

HIGH COURT OF CHHATTISGARH, BILASPUR

Arbitration Application No.24 of 2014

M/s. Sharma Publications Pvt. Ltd., Through Director Suresh Chandra Sharma, S/o Late Banshidhar Sharma, aged about 65 yrs, Having its Head Office, Ring Road, Bidanasi, Cuttack-753014 (Odisha), R/o Shree Vihar Colony, P.O. Tulsipur, District Cuttack, Pin No.753014 (Odisha)

---- Applicant

Versus

1. State of Chhattisgarh, Through Sole Arbitrator, The Secretary, School Education Department, Govt. of Chhattisgarh, DKS Bhawan, (Now at Mahanadi Bhawan) Raipur
2. Secretary, Ministry of School of Education, DKS Bhawan, (Now at Mahanadi Bhawan) Raipur, Chhattisgarh.
3. State Council of Education Research and Training (SCERT) through its Director, Shankar Nagar, Raipur, Chhattisgarh.

---- Non-applicants

For Applicant:	Mr. P.K. Parhi and Mr. Hemant Gupta, Advocates.
For Non-applicants/State:	Mr. Prasun Kumar Bhaduri, Govt. Adv.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

11/08/2017

1. In order to resolve the arbitral dispute arisen between the parties as per the arbitration agreement, the Secretary, Department of School Education was appointed as arbitrator and the matter was referred to him, but the learned Arbitrator – Secretary of the School Education Department by order dated 6-1-2006 dropped the proceeding holding that it is not possible to settle the dispute between the parties i.e. the applicant and the State Council of

Educational Research and Training (SCERT) and thereby closed the arbitration proceeding. The applicant aggrieved against that order, filed W.P.No.2211/2006 before this Court and this Court by order dated 15-1-2009, set aside that order of the Arbitrator and remitted the matter to the Sole Arbitrator (Secretary, Department of School Education) for passing award in accordance with law. It is the case of the applicant that from 15-1-2009 till 13-3-2009, the Arbitrator did not proceed with the hearing of the arbitration proceeding and on 13-3-2009, lodged a first information report against the applicant i.e. the Director of M/s. Sharma Publications Pvt. Ltd., for non-encashment of bank guarantee for which offence under Sections 422, 468, 471 and 477-A of the IPC in Police Station Civil Lines, Raipur in which he has applied for anticipatory bail, which was ultimately granted. It was found that now, the Secretary, School Education Department cannot adjudicate the dispute on account of lapse on his part in not continuing the arbitration proceeding and having lodged FIR and ultimately, the applicant filed this application for termination of the mandate of the Arbitrator as well as for appointment of substitute Arbitrator.

2. Learned counsel for the applicant would submit that since no action was taken by the named Arbitrator from 15-1-2009 despite the order of this Court and having lodged FIR against the applicant, the mandate of the Arbitrator shall stand terminated and a substitute Arbitrator be appointed by virtue of the

provisions contained in Section 14(1)(a) of the Arbitration and Conciliation Act, 1996 (for short, 'the Act of 1996') and any person other than the named arbitrator be appointed to adjudicate the dispute.

3. Learned State counsel would submit that the order of the writ court inter se is binding between the parties and after remand notice has been issued to the applicant on 7-4-2015 for proceeding with the arbitration, the applicant did not join and therefore the arbitration proceeding could not be proceeded with.
4. Learned counsel for the applicant in rejoinder would submit that it is only an eyewash to oppose the application filed by the applicant for terminating the mandate of the Arbitrator and in view of the provisions contained in Section 12 (5) of the Act of 1996, now also, the named arbitrator cannot proceed with the hearing of the dispute as such, the mandate of the Arbitrator be terminated and an independent arbitrator to adjudicate the dispute may be appointed.
5. I have heard learned counsel for the parties, considered the rival submissions made herein-above
6. Section 14 of the Act of 1996 provides for failure or impossibility to act as arbitrator. Section 14 (1) and (2) of the Act of 1996 read 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.”

7. A careful perusal of Section 14(1)(a) read with clause (b) of sub-section (1) of Section 14 of the Act of 1996 would appear that the mandate of the arbitrator shall stand terminated if he becomes *de jure or de facto* unable to perform his functions or for other reasons fails to act without undue delay.

8. Their Lordships of the Supreme Court in the matter of **Union of India v. Singh Builders Syndicate**¹ finding pendency of arbitration proceedings for over a decade expressed unhappiness stating that it is a mockery of the process. Their Lordships expressed their unhappiness in following words: -

“15. The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of the parties' choice. If the Arbitral Tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members of the Arbitral Tribunal or by failing to take steps expeditiously to replace the arbitrators in terms of the arbitration agreement, the Chief Justice or his designate, required to exercise power under Section 11 of the Act, can step in and pass appropriate orders.

16. We fail to understand why the General Manager

1 (2009) 4 SCC 523

of the Railways repeatedly furnished panels containing names of officers who were due for transfer in the near future. We are conscious of the fact that a serving officer is transferred on account of exigencies of service and transfer policy of the employer and that merely because an employee is appointed as arbitrator, his transfer cannot be avoided or postponed. But an effort should be made to ensure that officers who are likely to remain in a particular place are alone appointed as arbitrators and that the Arbitral Tribunal consisting of serving officers, decides the matter expeditiously.

17. Constituting Arbitral Tribunals with serving officers from different far-away places should be avoided. There can be no hard-and-fast rule, but there should be a conscious effort to ensure that the Arbitral Tribunal is constituted promptly and arbitration does not drag on for years and decades.

18. As noticed above, the matter has now been pending for nearly ten years from the date when the demand for arbitration was first made with virtually no progress. Having regard to the passage of time, if the Arbitral Tribunal has to be reconstituted in terms of Clause 64, there may be a need to change even the other two members of the Tribunal.

19. The delays and frequent changes in the Arbitral Tribunal make a mockery of the process of arbitration. Having regard to this factual background, we are of the view that the appointment of a retired Judge of the Delhi High Court as sole arbitrator does not call for interference in exercise of jurisdiction under Article 136 of the Constitution of India.”

9. Section 14(1) of the Act of 1996 came up for consideration before the Supreme Court in the matter of **Union of India and others v. U.P. State Bridge Corp. Ltd.**² in which Their Lordships held in paragraph 13 as under: -

“13. As is clear from the reading of Section 14, when there is a failure on the part of the Arbitral Tribunal to act and it is unable to perform its function either de jure or de facto, it is open to a party to the arbitration

proceedings to approach the Court to decide on the termination of the mandate. Section 15 provides some more contingencies when mandate of an arbitrator can get terminated. In the present case, the High Court has come to a categorical finding that the Arbitral Tribunal failed to perform its function, and rightly so. It is a clear case of inability on the part of the members of the Tribunal to proceed in the matter as the matter lingered on for almost four years, without any rhyme or justifiable reasons. The members did not mend their ways even when another life was given by granting three months to them. Virtually a pre-emptory order was passed by the High Court, but the Arbitral Tribunal remained unaffected and took the directions of the High Court in a cavalier manner. Therefore, the order of the High Court terminating the mandate of the arbitral tribunal is flawless. This aspect of the impugned order is not even questioned by the appellant at the time of hearing of the present appeal.”

10. Likewise, Their Lordships further pointed out that first and paramount principle of the first pillar is “fair, speedy and inexpensive trial by an Arbitral Tribunal”. Unnecessary delay or expense would frustrate the very purpose of arbitration.
11. Their Lordships finally reiterated with approval the observations made in **Singh Builders Syndicate's** case (supra) in paragraph 20 of its judgment and upheld the order of the High Court where the mandate of the arbitrator was terminated in paragraph 22 holding that “Courts are not powerless to remedy such situations by springing into action and exercising their powers as contained in Section 11 of the Act to constitute an Arbitral Tribunal, so that interest of the other side is equally protected”.
12. Reverting back to the facts of the present case, it is quite apparent that despite order of this Court on 15-1-2009, the arbitrator – Secretary of the School Education Department of the

Government of Chhattisgarh did not proceed with the matter and not only sat tight over the matter, but became a party to the dispute by lodging a first information report as late as on 7-3-2013 against the applicant which has rendered the named arbitrator ineligible and incapable of working and performing the job of arbitrator who is supposed to be impartial and independent particularly in view of the amended provision as incorporated in the Act of 1996 in the shape of Section 12 (5) by the Amendment Act of 2015 which came into force with effect from 12-10-2015.

13. As a fallout and consequence of aforesaid discussion, the mandate of the arbitrator – Secretary, Department of School Education, State of Chhattisgarh is hereby terminated. I hereby appoint Hon'ble Mr. Justice Dhirendra Mishra, former Judge of this High Court, Tilak Nagar, Bilaspur to arbitrate the dispute. Registry is directed to communicate this order to Hon'ble Mr. Justice Dhirendra Mishra who shall enter into reference after complying with the provisions contained in Section 12 (2) of the Act of 1996 and will adjudicate the dispute expeditiously keeping in view that the matter is pending since 27-7-2005.

14. The arbitration application is allowed to the extent indicated herein-above. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge