

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.04.2018

CORAM:

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

O.P.No.991 of 2017
and A.No.8119 of 2017

Sri Sai Balaji Gas Cylinders Pvt. Ltd.,
30/21, Dev Apartments,
First Main Road, Gandhi Nagar,
Adyar, Chennai 600 020
represented by its Managing Director,
Mr.M.Muruganandham

.. Petitioner

Vs.

Mr.D.Bala Ravi Chandrudu

.. Respondent

* * *

Prayer : Original Petition filed under Sections 11(6) and 12(5) of the Arbitration And Conciliation Act, 1996, praying to pass an order appointing an independent arbitrator in the place of the named arbitrator Mr.Lakshya Saadhan Chintapalli Lakshmi Narayana for resolving the dispute between the petitioner and the respondent regarding Lease Agreement dated 27.07.2016.

* * *

For Petitioner : Mr.K.Sampathkumar

For Respondent : Mr.GR.M.Palaniappan

J U D G E M E N T

The challenge in this petition is with respect to appointing an independent Arbitrator in the place of the named Arbitrator Mr.Lakshya Saadhan Chintapalli Lakshmi Narayana for resolving the dispute between the petitioner and the respondent regarding the Lease Agreement dated 27.07.2016.

2. The petitioner has stated that they were involved in the business of manufacturing LPG Gas Cylinders from the year 2009. They suffered a financial crunch and found it difficult to keep the manufacturing unit in a running condition. In the year 2016, the respondent approached them with a proposal to invest money in the manufacturing unit and pursuant to which, a Lease Agreement was entered into on 27.07.2016. Among other terms and conditions, *inter alia*, the parties had also agreed that the existing liabilities created before the signing of the agreement shall be settled by the petitioner from the 50% profit that they were entitled to. In the same agreement, it was agreed that in case of any interpretation of the clauses in the agreement, the same shall be referred to a sole Arbitrator Mr.Lakshya Saadhan Chintapalli Lakshmi Narayana,

Advocate, Hyderabad, under the Arbitration and Conciliation Act, 1996 (in short "the Act"). The respondent was made the Chief Executive Officer and he was authorised to operate the the Bank account and he was in control of the manufacturing unit from the date of the lease agreement.

3. The petitioner alleged breach of the agreement by the respondent in accordance with the Lease Agreement and caused a letter dated 16.03.2017 terminating the lease agreement and demanding statement of accounts. The petitioner further stated that on 06.10.2017, a letter was sent to the named Arbitrator Mr.Lakshya Saadhan Chintapalli Lakshmi Narayana requesting him to recuse himself from the arbitration proceedings, as he was appearing for the respondent for a long time and only through the respondent, the petitioner got introduced to the petitioner.

4. In the meantime, the named Arbitrator had sent a communication dated 29.10.2017 directing the petitioner to appear before him on 12.11.2017. The petitioner also appeared through its counsel before the learned Arbitrator on 12.11.2017 and filed a memo with an objection to conduct the proceedings before him, in view of the

bar under Section 12(5) of the Act read with Schedule VII of the Act.

5. Learned counsel for the petitioner stated that the appointed Arbitrator has been appearing for the respondent and he is also the counsel for the respondent as well in other matters. Hence, it is stated that he cannot act impartially or independently. Thus, learned counsel for the petitioner sought for change of the Arbitrator in the place of the appointed Arbitrator.

6. Learned counsel for the respondent contended that the named Arbitrator has been only appearing for the petitioner and not for the respondent and that the respondent did not have any objection for continuing with the Arbitral proceedings with the named Arbitrator. It is contended that the petitioner had sent the letter dated 06.10.2017 to the named Arbitrator requesting him to withdraw himself from the arbitration even without the knowledge of the respondent. Hence, he sought for dismissal of the petition.

7. Heard both sides.

8. It is the submission of the learned counsel for the petitioner

that the named Arbitrator cannot continue as he become ineligible by way of Section 12(5) of the Act, which reads as follows :

"12. Grounds for challenge.—

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

9. Even as per the proviso, the parties, with the express agreement in writing, had appointed the named Arbitrator and cannot challenge the same at this point of time.

10. However, Section 14(1)(a) of the Act states when the mandate of an Arbitrator can be terminated, as per which, only after the named Arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, the mandate of the Arbitrator shall be terminated considering him to be ineligible. The named Arbitrator did not have any previous involvement in the dispute covered by the present arbitration. Even presuming that the respondent had introduced the present Arbitrator to the petitioner,

and that he had appeared for them, having consented for appointment, while signing the agreement, it is not open to the petitioner to go back on the same. The Act does not contain any provision, where, the Court can remove an Arbitrator during the pendency of arbitration proceedings.

11. Section 14 of the Act deals with the failure or impossibility of the Arbitrator to act on account of other circumstances, such as unable to perform his functions on account of death, resignation or other reasons. Section 15 of the Act also lays down the procedure to be followed up on termination of the mandate to the Arbitrator, in the circumstances, referred to in Sections 13 and 14.

12. Curiously, the petition has been filed under Section 11(6) of the Act. Section 11(6) will apply only when a party fails to act, as required under the procedure, which had been agreed upon by them in the agreement or the appointed Arbitrators fail to reach an agreement expected of them. In the case on hand, in the agreement dated 27.07.2016, both the parties have consented to appoint Mr.Lakshya Saadhan Chintapalli Lakshmi Narayana as the Arbitrator and the respondent had issued the letter invoking the arbitration clause.

Therefore, when there is no failure on the part of the party concerned, as per the arbitration agreement to fulfil his obligation in terms of Section 11(6), the petitioner cannot maintain this very petition. Even when there is a challenge to the constitution of the Arbitral Tribunal, it is left to the Arbitral Tribunal to decide the same. Even if such preliminary objection is unsuccessful, it can be challenged only while challenging the award. Therefore, the challenge to the Arbitral Tribunal is held to be against the spirit of the Act. Nevertheless, if a party, who has a grievance against the Arbitrator on account of bias or prejudice, is not remediless. It has to only wait till the award is passed and challenge the same.

13. Accordingly, the letter for commencement of the arbitration was issued by the respondent as early as on 09.09.2017. The Claim Petition was also filed by the respondent in R.A.No.1 of 2017 on the same date. There is no provision in the Act to substitute the Arbitrator in the absence of any of the procedures prescribed under Sections 13, 14 and 15 of the Act. The challenge to the appointment of Arbitrator must be raised by the petitioner before the Arbitral Tribunal itself.

14. In the light of the above discussion, this Original Petition is

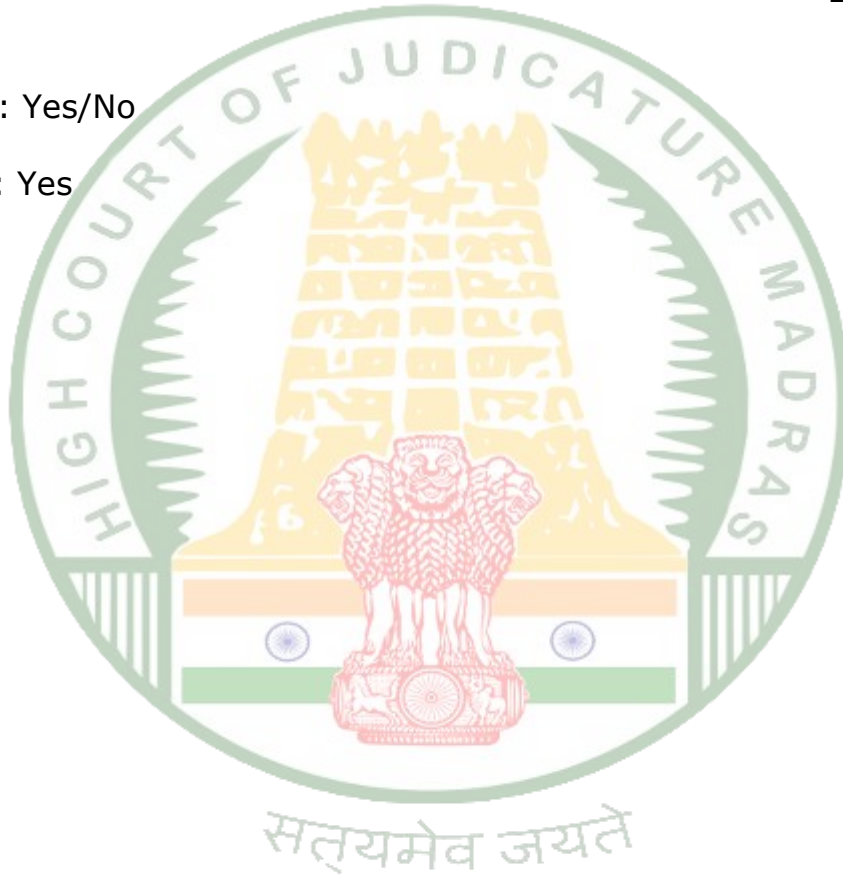
dismissed as not maintainable. The stay already granted is vacated.
The Arbitral Tribunal shall forthwith enter into the reference and shall
decide the same as expeditiously as possible.

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