

M/S Salter India Private Ltd. vs Mr. Rakesh Nayyar on 25 September, 2009

Author: Rajiv Sahai Endlaw

Bench: Rajiv Sahai Endlaw

*IN THE HIGH COURT OF DELHI AT NEW DELHI

+ Arb.A. No.13 of 2008

% Date of decision: 25th September, 2009

M/S SALTER INDIA PRIVATE LTD. ...Appellant
Through: Mr P.V. Kapoor, Sr Advocate with Mr.
Jayant Kumar and Mr. Atul Sahi,
Advocates.

Versus

MR. RAKESH NAYYAR ...Respondent
Through: Mr. Ramesh Singh with Ms Bina Gupta,
Advocates.

CORAM :-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. The appellant has preferred this appeal under Section 37 (2)

(a) of the Arbitration Act, 1996 against the order dated 10th May, 2008 of the Arbitral Tribunal accepting the plea of the respondent under Section 16 of the Act; the Arbitral Tribunal held the claims raised by the appellant not arbitrable.

2. The parties hereto were parties to two agreements for employment of which the first is dated 1st

January, 1999 and the other of re-employment dated 28th January, 2002. Both the agreements provide for arbitration as under:-

"All disputes, controversies or differences which may arise between the parties hereto in relation to this agreement or for breach thereof which cannot be settled amicably by the parties shall be submitted for arbitration and finally settled under the Arbitration & Conciliation Act, 1996, by one or more arbitrator approved in accordance with the said Act.".

3. Under the aforesaid agreements the respondent was appointed and re-appointed respectively as the Managing Director of the appellant company. The claims of appellant company against the respondent were for Rs.3,19,24,987/- on account of the alleged acts of omission and commission of the respondent as the Managing Director of the appellant company.

4. It appears that the appellant before the Arbitral Tribunal also contested the right of the respondent to maintain an application under Section 16 of the Act; it was contended by the appellant that the Arbitral Tribunal having been appointed by this court on an application under Section 11 of the Act, the respondent was not entitled to maintain an application under Section 16. The Arbitral Tribunal held the respondent entitled to maintain such an application. Neither can any wrong be found with the said part of the order nor has the senior counsel for the appellant challenged the said part of the order.

5. The Arbitral Tribunal has held the claims of the appellant company against the respondent not arbitrable for the reasons:

(i) that the employment agreement provides that upon breach by the respondent of the terms & conditions of the agreement, the appellant could withhold the salary of the respondent and/or terminate the employment of the respondent. The Arbitral Tribunal has held that the parties had agreed for the remedy for the breach of the agreement; that the omissions and commissions on the part of the respondent forming the basis of the claim of the petitioner were the same as the breach of the agreement by the respondent, the remedy wherefor to the appellant was for withholding the salary and terminating the employment; that the employment of the respondent with the appellant had admittedly come to an end; that the appellant company prior to the respondent ceasing to be the Managing Director of the appellant had never notified the respondent that he was in breach of the contract;

(ii) that the disputes raised by the appellant are not in relation to the employment agreement and thus not covered by the arbitration agreement; that the claims of the appellant against the respondent being de hors the agreement, the remedy of the appellant against the respondent was not of arbitration as provided in the agreement but under the Company Law;

(iii) that the claims of the appellant company against the respondent were inter-alia for misuse by the respondent of his position as Managing Director of the appellant -

the remedy therefor is under the statutory law;

(iv) that the claims of refund of salary, loss of goodwill and loss of profit were de hors the agreement because under the agreement the claim of the appellant could only be of withholding the salary and terminating the employment of the respondent.

The Arbitral Tribunal thus held the claims of the appellant to be not maintainable, not arising out of or in relation to the employment agreements and thus not within the jurisdiction of the Arbitral Tribunal. Though the respondent had also urged the claims to be barred by time, the Arbitral Tribunal held that it was not necessary to go into the said question.

6. The senior counsel for the appellant relying upon *Renusagar Power Co. Ltd. Vs. General Electric Co.* AIR 1985 SC 1156 contended that the arbitration clause aforesaid is very wide and that expressions such as "arising out of" or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relating to" the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect of the arbitration agreement. The senior counsel took pains to take this court through the copy of the claim petition to demonstrate that it could by no stretch of imagination be said that the claims of the appellant against the respondent are not in relation to the employment agreement between the parties. It is further contended that the merits of the claims are irrelevant under Section 16 and the plea of the claims being barred by time is also on the merits of the claims.

7. Per contra, the counsel for the respondent has urged three propositions. Firstly, it is contended that the parties have in the present case recorded accord and satisfaction. Reliance is placed on *National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd.* (2009) 1 SCC 267 to contend that the arbitration perishes on such accord and satisfaction. It is contended that the respondent was appointed as the Managing Director of the appellant company in his capacity as nominee of one of the joint venture partners and had stepped down from the office of the Managing Director upon the said joint venture partner selling its stake in the company to another joint venture partner; that no such claims as now being made were made by the appellant company till then or in fact till the respondent made claim for his unpaid dues to the appellant company. It is contended that the claims of the appellant company were in fact a counterblast. Reliance is placed on para 37 of *SBP & Co. Vs Patel Engineering Ltd* AIR 2006 SC 450 to contend that such plea would fall in the category of long dead claims and would be entertainable under Section 16 of the Act. Secondly, it is contended that the agreement provided for consequences of the respondent not performing his duties and the claims of the appellant are beyond the said consequences. Reliance in this regard is placed on *Dadarao Vs. Ramrao* (1999) 8 SCC 416 where the Supreme Court held that where an agreement for sale provided for payment of double the amount of earnest money by the seller to the purchaser in the event of refusing to sell, the only remedy of the purchaser was to recover double the amount of earnest money and the relief of specific performance could not be claimed. On the same proposition reliance is also placed on *Surjit Kaur Vs. Naurata Singh* (2000) 7 SCC 379. It is

contended that the arbitrator cannot go beyond the terms of contract between the parties. Lastly, it is contended that the disputes raised by the appellant in its claim petition were not covered by arbitration. It is contended that the claims are de hors the contract.

8. As far as the first two of the aforesaid propositions urged by the counsel for the respondent are concerned, the Arbitral Tribunal has not dealt with the plea of accord and satisfaction. There is absolutely no discussion whatsoever in the order impugned in that respect. Thus, it would not be appropriate to consider the same. As far as the other contention of the claimant, being that the claims are beyond the consequences provided in the agreement for breach thereof by the respondent would not in my opinion fall within the ambit of Section 16 of the Act. Section 16 of the Act is not intended as a summary procedure for disposal of claims. Section 16 of the Act enables the arbitral tribunal to rule on its jurisdiction i.e. whether the claims or the disputes raised before it are arbitrable or not. A plea on merits disentitling the claimant to the relief claimed would not make the said claim non-arbitrable and thus cannot be entertained under Section 16 of the Act. The Arbitral Tribunal, if finds the claims barred by any law or not maintainable for any other reason, on merits of the claim or not requiring any further adjudication/investigation, can dismiss the same (unless the same is contrary to procedure agreed by the parties or laid down by the arbitral tribunal) but such dismissal cannot be in the garb of Section 16 of the Act.

9. The counsel for the respondent had contended that sub Clause (iv) of Clause 2 of Section 34 makes decision of the Arbitral Tribunal holding claims to be beyond the scope of submission to arbitration a ground for setting aside of the award. It was contended that thus the appeal would not be maintainable under Section 16 of the Act in as much as the finding of the Arbitral Tribunal is within the ambit of Section 34 2 (iv) Supra. However, the Arbitral Tribunal having made the order on an application under Section 16, it is not open to the respondent to contend that the order is not under Section 16 and the remedy of appeal is not available to the appellant.

10. That brings me to the core question for adjudication in this appeal i.e. whether the Arbitral Tribunal is right in holding the disputes to be not arbitrable. The Supreme Court in A.M. Mair & Co. Vs. Gordhandass Sagarmull AIR 1951 SC 9 held that the test to determine whether a claim in dispute is covered by arbitration clause in a contract is whether it is necessary to have recourse to the contract to settle the dispute that has arisen. The same principle has been reiterated in Tarapore and Company Vs. Cochin Shipyard Ltd. AIR 1984 SC 1072 and in Rajasthan State Mines & Minerals Limited Vs. Eastern Engineering Enterprises AIR 1999 SC 3627. The test formulated is that if in settling a dispute, a reference to the contract is necessary, then such a dispute would be covered by the arbitration clause.

11. In the present case, it cannot be disputed that the claims of the appellant whether maintainable or not were arising out of the relationship with the respondent as Managing Director of the appellant. The said relationship emanated from the agreements aforesaid providing for arbitration. It cannot thus possibly be said that the said disputes, controversies or differences are not in relation to the agreement.

12. The reasoning given by the arbitrator that since the reliefs claimed for breach of agreement were different from the remedies provided under the agreement for such breach, in my view is not a reasoning under Section 16 of the Act. The same would, in the light of wide amplitude of arbitration clause, not make the dispute non- arbitrable even if the same is found by the arbitral tribunal to be a good reasoning for defeating the claim on merits.

13. I may notice that the courts in relation to construction contracts have held the contractor entitled to maintain a claim before arbitrator for escalation under the general principles of law and beyond the escalation provided for in the contract. Reference in this regard can be made to P.M. Paul Vs. Union of India 1989 Supp (1) SCC 368 and Food Corporation of India Vs. A.M. Ahmed & Co. JT 2006 (10) SCC 62.

14. There is another aspect of the matter. The remedies provided in the agreement and on the basis whereof the Arbitral Tribunal has held the remedy claimed to be non-arbitrable were for a situation when the breach came to the knowledge of the appellant during the currency/operation of the agreement. It is only then that the question of termination or withholding the service can arise. However, if the appellant is able to satisfy that it learnt of the breach on the part of the respondent after the determination of service or that the loss occurred to the appellant for action of the respondent during the term of his employment, the appellant in general law would be entitled to claim damages/compensation from the respondent and such dispute would be in relation to the employment agreement only and cannot be adjudicated de hors the agreement.

15. The other reasoning given by the Arbitral Tribunal of the appellant having not given any notice or of having filed the claim as an afterthought are also outside the ambit of Section 16 of the Act and on the merits of the claim.

16. I am, therefore, unable to agree with the Arbitral Tribunal, of the claims of the appellant against the respondent being not in relation to the agreement containing the arbitration clause and hold the same to be arbitrable.

The appeal is accordingly allowed. The order impugned is set aside. The application of the respondent under Section 16 of the Act is dismissed.

The parties to approach the Arbitral Tribunal for adjudication of the claims of the appellant in accordance with law. Nothing contained herein should be deemed to be an expression on the merits of the dispute and which shall remain open for adjudication by the arbitrator.

RAJIV SAHAI ENDLAW (JUDGE) September 25, 2009 PP