

Mr. Nilesh Shejwal vs Agrowon Agrotech Industries Private ... on 5 January, 2024

Author: Bharati Dangre

Bench: Bharati Dangre

2024:BHC-AS:1296

(42)J-coarp-

rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
COMMERCIAL ARBITRATION PETITION NO.14 OF 2022

Nilesh Shejwal]	..	Petit
vs.			
Agrowon Agrotech Industries Pvt. Ltd.]	..	Respo

Mr.Shavez Mukri i/b A & G Legal Associates for the Petitioner. Mr.Vishwajit Sawant, Senior Advocate and Prabhakar Jadhav for the Respondent.

CORAM : BHARATI DANGRE, J DATE : 5th January, 2024.

P.C. 1] The Commercial Arbitration Petition filed by the Petitioner, Chief Executive Officer and Director of the Respondent-Company, seek appointment of an Arbitrator to adjudicate the disputes, differences, claims etc. between the parties, out of the Employment Agreement dated 23.08.2019.

I have heard Mr. Shavez Mukri for the Petitioner and senior Advocate Mr. Vishwajit Sawant, for the Respondent.

It is the case of the Petitioner that he alongwith his brother Naresh Shejwal had formed a company Krushiking Agrotech Industries (42)J-coarp-14-2022.doc Pvt. Ltd. for providing services in the field of software and software enabled applications for farmers, villages, media and related activities. On coming into contact with Mr. Abhijit Pawar, the Managing Director of Sakal Group, who offered to buy out the company belonging to the Petitioner, a Share Purchase Agreement was entered on 23.08.2019 and the nomenclature of the company was changed to 'Agrowon Agrotech Industries Private Limited'. Similarly, the Petitioner also executed a Deed of Assignment on the same day in favour of Krushiking Agrotech Industries Pvt. Ltd. thereby assigning all the ownership rights,

trademark, copyrights as well as all other intellectual property rights.

In the backdrop of the aforesaid arrangement, the Petitioner came to be appointed as Chief Executive Officer of Krushiking Agrotech Industries Pvt. Ltd. vide Letter of appointment dated 23.08.2019, setting out the remuneration as well as various terms and conditions. The Employee Agreement was also executed at Pune on 23.08.2019 with the present Petitioner, pursuant to his appointment as Chief Executive Officer with effect from 23.08.2019, on separate terms contained in the Letter of Appointment.

The said Agreement under Clause 19 provide an Agreement for dispute resolution and the clause reads thus :

(42)J-coarp-14-2022.doc "All disputes, controversies or claims arising out of or in relation to this Agreement or the validity, interpretation, breach or termination thereof, including claims seeking redress or asserting rights under applicable law, shall be subject to the provisions of this clause, be resolved and finally settled by arbitration by a sole arbitrator in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

The arbitration proceedings shall be conducted in English language. The arbitration proceedings shall be conducted at Pune. The arbitrator shall apply this Agreement according to its terms and pass a reasoned award. The Parties agree to be bound by any award or order resulting from any arbitration conducted hereunder. All the disputes for this agreement shall be resolved subject to jurisdiction at Pune Courts." 2] It is the specific case of the Petitioner that the in pursuance to the aforesaid arrangement between the Parties, the Petitioner was actively involved with the day to day business of the Company and was conducting his duties with utmost honesty and integrity. But to his utter dismay, on 22.10.2021, the Petitioner was restrained and not allowed to attend the office on the pretext that some irregularities were found in the functioning of the Company. The Petitioner was also forcibly deprived of his mobile phone and his Savings Account password was changed, which constrained him to lodge a complaint before the concerned authorities. It is his specific case that he was also forced to (42)J-coarp-14-2022.doc tender his resignation as the Audit was in progress, but as soon as it was concluded, the Petitioner withdrew his resignation by email dated 15.02.2022 and requested for release of his pending salary and permission to serve for the remainder term.

3] As a counterblast action, the Respondent issued notice of termination of contract dated 27.12.2021, by posting it on 16.02.2022, which attribute that on receipt of audit report, the Petitioner is found guilty of misappropriation of funds, wrongful use of company brand and breach of trust/contract and, therefore, it was decided to discontinue his employment forthwith. It is also stipulated that he shall be relieved from the employment with effect from 27.12.2021, on the ground of loss of confidence and faith.

Not only this, a complaint was also lodged against the Petitioner at Chatushrangi Police Station, which resulted into registration of CR No.95/2022 dated 19.03.2022, invoking offence punishable

under Section 409, 420, 477A of the Indian Penal Code.

The Petitioner has sought protection from arrest from the Sessions Court at Pune.

4] Pursuant to the termination, a grievance was raised by the Petitioner for illegally terminating his services and the Petitioner addressed a notice to the Respondent on 06.04.2022 alleging that (42)J-coarp-14-2022.doc termination was in violation of the principle of natural justice and in fact is received by him 20.02.2022, though his termination is contemplated since 27.12.2021. Apart from this, the termination was clamped as vague, without furnishing any details and it was contested on the ground that the allegations levelled were false, frivolous and concocted and since the termination was illegal and in breach of the terms of the Employment Agreement, he was entitled to complete his terms of employment of 5 years as per the contract or otherwise he is entitled to a remuneration as agreed for the said terms of 5 years. The notice set out that as on date of issuance of notice, he was entitled for an amount of Rs.1,08,00,000/- towards his salary and variables as per the terms of Employment Agreement.

The notice, therefore, sought revocation of the termination letter and for payment of remuneration for his entire tenure as per the Contract of employment alongwith the arrears.

5] The notice was replied on 04.05.2022 denying the allegation that the termination was illegal and the claim towards salary and variables was specifically denied. On the other hand, the Respondent also staked the claim of damages and reserve its rights to claim the same once the damages are assessed and to initiate further appropriate action.

(42)J-coarp-14-2022.doc 6] By notice dated 10.05.2022, the Petitioner invoked arbitration , in the wake of Clause 19 of the Agreement since the dispute had arisen between the parties, in the wake of termination notice of his services, which according to him was illegal and in breach of the terms of Agreement.

The invocation of the arbitration is contested by the Respondent through its communication dated 20.05.2022, by raising a plea that the issue involved, is not arbitrable and no assent was accorded for appointment of an Arbitrator, which has constrained him to approach this court.

7] Opposing the appointment of the Arbitrator, the learned senior counsel Mr. Vishwajeet Sawant would submit that the dispute between the parties is not arbitrable since an offence is registered against the Petitioner under Section 409, 420 and 477 of IPC as the Petitioner who was working as CEO of the Respondent in collusion of other employees of the Respondent, has defrauded it by purchasing items/materials from various vendors, which were found to be of substandard quality and purchased at a higher price and thus he has made unlawful gain for himself from the fraudulent acts.

It is the submission of Mr. Sawant that as the CEO of the company, the Petitioner ought to have acted in the interest of the Respondent, but instead in collusion with other companies viz.

(42)J-coarp-14-2022.doc Cornnext Agri Products Pvt. Ltd, M/s. Renisons Infra and Energy Pvt, Ltd., M/s. PVG Enterprises etc. he had defrauded the Respondent in transactions relating to purchase of computer systems, television sets, agri products, etc. Mr. Sawant would specifically submit that these entities are not parties to the arbitration Agreement and hence there cannot be full and complete adjudication of the disputes and the grievances attempted to be raised by the Petitioner and it is nothing but an attempt on his part to scuttle a complete enquiry into the facts, alleged by the Respondent by resorting to the mechanism of arbitration.

Apart from this, the learned counsel would submit that the Petitioner had voluntarily resigned on 22.10.2021 and his resignation was accepted and as such the employment Agreement executed on 23.08.2019 has come to an end, hence no Arbitrator can be appointed. 8] The learned counsel has placed reliance upon the decision in the case of N.N. Global Mercantile Pvt.Ltd. vs. Indo Unique Flame Ltd. 2021 SC OnLine SC 13, and in specific Para 100, to submit that there exist clear distinction between the cases where there are allegations of serious fraud and fraud simplicitor and the Court may refuse to make reference to arbitration in cases where there are serious allegations of fraud, and when allegations of fraud are so complicated, it becomes absolutely essential that such complex issues shall be decided only by (42)J-coarp-14-2022.doc Civil Courts on appreciation of voluminous evidence. According to him, as per the Apex Court, these shall include those where cases there are serious allegations of forgery or fabrication of documents.

I am unable to find substance in the arguments of Mr. Sawant. The issue of arbitrability of fraud has been the focus of various decision of the Apex Court and it is trite position of law that a reference to arbitration, in the wake of valid existing arbitration clause is imperative unless the Arbitration Agreement is found to be invalid. It is a well recognized principle that certain categories of disputes which are of public nature are not capable of adjudication and settlement by arbitration, which is the private forum constituted by consent of parties.

The Apex Court in the case of A. Ayyasamy vs. Paramasivam & Ors., (2016) 10 SCC 386, laid down a twin test be followed i.e. 1] Does the plea of fraud permeate the entire contract and above all the Agreement of Arbitration rendering it void or 2] whether the allegations of fraud touch upon the internal affairs of the parties interse having no implication in public domain.

9] Undisputedly, the disputes relating to rights in rem are required be adjudicated by Courts and/or statutory tribunal as they are the right exercisable against the world at large and it create a legal status. A right in rem is not arbitrable by private tribunal constituted by consent of (42)J-coarp-14-2022.doc parties, whereas the action in personem determine the rights and interest of the parties, to the subject matter of the disputes which are arbitrable.

The broad categories of disputes which are considered to be non arbitrable are specifically highlighted in the decision of the Apex Court in case of Vidya Drolia vs. Durga Trading Corporation, (2021) 2 SCC 1 and the penal offences which are visited with criminal sanction; offences pertaining to bribery/corruption; matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody and guardianship matter, which pertain to the status of the person; testamentary matters which pertain to disputes relating to validity of a Will, grant of probate etc. are

some instances, which are to be adjudicated by Civil Courts. Thus disputes of non arbitrability and arising out of criminal offence, are admittedly, not arbitrable.

Though Mr. Sawant has relied upon the decision in case of NN Global (Supra) which has carefully outlined the position of law as regards the allegations of fraud being meted out and whether in such a scenario, the dispute would be arbitrable, the observations in the authoritative pronouncement in Para 100 deserve a reproduction ;

"100. The doctrine of separability has been statutorily recognized under the domestic arbitration regime in Singapore through Section 21 of the Singaporean Arbitration Act, 2001. The (42)J-coarp-14-2022.doc provision is that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract." The separability presumption has been further explained by the Singapore High Court in BNA v. BNB. The High Court observed that the "parties intend their arbitration agreement to remain effective if a provision of the substantive contract into which it is integrated could, in certain circumstances of fact or law, operate to render their arbitration agreement invalid. " Thus, the Singapore High Court held that the purpose of the separability presumption is to insulate an arbitration agreement from invalidity that may arise from a challenge to the substantive contract."

The further jurisprudence on the aspect of fraud is succinctly worded as under :

"110. In National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Co., the issue before this Court in an application under Section 11 was whether an arbitration clause comes to an end if the contract containing such clause is repudiated. While answering this in negative, this Court observed that even if the underlying contract comes to an end, the arbitration agreement contained in such contract survives for the purpose of the resolution of disputes between the parties. Similarly, in P Manohar Reddy & Bros. v. Maharashtra Krishna Valley Development Corp., 114 this Court referred to Buckeye Check Cashing Inc. (supra) to observe that an arbitration agreement contained in an underlying contract is a collateral term which may survive the termination of the contract."

(42)J-coarp-14-2022.doc In para 116 the conclusion derived and recorded is that the ground on which the fraud was held to be non arbitrable earlier was that it would entail voluminous and extensive evidence and would be too complicated to be decided in the arbitration. However, in contemporary arbitration practice, arbitral tribunals are required to traverse through volume of material in various kinds of disputes and therefore the ground of fraud is not arbitrable an archaic view has now become obsolete and deserve to be discarded. A clear word of caution, however, expressed is as under, "However, the criminal aspect of fraud, forgery or fabrication, which would be resulted with penal consequences and criminal sanctions can be adjudicated only by a Court of law, since it may result in conviction, which is in the realm of public law."

10] In the wake of aforesaid position of law, the objection of Mr. Sawant that the present dispute raised by the Petitioner is non arbitrable is not a correct reading of the position of law propounded by the Apex Court on the ground when fraud is involved it becomes non arbitrable, as per Para 116 of the Judgment relied upon by him. 11] The Petitioner has invoked arbitration, being aggrieved by the termination of his services by the Respondent on the alleged ground of (42)J-coarp-14-2022.doc misappropriation of funds, breach of contract/trust and on the contrary, it is the Petitioner who allege that the termination of contract dated 27.12.2021 is clearly contradictory to the Employment Agreement and it is in clear violation of the principles of natural justice. According to the Petitioner, the service contract contemplated termination on occurrence of the events stipulated therein and upon the "cause being shown", which is stipulated to be admission of any criminal proceedings in a Court and not obtaining any interim order or bail within period of 3 months or any conviction for an offence.

The dispute is evident between the parties as it is the case of the Respondent that the Petitioner has submitted his resignation, but the claim is contested by alleging that it was a forced termination and in any case subsequent to that there is termination of contract by the employer and it is alleged to be in breach of the 'Employment Agreement'. The claim of the Petitioner is about he being permitted to serve the remainder of his term, by setting aside the termination as the Employment Contract contemplated 5 years term, with the clause for termination to be effected only in the circumstances and the manner prescribed in the contract.

Whether the Petitioner is entitled for his claim, of being continued in service or not is ultimately the dispute which arises out of the Employment Agreement and though Mr. Sawant would vehemently (42)J-coarp-14-2022.doc submit that the employer has already initiated criminal proceedings against the Petitioner, I see no difficulty in justifying the termination before the tribunal, if at all, it is permissible to show a 'cause' but one thing is evidently clear that the dispute only relate to the contract of employment and the consequences flowing therefrom.

The Petitioner may face the charge in the criminal prosecution, and it may also have a repercussion in determining whether the termination was justified or not but filing of criminal proceedings by itself will not make the dispute that has arisen between the parties, which is set out in the notice invoking arbitration, to be a non arbitrable dispute.

The argument of Mr. Sawant, that in arbitration proceedings, the Respondent will have to disclose its stand upon the alleged charges which are levelled in the criminal proceedings, is not a valid and sufficient ground to decline arbitration, which is limited to employment agreement and the justiciability of the termination of the Employment Agreement.

It is informed that the FIR filed is presently under investigation and no charge sheet is yet filed and it may take its own course. However, it is not the case of the arbitration agreement itself being vitiated on account of fraud or an allegation of fraud when the Court can refuse its reference to an Arbitrator. Nonetheless the criminal (42)J-coarp-14-2022.doc aspect of fraud, forgery or fabrication may be visited with criminal consequences, but a claim for salary/remuneration arising out of Employment Agreement is definitely an arbitrable claim and the objection raised by Mr. Sawant

about the dispute raised by the Petitioner being non arbitrable.

12] For the reasons recorded above, Advocate Mr.Sarang Aradhye , is appointed an an arbitrator, having address at Room No.28,29, Prospect Chamber Annex, Pitha Street, Fort, Mumbai,Mob-98928 77979,EMAIL ID- aradhyeoffice@gmail.com.

The Parties have agreed that the Arbitration shall be conducted in Pune.

The Arbitrator shall be informed about his appointment by the Counsel for the Petitioner, and within a period of 15 days before entering the arbitration reference, he shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this application, with a copy to be forwarded to both the parties.

The Arbitrator shall be entitled for the fees as per the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018 and the arbitral costs and fees of the Arbitrator shall be borne by the parties in equal (42)J-coarp-14-2022.doc portion and shall be subject to the final Award that may be passed by the Tribunal.

The parties shall appear before the Sole Arbitrator within a period of two weeks from today and the Arbitrator shall fix up a first date of hearing in the week commencing from 22.01.2024. The Arbitral Tribunal shall give all further directions with reference to the arbitration and also as to how it is to proceed.

All contentions of both sides are left open to be raised by the respective parties before the Arbitral Tribunal, in accordance with law. Commercial Arbitration Petition stand disposed off in the aforesaid terms.

[BHARATI DANGRE, J]