

SUPREME COURT OF INDIA

Sumitomo Corporation

Vs.

CDC Financial Services (Mauritius) Ltd

C.A.No.1496 of 2008

(Tarun Chatterjee and P. Sathasivam JJ.)

22.02.2008

JUDGMENT

P. Sathasivam, J.

1. Leave granted.

2. This appeal is directed against the judgment and order dated 21.02.2007 passed by the High Court of Delhi in F.A.O. No. 305 of 2006 by which the High Court dismissed the appeal filed by the appellant herein for lack of territorial jurisdiction holding that Section 10(1)(a) of the Companies Act, 1956 will take precedence over Section 50 of the Arbitration and Conciliation Act, 1996.

3. Brief facts, in a nutshell, are: On 05.10.1984, a Joint Venture Agreement was entered into between Sumitomo Corporation (appellant herein), Punjab Tractors Pvt. Ltd. (respondent No.5 herein) and Swaraj Mazda Limited (Respondent No.6 herein) comprehensively specifying the respective rights and obligations of the parties including the management control of the affairs of the company. The Joint Venture Agreement, which is filed as Annexure P-1, contains in Article XVI, arbitration agreement between the parties.

4. In the beginning of 2005, the shareholding pattern of the appellant - Sumitomo Corporation (in short "SC") and respondent No. 5 - Punjab Tractors Pvt. Ltd. (in short "PTL") & respondent No. 6 - Swaraj Mazda Ltd. (in short "SML") was : respondent No.5 PTL - 29.04%, respondent No.6 SML 15.66%, appellant SC 10.44% and respondent No.1 - CDC Financial Services (Mauritius) Ltd., respondent No.2 - South Asia Regional Fund, Mauritius, respondent No.3 - CDC-PTL Holdings Ltd. and respondent No.4 - ACTIS Agri Business Ltd. 17.45%. On 30.06.2005, an agreement (Annexure P-2) was entered into between PTL, SC and SML for purchase by the SC, appellant herein, of 1,573,000 shares of SML from PTL. Thus, the shareholding of SC increased to 41% while the holding of PTL

came down to 14%. The said agreement also contains arbitration agreement in Article II, Section 2.03.

5. In May-June, 2006, disputes arose between the parties regarding rights of the parties envisaged in Section 4.1 and other provisions of the Joint Venture Agreement. PTL sought to nominate four Directors on the Board of SML and the same was disallowed in view of Section 4.1 of the Joint Venture Agreement.

6. On 3.8.2006, PTL and 4 others i.e. Respondent Nos. 1 to 5 herein filed Company Petition No. 68 of 2006 before the Company Law Board, Principal Bench, New Delhi seeking reprisal under Sections 397, 398, 402 etc. of the Companies Act, 1956 (for short the "Companies Act") for oppression and mismanagement on the part of the appellant and nominee directors of the appellant in the management and conduct of the affairs of Swaraj Mazda Ltd., the company in issue (Respondent No.6 herein). In the company petition, the appellant herein i.e. S.C. filed an application being C.A. No. 259 of 2006 seeking reference to arbitration under Section 45 and alternatively under Section 8 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the "Arbitration Act"). On 26.9.2006, the Company Law Board passed an order refusing to refer the parties to arbitration under Section 45 of the Act. Against the said order, the appellant filed an appeal being F.A.O. No. 305 of 2006 under Section 50 of the Act on 30.10.2006 in the High Court of Delhi.

7. On 21.2.2007, the High Court delivered the judgment dismissing the appeal not on merits but for lack of territorial jurisdiction holding that Section 10(1) (a) of the Companies Act will take precedence over Section 50 of the Arbitration Act. Aggrieved by the said order, the appellant SC filed this appeal before this Court.

8. We heard Mr. C.A. Sundaram, learned senior counsel appearing for the appellant and Mr. Sudipto Sarkar and Mr. Jaideep Gupta, learned senior counsel appearing for the contesting respondents.

9. According to Mr. C.A. Sundaram, learned senior counsel for the appellant, the High Court whilst noticing that it was the forum under Section 50 of the Arbitration Act has committed an error in holding that the forum of appeal was not the forum contemplated under Section 50 of the said Act and the appeal was liable to be filed in forum contemplated under Section 10(1) (a) of the Companies Act. He further submitted that in view of the fact that the appellant herein filed an application under Section 45 of the Arbitration Act though in a petition filed under Sections 397, 398, 402 etc. of the Companies Act for oppression and mis-management, in the light of the language used, namely, "judicial authority" under Section 45 of the Arbitration Act, the order dated 26.09.2006 having been passed by the Company Law Board (for short the "CLB") in its capacity as a judicial authority under the Arbitration Act, the appeal against the order lies under the Arbitration Act. He also submitted that the source of jurisdiction of the CLB exercising powers in passing the order impugned in the High Court is Section 45 of the Arbitration Act and not any provision of the Companies Act. According to him, the Arbitration Act has been held to be a complete code

as regards the law of arbitration and the same being a special statute has overriding effect than the Companies Act in the light of the language used in Section 50 of the Arbitration Act. The Delhi High Court is the appropriate Court authorized by law to hear appeals; hence the contrary conclusion cannot be sustained and liable to be interfered. On the other hand, Mr. Sudipto Sarkar and Mr. Jaideep Gupta, learned senior counsel for the contesting respondents submitted that Section 50 of the Arbitration Act clearly suggests that an appeal shall lie from the order of the CLB to the Court authorized by law to hear the appeal from such order of the CLB. In other words, according to them, in the event the order under Section 45 is passed by the CLB, the forum which is provided under law for hearing the appeal from the orders of the CLB will be the Appellate Forum. They elaborated that Section 10-F read with Section 10(1) (a) of the Companies Act, provides for such forum to hear the appeal from the orders of the CLB as the High Court within the jurisdiction of which the Registered Office of the company in issue is situated.

10. We have carefully perused all the relevant materials, Annexure and considered the rival contentions. The only question to be considered in the present appeal is whether the order dated 26.09.2006 of the CLB refusing to refer parties to arbitration under Section 45 of the Arbitration Act was liable to be challenged to the forum under Section 50 of the Arbitration Act or to the forum under Section 10(1) (a) of the Companies Act.

11. It is relevant to point out that in a company petition filed by the PTL and 4 others (Respondent Nos.1-5 herein) before the CLB, Principal Bench, New Delhi, the second respondent therein (appellant herein, namely, SC) filed Company Application No. 259 of 2006 under Section 45 of the Arbitration Act for referring the parties to arbitration. The said Section 45 reads thus:

"45. Power of judicial authority to refer parties to arbitration.- Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."By pointing out the provisions of the Joint Venture Agreement (in short "JVA"), it was contended on behalf of the appellant that the dispute having directly arisen from the terms of the arbitration agreement, the same has to be necessarily determined only by the arbitral tribunal, hence the CLB is bound to refer the parties to arbitration. It is not in disputing that as held by this *Court in Hindustan Petroleum Corp. Ltd. vs. Pink city Midway Petroleum's*¹ if there is an arbitration clause, in terms of Section 8, the Court has a mandatory duty to refer the disputes arising between the contracting parties to arbitrator. It is also not in dispute that in *Bhatia International vs. Bulk Trading S.A*² it has been held that Part 1 of the Act applies to international arbitration held outside India also. On the other hand, it was submitted on behalf of the respondents that the appellant invoked the provisions of the

Arbitration Act on the ground that both JVA and Share Purchase Agreement (in short "SPA") provide for arbitration, in the JVA arbitration has been provided only in case of disputes between the company (SVL/PTL on the one hand and Mazda/SC on the other), there is no provision for an arbitration in case of disputes between the company and the contesting respondents. It was also pointed out that in the two agreements, namely, JVA and SPA three arbitral tribunals have been named, hence in the light of the uncertainty regarding the contractual forum to which the parties are to be referred, the application cannot be entertained. It was also highlighted since some of the respondents herein were not being parties to the JVA, they cannot be referred to arbitration. It was also pointed out that the main grievance is that the company is not complying with the provisions of Article 87, therefore, the actual dispute is between the company and the respondents, even though the company is a party to the JVA, the arbitration clause does not cover the company, in such an event, the question of referring the parties to arbitration does not arise.

12. In the company application filed by the appellant herein, the main allegation relates to the claim, namely, the PTL has the right to nominate four directors and it is based on not only clause 4(1) of JVA but also on article 87 of AOA. We have already referred to the fact that the said application had been filed under Section 45 of the Arbitration Act. Section 2(h) of the Arbitration Act mentions that the "party" means a party to an arbitration agreement. To put it clear the party to the judicial proceeding should be a party to the arbitration agreement. As rightly observed by the CLB, the proceeding under Section 397/398 of the Companies Act always relates to the affairs of the company. Insofar as the arbitration clause in the JVA is concerned, to bind the company it has to be a party to the arbitration agreement. It was pointed out that even though the company is a party to the JVA, no arbitration has been provided for disputes between the shareholders and the company or in relation to allegations in the affairs of the company. A perusal of the agreement show that the arbitration clause contained in JVA has provided for resolution of disputes through arbitration classifying the company and/or PTL as one party and Mazda or SC as another party. In other words, no arbitration has been envisaged in the JVA if dispute arises even with reference to the terms of the JVA between PTL on the one hand and the company on the other. It is relevant to mention that the provisions of Section 397/398 of the Companies Act can be invoked only if the disputes, even among the shareholders or allegations against each other, relate to the affairs of a company. In the company petition, the composition of the board of directors is in the affairs of the company and the contesting respondents herein have alleged that the company is not complying with the provisions of article 87 in the matter of composition of the board. The CLB, on analyzing those relevant aspects, concluded that the grievances of the petitioners therein (contesting respondents) falls squarely in the affairs of the company and since no arbitration has been provided in regard to the disputes between PTL and the company, there is no arbitration agreement at all between the company and PTL in the JVA to refer the parties to arbitration. The CLB has also concluded that petitioner Nos. 2-5 therein are not parties to either of the two agreements. Based on the above factual aspects, the CLB has concluded that there is no commonalities of parties and considering all the relevant aspects arrived at a conclusion that the application deserves to be dismissed on the

main ground that the company in the affairs of which application has been filed, is not a party to the arbitration agreement in the JVA and petitioner Nos. 2 to 5 therein were not parties to the JVA or SPA could also independently prosecute the said petition as they satisfy the requirements of Section 399 and finally, the arbitral forum is not specific.

13. In the light of the said conclusion, in order to ascertain the correctness of the same, it is useful to refer to the provisions of Section 50 of the Arbitration Act and Section 10(1)(a) and Section 10-F and of the Companies Act.

"50. Appealable orders.- (1) An appeal shall lie from the order refusing to-

(a) Refer the parties to arbitration under section 45;

(b) Enforce a foreign award under section 48, to the court authorized by law to hear appeals from such order.

14. Jurisdiction of Courts. - (1) The Court having jurisdiction under this Act shall be-

“(a)The High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any District Court or District Courts subordinate to that High Court in pursuance of sub-section (2); and

(b) Where jurisdiction has been so conferred, the District Court in regard to matters falling within the scope of the jurisdiction conferred, in respect of companies having their registered offices in the district."

"10F. Appeals against the order of the Company Law Board.- Any person aggrieved by any decision or order of the Company Law Board made before the commencement of the Companies (Second Amendment) Act, 2002 may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order:

15. Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days."The above provisions make it clear that the forum shall be court authorized by law to hear the appeals from such order. In this regard, it is useful to reproduce the Explanation to Section 47 of the Arbitration Act which reads thus:

"47. Evidence- Explanation.- In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such

principal Civil Court, or any Court of Small Causes."As rightly pointed out, it is clear that unlike the explanation to Section 47, Section 50 uses the expression "Court" not simplicities but qualified by the wording "authorized by law to hear appeals from such order." It is not the court having jurisdiction if the subject-matter is a suit where jurisdiction is determined in accordance with the provisions of Sections 16-20 of the Code of Civil Procedure. On the other hand, Section 50 of the Arbitration Act specifically used the word "authorized by law" and not the "Civil Procedure Code" or "suit".

16. In *Smt. Ganga Bai vs. Vijay Kumar and Others*³ while considering relevant provisions from the Civil Procedure Code in respect of right of appeal against a finding, res judicata etc., this Court in Para 15 held thus:

“It is thus clear that the appeal filed by Defendants 2 and 3 in the High Court was directed originally not against any part of the preliminary decree but against a mere finding recorded by the trial court that the partition was not genuine. The main controversy before us centers round the question whether that appeal was maintainable. On this question the position seems to us well established. There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute." It is clear that if there is no bar in any statute, no difficulty in filing a suit, on the other hand in the case of appeals for its maintainability there must be a specific provision/clear authority of law. In view of the same, while exercise of original jurisdiction as provided in Section 47 and other similar sections of the Arbitration Act should be by the court within the jurisdiction of which the suit would have been filed, the appeal shall always be to the appellate forum which hears appeals from the order of the forum which passes the order. It is also clear from Section 37 of the Act dealing with appeals. Here also the appeal is to the court which hears the appeal and not the court which exercises original jurisdiction if the subject-matter had been a suit as provided in the explanation to Section 47 or Section 2(c) of the Arbitration Act. To our mind, the reading of Section 50 clearly suggests that an appeal shall lie from the order of the CLB to the court authorized by law to hear the appeals from such order of the CLB. To make it clear that in the event the order under Section 45 is passed by the CLB, the forum which is provided under law for hearing the appeal from the order of the CLB will be the Appellate Forum. In other words, while Section 50 of the Arbitration Act provides for the orders which can be made the subject-matter of the appeal, the forum to hear the appeal is to be tested with reference to the appropriate

law governing the authority or forum which passed the original order, that is, in the case on hand, the CLB. Section 10F read with Section 10(1)(a) of the Companies Act provides for such forum to hear the appeal from the orders of the CLB as the High Court within the jurisdiction of which the Registered Office of the company in issue is situated.”

17. Now let us look into Section 10(1) (a) and Section 10F of the Companies Act. An appeal against any order of the CLB including an order passed refusing reference to arbitration shall lie to the High Court within the jurisdiction of which the Registered Office of the company is situated. That is the reason Section 50 of the Arbitration Act purposively uses the expression "authorized by law to hear the appeal". As rightly pointed out, it cannot be that an order passed by the CLB becomes appealable to a civil court or a court exercising civil jurisdiction when Parliament has chosen to provide for a specific appellate forum which should hear the appeal from the orders of the CLB.

18. In *Stride well Leathers (P) Ltd. and Others vs. Bhankepur Simbhaoli Beverages (P) Ltd., and Others*⁴ the main question for decision relates to the meaning of the expression "the High Court" in Section 10F of the Companies Act, 1956 which has been inserted in the principal Act by the Companies (Amendment) Act, 1988 w.e.f. May 31, 1991. The controversy is whether the High Court to which the appeal lies under Section 10F from an order of the CLB is the High Court having jurisdiction in relation to the place at which the registered office of the Company is situate or it is the High Court having jurisdiction in relation to the place at which the Company Law Board makes the order under appeal. The Court has concluded as under:-

“For the aforesaid reasons, we are of the opinion that the expression "the High Court" in Section 10-F of the Companies Act means the High Court having jurisdiction in relation to the place at which the registered office of the company concerned is situate as indicated by Section 2(11) read with Section 10(1)(a) of the Act. Accordingly, in the present case, the appeal against the order of the Company Law Board would lie in the Madras High Court which has jurisdiction in relation to the place at which the registered office of the company concerned is situate and not the Delhi High Court merely because the order was made by the Company Law Board at Delhi. This appeal is allowed and the impugned order made by the Delhi High Court is set aside resulting in acceptance of the preliminary objection raised by the appellants in the Delhi High Court. The Delhi High Court will now make the consequential order.”

19. As per the ratio decided, the appeal under Section 50 of the Arbitration Act from an order passed by the CLB on matters concerning Swaraj Mazda whose Registered Office is in Punjab is maintainable in the High Court of Punjab and Haryana and not to the High Court of Delhi. Reliance placed by the appellant on the decision of *the High Court of Punjab and Haryana in Hind Samachar Ltd., Jalandhar vs. Smt. Sudarshan Chopra and Others*⁵ to contend that an appeal from an order passed by the CLB sitting in Delhi should be to the

Delhi High Court notwithstanding the Registered Office of the company concerned is in Punjab is not sustainable. A perusal of the said decision shows that the Punjab and Haryana High Court was not considering the issue of territorial jurisdiction on matters arising out of an order passed by the CLB. On the other hand, the High Court was considering the issue whether an appeal is maintainable from an order passed by the CLB rejecting the application under Section 8 of the Arbitration Act when Section 37 of the said Act expressly provides that no appeal shall lie against orders specifically mentioned in Section 37 and from no others and Section 8 is not mentioned in that section. As rightly pointed out by learned senior counsel appearing for the contesting respondents in that case the Punjab and Haryana High Court did not consider the issue that when an appeal lies which Court will have jurisdiction to entertain and decide the appeal. This is clear from the reading of pages 17 and 18 of the judgment of the Punjab and Haryana High Court. It is also brought to our notice that in *Sudarshan Chopra vs. Company Law Board*⁶ referring to various authorities, the very same Punjab and Haryana High Court has ruled that the jurisdiction of the Company Law Board under Sections 397 and 398 is not in any way affected by the existence of arbitration clause and, therefore, the CLB which exercises power under those Sections and passes orders as per the provisions of Section 402 of the Companies Act can proceed with the matter notwithstanding the arbitration clause.

20. In view of our conclusion, we are satisfied that the appellant has wrongly based its arguments on matters such as ouster of jurisdiction, over-riding effect of special statute over general statute, over-riding effect of subsequent statute etc. Since they have no application whatsoever to the matter in issue, there is no need to refer various decisions in those aspects. Ouster of jurisdiction arises only in regard to original jurisdiction and it cannot have any application to appellate jurisdiction as the one provided in Section 50 of the Arbitration Act. The appeal is a statutory remedy and it can lie only to the specified forum. The appellate forum cannot be decided on the basis of cause of action as applicable to original proceedings such as suit which could be filed in any court where part of cause of action arises. In such circumstances, we are unable to accept the lengthy arguments advanced on the above-mentioned subject by learned senior counsel for the appellant. Likewise, the submission of the appellant, namely, the Arbitration Act being a special and subsequent statute has no relevance to the present case.

21. In the light of what has been stated above, we sustain the impugned order of the High Court dated 21.02.2007 in F.A.O. No. 305 of 2006. Consequently, the appeal fails as devoid of any merit and the same is dismissed. It is made clear that the time taken by the appellant in pursuing their appeal before the Delhi High Court as well as this Court shall be excluded for the purpose of limitation. No costs.

¹(2003) 6 SCC 0503

²(2002) 4 SCC 0105

³(1974) 2 SCC 0393

⁴(1994) 1 SCC 0034

⁵(2002) 4 Comp LJ 1

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