

Rakesh Jain Vs. Ms. Wellwon Builders (India) Private Ltd.

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Court : Allahabad

Decided On : Feb-18-2011

Judge : Ferdino Inacio Rebello, C.J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11 (4) (6), 12 and 13; Code of Civil Procedure (CPC). - Section 9

Appeal No. : Arbitration Application No. 14 of 2010

Appellant : Rakesh Jain

Respondent : Ms. Wellwon Builders (India) Private Ltd.

Advocate for Def. : Mr. A.P. Singh Gaur, Adv

Advocate for Pet/Ap. : Mr. Viplav Sharma,; Mr. Nikhil Singh, Advs

Judgement :

1. The applicant, by means of this application, seeks the following relief:-

"Allow the present petition and appoint an independent arbitrator as per the provisions of Arbitration & Conciliation Act, 1996 and thereby, constitute arbitral tribunal for settlement of all disputes raised by the Applicant herein against the respondent from out of and/or touching upon and/or in relation to the 15 separate Agreements dated 20.8.2007 (Annexure A1 colly) between them for

sale and purchase of 15 flats (namely, Flats Nos. F-G, F-2, F-4, E-1, E-2, E-3, E-4, G-1, G-2, G-3, G-4, A-1, A-2, A-3 and A-4 in its River Front Apartments Project at 70, Dalibagh Lucknow) and payments made there against by the Applicant..."

2. There is no dispute that in the agreement entered into between the applicant and the respondents, there is an arbitral clause, which is worded as under:-

"32. All or any disputes arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereof for the time being in force. The arbitration proceedings shall be held at Lucknow by a Sole Arbitrator who shall be the Legal Advisor of the Company. The Allottee hereby confirms that it shall have no objection to this Appointment. The High Court at Lucknow shall have the jurisdiction in all matters arising out of/touching or concerning this agreement regardless of the place of execution of this Agreement, which is deemed to be at Lucknow."

3. The applicant, by means this application, is challenging the following words in the arbitral clause:-

"... who shall be the Legal Advisor of the Company. The Allottee hereby confirms that it shall have no objection to this Appointment. ..."

4. The arbitration application was filed on 24.02.2010. According to the applicant, failure on the part of the respondents to comply with the various contents of the terms of the agreement has given rise to several disputes which have arisen from

and/or touching upon and/or in relation to the arbitral agreements entered into between the applicant and the respondents. A legal notice dated 17.02.2010 came to be served on the respondents setting out, amongst others, that in the absence of settlement and/or compliance, the notice to be treated as an effective notice for commencement of arbitration under the agreements. It further stated that while disputing the nomination/appointment of the alleged Legal Advisor of the respondents as the sole Arbitrator on the ground that there exists sufficient circumstances to give rise to justifiable doubts as to his independence or impartiality and challenging the same by seeking its deletion under 'blue pencil doctrine' from a Competent Court, invokes the remaining provisions relating to arbitration as contained in Clause 32 of each respective Agreement.

5. The application as now filed, it is stated, has been filed under the provisions of Sections 11, 12 and 13 of the [Arbitration and Conciliation Act, 1996](#) (hereinafter referred to as the 'Arbitration Act').

6. A supplementary affidavit came to be filed on behalf of the applicant in which it has been set out that subsequent to the legal notices dated 17.02.2010 and 22.02.2010, counsel for the applicant received two e-mails both dated 23.02.2010 each containing, as an attachment, legal notice dated 23.02.2010 of the respondents which, inter - alia, stated that Justice U.C. Srivastava (Retired) has been appointed as the sole Arbitrator after obtaining his consent. Thereafter, according to the applicant, two notices were received by couriers from the respondent Company, one containing the notice dated 23.02.2010 and another containing notice dated 22.02.2010 relating to appointment of Justice U.C. Srivastava (Retired) as the sole Arbitrator. The applicant contends that the respondents, in nominating Justice U.C. Srivastava (Retired), acted in contravention of the impugned provisions of the arbitral clause. Accordingly, a prayer has been made to appoint some other Arbitrator.

7. The respondents have filed their reply dated 22.02.2010. In response to legal notice dated 17.02.2010, it is set out that they have nominated Justice U.C. Srivastava (Retired) as the sole Arbitrator. They have opted to file their statement of facts and claim in the very near future before the learned Arbitrator. The stand

of the applicant that the appointment of the sole Arbitrator was not in consonance with the appointment procedure contained in the arbitration agreement, was misconceived and that the alleged notion of 'Blue pen doctrine' is mere misapprehension on the part of the applicant. In case any Court is vested with the powers to avoid or declare any concluded part of the contract as redundant or void, such practice may not be permissible in case of statutory provisions or the trial in ordinary courts of law. With reference to the Courts order dated 23.04.2010 in respect of the objection regarding maintainability of the application, it is contended that it is only Section 11 (4) of the Arbitration Act, which permits intervention by the Court where the applicant raises doubts regarding the integrity of the Arbitrator named in the agreement and, it is in these circumstances, to avoid controversy, Justice U.C. Srivastava was appointed as the sole Arbitrator. It is also set out that the respondents have filed their claim petition before the learned Arbitrator. It is then set out that once the Arbitrator is appointed, it is not open to revoke the authority of such an Arbitrator.

8. Various contentions have been raised on behalf of the applicant and the respondents. The questions for our consideration are - (1) whether, it is open to the Chief Justice, exercising jurisdiction under Section 11 (4) of the Arbitration Act 1996, to decide that a part of the arbitration clause is invalid and/or to strike it off, and (2) is it open to the Chief Justice, exercising jurisdiction under Section 11 (4) of the Arbitration Act, to remove an appointed Arbitrator and appoint another Arbitrator in his place?

9. Before answering these issues, we may firstly note that the main relief sought by the applicant is to strike off and/or severe certain words in Clause 32 of the arbitration agreement, which is the clause pertaining to arbitration.

A similar issue as involved in this case was the subject matter of consideration before the Supreme Court in *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.*, (2006) 2 SCC 628, wherein Justice C.K. Thakker, as a delegate of the learned Chief Justice of India, but exercising judicial powers, has been pleased to uphold the 'doctrine of severability' of an arbitral clause. In that judgment, it was noticed that the agreement itself provided that if any provision of the agreement is held

invalid, illegal or unenforceable for any reason, it would not affect other clauses. The question for consideration in the said case was - 'whether the arbitration agreement was legal, valid and enforceable?' Reference was made to the Halsbury's Law of England (4th Edition, Volume 9) as also various other texts. It was then observed as under:-

"15. It is no doubt true that a court of law will read the agreement as it is and cannot rewrite nor create a new one. It is also true that the contract must be read as a whole and it is not open to dissect it by taking out a part treating it to be contrary to law and by ordering enforcement of the rest if otherwise it is not permissible. But it is well settled that if the contract is in several parts, some of which are legal and enforceable and some are unenforceable, lawful parts can be enforced provided they are severable."

Having so said, it was then observed that if it is held that the agreement is severable, that part can be enforced and implemented which is legal, valid and in consonance with law. It was also noted that in several judgments, Courts have held that partial invalidity in contract will not ipso facto make the whole contract void or unenforceable. Wherever a contract contains legal as well as illegal parts and where the objectionable parts can be severed, effect has been given to legal and valid parts striking out the offending parts. In the said case, it was held that objectionable part was clearly severable as it was independent of the dispute referred to and resolved by an Arbitrator. The severable part was a sentence in the arbitration clause which provided that the arbitrator's determination shall be final and binding between the parties and declared that the parties had waived the rights of appeal or objection in any jurisdiction. The learned Judge then applied the test, that for deciding the validity or otherwise of an agreement or order, what has to be considered is 'substantial severability' and not 'textual divisibility'. It was then held that it is the duty of the Court to sever and separate trivial or technical parts by retaining the main or substantial part and by giving effect to the latter if it is legal, lawful and otherwise enforceable.

10. In the ordinary course, considering the view taken in the case of Shin Satellite Public Co. Ltd. (supra), the issue could have been considered as to whether the part sought to be alleged as illegal, was severable. That is the only relief sought in the application.

11. In my opinion, that issue now need not be answered as the respondents themselves have not given effect to that part of the clause and instead appointed Justice U.C. Srivastava (Retired) as the sole Arbitrator. The issue thus has become academic. The Tribunal is now constituted. The appointment was done before expiry of 30 days of the notice dated 17th February, 2010 and even before the application was filed under Section 11 (4). Factually, as pointed out, the arbitration application is dated 23.02.2010. It appears to have been filed on 24.02.2010. The respondents by their notice dated 22.02.2010 in answer to the applicant's notice dated 17.02.2010 had nominated Justice U.C. Srivastava (Retired) as the sole Arbitrator, i.e. before the invocation of jurisdiction under Section 11(4) and 11(6) of the Arbitration Act. Therefore, it is not necessary, on the facts of the present case, to consider the issue as to whether the offending part was severable and if severable, what will be the effect of such severance.

12. Once an Arbitrator has been appointed before the application is filed, it would not be open to the Chief Justice or his delegate to remove the said Arbitrator and appoint another Arbitrator in his place. Such an exercise would be clearly without jurisdiction. In *Bharat Sanchar Nigam Ltd. & Anr. v. Dhanuradhar Champatiray*, (2010) 1 SCC 673, the Supreme Court has clarified that the appointment of an Arbitrator can be made even after expiry of 30 days but before an application under Section 11 of the Arbitration Act is filed. In the instant case, the Arbitrator was appointed before filing of the present application and before expiry of 30 days.

13. The other aspect of the matter is, whether the Chief Justice or his delegate, in the exercise of their judicial powers as held in *S.B.P. & Company v. Patel Engineering Ltd. & Anr.*, (2005) 8 SCC 618, can proceed to decide the issue pertaining to severability of the arbitration clause and sever the illegal part, which exercise is normally done in the course of proceedings for adjudication. That to an extent has been answered in *Shin Satellite Public Co. Ltd. (supra)*. The issue of

the existence of an arbitration agreement is an aspect which normally can be decided under Section 11 (4) or 11 (6). The issue is whether the validity of the arbitral clause can be decided by the Chief Justice or his delegate. The existence of a valid arbitral clause is a jurisdictional issue, the answer to which depends on the exercise of jurisdiction by the Chief Justice or his delegate. Severance of a part of arbitral claim considering the judgement in Shin Satellite Public Co. Ltd. (supra) can also be gone into. The question is whether the validity of the arbitral clause itself can be gone into. We may gainfully refer to the following paragraph:-

"39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11 (6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act to best serve the purpose sought to be achieved

by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal."

Even the Chief Justice acting judicially exercises limited jurisdiction. The Chief Justice is not clothed with the power under Section 9 of the Code of Civil Procedure.

14. In *National Insurance Company Limited v. Boghara Polyfab Private Limited*, (2009) 1 SCC 267, the Supreme Court firstly quoted paragraph 39 of the judgment in *SBP & Co. v. Patel Engineering Ltd.*, (2005) 8 SCC 618, which reads as under:-

"39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11 (6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as

may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal."

After having so quoted, the Court was pleased to call out the following propositions, which read as under:-

"22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are : (a) Whether the claim is a dead (long barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.

23. It is clear from the scheme of the Act as explained by this Court in SBP & Co., that in regard to issues falling under the second category, if raised in any application under Section 11 of the Act, the Chief Justice/his designate may decide them, if necessary, by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice or his designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object or the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue."

It is thus apparent that the Chief Justice or his designate can only answer or decide the issues, as described in first and second categories. The issue as to whether a part of the Arbitral clause is void in the light of the judgment in SBP & Co. (supra) as understood by the National Insurance Company Limited (supra) cannot, therefore, be decided by the Chief Justice or his designate.

This has once again been reiterated in *Indowind Energy Ltd. v. Wescare (I) Ltd. & Anr.*, AIR 2010 SC 1793, wherein the Court was pleased to observe that the scope of examination of the agreement by the learned Chief Justice or his Designate under section 11 (6) is necessarily to be restricted to the question whether there is an arbitration agreement between the parties. The examination cannot extend to examining the agreement to ascertain the rights and obligations regarding performance of such contract between the parties.

15. Even after the above conclusion, if the offending portion can be severed, then what is the arbitral procedure for appointment of a sole Arbitrator. The claim as it stood requires that the respondents name the Arbitrator by office (post). Consequently, what will follow is that there is no procedure for appointing the sole Arbitrator. If it is held that there is no procedure for appointment of a sole arbitrator and ordinarily parties do not agree to the name of the sole arbitrator, then under Section 11 (4), the Chief Justice could make the appointment. If, however, the appointment is already made, can the Chief Justice still adjudicate whether the Tribunal was improperly constituted and if so, does it amount to a nullity in law and consequent vacancy. Appointment of an Arbitrator by a post is merely following the terms of the contract. In my opinion, considering the dictum in *SBP & Co. v. Patel Engineering* (supra), the exercise cannot be done by the Chief Justice under Section 11 of the Arbitration Act.

16. We then go to the other issue as to whether the Chief Justice or his delegate, exercising jurisdiction under Section 11 (4) and 11(6) of the Arbitration Act can decide the challenges as to the impartiality or otherwise of an Arbitrator when there are specific provisions under the Arbitration Act to that effect?

To answer the questions, we may point out that Section 12 of the Arbitration Act provides, that the appointment of an Arbitrator can be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or he does not possess the qualifications agreed to by the parties. In the arbitration agreement, the Arbitrator was to be a sole Arbitrator. The part of that clause cannot be severed nor is there a prayer to that effect. Therefore, the

parties including the applicant, had agreed for appointment of the sole Arbitrator. In terms of the agreement, the applicant was not to object to the appointment of the Legal Advisor of the respondent as an Arbitrator. We are not really concerned with that issue now. Thus, the sole Arbitrator could have been appointed. From the part of the agreement sought to be severed, the intention of the parties was clear that it is the applicant who has to appoint the Arbitrator though on severance of the offending part, if any, there would be no procedure. At this stage, it may be pointed out that contracts of adhesion are not unknown to our law. Governmental contracts are one such class.

The applicant has not specifically categorised the objections for removal of the sole Arbitrator though our attention is sought to be invited to some of the averments made in the in the affidavit of the respondents.

17. Section 12 (3) of the Arbitration Act, provides the ground for challenge of an Arbitrator and it reads as under:-

"12. Grounds for challenge.- (1)

(3) An arbitrator may be challenged only if -

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties."

Thus, on such a challenge being made, the same has to be decided by the arbitral Tribunal itself. The other provision is Section 13 of which Section 13 (1) and 13 (2) are relevant and they read as under:-

"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 challenge to the arbitral Tribunal."

18. The Arbitration Act itself thus provides the mechanism by which an appointed Arbitrator can be removed, though on limited grounds. In the instant case, Justice U.C. Srivastava has been appointed as the sole Arbitrator. An Arbitrator cannot be removed by the Chief Justice or his delegate in exercise of powers under Section 11 (4) and (11 (6) as no such jurisdiction has been conferred to remove an Arbitrator appointed under an arbitration agreement. Section 11 (6) of the Arbitration Act confers power on the Chief Justice or his delegate to give effect to the arbitration agreement for appointment of an Arbitrator when the applicant has still not taken any steps or the parties feel to agree to a procedure for appointment and/or if there be a procedure to follow the procedure and that is not being followed.

19. In *Bhupinder Singh Bindra v. Union of India & Anr.*, (1995) 5 SCC 329, the arbitration clause provided for arbitration by the Superintending Engineer, Planning Circle, Chandigarh. The issue for consideration was, whether the Court could remove an Arbitrator considering the scheme of Sections 8, 5 and 11 of the Arbitration Act, 1940. We may gainfully reproduce the following observations from paragraph 3 of the said judgment, which reads as under:-

"3. It is settled law that court cannot interpose and interdict the appointment of an arbitrator, whom the parties have chosen under the terms of the contract unless legal misconduct of the arbitrator, fraud, disqualification etc. is pleaded and proved. It is not in the power of the party at his own will or pleasure to revoke the authority of the arbitrator appointed with his consent. There must be just and sufficient cause for revocation. There is no general power for the court to appoint an arbitrator unless the case falls within the relevant provisions of the Act nor will the court make an appointment where the arbitration agreement provides a method by which appointment is to be made. ..."

See also Indian Oil Corporation Ltd. & Ors. v. Raja Transport Pvt. Ltd., (2009) 8 SCC 520.

20. Thus, once an Arbitrator has been appointed in terms of the agreement, he cannot be removed unless legal misconduct, fraud, disqualification etc. is pleaded and proved. In the instant case, respondent no.1 had named the Arbitrator even before the applicant had invoked the arbitral clause. The exercise was completed before the application was filed.

21. We may also refer to the observations made by the Supreme Court in the case of ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corporation Ltd., (2007) 5 SCC 304, wherein the Supreme Court has held that once a party has entered into an agreement with eyes wide open, it cannot wriggle out of the situation claiming that the Arbitrator appointed is partial and that the remedy for such a party is to take recourse to the provisions of the Arbitration Act.

22. For all the aforesaid reasons, I find no merit in this application which is accordingly dismissed.

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