

(2014) 04 MP CK 0062

In the Madhya Pradesh High Court

Case No : Writ Petition No. 304 of 2014

State of Madhya Pradesh

APPELLANT

Vs

Vayam Technologies Ltd.

RESPONDENT

Date of Decision : 11-04-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 1, 10, 11, 11(8)(b), 12, 12
Constitution of India, 1950 — Article 226, 227

Citation : AIR 2014 MP 88 : (2014) 3 ARBLR 586 : (2014) 3 MPHT 126 : (2014) 2 MPLJ 641

Hon'ble Judges : Alok Aradhe, J

Bench : Single Bench

Advocate : Naman Nagrath, Sr. Advocate and Sanjeev Mishra, Advocate for the Appellant; Kishore Shrivastava, Sr. Adv., Naveen Prakash and Anshuman Shrivastava, Advocate for the Respondent

Final Decision : Allowed

Judgement

Alok Aradhe, J.—In this writ petition under Article 227 of the Constitution of India the petitioner has assailed the validity of the order dated 20-11-2013 by which mandate of the Arbitrator u/s 14(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") has been terminated. Background facts leading to filing of the writ petition, briefly stated, are that a tender was invited on 17-1-2011 by the Director General of Police with a view to procure a software solution, namely, Integrated Data Management System. The respondent submitted its bid, which was accepted, and a purchase order dated 4-10-2011 was issued by the Assistant Inspector General of Police on behalf of the Inspector General of Police. Thereafter, an agreement dated 9-11-2011 was executed between the Governor of Madhya Pradesh and the respondent. The agreement was signed by the Director General of Police on behalf of the Governor of Madhya Pradesh and the respondent. Clause 21 of the Agreement provides that any dispute between the parties to the agreement shall be referred to the arbitration of Director General of Police, Madhya Pradesh whose decision thereon shall be

final and binding on the parties. A show cause notice dated 1-3-2013 was issued by the Assistant Inspector General of Police on behalf of the Director General of Police to the respondent on the ground that the Software was not found up to date and the respondent was asked to show cause as to why the contract be not cancelled and the respondent-firm be not black listed. Thereafter, by an order dated 24-4-2013 the contract was rescinded by the Director General of Police and the respondent was black listed for one year.

2. The respondent vide communication dated 1-5-2013 requested the petitioner to initiate arbitration proceeding. The respondent filed its claim before the named Arbitrator on 7-5-2013 along with an application u/s 17 of the Act. The petitioner filed its reply before the Arbitral Tribunal. The Arbitrator vide order dated 27-5-2013 rejected the application filed by the petitioner u/s 17 of the Act. The respondent thereafter on 10-6-2013 filed an application u/s 13(2) of the Act. The Arbitrator vide order dated 28-9-2013 rejected the aforesaid application on the ground that the respondent itself initiated arbitration proceeding wherein it accepted the Director General of Police as an Arbitrator. Thereafter, the respondent filed an application u/s 14(2) of the Act before the trial Court which was allowed vide order dated 20-11-2013 and mandate of the arbitrator was terminated on the ground that a person cannot be a Judge in his own cause and there is real likelihood of bias. In the aforesaid factual background the petitioner has approached this Court.

3. Learned senior counsel for the petitioner submitted that impugned order is per se without jurisdiction as the Court has no power to terminate the mandate of the Arbitrator u/s 14(2) of the Act as situation envisaged under the aforesaid provision had not arisen. It was further submitted that after rejection of application u/s 13(2) of the Act, the application u/s 14(2) of the Act does not lie, as remedy is provided u/s 13(5) of the Act. It was also urged that mandate of the arbitrator was sought to be terminated on the ground of bias and partiality on the part of arbitrator. The aforesaid fact was well within the knowledge of the respondent at the time when the agreement was executed and the respondent itself sought initiation of arbitration proceeding therefore, it had waived its right to raise an objection on this ground. In this regard, the attention of this Court has been invited to Sections 4 and 5 of the Act. In support of his submissions learned senior counsel has placed reliance on the decisions of High Court of Delhi in *Bharat Heavy Electricals Ltd. Vs. C.N. Garg and Others*, *Ahluwalia Contracts (India) Ltd. Vs. Housing and Urban Development Corporation and Another*, *Progressive Career Academy Pvt. Ltd. Vs. FIIT JEE Ltd.*, and *Priknit Retails Ltd. Vs. Aneja Agencies*, .

4. On the other hand, learned senior counsel for the respondent while inviting the attention of this Court to provisions of Sections 11(8)(b), 12(1), 12(2) and 12(3)(a) of the Act submitted that under the scheme of the Act, emphasis is on appointment of an independent and impartial arbitrator, and a combined reading of Sections 12, 13, 14 and 15 of the Act makes it clear that these provisions are

interlinked and supplementary to each other. It is further submitted that nobody can be permitted to be a judge in his own cause and there is real likelihood of the bias. It is also submitted that the application u/s 14(2) of the Act is maintainable after rejection of the application u/s 13(2) of the Act as there is no specific bar under the Act and the misconduct of the arbitrator is not a ground of challenge u/s 34 of the Act. The period of 15 days prescribed in Section 14(2) of the Act is Directory as no consequences have been provided and the principles of waiver and estoppel do not apply to the facts of the case. Lastly, it was urged that this Court in exercise of extraordinary jurisdiction under Article 226 of the Constitution should not interfere and set aside the impugned order as the same would tantamount to revival of an illegality. In support of aforesaid submissions reliance has been placed on decisions in the cases of A.K. Kraipak and Others Vs. Union of India (UOI) and Others, , State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli, , Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant and Others, , Bihar State Mineral Dev. Corpn. and Another Vs. Encon Builders (I) Pvt. Ltd., , Justice P.D. Dinakaran Vs. Hon''ble Judges Inquiry Committee and Others, , N.K. Bajpai Vs. Union of India (UOI) and Another, , Bipromasz Bipron Trading SA Vs. Bharat Electronics Limited (BEL), , Manak Lal Vs. Dr. Prem Chand, , S. Parthasarathi Vs. State of Andhra Pradesh, , Madhya Pradesh Special Police Establishment Vs. State of Madhya Pradesh and Others, ,V.K. Diwan and Company v. Delhi Jal Board, (2010) 15 SCC 717, State of Gujarat and Another Vs. Hon''ble Mr. Justice R.A. Mehta (Retd.) and Others, , Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others, , Mohammad Swalleh and Others Vs. Third Addl. District Judge, Meerut and Another, , Maharaja Chintamani Saran Nath Shahdeo Vs. State of Bihar and Others, and Nisha Bai Vs. State of M.P. and Others, .

5. I have considered the submissions made on both sides. The Act is based on United Nations Commission of International Trade Law. The statement of objects and reasons of the Act states that one of the main object of the Act is to minimize the supervisory role of the Courts in the arbitral process. The Act is divided in four parts. Part-I deals with arbitration whereas Part-II deals with enforcement of certain foreign awards, Part-III of the Act deals with conciliation and Part-IV provides for supplemental provisions. The relevant provisions for the purpose of case in hand are to be found in Part-I which contains Sections 1 to 43.

6. At this stage, it is appropriate to notice certain provisions of the Act, relevant for the purpose of controversy involved in the instant writ petition, namely, Sections 5, 12, 13, 14 and 15, which read as under:--

5. Extent of judicial intervention.--Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

12. Grounds for challenge.--(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or

impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if-

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

13. Challenge procedure.--(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in Sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after become aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

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.

7. A careful reading of Sections 12(3) and 13(2) would show that grounds of challenge indicated in Section 12(3) are linked to Section 13(2) of the Act. Sections 12 and 13 of the Act are primarily concerned with the entitlement of a person to be appointed as an Arbitrator, whereas Sections 14 and 15 deal with authority of an arbitrator to continue, as such. Thus, sections 12 and 13 and 14 and 15 of the Act operate in different fields, as they stipulate the rights and the remedies. The Arbitral Tribunal is a creature of contract between the parties. In *Indian Oil Corporation Ltd. and Others Vs. Raja Transport (P) Ltd.*, it has been held that Arbitration is a binding voluntary alternative dispute resolution process by a private forum chosen by the parties. It is quite common for governments, statutory corporations and public sector undertakings while entering into contracts, to provide for settlement of disputes by arbitration, and further provide that the arbitrator will be one of its senior officers. If a party, with open eyes and full knowledge and comprehension of the said provision enters into a contract with a government/statutory corporations/public sector undertakings containing an arbitration agreement providing that one of its Secretaries/ Directors shall be the arbitrator, he cannot subsequently turn around and contend that he is agreeable for settlement of the dispute by arbitration, but not by the named arbitrator. It has further been held that no party can say that he

will be bound by only one part of the agreement and not the other part, unless other part is impossible of performance or is void being contrary to the provisions of the Act, and such part is severable from the remaining part of the agreement. The arbitration clause is a package which may provide for what disputes are arbitrable, at what stage the disputes are arbitrable, who should be the arbitrator, what should be the venue, what law would govern the parties, etc. A party to the contract cannot claim the benefit of arbitration under the arbitration clause, but ignore the appointment procedure relating to the named arbitrator contained in the arbitration clause. The aforesaid decision has been quoted with approval subsequently by the Supreme Court in the case of Denel (Proprietary Limited) Vs. Govt. of India, Ministry of Defence, .

8. It is well settled proposition of law that where a statute provides a right and lays down a procedure for enforcement of such right, mentions the grounds available for seeking right and provides a forum where such right can be enforced and provides a remedy available to a person who fails in his attempt to enforce such right, such a provision in the statute would be treated as a complete Code. If Section 13 of the Act is read in its entirety, it is evident that it is a complete Code in itself. If a party challenges authority of the arbitral Tribunal on the ground of independence and impartiality and in case such challenge fails, Section 13(4) provides that arbitral tribunal shall continue with the proceedings and shall make an award. Section 13(5) of the Act provides that where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34 of the Act. The Supreme Court in the case of Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited, has held that if a party who has entered into an agreement with eyes wide open, feels that the arbitrator has not acted independently or impartially, or he has suffered from any bias, it will always be open to the party to make an application u/s 34 of the Act to set aside the award on the ground that arbitrator acted with bias or malice in law or fact. Section 13(5) and Section 34 of the Act have to be read together. Sections 13(5) and 34 clearly imply that challenge is permitted even on the ground taken by the aggrieved party on which the challenge to the arbitral award was made u/s 13(2) of the Act. If Section 34 of the Act is interpreted to mean that challenge to arbitral award cannot be made on the ground of bias, then Section 13(5) of the Act would rendered redundant and otiose. The principles of natural justice are founded on public policy. Bias and prejudice are contrary to public policy and are, therefore, included in Section 34(2)(b)(ii) of the Act. A right conferred on a aggrieved party cannot be taken away by a narrow and pedantic interpretation of Section 34 of the Act. From careful scrutiny of Section 13(5) of the Act, the legislative intent is clear that Parliament did not want the Court to annul the arbitration tribunal on the ground of bias at the intermediate stage.

9. In the instant case, the respondent entered into an agreement voluntarily with the petitioner on 9-11-2011. The aforesaid agreement was terminated on

24-4-2013. The respondent thereafter, in terms of Clause 15 of the agreement, on 1-5-2014 sought redressal of its grievances through arbitration. On 7-5-2013 the respondent filed statement of claim along with an application u/s 17 of the Act. The petitioner filed its statement of claim. Thereupon, named arbitrator, namely, Director General of Police rejected the prayer for interim relief u/s 17 of the Act on 25-7-2013. Thereafter, on 10-6-2013 the respondent filed an application u/s 13(2) of the Act which was rejected on 28-9-2013. Thus, from the above narration of facts it is graphically clear that the respondent right from the beginning was aware about the fact that Director General of Police is the named arbitrator in the agreement. The respondent not only approached the named arbitrator but invoked the jurisdiction of the arbitrator who passed an order on the application preferred by the petitioner u/s 17 of the Act. For a period 9-11-2011 till 27-5-2013 i.e. the date of rejection of application u/s 17 of the Act the respondent did not make any grievance with regard to either independence or impartiality of the arbitrator.

10. From perusal of the impugned order it is evident that the respondent sought termination of the mandate of the arbitrator on the ground that arbitrator is not impartial, there is real likelihood of bias and no one can be permitted to be a Judge in his own cause. Thus, challenge to the authority of the arbitrator by way of application u/s 14(2) of the Act was in substance made on the grounds enumerated u/s 12(3) of the Act, which is impermissible in law as Sections 13 and 14 of the Act operate in different fields. Moreover the respondent had invoked the remedy u/s 13(2) of the Act therefore, in the facts of the case it cannot be permitted to invoke Section 14(2) of the Act on the ground enumerated u/s 12(3) of the Act and has to wait till an award is passed in view of Section 13(4) and Section 13(5) of the Act. For the aforementioned reasons it is not necessary to decide the other contentions raised on behalf of respondent.

11. In view of preceding analysis, the order passed by the trial Court suffers from an error apparent on the face of record as well as the jurisdictional infirmity and, therefore, it cannot be sustained in the eye of law. Accordingly, the same is quashed. In the result, the writ petition is allowed.