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Court : Mumbai

Decided On : Mar-23-2016

Judge : R.D. Dhanuka

Appeal No. : Arbitration Petition No. 46 of 2015 along With Civil Application No. 2 of 2015

Appellant : Bablu Namdev Navratne

Respondent : Khimji Jaisa Sanda Krishna Enterprises and Others

Judgement :

Oral Judgment:

1. By this petition filed under Section 11(4) of the Arbitration and Conciliation Act, 1996 (for short "the said Act"), the petitioner seeks appointment of an arbitrator.
2. There is no dispute that the arbitration agreement exists between the parties as referred in Clause 16 of the Partnership Deed dated 10th September 2011. The dispute arose between the parties. The petitioner herein filed a petition bearing No.56 of 2014 under Section 11 of the said Act, inter alia, praying for appointment of an arbitrator. The learned designate of the Chief Justice passed an order on 28th October 2014 holding that the said petition did not disclose any notice as required under Section 11(5) of the said Act having been served by the petitioner

on the respondents and accordingly dismissed the said arbitration petition.

3. The petitioner, thereafter, issued a notice on 7th November 2014 addressed to the respondent no.1-partnership firm and two partners. The said notice was issued under Section 11(5) of the said Act for invoking arbitration agreement recorded in Clause 16 of the Partnership Deed and calling upon the respondents to revert back within 7 days from the date of receipt of the said notice. Admittedly, the said notice was served only upon one of the partners Mr.Manabhai Ladabhai Patel on 22nd December 2014 and not on the partnership firm. The arbitration petition is affirmed on 7th November 2014. The arbitration petition is however lodged on 19th January 2015.

4. Learned counsel appearing for the respondents raises an issue of maintainability of this arbitration petition on the ground that the petition has not been filed after expiry of 30 days' notice to be computed from the date of receipt of notice by the respondents and is pre-mature. It is submitted that the partnership firm as well as one of the partners have not been served with any notice of arbitration petition.

5. Learned counsel appearing for the petitioner submits that there is an agreed procedure for appointment of an arbitrator prescribed under Clause 16 of the Partnership Deed. Since the respondents did not agree for appointment of an arbitrator inspite of notice received by at least one of the partners of the partnership firm, the provisions of Section 11(6) of the said Act would stand attracted and not Section 11(5) of the said Act. He submits that under Section 11(6) of the said Act, there is no time of 30 days prescribed for issuing any notice and thus even if the notice period of 30 days had not expired on the date of receipt of the notice by one of the partners, the present petition is maintainable. In support of this submission, the learned counsel placed reliance on the judgment of this Court in the case of Smt.Satya Kailashchandra Sahu and Ors. Vs.M/s.Vidarbha Distillers, Nagpur and Ors., reported in 1997 VI LJ 1232 = AIR 1998 Bombay 210 and more particularly paragraphs 39 and 40 thereof. He also placed reliance on the judgment of the Jharkhand High Court in the case of M/s.P.B. Enterprises, Engineers and Contractors, Burdwan, Vs.Eastern Coalfields Limited, Burdwan and

Ors., reported in AIR 2004 Jharkhand 71 and in particular paragraphs 11 and 12 thereof. He submits that the period of limitation for filing an application under Section 11(6) of the said Act read with Article 137 of Schedule I to the Limitation Act, 1963 is three years and not 30 days.

6. In so far as preliminary objection raised by the respondents that admittedly no notice invoking arbitration was served upon the partnership firm and one of the partners is concerned, it is submitted by the learned counsel that under Section 24 of the Indian Partnership Act, 1932, if a notice is served upon an acting partner, such notice to a partner operates as a notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

7. Learned counsel for the respondents, on the other hand, submits that there is no agreed procedure under the arbitration agreement for appointment of an arbitrator and thus, Section 11(6) of the said Act would not be applicable. He submits that Section 11(5) of the said Act would apply. Since the arbitration petition is filed before expiry of 30 days' notice, the arbitration petition is premature.

8. My attention is invited to the arbitration agreement recorded in Clause 16 of the Partnership Deed in support of the submission that no agreed procedure was prescribed under the said arbitration agreement for an appointment of an arbitrator.

9. I shall first deal with the submission of the learned counsel for the petitioner that there was an agreed procedure prescribed under the arbitration agreement and thus Section 11(6) of the said Act will be attracted in the facts of this case.

10. A perusal of the arbitration agreement recorded in Clause 16 of the Partnership Deed indicates that in case of dispute between the parties arising out of the Partnership Deed, the dispute shall be referred to the arbitration. The said clause does not provide any procedure for appointment of an arbitrator. It provides that the arbitration proceedings will be resolved under the provisions of the law applicable to the arbitration.

11. A perusal of Section 11(2) of the said Act makes it clear that subject to sub-section (6) of Section 11, the parties are free to agree on a procedure for appointing an arbitrator or arbitrators. Section 11(3) provides that failing any agreement referred to in sub-section (2) of Section 11, 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. Section 11(4) which is to be read with Section 11(3) provides that if the appointment procedure in sub-section (3) applies and a party fails to appoint an arbitrator within thirty days from the date of receipt of a request to do so from the other party; or 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.

12. A conjoint reading of Sections 11(2), 11(3) and 11(4) of the said Act makes it clear that failing any agreement referred to in sub-section (2) of Section 11, if a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; upon request of a party, the Chief Justice or any person or institution designated by him to appoint an arbitrator.

13. Section 11(5) of the said Act further provides that failing any agreement referred to in sub-section (2) of Section 11, 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. It is thus clear beyond reasonable doubt that in this case, since in the arbitration agreement, the parties have not agreed on number of arbitrators, the arbitral tribunal shall consist of a sole arbitrator in view of Section 10 of the Arbitration and Conciliation Act. Since there was no agreed procedure, in my view, Section 11(5) of the said Act would apply to the facts of this case.

14. Section 11(6) of the said Act would apply only if the appointment procedure was agreed between the parties which in this case is absent. I am thus not inclined to accept the submission of the learned counsel for the petitioner that either there

was an agreed procedure for appointment of an arbitrator in the arbitration agreement recorded in Clause 16 of the partnership deed or that Section 11(6) of the said Act would be applicable to the facts of this case.

15. A perusal of the order passed by this Court on 28th October 2014 in the earlier Arbitration Petition No.56 of 2014 filed by the petitioner also clearly indicates that the said arbitration petition was rejected by this Court having found that the petition did not disclose any notice as required under Section 11(5) of the said Act.

16. A perusal of the notice issued by the petitioner on 7th November 2014 also clearly indicates that the said notice was issued by the petitioner under Section 11(5) of the said Act. A perusal of the arbitration petition filed by the petitioner indicates that the petition was already affirmed on 7th November 2014. Prior to 7th November 2014, the petitioner had not even issued a notice invoking arbitration agreement. After affirming the arbitration petition on 7th November 2014, the petitioner made correction in paragraph 11 of the arbitration petition stating that the notice was sent on 22nd December 2014 which was much after affirmation of the arbitration petition. Be that as it may, the arbitration petition is admittedly lodged on 19th January 2015 i.e. before expiry of 30 days from the date of receipt of notice by one of the partners of the partnership firm.

17. In so far as the judgment of this Court in the case of Smt.Satya Kailashchandra Sahu and Ors. (supra) relied upon by the learned counsel for the petitioner in support of his submission that no period of 30 days is prescribed under Section 11(6) of the said Act is concerned, in my view, this judgment does not apply to the facts of this case, since there is no agreed procedure prescribed in the arbitration agreement. This judgment does not indicate that even for filing of an application under Section 11(6) of the said Act, the applicant is not required to wait for expiry of 30 days from the date of receipt of the notice before filing of an application under Section 11(6) of the said Act. Reliance placed on the judgment of this Court in the case of Smt.Satya Kailashchandra Sahu and Ors. (supra) thus is totally misplaced.

18. In so far as the judgment of the Jharkhand High Court in the case of M/s.P.B. Enterprises, Engineers and Contractors, Burdwan, (supra) relied upon by the

learned counsel for the petitioner in support of his submission that Article 137 will apply and thus the petition could have been filed within three years is concerned, in my view, this judgment relied upon by the learned counsel for the petitioner discloses a total non-application of mind. The respondents have not raised any issue of limitation in filing the arbitration petition under Section 11 of the said Act, but the contention of the learned counsel for the petitioner is that the petition is pre-mature. The judgment of the Jharkhand High Court in the case of M/s.P.B. Enterprises, Engineers and Contractors, Burdwan, (supra) thus does not assist the case of the petitioner. In my view, even if the notice is received by one of the partners of the partnership firm, the fact remains that before expiry of 30 days from the date of receipt of such notice, the petitioner admittedly has already lodged this petition. The day on which the petitioner had got this petition affirmed, the notice under Section 11(5) of the said Acts was not even issued by the petitioner. The petitioner subsequently lodged the petition and made those corrections in the arbitration petition.

19. The arbitration petition, in my view, is thus pre-mature and is not maintainable. The petition is accordingly dismissed. No order as to costs. In view of dismissal of the arbitration petition, civil application does not survive and is accordingly dismissed.

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