

(2008) 09 DEL CK 0222
In the Delhi High Court
Case No : Arbitration A. 516 of 2007

Dr. Deepashree

APPELLANT

Vs

Sultan Chand and Sons

RESPONDENT

Date of Decision : 22-09-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 10(1), 10(2), 11, 11(2)

Citation : AIR 2009 Delhi 85 : (2008) 4 ARBLR 94 : (2008) 106 DRJ 457

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Nandini Gidwaney, for the Appellant; Rakesh Sachdeva, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—Application is filed u/s 11 of the Arbitration and Conciliation Act, 1996, for appointment of Arbitrator. The relationship between the applicant and the respondent is of an author and a publisher. The agreement dated 1.8.2008 between the parties contains an arbitration clause as under:

If and when any dispute arises between the parties as to the meaning, interpretation or on implementation of these terms, such dispute shall be referred to the arbitration of two Arbitrators, one to be appointed by the publishers and the other by the author/s.

2. Disputes and differences have arisen between the parties, the applicant vide legal notice dated 13.3.2007 to the respondent nominated Justice A.P. Chaudhary, retired, as the Sole Arbitrator and called upon the respondent to within 30 days consent to his appointment. The respondent sent reply dated 7.4.2004 refusing to concur in the appointment of Sole Arbitrator and relying on arbitration clause in the agreement nominated Mr. S.S. Budhiraja, Advocate as the Arbitrator. The applicant thereafter moved the present application.

3. The counsel for the applicant has argued that claims of the applicant against the respondent are small, the applicant is an Academician and cannot afford

lengthy/costly arbitration, appointment of two arbitrators i.e. one by each party and which would also entail appointment of third Arbitrator will be onerous on the claimant. Reliance was placed on Sri Venkateswara Construction Co. Vs. Union of India (UOI) and Others, where an agreement for arbitration by two Arbitrators was construed as an agreement for reference to a Sole Arbitrator.

4. Per contra, the counsel for the respondent has argued that the agreement between the parties was for appointment of one Arbitrator by each of the parties and, thus the question of appointment of Sole Arbitrator as suggested by the applicant did not arise; the applicant cannot be permitted to rewrite the terms of the agreement; that the applicant having not followed the agreed procedure of nominating her Arbitrator and the respondent having nominated its Arbitrator, there was no cause of action for applying u/s 11 and the petition was liable to be dismissed. Reliance was also placed on Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others,

5. In Sri Venkateswara Construction Company, cited by the applicant, there is hardly any discussion for construing an agreement of arbitration by two arbitrators as of arbitration by Sole Arbitrator. On the contrary in Narain Prasad Lohia cited by the counsel for the respondent, the Apex Court has in para 17 laid down as under:

17. We are also unable to accept Mr. Venugopal's argument that, as a matter of public policy, Section 10 should be held to be non-derogable. Even though the said Act is now an integrated law on the subject of arbitration, it cannot and does not provide for all contingencies. An arbitration being a creature of agreement between the parties, it would be impossible for the legislature to cover all aspects. Just by way of example Section 10 permits the parties to determine the number of arbitrators, provided that such number is not an even number. Section 11(2) permits parties to agree on a procedure for appointing the arbitrator or arbitrators. Section 11 then provides how arbitrators are to be appointed if the parties do not agree on a procedure or if there is failure of the agreed procedure. A reading of Section 11 would show that it only provides for appointments in cases where there is only one arbitrator or three arbitrators. By agreement parties may provide for appointment of 5 or 7 arbitrators. If they do not provide for a procedure, then Section 11 does not contain any provision for such a contingency. Can this be taken to mean that the Agreement of the parties is invalid. The answer obviously has to be in the negative. Undoubtedly the procedure provided in Section 11 will mutatis mutandis apply for appointment of 5 or 7 or more arbitrators. Similarly even if parties provide for appointment of only two arbitrators, that does not mean that the agreement becomes invalid. u/s 11(3) the two arbitrators should then appoint a third arbitrator who shall act as the presiding arbitrator. Such an appointment should preferably be made at the beginning. However, we see no reason, why the two arbitrators cannot appoint a third arbitrator at a later stage i.e. if and when they differ. This would ensure that on a difference of opinion the arbitration proceedings are not frustrated. But

if the two Arbitrators agree and give a common award there is no frustration of the proceedings. In such a case their common opinion would have prevailed, even if the third arbitrator, presuming there was one, had differed. Thus we do not see how there would be waste of time, money and expense if a party, with open eyes, agrees to go to Arbitration of two persons and then participates in the proceedings. On the contrary there would be waste of time, money and energy if such a party is allowed to resile because the Award is not of his liking. Allowing such a party to resile would not be in furtherance of any public policy and would be most inequitable.

6. Thus on first blush, it appeared that the contention of the respondent was to be accepted. However, I find that this Court has in *Wipro Finance Ltd. v. Sandplast India Ltd.* 2006 3 Raj. 524 Delhi, and in *Marine Container Services (South) Pvt. Ltd. Vs. Atma Steels Ltd.* in each of which cases also, the agreement was for appointment of two Arbitrators, appointed a Sole Arbitrator. In both the said judgments, reliance was placed on Section 10 of the Act. It was held that Section 10(1) provided that the parties are free to determine the number of Arbitrators provided that such number shall not be an even number. Section 10(2) provides that failing the determination referred to in Sub-section (1) the Arbitral Tribunal shall consist of a Sole Arbitrator. It was held that when the parties have agreed to an even number of Arbitrators, the same is not a determination/agreement within the meaning of Sub-section (1) and thus the agreement had to be deemed to be of reference to a Sole Arbitrator.

7. I find that the same Hon'ble Judge of Andhra Pradesh High Court, who had delivered the judgment in *Sri Venkateswara Construction Company*, has also dealt with the matter in *Ashok Engineering Company Engineers and Contractors Vs. General Manager, South Central Railway, Secunderabad* and another, :and in which detailed reasoning for construing an agreement of appointment of two Arbitrators as an agreement of reference to Sole Arbitrator has been given. The Hon'ble Judge has gone to the extent of holding that Chief Justice or his designate while acting u/s 11(6) of the Act is not bound by the procedure agreed by the parties. It was held that if a party has failed to act under the agreed procedure, the Chief Justice or his designate upon being approached by the opposite party can appoint an Arbitrator/Arbitrators deviating from the agreed procedure. Reliance in this regard was placed on Section 11(8) of the Act, which does not mention the agreed procedure as a factor to which due regard shall be given to by the Chief Justice or his designate while appointing the Arbitrator. I, however, in the facts of the present case, do not deem it appropriate to adjudicate this aspect. However, the Hon'ble Judge proceeded to also hold that u/s 10(2) of the Act, if the parties fail to provide for an odd number of Arbitrators, the Arbitral Tribunal shall be constituted of a Sole Arbitrator. The same view was also taken by the same court in *North East Securities Limited, Hyd. Vs. Sri Nageswara Chemicals and Drugs Pvt., Ltd., Hyd.* and another,

8. I may at this stage, also noticed that the Apex Court in *Citibank, N.A. Vs. TLC*

Marketing PLC and Another, , in which the agreement did not specify the number of Arbitrators, declined the request for appointment of three Arbitrators holding that a composition of the Arbitral Tribunal comprising of three Arbitrators is not necessary or expedient nor it can be said to be fair and reasonable in the larger interest of the parties because such an order may lead to burdening the parties to bear extra amounts of money in prosecuting the arbitral proceedings which as per the objectives of the Act are less expensive and more efficacious remedy of the parties to settle their disputes. In the present case, even as per the respondent, royalties paid in the past to the applicant range from only about Rupees twelve thousand to Rupees seventy thousand per annum and the constitution of an Arbitral Tribunal in terms of the agreement would definitely be onerous on the applicant.

9. I respectfully concur with the judgments aforesaid of this Court and of the High Court of Andhra Pradesh laying down that an agreement for appointment of two Arbitrators is not an agreement within the meaning of Section 10(1) of the Act and consequently Section 10(2) of the Act comes into play and the Arbitral Tribunal is to consist of a Sole Arbitrator.

10. That still leaves the judgment of the Apex Court in Narain Prasad Lohia. That was a post award matter where the two Arbitrators i.e. one appointed by each party had given an award which was challenged on the ground of being contrary to the statutory provision of the Act and, therefore, void and invalid. The question framed by the Apex Court for adjudication in para-6 of the judgment was as to whether the mandatory provision of the Act could be waived by the parties. It was in that context that the Apex court held as aforesaid. The provisions of Section 10(2) of the Act were not directly in issue and the Apex Court was not faced with a situation as to when the Chief Justice or his designate was approached u/s 11, whether the reference was to be to two Arbitrator or to a Sole Arbitrator. I, therefore, respectfully find that the judgment in Narain Prasad Lohia is not a judgment on the issue raised in the present case. Though, I must admit that the judgment of the Apex Court in Narain Prasad Lohia was not noticed in any of the judgments aforesaid of this Court or of the High Court of Andhra Pradesh.

11. Having held that the agreement between the parties, is, u/s 10(2) of the Act, an agreement for arbitration by a Sole Arbitrator and the parties having failed to agree on a Sole Arbitrator, the cause of action had accrued to the applicant to approach u/s 11(6) of the Act.

12. I appoint Mr. B.S. Banerjee, Advocate, Chamber No. 415, Lawyers' Chambers, Delhi High Courts, New Delhi, as the Sole Arbitrator to adjudicate the claims and counter claims of the parties and his consolidated fee besides out of pocket expenses is fixed at Rupees 55,000/- to be borne equally by the parties, subject to the award to costs. The parties to approach the appointed Arbitrator. The copy of this order be also forwarded to the appointed Arbitrator.