

Dear All,

Greetings to you all,

CASE STUDY

COURT : High Court of Judicature at Bombay
Parties to the Case : Mahindra Lifespace Developers Ltd. Versus The New Great Eastern Spinning & Weaving Company Ltd., a Company) & Another
Case No. : Arbitration Application No. 110 of 2008
Judgment Dated : 16-04-2009
Judges : THE HONOURABLE CHIEF JUSTICE MR. SWATANTER KUMAR

Brief facts of the case :

“ The Application was for appointment of arbitrator. The clause read 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 nonavailability 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.”

The Applicant contended that the parties had not appointed any Arbitrator and Shri Rozal Mehta, Respondent No.2 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 1st respondent contended that Mr.Rozal Mehta has been appointed as an Arbitrator and he has been functioning as an arbitrator. The issue that was before the Hon'ble Court was as to whether Mr.Rozal Mehta was appointed as arbitrator and whether he has acted as an arbitrator.

Held:

The Hon'ble Court found on facts that Mr Rozal Mehta has acted as a mediator or conciliator rather than as an arbitrator. The Court had found that he was has not been appointed as an arbitrator. While coming to the aforesaid conclusion the Court has enumerated the features of mediation.

“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 specialized 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.” ”
“The role of Respondent No.2 (namely Mr Rozal Mehta) 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.”

“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, putforth 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.”

Events:

Mr.D.Saravanan, Chairman CNICA, is in Hong Kong attending a conference organized by Lexis Nexis wherein CNICA is a supporting organizer.

Mr.G.Ashokapathy, Secretary CNICA, is to deliver a short lecture titled ‘ADR–The Unexplored Solution’ in Lecture titled “Speedy Justice – Need of the Hour” to be presided by Honorable Justice Mr.S.Mohan, Former Judge of the Supreme Court of India, at 10.30 AM, on 2nd May 2009, at Bharaiya Vidya Bhavan, East Mada street, Mylapore, chennai 600 004. The programme is organised by Dr. Chitra S Narayanaswamy Centenary Trust

We appreciate your inputs, suggestions and contributions in this regard. We welcome all to send their articles and we shall publish the same. We shall also appreciate if you could furnish us the email address of persons who would be interested in receiving our email.