

Arbitration Case No. 143 of 2011 (Oandm) Vs. New India City Developers Pvt. Ltd. and Another

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Court : Punjab and Haryana

Decided On : Jul-19-2013

Appellant : Arbitration Case No. 143 of 2011 (Oandm)

Respondent : New India City Developers Pvt. Ltd. and Another

Judgement :

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH Arbitration Case No.143 of 2011 (O&M) Date of Decision:

19. 07.2013 Mordhwaj Singh and others ..Petitioners Versus New India City Developers Pvt. Ltd. and another ..Respondents CORAM: HON'BLE MR. JUSTICE SANJAY KISHAN KAUL, CHIEF JUSTICE.

1. Whether Reporters of local papers may be allowed to see the judgment?.

2. Whether to be referred to the Reporters or No.?.

3. Whether the judgment should be reported in the Digest?. Present : Mr. S.K.S.Bedi, Advocate, for the petitioners. Mr. Deepak Sibal, Advocate, for respondent No.1. Respondent No.2 is Arbitrator. **** SANJAY KISHAN KAUL C.J.The petitioners have filed the present petition under Section 11(6) read with Section 12(3) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the said Act) for termination of the authority of respondent No.2 as Arbitrator.

2. The dispute arose out of the Development Agreement dated 03.03.2007 which culminated in filing of Arbitration Case No.22 of 2008. This petition was disposed of by an order dated 29.05.2008 by this Court holding that there subsists a live agreement inter-se the parties for settlement of disputes through arbitration and appointed Justice Ms. Usha Mehra, a retired Judge of Delhi High Court as sole Arbitrator. In pursuance to this appointment, the learned Arbitrator Arbitration Case No.143 o

2. entered upon reference and proceeded to adjudicate the dispute. The parties ultimately settled their disputes before the Arbitrator in an Arbitral Award with the consent of parties in terms of Sections 30 and 31 of the said Act. Para No.11 of the said Award reads as under:- The Arbitration before Justice Mrs. Usha Mehra (Retired) shall continue till all the terms and conditions of the agreement dated 03.03.2007 have been performed by the parties and any future disputes which may arise in implementing the agreement shall be referred to the Arbitral Tribunal by way of additional disputes/claims for decision thereon.

3. It is the case of the petitioners that there was a breach of the settlement terms as the learned Arbitrator permitted fencing of the area of the cyber-park and appointment of Security Guards by the respondents without even any dispute being raised. This was assailed in the Court of Additional District Judge, Gurgaon and Arbitration Case No.1 of 2010 in the form of appeal under Section 37(2)(b) of the said Act. The appeal was allowed and the orders passed by the Arbitral Tribunal dated 14.12.2009 and 06.01.2010 were set-aside.

4. There were other disputes also which apparently arose between the parties including for providing of link road to cyber-park for residential areas of the petitioners and the petitioners state that they filed a Claim Petition dated 30.05.2010 before the Arbitrator and simultaneously moved an application under Section 9 of the said Act before the Court of District Judge, Gurgaon. Interim measures by consent were directed by the District Judge while the claim made before the Arbitrator remained unattended. The petitioners state that Arbitration Case No.143 o

3. since the award was not implemented, an Execution Application dated 20.09.2010 was filed in the Court of District Judge, Gurgaon under Section 36 of the said Act for enforcement of the Award on which notice was issued. In the meantime, the proceedings were stated to have been held before the learned Arbitrator on 15.11.2010. These proceedings records that there have been inter-se exchanges of correspondence between the parties and the parties had decided to sit across the table and settle the same for which they would meet on the next Friday at 3.00 P.M. The submission of learned counsel for respondent No.1 is that two issues left to be addressed by the Arbitral Tribunal were recorded i.e. a) Whether respondent is liable to pay the enhanced EDC or it is to be paid by the claimant?. b) Whether the respondent is entitled to compensation as per the Agreement?.

5. Learned counsel for the claimant/respondent No.1 further submits that certain monetary claims were still pending against the petitioners which had been stated in the additional statement of claim dated 12.05.2009 which is disputed by learned counsel for the petitioners.

6. Another aspect which may be noticed is the averments contained in para No.11 of the petition that an application was filed under Section 16(3) of the said Act before the Arbitrator for recalling the order dated 15.11.2010. It is averred that the arguments were heard on the said application and the judgment was reserved. A significant Arbitration Case No.143 o

4. fact, as informed during the course of hearing, is that this application was dismissed on 06.05.2011, yet this fact has not been disclosed even though the petition was filed on 15.10.2011.

7. It appears from the perusal of an application dated 05.05.2011 placed on record by the petitioners (Annexure P-9) that Madhu Sudan, a representative of respondent No.1, had informed the petitioners on e-mail that the case before the Arbitrator has been fixed for re-hearing on 06.05.2011 but counsel for the petitioners has shown his ignorance about any e-mail having been received or the date conveyed for re-hearing.

8. In so far the proceedings subsequent to order dated 06.05.2011 are concerned, it is stated that on 27.08.2011 the learned Arbitrator held the proceedings but none put in appearance for the petitioners herein. The learned Arbitrator noticed that the petitioners would have been proceeded against ex-parte but in the interest of justice one more opportunity was granted and proceedings were adjourned to 19.10.2011. On the aforesaid facts, it is alleged that the independence and impartiality of the learned Arbitrator was impaired on the following grounds:- a) The large amount of fee already paid to the Arbitrator. b) After the final award, though respondent No.2 was again named as Arbitrator, but without any claim being filed by the respondents, the directions were passed for appointment of Security Guard and putting barbed wire which was set- aside by the learned Addl. District Judge, Gurgaon. Arbitration Case No.143 o

5. c) Passed order dated 15.10.2011 framing issues without pleadings of the parties and without recording objections of the petitioners that the matter is pending in execution. d) Refusing to recall the order dated 15.11.2010. e) not considering the claim of the petitioners with respect to link road passing through the housing complex. f) Proceedings being held on 27.08.2011 without intimation to the parties. g) not considering the judgment of the learned Addl. District Judge, Gurgaon in Arbitration Case No.1/10 decided on 03.05.2010 qua the aspect of finality of the award.

9. The petition has been opposed by respondent No.1 the original claimant. It has been stated that despite the award dated 05.07.2009 certain matters required to be ironed out and award itself contains the clause providing the mechanism for the same by once again approaching the Arbitrator. It is in exercise of this power conferred upon the Arbitrator that both the parties were before the Arbitrator which resulted in orders dated 14.12.2009 and 06.01.2010 albeit set-aside on-merits in an appeal filed by the petitioners herein which once again relegated back the parties to the Arbitrator. The petitioners once again invoked the jurisdiction of the Arbitrator to move an application under Section 16(3) of the said Act which was rejected on 06.05.2011. This order was challenged in Civil Writ Petition No.19453 of 2011 alongwith order dated 15.11.2010. The order dated 06.05.2011 dismissing the application of the petitioners Arbitration Case No.143 o

6. under Section 16(3) of the Act has been withheld while filing the present petition.

10. In so far as the termination of the authority of the Arbitrator is concerned, it has been stated that this is as per Section 12(3) of the said Act. Such a challenge had to be laid before the Arbitrator first under Section 13 of the said Act. Infact very allegations which are sought to be made in the present petition are stated to have formed subject matter of the application filed by the petitioners under Section 16(3) of the said Act. As per the law it was submitted that if the challenge to the Arbitral proceedings is laid under Section 13, then next stage is only in accordance with Section 34 of the said Act, thus, even otherwise the legal procedure to be followed by an aggrieved party has not been followed.

11. On appreciating the submissions of learned counsel for the parties, I found the present petition completely merit-less. The petitioners themselves admit that the consent award of the Arbitrator dated 05.07.2009, as envisaged in para No.11 provides that in case of future disputes arising in implementation of the agreement it shall be referred to the same Arbitral Tribunal by way of additional disputes/claims for decision thereon. It is because of that respondent No.1 had approached the Arbitrator and obtained certain orders though they were set-aside in appeal by the learned Addl. District Judge, Gurgaon but that was with simultaneous direction to approach the Arbitrator in view of Clause 11 of the consent award. not only that, the petitioners themselves invoked the jurisdiction of the Arbitrator and Arbitration Case No.143 o

7. even filed application under Section 16(3) of the said Act, apart from the earlier application for urgent relief as pleaded. Thus under the said Act the Arbitrator is dealing with the matter in question which certainly cannot be called as a misconduct though the orders passed by the Arbitrator may not have been palatable to the petitioners.

12. Learned counsel for respondent No.1 is also right in his submission that the procedure prescribed for recusal of the Arbitrator as envisaged under Sections 12 and 13 of the said Act has not been followed but on the other hand the petitioners have straight away come forward before this Court by filing the present petition

under Section 11(6) read with Section 12(3) of the said Act. Section 11(6) of the Act would have no application to the matter in issue.

13. The third aspect which I have noticed is that the petitioners having filed the present petition in October, 2011 have failed to disclose the decision of the Arbitrator passed on the application 16(3) of the said Act stating that the order was reserved and not annexed the order.

14. I am unable to accept the explanation given by learned counsel for the petitioners that this occurred inadvertently as the writ petition was filed which is pending before this Court and the present petition was filed simultaneously. There was time gap of almost 5 months between the decision on the application and the present petition being filed. Thus, the present petition also suffers from concealment of material facts. Arbitration Case No.143 o

8. 15. Even otherwise, the facts set out and grounds taken can hardly constitute any allegation of misconduct on the part of the Arbitrator and merely unpalatable orders cannot give rise to a cause to remove an Arbitrator. The present petition is completely devoid of merits and is dismissed with costs of ` 10,000/- payable to respondent No.1. (SANJAY KISHAN KAUL) 19.07.2013 CHIEF JUSTICE 'ravinder' Sharma Ravinder 2013.07.23 11:05 I attest to the accuracy and integrity of this document

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