IN THE HIGH COURT OF MADHYA PRADESH AT GWALIOR

BEFORE
HON'BLE SHRI JUSTICE ANAND PATHAK

REVIEW PETITION No. 518 of 2021

Between:-

THE STATE OF M.P. THROUGH DIRECTOR GENERAL OF POLICE, JAHANGIRABAD, BHOPAL (MADHYA PRADESH)

.....PETITIONER

(BY SHRI TEJSINGH MAHADIK AND SHRI DEVESH SHARMA- ADVOCATES)

AND

NIDHI (I) INDUSTRIES THROUGH ITS PROPRIETOR SANJAY MAHESHWARI, AGED ABOUT 55 YEARS, S/O LATE SHRI A.R.MAHESHWARI, OCCUPATION-BUSINESS, R/O 25 VINAY NAGAR, SECTOR-1, GWALIOR (MADHYA PRADESH)

.....RESPONDENT

(BY SHRI SIDDHARTH SHARMA ON BEHALF OF SHRI PRASHANT SHARMA-ADVOCATE)

RESERVE FOR ORDERS ON : 20/07/2022

ORDER PASSED ON : 28/07/2022

O R D E R

The instant review petition has been preferred for recalling of order dated 20/5/2021 passed in A.C.No. 37/2021 by which the application under Section 11(6) of Arbitration and Conciliation Act, 1996 (for short "the Act"), preferred by respondent has been allowed and sole Arbitrator (former Judge, High Court of Madhya Pradesh) was appointed.

2. Precisely stated facts of the case are that an agreement was executed in year 2015 between Director General of Police, Government of Madhya Pradesh on behalf of the Governor of Madhya Pradesh and respondent for installation of CCTV Cameras in High Court Premises, Bench at Indore. In pursuance thereof, work order has been issued on 14/1/2015 and CCTV Cameras were installed at High Court premises, Bench at Indore.

3. It appears that said CCTV Cameras were found to be of inferior quality and many deficiencies and irregularities were found in whole installation project, therefore, as per the agreement, respondent-Company was blacklisted for one year vide order dated 8/9/2020. Said blacklisting order was passed in following terms:-

> *''उपरोक्त विसंगतियॉ सूक्ष्म प्रकृति की है जो कि प्रायः बहुत गहन जॉच उपरांत दृष्टिगत होती है एवं किसी भी संस्था से यह अपेक्षा नहीं की जाती कि वह इस प्रकार से बाहर से दर्शित उपकरणों के अंदर की अधोसंरचना पूर्ण नहीं करें । क्योंकि इस फर्म के संबंध में सूचना प्राप्त हो चुकी थी कि सीपित सामर्गियॉ ''उल्लेखित सामग्रियों'' से भिन्न है । इस कारण ही ये विसंगतियॉ परिलक्षित हो सकी । ऐसी स्थिति में जबकि फर्म की व्यवसायिक दक्षता एवं कार्य नैतिकता संदिग्ध एवं निम्न श्रेणी की है । इस फर्म का काली सूची में डाला जाना आवश्यक हो जाता है । अतः उपरोक्तानुसार फर्म द्वारा विक्रय अवधि में तथा*

वारंटी अवधि में अंसतोषजनक संवाओं के कारण फर्म Nidhi (I) Industries 1st Floor, Shivaji Towar, MLB Road, Phool Bagh, Gwalior को इस आदेश के जारी दिनांक से 01 वर्ष की अवधि के लिए ''ब्लैक लिस्ट'' (BLACK LIST) किया जाता है ।''

4. Against the said order of blacklisting, petitioner preferred a writ petition vide W.P.No. 13738/2020, which was dismissed vide order dated 21/9/2020 by Division Bench of this Court. In the said writ petition, respondent-company raised the suspicion over impartiality of Director General of Police as an Arbitrator as per clause 20 of the agreement according to which in case of any dispute, Director General of Police was to be appointed as sole Arbitrator. Said contention was rejected by the Division Bench and petition was dismissed.

5. Thereafter, a review petition vide R.P.No. 937/2020 was preferred by respondent-Company before the same Division Bench but same was dismissed vide order dated 1/10/2020.

6. Thereafter, SLP was preferred by respondent before the Hon'ble Supreme Court of India vide SLP No. 13452-13452/2020 (Nidhi (I) Industries Vs. State of Madhya Pradesh and Another) but same also got dismissed vide order dated 17/12/2020. However, respondent (petitioner therein) was given liberty to submit a fresh representation to the authority concerned to revisit blacklisting order and in pursuance thereof, a representation was preferred by the respondent-Company before the Director General of Police. On his behalf, order dated 31/12/2020 was

passed by Inspector General of Police (Intelligence) and rejected the same and upheld the order of blacklisting. Again, a writ petition was filed by respondent vide W.P.No. 5073/2021 before the Division Bench of this Court and Division Bench vide order dated 31/3/2021 dismissed the writ petition in limine while giving liberty to respondent to avail the conciliation /arbitration clause available under the agreement in question.

7. In between, respondent-Company issued show cause notice invoking arbitration under Section 11 of Act of 1996 on 20/1/2021,which was replied by the petitioner vide reply dated 10/2/2021 in which offer to go for arbitration was turned down on the ground that Hon'ble Supreme Court already given a chance to agitate the case before the competent authority i.e. Director General of Police and respondent-Company already availed of the said remedy and his representation was rejected earlier, therefore, there is no need for going for arbitration.

8. Against the said rejection order, respondent-Company filed an application under Section 11(6) of the Act of 1996 before the designated Authority (Single Bench of this Court).

9. After filing of said application on 12/3/2021, matter was listed on 25/3/2021 on which date respondent-Company was directed to file rejection order dated 31/12/2020. Thereafter, matter was listed on 17/5/2021 and on the said date also, it was informed on behalf of respondent-Company that rejection order has been filed. Thereafter, matter was placed on 20/5/2021 and on said date, application was heard and sole Arbitrator as referred above

was appointed. Although one Government Advocate appeared on behalf of State but admittedly no notice was issued. Therefore, this review petition has been preferred by the petitioner taking exception to the order dated 20/5/2021.

10. It is the submission of learned counsel for the petitioner that petitioner/State of M.P. through Director General of Police was never served any notice before passing of order dated 20/5/2021 by this Court whereby Arbitrator was appointed. In absence of service of notice to the State, the State could not file any response or instructions to the concerned Government Advocate and therefore, in absence of any such notice, very purpose of appointment of Arbitrator and going for arbitration is defeated.

11. Learned counsel for the petitioner referred Chapter XIII Rule 8 of M.P. High Court Rules and Orders, 2008 in which Registered AD notice is required to be served to Government Authority before passing any order finally. He also referred the M.P. Arbitration Rules, 1997, which were published in Gazette notification dated 21/2/2020, through which the amendments in the M.P. Arbitration Rules, 1997 have been made in which Rule 4-A (Mode of Application/Appeal) provides procedure which includes that notice shall be served on all opposite parties and on such other persons as the Court may direct. These are statutory rules and therefore, are to be construed accordingly.

12. Learned counsel for the petitioner relied upon Constitution Bench judgment of Hon'ble Supreme Court in the case of **SBP & Co. Vs. Patel**

Engineering Ltd. And Another, (2005) 8 SCC 618 to bring home the legal position that the power exercised by the Chief Justice of the High Court under Section 11(6) of the Act of 1996 is not an administrative power, it is a judicial power and therefore, opportunity of hearing is required to be given. The Chief Justice or the designated Judge has even right to decide the preliminary aspects as referred in judgment and therefore, if notice would have been issued then all those aspects would have been expressed or displayed before the Court including the suggestion of some different arbitrator could have been advanced. Here, appointment of Arbitrator suggested by respondent-Company is being accepted by the designated Court and thus caused illegality and irregularity.

13. Learned counsel for the petitioner also raised the point that as per Section 2 (1) of Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983, the matter ought to have been referred to Arbitration Tribunal, Bhopal because it relates to supply of goods and services and as per the Division Bench judgment of this Court (Principal Seat at Jabalpur), **M/s. Gayatri Project Ltd. Vs. MPRDC Ltd. 2022 (2) MPLJ 425**, matter ought to have been referred to the Arbitration Tribunal, Bhopal.

14. Learned counsel for the respondent-Company opposed the prayer and submits that when earlier notice dated 20/1/2021 was given for appointment of Arbitrator and same was rejected by authority vide reply dated 10/2/2021 then they waived their right to object for appointment of Arbitrator as per Section 4 of the Act of 1996. He relied upon the judgment of Apex Court in the matter of **Datar Switchgears Ltd. Vs. Tata Finance**

Ltd. and Another, (2000) 8 SCC 151 and M/s Durga Welding Works Vs. Chief Engineer, Railway Electrification, Allahabad & Anr., (Civil Appeal No. 54 of 2022 decided on 4/1/2022) to bolster his submissions.

15. So far as submissions regarding maintainability of claim before Arbitration Tribunal, Bhopal is concerned, learned counsel for the respondent while relying upon judgment of Coordinate Bench of this Court in the matter of **President, Nagar Panchayat, Pichhore and Anr. Vs. Rakesh Kumar Sehgal, 2005 (3) MPLJ 553** submits that only those work contracts in which supply of goods and services are involved, can be subject matter of Arbitration Tribunal. Here no work contract relating to construction, repair, maintenance of any building or superstructure,dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, work-shop, powerhouse, transformers etc is contemplated, therefore, matter ought not to go before Arbitration Tribunal.

16. It is further submitted that Government Advocate appeared in the case and it was a bi-parte order and in pursuance thereof, arbitration proceedings were started, therefore, no case for interference is made out. Review petition deserves to be dismissed.

17. No other arguments were advanced by the parties.

18. Heard learned counsel for the parties at length and perused the documents appended thereto.

19. Scope of review is well defined in the case of **Kamlesh Verma Vs. Mayawati and Others, (2013) 8 SCC 320,** principles relating to review jurisdiction have been laid down.

20. The principles relating to review jurisdiction may be summarized as follows:

When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words **"any other sufficient reason"** have been interpreted in **Chhajju Ram Vs. Neki, (1921-22) 49 IA 144** and approved by this Court in the case of **Moran Mar Basselios Catholicos Vs. Most Rev. Mar Poulose Athanasius, AIR 1954 SC 526** to mean **"a reason sufficient on grounds at least analogous to those specified in the rule"**.

When the review will not be maintainable:

"(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The meres possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate Court, it cannot be permitted to be advanced in the review petition.

(ix) Reviews is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

21. It is also held by the Apex Court in the case of **State Of West Bengal & Ors. Vs. Kamal Sengupta & Anr., (2008) 8 SCC 612** that mistake or error apparent on the face of the record means that mistake or error which is prima facie visible and does not require any detail examination. Erroneous view of law is not a ground for review and review cannot partake the category of the appeal.

22. Petitioner/State of Madhya Pradesh is in review petition seeking review of order dated 20/5/2021 by which this Court allowed the application under Section 11(6) of Act of 1996 preferred by respondent and appointed the sole arbitrator as referred above.

23. Submission of petitioner revolves around opportunity of hearing as

according to State, it was not served with notice on application under Section 11(6) of the act of 1996 so as to rebut / reply or to suggest its names for arbitration. As per clause 20 of agreement dated 14/1/2015, Director General of Police (DGP) was to be the sole Arbitrator for resolution of dispute but by the effect of Amendment Act of 2015 (w.e.f. 23/10/2015) and later on by the mandate of Apex Court in the case of **TRF Limited Vs. Energo Engineering Projects Limited, (2017) 8 SCC 377** and **Perkins Eastman Architects DPC and another Vs. HSCC (India) Ltd., AIR 2020 SC 59**, appointment of independent and impartial Arbitrators was taken into consideration and thereafter, Arbitrator was to be appointed. Therefore, an independent Arbitrator was required to be appointed and it could have been appointed by mutual consent.

24. So far as scope of application under Section 11(6) of the Act of 1996 is concerned, it is well settled by the Constitution Bench of Apex Court in the case of **SBP & Co. (supra);** wherein, the conclusions by majority view are summed up in following words:-

> *"**47. We, therefore, sum up our conclusions as follows:***
>
> *i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.*
>
> *ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court.*
>
> *(iii) In case of designation of a judge of the High Court or of*

the Supreme Court, the power that is exercised by the designated, judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designate judge.

(v) Designation of a district judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High

Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(ix) In a case where an arbitral tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) Since all were guided by the decision of this Court in ***Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd.*** *and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or arbitral tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.*

(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief

Justice of the High Court concerned or a Judge of that court designated by the Chief Justice.

(xii) *The decision in* ***Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd.*** *is overruled."*

Therefore, it is abundantly clear that proceedings under Section 11(6) of the Act of 1996 are judicial one and thus are to be guided by such principles.

25. In exercise of powers conferred by Section 82 of the Act of 1996, High Court of Madhya Pradesh made the M.P. Arbitration Rules, 1997 and later on vide amendment in Rules of 1997 by way of Gazette Notification dated 5th February, 2020 published in M.P. Gazette on 21/2/2020, amendments in Rules of 1997 were caused. These are statutory rules and carry legal bearing.

26. Rule 4-A of the said Rules of 1997 deals in respect of Mode of Application / Appeal. Same is reiterated for ready reference:-

*"**4A. Mode of application/appeal:***

Save as otherwise provided in these Rules, all Applications / Appeals shall be placed on board for admission after prior notice to all parties concerned.

(1) Procedure after filing of Applications / Appeals and requisitioning of Lower Court Records:

(a) In cases, arising out of matters pending before the lower Court, Tribunal or Authority, the record shall not be

requisitioned unless ordered by the Court.

(b) Where such record has been requisitioned, it shall be retained in the High Court/District Court (as the case may be) only as long as absolutely necessary; otherwise, it shall be returned and called back as convenience permits.

(2) In cases, arising out of judgments or orders finally adjudicating the case, the record of lower Court or Tribunal shall be requisitioned after admission of the case, notwithstanding the fact that no order requisitioning the record has been made by the Court or the Registrar.

(3) The Applicant/Appellant may file pleadings and/or evidence along with the memorandum of appeal or application which he considers necessary too enable the Court to appreciate the scope of dispute for the purpose of admission, interlocutory orders or disposal.

(4) Notice shall be served on all opposite parties and on such other persons as the Court may direct.

Provided that at the hearing any such Application/Appeal, any person who desires to be heard in opposition to it and appears to the Court to be proper, may be heard, notwithstanding that he has not been served with the notice; but may be liable to costs in the discretion of the Court.

Provided further that where at the hearing of the Application / Appeal, the Court is of opinion that any person who ought to have been served with notice of the Application/Appeal, has not been so served, the Court may order such notice to be served

and adjourn the hearing upon such terms, if any, as the Court may think fit.

(5) (a) All questions of fact arising for determination under this part shall be decided ordinarily upon affidavit, but the court may direct that such other evidence be taken as it may deem fit.

(b) Where the Court orders that certain matters in controversy between the parties shall be decided on oral evidence, it may either itself record the evidence or may direct any Court or Tribunal or a Commissioner appointed for the purpose of record it in accordance with the procedure prescribed by law.

(6) The Court may in such proceedings impose such terms as to costs as it thinks fit.

(7) The Court may in its discretion, either before the opposite party is called upon to appear and answer or afterwards on the application of the opposite party, demand from the Applicant security for the costs of the application/appeal."

27. Similarly, in Chapter XIII Rule 8 of M.P. High Court Rules and Orders, 2008, service of notice to instrumentality of State is provided in following words:-

"Notices to Public Officers and Corporations

8. Notices to Public Officers and Corporations shall be sent by Registered post acknowledgment due."

28. Therefore, once it is abundantly clear that proceedings under Section 11(6) of the Act of 1996 are judicial one and powers vested in the

designated Court are judicial in nature then principle of opportunity of hearing or putting other party to notice is imperative and in the interest of justice. Petitioner rightly pointed out that if petitioner would have been noticed then certainly certain facts would have been brought to the notice of the Court including the factum of representation being submitted by respondent-Company and subsequent rejection by DGP and also the point regarding appointment of Arbitrator would have also been discussed.

29. In fact Section 11 (1) of the Act of 1996 itself clarifies that a person may be an Arbitrator, **unless otherwise agreed by the parties.** Meaning thereby, sufficient leverage has been given to both the parties to reach to an agreement about the appointment of an Arbitrator. Whole procedure as described in Section 11 of the Act of 1996 gives indication of the legislative intention that both the parties have to reach to a consensus about the appointment of arbitrator and rightly so, because arbitration is part of Alternative Dispute Resolution Mechanism like Mediation and Reconciliation, primarily **based upon Consent quotient rather than Compulsion.**

30. In traditional set up parties have to appear for resolution of their disputes before the competent Judge / Magistrate within their jurisdiction presiding over the jurisdiction vested into it and parties have no alternative but to submit to the jurisdiction and to comply the judgment given in adjudicatory process. On the contrary, ADR mechanism specially arbitration is such device which delves more on consent then on compulsion. Parties agree to the Terms, Procedure and Person to act as Arbitrator and the very

genesis of concept of arbitration is peaceful and consensual resolution of dispute. This gives finality to the litigation and perhaps with more acceptance. Therefore, the process of appointment of arbitrator is ought to be just, fair and transparent.

31. Considering those aspects, Amendment Act of 2015 and thereafter by Act of 2019, stress over the transparency, relationship of Arbitrator with parties or the counsel, qualifications and experience of Arbitrator and impartiality and independence of Arbitrator have been taken care of with more vehemence.

32. In the instant case, from the proceedings, it appears that no notice was issued to the present petitioner in specific terms. If notice would have been issued to the petitioner then Department (Police Department/DGP) would have appeared and raised all the points available to it, that has not happened. Mere presence of Government Advocate (usually duty is rotational from one Court to another) in the order does not make the case better because State of Madhya Pradesh (represented here through Police Department) is an impersonal authority/entity and falls under Article 12 of the Constitution of India. It is required to be noticed and requirement is all the more pressing because after service of notice, department moves with appointment of OIC (Officer in-charge) with instructions and inputs from department. In present case, when department had some other names also in its mind as arbitrators then it becomes all the more required that notices ought to have been issued. Here no notice is admittedly issued, therefore, it prejudices the interest of petitioner and cause of justice. Hence, it vitiates order dated 20/05/2021 and

subsequent proceedings.

33. So far as, plea of Section 4 of Act of 1996 as raised by counsel for respondent is concerned, same is not available to the respondent becuase show cause notice invoking arbitration under Section 11 of the Act of 1996 was issued on 20/01/2021 and same was replied by petitioner vide reply dated 10/2/2021, in which offer to go for arbitration was turned down on the ground that Apex Court already given a chance to respondent-company to agitate the case before the competent authority and petitioner was of the opinion that since respondent-company already availed of the said remedy and his representation was rejected, therefore, there is no need for arbitration.

Even otherwise, at that time, that aspect was pending consideration vide W.P.No. 5073/2021 before the Division Bench of this Court in which vide order dated 31/3/2021 Division Bench passed the order dismissing the writ petition in limine while giving liberty to respondent to avail the arbitration clause available under the agreement in question. Thereafter, application for arbitration under Section 11(6) of Act of 1996 was filed, therefore, said plea of Section 4 of Act of 1996 has no application in the present set of facts.

34. So far as point raised by petitioner regarding alternative forum of Arbitration Tribunal is concerned, same does not hold good because from Section 2 (1) of Act 1983, it is crystal clear that supply of those goods and services would come into ambit of Arbitration Tribunal which are being supplied or tendered in pursuance to the works contract given to a contractor

for construction, repair, maintenance of any building or superstructure,dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, workshop, powerhouse, transformers etc. Here no such works contract was issued to the respondent-Company. It had to supply CCTV Cameras for installation in High Court Premises, Bench at Indore but it failed in providing quality and stipulated class of equipments, therefore, dispute arose. Therefore, on this count contentions of petitioner regarding availability of alternative remedy lacks merit. Hence, rejected.

35. In cumulative consideration, it is an error apparent on the face of record that no notice was issued and case proceeded for appointment of Arbitrator, therefore, case of review petitioner deserves consideration in the interest of justice. Accordingly, order dated 20th May, 2021 is hereby recalled and consequently any proceedings held also pales into oblivion / insignificance and are rendered nullity.

36. Resultantly, review petition is allowed and Arbitration Case No. 37/2021 is restored to its original number and be placed for hearing on admission and further orders in the month of August, 2022.

(Anand Pathak)
JUDGE

jps/-