

SUPREME COURT OF INDIA

Shivnath Rai Harnarain (India) Ltd

Vs.

Abdul Ghaffar Abdul Rehman(Dead) by L.Rs

Arb.P. 4 of 2007

(H.K. Sema)

10.03.2008

JUDGMENT

H.K.SEMA, J

- (1) This is an application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short "the Act") for appointment of an Arbitrator.
- (2) I have heard Dr.A.M. Singhvi, learned senior counsel for the applicant and Mr. Kailash Vasdev, learned senior counsel for the respondents at length.
- (3) The sole question that arises for consideration in this petition is as to whether an application under Section 11(6) of the Act is maintainable?

(4) In view of the order that I propose to pass, it may not be necessary to recite the entire facts, leading to the filing of the present application.

(5) Suffice it to say that contract Nos.2001-SI/25, 2001-SI/26 both dated 12th January 2001 and Contract No.2001-SII/41 dated 28th February 2001 were amended/modified by way of a common addendum No.1 on 2.3.2001. By an addendum dated 2nd March, 2001 clause (ii) was introduced. It reads:

"(ii) Settlement of disputes through Indian Arbitration Council, Delhi."

(6) The dispute having arisen and as agreed to by both the parties the matter was referred to one Mr. Samuel J. Marshall, who was agent for both the parties in the

transactions and who also agreed to mediate between the parties. With the intervention of Mr. Samuel J. Marshall, the parties arrived at an agreement to resolve the dispute between the parties. The settlement agreement was entered into on 18.1.2002. Clause 18 of the settlement reads:

"18. Should any dispute or non implementation arise this will be adjudicated solely by Mr. Samuel J. Marshall."

(7) It also appears from the letter dated 12.11.2002 and accepted on 21.11.2002 the parties have agreed to resolve the dispute under the following conditions:

1. That the venue for resolution of this dispute will take place in Singapore, assuming that Mr. Marshall is resident there, alternatively the UK;

2. That the Agreement dated 18th January 2002 is governed by India Law; and

3. UNCITRAL rules will apply.

(8) Pursuant to the aforesaid agreement, an application was filed sometime in January 2004, before the Arbitrator namely Mr. Samuel J. Marshall. However, the respondents herein did not participate in the arbitration proceedings. On 20.6.2005, the Arbitrator proceeded with the arbitration at

Singapore and passed the Award in favour of the applicant.(9) Aggrieved by the Award dated 20.6.2005, the respondents herein challenged the said Award before the High Court of Republic of Singapore in Originating Motion No.35/2005/H inter alia on the ground of violation of principles of natural justice. On 31.7.2006, the High Court of Singapore, set aside the Award with a liberty to the parties to apply for fresh arbitration. This is undisputed that the applicant herein did not apply for fresh arbitration before the Arbitrator at Singapore. However, this application has been filed before this Court under Section 11(6) of the Act.

(10) Dr.Singhvi, learned senior counsel for the applicant, would submit that the agreement is governed by Indian Law and, therefore, the law in India is applicable and thus, this Court can appoint Arbitrator in exercise of power under Section 11(6) of the Act. Per contra Mr. Kailash Vasdev, learned senior counsel for the respondents, would content that this application under Section 11(6) is not maintainable inasmuch as the parties have referred to the Arbitrator Mr. Samuel J. Marshall in Singapore. The Award was passed by Mr. Marshall at Singapore and the Award was set aside by the High Court of Singapore with liberty to apply for fresh arbitration and, therefore, the appropriate Court to apply is the Court at Singapore and this application is misconceived.

(11) The facts are not disputed that the parties by a mutual agreement referred the dispute to Mr. Samuel J. Marshall. Mr. Samuel J. Marshall proceeded with the

arbitration and passed the Award on 20.6.2005, which was set aside by the High Court of Singapore on 31.7.2006.

(12) Section 2(1)(e) of the Act defines Court. It reads:

"(e) "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 to decide the questions forming the subject-matter of the arbitration 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"

Further, Section 42 of the Act provides jurisdiction of the Court. It reads:

"Jurisdiction.- Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."

(13) Section 42 read thus, provides that notwithstanding anything contained elsewhere in this part or in any other law for the time being in force, where with respect to an arbitrator agreement any application under this part has been made in a court, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court.

(14) In the present case, as already adumbrated, the parties agreed to refer to the Arbitrator, Mr. Samuel J. Marshall for resolution of the dispute at Singapore. The Award of the Arbitrator was passed at Singapore. The Award of the Arbitrator was set aside by the High Court of Singapore and, therefore, in my view, the Court at Singapore, which alone shall have jurisdiction over the arbitral proceedings and all applications arising out of that agreement shall be made in that Court and no other Court.

(15) In support of his contention, Dr. Singhvi referred to the judgment of this Court, rendered in National Agricultural Coop. Marketing Federation India Ltd. Vs. Gains Trading Ltd., (2007) 5 SCC 692. In that case Clause 17 of the agreement deals with arbitration and it provides that the dispute be settled amicably by negotiation and mutual agreement and if no settlement can be reached the matter in dispute shall then be referred to and finally resolved by an arbitration in Hong Kong in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

(16) The question raised in that case was that whether Section 11 of the Act is inapplicable in regard to the arbitrations, which are to take place outside India? The

argument in that case was that as the venue of arbitration was outside India, Section 11 would not apply and, therefore, neither the Chief Justice of India nor his designate will have the jurisdiction to appoint an arbitrator.

(17) The aforesaid contention has been repelled in paragraph 9 of the judgment as under:-

"9. The rules of interpretation require the clause to be read in the ordinary and natural sense, except where that would lead to an absurdity. No part of a term or clause should be considered as a meaningless surplusage, when it is in consonance with the other parts of the clause and expresses the specific intention of parties. When read normally, the arbitration clause makes it clear that the matter in dispute shall be referred to and finally resolved by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (or any statutory modification, enactment or amendment thereof) and the venue of arbitration shall be Hong Kong. This interpretation does not render any part of the arbitration clause meaningless or redundant. Merely because the parties have agreed that the venue of arbitration shall be Hong Kong, it does not follow that laws in force in

Hong Kong will apply. The arbitration clause states that the Arbitration and Conciliation Act, 1996 (an Indian statute) will apply. Therefore, the said Act will govern the appointment of arbitrator, the reference of disputes and the entire process and procedure

of arbitration from the stage of appointment of arbitrator till the award is made and executed/given effect to.

(18) In my view, the facts of that case are not squarely applicable in the present case. The facts of the case at hand, as already adumbrated, the parties to the agreement agreed to refer the dispute to the Arbitrator Mr.Samuel J.Marshall. The Award was passed by the said Arbitrator at Singapore. The Award was also set aside by the High Court of Singapore with liberty to apply for fresh arbitration.

(19) Having mutually agreed to have the dispute referred to an arbitrator at Singapore, the applicant is not permitted to turn around and say that this Court be appointed an arbitrator.

(20) In the facts and circumstances of the case, as recited above, filing of an application under Section 11(6) of the Act, before this Court, is misconceived. The application is, accordingly dismissed. No costs.