
(2009) 08 MAD CK 0317

In the Madras High Court

Case No : C.R.P. (P.D.) No. 1173 of 2009

V. Shanmughasundaram

APPELLANT

Vs

Indian Oil Corporation Ltd.

RESPONDENT

Date of Decision : 18-08-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 16, 34, 34(2), 37

Citation : (2010) 1 MLJ 934

Hon'ble Judges : K.K. Sasidharan, J

Bench : Single Bench

Advocate : T.V. Ramanujam for T.V. Krishnamachari, for the Appellant; R. Ravi, for first respondent, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Sasidharan, J.—This revision petition is directed against the proceedings dated 15.04.2009 on the file of the second respondent whereby and whereunder, the challenge made to the appointment of the second respondent as arbitrator for the purpose of adjudicating the dispute between the petitioner and the first respondent was rejected without supplementing reasons.

The facts in outline:

2. The petitioner was given a contract to conduct a restaurant cum Dhaba at the Jubilee Retail Outlet, Palandur, for a period of five years, as per leave and license agreement dated 07.09.2003. As per the terms and conditions of the agreement of License, the petitioner was liable to pay a sum of Rs. 24,000/- as monthly rent. The Agreement also provided for renewal of the license for a further period of five years. Accordingly, the petitioner renovated the licensed premises spending considerable amount and carried on the business in the said premises.

3. While the matters stood thus, the first respondent called for applications from reputed hoteliers, restaurant operators and individuals for operation of the food court/restaurant complex which was hitherto carried on by the petitioner. Since

the steps taken by the first respondent to license the premises was in violation of the agreement and disregarding the renewal clause in the said agreement, petitioner filed applications in A. Nos. 892 and 893 of 2008 before this Court invoking Section 9 of the Arbitration and Conciliation Act, 1996. The applications were dismissed by a learned Judge of this Court as per order dated 29.08.2008. Those two orders were challenged by the petitioner in O.S.A. No. 324/2008. While disposing the original side appeal, Division Bench of this Court as per judgment dated 13.11.2008 restrained the first respondent from interfering with the petitioner's peaceful possession of the licensed premises.

4. The Division Bench as per the judgment dated 13.11.2008 also directed the first respondent to expedite the appointment of Arbitrator for the purpose of resolution of the dispute.

5. Subsequently, Director (Marketing) of the respondent Corporation as per letter dated 28.11.2008 appointed the second respondent Mr. S. Ganapathyrajan, Senior Manager of the Indian Oil Corporation, Chennai as the sole arbitrator. Immediately, the petitioner as per his letter dated 11.12.2008, informed the first respondent that the appointment was not in consonance of the order passed by the Division Bench in O.S.A. No. 324/2008. In the meantime on 19.01.2009, petitioner received a communication from the second respondent directing him to file a detailed statement of claim within four weeks. Immediately, the petitioner submitted a letter challenging the appointment of Mr. Ganapathyrajan as the sole arbitrator. Subsequently, as per communication dated 21.03.2009, the petitioner called upon the second respondent to decide the issue raised by him with respect to his appointment as arbitrator. The arbitrator as per letter dated 24.03.2009, called upon the petitioner to appear before him on 15.04.2009. As per proceedings dated 15.04.2009, the arbitrator overruled the challenge made to his appointment. It is the said order which is impugned in the revision petition.

Submissions:

6. The learned Senior Counsel appearing on behalf of the revision petitioner contended that the arbitrator is an employee of the first respondent Corporation and as such, he would never decide the matter against the interest of the Corporation. In short, it was the contention of the learned Senior Counsel that the very appointment of Mr. Ganapathyrajan as arbitrator was a make belief affair and no justice could be expected from such an arbitrator especially on account of his position as a subordinate officer of the Corporation. The learned Senior Counsel also contended that challenge was made to the appointment of Mr. Ganapathyrajan as Arbitrator on various grounds and as such, the arbitrator was expected to deal with those objections and to pass a speaking order. However, very strangely, arbitrator has passed a one line order overruling the objections filed by the revision petitioner and as such, the dismissal order is liable to be set aside.

7. The learned Counsel for the first respondent submitted that the petitioner has

executed an agreement with the first respondent which contains a clause for arbitration. As per the said agreement, the dispute between the parties had to be referred to an arbitrator to be nominated by the Director (Marketing) of the Corporation. Therefore, the petitioner has agreed to abide by the decision to be taken by the Director (Marketing) and as such, he cannot complain that the arbitrator appointed was not competent to arbitrate the matter. The learned Counsel also relied on the judgment of the Supreme Court in *CDC Financial Services (Mauritius) Ltd. v. BPL Communications Ltd. and Ors.* 2003 (12) SCC 140 and *International Airports Authority of India Vs. K.D. Bali and Anr.* .

Discussion:

8. The petitioner has executed an agreement with the respondent on 07.09.2003. Agreement contains details as to how the Food Court has to be operated by the petitioner as a licensee. Agreement also contains details of the working arrangement as well as provision for arbitration.

9. Clause 13 of the agreement dated 07.09.2003 reads thus:

13. Any dispute and/or difference of any nature whatsoever or regarding any right, liability, act omission on 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 Director (marketing) of the Licensor or of some officer of the licensor who may be nominated by Director (Marketing). It is clearly understood by the parties to this Agreement that the arbitrator so nominated is an employee of the Licensor and may be a shareholder of the Licensor. 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 Director (Marketing) as aforesaid at the time of such transfer or vacation of office or inability to act, may designate another officer of the Licensor 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 his predecessor left it. It is also a term of this agreement that no person other than the director (Marketing) or a person nominated by such Director (Marketing) of the Licensor as aforesaid shall act as arbitrator. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to the agreement, subject to the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification of or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause. The parties agree that the cost of arbitration as intimated by the arbitrator shall be shared equally.

10. The petitioner is a signatory to the Leave and License Agreement dated 07.09.2003. As per the said agreement, petitioner has agreed to the appointment of an arbitrator by the Director (Marketing) in the event of dispute or difference of any nature arising regarding the agreement between the parties. Clause 13 clearly provides that arbitrator would be nominated only by Director (Marketing). It was further provided that the arbitrator so nominated would be

an employee of the Licensor or he might be a shareholder of the Licensor. Therefore, the petitioner has agreed to the appointment of arbitrator nominated by the Director (Marketing) without any kind of reservations.

11. The learned senior counsel during the course of his submissions contended that the matter requires interpretation of various laws governing the Law of Contract. Since the arbitrator now appointed by the first respondent is not a law graduate, it would be impossible for him to act as an arbitrator and to interpret the provisions of the agreement in the light of the law of the land.

12. I have gone through the provisions of the Leave and License Agreement entered into between the petitioner and the respondent. Petitioner has expressly agreed to the appointment of an arbitrator by the Director (Marketing) and he was also agreeable for appointment of an employee of the first respondent corporation as arbitrator. There was nothing mentioned in the agreement that the arbitrator should be a person conversant with law. The qualification of the arbitrator was not found mentioned in the clause regarding the appointment of arbitrator. Therefore, it was not possible for the petitioner to contend for the position that the arbitrator should be a law graduate as the matter involves interpretation of the law of contract.

13. Now, by of the impugned proceedings dated 15.04.2009, the arbitrator has overruled the objections raised by the petitioner. It is trite that the question of jurisdiction is a matter to be decided by the arbitrator. Similarly, the question of deciding the procedure regarding arbitration is also a matter to be decided by the arbitrator.

14. Therefore, the issue raised by the petitioner is a matter to be decided only by the arbitrator. While considering such objections, the arbitrator was expected to consider the nature of objection made by the petitioner and there should be a speaking order in such matters. However, very strangely, arbitrator passed a one line order saying that the objections were overruled. Petitioner being the objector was expected to know the reasons which actually weighed with the arbitrator to overrule the objections raised by him. The arbitrator cannot behave like a dictator and he cannot say that he is not bound to give reasons for passing a particular order.

15. Order passed by the administrative authorities should contain reasons when it affects the interest of a party to the lis. The arbitrator was deciding the issue with regard to jurisdiction to take up the matter. It is immaterial as to whether those reasons were sufficient to justify the claim made by the party against the appointment of arbitrator. Reasons would give clarity to the order and it would also enable the appellate or revisional authority to examine the matter independently and also to consider the factors which actually weighed with the authority to take a decision one way or the other.

16. The Supreme Court in Director, Horticulture Punjab and Others Vs. Jagjivan Parshad, , indicated the necessity to supplement reasons in the orders of

authorities both quasi judicial as well as administrative and observed thus:

5. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court's Judgment not sustainable.

6. ...

7. Even in respect of administrative orders Lord Denning, M.R. in *Breen v. Amalgamated Engg. Union* (1971) 1 All ER 1148 observed: (All ER P. 1154h) "The giving of reasons is one of the fundamentals of good administration". In *Alexander Machinery (Dudley) Ltd. v. Crabtree* 1974 1 CR 120 it was observed:

Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at.

8. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking-out. The "inscrutable face of the sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance. (See: *Chairman and Managing Director, United Commercial Bank and Others Vs. P.C. Kakkar*,).

17. Even though the order passed by the arbitrator does not contain reasons, there is difficulty for the petitioner to maintain this civil revision petition in view of the judgment of the Supreme Court in *S.B.P. and Co. Vs. Patel Engineering Ltd. and Another*, .

The legal principles:

18. The Supreme Court in *Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited*, held that it was not permissible for a party to wriggle out of a situation having entered into an agreement, which contains a provision for arbitration and the appropriate remedy was to challenge the decision of the arbitrator in a proceeding u/s 34 of the Arbitration Act. The following observation would make the position clear:

21. In the present case, in fact the appellant's demand was to get some retired Judge of the Supreme Court to be appointed as arbitrator on the ground that if any person nominated in the arbitration clause is appointed, then it may suffer from bias or the arbitrator may not be impartial or independent in taking

decision. Once a party has entered into an agreement with eyes wide open it cannot wriggle out of the situation that if any person of the respondent BPCL is appointed as arbitrator he will not be impartial or objective. However, if the appellant 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.

19. In *Gas Authority of India Ltd. v. Ketu Construction (I) Ltd.* (2007) 7 Scale 98, the Supreme Court indicated that the plea of jurisdiction has to be taken before the arbitrator and in the absence of any such plea it was not possible to challenge the question of jurisdiction in a proceeding u/s 34 of the Act for setting aside the award. The material portion of the said Judgment read thus:

18. The whole object and scheme of the Act is to secure an expeditious resolution of disputes. Therefore, where a party raises a plea that the Arbitral Tribunal has not been properly constituted or has no jurisdiction, it must do so at the threshold before the Arbitral Tribunal so that remedial measures may be immediately taken and time and expense involved in hearing of the matter before the Arbitral Tribunal which may ultimately be found to be either not properly constituted or lacking in jurisdiction, in proceedings for setting aside the award, may be avoided. The commentary on Model Law clearly illustrates the aforesaid legal position.

19. Where a party has received notice and he does not raise a plea of lack of jurisdiction before the Arbitral Tribunal, he must make out a strong case why he did not do so if he chooses to move a petition for setting aside the award u/s 34(2)(a)(v) of the Act on the ground that the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties. If plea of jurisdiction is not taken before the arbitrator as provided in Section 16 of the Act, such a plea cannot be permitted to be raised in proceedings u/s 34 of the Act for setting aside the award, unless good reasons are shown.

20. In *SBP & Co. v. Patel Engg. Ltd.* (2005) 8 SCC 618, the Supreme Court considered the provisions of the Arbitration and Conciliation Act, 1996, in extenso and ultimately cautioned the High Courts from entertaining petitions under Article 226 and 227 of the Constitution of India in respect of interim orders passed by the Arbitrators thus:

44. It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. u/s 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting u/s 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal u/s

37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.

45. The object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them u/s 37 of the Act even at an earlier stage.

46. ...

(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(ix) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

21. In the case on hand, the petitioner has voluntarily entered into an agreement with the respondent. The contract contains a provision for reference to arbitration in case of dispute. The petitioner has unconditionally agreed to abide by the decision of the Director [Marketing] of the first respondent Corporation in the matter of appointment of arbitrator. There was nothing indicated in the agreement to show that the arbitrator should possess a particular qualification to act as the arbitrator to decide the dispute between the parties. Similarly, there was no prohibition for appointment of a subordinate officer of the Corporation as an arbitrator. The petitioner would get the right of appointment through Court only in case the first respondent fails to appoint the arbitrator within thirty days from the date of request made for such appointment. However, that is not the case here. The Division Bench directed the first respondent to appoint an arbitrator as expeditiously as possible and in any case on or before 30.11.2008. Admittedly, the first respondent has made the appointment within the time granted by the Division Bench. The fact that only an officer in the subordinate

cadre was appointed as the arbitrator would make no difference so long as the arbitration clause permits the Corporation to appoint any of its officers as arbitrators. By agreeing to the condition of appointment of an arbitrator by the Director [Marketing], the petitioner has subjected himself to the decision to be taken by the Director. Therefore, it is too late for the petitioner to contend for the position that the arbitrator now appointed by the respondent was incompetent to decide the issue.

Disposition:

22. The question regarding the incompetency of the arbitrator or his disqualification for acting as an arbitrator are all matters to be agitated before the Court while challenging the award passed by the arbitrator. It is true that the arbitrator has not stated in so many words about the reasons in support of his order overruling the objections. The said issue also could be challenged by the petitioner during the time of challenging the arbitration award. Therefore, I do not find any reason to interfere with the arbitration proceeding at this point of time.

23. The arbitrator is directed to give reasonable time, preferably thirty days, to the petitioner to file the claim statement.

24. The civil revision petition is dismissed with the above observation. No costs. Consequently, M.P. No. 1/2009 is also dismissed.