

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION (L) NO.849 OF 2016

Hitech Plast Limited (erstwhile Clear Mipak Packaging Solutions Ltd.), a Company incorporated under the Companies Act, 1956 having its registered office at 201, Welspun House, 2nd floor, Kamala City, Senapati Bapat Marg, Lower Parel (W) Mumbai-400 013)
)
)
)
)...Applicant/
 Petitioner

vs.

HO Plast Private Limited, a Company incorporated under the Companies Act, 1956 having its registered office at Digboi Road, Nakim Junet, Tinsukhia, Assam)
)
)..Respondent

ALONG WITH
NOTICE OF MOTION (L) NO. 1892 OF 2016
IN

SUMMARY SUIT NO. 2492 OF 2012

HO Plast Private Limited, a Company incorporated under the Companies Act, 1956 having its registered office at Chinapatty, A.T. Road, P.O. Makum Jn. District Tinsukia, Assam-786 170)
)
)...Applicant
 (Orig.Defendant)

In the matter between:

Clear Mipak Packaging Solutions Pvt. Ltd.)
 a Company incorporated under the Companies)
 Act, 1956 having its registered office at C/130, Solaries I)
 Powai -Saki Vihar Road, Bombay-400 072)..Plaintiff

versus

HO Plast Private Limited, a Company incorporated under the Companies Act, 1956 having its registered office at Chinapatty, A.T. Road, P.O. Makum Jn. District Tinsukia, Assam-786 170)
)
)...Defendant

Mr. Ashish Kamat, along with Mr. Shyam Kapadia, Mr. Pradeep Mane and Mr. Jay Zaveri, instructed by M/s. Crawford Bayley & Co., for the Applicant.

Mr. Jaydeep Mitra, instructed by Mr. Rajeev Talasikar, for the Respondent.

CORAM; S.J. KATHAWALLA,J.

DATE: 25th October, 2016

ORAL JUDGMENT:

1. The present Arbitration Application has been moved in light of the withdrawal of the previous sole arbitrator appointed by this Court. The circumstances which have given rise to the withdrawal are most unfortunate and are becoming increasingly prevalent in matters before this Court and are required to be addressed urgently and stringently.
2. The Applicant had initially filed a summary suit, being Summary Suit No.2492 of 2012, in this Court for recovery of certain amounts from the Respondent under an Agreement dated 17th September 2008. By an Order dated 15th September 2014, **with the consent of the parties**, the erstwhile Learned Sole Arbitrator was appointed to decide all the disputes arising between them which were the subject matter of the aforementioned Summary Suit. Further to such appointment, it appears that the proceedings before the learned Sole Arbitrator commenced and numerous hearings were held.

3. The Learned Arbitrator has in his Minutes dated 27th April 2016 recorded in detail as to what transpired before him at the hearing held on 16th February, 2016. In particular, the Learned Sole Arbitrator has recorded as follows:

“18.After some of the issues were finalized and while other issues were being discussed and considered for finalization by the Arbitral Tribunal, and hearing submissions of both Counsels, certain unpleasant events transpired due to which the Arbitral Tribunal was compelled and constrained to close the hearing/ meeting on that day, pending a decision by the Arbitral Tribunal whether to withdraw from these arbitration proceedings....

19. On being asked by the Arbitral Tribunal to elaborate on an issue under heated discussion by Counsel for both the parties, which arises from the Respondent to the Counter Claim’s Additional Affidavit in Reply dated 13th October 2015; Counter Claimant’s Additional Affidavit in Rejoinder dated 8th February 2016, the Counsel for the Counter-Claimant instead of responding from his submission and making arguments in law and /or fact did not do so. The Counsel for the Counter Claimant (Ho Plast) instead made a personal and derogatory remark about the Sole Arbitrator, specifically as to the Sole Arbitrator’s competence and ability to understand the very brief and cryptic submission being made by the Counsel for the Counter Claimant. Despite the Arbitral Tribunal’s request to Counsel for the Counter Claimant to make his submissions and arguments and, to withdraw his offensive remark, the Counsel for the Counter Claimant refused to do so. Instead Counsel for the Counter Claimant was not insistent that the Sole Arbitrator should withdraw himself from the entire arbitral proceedings. No cogent or valid reasons or grounds

were initially given as to why this request was made for the withdrawal by the Sole Arbitrator from the arbitral proceedings. Counsel for the Counter Claimant and Advocate on Record for Counter Claimant thereafter sought leave of the Arbitral Tribunal to step out of the room to confer amongst themselves, which was granted. Upon returning back into the room after a sufficiently long time, once again the request for the Sole Arbitrator to withdraw himself from the arbitral proceedings was made by the Counsel for the Counter Claimant. On this occasion, obviously and evidently as and by way of afterthought and in a misplaced and ill-conceived attempt to justify the ill-tempered and ill-conceived action, the Counsel for the Claimant sought to make another statement that this request for withdrawal was because of their suspicion of association between the Sole Arbitrator with one Mr. Dani.

20...This aspect relating to the said Mr. Malav Dani finds mention and has been extensively dealt with in paragraph 17 of the Minutes of the 7th Hearing / Meeting held in the matter on 15th December 2015, which said Minutes were sent to the Advocate for both parties under the Arbitral Tribunal's letter dated 30th December 2015 and received by both the said Advocates on or about 31st December 2015. In the interregnum, even between the last Minutes of the Hearing / Meeting and until now, there was not even slightest whisper or correspondence on this aspect. Interestingly and as resolved in the said previous Minutes of the Hearing/ Meeting, the Counsel for the Claimant and the Respondent after consultation with their respective Advocates on Record, and the Counsel for the Claimant after also consulting with his client's representatives / officers present on that occasion, had both stated that they had no objection to the Sole

Arbitrator continuing as arbitrator in these arbitral proceedings. The statements by both the Counsel under instructions from their respective Advocates on Record, who were then present, were accepted by the Arbitral Tribunal and recorded in these proceedings.

21. Further, if this aspect and issue had really been on the mind of the Counter Claimant, this aspect and issue would have been the very first issue that would and ought to have been raised at the very first instance today. As the records would show, the Sole Arbitrator was appointed as arbitrator by the Hon'ble High Court under its Order dated 15th September 2014 passed in Summons for Judgement No.16 of 2013 in Summary Suit No.2492 of 2012 filed by Clear Mipak Packaging' Solution Limited (as Applicant / Plaintiff) Vs Ho Plast Private Limited (as Defendant). The Sole Arbitrator upon his being informed on being appointed as arbitrator by consent had, inter alia, communicated his Statement of Disclosure dated 13th November 2014 (under the cover of the Sole Arbitrator's letter dated 13th November 2014 addressed to Advocate for both parties, with copies marked to both the parties), to ensure transparency and avoid any apprehensions in the minds of the parties and their respective Advocates.

22. It is also imperative to place on record that in a few previous Hearings/ Meetings in these arbitral proceedings, the Counsel for the Respondent / Counter-Claimant had attempted to try and control the arbitral proceedings, which were politely, but very firmly dealt with by the Arbitral Tribunal.

23. There was not even any semblance of or any attempt made to withdraw the remark and to apologize for this untoward incident by

the Counsel for the Respondent/ Counter-Claimant or his Advocate on Record, which though uncalled could have been attributed to as being in 'the heat of the moment and, may have resulted in the arbitral proceedings being continued with and the incident forgotten.'"

4. By a letter of the same date, i.e. 27th April 2016, the Ld. Sole Arbitrator wrote to the parties recording his withdrawal under the provision of Section 15(1)(a) of the Arbitration and Conciliation Act, 1996 (the "**Act**").
5. The Applicant has therefore filed the above arbitration application seeking appointment of a substitute arbitrator under the provisions of Section 11 read with Section 15(1)(a) of the Act.
6. The Respondent has filed its Affidavit-in-reply wherein it is contended that the Arbitration has come to an end and the Summary Suit No. 2492 of 2012 stands revived.
7. Mr. Kamat, learned Advocate appearing for the Applicant has pointed out my attention to the Minutes dated 27th April 2016, the relevant portions of which have been extracted above. He contends that upon a matter having been referred to arbitration, the provisions of Section 89 of the Code of Civil Procedure, 1908 ("CPC") would apply. He contends that Section 89 (2) of the CPC makes it clear that once a dispute has been referred for arbitration, the provisions of the Act shall apply. He submits that the above arbitration application is the only manner in which a substitute

arbitrator can be appointed. Relying on the decision of the Hon'ble Supreme Court in ***Shailesh Dhairyawan vs Mohan Balkrishna Lulla***¹ ; a Division Bench judgment of this Court in the case of ***Mr. Rehmat Ali Baig vs Minocher M. Deboo and Ors***² and the decision of the Delhi High Court in the case of ***Ashwani Khurana vs. Inder Kumar Chawla***³, Mr. Kamat submits, that in light of the withdrawal of the erstwhile learned Sole Arbitrator, this Court ought to appoint a substitute Arbitrator under the provisions of the Act and the arbitration proceedings.

8. On the other hand, Mr. Mitra, the learned Advocate for the Respondent opposes the appointment of a substitute arbitrator on various grounds. Firstly, he says that the Respondent has certain financial constraints and has already expended a large sum of money in the ongoing arbitration. Accordingly, the Respondent would not like to proceed with arbitration and has already moved a Notice of Motion, being Notice of Motion (L) No. 1892 of 2016 seeking restoration of the Applicant's original Summary Suit.

9. Mr. Mitra further submits that he is amenable to arbitration only if a particular identified Senior Advocate is appointed as the Ld. Sole Arbitrator. The name finds mention in the Respondent's Affidavit in Reply. Mr. Mitra submits that his client's instructions are that he has faith in only that identified individual to be appointed to adjudicate disputes.

1 (2016) 3 SCC 619

2 MANU/MH/1022/2009

3 MANU/DE/0362/2005

10. Lastly, it is submitted on behalf of the Respondent that the present Application is not maintainable on account of there being no arbitration agreement between the parties. It is contended that the Order of 15th September 2014 does not constitute an arbitration agreement as contemplated under the Act. It is on this basis that the Respondent had filed the aforementioned Notice of Motion (L) No. 1892 of 2016 seeking a declaration that the arbitration proceedings had come to an end and that the initial Summary Suit be restored to file and proceeded with. Mr. Mitra places great emphasis on the fact that the said Notice of Motion was taken out before the present Application.

11. Mr. Mitra placed reliance on a judgment of the Delhi High Court in *Harvinder Singh & Co. v. Chief Engineer (I & FC), Government of NCT of Delhi*⁴ for the proposition that there has to be a written arbitration agreement between the parties for a reference to be made under Section 7 of the Act.

12. Mr. Mitra has also labored for considerable length on what he believes to have transpired at the hearing on 16th February 2016.

13. I have heard the learned Advocates appearing for the parties at length and have considered their submissions as well as the case law relied upon by them and before dealing with the merits of the arguments, it is made clear that I do not intend to deal with what either party contends took place at the hearing held on 16th February 2016.

4 2012 (4) ArbLR 418 (Delhi)

Instead I intend to go by the record of the erstwhile Sole Arbitrator. I am supported in this view by two judgments relied upon by the Applicant. In ***Mohd. Akram Ansari v. Chief Election Officer***⁵, the Apex Court held that there exists a presumption that the record of the Court records all the submissions and arguments urged before the Judge. In the event that a party is of the view that the record is not accurate, it is open for that party to take out appropriate proceedings, including a review of the said Order. Similarly, in ***State of Maharashtra v. Ramdas Shrinivas Nayak***⁶, the Apex Court took strong objection to the practice of parties contending that the statements made by them before the lower Courts were not recorded correctly. Censuring such practice, it was held:

“ We are afraid that we cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena... We are bound to accept the statement of the judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that

5 (2008) 2 SCC 95

6 (1982) 2 SCC 463

statement of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call the attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. This is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there.”

14. While it is true that the aforementioned judgments relate to proceedings before the Court and the record of Courts, the same must also apply to proceedings before arbitrators and the record maintained by arbitrators, even if not with as much rigor. In the present case, the Respondent has made no effort to seek clarification from the erstwhile arbitrator in relation to the recording of what transpired at the hearing held on 16th February 2016. Without such clarification / modification being sought, it is now difficult to accept that the contents of the arbitrator’s record is not accurate.

15. Even on merits of the present Application, I am in agreement with the submission advanced by Mr. Kamat on behalf of the Applicant that upon the matter having been referred to arbitration, the provisions of Section 89 of the Code of Civil Procedure, 1908 (“CPC”) would apply. Section 89(2) of the CPC makes it clear that once a dispute has been referred for arbitration, the provisions of the Act shall apply.

16. The Hon'ble Supreme Court in its judgment in *Shailesh Dhairyawan vs Mohan Balkrishna Lulla (supra)* has held that when in a pending Suit parties agree to refer their disputes for arbitration, they intend to settle their disputes through arbitration and not through the Court. In such cases, Courts would have the power to appoint a substitute arbitrator and ought to give a liberal interpretation to the provisions of Section 15(2) of the Act so as to apply to all possible circumstances when the mandate of the previous arbitrator has been terminated.

17. In the case of *Mr. Rehmat Ali Baig vs Minocher M. Deboo and Ors. (supra)*, a Division Bench of this Court held that:

“10. Ordinarily, the parties having consciously agreed for resolution of their dispute before the private forum in furtherance of which the suit was disposed off, the Court would loath to once again allow the parties to switch over to suit proceedings before the Court unless it becomes imperative to do so.”

18. The Delhi High Court has in the case of *Ashwani Khurana vs. Inder Kumar Chawla (supra)* held that:

“5....Sub section 2 of Section 89 makes it manifest that once a dispute is referred for arbitration or conciliation under Section 89, the Arbitration and Conciliation Act, 1996 would apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act. The proceedings in the Suit in which such a reference is made, therefore, stand terminated for good.....As a matter of fact, the Court seized of the Suit becomes

functus officio after the making of an order under Section 89 of the Act. The prayer for enlargement of the arbitral tribunal cannot consequently be made by way of an interim application in the Suit which is no longer on the file of the Court.”

19. Therefore, in the instant case, once the parties agreed to refer their disputes to arbitration, as was recorded in the Order of this Court dated 15th September 2014, the provisions of the Act would apply. There is no question of the Respondent seeking to restore the Applicant's Summary Suit to file, an application which appears to me to be wholly misguided. The provisions of Section 11 read with Section 15 of the Act make it clear that this Court is required to appoint a substitute arbitrator in the event of withdrawal by the erstwhile arbitrator and no other mechanism having been agreed between the parties.

20. In respect of Mr. Mitra's first and second arguments, they appear to me to be completely self-destructive. It can hardly lie in the mouth of a party to first contend that he is in financial difficulty and cannot afford arbitration and then seek the appointment of a particular Senior Advocate of this Court as a condition precedent to continuing with arbitration. In any event, the party's alleged financial difficulty ought to have weighed on its mind while first consenting to arbitration. Having done so on 15th September 2014, it cannot now seek to withdraw from the arrangement merely because the erstwhile arbitrator has withdrawn himself from the arbitration. The mere withdrawal of an arbitrator would not bring a conclusion to arbitration proceedings

since parties are entitled to seek appointment of a substitute arbitrator under the provisions of Section 15 of the Act.

21. Dealing with Mr. Mitra's final argument, as has already been stated above, the proposition that there is no arbitration agreement between the parties is stated to be rejected. There is an Order of this Court dated 15th September 2014 recording the said agreement. It is a written record of what the Applicant and Respondent had consented to before this Court and to now seek to renege on that agreement is disingenuous on the part of the Respondent. In this light, the reliance by Mr. Mitra on the judgment of the Delhi High Court in *Harvinder Singh & Co.* (supra) is completely misplaced. In that case, there was no signed agreement between the parties and a mere letter from one of the parties asking the other party to sign the agreement, which in turn contained an arbitration clause. It is on this basis that the Delhi High Court reached the conclusion that there was no arbitration agreement within the meaning of Section 7 of the Act. These facts are not at all apposite to what is before me in the present Application, wherein the parties had agreed before this Court to refer disputes to arbitration and the agreement was recorded in writing through an Order of this Court dated 15th September 2014.

22. There is one further issue that requires the attention of this Court. With growing unease, this Court has been observing the increasing prevalence of what can only be said to be misconduct with arbitrators, many of whom are officers of this Court as in the present case. The intention behind such misconduct is often to engineer a

withdrawal by the concerned arbitrator or, at the very least, to delay and frustrate the arbitral proceedings. Needless to say, such conduct makes it difficult for arbitrators to function let alone meet the stringent time-frames provided for under the Act (as amended). It is critical that this behavior is nipped in the bud and substantial costs imposed on such parties by the Courts so as to prove a disincentive to any persons contemplating such action.

23. In light of the above, the following order is passed:-

(a) Mr. Karl Tamboly, Advocate, is appointed as substitute arbitrator to continue with the arbitral proceedings presently pending between the parties.

(b) The disclosure under Section 11 (8) read with Section 12 (1) of the Arbitration and Conciliation Act, 1996 is filed by Mr. Tamboly and taken on record.

(c) In view of this order, the question of restoring the Applicant's original Summary Suit does not arise.

(d) Costs of Rs. 25,000/- are ordered to be paid by the Respondent to the Applicant within a period of one week from today.

24. The above Arbitration Application stands disposed off on the above terms. Notice of Motion (L) No. 1892 of 2016 in Summary Suit No. 2492 of 2012 filed by the Respondent is dismissed.

(S.J. KATHAWALLA, J.)