SUPREME COURT OF INDIA

Nimet Resources Inc.

Versus

Essar Steels Ltd.

(S. Rajendra Babu, J.)

Arbitration Petition Nos. 19 to 21 of 2000.

27.09.2000

JUDGMENT

S. Rajendra Babu, J. - These three petitions have been filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as `the Act'). The facts and questions of law arising in these petitions are common. For purposes of convenience, I will advert to the facts of Arbitration Petition No. 19 of 2000.

2. The averments in the petition, in brief, are as under.

Nimet Resources Inc. is a company incorporated in Canada and is engaged in trading of metals conducting its business through its agent, the second petitioner. They claim that they entered into certain transactions with M/s. Essar Steels Ltd. in Arbitration Application No. 19 of 2000 on August 20, 1998 for sale and supply of about 100 metric tons of Ferro Vanadium through its agent, the second petitioner. Under the said contract, the petitioner was to deliver different quantities of metal on different dates between September, October and November 1998. The respondent was to make the payment by opening appropriate letters of credit in respect of each delivery and in the said sales contract, there is an arbitration agreement to the effect that the disputes arising out of the agreement shall be submitted to arbitration under the COMEX and/or the Institute of Scrap Recycling Industries and/or the L.M.E., as the case may be. The confirmation letter was also sent by the second petitioner acknowledging execution of the contract between the first petitioner and the respondent. Thereafter, the purchase order dated August 25, 1998 was issued and the respondent opened a letter of credit on October 15, 1998 but failed to open further letters of credit for ensuring payment of the balance quantity of about 80 tons of Ferro Vanadium. There was some correspondence between the parties subsequently. The respondent, on February 25, 1999, denied the liability to make payment and the very existence of the sales contract dated 20.8.1998 purportedly entered into between the parties on the basis that the sales contract has not been signed by it or on its behalf and thereafter stated that the sales contract, having not been signed, there existed no dispute and hence no arbitration would be accepted. The petitioner contends that the fact that respondent opened a letters of credit for 20 tons of Ferro Vanadium itself would indicate that the respondent had acted upon the terms of the

sales contract and the correspondence between them also would reveal that the respondents's acceptance of the sales contract. Thus the petitioner contends that a dispute exists between them and clause 10 of the contract between the parties indicates an agreement providing for resolution of the disputes between the parties by arbitration and venue thereof being in the event of their failure to resolve the disputes under the COMEX and/or the Institute of Scrap Recycling Industries and/or the L.M.E. Rules. The petitioner indicated in the notice sent on February 10, 1999 to choose a venue for the arbitration failing which the petitioner was free to choose the same. The respondent denied the existence of the sales contract by its reply dated February 25, 1999 and, therefore, the present application was made.

3. The respondent has filed a reply to this petition on 24.8.2000 denying the existence of any agreement between the parties to submit to arbitration any disputes between them and denied any legal relationship between them. The stand of the respondent is that it did not accept the sales contract dated 20.8.1998 and the alleged contract itself bears out that it was not signed by the respondent nor was the same confirmed in any other manner. The respondent did not execute any sale of confirmation. In these circumstances, the question for consideration is whether the powers under Section 11 of the Act should be exercised or not. The stand of the petitioner is that Section 16 of the Act empowers the arbitrial Tribunal to rule on its own as well as on objection with regard to the existence or validity of the arbitration agreement while diametrically opposite stand is taken by the other side.

4. In this case from the pleadings raised by the parties, prima facie*, it appears to me that the parties are not total strangers. There has been some correspondence between them in regard to sale and supply of different quantities of Ferro Vanadium on different dates.* Prima facie *examination reveals that it cannot be a case of there being no transaction between the parties in regard to sale and supply of the goods in question. Whether that transaction fructified into a contract with an arbitration clause is a moot point to be decided.*

5. Section 7 of the act sets out what an arbitration agreement is. It could be in different forms - by way of an arbitration clause in a contract or in the form of a separate agreement, but the condition is that an arbitration agreement should be in writing. When an arbitration agreement is not in writing, the same should be constructed by reference to : (a) a document signed by the parties; (b) exchange of letters, telex, telegram or other means of communication which provide a record of the agreement; or (c) exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. If the contract is in writing and the reference is made to a document containing arbitration clause as part of the transaction would mean that the arbitration agreement is part of the contract. Therefore, in a matter where there has been some transaction between the parties and the existence of the arbitration agreement is in challenge the proper course for the parties is to thrash out such question under Section 16 of the Act and not under Section 11 of the Act.

6. I am conscious of the fact that M. Jagannadha Rao, J. in **Wellington Associates Ltd. v. Kirit Mehta, 2000(4) SCC 272 : 2000(2) RRR 760 (SC)***, held that the jurisdiction of the nominee of the Chief Justice of India to decide the question is not*

excluded by Section 16 of the Act and such a power can be exercised in a suitable case. On this basis it is no doubt permissible under Section 11 of the Act to decide a question as to the existence or otherwise of the arbitration agreement but when the correspondence or exchange of documents between the parties are not clear as to the existence or non-existence of an arbitration agreement, in terms of Section 7 of the Act the appropriate course would be that the arbitrator should decide such a question under Section 16 of the Act rather the Chief Justice of India or his nominee under Section 11 of the Act.

7. I take this view because the power that is exercised by the nominee of the Chief Justice of India under Section 11 of the Act is in the nature of an administrative order. In such a case, unless the Chief Justice of India or his nominee can be absolutely sure that there exists no arbitration agreement between the parties it would be difficult to state that there should be no reference to arbitration. Further, such a view may not be conclusive in view of the nature of the powers that are exercised under Section 11(6) of the Act. In this view of the matter, I do not think it would be possible to accede to the defence raised by the respondent. Keeping open all questions raised in this case, I think it would be appropriate to refer the matter to arbitration. I have also restrained myself from referring in detail to the correspondence exchanged between the parties or the pleadings to assess the correctness or otherwise inasmuch as such an exercise will be undertaken by the arbitrator concerned to decide the question as to existence or otherwise of the arbitration agreement.

8. The learned Counsel had adverted to the decision of this court in **Konkan Railway Corpn. Ltd. and others v. M/s. Mehul Construction Co., 2000(6) SCALE 71**, *in which the nature of the order passed under Section 11(6) of the Act has been explained and it is also observed therein that in case of dispute between the parties as to the existence or validity of an arbitration agreement it should be examined by the arbitral Tribunal itself. This is how this Court has explained the position :*

"Section 16 empowers the arbitral Tribunal to rule on its own as well as on objection with respect to the existence or validity of the arbitration agreement. Conferment of such power on the arbitrator under 1996 Act indicates the intention of the legislature and its anxiety to see that the arbitral process is set in motion. This being the legislative intent, it would be proper for the Chief Justice or his nominee just to appoint an arbitrator without wasting any time or without entertaining any contentious issues at that stage, by a party objecting to the appointment of an arbitrator. If this approach is adhered to, then there would be no grievance of any party and in the arbitral proceeding, it would be open to raise any objection, as provided under the Act. But certain contingencies may arise where the Chief Justice or his nominee refuses to make an appointment of an arbitrator and in such a case a party seeking appointment of arbitrator cannot be said to be without any remedy."

9. The learned Counsel had also adverted to the decision of this Court in **Rickmers Verwaltung GmbH v. Indian Oil Corporation Ltd., 1999(1) SCC 1 : 1999(1) RRR 379 (SC)**. *In that case, on examination of the correspondence between the parties it was held that the court is not empowered to create a contract for the parties*

by going outside the clear language used and no concluded bargain had been reached between the parties as the stand of letter of credit was not accepted by the respective parties. Therefore, each of these cases stood on the peculiar facts available and the principle stated therein may not be attracted at this stage of the proceedings.

Post this matter for further orders.

Order accordingly.