A VINOD BHAIYALAL JAIN & ORS.

v.

WADHWANI PARMESHWARI COLD STORAGE PVT. LTD.THROUGH ITS DIRECTOR & ANR.

B (Civil Appeal No.6960 of 2011)

JULY 24, 2019

[R. BANUMATHI AND A.S. BOPANNA, JJ.]

Arbitration and Conciliation Act, 1996 – ss.34, 37(1)(b) –
C *Appellant utilized the services of respondent No.1 for keeping an agricultural product – According to appellants, the respondent no.1 caused damage to the product – Appellant issued notice for compensation, but in return respondent no.1 made a counter claim – Dispute arose between the parties – Respondent no.1 invoked the arbitration clause contained in the receipt of the storage of goods*
D *– Pursuant thereto, respondent no.1 referred the dispute to the Arbitrator 'STM', an advocate – Appointment of Arbitrator was objected on the ground that the said advocate was the counsel for respondent no.1 and its partners in other cases – However, Arbitrator proceeded with the matter and passed an award against the*
E *appellants – Aggrieved, appellant filed petition u/s.34 of the Act before the District Court – District Court found the objections justified and set aside the award – Respondent filed appeal u/s.37(1)(b) before the High Court – High Court restored the award passed by the Arbitrator – On appeal, held: The provision contained in s.12 of the Act, 1996 cast an obligation on the person, who is*
F *approached for appointment as an arbitrator, to disclose any circumstance likely to give rise to justifiable doubts as to his independence or impartiality – In the instant case, though technically as on 27.02.2004 when the storage receipt was drawn out and the Arbitration clause came into existence there was no circumstance*
G *for disclosure – However 'STM' had filed immediately thereafter, on 29.03.2004 vakalat for one of the parties (partner of respondent no.1) – Thus, as on 03.06.2006 when the claim was lodged before the 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 'STM' and in that circumstance it was the*

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appropriate stage when he ought to have disclosed the same and refrained from entertaining the claim – In the background, there is a reasonable basis for the appellants to make a claim that in the present circumstance the Arbitrator would not be fair to them even if not biased – In that view, an award passed by the arbitrator was not sustainable – District Court was justified in entertaining petition u/s.34 of the Act, 1996 to set aside the award.

Allowing the appeal, the Court

HELD: 1. With regard to the contention that 'STM', Advocate ought not to have acted as the Arbitrator since he was also the counsel for the respondent No.1 in another case, the same requires consideration. Not only from the observations contained in the order of the High Court it is noticed that the said Arbitrator had appeared as a counsel for the respondent, it is also seen from the records that as per the vakalatnama dated 29.03.2004 the Arbitrator has filed the vakalat in Mesne Profit Case to which 'P', one of the partners of the respondent No.1 herein was a party. Though it is sought to be made out that the said 'P' has nothing to do with respondent No.1, as pointed out by the counsel for the appellants, the supporting affidavit for making the solemn affirmation in respect of the First Appeal No.180 of 2007 filed under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 relating to this very proceeding is made by the said 'P'. Thus, it is clear that 'STM', Arbitrator had acted as a counsel in another case for one of the parties to the dispute in the instant case. In that circumstance it is also not a case where the Arbitrator had proceeded in the matter by oversight or without having knowledge of such conflict of interest. As noticed, a legal notice had been secured to be issued on behalf of the appellants herein raising objection in that regard. Though such notice was issued on the instructions given by the father of the appellants, it is not by a rank outsider nor have the appellants disowned it to be ignored. In addition, one of the appellants had also addressed a communication dated 07.08.2006 requesting the learned Arbitrator to stop the proceedings since they had filed a petition in the High Court for appointing an independent Arbitrator which was also for the reason that present Arbitrator could not have acted. [Para 7] [1085-F-H; 1086-A-D]

A **8. The Arbitrator had taken note of the letters at Exhibits 68 and 70 as narrated in the very award passed by the Arbitrator. Despite the same, the Arbitrator has proceeded with the matter instead of staying his hands. In that background, the observations as made by the High Court to hold that the objection raised was not sustainable as it did not comply with the requirement of Section**
B **13 of the Act, 1996 is not justified. In fact, the provision as contained in Section 12 of the Act, 1996 even prior to the amendment effected on 23.10.2015 would cast an obligation for disclosure. If section 12 is kept in view, though technically as on 27.02.2004 when the storage receipt was drawn out and the**
C **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**
D **had existed, which was well within the knowledge of 'STM' and in that circumstance, it was the appropriate stage when he ought to have disclosed the same and refrained from entertaining the claim. If in that background, the decision in the case of V.*K. Dewan and Co. vs. Delhi Jal Board and Ors.* (2010) 15 SCC 717**
E **relied upon by the appellants is kept in view, it was in the fairness of things that 'STM' should not have acted as an Arbitrator. [Para 8] [1086-E-H; 1087-A-C]**

V.K. Dewan and Co. v. Delhi Jal Board and Ors. **(2010) 15 SCC 717 – relied on.**

F **Case Law Reference**

(2010) 15 SCC 717	**relied on**	**Para 8**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6960
G of 2011

From the Judgment and Order dated 30.08.2007 and 31.08.2007 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in First Appeal No. 187 of 2007

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Gagan Sanghi, Rameshwar Prasad Goyal, Advs. for the Appellants. A

Ms. Shrishti Sen, Satyajit A. Desai, Ms. Anagha S. Desai, Vasu Khera, Advs. for the Respondents.

The Judgment of the Court was delivered by

A. S. BOPANNA, J. 1. The appellants herein are before this Court assailing the order dated August 30 and 31, 2007 passed by the High Court of Judicature at Bombay in First Appeal No. 187 of 2007. The said appeal was filed by the respondent No.1 herein invoking Sec. 37(1)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as the 'Act 1996' for short). Through the said appeal the respondent No.1 herein had assailed the order dated 06.11.2006 passed by the Principal District Judge, Nagpur in MCA No. 538/2006 in the proceedings under Sec. 34 of the Act, 1996. B C

2. The brief facts are that the respondent No.1 herein owns a cold storage at Nagpur. Sri Suresh Wadhwani manages the same. The appellants herein who are the sons of Sri Bhaiyalal Jain are engaged in business as commission agents for agricultural products. In that regard they had utilised the services of cold storage during the year 2004 for keeping 50 bags of 'Shingada' which is an agricultural product. According to the appellants herein the respondent No. 1 had failed to store the goods in an appropriate manner which had caused damage to the same. The appellants therefore got issued a notice dated 18.05.2006 seeking for compensation. The respondent No. 1 herein by its reply dated 27.05.2006 not only denied the claim put forth by the appellants herein but also made counter claim. Thus, dispute arose between the parties. According to respondent No. 1 herein, the parties were governed by an arbitration clause and the parties had agreed to refer the dispute, if any, to the Arbitrator, Sri S.T. Madnani, Advocate. The said arbitration clause is contained in the very receipt issued in respect of the storage of goods. The respondent No. 1, therefore through their claim dated 03.06.2006 submitted the same before the learned Arbitrator 2nd respondent Sri. S.T. Madnani. D E F G

3. The father of the appellants herein in that background got issued a notice dated 08.06.2006 disputing the very existence of the arbitration clause and more particularly the appointment of Sri S.T. Madnani, H

A Advocate as an Arbitrator was disputed and it was contended that the said Advocate being the counsel for the respondent No. 1 and its partners in other cases cannot act as an Arbitrator in respect of the disputes to which the respondent No. 1 is a party. A copy of the same was also dispatched to the learned Arbitrator. Further, the appellants also addressed letters dated 29.07.2006 and 07.08.2006 which was taken note by the learned Arbitrator in the order sheet of the proceedings as also in the award passed. Despite the same, unmindful of such objection raised and terming it as inconsequential, the learned Arbitrator proceeded with the matter in the absence of the appellants herein and passed the award dated 08.08.2006 directing the appellants herein to pay the claim amount as ordered. The learned Arbitrator also imposed a cost of Rs.43,000/- on the appellants. It is in that light the appellants claiming to be aggrieved filed the petition under Sec. 34 of the Act, 1996 before the District Judge, Nagpur raising objection to the award, more particularly with regard to the conduct of the learned Arbitrator. The learned District Judge while appreciating the same was of the opinion that the learned Arbitrator had in fact acted as a counsel for Sri Suresh, a partner of respondent No. 1, which fact was not disclosed in terms of Sec. 12 of the Act, 1996 and also on taking note of Sec. 13 of the Act, found the objection justified and set aside the award by order dated 06.11.2006.

4. The respondent No. 1 who was aggrieved by the same had filed the appeal under Sec.37(1)(b) of the Act, 1996 to the High Court. The learned Judge of the High Court while examining this aspect of the matter was of the opinion that the objection raised with regard to Sri S.T. Madnani, Advocate acting as the Arbitrator was raised by Sri Bhaiyalalji Jain who is the father of the appellants herein and not by the appellants themselves and as such the same cannot be construed as an objection by a party to the proceedings as contemplated under Sec. 13 of the Act. Further it was held that merely because the learned Arbitrator had appeared as a lawyer in one mesne profits case for the respondent No. 1, it would not make a reasonable man believe that the Arbitrator was biased and there was a possibility that the Arbitrator would rule in favour of the respondent No. 1. It was further observed that a fair-minded person would never have thought that the learned Arbitrator was biased merely because he had appeared as a lawyer for the party to arbitration in another case. In that view by the impugned order the learned Judge of the High Court set aside the order passed in the

proceedings under Sec. 34 of the Act, 1996 and restored the award passed by the learned Arbitrator. The appellant herein is therefore before this Court in this petition.

5. Having heard the learned counsel for the parties at length, it is noticed that issues arising herein for consideration at the threshold is with regard to the existence or otherwise of the Arbitration clause governing the parties and more particularly with regard to the conduct of the Arbitrator. It is only if the said two hurdles placed at the threshold is crossed, the question of considering the merits of the claim and the correctness or otherwise of the award passed by the learned Arbitrator would arise for consideration.

6. On the issue relating to the validity of arbitration clause, the learned counsel for the appellants would contend that the clause relied upon by the respondent No.1 to raise the claim before the Arbitrator is with reference to Clause No.9 printed as the terms and conditions on the overleaf of the receipt for storage. In that view, it is contended that there is no consensus *ad idem* namely, there is no meeting of minds between the parties regarding reference of dispute to the Arbitrator and such term printed in the receipt cannot be relied upon. Though such contention is put forth the said issue need not detain this Court for long. This is for the reason that as rightly pointed out by the learned counsel for the respondent No.1, it is the very case of the appellants herein that the appellants not being satisfied with the Arbitrator named in the Arbitration Clause had filed the Petition under Section 11 of the Act, 1996 in M.C.A.No.61/2006 before the Designated Court seeking the appointment of an independent Arbitrator. Since that is the undisputed position, the appellants are estopped from raising the contrary contention at this stage. Hence, the contention in that regard is rejected.

7. With regard to the contention that Sri S.T. Madnani, Advocate ought not to have acted as the Arbitrator since he was also the counsel for the respondent No.1 in another case, the same requires consideration. Not only from the observations contained in the order of the High Court it is noticed that the said learned Arbitrator had appeared as a counsel for the respondent, it is also seen from the records that as per the vakalatnama dated 29.03.2004 the learned Arbitrator has filed the vakalat in Mesne Profit Case No.7/2004 to which Sri Prakash, one of the partners of the respondent No.1 herein was a party. Though it is sought to be

A made out that the said Sri Prakash has nothing to do with respondent No.1, as pointed out by the learned counsel for the appellants, the supporting affidavit for making the solemn affirmation in respect of the First Appeal No.180 of 2007 filed under Section 37(1)(b) of the Act, 1996 relating to this very proceeding is made by the said Sri Prakash. Thus, it is clear that Sri S.T. Madnani, learned Arbitrator had acted as a B counsel in another case for one of the parties to the dispute in the instant case. In that circumstance it is also not a case where the learned Arbitrator had proceeded in the matter by oversight or without having knowledge of such conflict of interest. As noticed, a legal notice had been secured to be issued on behalf of the appellants herein raising C objection in that regard. Though such notice was issued on the instructions given by the father of the appellants, it is not by a rank outsider nor have the appellants disowned it to be ignored. In addition, one of the appellants namely, Sri Jagdish had also addressed a communication dated 07.08.2006 requesting the learned Arbitrator to stop the proceedings since they had filed a petition in the High Court for appointing an independent Arbitrator D which was also for the reason that present Arbitrator could not have acted.

8. The learned Arbitrator had taken note of the letters at Exhibits 68 and 70 as narrated in the very award passed by the learned Arbitrator. Despite the same, the learned Arbitrator has proceeded with the matter E instead of staying his hands. In that background, the observations as made by the High Court to hold that the objection raised was not sustainable as it did not comply with the requirement of Section 13 of the Act, 1996 is not justified. In fact, the provision as contained in Section 12 of the Act, 1996 even prior to the amendment effected on 23.10.2015 F would cast an obligation for disclosure. The pre-amended sub-section (1) to Section 12 of the Act, 1996 reads as follows:

> "(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstance likely to give rise to justifiable doubts as to his G independence or impartiality."

If the above provision is kept in view, though technically as on27.02.2004 when the storage receipt was drawn out and the Arbitration Clause came into existence there was no circumstance for disclosure of

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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. If in that background, the decision in the case of **V.*K. Dewan and Co. vs. Delhi Jal Board and Ors.*** (2010) 15 SCC 717 relied upon by the appellants is kept in view, it was in the fairness of things that Sri S.T. Madnani should not have acted as an Arbitrator.

9. In the ultimate analysis since we are not adverting to the merits of the claim and in that regard since, we have not adverted to the finding recorded by the learned Arbitrator on the merits of claim we would not venture to examine with regard to the ultimate conclusion on the claim as to whether it is justified or not. However, in the above background, what is to be seen is that there has been a reasonable basis for the appellants to make a claim that in the present circumstance the learned Arbitrator would not be fair to them even if not biased. It could no doubt be only a perception of the appellants herein. Be it so, no room should be given for even such a feeling more particularly when in the matter of arbitration the very basis is that the parties get the opportunity of nominating a judge of their choice in whom they have trust and faith unlike in a normal course of litigation where they do not have such choice.

10. That apart when one is required to judge the case of another, justice should not only be done, but it should also seem to be done is the bottom line. Hence in that background, if the present circumstance is taken not, there was reasonable basis for the appellants to put forth such contention which resulted in the situation wherein they had not participated in the arbitration proceedings. If nothing else, at least propriety demanded that the learned Arbitrator should have recused in the present facts; but he has failed to do so. In that view, such an award passed by the learned Arbitrator was not sustainable and the learned District Judge was justified in entertaining the petition under Section 34 of the Act, 1996 to set aside the award. In that view, we are of the opinion that the learned Judge of the High Court of Judicature at Bombay was not justified in allowing the appeal filed under Section 37(1)(b) of the Act, 1996.

A 11. In view of the above;

(i) the judgment dated 30 and 31 of August, 2007 passed by the High Court of Judicature at Bombay, Nagpur Bench in First Appeal No.187 of 2007 is set aside;

B (ii) consequently, the judgment dated 06.11.2006 passed by the Principal District Judge Nagpur in MCA No.538/2006 setting aside the award dated 08.08.2006 is restored;

(iii) the parties are reserved the liberty of availing their remedy of arbitration in accordance with law and all contentions on merits relating to the claim/counter claim are left open.

C (iv) The appeal is allowed with no order as to costs.

Ankit Gyan Appeal allowed.