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Court : Kolkata

Decided On : Feb-14-1997

Reported in : (1997)2CALLT277(HC)

Judge : Altamas Kabir, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 12, 12(3), 13, 14 and 15

Appeal No. : A.P. No. 182 of 1996

Appellant : Jas Enterprises

Respondent : The Karanpara Development Co. Ltd. and anr.

Advocate for Def. : R.M. Chatterjee, Adv.

Advocate for Pet/Ap. : Priyabrata Mukherjee, ;Sk. Nizamuddin and ;Sahabuddin Sardar, Advs.

Disposition : Application dismissed

Judgement :

Altamas Kabir, J.

1. This application has been made under Section 12 of the Arbitration and Conciliation Ordinance 1996, which has since been replaced by the [Arbitration and Conciliation Act, 1996](#), inter alia, for leave to the petitioner to revoke the authority

of Sri I.M. Puri appointed as the sole arbitrator and to remove him from the reference in respect of the disputes and differences arising out of the contract in question.

2. Appearing in support of the application, Mr. Priyabrata Mukherjee submitted that a notice inviting tenders was published in the Ranchi Express on 2nd August, 1994, and the petitioner's tender in respect thereof was duly accepted and Work Order was issued to the petitioner.

3. Disputes, however, arose between the parties over the execution of the work and it was submitted by Mr. Mukherjee that, inasmuch as, the respondents had failed to allot sufficient work to the petitioner in terms of the work order, the petitioner was compelled to keep its machineries and other equipment idle for a long time. The petitioner submitted a bill to the respondents for a sum of Rs. 41 lakhs, giving credit of Rs. 10 lakhs which had already been realised, which included a claim in regard to forced idleness. Mr. Mukherjee submitted that since disputes were raised in respect of the said bill, the petitioner filed an application under Article 226 of the Constitution in the High Court at Patna, but withdrew the same as the agreement provided for the arbitration proceedings to be held in Calcutta.

4. Mr. Mukherjee urged that in keeping with Clause 74 of the agreement, a letter was addressed on the petitioner's behalf to the Chairman of the Respondent No. 1, on 4th June, 1996, for adjudication, of the disputes in arbitration proceedings. On receipt of the said letter, the Chairman of the Respondent No. 1 company by his letter dated 24th June, 1996, appointed one Shri I.M. Puri, Chartered Accountant, as the sole Arbitrator to adjudicate on the disputes between the parties.

6. Mr. Mukherjee submitted that by a letter dated 19th July, 1996, the petitioner raised various objections to the appointment of Shri Puri as the sole Arbitrator and requested that a local and legal representative from the Ranchi area be appointed as Arbitrator to enable the petitioner to participate meaningfully in the arbitration proceedings. Pursuant to the objection raised, a hearing was conducted by Shri Puri to consider the said objections. After hearing the respective parties, the

Arbitrator held that his appointment was in order and that he could proceed with the arbitration.

6. It was urged by Mr. Mukherjee that from the minutes of the said meeting it would be quite clear that the Sole Arbitrator was closely associated with the respondent No. 1 and was likely to be biased against the petitioner. Mr. Mukherjee also urged that the fees of the Sole Arbitrator were too high for the petitioner company to bear and since he was based in Delhi it would be difficult for the petitioner to bear his other expenses such as air fare and Hotel charges.

7. Mr. Mukherjee urged that in view of the above, leave should be granted to the petitioner to revoke the authority of the Arbitrator and a fit and proper person should be appointed by this court to act as Arbitrator in place and in stead of Shri I. M. Puri.

8. Opposing the application, Mr. Rudrendra Mohan Chatterjee submitted that the Arbitrator had held that he was entitled to continue with the arbitration proceedings and had given directions for filing of statement of claims and rejoinder, which had not been complied with by the petitioner.

9. Mr. Chatterjee also submitted that since the Arbitrator had already entered upon the reference, the present application under Section 12 was totally misconceived and was not maintainable in law.

10. Mr. Chatterjee also submitted that the fear of the petitioner regarding alleged bias was entirely misconceived since Clause 74 of the tender papers clearly indicates that disputes arising between the parties were to be referred to the sole arbitration of a person to be appointed by the Chairman of the company, under the provisions of the Arbitration Act, 1940, and the Rules made thereunder. It was specifically indicated that no objection was to be taken on the ground that the Arbitrator so appointed was an employee of the company and that he had to deal with the matter to which the agreement or the reference relates or that in the course of his duties he had dealt with or expressed views on all or any of the matters covered by the reference.

11. Mr. Chatterjee submitted that in the absence of any disclosed bias the petitioner's apprehension was entirely misconceived and was liable to be disregarded.

12. On a careful consideration of the submissions made on behalf of the respective parties and the materials on record, in my view this application is not maintainable in law though not for the reasons as indicated by Mr. Chatterjee in his submissions. The Arbitration and Conciliation Ordinance, 1996, followed by the Arbitration and Conciliation, Act, 1996, radically altered certain provisions and procedures which were prevailing under the Arbitration Act, 1940. The powers given under the 1940 Act to revoke the authority of the Arbitrator or Umpire or to remove them under Section 5 and 11, have been completely changed and have been replaced by the procedure indicated in Chapter III of the ordinance as also the Arbitration and Conciliation Act, 1996, hereinafter referred to as the '1996 Act'.

Section 11, which forms part of Chapter III, specifically empowers only the Chief Justice to appoint an Arbitrator in the circumstances indicated therein.

Section 12 of the 1996 Act sets out the ground on which the appointment of an Arbitrator may be challenged and Section 13 lays down the procedure for making such challenge.

For the sake of convenience and better appreciation of the legal position, the provisions of Sections 12 and 13 are set out hereinbelow:-

12. Grounds for challenged.- (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 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 becoming aware of any circumstances referred to in sub-section (3) of Section 12, send a written statement of the reasons for the challenged 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 shall 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.'

13. It will thus be clear that the authority of the arbitrator can be challenged only if circumstances exist which give rise to justifiable doubts as to his independence or impartiality or he does not possess the qualifications agreed to by the parties.

14. Section 13 makes it very clear that if a challenge is to be thrown to the appointment of the arbitrator, the party who intends to challenge such appointment shall within fifteen days after becoming aware of the Constitution of the arbitral tribunal or after becoming aware of any of the circumstances referred to in sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the Tribunal, The scheme of the new provisions is such it is the arbitrator himself who is to decide the said challenge and if he is satisfied that he is entitled to proceed in the matter, he shall continue the arbitral proceedings and make an arbitral award, which is precisely the procedure which has been adopted in this case.

15. Sub-section (5) of Section 13 provides that a party challenging the arbitrator after an arbitral award is made, may make an application for setting aside such award in accordance with Section 34 of the Act.

16. The provisions for termination of the mandate of an arbitrator have been indicated in Sections 14 and 15 of the New Act which provides as follows:-

'14. Failure or impossibility to act.-(1) The mandate of an arbitrator shall terminate if-

(a) he becomes de jure or defacto 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 reasons 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.'

17. It will thus be seen that the mandate for an arbitrator ceases either if he becomes unable to perform his functions or fails to act without undue delay or if he withdraws from his office or if the parties agree to termination of his mandate and only if any controversy remains as to whether the arbitrator had become unable to perform his functions or fails to act with reasonable despatch, can a party apply to the court to decide on the termination of the mandate.

18. In the present case none of the circumstances exist in which the mandate of the arbitrator may stand terminated and only on an apprehension of bias has this application been made for his removal and appointment of a fresh arbitrator, despite the fact that in the arbitration proceeding only direction for filing of statement of claims and rejoinder thereto have been given and the hearing is yet to begin.

19. Furthermore, in view of Clause 74 of the agreement, the petitioner is precluded from objecting to the appointment of the arbitrator only on the ground that the person appointed is an employee of the company and that he had to deal with the matter to which the agreement relates. Uptil now, there has not been any substantial progress in the arbitral proceedings from which an assumption can be drawn that the arbitrator nurses a bias against the petitioner.

20. In my view, the circumstances of this case do not bring it within the scope and ambit of sub-section (2) of Section 14 of the 1996 Act, nor do the circumstances enumerated in Section 15 exist which warrants termination of the arbitrator's mandate.

21. The instant application is not only premature but is also misconceived and is, accordingly, dismissed.

22. There will be no order as to costs.

23. All parties to act on a signed copy of the operative part of this judgment on the usual undertaking.