

ORDER SHEET

AP 453 OF 2018

IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction

ORIGINAL SIDE

*SHRI BHAGWANDAS JAIN*  
*Versus*  
*CTS INDUSTRIES LTD. & ANR.*  
.....

BEFORE:

The Hon'ble JUSTICE ASHIS KUMAR CHAKRABORTY

Date : 30th November, 2018.

Mr. Sakya. Sen, Mr. Arik. Banerjee, Mr. Sankarsan Sarkar,  
Mr. P.G. Das, Advocates...for the petitioner.

Mr. Jishnu Saha Sr. Advocate, Ms. Swati Kedia,  
Mr. Ishan Saha, Advocates...for the respondents.

The Court: In this application under section 14(2), read with section 15 and section 11 (6) of the Arbitration and Conciliation Act, 1996, as amended by Act 3 of 2016 (in short, "the Act of 1996") the petitioner has prayed for, termination of the mandate of the named arbitrator in the arbitration agreement and appointment of an independent arbitrator to adjudicate the disputes between the parties.

In the arbitral proceeding before the arbitrator the respondents herein are the claimants and the petitioner herein is the sole respondent, respectively. Admittedly, the arbitration proceeding commenced after the amending Act 3 of 2016 has come into force.

The principal ground urged by the petitioner in this application for removal of the named arbitrator is that he has been representing the respondent no.1, the claimant in the arbitration in various pending litigation before this High Court and, as such, in view of the provisions contained in sub-section (5) of Section 12 read with the clauses contained in the Fifth and Seventh Schedule of the Act of 1996 he has become de jure unable to perform his function as the arbitrator.

It may be noted that against an order dated June 20, 2018 passed by the named arbitrator in the arbitral proceeding between the parties, under section 17 of the Act of 1996, the present petitioner filed an appeal, APO NO.191 of 2018 under section 37 of the Act of 1996 before this Court. In the said appeal, the present petitioner, as the appellant also filed an application, GA No.1688 of 2018 for stay of operation of the said order dated June 20, 2018. In the said appeal on July 9, 2018 this Court passed an interim order directing stay of all further proceedings in the arbitration before the arbitrator. While the said appeal was pending, by a written communication addressed to the respective parties and/or their learned Advocates, the named arbitrator had withdrawn himself from the arbitration proceeding.

By an order dated October 10, 2018 this Court held, inter alia, that when the named arbitrator is representing the claimant in the arbitration, in various legal proceedings filed by the latter, in view of the provisions contained in sub-Sections (1) and (5) of Section 12 together with the Fifth and Seventh Schedule of the Act of 1996, he is prohibited from adjudicating the disputes between the parties herein as an arbitrator. Thus, by the said order this Court allowed the appeal under Section 37 of the Act of 1996 and set aside the said order dated June 20, 2018 passed under Section 17 of the Act of 1996.

In the above background of facts when this application is taken up for hearing, Mr. Sakya Sen, learned Counsel appearing for the petitioner submitted that when the named arbitrator had withdrawn himself from the arbitral proceeding, this Court would dispose of the present application by appointing an independent arbitrator to adjudicate the disputes between the parties in the pending arbitration proceeding.

According to Mr. Jishnu Saha, learned Senior Counsel appearing for the respondents submitted that in view of the decision of the Supreme Court in the case of ACC Limited Vs. Global Cements Limited, reported in (2012) 7 SCC 71 even with the withdrawal of the named arbitrator from the arbitration proceeding, the arbitration agreement between the parties subsists and the parties are entitled to have their disputes being adjudicated by a new arbitrator. He, however, submitted that in the present case the disputes between the parties relate to an agreement for sale of an immovable property situate in the State of Jharkhand which is not registered or duly stamped. Mr. Saha contended that since the agreement for sale out of which the disputes have arisen between the parties is not sufficiently stamped, the petitioner cannot enforce the arbitration agreement contained in the agreement for sale by this application. In support of such contention, he relied upon a decision of the Supreme Court in the case of SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Co. Pvt. Ltd., reported in (2011) 14 SCC 66. It was stressed by the respondents that before considering the prayer of the petitioner for appointment of arbitrator, this Court should first impound the said agreement for sale and direct the petitioner to pay the appropriate stamp duty and penalty payable thereon.

In reply, Mr. Sen, learned Advocate appearing for the petitioner submitted that the decision of the Supreme Court in the case of SMS Tea Pvt. Ltd. (supra) has no application

in the present case. He submitted that in the said decision the Supreme Court held that when an application is filed by a party under Section 11 of the Act of 1996, as per the relevant rules of the High Courts the applicant is required to disclose the original or certified copy of the arbitration agreement and in order to be satisfied about the existence of the arbitration agreement between the parties, the Court is required to look into the arbitration agreement. Mr. Sen contended that in the case of SMS Tea Pvt. Ltd. (supra), the Supreme Court held that when the Court is required to look into the arbitration agreement contained in a document insufficiently stamped, the provisions of Section 35A of the Stamp Act would be applicable. He strenuously argued that in the present case, when the existence of the arbitration agreement with the named sole arbitrator is admitted between the parties, this Court is not required to look into the arbitration agreement for appointing a new arbitrator in place and stead of the named arbitrator who has since withdrawn himself from the arbitration proceedings.

I have considered the facts of the case, as well as the arguments advanced by the learned Counsel appearing for the respective parties. The only ground of objection urged by the respondents to the maintainability of this application is based on the decision of the Supreme Court in the case of SMS Tea Pvt. Ltd.(supra). The decision of the Supreme Court in the case of SMS Tea Pvt. Ltd. (supra) was rendered in an application under Section 11(6) of the Act of 1996 where in order to ascertain the existence of the arbitration agreement, the Court was required to look into the agreement for lease which was not duly registered nor sufficiently stamped. Thus, when the lease deed itself was not sufficiently stamped, the Court would not look into the same to ascertain the existence of the arbitration agreement. However, in the present case, the existence of the arbitration agreement containing the

named arbitrator is not in dispute. Though the named arbitrator has withdrawn himself from the arbitral proceeding, but in view of the decision of the Supreme Court in the case of ACC Limited (supra), the arbitration agreement between the parties still subsists and they are entitled to have their disputes relating to the said agreement for sale being adjudicated by a new arbitrator. It is not the case of either of the parties that the arbitrator should hold any technical qualification. In the facts of the present case, I find merit in the contention raised on behalf of the petitioner that in order to appoint a new arbitrator to adjudicate the disputes between the parties herein, this Court is not required to look into the said agreement for sale to ascertain the arbitration agreement between the parties herein and accept such contention.

Accordingly, this application succeeds and Justice Bhaskar Bhattacharya, the former Chief Justice of the High Court of Gujarat is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

The learned Arbitrator shall be free to fix his fees and engage secretarial staff to conduct the arbitral proceeding. The fees of the learned Arbitrator and the remuneration of the secretarial staff shall be borne by the parties in equal share.

A prayer is made on behalf of the respondents for stay of operation of this order. Such prayer is considered and rejected.

With the above directions, the application, AP No.453 of 2018 stands disposed of, without any order as to costs.

(ASHIS KUMAR CHAKRABORTY, J.)