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India: Bombay High Court Upholds Agreement Of Parties To Appoint An Arbitrator In An International Commercial Arbitration Without Filing Of An Application Under Section 11(9) Of The Arbitration Act

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Introduction

The Bombay High Court, in its judgment dated 6 September 2019 in Earnest Business Services Pvt Ltd (Petitioner/Applicant) v the Government of the State of Israel (Respondent), has *inter alia* held that parties to a dispute can agree on appointment of an arbitrator without filing an application under Sections 11(6) or 11(9) of the Arbitration and Conciliation Act, 1996 (Act), as the case may be, including in a petition under Section 9 of the Act or even without intervention of court.

In other words, even in an international commercial arbitration, if there is an agreement between the parties on appointment of arbitrator, when the dispute is before a High Court, the provisions of Section 11(9) of the Act will not be attracted.

For the sake of brevity and relevance, we have focused only on one aspect of this judgment, being the issue of appointment of an arbitrator in the matter.

Brief Background on Appointment of Arbitrators in International Commercial Arbitration as per the Act

It is a cardinal principle of the Act that parties are free to decide the number of arbitrators (provided it is an odd number) as well as the procedure for appointing them. However, if parties are not able to agree on the said procedure, or constitute the arbitral tribunal to their mutual satisfaction, either party has a remedy under Section 11 of the Act, which provides a detailed machinery for appointment of arbitrators through judicial intervention.[1]

Thus, the Act upholds and promotes party autonomy in appointment of arbitrators, and failing any agreement between the parties, the Act then provides for an appointment mechanism with court intervention.

Section 2(1)(f) of the Act defines an 'international commercial arbitration' as an arbitration in connection with disputes arising out of legal relationship which must be considered commercial under Indian law, where either of the parties is a foreign national or resident, or is a foreign body corporate or association or body of individuals whose central management and control is exercised in a country other than India, or Government of a foreign country.

Thus, if a party is a foreign party as discussed above, then the arbitration of a dispute involving such a party would be an 'international commercial arbitration' within the meaning of Section 2(1)(f) of the Act. Such an arbitration involving a foreign party, with a seat in India, will be subject to Part I of the Act and appointment of arbitrators shall be governed by Section 11 of the Act.

As stated above, the parties are free to agree on a procedure for appointing arbitrators. Failing any agreement, the party can request the Supreme Court or High Court, as the case may be, to appoint arbitrators.

In case of an international commercial arbitration, for seeking appointment of arbitrators, a request will have to be filed by a party before the Supreme Court under Section 11(9) of the Act.

In case of a domestic arbitration, the respective High Courts having jurisdiction shall appoint arbitrators, upon a request of a party.

Brief Facts of the Case

The parties to the present case had entered into certain agreements, admittedly containing an arbitration clause. The parties had also agreed that the said agreement was subject only to the laws of the Union of India and that the disputes between these parties would be subject to the exclusive jurisdiction of the courts at Mumbai.

These agreements between the parties came to an end by efflux of time, however certain disputes arose between the parties in connection therewith.

In view thereof, the Respondent in the present case, who was the original claimant, filed a petition under Section 9 of the Act before the Bombay High Court praying for various interim measures of protection.

During the pendency of this Section 9 petition, the parties concurred to the appointment of a sole arbitrator by way of exchange of written communications. Thus, the Bombay High Court, in its order under the Section 9 petition, recorded the consent of the parties and appointed the sole arbitrator to decide the dispute between the parties. Basis such appointment, the sole arbitrator filed its statement of disclosure under Section 11(8) read with Section 12(1) of the Act.

Thereafter, both parties voluntarily participated in the arbitration proceedings before the said sole arbitrator. Consequently, the sole arbitrator passed an award in favour of the Respondent and dismissed the set off and counter claim of the Petitioner. Accordingly, the Petitioner filed an application under Section 34 of the Act before the Bombay High Court to set aside the impugned arbitral award, in which application the present judgment came to be passed.

Arguments of the Parties on appointment of the sole arbitrator

The Petitioner argued that the Respondent, who was a party to the agreements, was admittedly the Government of State of Israel and being a foreign county, the arbitration between the parties was an 'International Commercial Arbitration' within the meaning of Section 2(f)(iv) of the Act. As such, it was contended that the application for appointment of arbitral tribunal could be made only before the Supreme Court under Section 11(9) of the Act and not under Section 11(6). On this reasoning, it was submitted that the Bombay High Court, while exercising powers under Section 9 of the Act, could not have appointed the sole arbitrator and thus such appointment was *ex-facie* beyond its jurisdiction, and was a nullity and void *ab-initio*. Thus, the entire proceedings before the sole arbitrator was without jurisdiction. Admittedly, this issue was raised for the first time in the Section 34 application, however since the same went to the root of the matter, the Petitioner was entitled to raise the same even at the Section 34 stage. In support of these submissions, the Petitioner relied upon the judgment of the Bombay High Court in the case of *Roptonal Lal v Anees Bazmee (2016 SCC OnLine Bom 3555)*.

The Respondent argued that the Petitioner had participated in the arbitration proceedings before the arbitrator without any protest at any stage and had raised this issue only after receipt of the arbitral award in favour of the Respondent. It was further argued that since the parties had already agreed to appoint an arbitrator and had subjected to exclusive jurisdiction of the Bombay High Court only in accordance with the arbitration agreement, there was neither any necessity to file any application under Section 11(9) of the Act nor such application was filed by the Respondent. It was also submitted that that the parties had already agreed to appoint the sole arbitrator, even prior to the date of the Bombay High Court passing the order under the Section 9 petition.

Decision

The Bombay High Court held that since there was no dispute about the name of the arbitrator between the parties and that the parties had agreed to the appointment of the sole arbitrator prior to the order under the Section 9 petition, there was no requirement of filing an application under Section 11(9) of the Act before the Supreme Court.

In other words, Section 11(9) of the Act was not attracted in the present case, given the fact that there was an agreement on the name of the arbitrator between the parties. Further, it was noted that the order appointing the arbitrator was not, in the first place, passed in an application filed under Section 11(6) of the Act. That is to say, the Bombay High Court did not exercise any powers under Section 11(6) of the Act. The order was passed under Section 9 of the Arbitration Act, with consent of the parties.

The Bombay High Court summed up its decision by holding that parties can agree on appointment of an arbitrator in any proceedings in court without filing an application under Section 11(6) or 11(9) of the Act, as the case may be, including in a Section 9 petition or even without intervention of court.

Comments

A peculiar situation arose in the present case where an arbitrator was appointed by a High Court under Section 9 of the Act in an international commercial arbitration. The validity of such an order was upheld in a challenge under Section 34 of the Act. However, it is pertinent to note that such appointment was only with the consent of the parties, and the order under the Section 9 petition merely recorded such prior agreement between the parties. Thus, in all other cases, where such agreement between

the parties is not in existence, recourse to an application under Section 11(9) before the Supreme Court, in an international commercial arbitration, would be proper.

The Bombay High Court, in the present case, took a pro-arbitration stand as it accorded primary importance to party autonomy, notwithstanding the nature and stage of the ongoing proceedings before it. So long as there is consent of the parties, even a High Court can, in any proceeding, appoint an arbitrator for an international commercial arbitration. This approach is likely to aid in expediting the movement of matters from courts to arbitration.

It would also be relevant to point out that the Arbitration and Conciliation (Amendment) Act, 2019 (2019 Amendment Act) recently received the Presidential assent on 9 August 2019. Thereafter, certain sections of the 2019 Amendment Act were notified on 30 August 2019. One of the changes proposed to appointment of arbitrators under Section 11 of the Act is that the appointment shall be made, on an application by the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration. The section pertaining to this amendment has, however, not yet been notified by the government. Be that as it may, different arbitral institutions may have varied procedures of appointment of arbitrators. The quality of decisions made by the arbitral institution may also depend on the grading of such institution by the Arbitration Council of India. This amendment in procedure for appointment of arbitrators, if notified, is likely to change the dynamics of the present system.

Footnote

1 IBI Group v DSC Ltd & Anr [2018 (17) SCC 95]

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