

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Arbitration Case No.173 of 2014 (O&M)
DATE OF DECISION: 08.05.2015

M/s Great Indian Nautanki Company Private Ltd.

....Petitioner

versus

Haryana Urban Development Authority and others

.....Respondents

CORAM:- HON'BLE MR.JUSTICE S.J. VAZIFDAR, ACTING CHIEF JUSTICE

Present: Mr. Ashok Aggarwal, Senior Advocate with
Mr. Mukul Aggarwal, Dr. Ashwinie Kumar Bansal and
Mr. Deepak Jindal, Advocates for the petitioner

Mr. D.V. Sharma, Senior Advocate with
Ms. Shivani Sharma, Advocate for the respondents

..

S.J. VAZIFDAR, ACTING CHIEF JUSTICE:

This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking the appointment of an Arbitrator in respect of the disputes and differences that have arisen between the parties in connection with an agreement dated 15.02.2008.

2. Clause-22 of the agreement dated 15.02.2008, which contains an arbitration agreement, reads as under:-

"22. That if any dispute arises between the parties of this lease agreement the matter shall be referred to sole arbitration of Chief Administrator, HUDA Panchkula or any person nominated by him."

3. In view of the facts of this case, I find the submission advanced by Mr. Aggarwal, learned Advocate General of the State of Punjab on behalf of the petitioner that the Chief Administrator of Haryana Urban Development Authority (HUDA) ought not to act as an Arbitrator to be well-founded. Nor would it be appropriate for the

same reasons to permit the Chief Administrator, HUDA to nominate any person in exercise of that prerogative contained in Clause-22.

4. Under the agreement, the respondents leased the property, namely, an auditorium to the petitioner for a period of fifteen years at the consideration and on the terms and conditions contained therein. Clause-4 stipulated a consideration of Rs.36 lacs per month. Clause-8 entitled the petitioner to use the auditorium for the activities mentioned therein. Clause-9 permitted the petitioner to use the balance permissible FAR by putting up construction and using the same for certain specified activities.

5. The respondents addressed a show cause notice dated 12.09.2014 under Section 17 of the Haryana Urban Development Authority Act, 1977, alleging that the petitioner had failed and neglected to make certain payments under the agreement. The petitioner was called upon to show cause why penalty ought not to be imposed upon it. By a letter dated 22.09.2014, the Chief Administrator informed the petitioner that a meeting had been convened to discuss the outstanding dues and cancellation of the agreement. By a further letter/notice dated 26.09.2014, the respondents called upon the petitioner to show cause why the agreement ought not to be terminated in view of the allegations contained therein.

The petitioner, by its letter dated 12.10.2014, replied to the show cause notice.

6. Under cover of a letter dated 01.10.2014, the Chief Administrator forwarded to the petitioner the minutes of the meeting held on 29.09.2014. Learned counsel for the petitioner relied upon the minutes which *inter alia* stated that the entire

matter has been discussed and reviewed; that it was the general consensus that the continuation of the lease was not in the interest of the respondents or in public interest in view of the default in the payment of over Rs.17 crores by the lessee and that the Administrator was advised to explore all options including coercive action after taking into consideration the relevant facts and applying his own mind as per the terms and conditions of the agreement. By a letter dated 17.10.2014, the Administrator directed the petitioner to appear before him.

7. The petitioner thereafter filed this petition on 29.10.2014, which was served on the respondents on 01.12.2014, for the appointment of an independent arbitrator. The respondents treated this petition as a notice to appoint an Arbitrator. In paragraph-5 of their written statement they stated that the Chief Administrator, who is named in the arbitration clause, was appointed as the Arbitrator.

8. It is important to note two facts which have persuaded me to accept the submission on behalf of the petitioner that the Chief Administrator ought not to be permitted to act as an Arbitrator. The petitioner had filed an application under Section 9 of the Act for interim reliefs. The Arbitrator filed an affidavit opposing the application (Annexure P/11). The respondents stated that they had filed a detailed reply to the petition and adopted the contents thereof. The detailed reply itself is not annexed to the petition. It was, however, agreed that the same opposed the petitioner's application for interim relief on merits. The reply annexed to the petition itself contended that the contents of the petitioner's application were "false, vague, untrue hence denied in

toto". The reply denied that the petitioner had a good *prima facie* case. It also denied that the petitioner was moving *bona fide* or in the interest of justice.

9. It was agreed that the officer, who filed the reply, was the one who is appointed as the Arbitrator. The written statement filed in the present case has been filed on behalf of respondents No.1,2 and 3. Respondent No.1 is impleaded "through its Administrator". Thus, the Administrator, who is appointed as an Arbitrator, has been impleaded, albeit in his official capacity as the Administrator of respondent No.1. What is important to note, however, is that the Administrator did not distance himself from the allegations contained in the written statement and in the reply filed to the application under Section 9. It is reasonable to presume that he, in fact, confirmed the same. I, obviously, do not express any views on the merits of the disputes. That is for the Arbitrator to decide. It is sufficient to note that what is relevant is the fact that the Arbitrator appointed by the respondents has already taken a stand on the merits of the matter both in the proceedings under Section 9 and in the present proceedings. This was not denied by the respondents. Indeed, it could not be denied for the stand adverse to the petitioner has been taken by the Arbitrator on affidavit. Even before us, it was not contended that the Administrator withdraws or dissociates himself with the allegations in the affidavit filed in the said proceedings.

10. Faced with this, however, it was contended on behalf of the respondents that the Administrator has now changed. A new Administrator has been appointed. It was contended, therefore, that

the stand taken by the present Arbitrator/ Administrator cannot be identified with the stand taken by the earlier Administrator. The submission is not well-founded. The present Arbitrator also has not distanced or dissociated himself with the allegations and contentions contained in the said affidavit and written statement filed by his predecessor-in-office. He does not state that though respondent No.1 has been impleaded through him, he expresses no opinion on the merits of the matter. In the absence thereof, it must be presumed that he associates himself with the allegations and contentions made by his predecessor.

In the circumstances, it is obvious that the Administrator ought not to act as the Arbitrator.

11. The only question is whether an application under Section 11(6) ought to be allowed when the respondents have already appointed the Arbitrator or whether the petitioner ought to adopt independent proceedings in the first instance for the removal of the Administrator as the Arbitrator.

12. The learned Advocate General invited my attention to the judgment of the Supreme Court in *DENEL (PROPRIETARY) LIMITED Vs. MINISTRY OF DEFENCE, (2012) 2 Supreme Court Cases 759*. That case also related to an application under Section 11(4) and 11(6) of the Act. The parties therein had entered into a contract for supply of certain goods. Some of the goods were rejected by the respondent. The respondent failed to take delivery of further consignments. The petitioners alleged that they had suffered loss and damage. The respondent suspended all further deliveries and sought

refund. The respondent appointed the Additional General Manager, Ordnance Factory as an Arbitrator in terms of an arbitration agreement. That arbitration agreement provided that the disputes and differences would be referred to the sole arbitration of the Director General, Ordnance Factory or to a Government servant appointed by him. The petitioner apprehended that the Arbitrator would be favourably inclined towards the employer i.e. respondent. The Principal District Court, on the application of the petitioner, terminated the mandate of the sole Arbitrator on the ground that he was biased in favour of the respondent and issued a fresh direction that the Director General of the Ordnance Factory or a person appointed by him would be the Arbitrator. The Director General neither commenced nor appointed an Arbitrator. The petitioner filed an application under Section 11(6). The petitioner contended that the direction issued by the Principal District Court to the effect that appointment of Director General as an Arbitrator or permitting him to appoint an Arbitrator was illegal. It is important to note that the petition had been filed on 02.03.2011. It was opposed by the respondent on the ground that after filing of the petition the respondent had appointed a substitute Arbitrator on 16.03.2011.

13. The facts, therefore, are identical to the case before me, namely, no appointment had been made till the filing of the petition and that an appointment was made by the respondent after filing of the petition. The Supreme Court held:-

"21. It is true that in normal circumstances while exercising jurisdiction under

Section 11(6), the Court would adhere to the terms of the agreement as closely as possible. But if the circumstances warrant, the Chief Justice or the nominee of the Chief Justice is not debarred from appointing an independent arbitrator other than the named arbitrator.

....

23. Keeping in view the observations made above, I have examined the facts pleaded in this case. I am of the opinion that in the peculiar facts and circumstances of this case, it would be necessary and advisable to appoint an independent arbitrator. In this case, the contract is with the Ministry of Defence. The arbitrator, Mr Satyanarayana has been nominated by the DGOF, who is bound to accept the directions issued by the Union of India. Mr Satyanarayana is an employee within the same organisation. The attitude of the respondents towards the proceeding is not indicative of an impartial approach. In fact, the mandate of the earlier arbitrator was terminated on the material produced before the court, which indicated that the arbitrator was biased in favour of the Union of India. In the present case also, Mr Naphade has made a reference to various notices issued by the arbitrator, none of which were received by the petitioner within time. Therefore, the petitioner was effectively denied the opportunity to present his case before the sole arbitrator. Therefore, the apprehensions of the petitioner cannot be said to be without any basis.

....

25. The material placed before the Court by the petitioner would indicate that it would not be unreasonable to entertain the belief that the arbitrator appointed by the respondent would not be independent. That being so, the appointment of Mr Satyanarayana cannot pass the test under Section 11(8) of the Act.

26. Similarly, applying the test laid down in Indian Oil Corpn. Ltd. [(2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460] this Court in Denel (Proprietary) Ltd. [(2010) 6 SCC 394 : (2010) 2 SCC (Civ) 701] also observed that the Managing Director, Bharat Electronics Ltd., which is a government company, is bound by the directions/instructions issued by his superior authority. The Court also observed that according to the pleaded case of the respondents, though it was liable to pay the amount due under the purchase order, it was not in a position to supply the dues only because of the direction issued by the Ministry of Defence, Government of India. Therefore, the Court concluded that the Managing Director may not be in a position to independently decide the dispute between the parties. Consequently, the Court proceeded to appoint an independent arbitrator."

14. The petition is, therefore, disposed off by appointing Justice R.V. Raveendran, retired Judge of the Supreme Court of India as the sole Arbitrator.

08.05.2015
parkash*

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE