India Household And Healthcare Ltd vs Lg Household And Healthcare Ltd on 8 March, 2007

Equivalent citations: AIR 2007 SUPREME COURT 1376

Author: S.B. Sinha

Bench: S.B. Sinha

CASE NO.:
Arbitration Petition 18 of 2005

PETITIONER:
India Household and Healthcare Ltd

RESPONDENT:
LG Household and Healthcare Ltd

DATE OF JUDGMENT: 08/03/2007

BENCH:
S.B. SINHA

JUDGMENT:

J U D G M E N T S.B. SINHA, J :

This application under Sub-sections (5) and (6) of Section 11 of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act") has been filed for appointing an arbitrator on the respondent's purported failure to do so in spite of notice dated 15.04.2005.

Allegedly, an agreement was entered into by and between the parties hereto on 8.05.2004. The said agreement contained an arbitration clause being Clause 12 thereof, the relevant portion whereof reads as follows:

"12.2 In the event of any dispute or difference arising between the parties hereto or as to the rights and obligations under this agreement or as to any claim monetary or otherwise of one party to another, such dispute or difference shall be referred to arbitration of a common arbitrator, if agreed upon, otherwise to two or more arbitrators, one to be appointed by each of the parties to this agreement and such arbitration shall be governed by the Arbitration and Conciliation Act, 1996, for the time being in force. The venue for such arbitration shall be in India or as is mutually decided otherwise. Until a finality is achieved in the arbitration or litigation, the Licensor shall have no right to cancel the agreement and appoint any third party or

> enter into agreement with any party for the sale/ importation or manufacture of the products/ provision of services in the territory."

Respondent, however, contends that the said agreement was preceded by a Memorandum of Understanding dated 1.11.2003. Respondent further contends that the said purported Memorandum of Understanding and licence agreement dated 8.05.2004 are vitiated by a fraud of a very large magnitude fructified by a criminal conspiracy hatched between M/s. K.P. Jayram Pillai and Vijay R. Singh representing the petitioner and M/s. C.H. Kim and B.K. Jung representing the respondent. The petitioner - company bribed the said C.H. Kim and B.K. Jung for the purpose of creation of the aforesaid documents. They had already been convicted and sentenced to undergo imprisonment by the Korean Criminal Court. It was contended that they misused their official position to advance private benefit. There seems to be a substantial and reasonable nexus to promote personal advantage. There was furthermore no ostensible authority on their part to represent the company. The said Memorandum of Understanding also contravenes the Korean laws in terms whereof the execution thereof required the prior approval of and a duly executed power of attorney from the Representative Director and the Chief Executive Officer of the respondent which did not exist in the present case.

Respondent has also filed a suit in the Madras High Court wherein by an order dated 6.10.2005, a learned Single Judge of the said High Court directed:

> "1. That 1. India Household and Health Care Limited, through Mr. Vijay R. Singh its Managing Director 2. Mr. K.P. Jayaram C/o India Household and Health Care Ltd. and 3. Mr. Vijay R. Singh, the respondents 1 to 3 herein, their agents, men, assigns, representatives, employees or any one claiming through or under them be and are hereby restrained by an order of interim injunction until further orders of this Court directly or indirectly acting on the so called MOU dated November 1, 2003, the License Agreement and the minutes dated May 8, 2004 respectively, or deriving any other benefit based upon the so called MOU, the License Agreement and Minutes, in any manner whatsoever."

The said interim order has been confirmed by an order dated 21.01.2006 stating:

> "That the order of interim injunction granted in pursuance of the order dated 06/10/2005 restraining the First, Second and Third Respondents, therein their agents, men, assigns, representatives, employees or any one claiming through or under them from directly or indirectly acting on the so called MOU dated November 1, 2003, the License Agreement and the minutes dated May 8, 2004, respectively, or deriving any other benefit based upon the so called MOU, the License Agreement and Minutes, in any manner whatsoever together be and is hereby made absolute."

This Court's attention was further drawn to the fact that in the plaint of the said suit it had categorically been stated that the private respondents therein hatched their conspiracy to defraud the respondent and for the purpose of obtaining bribes, commissions and kickbacks and in that view

of the matter the entire agreement is vitiated in law.

Mr. Dushyant Dave, learned senior counsel appearing on behalf of the petitioner, in support of this application, would submit:

(i) the execution of the agreement dated 8.05.2004 has not been denied or disputed.

(ii) The correspondences have been passed between the parties between the period 8.05.2004 and 5.02.2005 and dispute arose in regard to the use of the logo 'L.G.'

(iii) The arbitration agreement being a part of the contract, the validity or otherwise thereof can be gone into by the arbitrator in terms of Section 16 of the 1996 Act.

(iv) Once an arbitration agreement is found to exist; having regard to Section 5 thereof, no judicial authority can exercise any jurisdiction in the matter.

(v) This Court, having regard to the philosophy underlying the 1996 Act should uphold the arbitration agreement between the parties.

Mr. R.F. Nariman, learned senior counsel appearing on behalf of the respondent, on the other hand, would submit:

(i) in view of the Constitution Bench decision of this Court in SBP & Co. v. Patel Engineering Ltd. and Another [(2005) 8 SCC 618], this Court is obligated to go into the question as to whether the entire agreement is vitiated by fraud as a result whereof no valid arbitration agreement came into being.

(ii) a fraud of grave magnitude having been committed insofar as the officers representing the company had used different signatures, the entire agreement is vitiated.

(iii) The original agreement has not been produced before any court so as to compare the signatures of the persons with their original.

(iv) An order of injunction having been passed by a learned Judge of the Madras High Court on 6.10.2005, this Court should not exercise its discretionary jurisdiction.

(v) The arbitration agreement is vague as it contemplates both litigation as also an arbitration.

(vi) In any event, the applicant having not appointed its arbitrator in terms of the purported arbitration agreement, the application is premature.

(vii) As some of the disputes fall outside the scope of the arbitration agreement, this application is not maintainable.

There cannot be any doubt whatsoever that there exists a sharp distinction between the provisions of the Arbitration Act, 1940 and the 1996 Act. The philosophy of the 1996 Act is different. The 1996 Act is required to be read keeping in view the UNCITRAL Model Rules. [Pandey and Co. Builders Pvt. Ltd. v. State of Bihar and Anr. 2006 (11) SCALE 665 and Rashtriya Ispat Nigam Limited and Anr. v. Verma Transport Company (2006) 7 SCC 275] It is also no doubt true that where existence of an arbitration agreement can be found, apart from the existence of the original agreement, the Courts would construe the agreement in such a manner so as to uphold the arbitration agreement. However, when a question of fraud is raised, the same has to be considered differently. Fraud, as is well known, vitiates all solemn acts. A contract would mean a valid contract; an arbitration agreement would mean an agreement which is enforceable in law.

Before embarking upon the rival contentions noticed hereinbefore, we may notice that a 7-Judge Bench of this Court in SBP & Co. (supra) opined that an order passed by the Chief Justice or his designate under Sub-sections (5) or (6) of Section 11 of the 1996 Act is judicial in nature. It was stated:

> "39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral tribunal."

The power of this Court, therefore, no longer is an administrative power. The purported arbitration agreement is an international commercial arbitration agreement. Section 16 of the 1996 Act which is in Chapter 4 of Part I thereof may not, thus, be applicable in this case. Even if it applies, the

jurisdiction of the arbitrator to determine his own jurisdiction is on the basis of that arbitration clause which may be treated as an agreement independent of the other terms of the contract and his decision that the contract is null and void shall not entail ipso jure the validity of the arbitration clause. But, the question would be different where the entire contract containing the arbitration agreement stands vitiated by reason of fraud of this magnitude. It may be noticed that Part II of the 1996 Act contains a provision for approaching the court. Section 45 of the 1996 Act contains a non-obstante clause. A judicial authority, therefore, may entertain an application at the instance of a party which alleges that there exists an arbitration agreement whereupon judicial authority may refer the parties to arbitration, save and except in a case where it finds that the said agreement is null and void, inoperative and incapable of being performed. Section 8 of the 1996 Act, however, is differently worded.

Thus, as and when a question in regard to the validity or otherwise of the arbitration agreement arises, a judicial authority would have the jurisdiction under certain circumstances to go into the said question.

Fraud, as is well known, vitiates all solemn acts. [See Hamza Haji v. State of Kerala and Another, (2006) 7 SCC 416, Prem Singh and Others v. Birbal and Others, (2006) 5 SCC 353 and Jai Narain Parasrampuria (Dead) and Others v. Pushpa Devi Saraf and Others, (2006) 7 SCC 756] The said issue is pending consideration before the Madras High Court. Not only the parties to the agreement but also those officers who have negotiated on behalf of the respective companies are also parties therein. LG Corporation which is the owner of the LG logo is also a party therein. Therein, an order of injunction had been passed. In terms of the said order of injunction, the applicant herein was prohibited from taking any action in terms of the said agreement which would include the arbitration clause also. The order dated 21.01.2006 has become final. No appeal has been preferred thereagainst. The applicant could have filed an appropriate application for modification of the order of injunction which it did not choose to do. The doctrine of comity or amity required a court not to pass and order which would be in conflict with another order passed by a competent court of law. The courts have jurisdiction to pass an order of injunction not only under Order XXXIX, Rule 2 of the Code of Civil Procedure but also under Section 151 thereof.

This aspect of the matter has been considered in 'A Treatise on The Law Governing Injunctions' by Spelling and Lewis' wherein it is stated :

> "Sec. 8. Conflict and Loss of Jurisdiction. Where a court having general jurisdiction and having acquired jurisdiction of the subject-matter has issued an injunction, a court of concurrent jurisdiction will usually refuse to interfere by issuance of a second injunction. There is no established rule of exclusion which would deprive a court of jurisdiction to issue an injunction because of the issuance of an injunction between the same parties appertaining to the same subject- matter, but there is what may properly be termed a judicial comity on the subject. And even where it is a case of one court having refused to grant an injunction, while such refusal does not exclude another coordinate court or judge from jurisdiction, yet the granting of the injunction by a second judge may lead to complications and retaliatory action "

[See also M/s Transmission Corporation of A.P. Ltd. & Ors. v. M/s Lanco Kondapalli Power Pvt. Ltd. (2006) 1 SCC 540 and Morgan Securities and Credit Pvt. Ltd. v. Modi Rubber Ltd. 2006 (14) SCALE 267] In Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal [AIR 1962 SC 527], this Court injuncted a party from prosecuting a suit wherein power under Section 10 of the Code of Civil Procedure could not have been exercised.

A court while exercising its judicial function would ordinarily not pass an order which would make one of the parties to the lis violate a lawful order passed by another court.

Furthermore, the applicant herein has also prayed for inter alia the following reliefs:

> "c. Whether the issue of use of LG logo is a valid and tenable ground for the termination of agreements between the parties?
>
> d. Whether the Petitioner is entitled under the agreements to continue with the production of the "Products" with LG logo as agreed between the parties?"

The said prayers fall outside the arbitration agreement since LG Logo belongs to LG Corporation which is the owner of the trade mark. It is not a party to the arbitration agreement. It is allegedly has filed a separate suit. In a case of this nature, a Division Bench of this Court in Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya and Another (2003) 5 SCC 531] held:

> "Secondly, there is no provision in the Act that when the subject-matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators.
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> It was further stated :
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> "The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act. In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action, that is to say, the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed.
>
> Secondly, such bifurcation of suit in two parts, one to be decided by the Arbitral Tribunal and the other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost

> of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

We are, however, not oblivious of the fact that Sukanya Holdings (supra) has been distinguished in Rashtriya Ispat Nigam Limited and Anr. v. Verma Transport Company [(2006) 7 SCC 275]. The present case, however, is covered by Sukanya Holdings (supra).

By reason of a notice dated 15.04.2005, only a request had been made to nominate a person in Chennai with whom the respondent could "interact to agree on the arbitrator to whom the claims can be made to decide the disputes between the parties".

Applicant has not appointed its arbitrator. Respondent has also not been called upon to appoint its arbitrator by the said notice or otherwise. An application for appointment of an arbitrator, therefore, is not maintainable unless the procedure and mechanism agreed to by and between the parties is complied with.

In National Highways Authority of India & Anr. v. Bumihiway DDB Ltd. (JV) & Ors. [(2006) 9 SCALE 564], it was opined:-

> "44 The parties have entered into a contract after fully understanding the import of the terms so agreed to from which there cannot be any deviation. The Courts have held that the parties are required to comply with the procedure of appointment as agreed to and the defaulting party cannot be allowed to take advantage of its own wrong."

For the views, I have taken, it is not necessary to consider the other submissions made at the bar.

For the reasons aforementioned, this application is dismissed being not maintainable at this stage. No costs.