

# Case Comment: Oyo Hotels and Homes Pvt. Ltd. Vs. Rajan Tewari & Another

## Introduction

Arbitration is a very old concept and it was practiced in ancient India, following the traditions and customs where local disputes were mostly settled by the village headman, whose office was either elective or hereditary. India for the first time was statutorily recognized as a form of dispute resolution with the Indian Act of Arbitration, 1899. After that, it was further codified in Section 89 and Schedule II of the Code of Civil Procedure, 1908. Later on, when both acts were dissatisfying, the Arbitration Act of 1940 was introduced however it also could not serve its purpose properly. On December 4th of 1993, in a conference headed by the, then, Prime Minister of India, Mr. P.V Narsimha Rao, the Government of India considered international model like the United Nations Commission on International Trade Law, Model on Commercial International Arbitration and discussed the fate of arbitration in India. As a result of this conference, the Arbitration, and Conciliation Act, 1996 came into existence. The Arbitration and Conciliation Act came into existence as an act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration, and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected. The Arbitration and Conciliation Act, 1996 is a self-contained Code that has eighty-six sections and seeks to attain the objectives of consolidating and amending existing laws related to domestic arbitration, defining conciliation, enforcing UNCITRAL, creating a uniform system regulation relating to arbitration and conciliation, and the establishment of a unified legal framework for effective and fair settlement of disputes.

## Section 11, Arbitration and Conciliation Act, 1996

Section 11 of the Arbitration and Conciliation act, 1996, talks about the appointment of an arbitrator in a dispute. The 2015 amendment of Arbitration and Conciliation Act has granted the liberty to the parties involved to appoint an arbitrator mutually. The procedure concerning the appointment of arbitrators is given under section 11 of the act. The section mentions that a person of any nationality may become an arbitrator unless otherwise agreed by the parties. This section also deals with the contingency, wherein, the involved parties fail to appoint an arbitrator mutually.

## Facts of the Case

The case with which we are dealing here is, “*Oyo Hotels and Homes Pvt. Ltd. Vs. Rajan Tewari & Another*<sup>1</sup>”.

A petition was filed by the petitioner under section 11(6) of the Arbitration and Conciliation Act, 1996. The petitioner is a company incorporated under the Companies Act, 2013 and the respondents are the joint owners of the property or premises situated at 3/16, Main Shankar Road, Old Rajinder Nagar, New Delhi.

A dispute arose between both the parties which was related to a lease deed and it was mentioned in their contract that the dispute would be solved by an arbitrator mutually decided by the party. The petition was filed because the petitioner says that the sole arbitrator in their case was not appointed mutually and has requested by the Honorable court to intervene by filing a writ petition.

The petitioner has requested for the following prayers; a) to declare that the current arbitrator in the case did not have any jurisdiction to adjudicate the case, b) that the court appoint a sole arbitrator to adjudicate the claims of the petitioner in the case in accordance to the Arbitration and Conciliation Act, 1996, c) and award the cost of this petition against the respondent and in favor of the petitioner.

<sup>1</sup> ARB.P 424/2020

## What is the stand of both parties

The learned counsel of the petitioner submitted that when respondents invoke the arbitration clause and nominated the sole arbitrator, the petitioner because of the circumstances was not able to respond to that, therefore, the petitioner did not confirm the recommendation by the respondent. In such a case, the respondent should have approached the court but rather they appointed the arbitrator solely and illegally. It was also submitted by the petitioner's counsel that when the arbitrator issued a notice for the primary hearing, then only it came to the notice of the petitioner and the petitioner objected to that. It was also submitted that despite the objection the arbitrator carried on with the hearing and even during the hearing, the petitioner submitted his objection to the proceedings as being in contravention to the settled principle of law and lease deed, the counsel of the petitioner also mentioned the case of, *Naveen Kandhar & Anr. v. Jai Mahal Hotels Pvt. Ltd.*<sup>2</sup>, and *Manish Chibber v. Anil Sharma & Anr.*<sup>3</sup>, wherein it was held that an appointment of an Arbitrator in contravention of the agreed procedure is non-est and ought to be ignored. Thus, it was submitted by the learned counsel of the respondent that the sole arbitrator in the present case is de facto and de jure incapable of entering reference as sole arbitrator for the adjudication of the dispute between the involved parties.

The learned counsel from the respondent raised an objection on the maintainability of the petition saying that the relief sought by the respondent does not fall under the ambit of section 11(6) of the act. The council also submitted that the petitioner in the present case has already consented to the sole arbitrator as he attended the hearings and responded to it, hence the petition is liable to be dismissed. She also submitted that the mandate of the sole arbitrator who is already appointed cannot be terminated under the provisions of 11(6) of the Act. It was also submitted by the respondent's counsel that on the first hearing the petitioner was granted a period of 15 days to file an appropriate application challenging the appointment of the sole arbitrator but no such thing was done by the petitioner in the given period of time and hence it's forfeited the right of the petitioner to challenge the appointment and this also attracts the doctrine of estoppel against the petitioner. The respondent also side also submitted that for filing a petition under section 11 a prior notice has to be issued under section 21 and no such thing was done by the petitioner.

## The Decision of the Delhi High Court

After hearing both sides, the only question of law that arises before the Honorable Court for consideration is, whether the appointment of the learned arbitrator is at variance with the stipulation in the contract and as such non-est for this court to grant the relief to the petitioner by appointing a new arbitrator.

After reviewing the arbitration clause in the contract between both the parties, the court observed that the sole arbitrator appointed in the case was to be mutually decided by both of them and because the same was not followed, it must be held in view of the arbitration clause that the appointment made by the respondent is non-est and need to be ignored.

The court on the plea of the respondent that the petition is not maintainable under section 11 seeking termination of the mandate of the sole arbitrator is not appealing because when the appointment is non-est, being not in accordance with the agreed procedure, the petitioner is within its right to approach the Court for appointment of an arbitrator under Section 11 of the Act. For this, the court also quoted the paragraph 8, 9, and 10 judgment of the Supreme Court in the case of, *Walter Bau Ag, Legal Successor of the Original Contractor, Dyckerhoff & Widmann A.G. v. Municipal Corporation of Greater Mumbai & Anr.*<sup>4</sup> Also on the objection quoted by the respondent that an arbitrator has already been appointed by them and hence section

<sup>2</sup> Arb.P. 453/2017

<sup>3</sup> Arb.P. 249/2020

<sup>4</sup> (2015) 3 SCC 800.

11 and the petition is not maintainable, the court quoted paragraph 18 and 19 of the case of, *Naveen Kandhari & Anr.*<sup>5</sup> (supra) to counter the argument of the respondent.

Also on the plea of the respondent's counsel, that the petitioner has participated in the proceedings held on August 29, 2020, is estopped from challenging the mandate of the arbitrator. The court said that the same is not appealing when it is the case of the petitioner, that during the hearing, the petitioner had objected, that the proceeding are in contravention with the principles of law and Lease Deed. The court also mentioned the apex court's decision in the case of *Walter Bau* (supra), has in para 9 stated as under:- “Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. ....”

After keeping note of all the things, the court thereby held that,

- The petitioner has rightly filed a petition.
- The appointment of the sole arbitrator by the respondent is non-est.
- The court-appointed Justice S.P Garg, a retired judge of the court as the sole arbitrator to settle the dispute between the parties under the act.

### Conclusion

Many people believe that the Delhi HC's decision brings a positive change. It is hoped that they will be able to unshackle themselves from the technicalities that are associated with the arbitration however this judgment does question the courts on the kompetenz-kompetenz principle that the court talks about. This approach of the court has been referred to as more sensible, practical, and justice friendly.

---

<sup>5</sup> ARB.P.--453/2017.