
(2010) 12 MP CK 0033
In the Madhya Pradesh High Court
Case No : Arbitration Case No. 1 of 2010

Aashirwad Foods and Beverages

APPELLANT

Vs

Shri Arunendra Mohan Pathak and Others

RESPONDENT

Date of Decision : 08-12-2010

Acts Referred:

Arbitration Act, 1940 — Section 8(1)

Arbitration and Conciliation Act, 1996 — Section 11, 14(1), 15, 2(1), 7

Constitution of India, 1950 — Article 136

Citation : (2011) 1 JLJ 286 : (2011) 1 MPHT 305 : (2011) 1 MPJR 130 : (2011) 1 MPLJ 534

Hon'ble Judges : S.K. Gangele, J

Bench : Single Bench

Judgement

S.K. Gangele, J.

The applicant has filed this application u/s 14(1)(a) of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act of 1996") for appointment of an arbitrator in place of earlier arbitrators, i.e., non-applicant Nos. 3 and 4.

Applicant and non-applicant Nos. 1 and 2 are partners of a registered firm registered under the provisions of Partnership Act, named as Aashirwad Foods & Beverages, Malanpur, District Bhind having its Head Office at Gwalior. The partnership deed has been filed as Annexure A-1. There was a dispute between the partners and the non-applicant Nos. 1 appointed the non-applicant No. 3 and the non-applicant No. 2 appointed the non-applicant No. 4 as arbitrators to decide the dispute. As per the applicant only one arbitration proceeding was held on 22-9-2010 by the arbitrator and since then nothing has happened. The dispute is persisting. The applicant issued a notice, Annexure P-12 to the partners to resolve the dispute and conclude the arbitration proceedings. As per the applicant in spite of that the arbitrators have not proceeded further to conclude the arbitration proceedings and the arbitrators do not want to complete

the arbitration proceedings. The applicant has also filed an application I.A. No. 13663/2010 for taking additional facts and documents on record. Along with the aforesaid application, he filed a letter of non-applicant No. 3-Mr. U.C. Verma, who was one arbitrator mentioning the fact that he does not want to continue as an arbitrator, hence, he is resigning.

The non-applicant No. 1 in reply resisted the request of the applicant for appointment of the arbitrator in place of non-applicant Nos. 3 and 4. The non-applicants submitted that the application filed by the applicant before this Court u/s 14(1)(a) of the Act of 1996 is not maintainable. It has further been submitted that this Court has no power and jurisdiction to appoint an arbitrator. It has further been contended that the original arbitration proceeding has not been filed, hence, the arbitrator could not be appointed by this Court. The territorial jurisdiction of this Court has also been disputed. It has further been disputed that there is a dispute exists between the parties.

Learned Senior Counsel appearing on behalf of the applicant contended that the non-applicant Nos. 3 and 4 failed to perform their duties and only one sitting of arbitrators since 2008 has been held and one arbitrator non-applicant No. 3 has submitted his willingness to leave from the arbitration proceedings. In such circumstances, this Court has power to appoint an arbitrator because the dispute is in existence as per the act of the non-applicant Nos. 1 and 2 in regard to appointment of arbitrators. In support of his contentions, learned Counsel relied on the following judgments:

- (i) Smt. Satya Sahu and others Vs. M/s. Vidarbha Distillers and others, ; and
- (ii) Union of India (UOI) Vs. Singh Builders Syndicate,

Contrary to this learned Senior Counsel appearing on behalf of the non-applicant No. 1 contended that this Court has no jurisdiction to appoint the arbitrator. It has further been contended that the applicant has not filed the copy of agreement in regard to appointment of the arbitrator and there does not exist any dispute for appointment of the arbitrator. He further submitted that the application filed by the applicant before this Court is not maintainable. In support of his contentions, learned Senior Counsel relied on the following judgments:

- (i) S.B.P. and Co. Vs. Patel Engineering Ltd. and Another,
- (ii) Dr. Pratap Singh Hardia v. Sanjay Chawrekar 2008 (IV) MPJR 263; and
- (iii) Atul Singh and Others Vs. Sunil Kumar Singh and Others,

Undisputed facts of the case are that two arbitrators, i.e., non-applicant Nos. 3 and 4 were appointed to solve the dispute. From the facts of the case, it is clear that there exists dispute between the parties and parties have also agreed to solve the dispute through arbitration. The present case is not a case where a fresh arbitrator is to be appointed. As per the applicant the arbitrators appointed earlier are not performing their function and one of the arbitrator No. 3 has

submitted his willingness to withdraw himself from the arbitration proceedings, hence, this Court may appoint an arbitrator.

Section 11 of the Arbitration and Conciliation Act, 1996 prescribes procedure in regard to appointment of arbitrators. From the aforesaid Section, it is clear that if the parties disagree to appoint an arbitrator or number of arbitrators then the Chief Justice or any other person or institution designated by him could appoint the arbitrator. In the present case, this Court has been designated by the Hon'ble Chief Justice to hear the proceedings under the Arbitration and Conciliation Act, 1996. Hence, this Court has power to appoint an arbitrator.

Section 14 of the Act of 1996 further prescribes failure or impossibility to act on behalf of the arbitrators, which is as under:

Section 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; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(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.

(3) If, under this Section or Sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this Section or Sub-section (3) of Section 12.

From the aforesaid Section, it is clear that if an arbitrator becomes de jure or de facto unable to perform his functions, fails to perform undue delay, his mandate as per Section 15 of the Act of 1996 could be terminated. In the present case, no arbitration proceedings have been held except for one time which was held on 22-9-2010, hence, it is clear that the arbitrators have failed to perform their duties. Even though the non-applicant No. 3, who is one of the arbitrator, has informed the parties that he is not willing to continue as an arbitrator and he wants to withdraw himself from the arbitration proceedings.

The learned Single Judge of the Bombay High Court in the case of Smt. Satya Kailashchandra Sahu and Ors. (supra), has held as under in regard to power of the Court for appointment of the arbitrator if the arbitrator fails to perform its function:

The next question would be whether power which was exercised u/s 8(1)(b) of the Arbitration Act, 1940, could be exercised under the provisions of the present Act. Learned Counsel, Mr. Manohar, appearing for Respondent Nos. 1 to 5,

vehemently submitted that no such a case there is no similar provision empowering the Court to appoint arbitrator/ arbitrators.

In the present case, in view of the clause in the Deed of Partnership, it is clear that there was an arbitration agreement as provided in Section 7 read with Section 2(1)(a) of the Act. When an arbitration agreement makes a provision for appointment of named persons as arbitrators and when the named persons refuse to act as arbitrators, then the procedure which is required to be followed is provided in Section 11 of the Act, that is to say, if the named persons refuse to act as arbitrators, the arbitration clause is not wiped out. What is exhausted is the authority of the named persons to act as arbitrator. Relevant Sub-sections of Section 11 of the Act read as under:

Section 11. Appointment of arbitrators.-

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(2) Subject to Sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in Sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in Sub-section (3) applies and-

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in Sub-section (2), in an arbitration with a sole arbitrator. If the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

Sub-section (2) specifically provides that parties are free to agree on a procedure for appointing the arbitrator or arbitrators. If they fail to agree on a procedure for appointing the arbitrator or arbitrators, then Sub-section (5) provides that, in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him. Similarly, in respect of Sub-section (6), where, under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure, then also, power is given to the Chief Justice to take necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment. Admittedly, in the present case, the agreement on appointment procedure does not provide other means for securing the appointment of arbitrators.

Aforesaid Sub-sections are to be read along with Sections 14 and 15 of the Act which are as under:

Section 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; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(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.

(3) If, under this section or Sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or Sub-section (3) of Section 12.

Section 15. Termination of mandate and substitution of arbitrator.-

(1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate-

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under Sub-section (2), any hearings previously held may be repeated at the discretion of the Arbitral Tribunal.

(4) Unless otherwise agreed by the parties, an order a ruling of the Arbitral Tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the Arbitral Tribunal.

From a perusal of Section 14(1)(b), it is clear that the mandate of an arbitrator shall terminate if he withdraws from his office or the parties agree to the termination of his appointment. In the present case, the arbitrators have stated that it was not possible for them to arbitrate in the matter. Sub-section (1) of Section 15 also provides that the mandate of an arbitrator shall terminate where he withdraws from office for any reason and Sub-section (2) further provides that, where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. Therefore, these Sub-sections are to be read along with Sub-section (6) of Section 11. Reading Sub-section (6) of Section 11 and Section 15 together, it would be clear that the Chief Justice is required to take necessary measure for appointment of arbitrator, unless the agreement on the appointment procedure provides other means for securing appointment. Admittedly, in the present case, no other means or procedure are prescribed for securing the appointment of arbitrators. Further, under Sub-section (5) of Section 11, if there is failure on the part of the parties to agree on a person for appointment as arbitrator, then the Chief Justice is empowered to make the appointment of arbitrator.

Considering this provision, in my view, it is not possible to accept the contention of the learned Counsel for Respondent Nos. 1 to 5 that there is no similar provision to Section 8(1)(b) of the Arbitration Act, 1940, which empowers the Court to appoint the arbitrator, in case the appointed arbitrator refuses to act as arbitrator. Section 11 provides exhaustive procedure for appointment of arbitrators in a case where there is an arbitration agreement between the parties. This Section is to be read along with Sections 14 and 15 of the Act, which provide for termination of mandate of the arbitrator in a case where he withdraws from office for any reason to arbitrate the dispute.

The Hon"ble Supreme Court in the case of Union of India v. Singh Builders Syndicate (supra), has held as under in regard to appointment of arbitrator:

The delays and frequent changes in the Arbitral Tribunal make a mockery of the process of arbitration. Having regard to this factual background, we are of the view that the appointment of a retired Judge of the Delhi High Court as sole

arbitrator does not call for interference in exercise of jurisdiction under Article 136 of the Constitution of India.

Another aspect referred to by the Appellant, however, requires serious consideration. When the arbitration is by a Tribunal consisting of serving officers, the cost of arbitration is very low. On the other hand, the cost of arbitration can be high if the Arbitral Tribunal consists of Retired Judge(s).

When a Retired Judge is appointed as arbitrator in place of Serving Officers, the Government is forced to bear the high cost of arbitration by way of private arbitrator's fee even though it had not consented for the appointment of such non-technical non-serving persons as arbitrator(s). There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where Retired Judge(s) are arbitrators. The large number of sittings and charging of very high fees per sitting, with several . add-ons without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award.

When an arbitrator is appointed by a Court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties fee constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party, which is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party which readily agreed to pay the high fee.

Hence, as per the aforesaid principle of law laid down by the Hon"ble Supreme Court and the learned Single Judge of the Bombay High Court and as per the statutory provisions of the Act of 1996, in my opinion, this Court has power to appoint arbitrator under the facts of the present case because the non-applicant Nos. 3 and 4 have failed to perform their duties and the Respondent No. 3 has submitted his willingness to withdraw from the arbitration proceedings.

Consequently, the application of the applicant is hereby allowed. Shri S.S. Trivedi, Retired District Judge, is hereby appointed as arbitrator in this matter. Parties are directed to appear before the arbitrator. The arbitrator will fix the procedure of the arbitration and fee of the arbitrator will be Rs. 5000/- (Rupees five thousand only) per sitting. The fees of the arbitrator shall be shared by both the parties in equal proportion.

Looking to the facts of the case, there shall be no order as to cost.

A copy of this order be sent for placing before Shri S.S. Trivedi, Retired District Judge and the arbitrator is requested to pass the award within a period of one year from the date of receipt of a copy statements by the parties, which is to be

filed before the arbitrator.