

(2010) 09 BOM CK 0044
In the Bombay High Court
Case No : Arbitration Petition No. 6 of 2008

Mr. Ashok M. Kataria and Ashoka Education Foundation	APPELLANT
Vs	
Motiwala Trust for Human Resources Development and Others	RESPONDENT

Date of Decision : 16-09-2010

Acts Referred:

Arbitration Act, 1940 — Section 8(1)
Arbitration and Conciliation Act, 1996 — Section 11, 11(2), 11(3), 11(5), 11(6)

Citation : (2011) 7 ALLMR 57 : (2011) 2 ARBLR 464 : (2011) 2 BomCR 704 :
(2011) 1 MhLj 581 : (2011) 6 RCR(Civil) 2812

Hon'ble Judges : S.J. Vazifdar, J

Bench : Single Bench

Advocate : R.S. Apte and A.A. Garge, for the Appellant; Kunal Vajani and Pranaya Goyal, instructed by Wadia Gandhi and Co., for the Respondent

Judgement

S.J. Vazifdar, J.—The arbitration petition has been filed u/s 11 of the Arbitration and Conciliation Act, 1996.

2. The question that falls for consideration is whether the 1996, Act prohibits absolutely the appointment of a substitute arbitrator when an arbitrator named in the arbitration agreement refuses or is for any reason unable to act even if the agreement does not show that it was intended that the vacancy should not be filled. I have answered the question in the negative.

3. The parties entered into an M.O.U. dated 16.4.2007. Clause (viii) thereof contains an arbitration agreement which reads as under:

viii). In case of any dispute between the parties the same shall be resolved through arbitration by appointment of an Arbitral Tribunal consisting of three arbitrators out of which Retd. Justice Mr. B.C. Gadgil would be the arbitrator appointed by party of the third part and Mr. S.L. Deshpande, Advocate would be the arbitrator appointed by party of the first and second part and the two above named arbitrators would appoint the Presiding Arbitrator to constitute the

Arbitral Tribunal of three arbitrators. The entire proceedings will be done as per the provisions of Arbitration and Conciliation Act, 1996. The venue of arbitration would be at Nashik.

4. By a letter dated 6.12.2007, one of the named arbitrators stated that he would not be able to act as the arbitrator in the matter.

The petitioners by a letter dated 8.1.2008 nominated one Ajay Suhas Misar, an advocate, as an arbitrator in place of the named arbitrator, and requested the said new arbitrator and the other named arbitrator to appoint a presiding arbitrator and proceed with the reference.

By a letter dated 11.1.2008, the other named arbitrator also stated that he would not be able to act as an arbitrator in the matter.

5. The petitioners thereafter filed an application u/s 9. In the affidavit in reply the respondents contended that the arbitration clause had become infructuous as the arbitrators named in Clause (viii) had stated that they were unable to act as arbitrators in the matter. It is in these circumstances that the petition is filed.

6. Mr. Vajani submitted that the named arbitrators having refused to act as arbitrators, the arbitration agreement is exhausted. He submitted that under the 1996, Act there is an absolute bar to a Court substituting an arbitrator in the place of an arbitrator named in the arbitration agreement.

7. The submission is not well founded. Sections 14 and 15 are a complete answer to this submission and read 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 of 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) Unless otherwise agreed by the parties, where an arbitrator is replaced under Sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

8. The present case falls within Section 14(1)(a) of the said Act. I am unable to agree that Section 14(1)(a) would apply only where the named arbitrator formally accepts his appointment as an arbitrator. I see no reason to interpret Section 14(1)(a) of the said Act in this narrow manner. The term "mandate" in Sections 14 and 15 includes the authority of a party or the parties to a person to arbitrate. It does not necessarily posit the acceptance by the person of the mandate. Thus if the person named in the arbitration agreement does not accept the mandate, he becomes unable to perform his functions as an arbitrator within the meaning of Section 14(1)(a). The mandate given to him therefore terminates.

Thus the mandate of the two persons named in Clause (viii) stood terminated upon their having stated that they were unable to act as arbitrators. A party is then entitled to have the vacancy thereby caused to be filled u/s 15(2).

9. There is nothing in the 1996 Act which indicates that where a person named in an arbitration agreement refuses or is unable to act as an arbitrator the vacancy caused thereby cannot be filled if there is no intention not to fill the same or even if the intention is to fill the same. Where the intention is to refer the dispute to the arbitration of a particular person only, it is a composite agreement where, in the absence of such person acting as an arbitrator the arbitration agreement perishes as a whole. Thus upon such person being unable to act as an arbitrator for any reason the agreement to refer the disputes itself gets exhausted and ceases to exist. This is axiomatic for then its existence being dependent upon the named arbitrators acting as such, in their absence there is no agreement to refer the disputes to arbitration at all.

10. However where the parties agree to refer the disputes which may arise to arbitration per se, in principle and not to a particular person or persons only the agreement to refer the disputes to arbitration subsists for it is not dependent upon the named arbitrators accepting the reference. What the court even under the 1996 Act enforces in that case is the agreement to refer the disputes to arbitration.

A view to the contrary is not only not warranted by the provisions of the 1996 Act and is contrary thereto but derogates against the legislative policy underlying

the 1996 Act.

11. A Division Bench of this Court in *Khorshed v. Daryus* (2010) 4 Mh.L.J. 936 referred to this point. The Judgment and in particular the Judgments referred to therein support the view that I have taken. The facts in the Judgment are certainly different from the facts in the present case in that the names of the arbitrators in that case were furnished in an order agreed to by the parties earlier. However the Division Bench approved a Judgment of the then learned Chief Justice of this Court in an application u/s 11 in *Smt. Satya Sahu and others Vs. M/s. Vidarbha Distillers and others*, . The facts in that case are similar to the facts in the present case in that the arbitration clause in the partnership deed named the arbitrators who expressed their inability to act as arbitrators. It was contended there as it was contended before me, that in view their having refused to act as arbitrators the arbitration agreement got exhausted. The learned Chief Justice held:-

12. The next question would be whether power which was exercised u/s 8(1)(b) of the Arbitration Act, 1940, could be exercised under the provisions of the present Act. Learned Counsel, Mr. Manohar, appearing for Respondents No. 1 to 5, vehemently submitted that in such a case there is no similar provision empowering the Court to appoint Arbitrator/Arbitrators. 13. In the present case, in view of the clause in the Deed of Partnership, it is clear that there is an arbitration agreement as provided in Section 7 read with Section 2(1)(a) of the Act. When an arbitration agreement makes a provision for appointment of named persons as Arbitrators and when the named persons refuse to act as Arbitrators, then the procedure which is required to be followed is provided in Section 11 of the Act, that is to say, if the named persons refused to act as Arbitrators, the arbitration clause is not wiped out. What is exhausted is the authority of the named persons to act as Arbitrators. Relevant Sub-sections of Section 11 of the Act read as under

....

Sub-section (2) specifically provides that parties are free to agree on a procedure for appointing the arbitrator or arbitrators. If they fail to agree on a procedure for appointing the Arbitrator or Arbitrators, then Sub-section (5) provides that, in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him. Similarly, in respect of Sub-section (6), where, under an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure, then also, power is given to the Chief Justice to take necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment. Admittedly, in the present case, the agreement on appointment procedure does not provide other means

for securing the appointment of Arbitrators.

14. Aforesaid Sub-sections are to be read along with Sections 14 and 15 of the Act which are as under

....

From a perusal of Section 14(1)(b), it is clear that the mandate of an arbitrator shall terminate if he withdraws from his office or the parties agree to the termination of his appointment. In the present case, the Arbitrators have stated that it was not possible for them to arbitrate in the matter. Sub-section (1) of Section 15 also provides that the mandate of an arbitrator shall terminate where he withdraws from office for any reason and Sub-section (2) further 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. Therefore, these Sub-sections are to be read along with Sub-section (6) of Section 11. Reading Sub-section (6) of Section 11 and Section 15 together, it would be clear that the Chief Justice is required to take necessary measure for appointment of arbitrator, unless the agreement on the appointment procedure provides other means for securing appointment. Admittedly, in the present case, no other means or procedure are prescribed for securing the appointment of Arbitrators. Further under Sub-section (5) of Section 11, if there is failure on the part of the parties to agree on a person for appointment as Arbitrator, then, the Chief Justice is empowered to make the appointment of Arbitrator.

15. Considering this provision, in my view, it is not possible to accept the contention of the learned Counsel for Respondents No. 1 to 5 that there is no similar provision to Section 8(1)(b) of the Arbitration Act, 1940, which empowers the Court to appoint the Arbitrator, in case the appointed Arbitrator refuses to act as Arbitrator. Section 11 provides exhaustive procedure for appointment of Arbitrators in a case where there is an arbitration agreement between the parties. This Section is to be read along with Sections 14 and 15 of the Act which provide for termination of mandate of the Arbitrator in a case where he withdraws from office for any reason to arbitrate the dispute.

The ratio of this judgment is that the vacancy caused by a named arbitrator declining to accept the appointment can be supplied. Though the learned Chief Justice has not specified the particular part of the sections in support of this ratio he has based it on a combined reading of Sections 11, 14 and 15. Especially as the judgment has been approved by the Division Bench, it is binding on me nevertheless. I have in any event come to the conclusion that such a case falls within Section 14(1)(a)).

12. The Division Bench also approved the Judgment of the Allahabad High Court in Dharampal Satyapal Ltd v. Dinesh Enamelled Wire Industries Private Limited (2010) 2 Arb.L.R. 444. In that case also the arbitration agreement had named the arbitrators who refused to enter upon the reference. The court came to the

conclusion that the arbitration agreement reflected the intention of the parties to refer the matter to arbitration. The court held that the vacancy can be filled in u/s 11(6). As the judgment essentially followed the judgment in Satya v. Vidharba Distillers it does not carry the matter further.

13. Mr. Vajani relied upon the judgment of the Supreme Court in S.B.P. and Company Vs. Patel Engineering Ltd. and Another, in support of his submission and contended that the aforesaid judgments of this Court have been impliedly overruled.

14. The Supreme Court did not deal with the question which falls for consideration in the present case. It is important to note the facts including the arbitration clause that fell for the consideration of the Supreme Court in S.B.P. & Co. v. Patel Engg. Ltd. The arbitration clause, read as under:

19. During the continuance of this piece-work agreement/contract or at any time after the termination thereof, if any difference or dispute shall arise between the parties hereto in regard to the interpretation of any of the provisions herein contained or act or thing in relation to this agreement/contract, such difference or dispute shall be forthwith referred to two arbitrators for arbitration in Bombay, one to be appointed by each party with liberty to the arbitrators in case of differences or their failure to reach an agreement within one month of the appointment, to appoint an umpire residing in Bombay and the award which shall be made by two arbitrators or umpire as the case may be shall be final, conclusive and binding on the parties hereto.

If either party to the difference or dispute shall fail to appoint an arbitrator within 30 calendar days after notice in writing having been given by the parties or shall appoint an arbitrator who shall refuse to act then the arbitrator appointed by the other party shall be entitled to proceed with the reference as a sole arbitrator and to make final decision on such difference or dispute and the award made as a result of such arbitration shall be a condition precedent to any right of action against any two parties hereto in respect of any such difference and dispute.

(emphasis added)

Respondent No. 1 appointed an arbitrator in accordance with Clause 19 who declined to arbitrate in the matter. Thereafter Respondent No. 1 appointed another arbitrator who consented to the appointment. The new arbitrator addressed a letter to the arbitrator appointed on behalf of the Appellant suggesting the names of the presiding arbitrator.

Respondent No. 2 contended that Section 15(2) had no application and that in view of the arbitration clause, he was entitled to act as a sole arbitrator. Respondent No. 1 therefore filed an application for the appointment of a third arbitrator stating that it had appointed a new arbitrator in terms of Section 15(2) and that the new arbitrator, Respondent No. 2 therein, was not entitled to act as a sole arbitrator.

The Designated Judge of this Court accepted the contention on behalf of the Respondents and appointed a presiding arbitrator.

In paragraphs 19 and 20, the Supreme Court noted the following rival submissions regarding the scope of Section 15(2).

19. Shri Venugopal emphasised that the appointment of Shri S.L. Jain as a substitute arbitrator was legally impermissible because there is no provision in the arbitration clauses for appointment of a substitute arbitrator. Learned Senior Counsel argued that the provision contained in Section 15(2) of the Act can be invoked for appointment of a substitute arbitrator only if the mandate of an arbitrator gets terminated on account of his withdrawal from office or by or pursuant to an agreement of the parties and not in a case where the arbitrator appointed by either party refuses to act as such and, in any case, the provision contained in that section cannot be invoked for nullifying the agreement between the parties which does not provide for appointment of a substitute arbitrator. In support of his arguments, Shri Venugopal relied upon the judgments in *SBP & Co. v. Patel Engg. Ltd.*, *ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.*, *Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd.* and *Union of India v. Singh Builders Syndicate*.

20. Shri Dushyant Dave, learned Senior Counsel appearing for Respondent 1, invited our attention to the letter dated 1-2-2002 written by Shri S.N. Huddar expressing his inability to act as an arbitrator and argued that his client did not commit any illegality by appointing Shri S.L. Jain as a substitute arbitrator. Shri Dave submitted that the appointment of an arbitrator becomes effective only after he consents for the same and if he refuses to accept the appointment, the party appointing such person as an arbitrator has the freedom to appoint another arbitrator, even though there may not be any express provision to that effect in the agreement. In support of this argument, Shri Dave relied upon the judgment of this Court in *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.*

Ultimately however, the Supreme Court allowed the appeal on the construction of the arbitration clause. It was held that the terms of the arbitration agreement must be adhered to strictly. Clause 19 provided for the consequence of a party not appointing an arbitrator within thirty days namely that the other arbitrator would act as a sole arbitrator. Paragraph 41 of the judgment relied upon by Mr. Vajani reads as under:

41. The learned Designated Judge appointed the third arbitrator because he was of the view that in terms of Section 15(2), a substitute arbitrator could be appointed where the mandate of an already appointed arbitrator terminates. In taking that view, the learned Designated Judge failed to notice that Section 15(1) provides for termination of the mandate of arbitrator where he withdraws from office for any reason or by or pursuant to agreement of the parties and not where the arbitrator appointed by either party declines to accept the

appointment or refuses to act as such and that the term "rules" appearing in Section 15(2) takes within its fold not only the statutory rules, but also the terms of agreement entered into between the parties.

The ratio of the judgment does not deal with the question before me. It was contended that the vacancy arose in view of Section 15(1). Indeed in the case before me there is no question of the named arbitrators having withdrawn from the office as they had not assumed office as arbitrators. The case falls within Section 14(1)(a). Further in the case before me the consequence of the named arbitrator refusing to act as an arbitrator is not provided in the arbitration clause. The judgment of the Supreme Court is therefore clearly distinguishable. It is not an authority for the proposition that the 1996 Act bars the filling in of a vacancy caused by the named arbitrators refusing to act as arbitrators.

15. In the present case there is nothing to indicate that in the event of the named arbitrators being unable to act as arbitrators, their vacancy was not to be filled. Indeed the facts establish that the intention of the parties was that the vacancy was to be filled. The arbitrators named were a former Judge of this Court and an advocate. There were no special circumstances in or for which they were appointed. It is not the case of either party that there was any special relationship between the named arbitrators and themselves. Nor did they have any particular connection with the subject matter of the agreement. They were obviously named due to their expertise in the legal field. This qualification can be met by appointing similarly qualified arbitrators. Thus the clause in fact positively establishes that the vacancy, if any, was to be filled.

16. The remedy then would be u/s 15(2) of the said Act by the appointment of a substitute arbitrator. The appointment is to be according to the rules applicable to the appointment of the arbitrator being replaced. The arbitration clause itself does not provide for the manner in which a substitute arbitrator is to be appointed. The application therefore, has rightly been made u/s 11. In the present case Sub-section (3) of Section 11 would apply, as there is no agreement as stipulated in Sub-section (2) and the arbitration agreement contemplates an arbitral tribunal comprising of three arbitrators.

17. Faced with this, it was submitted that the petitioners were not entitled to name a substitute arbitrator and that only the Court is entitled to appoint such a arbitrator in place of the named arbitrator.

18. I will presume that to be so. That however, is a technicality which can easily be taken care of by this Court appointing the arbitrator even on behalf of the petitioners. Mr. Apte states that the petitioners have no objection to the Court naming the arbitrator even on behalf of the petitioners. I however see no objection to the person suggested by the petitioners being appointed as an arbitrator on their behalf. The respondents have nothing against him personally.

19. I requested the learned Counsel appearing on behalf of the respondents, to suggest the name of an arbitrator on behalf of the respondents, which he has

done. It is clarified that this is without prejudice to the rights of the respondents to challenge this order. It is made clear that their having suggested the name of the arbitrator to be appointed on their behalf ought not to be construed as their having accepted the order.

20. The arbitration petition is disposed of by the following order:

The said Ajay Misar, an advocate practising at Nashik and Mr. Justice B.N. Srikrishna (Retd.) are appointed as arbitrators. The arbitrators shall appoint the presiding arbitrator and proceed with the reference. There shall be no order as to costs.

This order is stayed upto and including 22.11.2010 to enable the respondents to challenge the same.