

IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 16th OF AUGUST, 2022

ARBITRATION APPEAL No. 15 of 2016

Between:-

**M/S CHOKHI DHANI THROUGH GULRAJ
VASWANI THROUGH POWER OF ATTORNEY
HARENDRA SINGH PROPRIETOR S-8 SHYAM
NAGAR AJMER ROAD JAIPUR RAJASTHAN/G-5
RITURAJ COMPLEX OPPOSITE INDIRA GANDHI
STATUE BAGALI CLUB AB ROAD INDORE
(MADHYA PRADESH)**

.....APPELLANT

**(BY SHRI S.C. BAGADIA, SENIOR ADVOCATE WITH SHRI AMIT
UPADHYAY, ADVOCATE)**

AND

**M/S JS CONSTRUCTION THROUGH JITENDRA
JOSHI PROPRIETOR 101 ROOPRAM NAGAR
COLONY MANIK BAG ROAD INDORE (MADHYA
PRADESH)**

.....RESPONDENTS

**(BY SHRI R.S. CHHABRA, SENIOR ADVOCATE WITH SHRI GAURAV
CHHABRA, ADVOCATE)**

*This appeal coming on for admission/orders this day, the
court passed the following:*

Reserved on ___ : 23/06/2022

Delivered on ___ : 16/08/2022

JUDGEMENT

Heard finally.

1] This appeal has been preferred under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act, 1996”) against the order dated 05/07/2016, passed by the XV Additional District Judge, Indore in arbitration case No.86/2013, wherein an application filed by the appellant/defendant under Section 34 of the Act of 1996 has been rejected affirming the award passed by the sole arbitrator on 10/05/2013.

2] In brief, the facts of the case are that the appellant is a proprietorship concern and is running its business in the name and style of ‘Chokhi Dhani’. In the year 2003, the appellant entered into an agreement with the respondent M/s J.S. Construction as the contractor for construction of a water park, Clause 46 of which refers to arbitration. In connection with the said agreement, a dispute arose between the parties in respect of payment towards the work carried out by the contractor as it was alleged by the contractor that the appellant has withheld an amount of Rs.14,95,960/- due to it and thus, for the appointment of an arbitrator, an application under Section 11 of the Act of 1996 was also filed by the respondent before this Court which was registered as AC No.8/2007, and came to be decided by this Court vide its order dated 28/04/2010, permitting the respondent to withdraw the petition with liberty to approach the named arbitrator under Clause

46.

3] After withdrawal of the aforesaid application AC No.8/2007, the respondent designated the Architect as the sole arbitrator as according to the agreement between the parties, the Architect is defined as 'Kalp Kartik Architects'. The said Architect served a notice of arbitration to the appellant and immediately, an application under Order 7 Rule 11 of CPC was filed before him objecting his appointment as the arbitrator. The aforesaid application was rejected by the arbitrator vide its order dated 03/12/2012, holding that all the issues have been settled by the order of High Court dated 28/04/2010 passed in AC No.8/2007..

4] The appellant's case is that thereafter, the counsel appearing for the appellant before the arbitrator sought time to file reply and on 12/12/2012, the arbitrator passed the order which reads as under:-

"Shri Rupesh Kumar, Advocate for the respondents present.
Request for new date for filing reply. New date shall be conveyed to respondents.

Arbitrator"

5] Appellant's further case is that despite this order, no date was conveyed to them and finally, an ex-parte award was passed on 10/05/2013. Against the said order dated 03/12/2012, passed by the arbitrator rejecting the application filed by the appellant under Order 7 Rule 11 of CPC, a civil revision was also filed before this Court being CR No.8/2013, but after passing of the final award by

the arbitrator, the aforesaid civil revision had become infructuous hence it was not proceeded with. The award passed by the arbitrator on 10/05/2013 was challenged by the appellant under Section 34 of the Act of 1996, before the District Judge, Indore which was dismissed by the District Judge vide impugned order dated 05/07/2016, hence, this appeal.

6] Shri S.C. Bagadia, learned senior counsel appearing for the appellant has submitted that a perusal of Clause 46 of the agreement clearly reveals that the Architect and Arbitrator are two different entities and could not be treated as the same and the so called arbitrator appointed in this case was never appointed as an arbitrator either by the agreement between the parties, or by the Court. It is also submitted that the Arbitrator so appointed he was not qualified as provided in Clause 56 of the Agreement, but this objection was not dealt with in the impugned order. Counsel has submitted that when the arbitrator himself was not competent and qualified as specifically provided in the arbitration agreement itself: the arbitration proceedings and the final award passed by him stand vitiated. In support of his contention, Shri Bagadia has relied upon a decision rendered by the coordinate Bench of this Court in the case of *Ravishankar University Vs. NDB Enterprises reported as 1999 SCC Online MP 389*.

7] It is further submitted that after 12/12/2012, no date of hearing was communicated to the appellant in-spice of the aforesaid order-sheet which clearly mentions that the next date of hearing

shall be communicated to the respondent (the present appellant) and even in the award, it is not mentioned that the next date after 12.12.2012 was ever communicated to the appellant. Thus, it is submitted that the appeal is liable to be allowed on two grounds namely; viz., the person passing the award was never appointed as an arbitrator according to the agreement which is a valid ground under Section 34(2)(iv) of Act of 1996 and secondly, the arbitration proceedings conducted after 12/12/2012, without notice to the appellant which would also be a ground covered under Section 34(2)(iii) of the Act of 1996, i.e., the appellant was not given proper opportunity to present its case.

8] It is further submitted that under the order passed by this Court on 10/08/2016, the appellant has already deposited 50% of the awarded amount on 17/11/2016 which comes to Rs.30,50,925/-. Hence, the aforesaid amount may be directed to be refunded to the appellant with appropriate interest.

9] The appeal has been opposed by the learned counsel for the respondent Shri R.S. Chhabra and it is submitted that no case for interference is made out as none of the grounds as enumerated under Section 34 of the Act of 1996 are available in the present case. It is submitted that in the order passed by this Court in AC No.8/2007, it was clearly directed to refer the dispute to the named arbitrator 'Kalp Kartik' as provided under the agreement and thus his competence to decide the dispute cannot be doubted.

10] Shri Chhabra has further submitted that the application filed

by the appellant under Order 7 Rule 11 of CPC regarding jurisdiction of the arbitrator was dismissed by the arbitrator vide order dated 10/05/2013, against which, the civil revision No.8/2013 was also filed by the appellant, however, after the final award was passed by the arbitrator, the said civil revision was withdrawn vide order dated 30/08/2013 without informing the Court that the arbitrator has passed the final award and also without taking any liberty to raise the ground urged in civil revision pending in the arbitration application under Section 34 of the Act of 1996, thus, it is submitted that in such circumstances, at this stage, the appellant cannot be permitted to raise this objection regarding the jurisdiction of the arbitrator to decide the dispute specially when the *Architect* has been defined in the contract between the parties at clause 1.2, which prescribes that '*Architects*' shall mean Kalp Kartik Architects and as per the contract, the parties had agreed to authorize Kalp Kartik architects as the arbitrator for settlement of disputes.

11] Counsel has further submitted that after dismissal of their application filed under Order 7 Rule 11 of CPC, the appellant was noticed on 20/11/2012 intimating that their application has been dismissed and to file their reply before 29/11/2012. Thereafter the notice were again issued on 03/12/2012 to the appellant to file the reply and also to make payment of arbitration fees but as it was not complied with, on 11/03/2013 the right of the appellant to file reply was closed and the final award has been passed on 10/05/2013.

12] So far as the objection raised by the appellant that it was not

noticed after 12/12/2012, it is submitted that in its application filed under Section 34 of the Act of 1996, the appellant has taken a ground that after dismissal of his application under Order 7 Rule 11 of CPC, no notice of next date of hearing was sent to them meaning thereby that they did not receive any notice after 03/12/2012, however, from the arbitral proceedings, it is apparent that after 03/12/2012 the appellant was represented before the arbitrator on 12/12/2012 which is contradictory and this new ground has been taken for the first time before this Court that no notice was received after 12/12/2012 which was never raised in the application under Section 34 of the Act of 1996. It is further submitted that the appellant was well aware of the dates fixed by the arbitrator and even in the application under Section 34, it is mentioned that he was not given *proper* notice (उचित सूचना) and not that it did not receive any notice at all. In support of his contentions, Shri Chhabra, learned Sr. counsel for the respondent has relied upon a decision rendered by the High Court of Delhi in the case of ***Unison Hotels Private Limited Vs. M/s Value Line Interiors Private Limited***.

13] Heard learned counsel for the parties and perused the record.

14] From the record, it is apparent that as submitted by counsel for the appellant, only two questions fall for the consideration of this Court firstly; whether the person passing the award was not competent to act as an arbitrator even as per the agreement between the parties, which is a ground under Section 34(2)(v) of Act of

1996; and secondly, whether the arbitration proceedings were conducted after 12/12/2012 without notice to the appellant which would be also a ground covered under Section 34(2)(iii) of the Act of 1996.

15] So far as the reference of dispute under clause 1.2 and 46 of the agreement is concerned, the same read as under:-

“1.2) “Architects” shall mean Kalp Kartik Architects and shall include their authorized representatives, for civil sanitary plumbing and their specialist consultants and the staff approved to supervise the work.

xxxxxxx

46) Settlement of disputes, arbitration:-

All disputes and differences of any kind whatever arisen out of or in connection with the contract or the carrying out of the work (whether during the progress of the work or after its completion and whether before or after termination, abandonment or breach of the contract) shall be referred to and settled by the architects/shall state their decision in writing. The decision of the architects with respect to any of the excepted matters shall be final and without appeal as stated in clause No.32 but if the contractor be dissatisfied with the decision of the architects on any other matter, the question of dispute of any kind (except any or the excepted matters) or as to the withholding by the architects of any payment to which the contractor may claim to be entitled then and in any such case, the contractor shall within 28 days after receiving notice to such decision give a written notice to the employer requiring that such matters in dispute be arbitrated upon. Such written notice shall specify the matter which are in dispute or difference of which such written notice has been given and no other shall be and is hereby to be referred to the arbitration and final decision of a single arbitrator or the arbitration of two arbitrators one to be appointed by each party, which arbitrator shall before taking upon themselves the burden or reference appoint an Umpire. The qualification of the arbitrator/arbitrators shall be (A) fellow of the institution of Engineers India or (B) fellow of the Indian Institute of Architects or © Member of the Institute of the Surveyors (India).”

(emphasis supplied)

16] So far as the order passed by this Court on 28/04/2010 in AC No.8/2007 is concerned, the same reads as under:-

“Shri R.S. Chhabra, learned counsel for the petitioner.

Shri Yashpal Rathore, learned counsel for the respondent.

After arguing at length learned counsel for the petitioner seeks leave to withdraw this petition with liberty to approach the named architect Kalp Kartik Architects in terms of condition no.46 of the contract.

With the aforesaid liberty, the petition is disposed of as withdrawn.

In case the petitioner approaches to the said architect in accordance with condition no.46 of the Arbitration Agreement the respondents and the said architect shall proceed in the matter in accordance with law. While considering the petitioner’s claim, the architects and the respondent shall keep in view that the matter was pending before this Court from 25.07.2009 till today.”

(emphasis supplied)

17] A perusal of the aforesaid order clearly reveals that it was the direction of this court to appoint the arbitrator in accordance with the condition no.46 of the Arbitration agreement and as per said condition, the qualification of the arbitrator/arbitrators shall be (A) fellow of the institution of Engineers India or (B) fellow of the Indian Institute of Architects or © Member of the Institute of the Surveyors (India). It is not the case of the respondent that the

arbitrator so appointed was qualified as per the aforesaid condition. It is also found that the appellant had also raised its objection regarding the competency of the arbitrator in its application filed under order 7 Rule 11 of CPC which in effect was an application filed under s.16(2) of the Arbitration Act. The contention of the respondent that the order dated 03/12/2012 Passed by the arbitrator on the aforesaid application was already challenged by the appellant in C.R.No.8/2013 which was dismissed as withdrawn without seeking any liberty, hence the appellant cannot be allowed to raise the same ground in this appeal also, is without merits as this court is of the considered opinion that the order dated 03/12/2012 passed by the arbitrator on the said application was essentially under the provisions of s.16 of the Arbitration Act notwithstanding that the application on which it was passed was filed under order 7 rule 11 of CPC. It is a trite law that nomenclature of an application is not important but what is averred in it and the prayer/relief sought therein only are relevant. Section 16 of the Arbitration Act is a complete code in itself, specifically providing the manner in which competence of arbitral tribunal can be challenged as also the remedy if such challenge is rejected by the arbitral tribunal. S.16 reads as under:-

- “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.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.”

(emphasis supplied)

18] Thus, as provided under s.16(6), the only recourse available to an aggrieved party who wants to challenge the order passed under s.16(5) is by way of an application for setting aside the arbitral award u/s.34 of the Arbitration Act. In such circumstances, even if a civil revision was filed by the appellant against the order passed by the arbitral tribunal under s.16(5), it was clearly not maintainable and its dismissal as withdrawn without seeking any liberty to raise the objection in the application to be filed under s.34 of the Arbitration Act had no consequences at all.

19] So far as the finding recorded by the Arbitral Tribunal

regarding its jurisdiction is concerned, the order dated 03.12.2012 reads as under:-

“The respondent has alleged that the agreement dated 21/11/2003 is null and void and is also time barred. In this regard, the attention of the parties are drawn towards the order dated 28/04/2010 passed by the Hon’ble High Court of M.P. Bench at Indore in A.C. No.8/2007. As per the aforesaid order, the Hon’ble High Court, has observed the validity of the said agreement and has also examined the arbitrability of the dispute and once the Hon’ble High Court has checked the validity of the agreement, the said question cannot be agitated again.”

20] If the aforesaid order is read in the light of the order passed by the this court in A.C.No.8/2007 (supra), it is apparent that the High Court has not checked the validity of the agreement but has held that the dispute is referable to the arbitrator in accordance with condition no.46 of the Arbitration Agreement. This condition also prescribes the qualification of an arbitrator which are, “(A) fellow of the institution of Engineers India or (B) fellow of the Indian Institute of Architects or © Member of the Institute of the Surveyors (India)”. The arbitrator has not dealt with the aforesaid aspect of the matter in the light of the said qualification of the Arbitrator which, in the considered opinion of this court is sufficient to non-suit the respondent as the qualifications of an arbitrator are sine qua non for his eligibility to be appointed as an arbitrator. In view of the same, the impugned order passed under s.34 as also the award passed by the arbitrator cannot be sustained in the eyes of law and are liable to be set aside.

21] So far as the other issue, i.e., whether the arbitration proceedings were conducted after 12/12/2012, without notice to the appellant is concerned, which is also a ground available to the appellant under Section 34(2)(iii) of the Arbitration Act, this court finds that on 12.12.2012, when the matter came up before the Arbitrator, counsel for the appellant sought time to file reply and the case was adjourned observing that the 'New date shall be conveyed to respondents'. At this juncture, it would be apt to refer to the proceedings dated 12.12.2012, 11.03.2013 and 10.05.2013 read as under:-

“12/12/2012

Shri Rupesh Kumar, Advocate for the respondents present.
Request for new date for filing reply. New date shall be conveyed to respondents. ”

“11/03/2013

Despite several notices respondents have failed to submit reply to the satisfaction of tribunal.

No attempt has been made by respondents to address the points raised by the claimant.

Respondents have tried to delay the matter by seeking extensions on several occasions.

Till date respondents have not submitted the Arbitration fees.

The tribunal shall draw the award based on the facts before it.

The Arbitral Award shall be issued on 10/05/2013.”

“10/05/2013

Tribunal has considered all the facts before it and conduct of both the parties.

It is apparent that respondents are not in a position to defend their position vis a vis points raised by Claimant.

In the light of above Award is drawn in favor of claimant.

A copy of the award shall be sent to the Claimant and

Respondent each.”

22] This court is also of the opinion that it is not possible that the appellant/his counsel would not even enquire from the arbitrator about the next date of hearing. It is also found that the appellant had also not paid the arbitrator’s fee. There is no communication placed on record by the appellant that it ever approached the arbitrator with a request for a date of hearing from 12/12/2012 to 10.05.2013 *which conduct of the appellant appears rather unnatural, deliberate and premeditated and does not entitle it to take advantage of its own wrong*. The decision relied upon by the appellant in the case of *Ravishankar University Vs. NDB Enterprises (supra)* is not applicable and is distinguishable on facts. Thus, it is held that the appellant was given proper opportunity of hearing by the arbitrator.

23] Be that as it may, since this Court has already held that the arbitrator was not competent to hold the arbitral proceedings, the appeal stands *allowed* on this ground only, consequently, the impugned order dated 05/07/2016 passed by the XV Additional District Judge, Indore as also the award dated 10/05/2013 passed by the arbitrator are hereby **set aside**.

24] As the appellant has also deposited Rs.30,50,925/- towards the 50% of the award amount, which has also been withdrawn by the respondents, it is directed that the respondent shall return the amount so received by them to the appellant within a period of three months from the date of this order, with interest at the prevailing

Bank rates till the date of payment. If the amount is not returned within the stipulated period, it would fetch interest @8% p.a. till its realization.

25] It is also observed that Respondents shall be free to proceed afresh in accordance with the provisions of condition no.46 of the agreement. Needless to say, the time spent by the parties in these proceedings, up to the final disposal of this appeal shall be excluded from any period of limitation.

Arbitration Appeal is accordingly **allowed and disposed of.**

(Subodh Abhyankar)

Judge

krjoshi