

Ion Exchange (India) Ltd. vs Panasonic Electric Works Co. Ltd. And ... on 23 December, 2014

Author: Rajiv Sahai Endlaw

Bench: Rajiv Sahai Endlaw

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 23rd December, 2014.

+ ARB.P. 662/2014

ION EXCHANGE (INDIA) LTD. Petitioner
Through: Mr. Amey Nargolkar and Mr.
Aaditya Vijaykumar, Advocates.

Versus

PANASONIC ELECTRIC WORKS CO. LTD.
AND ANR Respondents
Through: None.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petitioner has filed this petition under Section 11(6)(a) of the Arbitration and Conciliation Act, 1996 (Arbitration Act) impleading Panasonic Electric Works Co. Ltd., Japan (hereinafter called „Panasonic Japan) as respondent No.1 and Panasonic India Pvt. Ltd. (hereinafter called „Panasonic India) as respondent No.2 thereto, and pleading:

- (i) that Panasonic Japan through the Panasonic India, in the year 2010, approached the petitioner to discuss the possibility of a business venture / relationship and alliance;
- (ii) that during the course of negotiation, a Mutual Non-Disclosure Agreement dated 6th December, 2010 was executed between the

ARB.P.No.662/2014 Page 1 of 12
petitioner and Panasonic India, whereunder each of them agreed that
any confidential information exchanged during the course of

negotiation will not be used for any other purpose;

(iii) that thereafter on 14th September, 2011 two agreements were executed between the petitioner and "the respondents"; one being a Sales Agreement and other being a Development Agreement;

(iv) that under the Development Agreement, the petitioner was to develop the three models of water purifiers in terms of Annexure A to the agreement and once the water purifier was developed, the petitioner was required to manufacture the said water purifiers, as per the Sales Agreement;

(v) that the Development Agreement also contained a dispute resolution system by which all disputes, differences or controversies were to be finally settled under the London Council of International Arbitration (LCIA) India Arbitration Rules, with the seat of arbitration being New Delhi, India;

(vi) that the Sales Agreement also contained an arbitration clause which mandated that all disputes and differences would be mandatorily resolved by arbitration;

ARB.P.No.662/2014

Page 2 of 12

(vii) that the Sales Agreement was to come into effect only, once the product was developed and approved by the respondents;

(viii) that though the petitioner over the next two years, at a huge cost and expense, developed the product as per the Development Agreement, inspite of breaches by the respondents of their part of the Development Agreement, but subsequently, in or about November, 2012, the petitioner became aware of the dishonest intentions of the respondents, when the respondents failed to shift the manufacturing

unit to India;

(ix) that in May, 2013, a meeting was held between the parties to work out the costing and on 28th May, 2013 it was decided to terminate "the previous agreement and the petitioner was required to submit a revised costing"; it was further agreed that if the revised costing was agreed to between the parties, then the parties will execute a fresh agreement and the petitioner will not be entitled to development costs, if revised costing was not agreed to, then the petitioner would be entitled to be compensated;

(x) that the parties could not arrive at a consensus as to the revised costing and "the respondents wrongfully terminated the Sales

ARB.P.No.662/2014
Agreement";

Page 3 of 12

(xi) that "the respondent is liable to pay a sum of Rs.90,21,930/- towards non-payment of certain invoices and development costs, besides being liable to pay unliquidated damages and would be further liable to pay Rs.1,59,41,517.84 to VSE, for the costs incurred by it";

(xii) that the petitioner filed a petition under Section 9 of the Arbitration Act being O.M.P. No.150/2014;

(xiii) that "the respondents are liable to pay the petitioner and its sub-contractors a sum of Rs.2.5 crores, besides unliquidated damages";

(xiv) that the petitioner vide its letter dated 9th August, 2014 to the respondents invoked the arbitration clause;

(xv) that a vague reply was sent by the respondent No.1;

(xvi) that another notice dated 17th November, 2014 was got sent by the petitioner, calling upon the respondents to appoint an Arbitrator

mutually;

(xvii) that however the respondents failed to appoint an Arbitrator;
(xviii) that the seat of arbitration being at New Delhi, India and
otherwise under Section 42 of the Arbitration Act, this Court has

ARB.P.No.662/2014
jurisdiction.

Page 4 of 12

2. A perusal of the documents filed by the petitioner, showed:

- (a) that the Mutual Non-Disclosure Agreement dated 6th
December, 2010 supra was between the petitioner and Panasonic
India, as specifically pleaded by the petitioner also; though the same
provided for arbitration of a sole Arbitrator to be appointed with
mutual consent of parties, but the said agreement was for the period
of negotiation only;
- (b) though the petitioner had vaguely pleaded that both the
agreements dated 14th September, 2011 were between the petitioner
and the "respondents" but one of the agreements dated 14th
September, 2011 i.e. the Sales Agreement, was between the petitioner
and the Panasonic India and though executed in Mumbai, provides for
arbitration of an Arbitral Tribunal of three Arbitrators, of which one
is to be appointed by each of the parties and the third by the
Arbitrators nominated by the petitioner and Panasonic India, with the
venue of arbitration at New Delhi and in accordance with the
Arbitration Act; and,
- (c) the other agreement dated 14th September, 2011 titled
"Development Agreement" is between the Panasonic Japan on the

ARB.P.No.662/2014

Page 5 of 12

one hand and the petitioner on the other hand and provides for the resolution of disputes under the LCIA India Arbitration Rules, with the number of Arbitrators being one and the seat or legal place of arbitration being New Delhi, India and the agreement being governed in accordance laws of India.

3. The matter came up first before this Court yesterday i.e. 22 nd December, 2014, when it was enquired from the counsel for the petitioner, whether not the mutual Non-Disclosure Agreement has ceased to exit / operate upon the two agreements dated 14th September, 2011 being signed and whether not the arbitration clause contained in the Mutual Non-Disclosure Agreement is now of no avail.

4. The counsel for the petitioner replied in the affirmative.

5. It was next enquired from the counsel for the petitioner, whether not the disputes for adjudication whereof the petitioner is now seeking appointment of Arbitrator, are under the two separate agreements, one between the petitioner and Panasonic India and other between the petitioner and the Panasonic Japan and whether not Panasonic India and Panasonic Japan are separate legal entities.

6. The counsel for the petitioner again replied in the affirmative.

ARB.P.No.662/2014

Page 6 of 12

7. It was next enquired from the counsel for the petitioner, as to how one petition under Section 11(6)(a) has been filed with respect to two different agreements executed by the petitioner with two different entities and providing for different modes of arbitration. It was yet further enquired, as to what were the LCIA India Arbitration Rules (the same have not been filed by the petitioner) and whether the petitioner thereunder has taken any steps for invoking the arbitration and as to whether without taking the said

requisite steps, petitioner can file a petition under Section 11(6) of the Act.

It was yet further enquired, whether not the arbitration under the Development Agreement with Panasonic Japan is an international commercial arbitration within the meaning of Section 2(1)(f) of the Arbitration Act.

8. The counsel for the petitioner though agreeing with each of the aforesaid, contended that the disputes under the two agreements are intermingled and common and having two arbitration proceedings before different Arbitral Tribunals would unnecessarily increase the costs, to the prejudice of the petitioner, and thus the petitioner has filed this petition to have a common Arbitral Tribunal appointed for adjudication of disputes under both the agreements and for adjudication of claims of the petitioner

ARB.P.No.662/2014

Page 7 of 12

against both, Panasonic India and Panasonic Japan. Reliance in this regard was placed on paras 65, 66 and 67 of Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc. (2013) 1 SCC 641 and on the order dated 18th May, 2012 of a Co-ordinate Bench of this Court in ARB.P. No.69/2012 titled GMR Ambala Chandigarh Expressways Pvt. Ltd. Vs. National Highways Authority of India.

9. However, a perusal of the judgment aforesaid showed that in Chloro Controls (I) (P). Ltd. supra, the Supreme Court observed that though normally arbitration takes place between persons who have been parties to both, the arbitration agreement as well as the substantive contract underlining that agreement but it does occasionally happen that the claim is made against or by someone who is not originally named as a party and though the same creates some difficult situations, but they are not absolute obstructions to the law / arbitration agreement and arbitration is possible

between a signatory to an arbitration agreement and a third party, though the onus is heavy to show that such third party is claiming through or under the signatory party as contemplated under Section 45 of the Arbitration Act. It was further held that though the scope of an arbitration agreement is limited to the parties who entered into it but in certain cases the "Group of

ARB.P.No.662/2014

Page 8 of 12

"Companies Doctrine" has also been applied and a non-signatory could be subjected to arbitration provided these transactions with group of companies and there was a clear intention to bind both, the signatory as well as the non-signatory parties. It was further held that the intention of the parties is a very significant feature which must be established before the scope of arbitration can be said to including the signatory as well as the non-signatory parties. As far as GMR Ambala Chandigarh Expressways Pvt. Ltd. supra is concerned, the same is a consent order and thus cannot be used as a precedent.

10. It was thus further enquired from the counsel for the petitioner, as to how the judgment of the Apex Court in Chloro Controls (I) (P). Ltd. supra could be said to be applicable in the present situation, where the petitioner, on the same day entered into two separate and distinct agreements with two different companies, even if belonging to the same group, and providing separate mechanism for resolution of disputes. It was enquired, whether not the same was counter indicative of the parties having intended as aforesaid. It further appears that Section 45 of the Arbitration Act, to which reference was made by the Supreme Court, being in Part II of the Act relating to enforcement of foreign awards, may not be applicable in the present case

ARB.P.No.662/2014

Page 9 of 12

which as per Section 2(2) of the Act is governed by Part I of the Arbitration Act which applies where the place of arbitration is in India, as is the case under both the agreements aforesaid.

11. The counsel for the petitioner yesterday sought an adjournment to today, stating that the respondents will be approached to find out whether they are agreeable to a composite arbitration under both the agreements. Accordingly, the matter was adjourned to today.

12. The counsel for the petitioner today informed that the respondents are not agreeable to a composite arbitration under both the agreements and withdrew the petition with liberty to take separate steps under the two separate and distinct agreements. However, later on, the counsel mentioned the matter and stated that an order on merits may be made on this petition, to enable the petitioner to approach the Supreme Court which may, in exercise of its jurisdiction under Article 141 of the Constitution of India, order for a composite Arbitral Tribunal.

13. This Court having been vested the power to appoint the Arbitrator under Section 11 of the Arbitration Act, is bound thereby and cannot appoint an Arbitrator otherwise than as prescribed therein. Vide Section 11(2), the parties are free to agree on a procedure for appointing the

ARB.P.No.662/2014

Page 10 of 12

Arbitrator or Arbitrators; failing such agreement, Section 11(3) provides that in an arbitration with three Arbitrators, each party shall appoint one Arbitrator, and the two appointed Arbitrators shall appoint the third Arbitrator and Section 11(4) provides that upon failing of either party to appoint an Arbitrator, the appointment shall be made by the Chief Justice or any person designated by him; Section 11(5) provides that failing any agreement under Section 11(2), in an arbitration with sole Arbitrator, if the

parties fail to agree on the Arbitrator, the sole Arbitrator shall be appointed by the Chief Justice or his designate. As per the said procedure, the petitioner, for appointment of the sole Arbitrator under the Development Agreement, governed by the LCIA India Arbitration Rules, is required to approach LCIA i.e. London Council of International Arbitration and as per the Sales Agreement is required to nominate an Arbitrator and call upon Panasonic India to nominate its Arbitrator and neither of which steps have been taken by the petitioner. The intention of the parties in the present case, clearly was that the disputes if any of the petitioner with Panasonic India and / or Panasonic Japan be adjudicated by separate mechanism with the two, even if belonging to same group, being not party in each others disputes. What the petitioner called upon the respondents jointly to do vide

ARB.P.No.662/2014

Page 11 of 12

the notices preceding the petition, is to agree on a sole Arbitrator under both the agreements.

12. The petition is thus clearly misconceived. This Court, as the designate of the Chief Justice of this High Court, in exercise of powers under Section 11, is not empowered to grant the relief claimed.

13. Before parting, mention may be made of the judgment of the Division Bench of this Court (reported as Ion Exchange (India) Ltd. Vs. Panasonic Electric Works Co. Ltd. 208 (2014) DLT 597) in a reference made by the learned Single Judge in the Section 9 petition preferred by the petitioner, though the counsel for the petitioner chose not to refer thereto or place on record copy thereof and holding that this Court has territorial jurisdiction. Though, from the judgment, the Section 9 petition appears to have been preferred with respect to both agreement, but the question as considered above does not appear to have been considered therein.

14. Accordingly, the petition is dismissed. The petitioner of course will have liberty to take appropriate steps for invoking arbitration in accordance with the two agreements.

No costs.

RAJIV SAHAI ENDLAW, J.

DECEMBER 23, 2014/bs (corrected and released on January 05, 2015)