
(1997) 11 BOM CK 0015

In the Bombay High Court

Case No : Misc. Civil Application No. 89 of 1997

Smt. Satya Sahu and others

APPELLANT

Vs

M/s. Vidarbha Distillers and others

RESPONDENT

Date of Decision : 07-11-1997

Acts Referred:

Arbitration Act, 1940 — Section 8(1)

Arbitration and Conciliation Act, 1996 — Section 10, 11, 12, 13, 14

Citation : AIR 1998 Bom 210 : (1998) 1 ALLMR 601 : (1998) 2 BomCR 627 : (1998) 3 BOMLR 340 : (1998) 2 CivCC 270 : (1998) 1 MhLj 789

Hon'ble Judges : M.B. Shah, C.J

Bench : Single Bench

Advocate : V.V. Tulzapurkar and Mahesh Singh, for the Appellant; V.R. Manohar, Dharmadhikari, Anand Jaiswal, Ms. Usha K. Dhanuka and A.S. Kaushik, for the Respondent

Judgement

M.B. Shah, C.J.—It is the contention of the applicants that the applicants and non-applicants are partners of the firm, M/s. Vidarbha Distillers, Nagpur, registered under the Indian Partnership Act, 1932. The aforesaid firm came into existence in the year 1975. Thereafter, on 28th February, 1982, the partnership was re-constituted and a fresh Deed of Partnership was executed, which is annexed as Annexure "A" to this application. It is pointed out that this partnership firm consists of four distinct and separate groups, viz., Dinshaw Bapuna Group, Kailashchandra Sahu Group, Vinodkumar Sahu Group and Wasnik Group, and each of the same four groups has equal share of 25% in the partnership business. It has been also admitted that some dispute between the parties arose in 1984 and that dispute was resolved by the Arbitrator, Shri L.S. Dewani, as per his Award dated 31st December, 1984. As the dispute between the groups had arisen in year 1996, the applicants requested the Arbitrators to intervene in the matter and to arbitrate and decide the dispute by their letter dated 10th June, 1996. That letter is Annexure "D" to this application. To this, the Arbitrator issued direction to non-applicant No. 3 as under :---

"In terms of my award dated 31-12-1984 it was agreed that all cheque books and record shall be kept at the factory. I hope you will abide by the same and restore the same at the factory."

2. As the dispute arose between the parties, the applicants sent written communications on 18th April, 1997 and 19th April, 1997, requesting the Arbitrators to immediately intervene in the matter. However, by letter dated 23rd April, 1997, the named Arbitrators, Mr. L.S. Dewani and Mr. K.P. Dewani, replied as under:---

"In view of certain changed circumstances and the nature of disputes it will not be possible for us to act as Arbitrators. Please take note hereof."

3. Hence, this application u/s 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") is filed for appointment of Arbitrators and referring the dispute to them.

4. This application is opposed by the non-applicants. The parties have filed their written submissions and, on the basis of the written submissions, the learned Counsel for the non-applicants has submitted as under :--

(a) In the Deed of Partnership, the parties have appointed named Arbitrators on account of unique position which they enjoyed. Hence, there was a clear intention on their part not to supply vacancy of one or two arbitrators mentioned in the arbitration clause.

(b) In view of section 10(1) of the new Arbitration Act, only two Arbitrators are appointed as per the arbitration clause and section 10 provides that number of Arbitrators shall not be even number.

(c) It is submitted that, in any case, without prejudice to the above contentions, four Arbitrators are required to be appointed by the four groups involved in the partnership with a 5th Arbitrator to be appointed by the Chief Justice of this Court.

5. For appreciating these contentions, it will be necessary to refer to the arbitration clause in the Deed of Partnership, which is as under :---

"REFERENCE TO ARBITRATION: That if any dispute or difference which may arise between the parties or their representatives with regard to the construction of account, profits or losses of business the rights and liabilities of the business under this deed or the dissolution or winding up of the business or any other matter relating to the firm shall be referred to the Arbitration consisting of Shri L.S. Dewani, Advocate and Shri K.P. Dewani, Advocate and in the event of death of Shri L.S. Dewani, Advocate, to the sole arbitration of Shri K.P. Dewani, Advocate."

From the aforesaid clause, it is clear that the parties have unequivocally agreed that, if any dispute or difference arises between the parties or their representatives with regard to any matter relating to the firm, then, it is required

to be referred to arbitration. The clause further provides that it shall be referred for arbitration to the Arbitrators, Shri L.S. Dewani, Advocate, and Shri K.P. Dewani, Advocate, and, in the event of death of Shri L.S. Dewani, Advocate, to the sole arbitration of Shri K.R. Dewani. On the basis of this part of the clause, learned Counsel submitted that this clause contains a clear and emphatic indication that the parties did not intend to supply any vacancy of an Arbitrator if the Arbitrator named in the Arbitration Agreement could not function. It is, therefore, submitted that, on account of refusal to act by the named Arbitrators, the Arbitration Agreement contained in Clause 11 of the Deed of Partnership stands exhausted and the parties must necessarily be relegated to their common law remedies. In the alternative, it is pointed out that there is no provision in the new Arbitration Act similar to section 8(1)(b) of the Arbitration Act, 1940, which empowers the Court to appoint an Arbitrator, if any appointed Arbitrator neglects or refuses to act, and the arbitration agreement does not specify that it was intended that vacancy should not be supplied and the parties or the Arbitrator do not supply vacancy.

6. As stated above, the arbitration clause provides that any dispute with regard to the construction of account, profits or losses of business, the rights and liabilities of the business under the deed or the dissolution or winding up of the business or any other matter relating to the firm shall be referred to the Arbitrators named therein. But from this it cannot be said that the arbitration agreement gets exhausted if the named Arbitrators refuse to act as Arbitrators. It is settled law that section 8(1)(b) of the Arbitration Act, 1940 empowered the Court to appoint an Arbitrator where the arbitration agreement does not show or provide that it was intended that vacancy should not be supplied.

7. I would first refer to section 8(1) of the Arbitration Act, 1940, which is as under:-

"8. Power of Court to appoint arbitrator or umpire.---(1) In any of the following cases,---

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

.....

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy."

8. This section 8(1)(b) has been interpreted by the Apex Court in various

judgments and the Court has held that, where the arbitration clause provides for appointment of sole arbitrator or arbitrators, and the sole arbitrator or arbitrators refuse to act, it is for the Court to intervene and appoint another arbitrator u/s 8(1)(b) of the Arbitration Act, 1940 "if the arbitration agreement does not show that it was intended that the vacancy shall not be supplied". In a case, if the arbitration clause debars any further arbitration, then, there is no question of appointing Arbitrators by the Court u/s 8(1)(b), that is to say, the Court is empowered to appoint another Arbitrator, except where it is specifically debarred from doing so.

9. Dealing with the contention whether, on the refusal of an arbitrator to act, the power to appoint next Arbitrator vests in the Court or it has once again to be in accordance with the procedure provided in the agreement, the Supreme Court has, in the case of State of West Bengal Vs. M/s. Naional Builders, , held as under:--

"...it is for the Court to intervene and appoint another arbitrator u/s 8(1)(b), if arbitration agreement does not show that it was intended that the vacancy shall not be supplied."

10. The Apex Court referred to its earlier decisions in the cases of Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc., , Chander Bhan Harbhajan Lal Vs. State of Punjab, and Union of India Vs. R.B. Ch. Raghunath Singh and Co., , and, thereafter, held that it is settled law that even where an authority is named by office to be the sole Arbitrator but he refuses to act, then, the jurisdiction to appoint another Arbitrator vests in the Court, unless the arbitration clause indicates that the parties did not intend to supply the vacancy. The Court further held that, where the named person refuses to act, then, the agreement shall be deemed to have exhausted and if the named person has refused to act, he cannot be asked again to arbitrate. The Court further held that, if there is no agreement to appoint another person, the only remedy is to approach the Court to exercise its statutory power and appoint another Arbitrator and the same result follows where the arbitration clause empowers the sole Arbitrator either to arbitrate himself or to nominate anyone else.

11. In view of this settled law, the question is whether the present clause in the Deed of Partnership specifically provides that, on failure to act by the named Arbitrators; there should be any further arbitration or not. In my view, the agreement does not debar further arbitration. There is no specific indication or provision that, on failure to act as Arbitrator by the named person, the matter would not be referred to arbitration. As stated by the Supreme Court in the case of State of West Bengal Vs. M/s. Naional Builders, , the Court is precluded from exercising its power only if the parties intended that the vacancy should not be filled. "In other words the Court shall exercise jurisdiction to appoint another arbitrator except where it is specifically debarred from doing so." In the present case, the arbitration clause does not provide that, if Mr. L.S. Dewani and K.P.

Dewani fail to arbitrate the dispute shall not be referred to arbitration; it only provides that, in case of death of Mr. L.S. Dewani, the matter would be referred to the sole arbitration of Mr. K.P. Dewani. However, it was contended that once the named Arbitrators M/s. Dewani refuse to act as Arbitrators, then the arbitration clause stands exhausted and there is no question of referring the matter to the Arbitrators by the Court. In my view, the arbitration clause is not exhausted, but the procedure or machinery for appointing the Arbitrator under the agreement is exhausted.

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 refuse 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 :---

"Section 11. Appointment of arbitrators.---

...

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and---

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), 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.

(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 to him or it under that procedure,

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

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:--

"Section 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.

Section 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."

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 subsections 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 respondent Nos. 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.

16. The learned Counsel next contended that, the arbitration clause provided for appointment of two arbitrators, hence, the arbitration is valid u/s 10(1) of the "Act". This submission is without any substance and that contention is concluded in the case of M.M.T.C. Limited Vs. Sterlite Industries (India) Ltd., , in which the Apex Court held as under :---

"...There is nothing in section 7 (of the new Act) to indicate the requirement of the number of arbitrators as a part of the arbitration agreement. Thus the validity of an arbitration agreement does not depend on the number of arbitrators specified therein. The number of arbitrators is dealt with separately in section 10 which is a part of machinery provision for the working of the arbitration agreement . It is, therefore, clear that an arbitration agreement specifying an even number of arbitrators cannot be a ground to render the arbitration agreement invalid under the New Act as contended by the learned Attorney General."

17. Similarly, with regard to the third contention that there are four groups who have their members as partners of the firm, therefore each party may be directed to appoint four arbitrators, also requires to be rejected, because there is no such agreement in the Deed of Partnership and there is no such provision in the Act.

18. In view of the aforesaid, this application is allowed.

19. Learned Counsel appearing on behalf of the applicants submitted that Mr. M.S. Deshpande, retired Judge of this Court, be appointed as the Sole Arbitrator. As against this, learned Counsel Mr. Manohar appearing on behalf of respondents No. 1 to 5 submitted that Mr. M.R. Waikar, retired Judge of this Court, be appointed as the Sole Arbitrator. Considering the submissions made by the learned Counsel for the parties, Mr. M.R. Waikar, retired Judge of this Court, is appointed as the Sole Arbitrator. In the event Mr. Waikar refuses to act as the Sole Arbitrator, Mr. M.S. Deshpande is appointed as the Sole Arbitrator. It would be open to the Arbitrator to take the assistance of Chartered Accountants appointed by the parties to assist him, and it would be open to the parties to take their assistance for representing their case before the Arbitrator.