



Ashiana Infrahomes Pvt. Ltd. & Ors V. Adani Power Ltd. (Delhi High Court, May 18, 2018)

BRIEF BACKGROUND

In 2010 the parties entered into a Memorandum of Agreement ('**the Agreement**'). Clause 10 of the Agreement provided for the dispute resolution process and read as follows:

"Any dispute or differences relating to or in connection with the MoA shall be referred to the sole Arbitrator Mr. Puneet Saran son of Prem Vallabh Saran r/o F 22 Indraprastha CGHS Plot 114, Patparganj New Delhi, whose decision shall be final and binding on the Parties. The proceedings of Arbitration shall be in Gurgaon in accordance with the provisions of the Arbitration & Conciliation Act 1996 as amended up-to date."

In 2014, disputes between the parties were referred to the said sole arbitrator, Mr. Saran ('**the Arbitrator**'). The Petitioners challenged the appointment of the Arbitrator under Section 12(3) of the Arbitration and Conciliation Act, 1996 ('**the Act**') because, in their view the Arbitrator was de jure unable to perform his function as an arbitrator for the following reasons:

- i) He was a consultant and employee of the Respondent,
- ii) he was on the board of a connected company of the Respondent, and
- iii) he was the verifying authority for the claims submitted by the Petitioners under the Agreement.

The Arbitrator dismissed the Petitioners' application challenging his appointment, on the grounds that though he was serving as the President of the group of companies, he was neither involved in the daily affairs of any individual company, nor involved in the dealings between the parties.

Subsequently, the Petitioners also filed an application under Section 14 of the Act before the Arbitrator seeking a termination of his mandate, but this application too was dismissed. Thereafter, the Petitioners moved a petition before the Delhi High Court ('**the HC**') under Section 14(2)¹ of the Act (as amended by the Arbitration and Conciliation (Amendment) Act, 2015 ('**2015 Amendment**')).

ISSUES AND FINDINGS

The issues which arose for the HC's consideration were:

- i) Whether the HC had jurisdiction to decide the petition?
- ii) Whether the Act as amended by the 2015 Amendment would apply to the present case?
- iii) If the Act as amended by the 2015 Amendment was applicable, would the Arbitrator be disqualified under Schedule 7 of the Act (which was introduced by the 2015 Amendment)?

With respect to the first issue, the Respondent contended that the HC could not entertain the petition as it lacked jurisdiction on two grounds: (a) the arbitration clause specified that "*the proceedings of the arbitration shall be in Gurgaon*"; and (b) as prior to commencement of the arbitration proceedings the Respondent had filed a petition for interim relief under Section 9 of the Act before a court in Gurgaon, jurisdiction of the HC was ousted by operation of Section 42² of the Act.

On ground (a), the HC found that although the Agreement provided that "*the proceedings of arbitration shall be in Gurgaon*", it was possible for the parties to alter the seat of arbitration by consent³. In the present case, since the Arbitrator's procedural order dated 19 December 2014, recorded that the venue of arbitration would be mutually decided by the parties, the parties had overridden Clause 10 of the Agreement which provided that "*the proceedings of arbitration shall be in Gurgaon*". The intention to override the clause was further strengthened by parties' subsequent conduct i.e. over 40 arbitral hearings had all taken place in Delhi. Thus, the

¹ "**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; ...

(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."

² "**42. Jurisdiction** —Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."

³ *Konkola Copper Mines (PLC) v. Stewarts and Lloyds of India Ltd.*, (2013) 5 Bom CR 29.

HC was of the view that the arbitration clause had been altered by consent and conduct of the parties, and that Delhi became the seat of arbitration.

Regarding ground (b), HC observed that when an application pertaining to arbitration proceedings is made to a court which is not the appropriate 'Court' under the Act, such an application would not fulfil the requirements of Section 42, and a subsequent Court would not be precluded from exercising its lawful jurisdiction.⁴ Concurrently, HC also took into account Supreme Court's view in *Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited*⁵ namely that once a seat of arbitration is chosen, it is akin to an exclusive jurisdiction clause. In view of the foregoing jurisprudence HC concluded that because the seat of arbitration was Delhi, the court in Gurgaon was not the appropriate Court under the Act and did not have jurisdiction. Therefore, the application made before the court in Gurgaon would not oust the rightful jurisdiction of the HC.

The second issue before the HC was regarding the applicability of the 2015 Amendment to the present case. As the language of Clause 10 of the Agreement made it very clear that the Act would apply "as amended up to date" the HC observed that such stipulation was a sufficient agreement between the parties to apply the 2015 Amendment, as per the requirement under Section 26⁶ of the 2015 Amendment.


As for the third issue, in view of the 2015 Amendment being applicable, the HC upheld that Section 12(5)⁷ read with the Seventh Schedule of the Act (as amended by the 2015 Amendment) would apply to the present case. The HC looked at items 5 and 12 of the Seventh Schedule⁸ and observed that the Arbitrator was squarely hit by the same.

In view of its findings on all three issues, the HC found that the Arbitrator was *de jure* disqualified from continuing to be an arbitrator and terminated his mandate. It further ordered that the Delhi International Arbitration Centre ('DIAC') should appoint a substitute arbitrator, and the pleadings and documents placed before the Arbitrator were to form part of the record before the DIAC.

CONCLUSION

In the present case HC yet again gave effect to a very important aspect of the 2015 Amendment: protecting the interest of parties by ensuring impartiality of an arbitrator. Further, HC's efforts to ensure continuity of an arbitration proceeding (while terminating the mandate of the previous arbitrator) reiterates that if an arbitrator of an ongoing arbitration proceeding is removed, efforts, as best possible, must be made to ensure continuity of proceedings and avoid unnecessary delays. However, the present case also brings to light common delays that plague the process. The Petitioners, who had longstanding objections to the neutrality of the Arbitrator waited until 2017 - two years after the 2015 Amendment was effected - to file this petition. However, overall, the present ruling reiterates the legislative intent and attempts to ensure efficacy of arbitration.

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⁴ *State of West Bengal v. Associated Contractors*, (2015) 1 SCC 32.

⁵ (2017) 7 SCC 678.

⁶ "26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply."

⁷ "(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

⁸ "Arbitrator's relationship with the parties or counsel

...

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

...

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties."