

HIGH COURT OF CHHATTISGARH, BILASPUR

Arbitration Appeal No.23 of 2017

(Arising out of order dated 6-1-2017 in M.J.C.No.37/2014 of the learned District Judge, Durg)

Order reserved on: 27-4-2018

Order delivered on: 25-6-2018

M/s Farukh Warasi, through its proprietor namely Farukh Warasi, S/o Musabhai Warsi, Aged about 52 years, R/o Arihant Complex, Ring Road No.1, Raipur, District Raipur (C.G.)

---- Appellant

Versus

M/s B.S. B.K. Private Limited, through its Vice President V.R. Chetty, 4th Floor, Surya Treasure Island Mall, Junwani, Bhilai – 490 020, District Durg (C.G.)

---- Respondent

For Appellant: Mr. V.K. Pandey, Advocate.

For Respondent: Ms. Meha Kumar, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. The jurisdiction of this Court under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (for short, 'the AC Act') has been invoked by the appellant herein calling in question the order passed by the learned District Judge setting aside the arbitral award in exercise of power conferred under Section 34(2) of the AC Act.
2. Respondent M/s. B.S.B.K. Private Limited is a company registered under the provisions of the Indian Companies Act, 1956. It was granted work order dated 19-10-2010 for construction of WBM and bituminous road by NTPC, Sipat and the said Company further

entrusted execution of said work to the appellant herein by entering into agreement. In the course of execution of work, certain contractual disputes arose between the parties and in order to resolve the disputes, the appellant invoked clause 11 of the agreement and suggested the name of the arbitrator Mr. P.D. Kesharwani on 12-7-2011, which was reiterated on 4-8-2011, which the respondent proposed to be resolved by way of amicable settlement, but thereafter, the dispute could not be settled amicably leading to appointment of arbitrator by the appellant herein on 25-8-2011. The sole arbitrator commenced his arbitration proceeding on 30-9-2011 in which the respondent appeared and filed his statement of claim and counter claim and also filed an objection in para 8 of the statement of claim that the appellant / claimant has failed to follow the procedure for resolution of dispute through arbitration and the sole arbitrator has no jurisdiction to enter upon the dispute and various other disputes were raised therein. The respondent also raised counter claim to the extent of ₹ 275.78 lakhs with 15% interest per annum from 1-7-2011 along with the cost of arbitration. During the course of arbitration, the respondent proposed 21 issues for determination and the arbitrator held more than 15 sittings to conclude the arbitration and ultimately, granted the claim of the appellant to the extent of ₹ 30,48,494/- along with cost and interest at the rate of 9% per annum from 30-9-2011, but rejected the counter claim finding no merit.

3. The respondent herein feeling aggrieved and dissatisfied with the award of the arbitrator filed an application under Section 34(2) of

the AC Act mainly and principally contending inter alia that the appellant did not follow the procedure for resolution of dispute through arbitration and the sole arbitrator appointed by him had no jurisdiction to enter upon the reference and decide the question, therefore, the entire award deserves to be set aside. The learned District Judge allowed the application finding inter alia that the arbitrator appointed by the appellant was contrary to Section 11 of the AC Act and such an award is also against the public policy being hit by Section 34(2)(b)(ii) of the AC Act.

4. Questioning the legality, validity and correctness of the order so passed setting aside the award, this appeal has been preferred by the appellant herein stating that the order passed by the learned District Judge is contrary to law and it is liable to be set aside.
5. Mr. V.K. Pandey, learned counsel appearing for the appellant, would submit that the order passed by the learned District Judge is contrary to the facts and law available on record and runs contrary to Section 4, particularly clause (b), of the AC Act. The respondent knowing fully well about the appointment of arbitrator did not challenge the appointment so made in the procedure prescribed under Section 13 of the AC Act and allowed the appointment of arbitrator become final and thereafter, though raised a formal objection in para 8 of the statement of claim filed before the arbitrator, but thereafter, further participated in the arbitration proceeding without protest or demur and proposed 21 issues before the arbitrator for consideration and no issue was even raised with regard to the jurisdiction of the arbitrator and also led evidence by

filing his detailed affidavit, and when the award was pronounced which was against him, as the learned Arbitrator has granted the application and passed an award in favour of the appellant to the extent of ₹ 30,48,494/-, then the respondent decided to challenge the award on the ground that the appointment of arbitrator was contrary to Section 11 of the AC Act or the procedure established by law. He would further submit that the respondent having taken a calculated chance by submitting to the jurisdiction of the arbitrator without pressing his objection and even by raising the counter claim and finding the decision unpalatable, cannot turnround and question the award so passed by virtue of the provision contained in Section 4(b) of the AC Act, as such, the order of the learned District Judge granting the application under Section 34(2) of the AC Act deserves to be set aside and the award of the learned arbitrator deserves to be restored with costs.

6. Ms. Meha Kumar, learned counsel appearing for the sole respondent, would submit that the respondent from the day one by replying to the petitioner's letter dated 12-7-2011 appointing Mr. P.D. Kesharwani as arbitrator, proposed for mutual settlement, thereafter, on 8-10-2011, clearly informed to the arbitrator that he has no authority to act as sole arbitrator in the matter because there is no provision for sole arbitration in the agreement between the parties and as such, there was no matter for arbitration in the case, the only course open to the appellant was to file application for appointment of arbitrator under Section 11(6) of the AC Act before the Hon'ble Chief Justice or his designate under the aforesaid

provision and even in the statement of claim, in para 8, the respondent has clearly raised an objection that the sole arbitrator has no authority to enter upon and decide various dispute raised therein and as such, the order of the learned District Judge suffers from no illegality and it deserves to be upheld by dismissing the appeal preferred by the appellant.

7. I have heard learned counsel for the parties and also considered their rival submissions made herein-above and went through the record with utmost circumspection.
8. The short question that arises for consideration is, whether the learned District Judge is justified in granting the application filed under Section 34(2) of the AC Act by the respondent herein?
9. It is not in dispute that the agreement between the parties contained an arbitration clause in shape of clause 11 and finding the arbitral dispute between the appellant herein and the respondent herein, the appellant invoked the said clause and appointed Mr. P.D. Kesharwani as sole arbitrator by memo dated 12-7-2011 to which the respondent initially suggested for resolution of dispute by amicable settlement on 3-8-2011 and on 8-10-2011 and also opposed the appointment of Mr. P.D. Kesharwani by informing him by writing a memo to Mr. Kesharwani, the sole arbitrator. Thereafter, the respondent filed his statement of claim and counter claim on 12-11-2011 in which by way of preliminary objection it has been stated that the arbitrator has no jurisdiction to enter into reference and no jurisdiction to act as sole arbitrator in the matter, but simultaneously also raised a counter claim by

claiming an amount of ₹ 275.78 lakhs. Thereafter, the respondent proposed 21 issues to be decided by the arbitrator in which no such issue of jurisdiction was proposed to be decided by the respondent. Not only this, the affidavit also containing 15 paragraphs running into five pages was filed by the respondent, but no such objection of jurisdiction was raised.

10. The question to be considered was whether the respondent is deemed to have waived his right to object to the appointment of arbitrator under Section 4(b) of the AC Act.
11. In order to resolve the dispute, it would be appropriate to notice Section 4 of the AC Act which reads as follows: -

“4. Waiver of right to object.—A party who knows that

—
(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.”

12. From a careful perusal of the aforesaid provision, it appears that the principle of waiver is statutorily recognised in Section 4 of the AC Act and the said principle has been reduced in writing in shape of the said provision.
13. The Supreme Court in the matter of **Bharat Sanchar Nigam Limited and another v. Motorola India Private Limited**¹ has held that a party who knows that a requirement under the arbitration

¹ (2009) 2 SCC 337

agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object and observed as under: -

“39. Pursuant to [Section 4](#) of the Arbitration and Conciliation Act, 1996, a party which knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object. The High Court had appointed an arbitrator in response to the petition filed by the appellants (*sic* respondent). At this point, the matter was closed unless further objections were to be raised. If further objections were to be made after this order, they should have been made prior to the first arbitration hearing. But the appellants had not raised any such objections. The appellants therefore had clearly failed to meet the stated requirement to object to arbitration without delay. As such their right to object is deemed to be waived.”

14. The principle of law laid down in **Bharat Sanchar Nigam Limited** (supra) has been followed with approval by a three-Judge Bench decision of the Supreme Court in the matter of **Union of India v. Pam Development Private Limited**² in which it has been held as under: -

“18. In our opinion, the High Court has correctly come to the conclusion that the appellant having failed to raise the plea of jurisdiction before the Arbitral Tribunal cannot be permitted to raise for the first time in the Court. Earlier also, this Court had occasion to consider a similar objection in *BSNL v. Motorola India (P) Ltd.* [(2009) 2 SCC 337]. Upon consideration of the provisions contained in [Section 4](#) of the Arbitration Act, 1996, it has been held as follows: (SCC p. 349, para 39)

“39. Pursuant to [Section 4](#) of the Arbitration and Conciliation Act, 1996, a party which knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object. The High Court had appointed an arbitrator in response to

² (2014) 11 SCC 366

the petition filed by the appellants (sic respondent). At this point, the matter was closed unless further objections were to be raised. If further objections were to be made after this order, they should have been made prior to the first arbitration hearing. But the appellants had not raised any such objections. The appellants therefore had clearly failed to meet the stated requirement to object to arbitration without delay. As such their right to object is deemed to be waived.” “

15. In this case, the appellant made appointment of arbitrator on 12-7-2011 by stating as under: -

1. As upon failure (in two meetings) for mutual settlement of dispute arisen for recovery of Rs. 63,52,863.00 with interest against your organisation, we are compelled to invoke arbitration clause 11 embedded in documents.

2. As there is no specific procedure for appointment of arbitration, but the adoption of Indian Arbitration & Conciliation Act, 1996 was inforceable for settlement of dispute between the parties.

3. Hence I appoint the Arbitrator whose particular is as under: -

“P.D. Kesharwani resident of C/37 in MPHB / IE / Bhilai. Phone No. 0788-2281752” dealing arbitration dispute before C.G. Arbitration Tribunal-Raipur (C.G.) regularly is our Arbitrator.”

16. The procedure for challenging the appointment of arbitrator has been prescribed in Section 13 of the AC Act which states as under:-

“13. Challenge procedure.—(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the

challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.”

17. Thus, a complete procedure for challenging the appointment of arbitrator has been prescribed in the aforesaid provision.

18. In the instant case, it appears that the appellant appointed arbitrator by its memo dated 12-7-2011 to which the respondent replied on 3-8-2011 and proposed for amicable settlement though declined to accept the contents of the notice and as such, the respondent failed to challenge the appointment of arbitrator as envisaged under Section 13 of the AC Act and allowed the order of appointment of sole arbitrator to become final and binding. Therefore, the respondent failed to challenge the appointment of sole arbitrator in accordance with law and as such, the same has become final and binding.

19. In like situation, the Supreme Court in **Pam Development Private Limited's** case (supra) held as under: -

“15. As noticed above, by order dated 10-7-1988, the High Court appointed Mr Justice Satyabrata Mitra as the sole arbitrator. It is important to notice that this order dated 10-7-1998 was not challenged by the appellant and, therefore, the same became final and binding. This apart, the appellant failed to raise any objection to the

lack of jurisdiction of the Arbitral Tribunal before the learned arbitrator.”

20. Reverting to the facts of the present case, it would thus, appear that the respondent though did raise a formal objection with regard to the appointment of sole arbitrator while filing his statement of claim and counter claim before the learned arbitrator, but did not press it and participated in the arbitration proceeding by raising a counter claim and thereafter, by submitting 21 issues for consideration except the issue of jurisdiction of the arbitrator and also filed affidavit in support of his counter claim and when the claim of the appellant was allowed and his counter claim was rejected, the respondent raised a ground under Section 34(2) of the AC Act that the award is against the public policy, as the learned arbitrator had no jurisdiction. In the considered opinion of this Court, the respondent having willfully participated in the arbitration proceeding without any demur and allowed the final award to be passed, cannot be allowed to contend that the arbitrator has no jurisdiction and the award be set aside on that ground.

21. In the matter of **N. Chellappan v. Secretary, Kerala State Electricity Board and another**³, the Supreme Court relying upon the decision of the Privy Council in the matter of **Chowdhri Murtaza Hossein v. Mussumat Bibi Bechunnissa**⁴ has clearly held that when the Board without demur participated in the proceedings before the umpire and took the chance of an award in its favour, it cannot turn round and say that the umpire had no inherent jurisdiction and therefore its participation in the

³ (1975) 1 SCC 289

⁴ 3 IA 209, 220

proceedings before the umpire is of no avail.

22. The principle of law laid down in N. Chellappan (supra) was followed with approval by the Supreme Court in the matter of M/s. Neelkantan and Bros. Construction v. Superintending Engineer, National Highways, Salem and others⁵ in which it has been held that if the parties to the reference either, agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings.

23. In the instant case, as noticed herein-above, after raising a formal objection the respondent not only participated from time to time before the arbitrator, but also filed his counter claim and took a calculated chance to get the award in his favour by substantiating the counter claim and did not press his objection regarding jurisdiction so raised earlier and thereby, allowed the appointment of arbitrator to become final and also did not challenge the appointment of arbitrator under Section 13 of the AC Act. As such, the respondent is deemed to have waived his objection under Section 4(b) of the AC Act i.e. his right to so object under Section 4(b) and therefore the respondent was debarred from raising any such ground before the learned District Judge under Section 34 (2) of the AC Act. The respondent having contested the matter before the arbitrator on merits by submitting his defence on merits cannot be allowed to question that award on the ground that the arbitrator

⁵ AIR 1988 SC 2045

has no jurisdiction in the matter. Therefore, the learned District Judge is absolutely unjustified in setting aside the award passed by the arbitrator on the ground that the appointment of arbitrator was contrary to Section 11 of the AC Act.

24. As a fallout and consequence of the aforesaid discussion, the impugned order passed by the learned District Judge granting the application under Section 34(2) of the AC Act is hereby set aside. The award passed by the learned arbitrator is hereby restored.

25. The appeal is allowed to the extent sketched herein-above leaving the parties to bear their own cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge