
(2014) 03 MP CK 0046
In the Madhya Pradesh High Court
Case No : A.C. No. 11 of 2013

Gaurav Chaturvedi and Others

APPELLANT

Vs

Mr. Girdhar Gopal Bajoriya and Another

RESPONDENT

Date of Decision : 07-03-2014

Acts Referred:

Arbitration Act, 1940 — Section 20
Arbitration and Conciliation Act, 1996 — Section 11 11(6) 15(2) 21 7
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Companies Act, 1956 — Section 397 398 402

Citation : (2014) 3 ARBLR 148 : (2014) 3 MPHT 178 : (2014) 2 MPLJ 395

Hon'ble Judges : Sujoy Paul, J

Bench : Single Bench

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

Final Decision : Allowed

Judgement

Sujoy Paul, J.—This application is filed by the applicant u/s 11(6) of the Arbitration and Conciliation Act, 1996 (for brevity " Arbitration Act") for appointment of sole arbitrator. Shorn of unnecessary details, the relevant facts are that applicant and respondents No. 1 & 2 signed a share holder agreement on 20.06.2012 (Annexure P/1) The case of the applicant is that the aforesaid respondents handed over 10 cheques to the applicant on 20.06.2012. The total amount arising out of the said cheques was Rs. 1,73,83,000/-. The applicant submitted these cheques before the bank, but the cheques were not honored. After certain correspondence between the parties aforesaid, applicant sent a notice on 10.02.2013 by invoking clause 40 of the said agreement. The aforesaid respondents sent their reply on 16.02.2013 and stated that they do not agree for appointment of arbitrator suggested by the applicant. After this, present application u/s 11(6) of the Arbitration Act is filed.

2. Shri Jitendra Sharma, learned counsel for the applicants, relied on clause 40 of the share holder agreement and submitted that the respondents have erred in

not accepting the request for appointing of arbitrator. It is, therefore, prayed that this Court may direct for appointment of arbitrator.

3. Per Contra, Shri S.K. Shrivastava, learned counsel for the respondents No. 1 & 2 submits that an appropriate application u/s 8 of the Arbitration Act has already been filed before CLB by respondents No. 1 & 2. In the said proceedings, the present applicant has filed an application Annexure R/4 wherein he has prayed for referring the matter for Arbitration. The singular objection raised by Shri Shrivastava is that nature of dispute involved herein can only be solved by the specialized adjudicatory forum, i.e. Company Law Board (Board). The matter is already pending before the Board and certain issues incidentally touching upon the share holding agreement dated 26.02.2012 are pending consideration before the Board.

4. It is further submitted by Shri Shrivastava that Board exercises extraordinary power enshrined in Section 397, 398 read with Section 402 as well as other statutory provisions contained in the Companies Act, 1956. It is contended that plethora of grievance and issues raised by the applicant can be sent out and adjudicated upon by specialized forum i.e. Board and it cannot be a subject matter of arbitral proceedings. He submitted that while deciding application u/s 11 of the Arbitration Act, it falls within the plenary powers to appoint arbitrator as the parties have not been unanimous in the procedure of appointment of the same. It is, therefore, contended that when application u/s 8 of the Arbitration Act is filed and pending before the Board, this application u/s 11 need not be entertained. Scope and extent of Section 8 is much wider than the provision of Section 11 of Arbitration Act. Arbitrarily of dispute can also be gone into by the Board and therefore, in the fitness of things, this application be not entertained and parties be relegated to put forth their case before the Board. He further stated that this course would be in accordance with law because the application Annexure R/4 is filed by the present applicant himself. In support of his contention he relied on *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others*, . He also relied on *State of Goa Vs. Praveen Enterprises*, . No other point is pressed by the learned counsel for the parties.

5. I have heard learned counsel for the parties and perused the record in the light of submissions.

6. During the course of argument, learned counsel for the parties have not disputed about the existence of share holder agreement dated 20.06.2012. Clause 40 of the said agreement reads as under :-

40. All the disputes in relation to the interpretation of any term and condition of this agreement and the rights, the liabilities of any party or any dispute arising out of this agreement shall be referred to Arbitration of a Sole Arbitrator to be appointed by mutual consent and this agreement shall be deemed to be an agreement to submit to the arbitration. If the parties do not agree upon the name of the Arbitrator then the Arbitrator shall be appointed as per the

provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification thereto. The Venue of the Arbitration shall be at the place of business only and all the provisions of the Arbitration and Conciliation Act, 1996 will apply. The agreement would be subject to the jurisdiction of the courts at the place of business only.

7. A seven judges Bench of Supreme Court in *S.B.P. and Co. Vs. Patel Engineering Ltd. and Another*, opined that while exercising power u/s 11(6), the Chief Justice or his designate is bound to decide whether (i) he has jurisdiction, in the sense whether party making motion has approached the right High Court, (ii) there is a valid arbitration agreement in terms of S. 7, (iii) person before him with the request, is a party to the arbitration agreement, and (iv) there is a dispute/live claim subsisting which is capable of being arbitrated upon (though question whether the live claim made comes under the purview of the arbitration agreement should be left to be decided by the Arbitral Tribunal on taking evidence, along with merits of the claims involved).

8. If the present case is tested on the anvil of said principles laid down in *Patel Engineering (supra)*, it will be clear that there exists no dispute about the jurisdiction of this High Court between the parties. The validity, genuineness or correctness of arbitration agreement is also not in question. Parties herein are admittedly party to the arbitration agreement. There exists a dispute/live claim between the parties herein. Thus the necessary ingredients for invoking Section 11(6) are very much available in the present petition.

9. Before dealing with the rival contentions, I deem it proper to quote relevant provisions of the Arbitration Act:-

Section 8:-

8. Power to refer parties to arbitration where there is an arbitration agreement :-
(1) A judicial authority before which an action is brought in a matter which is the subject matter of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

Section 11(6) Appointment of arbitrators:-

(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.

Section 21:-

21. Commencement of arbitral proceedings:- Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

10. To bolster his submissions, Shri S.K. Shrivastava has placed heavy reliance on para 12 of the judgment of Supreme Court in case of State of Goa (supra). In para 12, the Apex Court dealt with the "reference to arbitration". The scope and ambit of sections 8 and 11 of the Arbitration Act was considered by the Supreme Court. In the course of analysis, the Apex Court opined that Section 8 of the Act does not provide for appointment of an arbitrator. When the judicial authority finds that the subject-matter of the suit is covered by a valid arbitration agreement between the parties to the suit, it will refer the parties to arbitration, by refusing to decide the action brought before it and leaving it to the parties to have recourse to their remedies by arbitration. Heavy reliance is placed on the finding where it is held that when such order is made, parties may either agree upon an arbitrator and refer their disputes to him, or failing agreement, file an application u/s 11 of the Act for appointment of an arbitrator.

11. On the strength of said finding, it is contended by Shri Shrivastava that application u/s 11 can be filed only when an order is made by the Board u/s 8 of the Act. He further relied on the judgment of Supreme Court in Booz Allen (supra). By placing reliance on question (iv) framed by the Apex Court, It is contended that it is only Board which can decide the arbitrability of dispute and only thereafter, parties can be sent for arbitration.

12. Section 21 of the Arbitration Act makes it clear that unless otherwise agreed by the parties, the arbitral proceedings regarding particular dispute commence on the date on which a request for referring that dispute for arbitration is received by the respondent. Despite specific question from the Bench, learned counsel for the parties did not point out any provision of share holder agreement which deals with agreement of the parties about the arbitral proceedings relating to Section 21. Thus the arbitral proceeding, as per Section 21 would be treated to have commenced on the date when a request for reference of dispute was received by the respondents.

13. Section 8(3) of the Arbitration Act makes it clear that even if an application

under sub-section (1) of Section 8 is pending, arbitration may commence or continue and an arbitral award can be made. A combined reading of Sections 8, 11 and 21 of the Arbitration Act makes it clear that Section 8 and 11 are independent proceedings and can run simultaneously/concurrently.

14. In the judgment of State of Goa (supra) the Apex Court opined that Section 20 of the old Act required the court while ordering the arbitration agreement to be filed, to make an order of reference to the arbitrator. The scheme of the new Act requires minimal judicial intervention. Section 11 of the New Act, on the other hand, contemplates the Chief Justice or his designate appointing the arbitrator but does not contain any provision for the court to refer the disputes to the arbitrator. Sub-sections (4), (5) and (9) of section 11 of the Act require the Chief Justice or his designate to appoint the arbitrator's. Sub-section (6) requires the Chief Justice or his designate to "take the necessary measure" when an application is filed by a party complaining that the other party has failed to act as required under the appointment procedure. All these sub-sections contemplate an applicant filing the application u/s 11, only after he has raised the dispute and only when the respondent fails to co-operate/concur in regard to appointment of arbitrator.

15. It is further held that section 11 of the Act requires the Chief Justice or his designate only to appoint the arbitrator's. It does not require the Chief Justice or his designate to identify the disputes or refer them to the Arbitral Tribunal for adjudication. Where the appointment procedure in an arbitration agreement requires disputes to be formulated and specifically referred to the arbitrator and confers jurisdiction upon the arbitrator to decide only such referred disputes, when an application is filed u/s 11(6) of the Act, alleging that such procedure is not followed, the Chief Justice or his designate will take necessary measures u/s 11(6) of the Act to ensure compliance by the parties with such procedure.

16. In Booz Allen (supra) the Apex Court held that even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application u/s 8 of the Act, to refer the parties to arbitration, if the subject-matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal. In the said case, the Apex Court opined that where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, u/s 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes. This finding of Supreme Court is in relation to the scope of Section 8 of the Arbitration Act. It is trite law that in exercise of power u/s 11(6) of the said Act this Court is not required to examine the arbitrability of the dispute. Finding in Booz Allen (supra) was given because there may be cases where the disputes are inarbitrable such as : (I) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights,

child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate. Thus the Court dealing with Section 8 proceedings may look into the said aspect. The said judgment is of no help to the respondents in the facts and circumstances of the present case.

17. In fact the question involved in this matter is answered in specific by Supreme court in Vijay Kumar Sharma @ Manju Vs. Raghunandan Sharma @ Baburam and Others, the Apex court after considering Section 8 of the Act opined that it is evident from subsection (3) of Section 8 that the pendency of an application u/s 8 before any court will not come in the way of an arbitration being commenced or continued and an arbitral award being made. The obvious intention of this provision is that neither the filing of any suit by any party to the arbitration agreement nor any application being made by the other party u/s 8 to the court, should obstruct or preclude a party from initiating any proceedings for appointment of an arbitrator or proceeding with the arbitration before the Arbitral Tribunal.

18. It is further held in the said judgment that having regard to the specific provision in Section 8(3) providing that the pendency of an application u/s 8(1) will not come in the way of an arbitration being commenced or continued, the Apex Court was of the view that an application u/s 11 or Section 15(2) of the Act, for appointment of an arbitrator, will not be barred by pendency of an application u/s 8 of the Act in any suit, nor will the designate of the Chief Justice be precluded from considering and disposing of an application u/s 11 or 15(2) of the Act. It follows that if an arbitrator is appointed by the designate of the Chief Justice u/s 11 of the Act, nothing prevents the arbitrator from proceeding with the arbitration. It also therefore follows that the mere fact that an appeal from an order dismissing the suit under Order 7 Rule 11 CPC (on the ground that the disputes were required to be settled by arbitration) is pending before the High Court, will not come in the way of the appointment of an arbitrator u/s 11 read with Section 15(2) of the Act, if the authority u/s 11 finds it necessary to appoint an arbitrator. Therefore, the sole contention of the respondents is liable to be rejected.

19. Apart from this, there is no difference of opinion in the judgments of Supreme Court in the aforesaid three cases State of Goa, Booz Allen and Vijay Kumar Sharma (Supra). A conjoint reading of section 8, 11(6) and 21 of the Arbitration Act makes it clear that this Court is not required to wait for the outcome of the application Annexure R/4 preferred in a proceedings u/s 8 of the Arbitration Act. In view of plain reading of Sections 8 and 11 of the Arbitration Act and judgments of Supreme Court referred herein above, I am unable to hold that only after decision on the question of arbitrability in section 8 proceedings, application u/s 11(6) can be entertained. Putting it differently, decision on arbitrability is not sine qua non to decide section 11(6), application. Conditions for attracting section 11(6), as held in Patel Engineering (supra) are already

satisfied. Accordingly, singular objection raised by respondents No. 1 & 2 is rejected.

20. Resultantly, I deem it proper to appoint Former Judge of this Court, Hon''ble Shri Justice N.K. Jain, R/o. E-7/478, Area Colony, Bhopal-462016 as sole arbitrator. Learned arbitrator is requested to do the needful. A copy of this order be communicated to learned arbitrator by the Registry forthwith. Application is allowed. No costs.