

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: September 18, 2008

+

O.M.P. 98/2008

THE CHHOTANAGPUR REGIONAL HANDLOOM..... Petitioner

Through Mr.D.K.Rustagi, Advocate.

versus

ASSOCIATION OF CORPORATION AND APEX Respondent

Through Mr.Neeraj Malhotra with Mr.Shohit Chaudhary,
Advocate for respondent No.1.**CORAM:****HON'BLE MR. JUSTICE S. RAVINDRA BHAT**

- | | | |
|----|---|-----|
| 1. | Whether reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

% **18.09.2008****Mr. Justice S. Ravindra Bhat (OPEN COURT)**

1. Heard counsel for the parties. The petitioners have sought an appropriate orders under Section 14 of the Arbitration and Conciliation Act 1996 for removal of arbitrator on the ground that his mandate terminated *de facto* as well as *de jure*.

2. The brief facts of the case are that the Government of Bihar framed a scheme 1997 for distribution of garments, i.e. cotton Dhoties and Sarees. It sought to purchase vast quantities of such articles. One ACASH's bids were found to be the lowest it entered to an agreement to supply such articles. ACASH entered into an agreement with the petitioner society on 11.3.1997

for procurement of Sarees valued Rs.11.39 crores and paid an advance of Rs.2 crores. It is claimed that the petitioner supplied certain quantities of the articles.

3. The dispute arose with respondent no.1 ACASH, now ACASH which invoked a bank guarantee. Eventually, a dispute arose which was referred to arbitration. Clause 14 of the agreement entered into the petitioner's society and respondent No.1 reads as follows:-

“Clause 14: Removal of difficulties. In case there are problems in implementing the contract, the matter will be sorted out through mutual negotiation between ACASH & Govt. of Bihar.”

4. It is not dispute that Development Commissioner Handlooms is ex-officio Chairman of the ACASH. The petitioner's claims were referred to arbitration, prior to 2000. It is contended that there have been practically no proceedings after 3.2.2000. It is also alleged that the Development Commissioner acted in a biased manner in a proceeding further, in arbitration which resulted in the loss of his mandate. On the strength of these allegations, the petitioner seeks an order to set aside the mandate of respondent No.2 Development Commissioner and for consequential appointment of another Arbitrator.

5. Several adjournments were given to the respondent to file their reply. The same is not placed on record. The respondent contended that the allegations are unfounded. The circumstances whereby the Development Commissioner had to invoke the bank guarantee, was because of his official duties which cannot have to interfere that he was biased in considering the dispute. Learned counsel contended that as far as question of loss of mandate in arbitration not proceedings with the case diligently is concerned the petitioner does not deserve relief. In this regard, the respondent contends that the petitioner is in fact approaching this Court after

more than eight years of the invocation of the bank guarantee and has, therefore, shown undue delay seeking relief.

6. Learned counsel contends that at least five incumbents have changed Office as Development Commissioner and therefore all cannot be biased nor can be said to have delayed conduct of proceedings. Learned counsel submitted that even if it were agreed that the arbitrator had lost mandate nevertheless Section 15(2) stipulates that the arbitrator would have to be same since the substitute arbitrator would be appointed in terms of the agreed rule.

7. The above factual narrative discloses that there is no dispute that arbitration proceedings have been at a standstill since about 8 years. Although the respondent is to some extent justified, in contending that the conduct of arbitral proceedings are to be judged from an overall perspective, it cannot be overlooked that the objective of the Act is speedy and alternative dispute resolution, when parties agree that their disputes would be decided by an arbitrator. The further consideration is that the proceedings would be terminated when an award is made as soon as reasonably possible. In this case the reference was made is more than 8 years ago. The arbitration proceeding has languished virtually since then. In answer to such proceedings, the respondents at least in the present case cannot be heard to contend that the petitioner has approached the Court belatedly to seek relief which it is admittedly entitled in law. If such argument were to prevail, the entire judicial system and even the proceedings under the Act would be prisoner to the whims of Arbitrator who can prolong the proceedings as long as he chooses. In view of the admitted facts, the Court is of the opinion that the conditions spelt out in Section 14, i.e. that the Arbitrator has failed to act without undue delay, applies squarely to the facts of this case. In the circumstances, the Court is of the opinion that the mandate of the Arbitrator has been terminated.

8. That brings the case for discussion on the second aspect which is what is the appropriate order. The respondent contends that once the Court declares that the mandate of the arbitrator has ended and that he has become *de jure* or *de facto* unable to perform his functions, the parties would then be relegated to Section 15(2) where the substitute Arbitrator has to be appointed according to the rules that were applicable to the appointment of Arbitrator, being replaced. The respondents, therefore, argue that once the Court terminates the mandate of the Arbitrator as in this case, the parties would have to go back to the rules agreed between them for the appointment of an Arbitrator. On the other hand, the petitioners argue that Section 15(2) has to be read reasonably so as to mean that parties should have visualized a situation where a substitute Arbitrator is necessary and has to be appointed. If the Arbitration Agreement provides for such contingency, the latter part of Section 15(2) would prevail. In other cases, it would be left to the Court to make an appropriate order substituting Arbitrator. The above rival positions raise a small area of interpretation involving Sections 14 and 15 of the Act. The said provisions may be shall extracted; they are as follows:-

“14. Failure or impossibility to act.-(1) The mandate of an arbitrator shall terminate if –he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and 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 reason; 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.”

9. In the decision of the Supreme Court reported as *Yashwith Constructions Private Limited vs. M/s. Simplex Concrete Piles India Limited & Another*, AIR 2006 SC 2798. The Court had occasion to consider what are meant by “Rules” under Section 15(2). The Court there held as follows:

“The term “rules” in Section 15 292) obviously referred to the provision for appointment, contained in the arbitration appointment, contained in the arbitration agreement or any Rules of any institution under which the disputes were referred to arbitration. There was no failure on the part of the concerned party as per the arbitration agreement, to fulfil his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice under Section 11(6) of the Act for appointing a substitute arbitrator. Obviously, Section 11(6) of the Act has application only when a party or the concerned person had failed to act in terms of the arbitration agreement. When Section 15(2) says that a substitute arbitrator can be appointed accordingly to the rules that were applicable for the appointment of the arbitrator originally, if is not confined to an appointment under any statutory rule or rule framed under the Act or under the Scheme. It only means that the appointment of the substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage. We are not in a position to agree with the contrary view taken by some of the High Courts.”

10. In that case, undoubtedly, the Supreme Court had noted in the preceding part of the judgment that the arbitration agreement did not specifically authorize the original appointing authority to appoint a substitute Arbitrator. However, the substitute Arbitrator had been appointed which was declared illegal by the High Court. The Supreme Court even while setting aside the judgment as it did, noted the position in law, in the extracted portion reproduced above.

11. In the recent decision of the Punjab and Haryana High Court, the Court, dealing with an almost identical situation explored the position, concerning as an identical agreement (that the Court after passing the order under Section 15 (2) cannot make appointment of a substitute Arbitrator). The Court first found that the agreed Arbitrator was biased and had not conducted arbitral proceedings appropriately. The Court after setting aside the mandate of the Arbitrator and also noting that the Arbitrator was a persona designate; went ahead to observe that in such a circumstances, the parties can be left the mercies of those who are principally at fault, and in the circumstances proceeded to appoint a substitute an Arbitrator.

12. This Court is also of the opinion that a similar approach requires to be adopted. Although judgments may turn on individual facts yet one cannot lose sight of a very vital aspect. If the structure of the Arbitration Agreement contemplates one or a named Arbitrator and does not provide a contingency for appointment of a substitute Arbitrator, the reasonable construction of Section 15(2) would have to be that in the event of the Court finding that such Arbitrator has lost his mandate on any of the grounds mentioned in Section 14, the sequetor would necessarily be that the Court can exercise power and appoint a substitute Arbitrator. Any other interpretation would lead to a highly anomalous situation, if not a legislative policy vacuum. For instance, if the Court were to declare the mandate of an Arbitrator as ended, and make no consequential

order, there would be confusion as it would legitimately open for one party to contend that the same Arbitrator would continue. It would also be contended that in such situation the party aggrieved would have to approach the Court again under Section 11(6). Surely, that cannot be the legislative intent. Section 15(2) has to be viewed as part of a broader effort to aid and strengthen the alternative dispute resolution mechanism rather than undermine it, as would inevitably be the result if the respondent's contention is accepted".

13. For the above reasons, the petition has to succeed. The mandate of the Arbitrator, i.e the incumbent development Commissioner is declared to have been ended under Section 14. In exercise of the powers conferred under Section 15(2) since there is no contingency provided for under the Arbitration Agreement for appointment of a substitute Arbitrator. Shri R.C.Chopra, retired Judge of this Court, N-113, Greater Kailash-I, New Delhi, Ph.32554242, 29248111, 9818097777(m).is hereby appointed as sole Arbitrator to decide the dispute between the parties. The Arbitrator would proceed with the matter from the existing stage under Section 15(3).

14. It is open to the Arbitrator to fix his fee; however, it shall not exceed Rs.2.5 lakhs, in aggregate. The fee shall be shared equally by the parties. The order shall be communicated directly to the Arbitrator who shall intimate the parties about further proceedings.

15. The petition is allowed in the above terms.

Order dasti.

S. RAVINDRA BHAT,J

SEPTEMBER 18, 2008

'b'

O.M.P. 98/2008

Page 7