

(2009) 04 BOM CK 0136

Bombay High Court

Case No: Arbitration Application No. 110 of 2008

Mahindra Lifespace Developers
Ltd.

APPELLANT

Vs

The New Great Eastern Spinning
and Weaving Company Ltd. and
Rozal Mehta, An Indian
Inhabitant

RESPONDENT

Date of Decision: April 16, 2009

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 11(2), 11(6), 11(8), 12

Citation: (2009) 3 BomCR 587 : (2009) 111 BOMLR 2048

Hon'ble Judges: Swatanter Kumar, C.J

Bench: Single Bench

Advocate: Virag Tulzapurkar, instructed by Little and Company, for the Appellant; D.D. Madon instructed by Kanga and Co., for the Respondent

Final Decision: Allowed

Judgement

Swatanter Kumar, C.J.

Simple but pertinent questions of law arise for consideration in this Petition u/s 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act"). On behalf of the Applicant, it is contended that the parties had not appointed any Arbitrator and Shri Rozal Mehta, Respondent No. 2 who had acted as a Conciliator and resultantly acquired disqualification for being nominated as an Arbitrator. Thus Respondent No. 2 cannot be appointed as an Arbitrator in terms of Section 11(8)(b) of the Act. The Applicant, thus, prays for an appointment of an independent Arbitrator.

2. On the other hand, the Respondent No. 1 objects to the very maintainability of the present Petition, as it contends that Respondent No. 2 was appointed and had acted

as an Arbitrator thus the mandate of an Arbitrator could be revoked or substituted only upon a petition being filed satisfying the grounds and reasons stated in Section 12(15) of the Act and such a Petition u/s 11 of the Act is not maintainable and is misconceived. In order to examine the merits or otherwise of these contentions, reference to the basic facts of the case is necessary. Mahindra and Mahindra Limited entered into an agreement with Respondent No. 1 for developing an immovable property situated at 2529, Dr. Ambedkar Road, Mumbai. Mahindra and Mahindra Limited, by virtue of a scheme presented in the Court was amalgamated with the Company known as Gesco Corporation Ltd. and by an order dated 24th October, 2001 the merger was allowed. Gesco Corporation Limited came into existence. On or about 24th December, 2002, Gesco Corporation Ltd. changed its name to Mahindra Gesco Developers Ltd. Again on 25th October, 2007, Mahindra Gesco Corporation Ltd. changed its name into Mahindra Lifespace Developers Ltd., the Applicant in the present case. The Applicant and Respondent No. 1 executed a Composite Service Agreement on 14th July, 1995. This agreement read with the original Memorandum of Understanding provided for detail terms and conditions for execution of the development of the property. The Applicant took several steps to develop the property. According to the Applicant, because of non cooperative attitude adopted by the Respondent No. 1 and despite at the Applicant rendering financial assistance the contract could not be concluded as desired.

3. According to the Applicant, it was willing to perform all its obligations under the terms and conditions of the agreement and even had advanced monies in excess of Rs. 35 crores to Respondent No. 1 besides putting in a lot of time and labour. In the long past years, the parties had been meeting, negotiations had taken place but nothing could be successfully concluded. Respondent No. 2 was the named arbitrator under the terms of the Agreement. He had also participated in various meetings between the parties which did not result in any decision. Clause 19 of the Composite Service Agreement provided for reference to the sole Arbitrator to adjudicate the disputes and differences which may arise between the parties. The clause reads as under:

19. All disputes and differences between the parties hereto including interpretation of any clause herein contained arising out of or under this Agreement shall be referred to the sole arbitration of Mr Rozal Mehta, or in the event of his non availability Mr. .. whose decision shall be final and binding on the parties hereto. The arbitration proceedings shall be held in Bombay and shall be in accordance with and subject to the provisions of the Indian Arbitration Act, 1940 or any statutory modification or reenactment thereof for the time being in force.

3. Respondent No. 2 vide his letter dated 7th January, 1996 had made certain suggestions and had also referred to offers made by Kanoria i.e. Representative of Respondent No. 1. He even commented upon the extent of profit that the parties could make by the executing of the project. The Respondent No. 1 vide its letter

dated 21st June, 1996 addressed to the Executive Director of the Applicant while refuting the allegations made in the letter of the Applicant dated 7th January, 1996 also referred with some emphasis on the participation of Respondent No. 2. The relevant portion of the said letter reads as under:

...Your letter further mentions the submission of certain papers by NGE but unfortunately does not go on to elaborate the reasons behind the same remaining pending which you are aware of and so is Mr. Rozal Mehta. In case there remains any confusion on this score in your mind I suggest you may have a fresh and detailed discussion once again with Mr. Rozal Mehta who has repeatedly assured me that all such issues have been thoroughly and repeatedly discussed by him with M & M and on the basis of which assured me on several occasions that they would be satisfactorily resolved but which unfortunately continue to remain pending.

With regard to your suggestion for a meeting we may do so at any time suitable to you after 3.30 p.m. Tomorrow. The presence of Mr. Rozal Mehta in the discussions would be most helpful as he is closely aware of all developments.

4. Vide letter dated 4th December, 1996 the Respondent No. 1 informed the Applicant that Shri Rozal Mehta should speak to both the parties separately and try to bridge the gap. A meeting between the parties appears to have been held on 7th October, 2002 wherein matters regarding money to be advanced to Applicant were discussed and it was also decided that the arbitration process shall proceed in parallel to the development of project and Shri Rozal Mehta, Respondent No. 2 to be provided legal assistance by either of the parties. Vide letter dated 5th June, 2003 the Respondent No. 1 again wrote to the Applicant in furtherance to the meeting held on 7th October, 2002 indicating the need for setting aside the arbitration process, opted for mediation and called upon a positive response from the Applicant.

5. Again Shri Rozal Mehta, Respondent No. 2, had on 1st April, 2003 written a private and confidential letter and had noticed, in furtherance to the discussion that took place between Kanti Kanoria, and Hemant that no formal arbitration would take place and the parties would, in a sealed cover, submit their claims and process of mediation would start. The terms of mediation were put to the parties. It was also stated by Respondent No. 2 that it was virtually impossible for him to wear two hats i.e. one of an Arbitrator and the other of a Mediator, and he would prefer the role of Mediator. Vide letter dated 15th January, 2008 the Applicant wrote to the Respondent No. 1 that there were disputes between the parties and they should be referred to an independent arbitrator to be appointed by the parties. This letter was responded by Respondent No. 1, by its letter dated 23rd January, 2008, stating that it would agree to have the disputes between the parties referred to arbitration in terms of Clause 19 to Shri Rozal J. Mehta, Respondent No. 2 herein. To this, the Applicant raised an objection and stated that instead of providing legal assistance to Shri Rozal Mehta, it will be better to appoint an independent arbitrator. However,

vide letter dated 16th February, 2008, Respondent No. 1 reiterated that the arbitration would be only before Respondent No. 2 and it was not willing for his substitution. In the light of these facts, the Applicant filed the present petition u/s 11(2) and 11(6) read with Section 80 of the Act for appointment of a suitable person to act as a Sole Arbitrator and refer the disputes between the parties to such an Arbitrator.

6. From the above narrated facts, it is clear that there is no dispute either to the execution or the existence of the arbitration agreement. The dispute only relates to the appointment of a Sole Arbitrator in the backdrop of the contentions raised by the learned Counsel appearing for the parties. First of all it needs to be noticed that Clause 19 of the Composite Service Agreement, the arbitration clause contained in the main Agreement between the parties refers to the appointment of a named Sole Arbitrator but at the same time the expression "or in the event of his non availability Mr. ___ whose decision shall be final and binding on the parties thereto" indicates that the agreement between the parties had contemplated non availability of Respondent No. 2 to act as a Sole Arbitrator and name of the substitute/alternate Arbitrator was left blank, thus leaving it open for appointment of any other Sole Arbitrator other than Respondent No. 2. This construction itself may not be absolutely befitting but in the facts and circumstances of the case it is of some significance. From the documents afore referred, it is clear that Respondent No. 2 had been acting in once capacity or the other in order to bring the parties to a compromise. He, vide his letter dated 7th January, 1996, had even projected the minimum profits resulting from the execution of the project. Respondent No. 1 vide its different letters including 4th December, 1996 had indicated that Respondent No. 2 understood the points of view of the parties, should meet them separately and try to bridge the gap. Thus, there is no document on record which in unambiguous terms appoints by consent of the parties Respondent No. 2 as Sole Arbitrator. On the contrary, as noticed by Respondent No. 2 himself, he had been wearing different hats from time to time. According to Respondent No. 2, he had indicated that he would prefer to resolve the disputes between the parties as a Mediator. A Mediator is a term having distinct with connotation and distinct functions and obligations to that of an Arbitrator. An Arbitrator is primarily a Tribunal to resolve the dispute by adjudicative process in accordance with law. In the letter of 1st April, 2003, it was specifically recorded "on Friday the 28th March 2003 wherein we had agreed that no formal arbitration would take place." These words clearly indicate that the parties had decided not to pursue the arbitral forum even if it had commenced. There are serious contentions raised even to this aspect of the matter as to whether the sole arbitrator had entered upon the reference and had in fact conducted arbitration proceedings at any stage. Firstly, it is not quite certain, at least the Court is not convinced that Shri Rozal Mehta had been appointed as a sole arbitrator in accordance with law and he had acted as the sole arbitrator to adjudicate differences and/or disputes between the parties. The emphasis of the Applicant is

that Respondent No. 2 had acted as a Mediator and the correspondence exchanged by him as well as his conduct with the parties is that of a Mediator and not that of an arbitrator. No attempts had been made by him to settle the dispute between the parties by adjudication process and that he had clearly worked as a Conciliator or Mediator between the parties, also had tried to bring them together and in fact had even put forth the proposal of one side the parties with greater emphasis to that correspondence. The Agreement dated 14th July, 1995 was subsisting and was treated as effective and binding between the parties as late as on 27th November, 2007. While referring to the letter dated 30th October, 2007 wherein the Applicant informed Respondent No. 1, after noticing the four options which even included that the decision of the sole arbitrator shall be final and bind. The Applicant had clearly stated that it, in view of the conduct of the parties, reserved its right to chose one of the options at an appropriate time. In other words, the parties were not ad idem that Shri Rozal Mehta, Respondent No. 2 had actually acted as the sole arbitrator. In various correspondence exchanged between the parties, which has already been referred by the Court, there is no unambiguous or definite record to show that Respondent No. 2 had been appointed as the sole arbitrator and he had so acted in that capacity. Once that is not so, the question of removing the arbitrator for making an appointment in his place would hardly arise and the contention of the Respondent No. 1 that the present Application u/s 11 of the Act is not maintainable is without substance and merit. The provisions of Sections 12 to 14 would be invocable only when there is a mandate for appointment of an arbitrator which can be revoked in the facts and circumstances of a case.

7. There is definite documentation on record to show that Respondent No. 2 acted as a Mediator or Conciliator and always attempted to reconcile the dispute between the parties by mutual agreement and persuasion. In fact, as already noticed, he himself in his letter dated 1st April, 2003 had noticed that during the discussions between the parties and him, it was agreed that the process of mediation would start on both parties submitting their claims in sealed envelope, and had clearly stated that he could not wear two hats, i.e. one of an Arbitrator and the other of a Mediator. He had also stated that he had been acting as an Mediator and would step down as an Mediator when ever his role as an Arbitrator would be called for and would look into the matter. The letter dated 21st June, 1996 (Exhibit13 C) indicates that Respondent No. 2 was present in all the meetings between the parties. It also refers to discussion of Respondent No. 2 with one party and consequent assurances being given to the other party. Vide letter dated 15th January, 2008, the Applicant had clearly stated that the arbitration agreement should be invoked and had requested for an appointment of any independent arbitrator. The distinction between the arbitration and mediation is well known and accepted now. The arbitration in no uncertain terms is an adjudication process which an arbitral tribunal performs in accordance with law while mediation is a conflict resolution method where a neutral person facilitates discussions between

the parties in an attempt to get the parties to reach an agreement that is mutually agreeable to both the parties. In short mediation is a method to dissolve disagreement designed to help disputing parties resolve their own dispute even without obtaining legal counsel. It is a non adversarial approach to conflict resolution and the approach of mediator is to encourage mutual agreement rather than to impose a settlement. It is not simply a remedy but a system having appropriate of dispute resolution. One must remember that litigant should not feel that by resorting to mediation he is going to get justice of second class. Legitimacy of action of court in referring matter to mediation depends upon quality of mediation process which is offered. It is, therefore, important to keep in mind the objectives of mediation.

- (i) It is to facilitate parties resolving dispute themselves;
- (ii) To provide fair and expeditious ADR process;
- (iii) To provide effective and cost effective ADR process;
- (iv) To provide informal ADR process.

For all kinds of mediation, the basic training of a mediator is for transforming "No" to "I will think over the solution" and further to "I think it is a better solution". It definitely would require specialised communication skills. Mediator has to apply universal principles of persuasion in the process of mediation. Cialdini has stated six such principles, namely,

- (a) Reciprocity : People feel obligated to give back to others who have given to them.
- (b) Linking : We prefer to say "yes" to those we know and like.
- (c) Consensus : People decide what's appropriate for them to do in a situation by examining and following what others are doing.
- (d) Authority : People rely on those with superior knowledge or perspective for guidance on how to respond AND what decision to make.
- (e) Consistency : Once we make a choice/take a stand, we will encounter personal and interpersonal pressure to behave consistently with that commitment.
- (f) Scarcity : Opportunities appear more valuable when they are less available.

8. The role of Respondent No. 2 as reflected from the record on the Court file was primarily that of a mediator and not that of an arbitrator. There is no much doubt that Respondent No. 2 had acted as Mediator or Conciliator between the parties and had put forward a point of view of one party to the other. Thus, in view of a fine distinction between the Conciliator and Arbitrator, the action is not a greater significance in the present case, and as held in [Salem Advocate Bar Association, Tamil Nadu Vs. Union of India \(UOI\)](#), that "in conciliation, there is a little more latitude and a conciliator can suggest some terms of settlements too." Attempts

made by Respondent No. 2 were actually for resolving the disputes between the parties by recourse to the process of mediation rather than by adjudication process. He talked to the parties individually, put forth proposal of one party to the other and tried to bring up a commonly acceptable solution to their problems. Thus, this is not a function of an arbitrator. Another way of looking at it is as to what the parties actually understood and practiced as a result of the role played by Respondent No. 2. As far as the Applicant is concerned, all throughout, it took up the stand as to whether Respondent No. 2 should act as a Conciliator or Mediator and ultimately requested for an independent arbitrator because of the bar contained in Section 80 of the Act. The Respondents No. 1 did aver in the correspondence that Respondent No. 2 acted as an arbitrator but he himself made it clear that he was acting as Mediator and would give up that role and consider the role of an arbitrator as and when occasion arose. It may not be absolutely essential for this Court to examine in a greater detail when there is a bar contained in Section 80 of the Act. Because it would always be better and in the interest of justice to appoint an arbitrator in which both the parties have failed and where there is no genuine apprehension or bias. The Applicant had made certain averments in his Arbitration Application and resultantly had asked for an appointment of an independent arbitrator. The provisions of Section 80 of the Act are pleaded as a bar to the appointment of Respondent No. 2 as an arbitrator. At this stage, it may be appropriate to refer to the arbitration clause between the parties. Clause 19 states that "All disputes and differences between the parties hereto including interpretation of any clause herein contained arising out of or under this Agreement shall be referred to the sole arbitration of Mr. Rozal Mehta, or in the event of his non availability Mr. ...whose decision shall be final and binding on the parties thereto." In other words, the parties had contemplated and the arbitration clause so specifically provides that some other sole arbitrator could be appointed in the event Respondent No. 2 could not be available for any reason. No prejudice will be caused to any of the parties into proceedings and it would be in the interest of justice, equity and good conscious that some other person is appointed as Sole Arbitrator in terms of Clause 19 of the Agreement between the parties rather than Respondent No. 2.

9. The parties infact can agitate their controverted contentions even before the Arbitrator. This being an Application for appointment of an Arbitrator, there is limited scope for this Court to play larger role, as the contentions are left open to be urged before the Learned Arbitrator in terms of Section 16 of the Act.

10. Resultantly, Shri S.P. Bharucha, former Chief Justice of India is appointed as Sole Arbitrator to enter upon reference to adjudicate the disputes between the parties.

11. The Arbitration Application is allowed and accordingly stands disposed of. No order as to costs.