

**VINOD BHAİYALAL JAIN AND ORS. V. WADHWANI PARMESWARI  
COLD STORAGE PVT. LTD. THROUGH ITS DIRECTORS AND ANR.  
[CIVIL APPEAL NO. 6960 OF 2011]**

**-RAVIKIRAN SHUKRE**

**FACTS OF THE CASE:**

- 1) The Appellants have come before this court attacking the order dated August 30, 31 2007 passed by the Hon'ble High Court of Judicature at Bombay in first appeal no. 187 of 2007.
- 2) Respondent no. 1 owns a cold storage facility at Nagpur and Mr. Suresh Wadhvani manages the same. The appellants are engaged in the business as commission agents for the agriculture products and are sons of Shri. Bhaiyalal Jain. In regard to their business they have utilised the cold storage facility for storing 50 bags of *Shingada*, an agricultural product during the year 2004.
- 3) But, according to Appellants, Respondent no. 1 has failed to store the goods in proper manner which led to damage their product. Therefore, Appellants issued notice dated 18/05/2006 pursuing for a compensation. Respondent no. 1, through its reply to notice dated 27/05/2006 denied the claim put by the Appellants but also made a counter claim. Therefore, the dispute arose between parties. According to Respondent no. 1, Parties were governed by the Arbitration clause and they have agreed to refer this dispute to the Arbitrator Shri. S. T. Madnani, Advocate. According to them the said arbitration clause contained in receipt issued in respect of storage of goods.
- 4) Therefore, in this context, the father of the appellants has issued a notice on 08/06/2006, stating that there exist a dispute regarding the appointment of the arbitrator as Shri. S. T. Madnani, Advocate being the counsel of the Respondent no. 1 and its partners in other cases cannot act as an Arbitrator in respect to which Respondent no. 1 is a party in a dispute. Despite, the such objection Arbitrator proceeded further in the matter in absence of the Appellants and passed award that directing appellants to pay the claim amount and also imposed a cost of Rs. 43,000/-. Being aggrieved by this, Appellants filed a petition u/s 34 of the 1996 Act, before District Judge, Nagpur raising objection to the award and with regard to Arbitrator. The learned District Judge was of the opinion that, the Arbitrator acted as a counsel for Shri. Suresh, a partner of Respondent no. 1 and which he did not disclose and found the objection of the appellants justifiable and set aside the award.
- 5) Respondent no. 1 being aggrieved by this, filed an appeal before Hon'ble High Court of Judicature at Bombay, Nagpur Bench, u/s 37 (1) (b) of the Act. The subject of the matter was observed thoroughly by High Court judge and was of the opinion that, such objection was put forth by the father of the appellants and not by themselves. And therefore, cannot be construed as an objection by party to proceedings u/s 13 of the Act.

It was held that, merely because arbitrator had appeared as lawyer in one case, it would not be considered as he is biased and would rule in favour of Respondent no. 1. Therefore, High Court set aside the judgment passed by the District Court u/s 34 of the Act and restored the award.

- 6) Being aggrieved by this; Appellants has come before this court.

### **ISSUES RAISED:**

- Whether the Arbitration Clause is valid?
- Whether appointed arbitrator is chosen by proper procedure and by consensus-ad-idem?

### **RULE OF LAW WHICH APPLIES:**

#### 1) **Section 7: Arbitration Agreement<sup>1</sup>:**

- (1) In this part, “Arbitration Agreement” means an agreement by the Parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
- (2) Arbitration Agreement may be in form of Arbitration Clause in a contract or in the form of separate agreement.

#### 2) **Section 11: Appointment of Arbitrators<sup>2</sup>:**

- (1) A person of any nationality may be an arbitrator, unless otherwise agreed by parties.
- (2) Subject to (6), the parties are free to agree on a procedure for appointing the arbitrator.
- (3) Failing to any agreement referred to in sub-section (2), in an agreement with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint third arbitrator who shall act as the presiding officer. (5) Failing any agreement referred to in sub-section (2), in an arbitration with sole arbitrator, if parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or as the case may be, High Court or any person or institution designated by such court. (6) Where, under an appointment procedure agreed upon by the parties – (a) a party fails to act as required under that procedure; or (b) the parties, or two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Supreme Court or as the case may be, High Court or any person or any institution designated by such court to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.

---

<sup>1</sup> Section 7 of the Arbitration and Conciliation Act, 1996

<sup>2</sup> Section 11 of the Arbitration and Conciliation Act, 1996

3) **Section 12: Grounds for challenge<sup>3</sup>:**

- 1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances – (a) Such as the existence of either direct or indirect, of any past or present relationship with interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and (b) Which are likely to affect his ability to devote sufficient time to arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

**STATING THE APPLICATION OF RULE OF LAW WHICH APPLIES:**

If we look at the case in hands, we get to see that, there is a dispute between two parties which *prima facie* states that they have decided to resolve their disputes by way of Arbitration Clause. an agreement by the Parties to submit to arbitration all or certain disputes which have arisen between them in respect of a defined legal relationship.

Here, Appellants are having a business as a commission agent, they have agreed to use the cold storage facility of the Respondent. According to appellants, respondent no. 1 has failed to store the goods in proper manner which led to cause damage to them. And therefore, they issued a notice pursuing compensation to Respondents. Respondent no. 1 has not only denied their claim but also put counter claim before them through his reply to their notice. According to Respondent no. 1, parties were governed by the arbitration clause – and they have agreed to refer this dispute to the Arbitrator Shri. S. T. Madnani, Advocate. According to them, the said arbitration clause contained in receipt issued in respect of storage of goods.

Therefore, in this context, the father of the appellants has issued a notice on 08/06/2006, stating that there exist a dispute regarding the appointment of the arbitrator as Shri. S. T. Madnani, Advocate being the counsel of the Respondent no. 1 and its partners in other cases cannot act as an Arbitrator in respect to which Respondent no. 1 is a party in a dispute.

Now, when we read section 12 (1) (a) and (b) with section 7 then we can determine that, arbitration clause must be entered by both of the parties consequently. But in our case, there has been a doubt regarding the impartiality of the appointed arbitrator as, he had been a counsel for respondent no. 1 and its partners therefore, an interim inference can be drawn *prima facie* that; the appointed arbitrator may have relationship with interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality. Therefore, it can be said that there was no meeting of minds between parties regarding reference of dispute to the arbitrator.

Despite, the such objection Arbitrator proceeded further in the matter in absence of the Appellants and passed award that directing appellants to pay the claim amount and also

---

<sup>3</sup> Section 12 of the Arbitration and Conciliation Act, 1996

imposed a cost of Rs. 43,000/-. Being aggrieved by this, Appellants filed a petition u/s 34 of the 1996 Act, before District Judge, Nagpur raising objection to the award and with regard to Arbitrator. The learned District Judge was of the opinion that, the Arbitrator acted as a counsel for Shri. Suresh, a partner of Respondent no. 1 and which he did not disclose and found the objection of the appellants justifiable and set aside the award.

When the storage receipt was drawn out and the Arbitration Clause came into existence there was no circumstance for disclosure of the present nature, it is seen that he has immediately thereafter, on 29.03.2004 filed the vakalat for one of the parties. Thus, as on 03.06.2006 when the claim was lodged before the learned Arbitrator both the events of, he being appointed as an Arbitrator and also as a counsel in another case had existed, which was well within the knowledge of Sri. S.T. Madnani and in that circumstance, it was the appropriate stage when he ought to have disclosed the same and refrained from entertaining the claim.

There has been a reasonable basis for the appellants to make a claim that in this present circumstance the learned Arbitrator would not be fair to them even if not biased.

### **CONCLUSION:**

When a person is required to judge the case of another, justice should not only be done, but it should also seem to be done, this is because it implies the nature of the judge, his ability of impartiality and his ability of devoting himself for that purpose. In this case, judgment passed by the Hon'ble High Court of Judicature at Bombay, Nagpur Bench dated 30 and 31 August, 2007 is set aside and, Judgment passed by the Principal District Judge Nagpur in MCA no. 538/2006 setting aside the award dated 08/08/2006 is restored. And, parties are reserved the liberty of availing their remedy of arbitration in accordance with law and all contentions regarding claim/counter claim are left open.

It can be said that if learned arbitrator would not be fair in arbitral proceedings then he would not even be biased to a party. No room should be given for even such a feeling of doubt regarding the ability of the arbitrator and his impartiality, particularly in matter of arbitration the very basis is that; the parties get the opportunity to nominating a judge of their choice in whom they have trust and faith.

By reading section 12 (1) (a) and (b) with section 7 then we can determine that, arbitration clause must be entered by both of the parties consequently. But in our case, there has been a doubt regarding the impartiality of the appointed arbitrator as, he had been a counsel for respondent no. 1 and its partners therefore, an interim inference can be drawn *prima facie* that; the appointed arbitrator may have relationship with interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality. Therefore, it can be said that there was no meeting of minds between parties regarding reference of dispute to the arbitrator. There was no consensus-ad-idem between the parties for the appointment of the arbitrator as normally, parties get the opportunity to nominating a judge of their choice in whom they have trust and faith.