
(2016) 07 MP CK 0055
In the Madhya Pradesh High Court
Case No : Arbitration Appeal No. 22 of 2012

State of M.P.

APPELLANT

Vs

M/s Associated Computers Service

RESPONDENT

Date of Decision : 28-07-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 32(2)(c), 34(3)

Citation : (2016) 4 MPLJ 174

Hon'ble Judges : Sujoy Paul, J.

Bench : Single Bench

Advocate : Shri Pushpendra Yadav, GA, for the Appellants; Shri Dhruv Verma, Advocate, for the Respondents; Shri Dhruv Verma, Advocate, for the Applicants; Shri Pushpendra Yadav, GA, for the Respondents

Final Decision : Dismissed

Judgement

Sujoy Paul, J.—Since both the matters are interconnected, with the consent of learned counsel for the parties, matters were analogously heard and decided by this common order.

2. The arbitration appeal No.22/2012 filed under section 37 of the Arbitration and Conciliation Act, 1996 (for short "the Act"), is directed against the order passed in Arbitration Case No.41/07 by Ist ADJ, Bhopal.

3. Draped in brevity, the relevant facts are that admittedly by order dated 11.01.1995, the appellants assigned the work of preparation of Photo identity card of electors of certain districts to the respondents. As per Clause-16 of the agreement, there was an arbitration clause for the purpose of appointment of arbitrator in the event dispute arises. A dispute arose regarding payment of bills for an amount of Rs. 42,25,135/-. Shri M.M. Dubey, retired District Judge was appointed as sole arbitrator. The learned arbitrator passed an award on 17.09.1999 granting some financial benefits in favour of the present respondent. The said award was called in question before the Addl. District Judge, Bhopal in

MJC No.56/99. The said MJC was dismissed on 09.02.2001. This has given rise to filing of FA No.249/01 before this court. The said first appeal was disposed of by a bi-parte order dated 2.12.2004 (Annexure A/2).

4. Shri Pushpendra Yadav, learned GA contends that as per the remand order dated 2.12.2004, the parties were required to appear before the arbitrator on 19.03.2003. For this date, no notice was required to be issued. Admittedly, the respondents did not appear on the said date and on the next date of hearing. In the result, the learned arbitrator opined that his claim must be dismissed for want of prosecution. In addition, the claim was dismissed by the arbitrator on the ground that respondents herein did not pay the requisite deposit to him.

5. Shri Pushpendra Yadav, GA submits that the appeal preferred under section 34 of the Act by the respondents is erroneously allowed by the court below. He submits that the order of the court below needs to be interfered with on following counts :-

(a) The court below has erred in allowing the application for condonation of delay which runs contrary to section 34(3) of the Act.

(b) Since the respondents herein did not appear before the Arbitrator despite notice and as per order of this court in FA No.249/01, no fault can be found in the order of the arbitrator.

He submits that as per section 34(2)(iii) of the Act, the party making the application must establish that he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case. By taking this court to the appeal memo, it is submitted that the singular ground "(a)" raised is that the applicant (respondent herein) was not given proper notice of hearing of the arbitral proceedings. At the cost of repetition, it is urged that as per the order of this Court in FA No.249/01, there was no need for issuance of fresh notice to the parties. If despite directions of this court in the said FA, the applicant did not appear, no fault can be found in the order of the Arbitrator. Lastly, it is submitted that the respondent deposited the requisite amount/share of his part in the first found before the arbitrator but when matter was remanded back by this court, as per section 38 of the Act, the respondent was required to deposit the supplementary deposit. Learned counsel for the State, in nut-shell contends that there was no justification in disturbing the order of the arbitrator.

6. Per contra, Shri Dhruv Verma, learned counsel for the other side supported the order of the court below. It is submitted that the order is in consonance with various provisions of the Act.

7. No other point is pressed by learned counsel for the parties.

8. I have heard learned counsel for the parties and perused the record.

9. The first question raised is regarding correctness of the order of the court

below in allowing the application for condonation of delay. Admittedly, the award was passed on 02.04.2007 and the appeal was filed on 23.07.2007. Proviso to section 34(3) of the Act prescribes that the appeal can be entertained beyond the period of 90 days if it is filed within 30 days therefrom, subject to satisfying the court that the applicant was prevented by sufficient cause from making the application within the said period of three months. A conjoint reading of sub-section (3) with the proviso makes it clear that maximum time within which the application for condonation of delay can be entertained and allowed, is 120 days. Admittedly, in the present case the said application is filed within 120 days. The court below has given plausible reasons for allowing the said application. Resultantly, it cannot be said that the order of court below is without authority of law or illegal.

10. A plain reading of the award shows that the proceedings were terminated on two counts :- (i) The respondent herein failed to appear before the arbitrator on 2.04.2007 and ; (ii) The respondent herein has not paid the deposit/share of his part.

11. The court below interfered with the said order of the arbitrator on the basis of following reasons :-

(i) The arbitral proceedings can be terminated only in accordance with section 32 of the Act.

(ii) The agents of respondents appeared before the arbitrator and deposited the amount/counter claim expenses. Hence, this cannot be a reason for terminating the proceedings. Even if amount/deposit was not paid by the respondents herein, as per section 39 of the Act, the arbitrator had a lien on the award and he could have realised it as per procedure laid down under section 39 of the Act.

12. The question is whether this order of the court below is in consonance with law. For examining this, it is relevant to refer section 32 of the Act. This section provides that the arbitral proceedings can be terminated by the order of the arbitration tribunal where ; (a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute, (b) the parties agree on the termination of the proceedings, or (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

13. If the present case is examined on the anvil of said clauses, it will be clear that clause (a) and (b) are not attracted in the facts and circumstances of the present case. Neither the claimant had withdrawn his case nor the parties agreed for the termination of the proceedings. So far clause (c) is concerned, the arbitration tribunal has to give a finding that for any other reason, the proceedings became unnecessary or impossible. No doubt, as per the direction of this Court in FA No.249/01, no notices were required to be issued to the parties. Learned counsel for the parties appearing before this court fairly submitted that

neither present appellant nor the respondent appeared on the first date of hearing i.e 19.03.2003. The next date was 02.04.2007. On the said date, the arbitrator opined that the respondents herein has abandoned the claim.

14. In view of the aforesaid it is clear that neither present appellant nor respondent appeared before the tribunal on 19.03.2003. On the very next date, the tribunal closed the proceedings by drawing a presumption that the respondent has abandoned the claim. In the facts and circumstances of this case, it is to be seen whether because of non-presence of respondent herein for two dates or for short time the proceedings can be said to be "unnecessary" or it can be said that further proceedings became "impossible". The ancillary question is that on that ground whether Arbitrator was justified in holding that respondent herein has "abandoned" his case because of his non-presence. In my view the word "unnecessary" may involve a situation where proceedings are rendered infructuous. "Impossibility" is not to be viewed merely from the point of view of physical impossibility of an adjudication but it may include a situation where a party by a consistent course of conduct renders impossible the very continuation of the proceedings. The period of absence has to be so long that the only possible inference is abandonment. {See : *Francaise D' Importation et de Distribution S.A. v. Deutsche Continental Handelsgesellschaft* (1985) 2 Lloyd's Rep.592 at 598-599; *Leonidas D*, (1985) 2 Lloyd's Rep. 18 at 24-25; *Food Corporation of India v. Antclizo Shipping Corporation, Antclizo, The* (1988) 2 All ER 513; *Multitank Holsatia*, (1988) 2 Lloyd's Rep. 486 at 491; *Thai-Europe Taioca Service Ltd. v. Seine Navigation Co. Inc. (Maritime Winners), The* (1989) 2 Lloyd's Rep.506 at 513-515, *Golden Bear*, (1987) 1 Lloyd's Rep 331; *Unisys International Services Ltd. v. Eastern Counties Newspaper Ltd.*, (1991) 1 Lloyd's Rep. 538 (CA).

Unisys International Services Ltd. v. Eastern Counties Newspaper Ltd., (1991) 1 Lloyd's Rep.538 (CA).{See : page 1419 of *Law of Arbitration & Conciliation* by Justice R.S. Bachawat, 5th Edition}.

In the present case absence of the respondent before the Arbitrator was not so long which may result in abandonment of proceedings.

15. Section 32 makes it clear that nonpayment of deposit by the present respondents cannot be a ground for terminating the proceedings. Admittedly, the respondent had deposited his share before the arbitrator in the first round. If the matter is remitted back by this court, it amounts to revival of the same proceedings. As per section 38 of the Act, the arbitrator can fix the amount of supplementary deposit. There is no material on record to show that the arbitrator had fixed any amount of supplementary deposit after remand. The main amount stood paid by the present respondent. When no supplementary amount was fixed, there is no question of payment of the same by the respondent nor it can be a reason for terminating the proceedings. The court below has rightly held that learned arbitrator has erred in terminating the proceedings on that count. The order of the court below is justified wherein it is held that if deposit was not

made, the recourse of section 39 could have been adopted. Resultantly, no fault can be found in the order passed by the court below. Apart from this in FA No.249/2001, following directions were issued. These include :-

"5. We accordingly dispose of all these appeals with the under-noted directions to the Arbitrator :-

(i) That the Arbitrator shall consider the claim of the respondent, the objections taken by the State, the counter claim preferred by the State and the objection, if any, taken by the respondent to the said counter-claim and decide the cases afresh in accordance with law.

(ii) Before passing the Award, as aforesaid, the Arbitrator shall permit both the parties to lead additional evidence, if any, and shall also consider the evidence already recorded.

(iii) The earlier common Award passed by the Arbitrator shall stand vacated and the order impugned passed by the District Judge, shall also accordingly stand modified.

(iv) Should there be any further delay in the matter, the parties are directed to appear before the Arbitrator on 19.03.2003 and no further notice shall now be required to be served on them by the Arbitrator for further hearing.

(v) The Arbitrator is also requested to expedite the hearing and conclude the same at the earliest say within three months of the appearance of the parties before him."

As per this order of the High Court also it was expected that Arbitrator will decide the matter on merits.

16. At this stage, Shri Verma submits that the court below has merely set aside the award and no further directions are issued, hence he has filed another application under section 11 (6) for appointment of an arbitrator which is registered as AC No.37/12.

17. Shri Pushpendra Yadav, GA contends that if respondent is not satisfied and wants to change the arbitrator, he can take recourse of section 14 of the Act or the arbitration clause.

18. In the opinion of this court, once the award is set aside by the court below by order dated 8.11.2011, it becomes nullity in the eyes of law. The arbitral proceedings stood revived on setting aside of the award. In view of this observation, the parties can appear before the learned arbitrator and pursue their matter in accordance with law. The parties agreed to appear before the arbitrator on 29.08.2016. For this date, no notice will be required to be issued to the parties. However, learned arbitrator as per his convenience may fix further dates.

19. Shri Verma, learned counsel for the respondents prayed that the arbitrator

may be changed because of his age/incapacity etc. However, there is no such pleading in A.C. No. 37/12. In the absence of any ground mentioned in the application showing incapacity of arbitrator, I am unable to accept the said contention. The respondents herein will be free to make appropriate application in this regard before the appropriate forum. Since, the arbitral proceedings are restored/revived, there is no need to pass any order in A.C. No. 37/12.

20. Resultantly, A.A. No. 22/2012 is dismissed. A.C. No. 37/2012 is disposed of with aforesaid observations. Needless to mention that on revival of the arbitral proceedings, it will be open for the arbitrator to invoke section 38 of the Act and fix his further fees in accordance with law.