

+ **OMP No.552/2006**

Sh. Surender Pal Singh Petitioner

Versus

Through: Mr. Rajiv Kapur, Advocate for
respondent.

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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

1. The petition has been preferred under Sections 14&15 of the Arbitration & Conciliation Act, 1996 for declaration that the mandate of the arbitrator has terminated and for appointment of an independent arbitrator, preferably a retired judge of this court or of some other High Court.

2. The parties herein are parties to an agreement dated 15th December, 1981 containing an arbitration clause whereunder all disputes and differences between the parties were agreed to be referred to the arbitration of the nominee of the Managing Director of the respondent. It is further a term of the said arbitration clause that the petitioner shall not have any objection to any such nomination by the Managing Director of the respondent on the ground that the person so nominated is an officer of the respondent corporation or

that he has to deal with the matters to which the contract relates or that he has in the course of duties as an officer of the respondent corporation expressed views on the matters in dispute. The clause further authorizes the Managing Director to in the event of the officer so appointed as the arbitrator being transferred or vacating his office or being unable to act as the arbitrator, designate another person to act as the arbitrator in terms of the agreement.

3. Disputes and differences having accrued between the parties, the petitioner approached the Managing Director of the respondent, who then appointed one Mr. S.P. Chaudhry officer of the respondent corporation as the arbitrator.

4. It is inter-alia the case of the petitioner that it is also a term of the arbitration clause aforesaid that

“the award shall be made in writing within six months after entering upon the reference or within such extended time not exceeding further four months as the sole arbitrator shall by a writing under his own hands appoint.”

5. It is not disputed that the aforesaid Mr. S.P. Chaudhry entered into reference on 29th May, 2000. The petitioner on 31st March, 2001 applied to the arbitrator aforesaid with the contention that a period of 10 months having elapsed since entering upon reference and the award having not been published, Mr. S.P. Chaudhry was not entitled to continue as the arbitrator. Upon the arbitrator refusing to admit the said position the petitioner filed a petition under Article 227 of the Constitution of India bearing Civil Misc. (Main) No.281/2001 in this court inter-alia for quashing of the said order of the arbitrator. Vide interim order in the said petition, the arbitration proceedings were stayed. The petitioner then also filed a suit in the District Court for the same reliefs as claimed before the arbitrator. During the

pendency of the suit the respondent also terminated the dealership of the petitioner. The suit was disposed of by suspending the operation of the letter of termination of dealership during the pendency of the arbitration and the parties were directed to take all their disputes before the arbitrator. Both parties filed appeals in this court against the said order, being RFA No.186/2001 and RFA No.283/2001.

6. In the interregnum the petitioner also applied to the Managing Director of the respondent for appointing another arbitrator and upon the failure of the Managing Director of the respondent to within 30 days thereof appoint an arbitrator filed arbitration application No.38/2002 in this court under Section 11(6) of the Act for appointment of an independent arbitrator.

7. Both the RFAs, arbitration application No.38/2002 and Civil Misc. (Main) No.281/2001 were disposed of vide judgment dated 10th October, 2006 of the Division Bench of this court. The Division Bench inter-alia held that the suit filed by the petitioner was not maintainable; that if the petitioner contended that the mandate of the arbitrator had terminated, the proper remedy for the petitioner was to apply to the court under Section 14 of the Act and till the said petition was decided there could be no question of entertaining the petition under Section 11(6) of the Act.

8. It was thereafter that the present petition came to be filed. Vide order dated 11th December, 2006 in these proceedings arbitration proceedings were stayed.

9. It is the contention of the counsel for the petitioner that the parties having agreed that the arbitrator will render an award within the time specified, upon expiry of the said time and the failure of the arbitrator to render the award, the mandate of the arbitrator terminated and the arbitrator had become de-jure unable to perform his functions. He has in this regard also relied upon the judgment of

this court in ***Shyam Telecom Ltd. Vs. ARM Ltd.*** 113 (2004) DLT 778 and a judgment of Bombay High Court in ***Kifayatullah Haji Gulam Rasool Vs. Smt. Bilkish Ismail Mehsania*** AIR 2000 Bombay 424. In ***Shyam Telecom Ltd.*** it was held by this court that the arbitrator is clothed with authority only under the agreement of the party and the authority of the arbitrator is also unclothed in terms of the said agreement.

10. I may notice that Section 14(1) (a) besides providing for the termination of the mandate of the arbitrator on the arbitrator becoming de-jure or de-facto unable to perform his functions also provides the ground of, the arbitrator for other reasons failing to act without undue delay also as a ground for termination of the mandate of the arbitrator.

11. The counsel for the respondent has contended that the arbitration in the present case having commenced after coming into force of the 1996 Act, notwithstanding the agreement being of a date prior thereto, the proceedings would be governed by the provisions of the 1996 Act; that the 1996 Act unlike the 1940 Act does not provide for any time limit for making of the award; it is thus contended that the agreement between the parties of the time for making of the award is of no avail and the mandate of the arbitrator cannot be terminated on the said ground.

12. In view of the judgment of this court in ***Shyam Telecom Ltd.*** and with which I am not inclined to disagree, the aforesaid contention of the counsel for the respondent cannot be upheld. There is nothing in the 1996 Act which prevents/bars the parties from agreeing to the time limit for making the award. Several of the provisions of part I of the Act are subject to the agreement to the contrary between the parties. The Bombay High Court, Judgment whereof I respectfully concur, has also held that it is open to the parties to provide for

termination of mandate of arbitrator i.e. the mandate of the arbitrator can be subject to agreement between the parties. The consent order in that case providing for time for making the award was held to be an agreement that the authority of arbitrator shall come to an end thereafter. Similarly, though the agreement in the present case does not provide that the mandate of arbitrator shall terminate after expiry of ten months but an agreement of time for making the award would in the absence of consent implied or explicit, terminate the mandate of arbitrator on expiry of such time. Same is not repugnant to the Act. I am also of the view that irrespective of the above, failure of the arbitrator to make the award within the agreed time would also fall within the ambit of the other ground under Section 14 (1) (a) of termination of mandate i.e. of failure to act without undue delay, which is found to be made out in present case. Thus it has to be necessarily held that the mandate of Mr. S.P. Chaudhry has terminated.

13. I may however notice that even if the mandate of the arbitrator is held to terminate under Section 14 of the Act, Section 15 (2) of the Act provides that a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

14. The counsel for the petitioner has contended that since the respondent failed to appoint a substitute arbitrator inspite of notice, the petitioner has become entitled to the appointment of an independent arbitrator. Though this is not a petition/application under Section 11(6) of the Act but nevertheless, besides the relief of declaration of termination of mandate of Mr. S.P. Chaudhry, relief of appointment of alternate arbitrator is also claimed.

15. Under Section 14 of the Act, if a controversy remains between the parties and/or between the party and the arbitrator as to whether

the mandate of the arbitrator has terminated or not, the party contending that the mandate has so terminated is to approach the court in this regard. From the facts aforesaid it is apparent that in the present case the controversy remained, leading to the filing of this petition. The controversy having remained, unless the said controversy is adjudicated by the court, it cannot be said that the petitioner has become entitled to apply under Section 11(6) or that there is any failure on the part of the respondent under the agreed procedure.

16. Thus, only upon this court ruling on the controversy of termination of mandate of arbitrator, the procedure under Section 15(2) is to be set into motion.

17. I may notice that in ***N.H.A.I. Vs. Bumihway DDB Ltd.*** 2006 (9) SCALE 564, upon resignation by presiding arbitrator, petition under Section 11(6) was preferred and substitute arbitrator appointed. The Supreme Court struck down such appointment and held Section 15(2) to be applicable and the agreed procedure for appointment of substitute arbitrator required to be followed. To the same effect are ***Yashwith Construction (P) Ltd. Vs. Simplex Concrete Piles India Ltd.*** V (2006) SLT 443 and ***D.S. Gupta Contracts Pvt. Ltd. Vs. Unison Hotels Ltd.*** 98 (2002) DLT 369. Thus, as per the settled law, on petition under Section 14 being allowed, the procedure for appointment is the same as of appointment of arbitrator being replaced and this court cannot appoint a retired judge, as sought. Only if the respondent/appointing authority default in the agreed procedure, will Section 11(6) come into play.

18. As per the agreed procedure, the appointment has to be made by the Managing Director of the respondent.

19. I may also notice that as per the dicta in ***ACE Pipeline Contracts Ltd. Vs. Bharat Petroleum Corp. Ltd.*** 2007 (5) SCC 304

and in *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Ltd.* (2008) 10 SCC 240, even in exercise of powers under Section 11(6) of the Act, the court can give a mandate to the appointing authority to appoint the arbitrator as per the agreement or appoint the arbitrator in terms of agreed mechanism.

20. Since the matter has already remained pending for long the Managing Director of the respondent is directed to appoint a substitute arbitrator within one month from today with notice thereof to the respondent. Needless to add that upon failure of the Managing Director, the petitioner shall have remedies available to it in law. It is further clarified that in accordance with the judgment aforesaid of the Division Bench, all disputes between the parties including which may have accrued after the initiation of arbitration proceedings before Mr. S.P.Chaudhry will be dealt with by the substitute arbitrator and the parties shall be entitled to file fresh pleadings with respect thereto. With the aforesaid directions, the petition is disposed of leaving the parties to bear their own costs.

IA No.13133/2006 (of the petitioner for interim stay).

Vide order dated 11th December, 2006 on this application further arbitration proceedings before Mr. S.P.Chaudhry were stayed. The said order continues to be in force. Upon disposal of the petition the said application does not survive. The interim stay is vacated.

Copy of the order be given dasti under the signature of Court Master.

RAJIV SAHAI ENDLAW, J

**July 06, 2009
PP**