

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION (L) NO. 1457 OF 2019
WITH
IN PERSON APPLICATION NO. 3 OF 2020
WITH
IN PERSON APPLICATION NO. 4 OF 2020

Manipal Technologies Ltd	...Petitioner
<i>Versus</i>	
Mapple Edusoft Pvt Ltd	...Respondent

Mr Dakshesh Vyas, *i/b Jayesh G Gawde, for the Petitioner.*
Mr Anurag Simsimwar, *Director of Respondent Company, present in person.*
Mrs Rajni Dahiya, *authorised representative of the Respondent, present in person.*

CORAM: G.S. PATEL, J.
DATED: 17th February 2020

PC:-

1. The Application is under Section 15 of the Arbitration and Conciliation Act 1996. It arises in most unfortunate circumstances. The Applicant is the claimant in arbitration. The Respondent is a private limited company that seems to have run into serious financial difficulties. It is represented in Court today by Ms Rajni

Dahiya. She used to be a director of the Respondent at the relevant time. Her husband, Anurag Simsimwar, is a director. He is present in Court. He expressly accepts that Ms Dahiya is authorised to represent the company both before me and later in arbitration.

2. The disputes between the parties arise apparently under an Agreement dated 6th January 2016. That Agreement had an Arbitration clause and it provided for arbitration in Mumbai. The Respondent is a Jaipur-based company.

3. On 23rd December 2016, this Court constituted an arbitral tribunal. The sole Arbitrator entered upon the reference to her arbitration shortly thereafter. The matter seems to have proceeded with rival pleadings being filed including a reply to the statement of claim, a counter claim and a reply to the counter claim. Several hearings were held — I am told over 25 or so. An initial extension was agreed by consent, two time extensions under Section 29-A. The matter continued before the sole Arbitrator initially appointed.

4. In July-August 2019, the Respondent filed an Arbitration Application (L) No. 804 of 2019 seeking a substitution of the arbitrator. On that application, without going into the merits because the parties consented, GS Kulkarni J made an order on 17th September 2019 in which he recorded the consent of both sides to a substitution of the Arbitrator. He appointed Hon'ble Mr Justice RG Ketkar, a former Judge of this Court, as a sole Arbitrator and made the following order:

- “(i) Shri Justice R.G. Ketkar (Retd.), is appointed as a sole Arbitrator to arbitrate the disputes and differences between the parties under the Agreement dated 6th January 2016;
- (ii) The learned substitute sole Arbitrator, fifteen days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary and Senior Master of this Court, to be placed on record of this petition with a copy to be forwarded to both the parties;
- (iii) The fees payable to the arbitral tribunal shall be governed in accordance with the fees prescribed under the Bombay High Court (Fees Payable to Arbitrators) Rules, 2018;
- (iv) At the first instance, the parties shall appear before the prospective Arbitrator within 10 days from today on a date which may be mutually fixed by the prospective sole arbitrator;
- (v) All contentions of the parties are expressly kept open;
- (vi) The petition is disposed of in the above terms. No costs.”

5. On 12th October 2019, the learned sole Arbitrator, now appointed, fixed a preliminary meeting. A little later on 7th November 2019, he took up the Counter Claim and Claim and made a procedural order in regard to the fees of the Arbitrator. It is at this point that the matter seems to have disintegrated entirely because the Respondent now said it was unwilling to pay this amount as

Arbitrator's fees. This was contested and indeed a substantive Application seems to have been filed before the Arbitrator for waiving or excluding a part of the Counter Claim and second an Application ostensibly under Section 31-A in regard to the apportionment of fees. I am not concerned with the first Application by which the Respondent sought to reduce the amount of the Counter Claim. That is evidently something that is for the arbitral tribunal to decide.

6. It is on the second Application in regard to the arbitral tribunal's fees that there is an issue. The learned sole Arbitrator heard the parties at length and considered the rival submissions. One of these submissions was that the maximum the Respondent was willing to pay was Rs. 2.50 lakhs as Arbitrator's fees. An alternative submission was that the Claimant/Petitioner should bear the fees on its Statement of Claim and the Respondent would bear the fees on the Counter Claim. Now the Petitioner's claim is significantly higher and the Respondent's claim is lower so there would be an inequality in the payment of fees. Before the learned sole Arbitrator, the Respondent also invoked Section 31-A (1) and (2), Section 18 and Section 38. One of the complaints made to the Arbitrator was that the parties were not being treated equally. It was argued that the explanation in Section 31-A would apply to sub-Sections (2), (3) and (4) of Section 31-A. The learned sole Arbitrator rejected this submission and in my view quite correctly so in law.

7. As a result of this situation presented by the Respondent, the learned sole Arbitrator Mr Justice RG Ketkar choose to withdraw. Hence this Petition.

8. Section 15 of the Arbitration and Conciliation Act read thus:

15. Termination of mandate and substitution of arbitrator.— (1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substituted arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.”

9. As to the question of payment of fees and costs, there is a detailed provision in Section 31-A which read thus:

31-A. Regime for costs.— (1) In relation to any arbitration proceedings or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), shall have the discretion to determine—

- (a) whether costs are payable by one party to another;
- (b) the amount of such costs; and
- (c) when such costs are to be paid.

Explanation.—For the purpose of this sub-section, “costs” means reasonable costs relating to —

- (i) the fees and expenses of the arbitrators, Courts and witnesses;
- (ii) legal fees and expenses;
- (iii) any administration fees of the institution supervising the arbitration; and
- (iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

(2) If the Court or arbitral tribunal decides to make an order as to payment of costs, —

- (a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or
- (b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.

(3) In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including

—

- (a) the conduct of all the parties;
- (b) whether a party has succeeded partly in the case;
- (c) whether the party had made a frivolous counter-claim leading to delay in the disposal of the arbitral proceedings; and
- (d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

(4) The Court or arbitral tribunal may make any order under this section including the order that a party shall pay

—

- (a) a proportion of another party's costs;
- (b) a stated amount in respect of another party's costs;
- (c) costs from or until a certain date only
- (d) costs incurred before proceedings have begun;
- (e) costs relating to particular steps taken in the proceedings,
- (f) costs relating only to a distinct part of the proceedings; and
- (g) interest on costs from or until a certain date.

(5) An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question arisen.”

10. Section 38 is also material but to a limited extent because it is under Chapter 10 which deals with Miscellaneous matters. Section 38 is by no means compulsory and no tribunal is required to fix an amount of deposit or supplementary deposit. That deposit is meant to cover costs referred to in Section 31(8). That sub-Section is part of Section 31 which deals with the form and contents of the Award and Section 31(8) says that the cost of an arbitration are to be fixed by the arbitral tribunal in accordance with Section 31-A.

11. It is therefore on the Section 31-A that we must primarily direct our attention. There are two submissions made by Ms Dahiya for the Respondent today. First that having an arbitration in Mumbai is unworkable and that for the Respondent’s convenience the arbitration should be shifted to Jaipur. It is not possible to order this. The arbitration is Mumbai-seated. I am however making it clear that any Arbitrator is entitled to say that for the convenience of parties and by consent a sitting or a set of sittings may be held in Jaipur. The Respondent will however bear in mind that this is not necessarily cost-saving because provision will have to be made for the Arbitrator’s travel to and from and accommodation in Jaipur (in the class and manner to which he or she is accustomed) as also the costs of booking an appropriate venue and associated fees.

12. More to the point, an Arbitrator has plenary powers and authority to direct at the end of the arbitration that the entire costs incurred by one party are to be recovered from the other or that only part may be recovered or that both parties are to be left to bear their own costs. How the arbitral tribunal should determine costs is provided in sub-Section (3) of Section 31-A and the gamut of possible orders is broadly set out in sub-Section (4). Now sub-section (5) of Section 31-A tells us that the proposal now being advanced by the Respondent simply cannot work. It is untenable. If there is to be an agreement that the Petitioner is to pay the whole or part of the costs of the arbitration, this is only valid if there is such an agreement made *after* the onset of disputes. There is no such pre-dispute agreement about the sharing of arbitral costs.

13. In view of the order of the sole Arbitrator, I will request Ms Mamta Sadh, learned Advocate of this Court to accept the assignment as a sole Arbitrator.

(a) **Appointment of Arbitrator:** Ms Mamta Sadh, learned Advocate of this Court, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties under an Agreement dated 6th January 2016.

(b) **Communication to Arbitrator of this order:**

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within one week from the date this order is uploaded.

- (ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator/s Ms Mamta Sadh, Advocate

Address Office No.15, 1st Floor
32, Rajabahadur Mansion
Ambalal Doshi Marg
Mumbai 400 001

Mobile +91 98212 11223

Email mamtasadh@gmail.com

- (c) **Disclosure:** The learned Sole Arbitrator is requested to forward the necessary statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the Prothonotary and Senior Master of this Court, referencing this arbitration application, as soon as possible, and in any case sufficiently before entering upon the reference to arbitration. That statement will be retained by the Prothonotary & Senior Master on the file of this application. Copies will be given to both sides.
- (d) **Appearance before the Arbitrator:** Parties will appear before the learned Sole Arbitrator on such date and at such place as the learned Sole Arbitrator nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.

- (e) **Contact/communication information of the parties:**
Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email address.
- (f) **Fees:** The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.
- (g) **Sharing of costs and fees:**
 - (i) I am making it clear that it is open to the learned sole Arbitrator to make such provision for payment of costs as she thinks fit. In particular she is entitled to ask that initially both sides should equally bear the arbitral costs and that this order is subject to a final order when she may award the entire costs of arbitration in favour of one party against the other. This necessarily means that the Respondent will be entitled to make a claim before the Arbitrator that the Respondent should be entitled to recover the full costs of the arbitration including all costs that it has incurred even as to Arbitrators' fees. All other claims are expressly left open.
 - (ii) I can only request her to take into account the amount of fees previously fixed by the first

arbitrator and the amount that previously paid by both sides and the representation made by the Respondents for minimizing the costs.

- (iii) I will also request Ms Sadh to consider a request provided it is jointly made by the parties for an appropriate scaling down of the Arbitrator's fees having regard to how long this matter has been pending. Ms Sadh is not bound to accept any such suggestion, even if made by consent.

(h) Consent to an extension if thought necessary. Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.

(i) Seat of arbitration: Parties agree that the seat of the arbitration will continue to be in Mumbai. As regards venue, the directions above will govern.

14. Finally I must request Ms Sadh, seeing that the matter has otherwise reached the stage of evidence, to endeavour to complete the arbitration at the earliest possible and in any event before 30th September 2020. The time for completion of the arbitration in any case by Ms Sadh will commence from the date that she enters upon the reference to her arbitration.

15. Finally it needs to be clarified that no objection is to be taken by the Petitioner to the Respondent appearing through any of its authorised representatives including Ms Rajni Dahiya who appears today. There will be no question raised about previous Advocates and why they have or have not issued their no objection.

16. Ms Dahiya's mobile and email address are noted below so that the Arbitrator can communicate directly with her on behalf of the Respondent.

Ms Rajni Dahiya,
78, 3rd GOM Defence Colony,
Vaishali Nagar, Jaipur 302 021,
Mobile No. 7014074112
Email: rajni@mapple.ac.in

17. The Petition is disposed of in these terms. There will be no order as to costs. All contentions before the Arbitrator are expressly left open.

(G. S. PATEL, J)