

HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE
(SB: HON. SHRI JUSTICE PRAKASH SHRIVASTAVA)

Arbitration Case No.42/2007

Smt. Surya Kumari Mehta & Ors.**Applicants**

Vs.

Shri Rajendra Singh Mehta & Ors. **Respondents**

Shri Amit Agrawal, learned counsel for the applicants.
Shri B.A. Chitale, learned counsel for the respondent
No.1.
Ms. Kirti Joshi, learned counsel for the respondent No.2.
Shri J.B. Mehta, learned counsel for the respondent
No.3.
Respondent No.4 present in person.
Shri Vishal Baheti, learned counsel for the respondent
No.5.
Shri R.S. Yadav, learned counsel for the respondent
No.6.

Whether approved for reporting :

ORDER

(Passed on 23/11/2015)

1/ This application under Section 11(6) of the Arbitration and Conciliation Act, 1996 has been filed by the applicant for appointment of the substitute arbitrator.

2/ In brief, the case of the applicants is that the applicants and the respondents belong to the same family and closely related to each other. They belong to three different branches of deceased brothers Sajjan Singh, Anand Singh and Manohar Singh. The dispute is in respect of

goodwill of business carried on in the name and style of 'Mehta Motors' and 'Mehta Automobile Pvt. Ltd.' as also the immovable properties involved in the controversy. The MOU dated 31.5.2002 was entered into between the parties, in which applicants as well as the original respondents No.1 and 2 were parties to the first part and other respondents were parties to the second and third part. The applicants had to pay some amount to the respondents (parties to the second and third part) to receive certain properties and benefits accruing from the MOU. The second MOU dated 10.10.2002 was entered into between the parties containing the schedule of payment to be made by the applicants and the third MOU dated 16.4.2004 was entered into between the parties mentioning about the installments and payment of interest. According to the applicants, part payment was to be made by the applicants and remaining 50% was payable by respondents No.1 and 2 to the other respondents, and substantial amount was paid by the applicants to respondents No.3 to 6 but since the dispute had arisen, therefore, in terms of the Arbitration Clause the parties had approached the named arbitrator M/s. M. Mehta & Company but the dispute could not be settled and ultimately the named arbitrator vide letter dated 17.3.2007 had withdrawn from the proceedings, therefore, a substitute arbitrator needs to be appointed.

3/ The respondents have filed their separate reply and except for respondents No.1 and 2, other respondents have opposed the application for appointment of substitute arbitrator.

4/ The application for appointment of substitute

arbitrator has been opposed by the respondents on the ground that the MOUs are in the nature of family settlement and the clause therein is not an arbitration clause and that the MOUs have come to an end, therefore, arbitration clause does not exist and no live issue exist between the parties, and that the non payment of the amount does not amount to a dispute, therefore, no reference to the arbitrator is required.

5/ I have heard the learned counsel for the parties and perused the record.

6/ The Supreme Court in the matter of **National Insurance Company Limited Vs. Boghara Polyfab Private Limited, reported in (2009) 1 SCC 267** has considered the issues which will have to be decided by the Chief Justice or his designate and the issues which are optional for decision by the Chief Justice or his designate as also the issues which should be exclusively left for decision by the Arbitral Tribunal, it has been held as under :-

“22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under [section 11](#), the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under [section 11](#) of the Act into three categories, that is, (i) issues which the Chief Justice or his Designate is bound to decide; (ii) issues which he can also decide, that is issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate

High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under [section 11](#) of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are:

(a) Whether the claim is a dead (long barred) claim or a live claim.

(b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are :

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.”

7/ The same position has been reiterated by the Supreme Court in the matter of **Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. and others, reported in (2013) 1 SCC 641.**

8/ In the present case, the MOU dated 31.5.2002 executed between the parties is not in dispute. The MOU supplemental to the original MOU dated 31.5.2002 was entered into between the parties on 10.10.2002 and in continuation to this supplemental MOU, the second supplemental MOU was entered into between the parties on

16.4.2004.

9/ The main Memorandum of Understanding dated 31.5.2002 contains following arbitration clause :-

“6. That M/s. M. Mehta & Company, Chartered Accountants, Indore will be the Sole Arbitrator and are also authorised to implement this M.O.U. on behalf of all the parties thereto. The decision of the Sole Arbitrator shall be final and binding on all the parties thereto.”

10/ The first supplemental MOU dated 10.10.2002 contains the arbitration clause on the following terms :-

“In the event of any dispute or difference in the interpretation of Terms & Conditions of the original and supplemental M.O.U., the decision of Mediator (Arbitrator) shall be final & binding on the parties thereto.”

11/ The second supplemental MOU dated 16.4.2004 was in continuation to the earlier two MOUs.

12/ Shri R.S. Yadav, learned counsel for the respondent No.6 placing reliance upon the judgment of the Supreme Court in the matter of **K.K. Modi Vs. K.N. Modi and others, reported in AIR 1998 SC 1297** has raised a submission that the above MOU are in the nature of family settlement and the clause relating to settlement of dispute is not an arbitration clause, but such a submission cannot be accepted in view of the fact that by the MOU the parties had arrived at an agreement in respect of the properties mentioned therein, on performance of certain conditions. The clauses relating to settlement of dispute as quoted above, in

clear terms reveal that in the event of dispute or difference relating to the interpretation of terms and conditions of the contract as also implementation of the agreement, the named arbitrator was authorised to take a decision which was accepted to be final and binding between the parties. The terms and contents of the MOU alongwith the clause quoted above reveal that they are in the nature of arbitration agreement. So far as the judgment of the Supreme Court in the matter of **K.K. Modi (supra)** is concerned, in that case Clause 9 of the agreement under consideration was differently worded which was only in respect of the implementation of the agreement and it did not provide for deciding the dispute by the Arbitrator and even the said named arbitrator was entitled to nominate another person for deciding any question. Hence, the benefit of the said judgment cannot be granted to the respondents.

13/ The next issue raised by the respondent is that since the MOU has come to an end, therefore, arbitration clause does not survive.

14/ It is no longer *res integra* that even in those cases where the agreement ceases to exist, the arbitration clause does not come to an end for the purpose of determination of dispute in terms of the said clause. The Supreme Court in the matter of **N. Srinivasa Vs. Kuttukaran Machine Tools Limited, reported in (2009) 5 SCC 182** has held as under :-

“37. It is well settled that even if an agreement ceases to exist, the Arbitration clause remains in force and any dispute pertaining to the agreement ought to be resolved according to the conditions mentioned in the Arbitration clause. Therefore, in our view,

the High Court was not justified in setting aside the order of the trial Court directing the parties to maintain status quo in the matter of transferring, alienating or creating any third party interest in the same till the award is passed by the sole Arbitrator.”

15/ An arbitration clause is an agreement independent of the other terms of the contract, hence even if the contract is terminated or it comes to an end on account of repudiation, frustration etc., the arbitration agreement subsists for the purpose of resolution of dispute between the parties arising in connection with the contract. The said position is also reflected in Section 16 of the Arbitration and Conciliation Act, 1996. Supreme Court in the matter of **SMS Tea Estates Private Limited Vs. Chandmari Tea Company Private Limited**, reported in (2011) 14 SCC 66 has held as under :-

“12. When a contract contains an arbitration agreement, it is a collateral term relating to the resolution of disputes, unrelated to the performance of the contract. It is as if two contracts -- one in regard to the substantive terms of the main contract and the other relating to resolution of disputes -- had been rolled into one, for purposes of convenience. An arbitration clause is therefore an agreement independent of the other terms of the contract or the instrument. Resultantly, even if the contract or its performance is terminated or comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract.

13. Similarly, when an instrument or deed of transfer (or a document affecting immovable property) contains an arbitration agreement, it is a collateral term relating to resolution of disputes, unrelated to the transfer

or transaction affecting the immovable property. It is as if two documents - one affecting the immovable property requiring registration and the other relating to resolution of disputes which is not compulsorily registrable - are rolled into a single instrument. Therefore, even if a deed of transfer of immovable property is challenged as not valid or enforceable, the arbitration agreement would remain unaffected for the purpose of resolution of disputes arising with reference to the deed of transfer.

14. These principles have now found statutory recognition in sub-section (1) of [section 16](#) of the Arbitration and [Conciliation Act](#) 1996 ('Act' for short) which is extracted below :

"16. Competence of arbitral tribunal to rule on its jurisdiction. -

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,--

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

15. But where the contract or instrument is voidable at the option of a party (as for example under [section 19](#) of the Indian Contract Act, 1872), the invalidity that attaches itself to the main agreement may also attach itself to the arbitration agreement, if the reasons which make the main agreement voidable, exist in relation to the making of the arbitration agreement also. For example, if a person is made to sign an agreement to sell his property under threat of

physical harm or threat to life, and the said person repudiates the agreement on that ground, not only the agreement for sale, but any arbitration agreement therein will not be binding.”

16/ The same position has been reiterated by the Supreme Court in the matter of **Ashapura Mine-Chem Limited Vs. Gujarat Mineral Development Corporation, reported in (2015) 8 SCC 193.**

17/ Since in the present case, the parties have not questioned the validity of main MOU as also the two supplementary MOUs, therefore, even after the termination of the agreement/MOU, the arbitration clause contained therein will survive.

18/ In view of the above position in law, the contention of counsel for the respondents that with the termination/expiry of MOU the arbitration clause has come to an end, cannot be accepted and is hereby rejected.

19/ Shri J.B. Mehta, learned counsel for the respondent No.3 has also raised an objection that the issue is about non payment in terms of the MOU which is not covered within the meaning of dispute but such a submission cannot be accepted since it is a matter relating to the performance of the terms of the contract and the interpretation thereof, hence the dispute exists between the parties.

20/ An issue has also been raised that after the named arbitrator has withdrawn himself, no substitute arbitrator can be appointed. The record reflects that the named arbitrator Ms. M. Mehta & Company was approached for settlement of dispute in terms of the MOU and the named

arbitrator on 17.3.2007 had withdrawn by mentioning that the dispute in respect of the properties of Mehta Associates/co-owners could not be settled fully and the part balance payment as agreed by various MOU's by party of first part have not been made in time and even the last letter given by the parties in second and third part have remained unreplied by the party of the first part till date, therefore, the arbitrator has withdrawn leaving parties free to take appropriate action on their part. The MOUs entered into between the parties do not mention any named substitute arbitrator in case of withdrawal by the main arbitrator, therefore, the provisions of Section 15 of the Arbitration and Conciliation Act are attracted and in terms thereof the substitute arbitrator is required to be appointed. The Supreme Court in the matter of **San-A Tradubg Company Limited Vs. I.C. Textiles Limited, reported in (2012) 7 SCC 192** considering somewhat similar situation has held as under :-

“18. When the agreement provides for reference of a dispute to a particular individual and such agreed arbitrator refuses to act, the next appointment could be made as agreed by the parties, but where no such procedure is prescribed authorizing appointment of another arbitrator then the agreement clause cannot operate. It, therefore, follows that in case where the arbitration clause provides for appointment of a sole arbitrator and he had refused to act, then the agreement clause stands exhausted and then the provisions of [Section 15](#) would be attracted and it would be for the Court under [Section 11\(6\)](#) to appoint an arbitrator on the procedure laid down in [Section 11\(6\)](#) being followed unless there is an agreement in the contract where the parties specifically debar appointment of any other arbitrator in

case the named arbitrator refuses to act.

19. In the present case, I do not find any such stipulation in the contract entered into between the parties whereunder the parties have specifically debarred appointment of a fresh arbitrator if the named arbitrator refuses to act and perform his function as arbitrator. In the absence of any specific condition debarring appointment of a fresh arbitrator, it cannot be said that the arbitration clause in the contract agreement stands obliterated on the named arbitrator's refusal to perform his function.”

21/ Supreme Court in the matter of **ACC Limited (formerly known as the Associated Cement Company Limited) Vs. Global Cements Limited, reported in (2012) 7 SCC 71** has also held as under :-

“29. The question may also arise in a given case that the named arbitrators may refuse to arbitrate disputes; in such a situation also, it is possible for the parties to appoint a substitute arbitrator unless the clause provides to the contrary. Objection can be raised by the parties only if there is a clear prohibition or debarment in resolving the question or dispute or difference between the parties in case of death of the named arbitrator or their non-availability, by a substitute arbitrator.”

22/ In the present case, there is no prohibition in the main MOU or the supplemental MOUs for appointment of the substitute arbitrator, therefore, on the withdrawal of the named arbitrator there is no hurdle in appointing the substitute arbitrator in terms of Section 15 of the Act.

23/ The respondent No.4 present in person has submitted that the applicant has committed willful default in

making the payment and is deliberately delaying and mismanaging the properties, but these are the issues relating to the merits of the matter which are to be examined by the Arbitrator, if raised, in accordance with law.

24/ In the aforesaid circumstances, I am of the opinion that on the withdrawal of the named arbitrator and in terms of the arbitration clause contained in the MOU which are in the nature of the arbitration agreement and also considering the provisions of Section 15 of the Act and the judgments which have been noted above, the substitute arbitrator is required to be appointed for resolving the dispute between the parties. The dispute has arisen within the territorial jurisdiction of this Court.

25/ Accordingly, considering the nature of dispute Hon'ble Shri Justice S.P. Khare (Retd.) R/o A-1, 202, Shehnai Residency, A.B. Road, Indore (M.P.) is appointed as the substitute Arbitrator for deciding the dispute between the parties.

26/ Parties are directed to appear before the substitute Arbitrator on 15th December, 2015.

(PRAKASH SHRIVASTAVA)
J u d g e

Trilok.