SUPREME COURT OF INDIA

MALAYSIAN AIRLINES SYSTEMS BHD (II)

Vs.

M/S. STIC TRAVELS (P) LTD

30/11/2000

(M.J.Rao)

Arbitration Petition 18 of 2000

JUDGMENT

M. JAGANNADHA RAO J.

This is an application under Section 11(5) of the Arbitration and Conciliation Act, 1996 and relates to a dispute under an agreement between a foreign company and an Indian company. The application is filed by the foreign company against the Indian company seeking reference of the disputes to an arbitrator. The learned Chief Justice of India has nominated me to deal with the application. The claim of the petitioner is that the respondent company is liable to pay the petitioner a sum of Rs.96,21,137/- with interest at 24% with quarterly rests w.e.f. 1.5.99 besides other amounts. The facts set out in the petition by the petitioner as follows: The petitioner company has its Principal place of business at Kaulalumpur, Malaysia. It has an office at New Delhi and it is carrying on business of air-transportation, operation of air flights in and from India under a bilateral agreement between Malaysia and India. It is stated that its Senior Vice President, South Asian Region, Mr. Noor Amiruddin holds a general power of attorney to act for and on behalf of the petitioner and that the said person is the Principal Officer of the petitioner company in India. Original power of attorney dated 15.12.97 has been produced and by order dated 3.11.2000, it was impounded for collection of stamp duty and penalty and, after overruling objections by an order dated 21.11.2000, the original power of attorney was treated as evidence under Section 42(1) of the Indian Stamp Act. It is the case of the petitioner that the respondent has been appointed as General Sales Agent (passenger) for various countries and that under agreements dated 15.9.86 and 11.1.89, the respondent has been so appointed, the former agreement relating to passengers and the latter relating to cargo. The agreements were to be performed in India and the cause of action arose in India. The originals of the agreements are with the respondent. It is stated that the aforesaid agreements could be terminated by either side by giving to the other, written notice 60 days in advance as per Article 3 of the agreements. It is stated that the petitioner established its office for North India w.e.f. 1.5.99. It is further stated that the petitioner terminated the aforesaid agreements by notice dated 1.3.99 (delivered to respondent on the same date). This was done on the ground that the respondent failed to remit and pay to the petitioner, all the sums and monies received by it in the course of agency on account of sale of passenger tickets and airway bills. At present, it is said, the respondent has to pay a sum of Rs.96,21,137/- besides such further sums as may be ascertained after rendition of accounts by respondent. Interest at 24% is also claimed with quarterly rests w.e.f. 1.5.99 till payment. According to the petitioner, the respondent had, in its letter dated 15.6.99

admitted liability upto Rs.83,54,655.79 and failed to pay the same and had fraudulently attempted to "arbitrarily and illegally" adjust the same against false claims with a view to defraud petitioner. All the amounts unilaterally adjusted by respondent were false claims. The petitioner, it was said, had enforced Bank guarantee for 13 lakhs of rupees one day before the expiry of the guarantees. But the American Express Bank, it is said, did not immediately honour the same and contacted the respondent allowing adequate time to the respondent to file a suit (No. 1710/99) for injunction against the Bank. The petitioner filed an application under Section 8 in that suit but has not taken any other step in the said proceedings. The respondent, it is said, is further declining illegally to refund clams of passengers and directing them to the appellants. This was not tenable. The respondent is also not restoring the commissions received. Petitioner gave registered notice on 25.8.99 to respondent to concur in the appointment of a retired Judge of the Supreme Court of India or any other person of equivalent status. Respondent, in his reply dated 16.9.99, refused to concur. It is in these circumstances that petitioner is seeking appointment of a retired Judge of the Supreme Court as an arbitrator. These are the broad contentions of the petitioner. Respondent filed a counter contending that the agreements dated 15.9.86 and 11.1.89 ceased to exist w.e.f. 1.5.99 and hence there is no arbitration clause. The notice dated 25.8.99 of the petitioner is bad in law. The petitioner has not produced the original agreements. They are not with the respondent. The petitioner cannot file attested copies of the two agreements. It is denied that Mr. Noor Amiruddin is authorised to file this suit on behalf of petitioner. The petitioner is put to strict proof. The original of power of attorney is not placed on record (The original has since been produced, impounded and stamp duty collected and returned after substitution of a copy). Mr. Subhash Goyal is not the Managing Director of the respondent Company but is its Chairman. Mrs. Gursharan Goyal is its Managing Director. The cause of action has not arisen in India if Malaysian laws were applicable as per clause 28. The petitioner does not have an established office in North India w.e.f. 1.5.99 as alleged. The termination of agreements is bad. No sums are due to the petitioner much less Rs.96,21,137/-. Nothing has been admitted in letter dated 15.6.99. There is no liability to account for any money collected and no interest is payable. The respondent is not liable to refund any amounts to passengers nor is it responsible to pay any commissions. There are no disputes or differences which can be referred to arbitration. A rejoinder was filed by the petitioner refuting the various allegations made in the counter. It is pointed out that the respondent, could not have denied that the original agreements were with him. Nor could respondent deny the existence of the arbitration agreements. It is said that, in fact, respondent had admitted its existence and also the various clauses. There are disputes and differences which are to be referred to arbitration. A point was also raised whether in the case of an international arbitration it is incumbent on the Chief Justice of India or his nominee to appoint an arbitrator not belonging to Indian nationality? The learned counsel for the petitioner and for the respondent have made their respective submissions reflecting the above contentions. The following points arise for consideration: (1) Whether the preliminary issues raised by the respondent can be decided at this stage or be referred to the arbitrator? (2) Whether, in the case of an international arbitration agreement, where one of the parties is an Indian national, it is not permissible to appoint an arbitrator of Indian nationality in view of the observations in Dolphin International Ltd Vs. Ronak Enterprises Inc. 1998(5) SCC 724? Point 1: On 5.9.2000, learned counsel for the petitioner took time for filing an application directing the respondent to produce the original agreements which, according to him, were with the respondent. Inasmuch as the petitioner has contended that the respondent is in possession of the original agreements and the respondent has contended that the originals are with the petitioner, question arises whether, as required by Section 8 of the Act, the petitioner has complied with the requirement of the said section or whether secondary evidence could be permitted to be adduced. Question also arises whether Mr. Noor Amiruddin could have signed the petitioner and as to whether he was duly authorised to do so. Yet

another question raised is that after termination of the agency, there is no agreement in existence and hence arbitration clause cannot be invoked. The question arises whether such issues raised at the stage of Section 11 application or at the stage of Section 8 proceedings (corresponding to Section 34 of the Old Act, 1940) could be decided by the Court. This Court in some cases felt that they could be decided to cut short litigation and waste of time, where the documents are clear enough. But, subsequently the three Judge Bench in Konkan Railway Corporation Ltd. Vs. Mehul Construction Co. (JT 2000(9) SC 362) has taken the view that the Chief Justice or his nominee is performing an administrative duty and cannot decide the preliminary issues at this stage and it is for the arbitrator alone to decide the same. (No doubt, the question has now been referred for fresh consideration in M/s Konkan Construction Corporation Ltd. Vs. M/s Rani Construction Pvt. Ltd. (JT 2000 (Supple.2) SC 150). In view of the said three Judge judgment, I decline deciding these preliminary issues and direct that the matter be straightaway referred to an arbitrator. Point 1 is decided accordingly. Point 2: This question has arisen because of some observations in Dolphin International Ltd. Vs. Ronak Enterprises Inc. (1998(5) SCC 724). Here the petitioner is a foreign company while the respondent is an Indian national. Learned counsel for the petitioner foreign company, in fact, requested that an arbitrator of Indian nationality is acceptable to the petitioner. The question is whether when a foreign company has a dispute with an Indian national and approaches an Indian Court, it is mandatory for the Court under Section 11(9) of the Indian Arbitration & Conciliation Act, 1996, to appoint an arbitrator who does not belong to the respondent's (i.e. Indian) nationality, even where the foreign company has no objection to have an Indian Judge as an arbitrator. Sub-clause (9) of Section 11 of the Act reads as follows: "Section 11(9): In the case of appointment of a sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities." Majmudar, J. in Dolphin International Ltd. Vs. Ronak Enterprises Inc. (1998(5) SCC 724) observed that at an earlier point of time in the said case when it was listed before Justice Punchhi (as he then was), it appears a view was 'orally' expressed that section 11(9) was mandatory. Therefore Majmudar, J. did not go into the meaning of the word 'may' in section 11(9) and thought that if one of the parties belonged to Indian nationality, it was not permissible to appoint an arbitrator who was an Indian national. Further, it does not appear that, in that case, the foreign company made any statement that an Indian arbitrator was acceptable to it. I am, therefore, of the view that in Dolphin International case, this Court did not have to examine in detail the legal position under the UNCITRAL law on which the Indian Act of 1996 is modelled. I may initially point out that under Article 11(5) of the Model Law, all that was required was for the Court to "take into account, as well, the advisability of appointing an arbitrator of a nationality other than those of the parties". Thus, the Court has to keep this aspect in mind and is not compelled to appoint an arbitrator not belonging to the nationality of either parties. In fact, in several countries which have adopted the UNCITRAL MODEL, 1985, it is clear that the point relating to nationality is only a factor to be kept in mind. I shall refer to the position in some other countries where the UNCITRAL model is adopted, in so far as appointment of arbitrators of a nationality other than that of one of the parties. Article 6(4) of the UNCITRAL Arbitration Rules, 1976 stated that the appointing authority shall take into account the advisability of appointing an arbitrator of a nationality other than the nationality of the parties. The London Court of International Arbitration Rules (LCIA), 1998 say in Article 6 that the "sole Arbitrator or Chairman of the Arbitral Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed appointee all agree in writing otherwise." The Rules of Arbitration of the International Chamber of Commerce, 1998 say in Article 9(1) that the Court shall 'have regard to' to the prospective arbitrator's nationality. Article 9(5) says that the sole arbitrator or the Chairman of the Arbitral

Tribunal shall be of a nationality other than that of the party, but, in suitable circumstances and "provided neither party objects within the time limit fixed by the Court, the arbitrator or the Chairman of the Arbitral Tribunal may be chosen from the country of which any of the parties is a national." The American Arbitration Association International Arbitration Rules as amended in 1997 say in Article 6(4) that the 'administrator, after inviting consultation with the parties, shall endeavour to select suitable arbitrators. "At the request of any party or on its own initiative, the administrator may appoint nationals of a country other than that of the parties." In the Rules of the ICADR, New Delhi (International Centre for Alternative Dispute Resolution, New Delhi), it is stated in Rule 5(5)(c)(iii), that the ICADR will have 'regard to' the "advisability of appointing a person of a nationality other than the nationalities of the parties." In Fouchard Gaillard Goldman on 'International Commercial Arbitration' (1999) it is stated (see para 1037 and 764) (page 570) that though normally, the independence of arbitrators and likewise their neutrality, can be enhanced by their nationality still, 'several institutional arbitration rules containing it also allow the institution to disregard this principle in certain circumstances (The authors refer to ICC Rules, LCIA Rules, ICADR Rules, and those applicable in France and Algeria) (1986 Rev.Arb.311). The Paris Tribunal of First Instance has held in one case (T.G.I. Paris, ref.May 22 and June 23, 1987) (1988 Rev.Arb.699) as follows: "Although the practice is adopted in a number of arbitration rules, it does not necessarily oblige the President of the Tribunal of First Instance to reject the choice of an arbitrator who is of the same nationality as one of the parties ..... The arbitrator, who is a Judge and not a party's representative, cannot be suspected of bias solely on the basis of his nationality, and the requirement of impartiality which determines the choice of the individual .....is sufficient to guarantee that the hearings will be conducted fairly". (Transportacion Maritima Mexicana S.A. Vs. Alsthom) The Court, in that case, considered itself justified in appointing a French Chairman where one of the parties was French, although its opponent, a Mexican Corporation, had asked for the appointment of a 'neutral' individual. (I am however dealing with a case where the foreign company has no objection to an Indian Judge being appointed as arbitrator). The authors (Fouchard etc.) say that "the Court cannot be reproached in law for considering that an arbitrator's nationality cannot constitute an element of partiality in itself. However, it should have taken such nationality into account as a factual matter, the appearance of neutrality being as important in international arbitration as neutrality itself." In "Law and Practice of International Commercial Arbitration" by Alan Redfern and Martin Hunter (3rd Ed)(1999), it is pointed out (at p.215, para 4.55) that though the practice in international arbitration is normally to appoint an arbitrator of a nationality other than that of the parties, sometimes difficult problems can arise if a mandatory principle is applied. The following example is given: 'Consider, for instance, a dispute between a Swiss company and a French company, where the law applicable to the dispute is the law of Switzerland. It seems sensible that the person chosen as the sole or presiding arbitrator should be a Swiss lawyer, particularly if the seat of the arbitration is Switzerland. Yet the insistence on a so-called "neutral" nationality ensures that the one person who cannot be chosen (unless the parties agree otherwise) is a Swiss lawyer." (See also 'On the Neutrality of the Arbitrator and the place of Arbitration by Lalive) (Swiss Essays on International Arbitration) (1984)(PP.23, 25) It is, therefore, clear that in several countries where the UNCITRAL model is adopted, it has been held that it is not impermissible to appoint an arbitrator of a nationality of one of the parties to arbitration. In the light of the above rules in various countries and rulings of Court and also in view of the fact that the 1996 Act is based on UNCITRAL Model law which in Article 6(4) only speaks of "taking into account" the nationality as one of factors, I am of the view that the word 'may' in section 11(9) of the Act is not intended to be read as 'must' or 'shall'. I am therefore of the view that while nationality of the Arbitration is a matter to be kept in view, it does not follow from section 11(9) that the proposed arbitrator is necessarily disqualified because he belongs to the nationality of

one of the parties. The word 'may' is not used in the sense of 'shall'. The provision is not mandatory. In case the party who belongs to a nationality other than that of the proposed arbitrator, has no objection, the Chief Justice of India (or his nominee) can appoint an arbitrator belonging to a nationality of one of the parties. In case, there is objection by one party to the appointment of an arbitrator belonging to the nationality of the opposite party, the Chief Justice of India (or his nominee) can certainly consider the objection and see if an arbitrator not belonging to the nationality of either parties can be appointed. While taking that decision, the Chief Justice of India (or his nominee) can also keep in mind, in cases where the parties have agreed that the law applicable to the case is the law of a country to which one of the parties belongs, whether there will be an overriding advantage to both parties if an arbitrator having knowledge of the applicable law is appointed. In the result, I am of the view that under section 11(9) of the Act it is not mandatory for the Court to appoint an arbitrator not belonging to the nationality of either of the parties to the dispute. In the circumstances of the case and after hearing the counsel on both sides and inasmuch as the petitioner has no obligation for appointment of an arbitrator of Indian nationality, I appoint Sri Justice D.P. Wadhwa, retired Judge of this Court as the sole arbitrator in the case. The remuneration payable for the case and other costs payable may be fixed by the arbitrator after hearing the parties on both sides. The petition is disposed of accordingly.