
(2013) 12 BOM CK 0035

In the Bombay High Court

Case No : Application for Appointment of Arbitrator No. 16 of 2012

M/s. Hira Steel Limited

APPELLANT

Vs

M/s. Prasanna V. Ghotage

RESPONDENT

Date of Decision : 06-12-2013

Acts Referred:

Citation : (2014) 1 ABR 806 : (2014) 5 ALLMR 309

Hon'ble Judges : B.R. Gavai, J

Bench : Single Bench

Final Decision : Allowed

Judgement

B.R. Gavai, J.—The applicant has approached this Court invoking jurisdiction of this Court u/s 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act" for the sake of convenience).

The facts in brief giving rise to the application are as under:--

That a contract for sale and purchase of Indian Iron Ore was entered between the respondent as a seller and the applicant as a buyer. Since according to the applicant there was breach in regard to the terms and conditions of a contract between the parties, an application came to be filed u/s 9 of the said Act before the learned District Judge, Panaji for certain interim reliefs against the respondent. That the said application is pending before the learned District Judge. The applicant thereafter invoked Clause 14 of Memorandum of Understanding ("MOU" for short), vide communication dated 27.1.2012. After that till 16.7.2012, except certain exchange of correspondence between the parties, the matter has not proceeded much further. The applicant has therefore invoked jurisdiction of this Court under sub-section (6) of Section 11 of the Act.

2. Heard Dr. Harsh Pathak, learned counsel appearing on behalf of the applicant and Mr. D. Shirodkar, learned counsel appearing on behalf of the respondent.

3. Dr. Harsh Pathak, learned counsel appearing on behalf of the applicant

submits that arbitration agreement as per MOU provided for appointment of one arbitrator each of the parties. He submitted that the applicant addressed a notice dated 27.1.2012 thereby invoking Clause 14 of the MOU and calling upon the respondent to attend the meeting at hotel Fidalgo, Panaji, Goa on 27.2.2012 at 3.30 p.m. It is however submitted that there has been no positive response from the respondent. He further submitted that the respondent has been delaying the matter on one pretext or the other and avoiding either Arbitral Tribunal to be constituted or being put to function in effective manner. Learned Counsel therefore submitted that this is a fit case wherein this Court should exercise jurisdiction u/s 11(6) of the said Act. He further submitted that in view of the Section 10 of the said Act, this is a fit case wherein this Court should appoint a sole arbitrator. Learned counsel relied on the judgments of the Apex Court in the case of Deep Trading Company Vs. Indian Oil Corporation and Others, , Union of India (UOI) Vs. Singh Builders Syndicate, . He has also relied upon the judgment of the Delhi High Court in the case of Akshaya Jain Vs. Airports Authority of India, Delhi and the judgment of the Andhra Pradesh High Court in the case of K. Venkateswarlu Vs. State of A.P. and Another, .

4. Shri Shirodkar, on the contrary, submits that the Arbitral Tribunal has to be constituted only as per the agreement, between the parties. Learned counsel submits that when the agreement as can be read from Clause 14 of the MOU clearly provides two arbitrator to be appointed by each of the parties and having that been done, it is not permissible for this Court to exercise jurisdiction u/s 11(6) of the said Act.

5. Learned counsel further submits that it is not permissible for this Court while sitting in jurisdiction to appoint an arbitrator u/s 11(6) of the Act to rewrite the contract between the parties. Learned counsel in the alternative submitted that since the Arbitral Tribunal has already come into existence, the jurisdiction under sub-section (6) of Section 11 cannot be exercised by this Court. Learned Counsel relies on judgments of the Apex Court in the case of National Highways Authority of India and Another Vs. Bumihway DDB Ltd. (JV) and Others, ; Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, , The Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Ltd. and Another, and the judgment of the learned single Judge of this Court in the case of Mrs. Perm Hoshang Davierwalla and another v. Mr. Kobad Dorabji Davierwalla and others.

6. To appreciate the rival submission, it would be appropriate to refer to Section 10 of the said Act. It is also relevant to refer to subsection (6) of Section 11 of the said Act which read thus:--

10. Number of arbitrators.

(1) The parties are" free to determine the number of arbitrators, provided that such number shall not be an even number.

(2) Failing the determination referred to in sub-section (1), the arbitral tribunal

shall consist of a sole arbitrator.

Section 11(6) in the Arbitration and Conciliation Act, 1996

(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 him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

7. From the tenor of the arguments, it appears to be undisputed position that there is an agreement between the parties to refer the dispute to the arbitration. It is relevant to refer to Clause 14 of MOU agreement between the parties which reads as under:

It is further agreed that any controversy, claims or dispute arising out to and/or relating to any part of the whole of this agreement or breach thereof any which is not settled between the signatories, themselves, shall be settled and binding by and through arbitration in accordance with the rules and by appointing two arbitrators individually by the parties, any decision and/or award made by the arbitrator shall be final, conclusive and binding on the parties and enforceable in the Court of law in India.

8. It is to be noted that in spite of the notice of this application being duly served, the respondent has chosen not to file any reply to the present application and, as such, the averments made by the applicant have gone uncontroverted. It therefore appears that there is no dispute with regard to the aspect of disputes between the parties being referred to the arbitration. The only dispute appears to be between parties with regard to interpretation of the arbitration clause, is as to whether the parties are required to appoint one arbitrator each or two arbitrators each. However, in the light of the above, I propose that it will not be necessary to go into that aspect of the matter. For considering the rival contentions, it will be necessary to refer to the correspondence between the parties.

9. The applicant has addressed a notice to the respondent dated 27.1.2012 styled as a notice of arbitration. In paragraph 4 of the said notice, it has been specifically stated that the dispute has arisen between the parties as regards the performance of contract and breach of the obligations by the respondent. Paragraph 5 of the notice states regarding invoking the provisions of the said MOU and referring the dispute to arbitration. Vide said notice, the applicant has called upon the respondent to attend at the hotel Fidalgo, Panaji Goa, at 3.30 p.m. on 27.2.2012 for a meeting to appoint the respective arbitrators of the

parties and to initiate arbitration proceedings. Vide paragraph 7, the respondent has specifically called upon the respondent to bring his arbitrator along with his consent in writing to the proposed arbitration, so as to constitute the arbitral panel. Reply has been sent by the respondent on 23.02.2012. The said reply does not dispute about arbitration agreement. It only states that the counsel representing the respondent namely Shri S.A. Samant is unwell and undergoing medical treatment at Pune and old aged mother of the respondent being unwell. Request is therefore made that the proposed matter for arbitration be fixed after 15 days at anytime as per convenience of the parties and the arbitrators.

10. Again a second notice has been sent by the applicant on 9.3.2012 reiterating the contents in the earlier notice. Vide said notice, the applicant has called upon the respondent to attend hotel Fidalgo, Panaji Goa at 3.30 p.m. on 7.4.2012 to appoint respective arbitrator of the parties. It is clearly stated in the said notice, that it was final notice in that regard and failure in to attend this time will result in initiation of appropriate judicial proceedings against the respondent, as per the governing law of the land of India.

11. Since there was no response from the respondent a letter dated 7.4.2012 is addressed by the applicant to the respondent pointing out therein that one Mr. Anil Sapra, Senior Advocate has consented for his appointment as arbitrator by the applicant. The respondent was therefore called upon to attend Hotel Fidalgo, Panaji Goa on 20.4.2012 at 3.30 p.m. so that the proposed two arbitrators can meet to appoint the third arbitrator. Letter dated 7.4.2012 is addressed by the respondent stating therein that the respondent has proposed to hold meeting in the arbitration matter at 1.00 p.m. on 25.4.2013 at Hotel Fidalgo, Panaji, Goa. Vide said letter the respondent has informed the consent regarding Mr. Sangram D. Dessai and one Mr. Sudhir Khandolkar to be arbitrators appointed by the respondent. It is stated in the said letter that in the meeting, third arbitrator could be appointed for completing arbitral panel.

12. Another communication is addressed by the applicant on 12.4.2012 to the respondent pointing out all the earlier correspondence and the respondent has been calling upon by the applicant to intimate as to who is the arbitrator to be appointed by the respondent, of the two persons namely Mr. Sangram D. Dessai or Mr. Sudhir Khandolkar.

13. Again, a communication is addressed on 25.4.2012 by the applicant to the respondent reiterating all the earlier correspondence and the respondent has been informed that meeting is scheduled on 12.5.2012 at 11.30 a.m. at Hotel Fidalgo, Panaji, Goa. Vide said notice, the respondent has been specifically informed that in case failure on the part of the respondent to co-operate in the matter and if there is continuance of avoiding holding arbitration meeting as scheduled, the applicant shall be constrained to initiate appropriate legal proceedings and to move the Court for appointment of arbitrator u/s 11(6) of the said Act.

14. Undated reply is sent by the respondent to the applicant, informing that the respondent is appointing one Mr. Sangram D. Dessai as an arbitrator. It is stated that meeting in the matter of arbitrator will be held at Hotel Fidalgo as per the convenience of both the parties, so that the arbitrators can meet and elect the third arbitrator completing the arbitral panel for further proceedings.

15. A further communication is addressed on 21.6.2012 by the applicant referring to all the earlier communications and informing the respondent that the next meeting is proposed to be held on 7.7.2012 at 11.00 a.m. at Hotel Fidalgo, Panaji, Goa. In paragraph 4, it is again reiterated that in case of failure on the part of the respondent, the applicant shall be constrained to initiate appropriate legal proceedings and move the Court as per provisions of the Arbitration and Conciliation Act, 1996.

16. It has been averred in paragraph 39 of the application as under:--

That thereafter the petitioner has made repeated efforts to carry out the arbitration proceedings but in vain. The petitioner further scheduled a meeting to be held for the appointment of the third arbitrator vide letter dated 21.06.2012 on 07.07.2012 at 11 a.m. at Hotel Fidalgo, Panaji, Goa, whereby once again the respondent did not turn up himself and without any intimation of such absence, sent a representative seeking adjournment for further fifteen days in the arbitration proceedings. This clearly shows there unwillingness to carry out the arbitration proceedings in a legitimate manner and are using tactics to delay the process.

17. It is thus clearly stated by the applicant that though on the said date i.e. 7/7/2012, the applicant was present, the respondent was not present but only sent representative seeking an adjournment. As already stated hereinabove. the averments made on affidavit by the applicant have not been replied to by the respondent and, as such, the said averments have gone unchallenged and untraversed.

18. The Apex Court in the case of Union of India (supra) was considering an appeal arising out of an order passed by Delhi High Court, appointing a retired Judge of High Court as sole arbitrator. In the said case it was contended on behalf of the respondent that the appointment of arbitrator should be done only under Clause 64 of the said Act, which requires two serving Gazetted Railway Officers of equal status being appointed as Arbitrators, one by the contractor from a panel made available by the General Manager of Northern Railways and the other by the Northern Railways, and the two arbitrators so appointed, in turn, will appoint an Umpire. A similar argument which is advanced herein is also advanced in that case. In the said case, the High Court had appointed a sole arbitrator, finding that no useful purpose will be served by again reconstituting a three Member Arbitral Tribunal in accordance with Clause 64 of the said Act. The Apex Court has observed in paragraph 15 thus:--

The object of the alternative dispute resolution process of arbitration is to have

expeditious and effective disposal of the disputes through a private forum of parties" choice. If the Arbitral Tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such Tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members of the Arbitral Tribunal or by failing to take steps expeditiously to replace the arbitrators in terms of the Arbitration Agreement, the Chief Justice or his designate, required to exercise powers u/s 11 of the Act. can step in and pass appropriate orders.

19. It can thus clearly be seen that the Apex Court has held that when Arbitral Tribunal is made non-functional on account of the action or inaction or delay on behalf of the parties, the Chief Justice or his designate, equipped with the powers u/s 11 of the Act, can step in and pass appropriate orders.

20. It will also be relevant to refer to the observation made by the Apex Court in the paragraph 19 of the said judgment which reads thus:--

The delays and frequent changes in the Arbitral Tribunal make a mockery of the process of arbitration. Having regard to this factual background, we are of the view that the appointment of a retired Judge of the Delhi High Court as sole Arbitrator does not call for interference in exercise of jurisdiction under Article 136 of the Constitution of India.

21. In that view of the matter, I find that parties have failed to determine number of arbitrators to constitute an Arbitral Tribunal under sub-section (1) of Section 10 of the said Act and as such this is a fit case wherein this Court should direct that Arbitral Tribunal shall consist of sole arbitrator in view of the provisions of sub-section (2) of Section 10 of the said Act.

22. Observing thus the Apex Court dismissed the appeal challenging the exercise of jurisdiction by the learned Chief Justice of Delhi High Court.

23. In the case of Deep Trading Company Vs. Indian Oil Corporation and Others, , the Apex Court was considering the question as to whether the respondent No. 1 herein had forfeited his right to appoint the arbitrator having not done so after the demand was made and till the appellant had moved the Court u/s 11(6) of the Act. The Apex Court observed thus in paragraph 22 thus:--

We are afraid that what has been stated above has no application to the present fact situation. In Newton Engineering, this Court was not concerned with the question of forfeiture of right of the Corporation for appointment of an arbitrator. No such argument was raised in that case. The question raised in Newton Engineering was entirely different. In the present case, the Corporation has failed to act as required under the procedure agreed upon by the parties in Clause 29 and despite the demand by the dealer to appoint the arbitrator, the Corporation did not make appointment until the application was made u/s 11(6). Thus, the Corporation has forfeited its right of appointment of an arbitrator. In this view of the matter, the Chief Justice ought to have exercised his jurisdiction u/s 11(6) in

the matter for appointment of an arbitrator appropriately. The appointment of the arbitrator by the Corporation during the pendency of proceedings u/s 11(6) was of no consequence.

24. It can thus be seen that the Apex Court held that if a party fails to make an appointment of an arbitrator within a stipulated period, it forfeits the right to make an appointment and the Chief Justice is required to exercise his powers u/s 11(6) of the Act.

25. It would also be relevant to refer to paragraph 35 of the Judgment of Delhi High Court in the case of Askhaya Jain (supra):--

All the above provisions show that the dominant feature underlying the 1996 statute is expeditious disposal. In particular even Section 11(4) & Section 11(5) clearly set out a 30 days time limit for taking action by a party when more than one arbitrator is to be appointed or parties have failed to agree upon a procedure. Thus even though Section 11(6) does not stipulate an explicit time limit, yet inherent in the 1996 enactment and other subsection of Section 11 is the element of expedition. Section 11(4) & (5) certainly provides a guidance if not a limit to the time taken by the appointing authority. By no stretch of imagination can a period of about 11 months, taken by the respondent after 5th July, 1999, when the first demand for appointment of an arbitrator was made, be considered reasonable.

26. It can thus be seen that Delhi High Court has also taken a view, that expeditious disposal is a dominant feature underlying the said Act.

27. The Andhra Pradesh High Court in the case of K. Venkateswarlu (supra), has taken a view that once the agreement with regard to the appointment of the arbitrators fails between the parties, the Chief Justice or his designate can appoint a sole arbitrator even in respect of the parties where parties agreed upon to have dispute resolved by the panel of arbitrator.

28. Insofar as the judgment of the Apex Court in the case of National Highways Authority of India and Another Vs. Bumihiway DDB Ltd. (JV) and Others, on which the learned counsel for the respondent heavily relies, the Apex Court has held that unless the procedure for appointment of arbitrator provided for in a contract is exhausted, it is not permissible for the High Court to assume a jurisdiction to appoint an arbitrator u/s 11(6) of the Act. There can be no quarrel with the said proposition of law as it is well settled. In the said case, the High Court had come to the conclusion that as per the procedure prescribed in the contract between the parties the appointment of the presiding arbitrator was required to be done by IRC. In spite of the said agreement and ignoring the same, the High Court had appointed presiding officer. As such the Apex Court held that in view of the specific agreement between the parties with regard to the procedure, the High Court could not have had invoked powers u/s 11(6) of the Act. In that view of the matter the said judgment would not be applicable to the facts of the present case.

29. Insofar as the judgment in the case of Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others, is concerned, the same is relied upon by the learned counsel for the respondent in support of a proposition that number of arbitrator can be even and in derogation of the provisions of Section 10 of the said Act.

30. However, the facts in the said case were totally different. In the said case, the parties thereto had agreed for arbitration by two arbitrators. After having submitted to the arbitration and after permitting the arbitrators to pass an award, an objection was taken u/s 34(2) of the Act that the award passed by an even number of arbitrators, was in contravention of Section 10 of the said Act and was void in law. In the facts of the said case, the Apex Court found that having agreed for arbitration for even number of persons and submitted to their jurisdiction it was not permissible to raise such an objection after an award was passed. In that view of the matter, the said judgment is not applicable to the facts of the present case.

31. In the case of The Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Ltd. and Another, , which judgment is relied on in support of a proposition that once a contract is executed between the parties it is not permissible for the Court to rewrite the same. There can be no quarrel with the said proposition of law also. However, the question that falls for consideration is that once an agreement between the parties regarding appointment of arbitrator fails can this Court not exercise powers under sub-section (67) of Section 11 of the Act.

32. Insofar as the judgment of the learned single Judge of this Court in the case of Mrs. Perin Hoshan Davierwalla (supra) is concerned, the question that came for consideration was as to whether the parties can invoke jurisdiction u/s 11 of the Act de hors the agreement as entered between them in partnership deed. With great respect to the learned counsel, the said question does not fall for consideration in the present matter.

33. In my respectful view, the only question that requires to be considered in the present case is as to whether on account of action or inaction on behalf of the parties or when the parties have failed to take steps for making Arbitral Tribunal functional, whether this Court can step in, in view of the provisions of Section 11(6) of the said Act for appointment of an arbitrator or not.

34. The provisions of Section 10 in the present case will have to be therefore construed in the background of the factual matrix that arises in the matter.

35. As already discussed hereinabove, not only the respondent is taking contradictory stand but he is making every attempt possible not only to protract but to frustrate the agreement entered between the parties. On one hand it is sought to be argued by the respondent that arbitration agreement provides two arbitrators each to be appointed by each of the parties. In the same breath the respondent has an audacity to address communication stating therein that he is appointing Mr. Sangram B. Dessai as his arbitrator and the said arbitrator so also

arbitrator appointed by the applicant can meet and elect the third arbitrator. It can thus be clearly seen that the respondent has been taking self contradictory stands. From the correspondence which has been placed on record and discussed in detail by the hereinabove, it is clear that except addressing certain communications, the respondent has not done anything in making arbitration proceedings functional. Every attempt has been made by him to protract and frustrate the arbitration agreement. Not only this, now it is uncontraverted position as can be seen from paragraph 39 of the application, that even on the last date which was fixed on 27.7.2012, the respondent failed to remain present to proceed further with the arbitration. The tenor of communication addressed by the respondent clearly shows that he goes on to say that the date convenient to both the party be fixed for arbitration. However, he nowhere goes to state that which particular date is convenient to him. On the contrary, whatever dates are fixed he has chosen either to remain absent or to seek an adjournment. It is thus clear that in the facts of the present case the agreement as entered into between the parties has become non-functional and not workable.

36. In that view of the matter, I find that since there is no effective determination by the parties. under sub-section (1) of Section 10 of the said Act, the Arbitral Tribunal shall consist of sole arbitrator in terms of Section 10 of the said Act. I find that the facts of the present case are almost similar with the facts before the Apex Court in the Union of India (supra). In the present case, on account of neglect or failure of duty and non-co-operative attitude on behalf of the respondent, firstly the Arbitral Tribunal has not come into existence and even for a moment it is assumed that the same has come to an existence, the same has become totally non-functional. At the cost of repetition, it is to be said, that this is all because of the conduct of the respondent.

37. In that view of the matter, I find that this is a fit case wherein this Court should exercise jurisdiction u/s 11(6) of the Act and appoint a sole arbitrator for deciding the dispute between the parties.

38. In that view of the matter, the application is allowed. The dispute between the parties is referred to arbitration. Hon''ble Shri Justice A.P. Lavande (retired) is appointed as an arbitrator. The arbitrator shall determine his fees. The parties to bear his fees in equal proportion.

39. The Registry to communicate the order to the learned Arbitrator. In the facts and circumstances of the case, no order as to costs.