

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

LPA No.821 of 2015

Date of Decision: 28.05.2015

Prem Kumar Gupta

...Appellant

Versus

Ireo Waterfront Pvt. Ltd. & another

...Respondents

CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present: Mr. H.C.Arora, Advocate, for the appellant.

HEMANT GUPTA, J.

The present letters patent appeal under Clause X of the Letters Patent is directed against an order passed by the learned Single Bench of this Court on 15.05.2015, whereby the writ petition to direct the Arbitrator to decide an application under Section 13 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') was dismissed.

Respondent No.1, a real estate developer company, advertised plots in a colony under development namely 'Ireo Waterfront Colony'. The appellant applied for allotment of a plot measuring 339.40 sq. yards. Pursuant thereto, plot was allotted to the appellant and a regular plot buyer agreement was executed on 19.02.2012. In the said agreement, there is an arbitration clause, which reads as under:

"33. DISPUTE RESOLUTION BY ARBITRATION

All or any dispute arising out of or touching upon or in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms hereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussions failing which the same shall be settled through reference to a sole Arbitrator to be appointed by a resolution of the

Board of Directors of the company, whose decision shall be final and binding upon the parties. The allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator even if the person so appointed, is an employee or advocate of the company or is otherwise connected to the company and the allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said sole Arbitrator to conduct the arbitration. The arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/modification thereto and shall be held at the Company's offices or at a location designated by the said sole Arbitrator in Ludhiana. The language of the arbitration proceedings and the Award shall be English. Both the parties will share the fees of the Arbitrator in equal proportion.”

Thereafter, disputes arose between the parties, which were referred to an Arbitrator appointed by the resolution of the Board of Directors of respondent No.1. The appellant conveyed that he does not have faith in respondent No.2, as an Arbitrator vide communication dated 18.10.2014. Such representation was rejected and the appellant was called upon to file his claim. It is, thereafter, the appellant filed a petition before this Court under Section 11 of the Act, which was dismissed on 07.01.2015 while holding as under:

“2. Pursuant to the said clause, respondents have already appointed an arbitrator, who is a former Additional District & Sessions Judge. The petitioner vide letter dated 18.10.2014 (Annexure P-6) informed the arbitrator that he has no faith in him for the reasons stated therein. The arbitrator, however, stated that the apprehensions were unfounded and he further stated that he was not acting as an arbitrator in any other case of the respondents. The arbitrator, accordingly, called upon the petitioner to file its claim on 01.11.2014. The petitioner seeks the removal of the said arbitrator and appointment of any other arbitrator. Such an application does not fall within the scope of Section 11 of the Arbitration and Conciliation Act, 1996 (for short ‘the Act’).”

Thereafter, the petitioner filed a writ petition, which was dismissed vide order dated 15.05.2015 impugned in the present appeal. Learned Single Judge found that once the Arbitrator has rejected the challenge, the appellant could not move a fresh application challenging the appointment of the Arbitrator again. The learned Single Judge also observed that once an application was not allowed, mere fact that there is no bar to the entertainment of the second application could not come to the aid of the petitioner-appellant. Still aggrieved, the petitioner-appellant is in appeal.

Before this Court, learned counsel for the appellant has vehemently argued that the appellant has no other remedy except to challenge the order passed by an Arbitrator before the writ Court. The arbitrator, being a Tribunal, is subordinate to this Court; therefore, in terms of Article 227 of the Constitution of India, the appellant has rightly invoked the jurisdiction of this Court.

We have heard learned counsel for the appellant and find no merit in the present appeal. An agreement containing an arbitration clause may also prescribe a procedure for appointment of an Arbitrator and also challenge methodology. If no procedure is prescribed or parties fail to appoint an Arbitrator in terms of the appointment procedure, liberty is granted to any of the parties to the agreement to invoke the jurisdiction under Section 11 of the Act.

On the other hand, Section 12 of the Act provides that 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. The procedure to challenge an Arbitrator is contained in Section 13 of the Act. As per sub-section (2) of Section 13, any person aggrieved can challenge the

constitution of the arbitral tribunal. Sub-section (5) of Section 13 contemplates where an arbitral award is made; the parties challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34. Thus, any of the parties to an agreement can dispute the constitution of arbitral tribunal in accordance with Section 34 of the Act. Section 34 of the Act gives procedure for setting aside of an arbitral award.

Section 14 of the Act deals with termination of a mandate of an arbitrator and that a party may apply to the Court to decide on a termination of a mandate after an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay or withdraws from his office or the parties agree to the termination of his mandate. Section 14 of the Act reads as under:

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

(a) he becomes *de jure* or *de facto* 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.”

We find that the Arbitration and Conciliation Act, 1996 is a complete code in respect of appointment and the procedure to be followed

before an Arbitrator and also the forum and mode of challenge of the Arbitral Award including the procedure to terminate the mandate of an Arbitrator. In the face of the remedies provided under the Act, the writ petition preferred by the appellant against the action of an Arbitrator is not maintainable. A larger Bench of the Hon'ble Supreme Court in State Bank of Patiala & Co. Vs. Patel Engineering Limited (2005) 8 SCC 618 has held to the following effect:

“45.We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 2226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible.”

Relying upon the aforesaid judgment, the Hon'ble Supreme Court in Lalitkumar V. Sanghavi (Dead) through LRs & another Vs. Dharamdas V. Sanghavi & others (2014) 7 SCC 255 has recently held that against an order passed by an arbitral tribunal, the writ petition is not maintainable. In the said case, an order passed by the arbitral tribunal observing that the arbitration proceedings stand terminated was disputed by way of an application under Section 11 of the Act. While dismissing the application, it was observed that the remedy of the applicant is by filing a writ petition and not an application under Section 11 of the Act. In these circumstances, the Court referred to the larger Bench judgment in Patel Engineering Limited's case (supra) disapproving the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Court is not permissible. The Court held that the liberty is to approach the appropriate Court, as defined under Section 2(1)(e) of the Act, for determination of the legality of

the termination of the mandate of the arbitral tribunal. The Court observed as under:

“10. Chapter III of the Act deals with the appointment, challenge to the appointment and termination of the mandate and substitution of the arbitrator etc.

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10.3. Section 14 declares that “the mandate of an arbitrator shall terminate” in the circumstances specified therein. They are-

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14. Therefore, we are of the opinion, the apprehension of the appellant that they would be left remediless is without basis in law.

15. The appellants are at liberty to approach the appropriate court for the determination of the legality of the termination of the mandate of the arbitral tribunal which in turn is based upon an order dated 29th October, 2007 by which the arbitral proceedings were terminated.”

Present is a case of a converse situation, where the petitioner is asking for termination of the mandate of the arbitral tribunal. Such question, whether the mandate of the arbitral tribunal should be terminated or not, has to be adjudicated upon by the Court and not through the writ petition.

In view of the above discussion, we do not find any error in the order passed by the learned Single Bench, which may warrant any interference by this Court in the present intra court appeal.

Dismissed.

(HEMANT GUPTA)
JUDGE

28.05.2015
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(HARINDER SINGH SIDHU)
JUDGE