order dated August 31, 1999/September 9, 1999 appointed Shri A. K. Bhatnagar as the sole arbitrator in place of Shri B. K. Biswas as the first arbitrator was transferred/vacated his office on August 9, 1999 Shri A. K. Bhatnagar was asked to start the proceedings from the stage at which the first arbitrator left it. The newly appointed arbitrator, Shri A, K. Bhatnagar, held only three sittings between the period from September, 2001 and March, 2002. However, the said Shri A. K, Bhatnagar, also, could not make and publish the award and, ultimately, the Chief Engineer appointed Shri O. P. Gaddyhan as the sole arbitrator instead and in place of the said Shri A. K. Bhatnagar.

6. The petitioner moved an application before this Court, which was registered as A. P. No. 92 of 2002, for revocation of mandate of the arbitrator on the allegation of inaction on the part of the arbitrator in the proceeding with the reference. However, Girish Chandra Gupta, J. on September 12, 2002 disposed of the said application, inter alia, by directing the newly appointed arbitrator to conclude the proceedings and to make and publish his award within 6 (six) months from the date of communication of the said order to him.

7. Shri O.P. Gaddyhan on October 28, 2002 held one meeting. The arbitrator fixed the next date of hearing on January 6, 2003 and inter alia, asked the claimant to file the complete documents concerning A. P. No. 92 of 2002 for further actions. On March 6, 2003 the meeting was adjourned as the respondents were not present without any intimation to the arbitrator. Unfortunately, Shri O.P. Gaddyhan could not conclude the arbitration proceedings and could not make and publish the award within the time frame as indicated in the order dated September 12, 1999 passed by Girish Chandra Gupta, J. in A. P. No. 92 of 2002.

8. Accordingly, the petitioner has again come before this for termination of the mandate of the arbitrator and prayed for appointment of an arbitrator instead and in place of the present arbitrator by this Court.

9. It has been submitted on behalf of the claimant that the arbitrator failed to act without undue delay and as such the mandate of the arbitrator should be terminated.

10. The learned Advocate appearing for the respondents, however, submitted that because of the dilatory tactics adopted by the claimant in not furnishing the particulars, the learned arbitrator could not conclude the arbitral proceedings and as such the petitioner is not entitled to ask for termination of the mandate of the arbitrator. It has, further, been submitted that a substitute arbitrator could only be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

11. From the facts and circumstances stated hereinabove, I am satisfied that the arbitrator failed to act without undue delay even after the directions passed by Girish

Chandra Gupta, J. in the order dated September 12, 1999. Because of the causal attitude taken by the arbitrator, the very purpose of resolving the disputes through arbitration failed to yield any result expeditiously for which the Arbitration and Conciliation Act, 1996 ("the said Act" in short) has been promulgated. The arbitrator, in the facts and circumstances of the case, failed to use all reasonable cares in the conduct of the arbitral proceedings. Therefore, his mandate should be terminated.

12. In order to appreciate the second limb of the argument of the learned Advocate for the respondents that in view of the provisions of Sub-section (2) of Section 15 a substitute arbitrator could only be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced, it is necessary to refer to Sections 14 and 15 of the said Act :

"14. Failure or impossibility to act.--(1) The mandate of an arbitrator shall terminate if--

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay ; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in Clause (a) of Sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or Sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or Sub-section (3) of Section 12.

15. Termination of mandate and substitution of arbitrator.--(1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate--

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) 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.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under Sub-section (2), any hearing previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."

13. Section 14 of the said Act contemplates that the mandate of an arbitrator should be terminated if he becomes de jure or de facto unable to perform his functions or for other reasons failed to act without undue delay or if he withdraws from his office or if the parties agree to the termination of his mandate. In case of controversy concerning any of the grounds referred to hereinabove, a party may apply to the Court to decide on the termination of the mandate.

14. Section 15 of the said Act refers two other circumstances in addition to the circumstances referred to in Sections 13 or 14 of the said Act, that is, such termination of mandate and substitution of arbitrator is, also, possible where the arbitrator withdraws from his office for any reason or by or pursuant to an agreement of the parties.

15. I am unable to accept the contentions of the learned Advocate for the petitioner that only under the circumstances referred to in Section 15 of the said Act, a substitute arbitrator could be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced and not when the mandate of the arbitrator is terminated under the circumstances referred to u/s 14 of the said Act. In my view, Sections 12, 13, 14 and 15 of the said Act are to be read together and not in isolation. Sections 14 and 15 of the said Act provide the grounds for termination of the mandate of the arbitrator either on the ground of incapability of the arbitrator to act or if he withdraws from this office or when the parties agree to termination of the mandate of the arbitrator and Sub-section (2) of Section 15 states that a substitute shall be appointed as per the rules that were applicable to the appointment of the arbitrator being replaced. Sub-section (2) of Section 15 should be interpreted to apply all possible circumstances under which the mandate may be terminated. The Court can, however, exercised its power only if the appointing authority did not supply the vacancy caused on account of termination of the mandate.

16. However, there is another aspect of the matter. I have noticed hereinabove that the authority concerned nominated three successive arbitrators to resolve the disputes, but each one of them failed to conclude the arbitral proceedings. At one stage the petitioner approached this Court and Girish Chandra Gupta, J. on September 12, 1999 directed the present arbitrator to conclude the arbitral proceedings and to make and publish his award within 6 (six) months from the date of communication of the said directions upon him. Still the arbitral proceedings could not be completed.

17. Sub-section (6) of Section 11 of the said Act states that where in the matter of appointment of the arbitrators a party fails to act as required under the procedure agreed upon by the parties, a party may request the Hon''ble Chief Justice or his designate to take the necessary measures for securing the appointment.

18. In my view, in the facts and circumstances of the case, the Chief Engineer, who was authorised under the procedure agreed upon by the parties to constitute the arbitral tribunal, failed to act as required under that procedure and as such it is a fit case where this Court should exercise the jurisdiction under Sub-section (6) of Section 11 of the said Act for securing the appointment of the arbitrator.

19. I, therefore, admit these applications and direct the office to place these matters before My Lord the Chief Justice for naming the arbitrators.

20. It will be open to the parties to bring to the notice of the Hon''ble Chief Justice any qualification required of the arbitrators by the agreement of the parties, if any.

21. All parties and the office are directed to act on a xerox signed copy of this dictated order on usual undertakings.