
(2015) 05 MP CK 0045
In the Madhya Pradesh High Court
Case No : A.C. No. 11 of 2014

Gaurav Chaturvedi and Others

APPELLANT

Vs

Girdhar Gopal Bajoria and Others

RESPONDENT

Date of Decision : 05-05-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 12, 13, 14

Citation : AIR 2015 MP 220 : (2015) 5 ARBLR 410 : (2015) 2 JLJ 336 : (2015) 3 MPHT 278 : (2015) 3 MPLJ 216

Hon'ble Judges : Sujoy Paul, J

Bench : Single Bench

Advocate : Jitendra Sharma, for the Appellant; S.K. Shrivastava, Advocates for the Respondent

Final Decision : Allowed

Judgement

Sujoy Paul, J.—This is second visit of the applicant to this Court for appointment of arbitrator. Earlier he filed AC No. 11/2013 for appointment of arbitrator. The said case was decided by this court on 07.03.2014 (Annexure P/10). The respondent herein filed SLP No. 17065/2014 against the said order. The SLP was dismissed in limine on 18.07.2014. This Court in AC 11/2013 appointed a former judge of this Court as sole arbitrator. The proceedings before the sole arbitrator began and on 13.04.2014 the applicant herein appeared before the arbitrator. The respondent sent an application by speed post seeking adjournment till 13.07.2014 on the ground that they intend to challenge the order of this court dated 07.03.2014 before Apex Court. Learned arbitrator posted the matter on 20.07.2014. On 20.07.2014, neither party appeared. Learned arbitrator opined that the parties are not interested in prosecuting the arbitration proceedings. Hence, proceedings were terminated. Applicant preferred an application dated 24.07.2014 before the arbitrator with a prayer to accept his apology for not appearing on 20.07.2014 and with a further prayer for fixing a next date of hearing. The applicant also appeared before the Arbitrator on 25.07.2014. The

Arbitrator opined that due to non-cooperative attitude of the parties and more so on the part of respondent, it is not proper to revive the proceedings. The same stood terminated.

2. Shri Jitendra Sharma, Advocate for the applicant, submits that present application is filed under Section 11 R/w Section 15 of Arbitration and Conciliation Act, 1996 (the Act). He is not challenging the order of the learned Arbitrator and therefore, this application may be entertained. He submits that the necessary factual foundation is available to invoke powers under Section 15 of the Act and therefore, a substituted arbitrator be appointed. In support of this contention, he relied on Union of India (UOI) Vs. U.P. State Bridge Corporation Ltd. .

3. Shri S.K. Shrivastava, Advocate appearing for the respondent has prayed for rejection of this application. He contends that the present application is not maintainable. Termination of arbitration proceedings amounts to passing of award which can be challenged only as per procedure prescribed under Section 34 of the Act. He submits that termination of proceedings by the Arbitrator by no stretch of imagination can be treated as "withdrawal of the proceedings". He submits that order of Arbitrator is squarely covered under Section 32(2)(c) of the Act. By placing reliance on recent Supreme Court judgment reported in Lalitkumar V. Sanghavi (D) Th. L.Rs. Neeta Lalit Kumar Sanghavi and Another Vs. Dharamdas V. Sanghavi and Others, (2014) AIRSCW 1670 : (2014) 1 ARBLR 568 : (2014) 3 JT 526 : (2014) 2 RCR(Civil) 859 : (2014) 3 SCALE 362 : (2014) 7 SCC 255 : (2014) 6 SCJ 28 , it is contended that the facts of the present case are similar to that of Lalit Kumar (Supra). In the said case, the Apex Court held that the remedy for the applicant to question whether mandate of arbitrator stood legally terminated or not can be examined by the Court as provided under Section 14(2) of the Act. He submits that it is only the competent court defined under the Act which can decide this aspect. Thus, application preferred under Section 11 is not tenable. In nut shell, the stand of the respondent is that the present application is not tenable and if the applicants are sent to avail the remedy as per Section 14 read with section 32 of the Act, no prejudice will be caused to them. They will not be remedy less because they can put the order of arbitrator to test before the appropriate Court. No other points are pressed by the parties.

4. I have heard learned counsel for the parties and perused the record.

5. I deem it appropriate to reproduce the relevant provisions of the Act before dealing with the rival contentions of the parties. Relevant portion of Sections 14, 15 and 32 reads as under :-

"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.

15. Termination of mandate and substitution or 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).....

(4).....

32. Termination of proceedings-(1) the arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under subsection (2).

(2) the arbitral tribunal shall issue an order for the termination of the arbitral proceedings where

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings."

6. The Apex Court in ACC Limited (Formerly known as the Associated Cement Company Ltd). Vs. Global Cements Ltd., AIR 2013 SC 3824 : (2012) 3 ARBLR 329 : (2012) 3 CompLJ 56 : (2012) 3 CTC 871 : (2012) 6 JT 41 : (2013) 1 RCR(Civil) 248 : (2012) 5 SCALE 778 : (2012) 7 SCC 71 : (2012) 114 SCL 500 : (2012) AIRSCW 3635 : (2012) 4 Supreme 196 opined that the legislative policy

embodied in Section 14 and 15 of the Act is to facilitate the parties to resolve the dispute by way of arbitration. The arbitration clause if clearly spells out any prohibition or debarment, the court has to keep its hand off and there is no question of persuading or pressurizing the parties to resolve the dispute by a substitute arbitrator. Generally, this stands out as an exception and that should be discernible from the language of the arbitration clause and the intention of the parties. In the absence of such debarment or prohibition of appointment of a substitute arbitrator, the court's duty is to give effect to the policy of law that is to promote efficacy of arbitration.

7. In the present case, admittedly, the arbitrator has terminated the proceedings. The question is whether this termination will amount to "refusal" on his part or whether it can be called as "withdrawal" by him. In *S.B.P. and Company Vs. Patel Engineering Ltd. and Another*, (2009) 4 CompLJ 455 : (2009) 13 JT 315 : (2009) 13 SCALE 335 : (2009) 10 SCC 293 : (2009) 15 SCR 340 : (2009) 10 UJ 4811 the Apex Court dealt with this aspect in great detail. The dictionary meaning of "refusal" and "withdrawal" was considered. The dictionary meaning of word "refusal" is as follows :-

1. P. Ramanatha Aiyar's *Advanced Law Lexicon* (3rd Edn., 2005) the word "refuse" means : "To decline positively; to express or show a determination not to do something."

2. *Century Dictionary*, the word "refuse" means to deny, as a request, demand or invitation; to decline to accept; to reject, as to refuse an offer.

3. *New Oxford Illustrated Dictionary*, Vol. II, P. 1421, the word refuse means-say or convey by action that one will not accept, submit to, give, grant, gratify consent. The dictionary meaning of word "withdraw" is as follows :-

1. *Advanced Law Lexicon* (3rd Edn., 2005)- "To take back or away something that has been given, allowed, possessed, experienced or enjoyed; to draw away.

2. *Black's Law Dictionary* (8th Edn., p.1632) -" 1. The Act of taking back or away, removal. 2. The act of retreating from a place, position or situation."

3. *New Oxford Illustrated Dictionary* (Vol.II, p.1894)-" Pull aside or back, take away, remove, retract, retire from presence or place, go aside or apart."

8. The Apex Court opined that "refuse" denotes a situation before acceptance of an invitation, offer, office, position, privilege and the like. Whereas the word "withdraw" means to retract, retire or retreat from a place, position or situation after acceptance thereof. In the present case, the arbitrator did not refuse to accept the task of arbitration. In other words, learned arbitrator accepted the appointment and initiated the proceedings. Later on, for the reasons stated above terminated the proceeding. Section 15 (2) of the Act does not per se apply to a case where an arbitrator appointed by a party to the agreement declines to accept the appointment or refuses to arbitrate in the matter. In the present case, it cannot be said that action of arbitrator amounts to refusal. As per dictionary

meaning quoted above and finding of Supreme Court in para 44, it is clear that word "withdraw" has wide meaning. The arbitrator has retreated from his position as arbitrator after accepting that appointment. Thus, in my view, in the peculiar facts and circumstances of this case, the termination of arbitration proceeding by the arbitrator amounts to withdrawal by him.

9. A plain reading of section 15 of the Act makes it clear that termination of mandate of arbitrator is to be gathered on the basis of conditions mentioned in Sections 13, 14 and 15 of the Act. Section 14(1)(a) provides that mandate of arbitrator shall be terminated if he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay. In "legal glossary" published by Government of India (Ministry of Law) the word "de facto" is defined as under :-

"in fact; an expression indicating the actual state of circumstances independently of any remote question of right or title

10. In the facts and circumstances of this case, the arbitrator has expressed his inability to perform his functions, it may be for any reason. In the present case, reason is that he was unhappy with the non-cooperative attitude of the parties. Fact remains that de facto he terminated the proceedings because he thought he is unable to perform the duty of arbitrator in absence of proper cooperation by the parties. Section 32(2)(c) on which heavy reliance is placed by Shri S.K. Shrivastava, no doubt, deals with termination of arbitral proceedings where arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

11. In the opinion of this Court, termination of arbitral proceedings also attracts Section 32(2)(c). However, in my considered opinion, it simultaneously falls within the ambit of Section 14 (1)(a). Section 15(2) provides that where the mandate of arbitrator is terminated, a substitute arbitrator shall be appointed according to the rules. The word "rules" is considered by the Supreme Court in various judgments. The Apex Court opined that rule includes arbitration clause. In the present case, the parties have not shown any provision of the agreement which provides the method of appointment of substitute arbitrator. No provision was brought to the notice of this Court which debars the appointment of any such substitute arbitrator.

12. In *Lalit Kumar V. Sanghavi* (Supra) the arbitration proceedings were terminated by the presiding arbitrator. The Apex Court in para 14 framed question "whether the mandate of the arbitrator stood legally terminated or not can be examined by the Court as provided under section 14(2) ? The Court opined that if action of arbitrator is put to test, the proper forum is the "Court" defined under Section 2(1)(e). In the present case, the applicant has not challenged the order of arbitrator whereby he terminated the arbitral proceeding. I find force in the argument of Shri Jitendra Sharma that if applicant intended to challenge the order of arbitrator whereby he terminated the proceedings, the

appropriate forum would have been the court defined in the act. This could be in consonance of Section 14(2) of the Act. In the present case, learned arbitrator terminated the proceedings on 20.07.2014. The applicant's subsequent request was also not accepted. In this factual backdrop, the present applicant has prayed for appointment of substitute arbitrator and has not prayed for to examine the validity of termination of proceedings by the order of presiding arbitrator. There is no prayer to set aside the order of presiding arbitrator and therefore, the judgment of Lalit Kumar V. Sanghvi is distinguishable and cannot apply in the factual matrix of the present matter.

13. In U.P. State Bridge Corporation Ltd. (Supra) the Apex Court has again emphasized the need of speedy conclusion of arbitration proceedings. In para 14 of the judgment, the Apex Court considered the legal position relating to arbitration in other countries. In the said case, the Apex Court opined that in a clear case of inability on the part of arbitrator to proceed in the matter, the substitute arbitrator can be appointed. In para 13, the Apex Court considered the question as to whether a course of action can be adopted by the High Court while dealing with the application under Section 11 of the Act or is there any room for the play in the joints and the High Court is not divested of exercising discretion under some circumstances? If yes, what are those circumstances? The Apex Court considered the judgment of North Eastern Railway Vs. Tripple Engineering Works, (2014) AIRSCW 4669 : (2014) 9 SCALE 351 : (2014) 9 SCC 288 and other cases on the point. It is taken note of that earlier the Supreme Court had taken a view that though contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. After considering the Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited, AIR 2007 SC 1764 : (2007) 2 ARBLR 49 : (2008) 4 CompLJ 20 : (2007) 5 JT 105 : (2007) 5 SCALE 341 : (2007) 5 SCC 304 : (2007) 4 SCR 777 : (2007) AIRSCW 2918 : (2007) 3 Supreme 502 respectively, the Apex Court in Tripple Engg. Works (Supra) held as under :-

"7. The apparent dichotomy in ACE Pipeline and Bharat Battery Mfg. Co. (P) Ltd. (Supra) was reconciled by a three-Judge Bench of this Court in Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd., (2008) 3 ARBLR 349 : (2008) 4 CompLJ 39 : (2008) 11 SCALE 500 : (2008) 10 SCC 240 , wherein the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasized by taking into account the expression " to take necessary measure" appearing in sub-section (6) of Section 11 and by further laying down that the said expression has to be read along with the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd., (2009) 11 JT 450 : (2009) 11 SCALE 672 : (2009) 8 SCC 520 : (2009) 13 SCR 510 : (2009) 9 UJ 4269 . Para 48 of the Report wherein the scope of Section 11 of the Act was summarized may be quoted by reproducing sub-paras (vi) and (vii) hereinbelow :(Indian Oil case, SCC p.537)

"48.(vi) The Chief Justice or his designate while exercising power under the sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exists, giving rise to the justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons may be recorded, ignore the designate arbitrator and appoint someone else."

14. It is further held that first and paramount principle of the proceeding is "fair, speedy and inexpensive trial by an Arbitral Tribunal". Unnecessary delay or expense would frustrate the very purpose of arbitration. This means that if a particular procedure is prescribed in the arbitration agreement which the parties have agreed to, that has to be generally resorted to. It is because of this reason, as a normal practice, the court will insist the parties to adhere to the procedure to which they have agreed upon. This would apply even while making the appointment of substitute arbitrator and the general rule is that such an appointment of a substitute arbitrator should also be done as per original agreement applicable to the appointment of arbitrator at the initial stage. It is further opined that appointment of arbitrator by the Court of its own choice, is not unknown to law and is an acceptable proposition of law (para 19).

15. Considering the aforesaid, in my view, the applicant has successfully made out a case for appointment of substitute arbitrator. If any other course is adopted, there will be undue and unnecessary delay which will not be as per scheme of the Act. Needless to mention that sufferer would be the applicant. As analyzed above, I deem it proper to appoint a substitute arbitrator.

16. Resultantly, in exercise of power under section 11(6) of the Act, I deem it proper to appoint Hon"ble Shri Justice S.P. Khare, a former Judge of this court [R/o Formet A-1, 202, Sahanai Residency, AB Raod Indore, Mobile No. 09425154266] as a Sole Arbitrator in the present matter. Parties are directed to approach Hon. Shri Justice S.P. Khare in this regard. Registry is directed to send a copy of this order to Hon. Shri Justice S.P. Khare. Needless to mention that the learned arbitrator will be free to fix his own procedure and fees.

17. Application is allowed.