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(2012) 11 P&H CK 0059

High Court Of Punjab And Haryana At Chandigarh

Case No: CR No. 7687 of 2011

Imaging Solutions Pvt. Ltd.		APPELLANT
	Vs	
Hughes Communications India Ltd. and Another		RESPONDENT

Date of Decision: Nov. 17, 2012

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 12, 12, 12(1), 12(2), 13, 13
- Constitution of India, 1950 - Article 227

Citation: (2013) 1 ARBLR 433

Hon'ble Judges: L.N. Mittal, J

Bench: Single Bench

Advocate: Akshay Bhan, for the Appellant; Ashwani Chopra (Sr.), Ashish Chopra and Dharmesh Mishra for the Respondent No. 1, for the Respondent

Final Decision: Allowed

Judgement

L.N. Mittal, J.

This revision petition filed under Article 227 of the Constitution of India, 1950 is directed against order dated 02.12.2011 (Annexure P-19) passed by learned Additional District Judge, Gurgaon, thereby dismissing petition u/s 14 of the Arbitration and Conciliation Act, 1996 (in short "the Act"), filed by the petitioner herein for terminating the mandate of respondent no. 2-arbitrator Mr. Vijay Dhar. Invoking the arbitration clause contained in lease agreement between petitioner and respondent no. 1, dispute between them was referred by respondent no. 1 to respondent no. 2 as arbitrator. During pendency of the arbitration proceedings, petitioner moved application under Sections 12 and 13 of the Act before the arbitrator challenging the mandate of the arbitrator on the ground that the arbitrator is Director of respondent no. 1 company, but the arbitrator did not disclose the said fact before entering upon arbitration and also on the ground of possible bias, i.e. lack of independence or impartiality on account thereof. When the

arbitrator failed to decide the said application, the petitioner filed CR No. 1614 of 2011 in this court seeking direction to respondent no. 2 for deciding the said application and also seeking removal/termination of the mandate of respondent no. 2. Before the said revision petition could be decided, respondent no. 2 disposed of and dismissed the petitioner''s application under Sections 12 and 13 of the Act. In view thereof, the said revision petition was disposed of as infructuous with liberty to the petitioner to raise all objections/pleas qua its grievance before the appropriate forum for any other legal remedy available in accordance with law.

2. Thereafter, the petitioner filed petition u/s 14 of the Act before the lower court seeking termination of the mandate of respondent no. 2-arbitrator on the aforesaid grounds. Respondent no. 1 contested the said petition and controverted the averments of the petitioner.

3. Learned trial court, vide impugned order (Annexure P-19), has dismissed the petitioner''s petition u/s 14 of the Act. Feeling aggrieved, petitioner has filed this revision petition to challenge the said order.

4. I have heard counsel for the parties at considerable length and perused the case file with their assistance.

5. Counsel for the petitioner contended that u/s 12(1) and 12(2) of the Act, respondent no. 2-arbitrator was required to disclose in writing any circumstance likely to give rise to justifiable doubt as to his independence and impartiality, but respondent no. 2 did not do so as he did not disclose the factum of his being Director of respondent no. 1 company. Consequently, respondent no. 2 is de jure unable to perform his function as arbitrator, and, therefore, his mandate is liable to termination in view of Section 14 of the Act. It was also argued that bias or lack of independence or impartiality on the part of respondent no. 2 is apparent because respondent no. 2 is Director of respondent no. 1 company. Relying on judgments of Hon''ble Supreme Court in Jiwan Kumar Lohia and another Vs. Durgadutt Lohia and others, and Bihar State Mineral Dev. Corpn. and Another Vs. Encon Builders (I) Pvt. Ltd., it was contended that in case of bias, mandate of arbitrator is liable to termination.

6. It was also argued by counsel for the petitioner that the lower court has dismissed the petitioner''s petition u/s 14 of the Act holding that by virtue of Section 13(5) of the Act, the remedy available to the petitioner is to challenge the final award of the arbitrator u/s 34 of the Act and petition u/s 14 of the Act is not maintainable. It was contended that aforesaid approach of the trial court is erroneous and illegal. It was argued that the petitioner also has remedy u/s 14 of the Act to seek termination of mandate of the arbitrator on the aforesaid grounds even after the arbitrator has dismissed the petitioner''s application under Sections 12 and 13 of the Act. In this respect, reliance has been placed on Division Bench judgment of this court in the case of Satish Chander Gupta and Sons Vs. Union of India (UOI) and Others, ; Single

Bench judgment of this court in the case of OPBK Construction Pvt. Ltd. Vs. Punjab Small Industries and Export Corporation Ltd. and Another, ; and also a Division Bench judgment of Gauhati High Court namely Subhash Projects and Marketing Ltd. Vs. Government of Arunachal Pradesh, .

7. On the other hand, counsel for respondent no. 1 contended that the petitioner, having sought termination of mandate of respondent no. 2 in earlier CR No. 1614 of 2011, is not entitled to seek the same remedy by way of petition u/s 14 of the Act and by way of instant revision petition. It was also pointed out that in very first letter dated 13.03.2008, addressed by the arbitrator to both--petitioner and respondent no. 1, the arbitrator mentioned that he was named, nominated and appointed as agreed arbitrator by both the parties with knowledge of relationship with both and on first date of proceedings on 28.04.2008 also, the arbitrator observed that the parties had no objection to his appointment to act as arbitrator, and, therefore, it cannot be said that relationship of respondent no. 2 with respondent no. 1 being Director thereof, was not known to the petitioner. Reference was also made to order dated 08.04.2011 (Annexure A-21) passed by the arbitrator, thereby dismissing the petitioner''s application under Sections 12 and 13 of the Act, wherein it was observed that the arbitrator was personally known to petitioner''s Managing Director Mr. Imran Baig, who was, therefore, aware of the arbitrator''s position as Director of respondent no. 1 company. It was thus argued that respondent no. 2 was named as arbitrator by both the parties with their eyes open, and, therefore, petitioner cannot now object to the continuation of respondent no. 2 as arbitrator. It was next argued that petitioner''s application under Sections 12 and 13 of the Act, having been dismissed by the arbitrator, then in view of Section 13(5) of the Act, the only remedy available to the petitioner is to challenge the ultimate award of the arbitrator u/s 34 of the Act. Reliance in support of these contentions has been placed on various judgments, i.e. two judgments of Hon''ble Supreme Court namely Ace Pipeline Contracts Private Limited Vs. Bharat Petroleum Corporation Limited, ; and S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, ; three judgments of Delhi High Court namely Mindmill Software Ltd. Vs. Paragon Construction (India) Pvt. Ltd., ; Progressive Career Academy Pvt. Ltd. Vs. FIIT JEE Ltd., ; and Neeru Walia Vs. Inderbir Singh Uppal and Another, ; and one judgment of Andhra Pradesh High Court in the case of Chintakayala Siva Rama Krishna Vs. Nadimpalli Venkata Rama Raju and Others, .

8. I have carefully considered the matter.

9. Sections 12 to 14 of the Act are reproduced hereunder:

12. Grounds for challenge--

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if--

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reason of which he becomes aware after the appointment has been made.

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 subsection (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.

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.

(3) If, under this section or sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of Section 12.

10. A bare perusal of sub-sections (1) and (2) of Section 12 of the Act reveals that at the time of possible appointment of arbitrator as well as throughout the arbitral proceedings, the arbitrator is required to disclose in writing any circumstance likely to give rise to justifiable doubt as to his independence or impartiality. In the instant case, it is undisputed that respondent no. 2 is Director of respondent no. 1 company. This is certainly a material circumstance likely to give rise to justifiable doubts as to his independence or impartiality as arbitrator. Justice should not only be done, but should also seem to be done. The possibility of bias of respondent no. 2 being Director of respondent no. 1 is very distinct and most probable. In any event, it has rightly given rise to justifiable doubt about independence or impartiality of the arbitrator in the mind of petitioner company.

11. According to sub-sections (1) and (2) of Section 12 of the Act, the aforesaid circumstance had to be disclosed by the arbitrator in writing to both the parties. However, it was not so done. Reference to letter dated 13.03.2008 (Annexure A-9) written by the arbitrator to both the parties mentioning that he was named as arbitrator with knowledge of relationship with both does not even remotely suggest that the arbitrator was Director of respondent no, 1 and this fact was known to petitioner company. Similarly, order dated 28.04.2008 (Annexure A-10) does not at all refer to any relationship of respondent no. 2 with respondent no. 1. It simply records that parties had no objection to respondent no. 2 acting as arbitrator. However, if the petitioner did not know at that stage that respondent no. 2 was Director of respondent no. 1, the so-called consent or no objection given by the petitioner would be of no value in the eyes of law, particularly in view of mandatory provisions of sub-sections (1) and (2) of Section 12 of the Act.

12. In the instant case, at no stage, respondent no. 2 informed the parties in writing that respondent no. 2 is Director of respondent no. 1. Consequently, in view of violation of aforesaid mandatory provisions of sub-sections (1) and (2) of Section 12 of the Act and also in view of possible bias and justifiable doubt as to his independence and impartiality, mandate of respondent no. 2 as arbitrator is liable to termination under Sections 12 and 14 of the Act.

13. Counsel for respondent no. 1 pointed out that respondent no. 2 was Director of respondent no. 1 since the year 1992, i.e. since before the date of lease agreement containing the arbitration clause. However, at that time, respondent no. 2 was only alternate or substitute Director in the absence of a regular Director. On the contrary, as per information (Annexure P-6), respondent no. 2 became Director of respondent no. 1 w.e.f. 20.04.2006, i.e. long after the date of lease agreement dated 23.03.2001 containing the arbitration clause. Consequently, while entering into arbitration agreement, the petitioner could not be aware of position of respondent no. 2 as Director of respondent no. 1 nor the petitioner was made aware of the said position at any stage.

14. In the aforesaid circumstances, the arbitrator having rejected the application moved by petitioner under Sections 12 and 13 of the Act, the question would arise whether in view of Section 13(5) of the Act, the only remedy available to the petitioner is by challenging the ultimate award u/s 34 of the Act or whether the petitioner has remedy to seek termination of mandate of the arbitrator by filing petition u/s 14 of the Act. Judgments in the cases of Satish Chander Gupta; OPBK Construction Pvt. Ltd.; and State of Arunachal Pradesh; cited by counsel for the petitioner supports the view that the petitioner has remedy u/s 14 of the Act. However, judgments in the cases of Progressive Career Academy Pvt. Ltd.; Chintakayala Siva Rama Krishna; Neeru Walia; and Mindmill Software Ltd. do support the contention of counsel for respondent no. 1 that the only remedy with the petitioner is to challenge the ultimate award u/s 34 of the Act, as stipulated in Section 13(5) of the Act. However, I have to follow the Division Bench judgment of this court in the case of Satish Chander Gupta and also judgment of Single Bench of this court in OPBK Construction Pvt. Ltd., with which I have no ground to differ.

15. Even on principle, the petitioner cannot be left remediless. It would be futile to go through the whole exercise of arbitration proceedings leading to the final award and then challenging the same u/s 34 of the Act. On the contrary, if the arbitrator becomes de jure unable to perform his function, then his mandate is liable to termination u/s 14 of the Act. In the instant case, respondent no. 2 became de jure unable to perform his functions as arbitrator because of his being Director of respondent no. 1, which fact was not earlier known to the petitioner. Consequently, this ground squarely falls within parameters of Section 14 of the Act for termination of mandate of respondent no. 2 as arbitrator, without resorting to Section 34 of the Act read with Section 13(5) of the Act.

16. The contention of counsel for respondent no. 1, based on earlier CR No. 1614 of 2011, to bar the subsequent petition u/s 14 of the Act and the instant revision petition, is untenable because the said revision petition was disposed of as infructuous on account of decision by arbitrator on application of petitioner under Sections 12 and 13 of the Act, with liberty to petitioner to avail of any other remedy available in accordance with law. Consequently, petitioner is not debarred from

availing of remedy available to it u/s 14 of the Act.

17. For the reasons aforesaid, I find that the lower court erred in holding that petition u/s 14 of the Act is not maintainable at this stage. The said approach of the lower court is erroneous and illegal.

18. Accordingly, the instant revision petition is allowed. Impugned order (Annexure P-19) passed by the lower court is set aside. Petition (Annexure P-7) filed by the petitioner u/s 14 of the Act is allowed and mandate of respondent no. 2 to act as arbitrator is terminated. The matter is remitted to trial court for appointing a substitute arbitrator, as required by Section 15(2) of the Act. Parties are directed to appear before the trial court on 10.12.2012.