

(2013) 07 BOM CK 0135

In the Bombay High Court

Case No : Miscellaneous Civil Application (Arbitration) No"s. 142, 791 and 1090 of 2012

Abhijeet Infrastructure Ltd.

APPELLANT

Vs

State of Maharashtra and The Executive Engineer
 M/s. Ganapati Builders and Developers and Others Vs M/s. Surmee Agencies Pvt. Ltd., Shri Ashish Suresh Raheja and Shri Rahul Suresh Raheja
 Education Design Architects India Pvt. Ltd. Vs Mr. Deepak Jain

RESPONDENT

Date of Decision : 05-07-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 82, 84
Civil Procedure Code, 1908 (CPC) — Section 89

Citation : (2013) 5 ABR 862 : (2014) 1 ALLMR 335 : (2013) 5 MhLj 366

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : S.P. Bodalkar in Miscellaneous Civil application Arbitration No. 142/2012, Mr. S.S. Godbole Holding for Mr. S.G. Jagtap In Miscellaneous Civil application Arbitration No. 791/2012 and Mr. C.S. Dhore, in Miscellaneous Civil application Arbitration No. 1090/2012, for the Appellant; B.P. Maldhure, Assistant Government Pleader for the Non-Applicant Nos. 1 and 2, None in Miscellaneous Civil Application (Arbitration) No. 791, 2012 and Shri Shyam Dewani, counsel for the non-applicant. in Miscellaneous Civil Application (Arbitration) No. 1090/2012, for the Respondent

Final Decision : Disposed Off

Judgement

Anoop V. Mohta, J.—Since the identical issue arises in these miscellaneous civil applications, these applications are heard finally with the consent of the learned counsel for the parties.

These are applications u/s 11 of the Arbitration and Conciliation Act, 1996 (for short "Arbitration Act"), whereby applicants pray to appoint arbitrator pursuant to their agreements as the other side has failed to take steps and/or appoint arbitrator though demanded within prescribed period/time. In all these matters

after hearing both the parties, the designate Judge has allowed the applications and appointed the arbitrators. However, all the applicants have been directed to deposit the process fee ranging from Rs. 5,000/- to Rs. 7,500/- in the respective matters.

In Miscellaneous Civil Application No. 142/2012 order is dated 12.10.2012, in Miscellaneous Civil Application No. 791/2012 order is dated 05.04.2013 and in Miscellaneous Civil Application No. 1090/2012 order is dated 03.05.2013 by which, directions were issued to the applicants to deposit the process fees. In Miscellaneous Civil Application No. 791/2012, both the parties have invoked Section 11 of the Act of 1996 arising out of same contract and the same arbitration clause between the parties. The Arbitrator has been, in fact, appointed by the consent of the parties. The learned counsel appearing for the parties, when inquired, referred the scheme for the "Appointment of the Arbitrator by Chief Justice of India Scheme, 1996 (published on 29.01.1996) which was in pursuance to sub-Section 10 of Section 11 of the Arbitration Act. The relevant clause is Clause 12, which is reproduced as under:

12. Costs for processing requests.-The party making a request under this Scheme shall, on receipt of notice of demand from-

(a) the Registry of the Court, where the Chief Justice makes the appointment of an arbitrator or takes the necessary measure, or

(b) the designated person or the institution, as the case may be, where such person or institution makes appointment of arbitrator or takes the necessary measure, pay an amount of Rs. 15000/- in accordance with the terms of such notice towards the costs involved in processing the request.

2. The similar scheme is also framed by the Chief Justice of Bombay High Court, which is referred as Appointment of Arbitrators by the Chief Justice of Bombay High Court Scheme, 1996 (published on 06.04.1996), which was also in pursuance to sub-Section 10 of Section 11 of the Arbitration Act. The relevant clause is Clause 12, which is reproduced as under:

12. Costs for processing requests

The party making a request under this Scheme shall, on receipt of notice of demand from,-

(a) the Registry of the Court, where the Chief Justice makes the appointment of an arbitrator or takes the necessary measure; or

(b) the designated person or the institution, as the case may be, where such person or institution makes appointment of arbitrator or takes the necessary measure;

pay an amount not less than of Rs. 3,000 and not more than Rs. 10,000 as may be determined by the Chief Justice, in accordance with the terms of such notice towards the costs involved in processing the request.

3. Sub-Section 10 of Section 11 of the Arbitration Act provides for framing of such scheme and/or rules or regulations. There is nothing to show in the Act, whereby parties/applicants are liable to pay costs for processing request. The scheme was framed in the year 1996 principally along with the Arbitration Act which is brought into force on 28.08.1996. The scheme so referred has been framed even before the Arbitration Act brought into force. There is no other provision under the Act which deals with payment of costs for processing request and/or even for the Court fees. The respective rules of respective Courts based upon the Court Fees Act-Central as well as State Act provide for requisite Court fee and/or process fee for filing any application in the Court and/or before the appropriate forum. It is not specifically prescribed whether it will be governed by the miscellaneous provisions under the respective Acts. Therefore, the applicants/petitioners whosoever invoke this provision are required to pay Court fee and in the cases where notices are issued further process fee and/or Court fee needs to be paid and/or deposited as per the requisite rules. There is nothing pointed out that under the Court Fee Act and/or under the Arbitration Act, the parties are bound to pay and/or deposit the costs for processing such applications which they are legally bound to invoke in view of the specific provisions of the Arbitration Act itself.

4. It is relevant to note that prior to the judgment of the Supreme Court in the case of (2005) 8 Supreme Court Cases 618 S.B.P. & Co. Versus Patel Engineering Limited & another the order of Chief Justice and/or designate Judge was treated as an "Administrative Order". Now, after the aforesaid judgment, it is declared to be a "Judicial Order". When the scheme was framed it was probably on the foundation that the order would be the administrative order and, therefore, certain costs or process fee is required to be paid by the applicant. But, now if it is a judicial order and even otherwise, parties are entitled to invoke Section 11 of the Arbitration Act, the requisite Court fee and/or process fee need to be paid and/or deposited by the parties as per the respective rules. The question is requirement of direction to deposit the costs for processing. The learned advocates appearing for the parties even referred and read the schemes of other High Courts including The High Court of Delhi, Calcutta High Court, The High Court of Judicature at Madras, where in the similar scheme, the provision of process for costs of processing request is there. However, the amount is different from Court to Court/scheme to scheme. In The High Court of Delhi scheme, the costs for processing request ranges from Rs. 250/- to Rs. 1,000/-. The learned counsel for the applicants have pointed out that in High Court of Orissa Scheme and The Gauhati High Court Scheme, processing fee amount is only Rs. 100/-. Similar are the amounts in other High Court schemes. It is, therefore, clear that all the schemes so framed by High Courts are not similar to the scheme as framed by the Chief Justice of India, though basic design of the schemes is similar on most of the issues. It is relevant to note that all the schemes even of different High Courts have been in force before coming into force of this Arbitration Act. It appears that all the schemes must have been framed prior to

the enforcement of the Act itself. Strikingly, there is no substantial change whatsoever made in the schemes though the order of Chief Justice/Designate Judge is now the judicial order and not the administrative order.

5. In the Bombay High Court Original Side Rules, there is no provision to charge such costs for processing request though all are governed by the basic principles of the Arbitration Act. The same is the position at High Court of Judicature at Bombay, Bench at Goa (Panaji). However, Benches at Nagpur and Aurangabad have been directing the parties to deposit the costs for processing request pursuant to the scheme.

6. The parties based upon the orders passed by the Courts in most of the matters have deposited the amount. Thereafter, the arbitral Tribunal is constituted. The parties appear before the Tribunal accordingly. This Court intimates about the appointment to the learned Arbitrators. After passing of Award, it is reported that the Arbitrator forward the record of the proceedings to this Court. The Registry of this Court maintains the record till further orders. In a given case, in execution if asked for, the Registry of this Court forwards the same for execution.

7. The relevancy of above observation is that in this process, though the Arbitrator is appointed on the application filed by the parties but, for want of deposit of costs for processing request, the Registry is unable to forward the order of appointment by the Court to the learned Arbitrator. In view of the scheme in question, I am inclined to observe that the purpose of arbitration would get frustrated the moment no further steps are taken by the parties though the Designate Judge has appointed the Arbitrator. For early disposal of the matter, it is necessary that everybody should take steps within the prescribed time and/or at least as early as possible. Mere getting the Arbitrator appointed without taking further steps would be against the Appointment of Arbitrators by Chief Justice of Bombay High Court Scheme, 1996.

8. Section 89 of CPC also provides for appointment of Arbitrator by Court being one of the alternative mode of settlement of dispute pending in the Court. There is nothing to show that such costs and/or process fee is required to be paid by the parties in those proceedings. Though scheme is different yet, the costs for processing for appointment of Arbitrator u/s 11 of the Arbitration Act in my view is not contemplated under the Arbitration Act and/or even under the Arbitration Act and/or even under the Court Fee Act and/or any specific rules except the Scheme of 1996, which had been framed prior to the judgment in S.B.P. & Co. (cited supra) and not amended till date.

9. I am inclined to observe that it is necessary to frame common and/or similar rules/regulations as contemplated u/s 82 read with Section 84 of the Arbitration Act. The Arbitration Act being Central Act, it is necessary for the Central Government to frame the Rules u/s 84 which need to be followed by the High Court as contemplated u/s 82 of the Arbitration Act to avoid different situations

in the same State and/or other States basically when it is about arbitration proceedings arising out of the Central Arbitration Act. There is a provision to amend the scheme also. The scheme remained unchanged till this date in spite of change of approach to the power and jurisdiction of Chief Justice/Designate Judge u/s 11 of the Arbitration Act, specially in view of the judgment in S.B.P. & Co. (cited supra).

10. However, it is made clear that as on today, unless pointed out otherwise and as there is no challenge at any point of time to the orders passed by this Court directing the parties to deposit the process fee and as most of the parties have complied it, I am not inclined to observe that the same is illegal and/or impermissible. However, as observed above, an immediate attention is required from all sources to bring in force common scheme and/or rules to avoid further complications in the matter apart from delay in constituting the Tribunal for want of deposit of such process fee.

11. In Miscellaneous Civil Application No. 791/2012, situation is quite peculiar. Both the parties have invoked Section 11 of the Arbitration Act. By consent, the Arbitrator is appointed based upon the same Arbitration clause. However, both the parties are directed to deposit the amount separately. The learned counsel appearing for the applicant makes a statement that in M.C.A. No. 790/2012, the applicant therein (who is the non-applicant here) has already deposited the process fee. The point is that it is difficult to understand the purpose and object of charging this process fee though parties have to pay the fixed Court fee separately.

12. Hence, by keeping all points open, I am inclined to observe that as there is already an order disposing of these miscellaneous civil applications, these miscellaneous civil applications be treated as disposed of for all the purposes. The parties to act upon the order of appointment of Arbitrator. The parties to take steps and proceed with the arbitration matter atleast specially in the matters where the Arbitrator is appointed by consent of the parties. No specific Court notice is required in every matter. It is not the obligation of the Office/Registry to communicate about the order of appointment to the learned Arbitrator, except in the cases where there is contest and the Court appoints the Arbitrator. The Court is neither under obligation to maintain nor any term provides that a private Arbitrator's record should be deposited in the Court till further orders unless specifically directed and/or any rule prescribes accordingly. All the three miscellaneous civil applications are disposed of with liberty and, as already directed, the parties are permitted to deposit the amount within two weeks as a last chance, failing which the respective orders of appointment of Arbitrator would stand revoked. The parties to take appropriate steps in accordance with law.