

Bawa Masala Co. Vs. Bawa Masala Co. Pvt. Ltd. and anr.

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Court : Delhi

Decided On : Aug-06-2007

Reported in : AIR2007Delhi284; 2007(97)DRJ541; (2008)149PLR38

Judge : Sanjay Kishan Kaul, J.

Acts : Arbitration Act - Sections 8; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 89 - Order 39, Rules 1 and 2

Appeal No. : C.S. (OS) No. 139 of 2002

Appellant : Bawa Masala Co.

Respondent : Bawa Masala Co. Pvt. Ltd. and anr.

Advocate for Def. : Siddharth Bambhar, Adv.

Advocate for Pet/Ap. : Pravin Anand and; A.K. Katoch, Advs

Judgement :

ORDER

Sanjay Kishan Kaul, J.

CS (OS) No. 139/2002.

IA No. 579/2002 (Under Order 39, Rules 1 and 2 CPC) and is No. 1860/2002 (Under Section 8 of the Arbitration Act).

1. The legal dispute in the present case was referred for mediation. Mr. Rajiv Virmani, Advocate and Mr. Dalip Mehra, Advocate were the mediators. It is stated that there were a number of inter-linked disputes pending before the trial Court and even they were called for mediation to the Delhi High Court Mediation and Conciliation Centre. The mediators were successful in resolving all the other disputes but unfortunately the dispute in the present case has not been resolved.

2. Learned Counsel for the parties suggest that another effort should be made to resolve the disputes amicably by alternative dispute resolution mechanism. Learned Counsel for the parties suggest that instead of the process of mediation, an endeavor be made through the process of Early Neutral Evaluation (ENE)'.

3. In order to appreciate this contention, it is necessary to examine this methodology of ENE. ENE is a process of alternative dispute resolution, which has been adopted in the United States of America. In the words of Robert A. Goodin : 'Early neutral evaluation is a technique used in American litigation to provide early focus to complex commercial litigation, and based on that focus, to provide a basis for sensible case management or offer resolution of the entire case, in the very early stages.'

4. A senior counsel or a panel with expertise and experience in the subject matter of litigation are called upon to conduct ENE. Such persons are referred to as the Evaluator of a neutral person. A written brief is provided by the lawyers to such neutral evaluator, summarizing the facts, legal arguments and authorities in support of each party's case. In a nutshell, the process would be same as would be required for making submissions in Court.

5. In the initial session before the evaluator, a decision-maker of each party accompanied by their lawyers would be present and a short concise presentation would be made by the counsel for each side referring to the documents and legal proposition. It is open to the evaluator to raise queries on the counsel for the parties and involve the decision-makers of the parties in the process. The neutral evaluator thereafter retires to prepare what according to the neutral evaluator is the central dispute in the case and what as per the neutral evaluator is the likely outcome on each of the issues/aspects. The evaluator also estimates the costs to

each of the parties.

6. The evaluator thereafter shares his conclusion with the parties either at joint sessions or at private sessions, called caucuses. Said private caucuses are often useful as they may allow a more frank and free discussion about the strength and weaknesses of the respective parties. If no settlement is possible the matter is referred back to the Court without disclosing the reason for the failure of the process of ENE. Thus, the confidentiality and the principles of mediation are equally applicable to such ENE.

7. The aforesaid feature would show that such ENE is one of the choices in the ADR Multi Option Programme. It has the same features as a mediation process of being not binding, confidential and participative in nature. The difference is that in case of a mediation the solutions normally emerge from the parties and the mediator makes an endeavor to find the most acceptable solution by bridging the gap between the parties.

8. In case of ENE, the evaluator acts as a neutral person to assess the strengths and weaknesses of each of the parties and discusses the same with the parties jointly or in caucuses, so that the parties are aware of the independent evaluation of the merits of their case. ENE is, thus, distinct from mediation being explicitly evaluative in nature and normally requires the expertise in the subject matter. It also focuses on procedure of law as opposed to interest of parties and it is not a process of discussion towards negotiated settlement.

9. The process of ENE is, however, distinct from arbitration as there is no testimony or oath or examination and such neutral evaluation is not recorded. The process is confidential and cannot be used by any of the parties against the other. There is no award or result filed. It is really a judgment by the neutral evaluator on the basis of material on record -without the judgment being binding and in a Case of non-acceptance, the matter is referred back to the Court without disclosure of reasons as in the case of a mediation.

10. Learned Counsel for the parties state that since two persons, who are advocates of standing and have spent time in the mediation process being familiar

with the ramifications of the disputes between the two parties, it would be eminently appropriate, if they are jointly appointed as Early Neutral Evaluators.

11. ENE is, thus, a different form of alternative dispute resolution and I see no reason why this process cannot be resorted to towards the object of negotiated settlement in pursuance to Section 89 of the Code of Civil Procedure, 1908 specially when the parties volunteer for the same. The provisions of the said section inter alias provide for Alternative Dispute Resolution Mechanism, which inter alias includes mediation. ENE also broadly follows the same process as a mediation, though the concept is not a negotiated settlement, but a neutral assessment.

12. In view of the aforesaid, I deem it appropriate that such neutral evaluation should take place by the two mediators evaluators appointed aforesaid, now acting as neutral evaluators in terms of what has been explained here in above and the result-of success or failure be communicated to this Court by the panel of the two neutral, evaluators,

13. List for directions on 2-11-2007.