
(2011) 02 J&K CK 0018

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 1373 of 2010

Sai Advertisers

APPELLANT

Vs

Jammu Municipal Corpn. and Others

RESPONDENT

Date of Decision : 28-02-2011

Acts Referred:

Jammu and Kashmir Arbitration and Conciliation Act, 1997 — Section 12(3)(a), 34

Citation : (2011) 2 JKJ 546

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hasnain Massodi, J.

Heard

Admit.

1. The petition, at the request of learned Counsel for the parties is taken up for final disposal.

2. The Petitioner, through medium of instant writ petition, calls in question Arbitration Clause (clause 14) in Licence Deed dated 25 April 2008

executed by and between the Petitioner and Respondent No. 1 on 25 April 2008, in so far as it relates to appointment of Respondent No. 2 as

sole arbitrator on the ground of being violative of Section 12(3)(a) J & K Arbitration and Conciliation Act 1997 (hereinafter referred to as Act).

The Petitioner also throws challenge to order dated 20 November 2010 passed by Respondent No. 2 in the arbitration proceedings tilted SAI

Advertisers v. Jammu Municipal Corporation. The Petitioner further prays for a writ of prohibition prohibiting Respondent No. 2 from proceeding

with the arbitration proceedings and an order directing appointment of an independent arbitrator in accordance with Sections 7, 8 and 11 for resolution of the dispute claimed to have arisen out of the aforementioned contract.

3. The background facts are as under:

The Petitioner, a partnership firm engaged in advertising business, responded to a tender notice dated 25 February 2008 floated by Respondent

No. 1 inviting offers for advertising rights in and within extended areas of Jammu Municipal Corporation. The Petitioner succeeded in his bid and

was given advertising rights within the area notified in the aforementioned NIT in consideration of payment of annual fee of Rs. 91,11,111/- to be

deposited within the stipulated time. The Petitioner claims to have deposited the agreed amount of Rs. 91,11,111/- with the Respondent

Corporation on 16 April 2008 whereafter a formal Licence Deed was executed by the Respondent Corporation in favour of the Petitioner on 25

April 2008. The Petitioner's case is that the Petitioner was not in a position to exercise exclusive advertising rights within the notified area till 14

October 2008 because of a writ petition touching the matter, filed by M/S Selvel Media Services Private Limited and also because of failure of the

Respondent Corporation to remove existing advertising material hoisted and displayed unauthorisedly within the notified area. It is pleaded that the

Respondent corporation, in terms of the Licence Deed, was under a contractual obligation to remove such material so as to enable the Petitioner to

exercise exclusive advertising rights within the aforesaid notified area. It is pleaded that the Petitioner was also deprived of right otherwise available

under the Licence Deed in question to exercise and enjoy the advertising rights in Trikuta Nagar area on the plea that Respondent corporation was

yet to receive a "No Objection Certificate" (NOC) from Jammu Development Authority. The Respondent Corporation, it is pleaded, despite

inability of the Petitioner to enjoy the exclusive rights of advertising within the notified area because of litigation and thereafter failure to take steps

to make possible exercise of such rights, laid a demand of full licence fee amount for the year 2010-11, in violation of the terms and conditions of

the Licence Deed. The events set out in detail in the petition, according to the Petitioner, have resulted in a dispute between the parties arising out

of the contract (Licence Deed in question) and the Respondent Corporation in terms of Clause 14 of the Licence Deed has referred the dispute to

Respondent No. 2 for resolution/settlement.

4. The Petitioner admits to have been conveyed the decision regarding appointment of Respondent No. 2 as sole arbitrator vide notice dated 29

September 2009 and asked to appear before the arbitrator on 1st. October 2009 at 11 AM. It is averred that on second date of hearing before

the arbitrator i.e. 10 November 2010 the Petitioner found the arbitrator (Respondent No. 2) visibly partisan and not ready to conduct the

proceedings in an impartial and non-partisan manner. It is insisted that having regard to the relationship between Respondent corporation and

Respondent No. 2 commissioner of Respondent corporation, the Petitioner has a reason to believe that Respondent No. 2 would not be

independent and impartial; that the Petitioner laid formal application on 16 November 2010 before Respondent No. 2 u/s 12(3)(a) of the Act

urging therein that Respondent No. 2 because of his being an employee of the Respondent No. 1 was disabled from discharging his duties as

arbitrator in terms of said provision and requested the Respondent No. 2 to desist and refrain from proceeding any further with the arbitration. The

Respondent is said to have vide order dated 20-11-2010 dismissed the application in a slipshod manner.

5. The Petitioner's case is that the Arbitration Clause (Clause 14 of the Licence Deed) to the extent it relates to appointment of commissioner of

the Respondent No. 1 as sole arbitrator offends Section 12(3)(a) of the Act, because of the relationship between the Respondent No. 1 and

Respondent No. 2, and that the Arbitration clause to said extent is non-est in law and void ab initio. It is pleaded that as a sequel to the ground

questioning validity of Arbitration clause to the said extent, the appointment of Respondent No. 2 as sole arbitrator is also violative of Section

12(3)(a) of the Act. The Petitioner also assails the order dated 20-11-2010 passed by Respondent No. 2 on Petitioner's application u/s 12(3)(a)

of the Act on the grounds that it suffers from non-application of mind and mis-appreciation of the settled legal position. The Petitioner against the

backdrop of above factual matrix seeks reliefs summarized above.

6. The petition is opposed on the grounds that the Petitioner is estopped from

questioning validity of Arbitration Clause (Clause 14) of the Licence deed dated 25 April 2004 to the extent it relates to appointment of Respondent No. 2 as sole arbitrator, inasmuch as the Petitioner has been a party to the Licence Deed and has agreed to the appointment of Respondent No. 2 as the sole arbitrator. The Petitioner, it is insisted, having failed in his challenge to Arbitration clause has in terms of Section 13(4) of the Act to participate in the arbitration proceedings and throw challenge, if so required, to the arbitral award u/s 34 of the Act. It is pleaded that in terms of Section 5 of the Act, the writ petition is not maintainable inasmuch as an effective and alternate remedy is available u/s 34 of the Act. The Respondents insist that the Petitioner after enjoying the rights available under the Licence Deed for the years 2009 and 2010, is using litigation as a tool to avoid payment of licence fee for the third year and obtained an exparte order of injunction in a petition filed u/s 9 of the Act before Principal District Judge, Jammu, later dismissed as withdrawn vide order dated 18 November 2009. The Respondent No. 3 is said to have already served notice No. JMC/RB/2216-18 dated 1st. October 2010 on the Petitioner requiring him to deposit the licence fee of Rs. 91,11,111/- within seven days. It is averred that the Petitioner to avoid the payment has first resorted to litigation before the Principal District Judge, Jammu and thereafter filed the instant petition to use it as a device to avoid deposit of the licence fee. It is denied that Respondent No. 2 at any stage of the arbitral proceedings acted in a partisan or partial manner or is otherwise not in a position to act in a non-partisan and impartial manner. The order dated 20-11-2010 whereby the Respondent No. 2 dismissed the Petitioner's application u/s 12(3)(a), according to the Respondents, is in conformity with law. It is insisted that a party aggrieved of appointment of arbitrator can press into service Section 12 of the Act instead of resorting to litigation not permissible under the Act.

7. Heard and considered.

8. J&K Arbitration and Conciliation Act 1997 is a complete code in itself dealing with all aspects of domestic arbitration. As evident from its

preamble, the Act is a legislative effort to consolidate and amend the law relating to domestic arbitration and the matters connected therewith and

incidental thereto. Sections 12 and 13 of the Act reflect intention of the

legislature to ensure transparent and bias free arbitral proceedings and give the parties an option to voice and get addressed their apprehensions regarding partiality of the arbitral tribunal at the earliest so that either of parties to a dispute do not feel compelled to participate in the arbitral proceedings despite their reservations as regards impartiality and independence of arbitral tribunal. Section 12 (3) (a) confers right on a party to a dispute referred to arbitration, to challenge the arbitrator if "circumstances exist that give rise to justifiable doubts as to the independence or impartiality of the arbitrator". Having regard to the present controversy the focus is to remain on Section 12(3)(a) of the Act only and reference to other grounds of challenge available u/s 12 is unwarranted. Section 13 of the Act lays down the procedure to be followed in the event either of the parties decides to challenge the arbitrator. Section 13(1) of the Act gives freedom to the parties to agree on a procedure for challenging an arbitrator. However, such procedure must not debar arbitral tribunal from continuing with the arbitral proceedings, in the event the challenge thrown is not successful. In absence of agreed procedure for challenging the arbitrator, Section 13(2) steps in and requires a party intending to challenge an arbitrator to send a written statement of the reason for the challenge to the arbitral tribunal within 15 days of becoming aware of the constitution of arbitral tribunal or after it becomes aware of any circumstances referred to in Section 12(3)(a) of the Act. Once the party signifies its intention to challenge an arbitrator, the matter may take any of the three courses mapped out in Section 13(3) & (4) of the Act. The arbitrator may in view of the challenge thrown, of his/her own withdraw from his/her office or the other party may agree to the challenge. In both cases the controversy is to end and the voluntary relinquishment of office by the arbitrator or agreement of the opposite party result in displacement/removal of the arbitrator and pave way for appointment of a new arbitrator. However, if neither the arbitrator withdraws from his office nor does the party agree to the challenge, the arbitral tribunal is to consider the challenge and if on consideration merit is found in the challenge, the arbitral tribunal is to step aside for a new arbitral tribunal to step in. In case the challenge is not successful the arbitral tribunal in terms of Section 13(4) of the Act is to continue with the arbitral proceedings and make arbitral award. In last case

the party challenging the arbitrator has to wait till the arbitral award is made and to file an application, if necessary, for setting aside the arbitral

award in accordance with Section 34. The brief survey of the procedure laid down under Sections 12 and 13 of the Act is made to appreciate, in

right perspective, the arguments advanced by learned Counsel for the parties in support of their respective stands.

9. It is argued by learned Counsel for the Petitioner that the case set up by the Petitioner in the present petition is not to be mixed up and/or

confused with right to challenge the Arbitrator available to a party, u/s 12(3)(a) of the Act. It is submitted that the petition is not an effort to

exercise rights available u/s 12(3)(a) of the Act and thus adherence to procedure u/s 13(3)(4) is neither called for nor is order dated 20 November

2010 rejecting challenge to the arbitrator, going to have any negative fallout on the case projected in the petition.

10. Learned Counsel for the Petitioner insists that the Arbitration Clause (Clause 14) of the Licence Deed dated 25 April 2004 is in conflict with

and violative of Section 12(3)(a) of the Act to the extent it relates to appointment of Respondent No. 2 as arbitrator and is thus liable to be

quashed and so are the orders made by the arbitrator after entering upon the reference including order dated 20.11.2010 disallowing the

Petitioner's application u/s 12(3)(a) of the Act. It is further submitted that as a sequel to the quashment of the arbitration clause to the extent it

relates to the appointment of Respondent No. 2 as arbitrator, a new arbitrator in terms of Section 11(6) of the Act is required to be appointed.

The learned Counsel for the Petitioner to bring home his point seeks to draw support from law laid down in:

AIR 2010 SCW 3868 Danel (Proprietary Ltd) v. Bharat Electronic Limited and Anr.

Pimpri Chinchwad Municipal Corporation and Others Vs. Gayatri Construction Company and Another, .

2007 (3) Supreme 52 M/s Popcorn Entertainment and Anr. v. City Industrial Development Corp. and Anr.

Chief of Army Staff and Others Vs. Major Dharam Pal Kukrety,

2006 (1) Supr 575 L.K. Verma v. HMT Limited and Anr.

Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, ; Kartar Singh Vs. State of Punjab, .

11. Learned Counsel for the Respondents on the other hand argues that the Petitioner having already challenged the arbitrator in accordance with

Section 13 of the Act and his challenge having not met success, the only course available to the Petitioner is to allow the arbitrator to take the

arbitral proceedings to their logical conclusion and thereafter make an application u/s 34 for setting aside the arbitral award. It is insisted that the

present proceedings are nothing except a device to delay the arbitral proceedings and avoid payment of licence fee despite the same having since

fallen due. Learned Counsel for the Respondents to buttress his argument places reliance on law down in:

Radhakrishna Agarwal and Others Vs. State of Bihar and Others, . (para 10)

Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, . (para 11)

Pimpri Chinchwad Municipal Corporation and Others Vs. Gayatri Construction Company and Another, (paras 11, 12, 13 and 16)

(2005) 8 SCC 618 SBP & Company v. Patel Engineering Ltd. and Anr. (paras 45, 46, and 47)

12. The conceptual framework of arbitration rests on the edifice of contract. The arbitration as a mode of dispute resolution is in essence an

extension of the right to enter into a contract. While the State in exercise of its sovereign power and in discharge of its fundamental obligation

strives to provide an efficient and result oriented justice delivery system, it at the same time gives the parties freedom to agree on a mode of dispute

resolution other than one provided by the State and even to appoint a person(s) in whom the parties repose confidence to settle their dispute(s). It

is in this context that Section 28 Exceptions 1 and 2 Contract Act take out, the contract to refer existing or future dispute arising out of a contract,

outside the ambit of prohibition embodied in Section 28 against restraint of legal proceedings.

13. The State while prescribing procedure to govern fundamental aspects of arbitration, gives freedom to the parties to agree on some of its facets.

Section 13(1) of the Act is a ready example of such freedom. Having said so, it would be appropriate to dwell on some of the factual aspects of

the present case. The Petitioner of his own free will and volition put his hands unto the Licence Deed dated 25 April 2008, Clause 14 whereof

binds down the parties to settle any dispute arising out of the contract, through arbitration of Commissioner, Jammu Municipal Corporation. The

Petitioner acted upon the Licence Deed and drew benefits, whatever due to the Petitioner under the Licence Deed from the date of its execution,

initiated the arbitration proceedings way back in the year 2009 as is evident from minutes of the proceedings; even pressed into service Section 9

of the Act to seek interim measure from the Principal Civil Court (Principal District Judge) at Jammu and woke up to find the Arbitration Clause in

conflict with Section 12(3) (a) of the Act only after the Arbitration proceedings were pending for more than a year. The petition u/s 9 was

dismissed as withdrawn and the application u/s 13(4) challenging the arbitrator met the same fate. Though failure of the Petitioner to call in

question, vires of Arbitration Clause soon after Licence Deed was executed may not by itself have a negative spill over on the Petitioner's case, yet

the facts and events assume significance being reflective of the conduct of the Petitioner, and may help us to understand what is up his sleeve.

14. The right to enter into a contract to refer existing or future dispute to Arbitration available u/s 28 Exceptions 1 and 2 does not debar reference

of such dispute to an employee or relation of either of the parties. Relationship or employment, by itself, is not a disqualification for appointment as

Arbitrator. The Arbitration Agreement/Clause that provides for reference to a dispute to an officer/Director, or to a relation of one of the parties

has been held as valid as long as the parties execute the agreement having full knowledge of such relationship. The sanctity attached to a contract is

acknowledged to an extent that an award by a party himself has been held to be valid, if the other party has agreed to refer the dispute to him.

Section 12(3)(a) of the Act, does not restrict the choice of the parties in the matter of appointment of the Arbitrator/s. It does not lay down that

challenge to Arbitration shall be competent where the Arbitrator is a relation or an employee of one of the parties. The provision makes room for

challenge to the Arbitrator where ""circumstances exist"" that give rise to ""justifiable doubt"" as to the independence or impartiality of the Arbitrator"".

It is not a mere doubt that would give the party a right u/s 12 (3) (a) of the Act to challenge the Arbitrator unless such doubt is ""justifiable"". In other

words, the party challenging an Arbitrator u/s 12(3)(a) of the Act must not only nurse a doubt as to the independence or impartiality of the

Arbitrator, but must have valid reasons for having such doubt. There may be, cases without number where an Arbitrator though relation or an employee of one of the parties is yet fiercely independent and reputedly impartial. We, day in and day out, come across Arbitration agreements that provide for reference of dispute arising out of the contract to senior most officer or one of the senior most officers in the hierarchy of a department - party to a dispute and in a good number of cases disputes are settled through Arbitrator(s) to the satisfaction of the parties, more so, when, as in present case, an officer who had a role in concluding the contract, and is by office designated as Arbitrator, is replaced by another officer by the time, dispute arises and the reference is made.

15. In Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd., .

The Supreme Court has held:

34. The fact that the named arbitrator is an employee of one of the parties is not ipso facto a ground to raise a presumption of bias or partiality or lack of independence on his part. There can however be a justifiable apprehension about the independence or impartiality of an employee arbitrator, if such person was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other Department) to the officer whose decision is the subject-matter of the dispute.

35. Where however the named arbitrator though a senior officer of the Government/statutory body/government company, had nothing to do with the execution of the subject contract, there can be no justification for anyone doubting his independence or impartiality, in the absence of any specific evidence. Therefore, senior officer(s) (usually Heads of/Department or equivalent) of a Government/statutory corporation/public sector undertaking, not associated with the contract, are considered to be independent and impartial and are not barred from functioning as arbitrators merely because their employer is a party to the contract.

16. The court after drawing distinction between a senior officer of Government/statutory body/government company and an employee of a company or body or individual other than State and its instrumentality, as regards existence of reasonable apprehension of bias, proceeded to observe: -

...We hold that a person being an employee of one of the parties (which is a State or its instrumentality) cannot per se be a bar to his acting as an arbitrator.

17. Section 12(3)(a) of the Act, visualizes a situation where, after an Arbitration agreement or an agreement having Arbitration clause incorporated

therein, is executed, either of the parties has a valid reason to apprehend that the arbitrator may not act independently or impartially. In such case

the provision gives such party a right to challenge the arbitrator in accordance with the procedure laid down u/s 13.

18. Viewed thus, there is no scope for testing an Arbitration Agreement/Clause on the touch stone of Section 12 (3) (a) of the Act, as the

provision does not lay down any criteria for appointment of the arbitrator nor does it restrict the right of the parties to agree on appointment of

arbitrator by designation or otherwise, but takes care of a post agreement/reference situation where one of the parties finds valid reasons for doubt

as to independence or impartiality of the arbitrator. Since, the doubt is to be "justifiable" such doubt is to be considered by some authority-arbitral

tribunal in terms of Section 13, so as to see whether the doubt voiced is "justifiable" i.e. well reasoned.

19. In the circumstances, the Petitioner's challenge to the Arbitration Clause (Clause 14) to the extent it relates to appointment of Respondent No.

2 as sole arbitrator, on the ground of it being in conflict with Section 12(3)(a) of the Act is devoid of merit and destined to fail. Resultantly

challenge to the Arbitration proceedings including the order dated 20th November, 2010 is not to succeed. No ground is made out for

appointment of a new arbitrator. It needs to be pointed out that Section 11(6) of the Act, comes into play only where reference is yet to be made

to the designated arbitrator or the arbitrator, is not appointed and not where the arbitrator stands appointed, has entered upon reference and gone

ahead with the arbitral proceedings. In the event, the arbitrator has entered upon reference and one of the parties challenges the arbitrator, the only

option available to such party is to proceed in accordance with Section 13 of the Act. Where the challenge fails, the party has to wait till arbitral

award is made and thereafter question it u/s 34 of the Act.

20. Reliance placed by learned Counsel for the Petitioner on Daniel (proprietary

limited) v. Bharat Electronics Ltd. and Anr. AIR 2010 SCW

3868 is mis-placed. In the reported case, unlike case in hand, there was failure on part of the party, required under the Arbitration Agreement to

appoint an arbitrator, in making appointment of arbitrator for resolving the dispute. It is against the said backdrop, that the prayer for appointment

of arbitrator was allowed and an arbitrator other than designated arbitrator (Managing Director of the Respondent company) appointed.

21. For the reasons discussed, the writ petition is meritless and is accordingly dismissed.

All interim directions are vacated.