

(2016) 10 RAJ CK 0084

In the Rajasthan High Court

Case No : Arbitration Application No. 74 of 2013

Mayur Associates, Engineers & Contractors

APPELLANT

Vs

Mr. Gurmeet Singh

RESPONDENT

Date of Decision : 07-10-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, Section 14, Section 15

Citation : (2017) AIRCC 424

Hon'ble Judges : Mr. Mohammad Rafiq, J.

Bench : Single Bench

Advocate : Mr. Sumit Bishnoi, Advocate, for the Respondents; Mr. Mahendra Gaur, Advocate, for the Applicant

Final Decision : Dismissed

Judgement

Mr. Mohammad Rafiq, J. - This application under Section 11(5) of the Arbitration and Conciliation Act, 1996(for short "the Act of 1996") has been filed by the applicant through its Proprietor Mr. Ajay Dhawan with the prayer that a retired Judge of this Court may be appointed as independent sole arbitrator in the matter for adjudication of disputes between the parties or alternatively appoint a retired Judge of this Court as a presiding arbitrator with liberty to the parties to have one each "expert" arbitrator of their choice on the panel of the arbitrators.

Factual matrix of the case as averred in the application is that the applicant is a proprietorship firm registered with Indian Oil Corporation(for short "the Corporation") as a contractor having SAP No. 10104091. The applicant is also doing business with other petroleum companies such as Bharat Petroleum Corporation Limited and Hindustan Petroleum Corporation Limited etc. Respondent No. 1, General Manager of the Corporation after obtaining concurrence in writing from applicant appointed Shri Mukesh Gupta, Chief Manager(RS) of the Corporation at Jaipur as the sole arbitrator vide letter dated 10.10.2012 to adjudicate the dispute between the applicant-firm and the respondent-Corporation.

2. Mr. Mahendra Gaur, learned counsel for the applicant submitted that after transfer of Mr. Mukesh Gupta, Respondent No. 1 vide its letter dated 16.05.2013 suggested three names, all of whom were working under his direct supervision and control. Respondent No. 2 is a Government Company as defined under Section 617 of the Companies Act, 1956. The dispute is about fabrication of canopy at Dholpur which lies within the administrative control of Respondent No. 1. This dispute arose between the applicant and the respondent-Corporation on 26.06.2006. The respondents for as long as six years kept on assuring the applicant-firm that they will look into the grievances of the applicant. When no fruitful result came out, the applicant on 01.09.2012 addressed a letter to the Chairman of the respondent-Corporation to refer the dispute to arbitrator as per the arbitration clause of agreement. The respondents accepting request of the applicant, vide letter dated 10.10.2012 appointed Mr. Mukesh Gupta, Chief Manager(RS) of the respondent-Corporation as the sole arbitrator. Mr. Mukesh Gupta, sole arbitrator issued notice to the applicant to submit its claim within 15 days of receipt of notice. The applicant submitted its claim on 19.11.2012. By December, 2012, all the pleadings of the parties such as filing of claim, reply and rejoinder was completed. However, for the reasons best known to the arbitrator, he did not fix any date for hearing. Respondent No. 1 in his capacity as in-charge of Rajasthan State Office is having a direct interest in the dispute between the parties and also having direct administrative and supervisory control over Mr. Mukesh Gupta, the sole arbitrator appointed by him about his promotion and transfer.

3. Mr. Mahendra Gaur, learned counsel for the appellant submitted that the respondents suddenly transferred Mr. Mukesh Gupta from Jaipur to Noida, without the consent and knowledge of the applicant. Respondent-Corporation through its Law Officer, Mr. S.S. Sharma on 10.05.2013 made a request to Respondent No. 1 that some other officer may be appointed as sole arbitrator in place of Mr. Mukesh Gupta. Though, Respondent No. 1 and Law Officer sit in the same building, but surprisingly the said communication was sent by speed post. The applicant did not accept proposal suggested by Respondent No. 1 and conveyed his decision to him by e-mail. However, Respondent No. 1 seized upon the opportunity and immediately appointed Mr. Vivek Garg as sole arbitrator. Learned counsel for the applicant argued that in view of the amended provisions of the Act namely Section 12(5), especially entries 1 and 5 of Schedule Fifth and Seventh, Mr. Vivek Garg, being under the employment of the respondents, more particularly being subordinate to Respondent No. 1, could not act as an independent arbitrator. It is argued that two months have elapsed since appointment of second arbitrator and nine months since filing of claim but so far not a single hearing has taken place. This submission is being made without prejudice to right and contest of the applicant that without giving notice to the applicant and without his consent or knowledge, Respondent No. 1 could not have changed Mr. Mukesh Gupta from the post of sole arbitrator and appointed Mr. Vivek Garg, Respondent No. 3 as sole arbitrator.

4. Mr. Samit Bishnoi, learned counsel for the respondents opposed the application and submitted that aforesaid amended provisions cannot apply to the present case because arbitral proceedings were pending on the date on which amendment was introduced by Arbitration and Conciliation (Amendment) Act, 2015(for short "the Amendment Act of 2015") which came into force w.e.f. 01.01.2016. Aforesaid amended provisions cannot therefore apply to the pending arbitral disputes in which proceedings have already commenced. Learned counsel submitted that the applicant vide communication dated 01.09.2012 requested the General Manager of the respondent-Corporation to provide a list of three arbitrators to select an arbitrator in terms of Clause 9.0.1.1 of the agreement. It was in furtherance thereof that General Manager of the Respondent-Corporation at Jaipur vide communication dated 03.10.2012 forwarded names of three arbitrators. The applicant consented for appointment of Mr. Mukesh Gupta. Accordingly, General Manager of the respondent-Corporation vide its letter dated 10.10.2012 appointed Mr. Mukesh Gupta as the sole arbitrator to adjudicate disputes between the parties. While the applicant submitted its statement of claim, the respondents filed reply to the same and thereafter, the applicant filed its rejoinder. Subsequently, Mr. Mukesh Gupta, the sole arbitrator was transferred to Nodia vide order dated 02.04.2013. Therefore, the necessity arose for his substitution by appointment of new sole arbitrator. It is argued that transfer of employee is incident of service. There was no necessity of any consent of the applicant before transferring Mr. Mukesh Gupta. On request being received from Law Department of the respondent-Corporation for appointment of fresh arbitrator, General Manager, IOCL forwarded names of three officials of the Corporation asking the applicant to select one of the officers. The applicant vide communication dated 14.06.2013 conveyed his unacceptability to choose any one of them as the arbitrator. When no option was left with the General Manager, he vide memorandum dated 19.06.2013 appointed one of the three, namely Mr. Vivek Garg, as the sole arbitrator. As regards provisions of Section 12(5) and entries 1 and 5 of Schedule Fifth and Seventh of the Amendment Act of 2015, learned counsel argued that the aforesaid amendments came into force w.e.f. 23.10.2015 and Section 26 of the Amendment Act clearly provides that provisions contained therein would not apply to pending arbitral proceedings. Since Mr. Mukesh Gupta had already entered upon the arbitral proceedings and the applicant had filed statement of claim and the respondents also filed their reply and thereafter the applicant filed rejoinder thereto, therefore, provisions of Amendment Act would not apply to the present proceedings.

5. It is argued that upon termination of mandate of arbitrator in terms of Section 14(1)(a) of the Act, the Court is only required to decide whether the mandate has terminated or not and if Court holds that the mandate of the arbitrator has terminated, then in that eventuality a substitute arbitrator has to be appointed as per provisions of Section 15(2) of the Act. Substitute arbitrator has been appointed in the present case keeping in view the provisions of Section 15(2) of the Act and therefore, present application under Section 11 of the Act for

appointment of fresh arbitrator would not be maintainable as the mandate of the arbitrator has terminated on account of inability of the initial arbitrator to perform his functions. This Court in the scope of Section 11 of the Act of 1996 cannot appoint a fresh arbitrator overlooking provisions of Section 15(2) of the Act. Termination of the mandate of the arbitrator followed by the appointment of a substitute arbitrator only results in change in the composition of the arbitral tribunal.

6. Learned counsel argued that where the mandate of an arbitrator terminates under Section 13 and 14 of the Act of 1996 or because of his withdrawal from office for any reason or because of the revocation of his mandate by Agreement of the parties, or in other case of termination of his mandate, a substitute arbitrator is appointed according to the Rules that were applicable to the appointment of the arbitrator being replaced, unless the parties agree otherwise. In the present case, as per Arbitration Clause 9.0.1.1, the contractor was to select an arbitrator out of the panel of three persons nominated by the owner. Should the contractor fail to select an arbitrator within 30 days of the panel of names being furnished by the owner, the sole arbitrator was to be appointed by the owner out of the said panel. Said list of three persons was sent to the applicant on 16.05.2013 and only on it being unable to grant approval of any particular person out of the nominated list, General Manager, RSO, IOC appointed Mr. Vivek Garg. Sections 11, 14 and 15 of the Act of 1996 clearly emphasizes the necessity of adherence to the terms of the Agreement between the parties in the matter of appointment of the arbitrators. Section 15(2) of the Act of 1996 which regulates appointment of substitute arbitrator requires that such an appointment shall be made according to the rules, which were applicable to the appointment of original arbitrator. It is argued that the phraseology "to the arbitral proceedings" used in first part of Section 26 of the Amendment Act of 2015, would mean that if the arbitral proceedings had commenced prior to enforcement of the Amendment Act of 2015, it can be taken to have terminated only on passing of the final award and till the award is passed, proceedings have to be taken as continuing and pending. Second part of Section 26 of the Amendment Act of 2015 has used words, "in relation to", arbitral proceedings. Therefore, matter in relation to arbitration proceedings come within the purview of the new Act and not in matters relating to first part, i.e. to the arbitral proceeding itself.

7. Mr. Samit Bishnoi, learned counsel, in support of his arguments, also relied upon judgments of Supreme Court in the case of SBP & Company v. Patel Engineering Ltd. (2009) 10 SCC 293; Yashwith Constructions Pvt. Ltd. v. Simplex Concrete Piles India Ltd. (2006) 6 SCC 204; ACC Ltd. v. Global Cement Ltd. (2012) 7 SCC 71 and judgment of Bombay High Court in Jayesh H. Pandya v. Subhtext India Ltd., 2009 (2) RAJ 439 (Bom.); judgment of Delhi High Court in Earthtech Enterprises Ltd. v. NAFED, AIR 2008 Del 155 and Surendra Pal Singh v. HPCL, 2010 (1) (Raj.) 258 (Delhi).

8. I have given my anxious consideration to rival submissions and carefully perused the material on record.

9. Indisputably, arbitration proceedings in the present case had commenced much prior to enforcement of Amendment Act of 2015. The Arbitration and Conciliation (Amendment) Ordinance, 2015 was published in the official Gazette on 23.10.2015. This Ordinance later on became the Amendment Act of 2015. Significant changes were brought about thereby in the Act of 1996, especially by substitution of Section 12(1) and insertion of Section 12(5) as also insertion of Fourth and Seventh Schedules to the Act w.e.f. 23.10.2015. Article 1 of the Seventh Schedule to the Amendment Act of 2015 makes a serving officer of an organisation ineligible to act as arbitrator. Fifth Schedule to the Amendment Act of 2015 narrated circumstances giving rise to justifiable doubts listing out as many as 34 parameters in great detail and in a more explicit manner, while Sixth Schedule provides the form in which the disclosure is to be made by the proposed Arbitrator. No doubt Section 12(5) of the Amendment Act of 2015 begins with a non-obstante clause and overrides any prior agreement between the parties, but this has to be viewed in the facts of the present case and law available on the subject.

10. Section 21 of the Act of 1996 provides that 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. In the present case, not only request was received by the respondents but arbitration proceedings actually commenced by appointment of arbitrator chosen by the applicant himself from amongst three officers of the respondent-Corporation much prior to enforcement of the Amendment Act of 2015. Subsequently, when the appointed arbitrator was transferred, his mandate stood terminated because he thereby became unable to perform his functions as such arbitrator. Deputy Manager(Law) of the respondent-Corporation sent a request vide its letter dated 10.05.2013 to Respondent No. 1, General Manager of the Corporation that upon transfer of Mr. Mukesh Gupta, some other officer may be appointed as sole arbitrator. Respondents vide their letter dated 16.05.2013 suggested names of three officers of the Corporation. The applicant vide communication dated 14.06.2013 expressed his inability to choose anyone out of those three names. It then led to the General Manager appointing Shri Vivek Garg as the sole arbitrator who was one amongst those three suggested vide order dated 19.06.2013. Clearly, all these events also took place much before Amendment Act of 2015 and more particularly amended provision of Section 12(1), Section 12(5) and Fifth and Seventh Schedules in the Act came into force w.e.f. 23.10.2015. In these circumstances whether or not the applicant exercised the option of choosing one name out of three names proposed by the respondents as arbitrator, the fact remains that this was the stipulation in the agreement between the parties namely that "sole arbitrator" referred to in Clause 9.0.1.1 of Section 9 of the Agreement, shall be selected by the contractor out of panel of three officers nominated by the owner. However, if

the contractor fails to select the arbitrator within 30 days out of panel of such names being furnished by the owner, arbitrator shall be selected by the non-applicants out of such panel. Mandate of sole arbitrator Mr. Mukesh Gupta stood terminated because of his inability to perform as arbitrator on account of his transfer. In this situation, Section 15(2) of the Act of 1996 would be attracted which inter alia 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.

11. The Supreme Court in *S.B.P. & Company*(supra) while interpreting term "Rules" used in Section 15(2) held that it is not confined to statutory rules or the rules framed by the competent authority, but also includes the terms of agreement entered into by the parties. Therefore, even when a petition for removal of Arbitrator filed under Section 14 is allowed, the court is required to follow the same procedure for appointment of the substitute as adopted at the time of appointment of the arbitrator being replaced.

12. The Supreme Court in *Yashwith Constructions Pvt. Ltd.* (supra), while interpreting Section 15(2), held that withdrawal of an arbitrator from the office for any reason is within the purview of Section 15(1)(a) of the Act and, therefore, Section 15(2) would be attracted and a substitute arbitrator has to be appointed according to the rules that are applicable for the appointment of the arbitrator to be replaced.

13. The Supreme Court in *ACC Ltd.*(supra) held that application under Section 11 cannot be entertained where there has been compliance with the procedure for appointment of a substitute arbitrator. It has been specifically stated in proviso to Section 12 of the Amended Act that where an arbitrator has already been appointed on or before the commencement of the Arbitration and Conciliation Amendment Act, 2015, then in that eventuality sub-section 5 of Section 12 would not be applicable.

14. The Supreme Court in *National Highways Authority of India & Another v. Bumhiway DDB Ltd. (JV) & Others*, (2006) 10 SCC 763 held that on resignation or termination of mandate of an arbitrator, the process of appointment of arbitrator begins afresh in accordance with terms of the contract, which according to Section 15(2) of the Act are the rules applicable to the appointment of the arbitrator being replaced. Unless the mechanism/procedure for appointment of the substitute arbitrator fails or the mechanism/procedure is not exhausted, the court cannot assume jurisdiction under Section 11(6) of the Act. In that case, appointment of substitute arbitrator made by the High Court concerned without the agreed contractual procedure having been exhausted was set aside and parties were directed to follow procedure provided for in the arbitration agreement for appointment of the substitute arbitrator.

15. Bombay High Court in *Jayesh H. Pandya*(supra) held that termination of the mandate of an arbitrator must clearly be distinguished from the termination of

the arbitral proceedings. Delhi High Court in Earthtech Enterprises Ltd.(supra) held that assuming that Section 14(1)(a) of the Act becomes applicable and the mandate of the appointed arbitrator terminates, the only remedy available in such a case would be to appoint a substitute arbitrator in terms of Section 15(2) of the Act of 1996. Delhi High Court in Surendra Pal Singh(supra) held that Sub-section (6) of Section 11 of the Act of 1996 would come into play only if the owner has failed to appoint arbitrator as per the agreed procedure.

16. When the Section 26 of the Amendment Act of 2015 and Section 85(2)(a) of the Principal Act are carefully examined, both are couched in the similar language. The Supreme Court in State of West Bengal v. Amritlal Chatterjee, (2003) 10 SCC 572 had an occasion to construe Section 85(2)(a) of the Principal Act. The facts in that case were that the respondent contractor sought reference for adjudication of dispute regarding payment of additional work. Consequently, an arbitrator was appointed by the Chief Engineer on 07.09.1994. When the arbitrator failed to give the award for a considerable period of time, the respondent filed an application under Sections 5, 11 and 12 of the Arbitration Act, 1940 for appointment of a new arbitrator, which was allowed by the learned Single Judge of the High Court. This was objected to by the State which challenged the said order in appeal before the Supreme Court. Dismissing the appeal filed by the State, the Supreme court in Para 4, 5, 6, 7 and 14 of the report observed thus:

"4. It may be noticed that the earlier arbitrator was appointed by the Chief Engineer on 7-9-1994 under the Arbitration Act, 1940. The new Act came into force with effect from 25-1-1996. Section 21 of the new Act provides that 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. Clause (a) of subsection (2) of Section 85 of the new Act provides that notwithstanding repeal of the Arbitration Act, 1940, the provisions of the said enactment shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force.

5. On the arguments of the learned Senior Counsel for the appellant, the question that arises is as to when the proceedings commence.

6. In Shetty's Constructions Co. (P) Ltd. v. Konkan Rly. Construction (1998) 5 SCC 599 it was held that the arbitration suit in respect of arbitration dispute shall be deemed to have commenced on the date on which the request for referring the dispute for arbitration is received by the respondent.

7. Thyssen Stahlunion GMBH v. Steel Authority of India Ltd. (1999) 9 SCC 356 which was passionately relied upon by the learned Senior Counsel for the appellant, has, in our view, no application to the facts of the Present cases. The Bench concluded :

"1. The provisions of the old Act (Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have commenced before the coming into force of the new Act (Arbitration and Conciliation Act, 1996).

2. The phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree under Section 17 thereof and also appeal arising thereunder." There cannot be any doubt that invoking the arbitration clause by a party and appointment of arbitrator pursuant thereto and in furtherance thereof are proceedings which are required to be taken under the 1940 Act. Such steps are necessary in terms of Chapter II thereof as is evident from the fact that even in terms of subsection (1) of Section 20 of the Act, an application thereunder would be maintainable by a person who does not intend to proceed under Chapter II praying for filing of arbitration agreement in court.

14. Furthermore, Section 85(2)(a) of the new Act may have to be construed keeping in view the provisions contained in Section 21 of the new Act."

17. In my considered opinion, interpretation placed on Section 85(2)(a) of the Act of 1996 can safely be extended to provisions of Section 26 of the Amendment Act of 2015. Section 21 of the Act of 1996 similarly provides that 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. In the present case not only dispute was referred, but the arbitrator was appointed and on termination of his mandate, again as per arbitration clause, three names were proposed and the applicant refused to select anyone of them as arbitrator. In that situation, the respondents could have legitimately appointed, and have indeed appointed, one of those three as the sole arbitrator and they can, in the meaning of Section 15(2) be held to have acted in accordance with the rules applicable at the time of appointment of original arbitrator. Notwithstanding what is provided in Section 12(5) and Entry 1 and 5 of Schedule Fifth and Seventh of the Amendment Act of 2015, therefore, appointment of arbitrator made by the respondents cannot be faulted and his mandate cannot be ordered to be terminated. Doing so would amount to violation of parameters contained in Section 26 of the Amendment Act of 2015, which has kept the pending arbitral proceedings out of the bounds of Amendment Act of 2015. It is cardinal rule of interpretation of statute that when language of a statutory provision is clear and unambiguous, full effect must be given to it irrespective of the consequences. The courts are not meant to legislate, their function is to interpret the law as enacted by the Legislature.

18. In view of above, prayer of the applicant for terminating mandate of the

arbitrator appointed by the respondents cannot be accepted. The application is dismissed.