
(2015) 05 UK CK 0012

In the Uttarakhand High Court

Case No : Arbitration Petition No. 04 of 2014

Ram Mohan Agrawal

APPELLANT

Vs

Hindustan Petroleum Corporation Ltd. and Others

RESPONDENT

Date of Decision : 12-05-2015

Acts Referred:

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

Citation : (2015) 05 UK CK 0012

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Advocate : Arvind Vashistha, Senior Advocate assisted by Vivek Pathak, for the Appellant; Siddhartha Sah, Advocates for the Respondent

Judgement

Sudhanshu Dhulia, J.—Mr. Arvind Vashistha, Senior Advocate assisted by Mr. Vivek Pathak, Advocate, present for the petitioner.

2. Mr. Siddhartha Sah, Advocate, present for the respondents.

3. Supplementary affidavit filed today is taken on record.

4. The petitioner and respondents had entered into an agreement by which the present applicant was given a dealership of respondent, which is a petroleum company. Admittedly, there is an arbitration clause (Clause 68), which reads as under:--

"68. ANY DISPUTE OR DIFFERENCE OF ANY NATURE WHATSOEVER OR REGARDING ANY RIGHT, LIABILITY, ACT OMISSION OR ACCOUNT OF ANY OF THE PARTIES HERETO ARISING OUT OF OR IN RELATION TO THIS AGREEMENT SHALL BE REFERRED TO THE SOLE ARBITRATION OF THE MANAGING DIRECTOR OF THE CORPORATION, OR OF SOME OFFICER OF THE CORPORATION WHO MAY BE NOMINATED BY THE MANAGING DIRECTOR. THE DEALER WILL NOT BE ENTITLED TO RAISE ANY OBJECTION TO ANY SUCH ARBITRATOR ON THE GROUND THAT THE ARBITRATOR IS AN OFFICER OF THE CORPORATION OR THAT HE HAS TO DEAL WITH THE MATTERS TO WHICH THE CONTRACT RELATES

OR THAT IN THE COURSE OF HIS DUTIES AS AN OFFICER OF THE CORPORATION HE HAD EXPRESSED VIEWS ON ALL OR ANY OF THE MATTERS IN DISPUTE OR DIFFERENCE. IN THE EVENT OF THE ARBITRATOR TO WHOM THE MATTER IS ORIGINALLY REFERRED BEING TRANSFERRED OR VACATING HIS OFFICE OR BEING UNABLE TO ACT FOR ANY REASON THE MANAGING DIRECTOR AS AFORESAID AT THE TIME OF SUCH TRANSFER, VACATION OF OFFICE OR INABILITY TO ACT, SHALL DESIGNATE ANOTHER PERSON TO ACT AS ARBITRATOR IN ACCORDANCE WITH THE TERMS OF THE AGREEMENT. SUCH PERSON SHALL BE ENTITLED TO PROCEED WITH THE REFERENCE FROM THE POINT AT WHICH IT WAS LEFT BY HIS PREDECESSOR. IT IS ALSO A TERM OF THIS CONTRACT THAT NO PERSON OTHER THAN THE MANAGING DIRECTOR OR A PERSON NOMINATED BY SUCH MANAGING DIRECTOR OF THE CORPORATION AS AFORESAID SHALL ACT AS ARBITRATOR HEREUNDER. THE AWARD OF THE ARBITRATOR SO APPOINTED SHALL BE FINAL, CONCLUSIVE AND BINDING ON ALL PARTIES TO THE AGREEMENT, SUBJECT TO THE PROVISION OF THE ARBITRATION ACT, 1940, OR ANY STATUTORY MODIFICATION OR RE-ENACTMENT THEREOF AND THE RULES MADE THEREUNDER AND FOR THE TIME BEING IN FORCE SHALL APPLY TO THE ARBITRATION PROCEEDING UNDER THIS CLAUSE.

THE AWARD SHALL BE MADE IN WRITING WITHIN SIX MONTH AFTER ENTERING UPON THE REFERENCE OR WITHIN SUCH EXTENDED TIME NOT EXCEEDING FURTHER FOUR MONTHS AS THE SOLE ARBITRATOR SHALL BY A WRITING UNDER HIS OWN HANDS APPOINT."

5. According to the petitioner since a dispute arose between the parties in the year 2009, he approached the respondents/Oil Company under the above provision and the Managing Director of the Oil Company Petroleum appointed an arbitrator on 3rd December, 2009. The arbitrator was an employee of Oil Company, namely, Mr. R.N. Mathur, Chief Manager of the Company. However, since the arbitrator was not proceeding with the matter inspite of reminders, present applicant/petitioner was constrained to file present arbitration petition under Section 11 (6) of the Arbitration and Conciliation Act. Inter alia, his challenge was that the mandate by the arbitrator has come to an end ipso facto when he failed to act as an arbitrator, therefore, a new arbitrator be appointed.

6. The Hon"ble Chief Justice vide order dated 17.05.2014, after filing of the counter affidavit, passed following order dated 17.05.2014:--

"Until further orders, the Arbitrator is restrained from functioning as such Arbitrator."

7. Thereafter, the matter was listed before the Hon"ble Acting Chief Justice on 30.06.2014, on 24.04.2015 and 05.05.2015. Now an affidavit has been filed before this Court by the Oil Company stating that the arbitrator appointed by the Managing Director of the Corporation has reached the age of superannuation and retired from service on 30th June, 2014 and they may be permitted to appoint

another arbitrator in accordance with the terms agreed between the parties.

8. Now the question before this Court is as to whether an arbitrator can be appointed by this Court or not? As per the terms and agreement between the parties, an arbitrator has to be a person who is appointed by the Managing Director of the Oil Company.

9. The contention of the learned counsel for the petitioner would be that since the respondents have failed to act as required under the procedure agreed between the parties for appointment of an arbitrator, they should now not be given an opportunity to appoint arbitrator and let the Court appoint an arbitrator. The learned counsel for the Oil Company resist the claim of the petitioner and has cited a case, namely, Yashwith Construction P. Ltd. Vs. Simplex Concrete Piles India Ltd. and Another, AIR 2006 SC 2798 : (2006) 3 ARBLR 55 : (2006) 6 CompLJ 58 : (2006) 7 SCALE 48 : (2006) 6 SCC 204 : (2006) 4 SCR 96 Supp : (2006) AIRSCW 3808 : (2006) 5 Supreme 461 , wherein it has been stated that in case an arbitrator appointed as per the procedure agreed between the parties fails to act upon the arbitral proceedings then the arbitrator has to be replaced and another arbitrator be appointed as per the same procedure, hence it would mean that now another arbitrator can be appointed only by the Managing Director of the Oil Company.

10. Learned counsel for the petitioner, on the other hand, would argue that the peculiar facts of the present case would suggest that the parties in the present case particularly the respondents clearly failed to act as required under the procedure and, therefore, the arbitrator can only be appointed by this Court.

11. Heard the learned counsels for both the parties on this issue.

12. The learned counsel for the petitioner has cited a recent judgment of Hon''ble Apex Court rendered in the case of Union of India (UOI) Vs. U.P. State Bridge Corporation Ltd. , wherein the Hon''ble Supreme Court held while distinguishing the case relied upon by the Oil Company that though ordinarily the new arbitrator also be appointed in accordance with the procedure agreed between the parties but this procedure has to be deviated in case where one of the parties has committed default by not acting in accordance with the procedure prescribed. The Hon''ble Apex Court in the above cited judgment has traced the entire history of the arbitration law on this subject and has come to the conclusion that the normal practice earlier had been that a new arbitrator be appointed as per the rules agreed between the parties but this procedure has been diluted in the subsequent judgments of Supreme Court and in a given contingency, particularly, where there is failure on the part of the respondent to act as per the procedure agreed between the parties, arbitrator should be appointed by the High Court. Paragraph 19 of the aforesaid judgment reads as under:--

"19. The appointment of the arbitrator by the Court, of its own choice, departing from the arbitration clause, is therefore not unknown and has become an

acceptable proposition of law which can be termed as a legal principle which has come to be established by a series of judgments of this Court. Reasons for debating such a course of action are not far to seek and already taken note of above."

13. Clearly, therefore, in this case not only the arbitrator though appointed as far back on 03.12.2009 did not proceed with the matter and the petitioner had filed present application under the Arbitration and Conciliation Act, before this Court in the year 2014 wherein an interim order was passed by this Court on 17.05.2014, the inaction on the part of the Oil Company is clear inasmuch as the fact that the arbitrator appointed by it has already retired from service and this information was not brought before this Court in time nor is there any application on record, which may suggest that there was any effort on the part of the Oil Company to proceed with the matter in accordance with the procedure agreed between the parties. This factor that the arbitrator appointed by the Managing Director way back in the year 2009 has retired from service on 30.06.2014 has been brought before this Court by means of an affidavit as late as on 05.05.2015. Therefore, there is a total inaction on the part of the Oil Company to act as per the procedure prescribed by them.

14. In view thereof, this Court is of the considered view that the arbitrator must be appointed by this Court. Therefore, three weeks time is granted to both the parties to suggest a name of the arbitrator to this Court, who can act as an arbitrator in the matter.

15. List this matter on 04.06.2015 in a daily cause list.