

Sbpl Infrastructure Ltd. Vs. India Media Services Pvt. Ltd.

Sbpl Infrastructure Ltd. Vs. India Media Services Pvt. Ltd.

SooperKanoon Citation : sooperkanoon.com/76284

Court : Kolkata

Decided On : Jul-20-2016

Judge : Debangsu Basak

Appellant : Sbpl Infrastructure Ltd.

Respondent : India Media Services Pvt. Ltd.

Judgement :

IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction Original Side G.A.No.2997 of 2015 with A.P.No.306 of 2012 with A.P.No.457 of 2015 with A.P.No.696 of 2014 with A.P.No.78 of 2012 SBPL Infrastructure LTD.versus India Media Services PVT.LTD.For the Petitioner : Mr.Pratap Kr.

Chatterjee, Sr.Advocate Mr.Abhrajit Mitra, Sr., Advocate Mr.Jishnu Chowdhury, Advocate Mr.S.Mukherjee, Advocate Mr.S.Ghosh, Advocate Mr.A.Sarkar, Advocate Mrs.A.Chatterjee, Mr.A.C.Kundu, Advocate For the Respondent : Mr.Mr.Mr.Mr.Hearing concluded on : July 14, 2016 Judgment on : July 20, 2016 Pramit Kr.

Roy, Sr.Advocate Jayjit Ganguly, Advocate S.

Ghosh, Advocate Debangsu Dinda, Advocate DEBANGSU BASAK, J.:- Five applications are taken up for hearing analogously.

They are between the same parties and involve the same immovable property.

Moreover, the learned Advocates appearing for both the parties have given their consent to the five matters being taken up together.

A.P.No.306 of 2012 is an application under Section 11 read with Section 15 of the Arbitration and Conciliation Act, 1996.

G.A.No.2997 of 2015 is an application for dismissal of A.P.No.306 of 2012.

The petitioner in A.P.306 of 2012 is referred to as the petitioner and the respondent therein as the respondent for the sake of convenience.

A.P.No.696 of 2014 and A.P.No.457 of 2015 are the applications under Section 9 of the Act of 1996 filed by the petitioner.

Learned Senior Advocate for the respondents submits that, a petition under Section 11 of the Act of 1996 is not maintainable in the facts of this case.

He refers to the arbitration agreement.

He submits that, a reference in terms of the arbitration agreement was made to the arbitrator named in the arbitration agreement.

Such arbitrator has, by a writing dated January 18, 2012 stated that, the arbitration proceedings stands terminated.

He submits that, the arbitration proceedings therefore stands terminated.

He refers to Section 32(1).32(2) and (c) of the Act of 1996 and submits that, it is not permissible to substitute the arbitrator.

He refers to 2014 Volume 7 Supreme Court Cases page 255 (Lalitkumar V.

Sanghavi & Anr.v.Dharamdas V.

Sanghavi & Ors.) in support of such contention.

On the merits of the claim made by the petitioner, he submits that, the disputes no longer exist.

He submits that, the contract was cancelled at the behest of his client and that such cancellation was accepted by the petitioner.

In view of the fact that, there does not subsist any dispute between the parties an arbitrator need not be appointed.

In support of such contention he relies upon Judgment Today 2015 Volume 6 Supreme Court page 492 (Naseem Ahmad v.

State of U.P.& Ors.).Learned Senior Advocate for the petitioner submits that, the arbitration before the named arbitrator was continued up to the stage of filing of Written Notes on Argument.

He submits that, the respondent was supposed to give consent for extension of time for the arbitration to continue till its conclusion.

The respondent did not give such consent.

Consequently, the arbitrator named in the arbitration clause acting in terms therewith was compelled to issue the writing dated January 18, 2012 stating that, the arbitration agreement stands terminated.

He refers to one of the letters issued by the respondent subsequent to the commencement of the arbitration as well as the letter of the Advocate of the respondent.

Learned Senior Advocate for the petitioner submits that, the writing dated January 18, 2012 of the named arbitrator cannot be construed as an award.

Therefore, Section 34 of the Act of 1996 does not come into operation.

The issues raised before the arbitrator have not been decided.

In view of the arbitrator named in the arbitration agreement not being able to complete the arbitration, it would be proper for the Court to appoint a new arbitrator.

He refers to the arbitration clause and submits that, the clause provides that the named arbitrator should conclude the arbitration proceedings within the time stipulated.

In the event, the arbitration could not be concluded within the time specified by the named arbitrator, then in such case the arbitration by the named arbitrator would stand terminated.

The arbitration clause also provides that, in such an eventuality, the parties would be at liberty to approach the Calcutta High Court for appointment of an arbitrator.

Acting in accordance with such arbitration clause, the named arbitrator had issued the writing dated January 18, 2012 as the arbitration could not be completed within the time stipulated.

The arbitration clause allows the parties thereto to apply for appointment of an arbitrator on the basis of such a writing by the named arbitrator.

The petitioner has applied under Section 11 of the Act of 1996 as contemplated in the arbitration agreement.

He submits that, a Court cannot extend the time to conclude the arbitration.

Consequently, the only other remedy is to apply under Section 11 of the Act of 1996.

In support of such contention he relies upon 2010 Volume 2 Supreme Court Cases page 385 (NBCC Ltd.v.J.G.Engineering Private Limited).On the petitions under Section 9 of the Act of 1996, learned Senior Advocate for the petitioner submits that, the petitioner was initially not granted any relief by the fiRs.Court.

In the appeal carried from the refusal to grant an interim order the Appeal Court had on May 14, 2013 passed an order stating that the property concerned should not be dealt with without the leave of the Court.

Such order was confirmed while disposing of the appeal.

Similar order need be passed in the three Section 9 applications.

Learned Senior Advocate for the respondents submits that, the arbitration proceeding being a suit for land no relief ought to be granted to the petitioner.

He submits that, the immovable property involved is admittedly is situated outside the territorial jurisdiction of this Honble Court.

He further submits that, the petitioner has made a prayer for possession in the arbitration proceedings with regard to such immovable property.

Consequently, the arbitration proceedings is a suit for land.

Since such a proceeding is a suit for land, and such land being situated outside the Ordinary Original Civil Jurisdiction of this Honble Court, no relief should be granted to the petitioner.

In reply learned Senior Advocate for the petitioner submits referring to the Order dated November 14, 2014 passed by the Appeal Court that, the petitioner has given up the prayer for possession in the arbitration proceedings.

Consequently, the proceedings no longer can be termed to be a suit for land.

The records made available demonstrate that, the parties had entered into an agreement referred to as the nomination agreement dated December 5, 2005.

Such nomination agreement contains an arbitration clause which is as follows:- 12.

All disputes and differences by and between the Parties relating to, arising out of or concerning the subject matter of this Agreement shall be referred to the sole arbitration of Mr. Justice Umesh Chandra Banerjee, Retired Judge of Supreme Court of India in accordance with the Arbitration & Conciliation Act, 1996 and the decision of the Arbitrator shall be final and binding on the Parties.

The venue of arbitration shall be Kolkata.

The Arbitration proceeding shall be concluded within 60 days from the date of entering into reference.

In default the Arbitrator shall stand discharged without remuneration and the Parties shall apply for appointment of new Arbitrator on the same terms to the Honble High Court at Calcutta. The arbitrator named in the arbitration clause had entered into reference.

The reference could not be completed within the time stipulated in the arbitration clause.

By a writing dated January 18, 2012 the named arbitrator had stated as follows: In the view aforesaid and by reason of efflux of time and since it is possible to conclude the Arbitration proceeding by 21st January, 2012 the proceeding stands terminated.

Incidentally, be it placed on record that the undersigned was appointed upon obtaining consent from the undersigned and at the initiative of the claimant in 2005.

In the view as above, there shall be an award to the effect that the instant Arbitration proceeding stands terminated by efflux of time and as initiated by the claimant in terms of Clause 12 of the nomination agreement dated 5th December, 2005.

Each party would pay and bear their respective costs.

I do hereby thus make and publish this award on this day, the 18th day of January, 2012 at Kolkata. The writing dated January 18, 2012 has not been termed as an award by the respondent.

The petitioner also does not claim such writing to be an award.

The writing records the termination of the arbitration of the named arbitrator consequent to the contingent contemplated in the arbitration clause happening, that is to say, the arbitration by the named arbitrator could not be completed within the time stipulated in the arbitration clause.

The writing dated January 18, 2012 has not decided any of the issues raised in the arbitration and still subsisting between the parties.

The Section 11 application has been filed on September 8, 2015.

The claim was live at the time of the reference to the named arbitrator.

The claim is live on the date of filing of the Section 11 petition.

None of the parties have urged that the claim involved is no longer live.

Section 32 of the Act of 1996 stipulates the circumstances in which the arbitration proceedings can be said to be terminated.

Subsection (1) provides that, an arbitration proceedings would stand terminated by the final arbitral award of the arbitrator or by an order of the arbitral Tribunal under Sub-section (2) of Section 32 of the Act of 1996.

Sub-section (2) of Section 32 of the Act of 1996 recognizes the instances when an arbitral Tribunal may issue an order for termination of the arbitral proceedings without making the final arbitral award.

Section 32(2)(c) mandates that, the arbitral Tribunal shall issue an order of termination of the arbitration proceedings when it finds that, the continuation of the proceedings has for any other reasons than those stipulated in Sub-section (2) become unnecessary or impossible.

In the present case, the parties could not have their disputes resolved through the arbitration of the named arbitrator in terms of the arbitration clause, within the time stipulated therein.

Consequently, the arbitral Tribunal was compelled to issue the writing dated January 18, 2012 stating that, the arbitration stands terminated.

Section 15 of the Act of 1996 specifies when the mandate of the arbitrator would stand terminated and when substitution of an arbitrator is possible.

It provides that, in addition to the circumstances referred to Sections 13 and 14 of the Act of 1996 the mandate of an arbitrator will be considered to be terminated when he withdraws from office or the parties agreed to the termination of his

mandate.

In the instant case, the parties had agreed that, the arbitration of the named arbitrator to stand terminated on the expiry of the time period stipulated therein.

The arbitration clause goes on to provide that, in the event of the termination of the mandate of the named arbitrator due to expiry of time, the parties should apply for appointment of a new arbitrator on the same terms to the Honble High Court at Calcutta.

The petitioner has done so.

In Lalitkumar V.

Sanghavi & Anr.

(supra) the arbitrators appointed found the claimant not to have taken any interest into the matter over a period of four years. The fees for the arbitrators were not paid.

In such circumstances, the arbitrators terminated the proceedings and vacated all interim orders. One of the parties to such arbitration had applied to the arbitral Tribunal for modification of such order of termination.

Thereafter, an application was filed under Section 11 of the Act of 1996.

Such application was dismissed.

Against the order of dismissal a Special Leave Petition was filed.

On facts it found that, the orders of the arbitral Tribunal would fall within the Section 32(2)(c) of the Act of 1996.

It is held that, having regard to the scheme of the Act of 1996 and on a cumulative reading of Sections 32 and 14 of the Act of 1996, the question whether a mandate of an arbitrator stood legally terminated or not can be examined by the Court under Section 14(2) of the Act of 1996.

In such circumstances, the appellants before the Supreme Court were granted liberty by approaching the appropriate Court for the determination of the legality of the termination of the mandate of the arbitral Tribunal.

Naseem Ahmad (supra) records a payment for the satisfaction of the claim without entering into any arbitration.

No ratio has been laid down therein.

In NBCC LTD.(supra) it is held that, the Court does not have power to extend the time to make and publish an award.

It goes on to observe that where the arbitration agreement itself provides the procedure for enlargement of time and the parties have taken recourse to it and consented to enlargement of time by arbitrator, the Court cannot exercise its inherent power in extending time fixed by the parties in absence of consent of either of them.

In the present case, the respondent did not consent to the extension of time for completion of the arbitration by the named arbitrator.

Section 11 of the Act of 1996 can be read to say that, the parties to the arbitration agreement must be asked to adhere to and give effect to the arbitration clause to the extent possible.

Where a Court finds that, a party to the arbitration agreement is failing in its obligations specified in the arbitration clause, the Court may direct such party to discharge such obligations as closely as possible to the agreement.

The Act of 1996 also empowers the Court to look into whether the mandate of the arbitrator stands terminated validly or not.

In the present case, the arbitration clause is such that, it provides for an arbitration through a named arbitrator within the time period stipulated.

It also contemplates a situation where the arbitration by the named arbitrator may not be concluded within the time period stipulated, and therefore it provides for

such an eventuality.

It stipulates that, in the event of such an eventuality happening, the parties should approach the Calcutta High Court for appointment of an arbitrator on the same terms. By the writing dated January 18, 2012 the named arbitrator has recorded the termination of his mandate in terms of the arbitration agreement as the arbitration could not be completed within the time stipulated therein.

The next part of the arbitration agreement therefore comes into operation.

The next part provides that, in the eventuality of the named arbitrator not completing the arbitration within the time stipulated the party should approach to the Calcutta High court for appointment.

In such circumstances, the present application under Section 11 read with Section 15 thereof is maintainable.

In course of hearing the parties were requested to agree to an arbitrator.

The parties were unable to do so.

In such circumstances, Mr. Justice Jayanta Kumar Biswas (Retired) is appointed as an arbitrator to adjudicate the disputes between the parties.

The arbitrator will enter into reference as expeditiously as possible.

He will be paid a remuneration of Rs.25,000/- each by the parties for each sitting.

It is expected that, the parties proceed with the arbitration as expeditiously as possible.

The arbitrator will be at liberty to proceed on a day to day basis with the witness action as well as arguments on completion of the pleadings.

The arbitrator is requested not to grant any adjournment on any ground whatsoever in excess of seven days to any of the parties.

If filing of pleadings is required, the arbitrator is requested not to grant any time in excess of seven days to any of the parties for such purpose.

The parties are requested to cooperate with the arbitrator.

So far as to the three petitions under Section 9 of the Act of 1996 are concerned, by the Order dated November 14, 2014 the Division Bench had directed the undertaking given by the respondent to continue until the disposal of the applications.

The petitioner had given up its prayer for possession.

Such fact is recorded in the Order dated November 14, 2014.

In such circumstances, it cannot be said that the arbitration proceedings is a suit for land.

No material is placed to demonstrate that, the arbitration proceedings is a suit for land after the prayer for possession being given up by the petitioner as recorded by the Order dated November 14, 2014.

In view of the claim and counterclaim between the parties revolving around an immovable property, it is just and proper that, such immovable property is kept available to the parties for the satisfaction of any award that may be passed in the arbitration proceedings.

Therefore, the undertaking given by the respondent and as continued by the Appeal Court on November 14, 2014 will continue for a period of 4 months from the date of award to be passed in the reference.

G.A.No.2997 of 2015, A.P.No.306 of 2012, A.P.No.457 of 2015, A.P.No.696 of 2014 and A.P.No.78 of 2012 are disposed of.

No order as to costs.

[DEBANGSU BASAK, J.].Later:Learned Advocate for the respondent, in the Section 11 application, prays for stay of operation of the order appointing the

arbitrator.

Such prayer is considered and refused.

[DEBANGSU BASAK, J.].

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com