SUPREME COURT OF INDIA

M/S Comed Chemicals Ltd.

Vs.

C.N. Ramchand

Arbitration Petition No. 17 of 2007

(C.K. Thakker)

06/11/2008

JUDGMENT

C.K. THAKKER, J.

1. The present petition is filed by the petitioner under Section 11 of the Arbitration and Conciliation Act,1996 (hereinafter referred to as "the Act") praying to Hon'ble the Chief Justice of India to appoint third Arbitrator as Presiding Arbitrator or to appoint Sole Arbitrator as deemed fit in the facts and circumstances of the case.

2. It is the case of the applicant that it is a Company known as M/s Comed Chemicals Ltd. registered under the Indian Companies Act, 1956. Mr. Ashwani Kapil is the authorized signatory who has approached this Court. It is stated in the application that the Company is doing business in chemicals in the field of bio-technology. To expand the business, the Company floated a subsidiary company in the name and style of Comed Biotech Ltd. For the said purpose, it entered into a Memorandum of Understanding (`MoU' for short) and appointed Dr. C.N. Ramchand (respondent herein) on September 4, 2003 for the development of products in the field of bio-industries and

manufacturing and marketing of such products. After various meetings and negotiations, terms and conditions were finalized between the parties and the respondent was appointed as Director (Technical) by the applicant Company. A copy of the agreement has been annexed to the Application. MoU also provided that the respondent will work full time with the Company at least for next eight years from the date of signing of the agreement. According to the Company, it invested large amount in the new adventure and paid substantial sum as remuneration to the respondent for the work.

3. It is the allegation of the Company that the respondent did not take interest in work and failed to attend Board Meetings held in May and June, 2004 in spite of prior notice and information in advance about such meetings. A notice was issued by the Company to the respondent on July14, 2004 asking him to remain present at the Board Meeting scheduled to be held on July 30, 2004. The respondent, however, sent a Letter of Resignation on July 17, 2004. The Company has alleged that not only the respondent wanted to quit the Company before completing the work assigned to him in violation of the agreement, but he also instigated other subordinate staff-workers to leave the organization. Resultantly, other staff members also resigned. In view of the large investment by the Company, it refused to accept the resignation of the respondent. There was correspondence and exchange of legal notices between the parties. It is, however, not necessary to enter into the details thereof in the present proceedings.

4. By a communication dated August 12, 2005, the applicant through his advocate sent a notice to the respondent for appointment of an arbitrator in accordance with Clause 12 of MoU and informed him that the applicant-Company had decided to appoint Ramesh H. Nanavati, retired District Judge as his arbitrator. The applicant called upon the respondent to state whether he was agreeable to the said name. It also stated that if he was not agreeable, he could suggest any other name and/or appoint an arbitrator for resolving the dispute failing which the applicant would be constrained to take appropriate action in accordance with law. The respondent through his advocate informed the Company on September 12, 2005 that he was not agreeable to the arbitrator suggested by the Company. He, however, suggested three names. At Sl. No.1, there was a name of Dr. Sandeep H. Shah, President, Indian Psychiatric Association.

5. In view of non-agreement between the applicant and respondent, the Company filed Arbitration Application No. 9 of 2006 under Section 11 of the Act in the High Court of Gujarat at Ahmedabad requesting the Hon'ble Chief Justice of the High Court to appoint an arbitrator. Notice was issued to the respondent who filed his reply. In the reply, he asserted that he is a `British national' and hence any question of arbitration between the applicant- Company which is registered in India and the respondent-British national would fall under `International Commercial Arbitration' as defined in Section 2(1)(f) of the Act and under Section 11(9) of the Act, it would be within the power and authority of the Chief Justice of India to deal with and decide such application and the Chief Justice of a High Court has no jurisdiction to entertain the application. In support of the contention that he is a British national, the respondent submitted requisite material which went to show that he is British national. In view of the above contention, the Company sought permission from the High Court to withdraw the petition so as to enable the Company to make appropriate application to the

Hon'ble Chief Justice of India. The permission sought for was granted and the application was disposed of as withdrawn.

6. The Company then approached this Court by filing the present application on May 22, 2007. Hon'ble the Chief Justice of India designated me as his nominee to deal with and decide the application preferred by the Company. Notice was issued to the respondent pursuant to which he appeared and filed a counter-affidavit on February 12, 2008. The Registry was directed to place the matter for hearing.

7. I have heard the learned counsel for the parties.

8. Learned counsel for the applicant-Company submitted that the application deserves to be allowed by appointing a third arbitrator as Umpire or sole arbitrator in view of difference between the applicant and the respondent and failure to come to an agreement to appoint an arbitrator acceptable to both the parties. It was stated that the applicant appointed Ramesh H. Nanavati, retired District Judge as his arbitrator since the controversy related to interpretation of agreement and legal issues were involved. The respondent, however, did not agree and suggested another name. The applicant could not agree to that name because of absence of legal background on the part of the person sought to be appointed.

The Company, therefore, invoked Section 11 of the Act by going to the High Court of Gujarat. But in view of objection raised by the respondent that he is a British national, the application was withdrawn and thereafter the applicant has approached this Court. It was, therefore, prayed that the petition deserves to be allowed by either appointing third arbitrator as Umpire or by appointing sole arbitrator to deal with dispute between the parties.

9. The learned counsel for the respondent, on the other hand, submitted that the present application is not maintainable. According to him, there is no dispute arising out of legal relationship considered as commercial covered by clause (f) of Section 2 (1) of the Act and hence the provisions of the Act would not apply to the case on hand. It was also submitted that the agreement in substance, provides for supply of technical know-how and expertise for payment of `fees' and there is no element of `commerce' which could attract the provisions of the Act. It was also urged that the respondent was appointed by the Company as an employee and the relation between the Company and the respondent was of master and servant and to such cases, the Act has no application. Clause (12) of the Agreement on which strong reliance had been placed by the Company cannot be termed as `arbitration clause'. In absence of legal, valid and enforceable arbitration clause, applicant-Company has no right to approach this Court. It was, therefore, submitted that the application deserves to be dismissed.

10. Having heard the learned counsel for the parties, in my opinion, the petition should be allowed. Clause (f) of sub-Section (1) of Section 2 of the Act defines "International Commercial Arbitration" and reads thus;

(f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is--

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country.

11. Chapter II of the Act deals with "Arbitration Agreement" and declares that all disputes arising between the parties would be governed by the provisions of the Act. Chapter III provides for "Composition of Arbitral Tribunal". Section 10 enacts that the parties are free to determine number of arbitrators, but such number shall not be an even number. In case of failure to determine number of arbitrators, the Arbitral Tribunal shall consist of a sole arbitrator. Section 11 relates to appointment of arbitrators. It states that in case of failure on the part of the parties in arriving at an agreement to appoint an arbitrator, an application may be made to the Chief Justice of India in case of International Commercial Arbitration so that an appropriate order may be passed for appointment of arbitrator. It is on the basis of the above provision that the applicant-Company has filed this application.

12. I find no substance in the preliminary objection raised by the learned counsel for the respondent that there is no arbitration clause in the Agreement. Clause 12 of the agreement which provides for arbitration reads thus;

"If there be any dispute pertaining to meaning of this MoU or of any nature, will be solved and decided by appointing an independent Arbitrator acceptable to all the parties and if not solved by him can be referred to court of law and for which the jurisdiction will be Vadodara."

13. Bare reading of the above clause leaves no room for doubt that it is an `arbitration clause' and expressly declares that any dispute pertaining to MoU would be solved and decided by an arbitrator.

14. I am also unable to uphold the argument of the learned counsel that there is no International Commercial Arbitration. The learned counsel for the respondent submitted that there is no `commercial' element in the agreement and what was agreed between the parties was to provide `technical know-how' and `expertise' to the applicant-Company for which the respondent was to be paid `fees'.

15. The learned counsel in this connection referred to Kamani Engineering Corporation Ltd. & Ors. v. Societe De Traction Et D'Electricite Societe Anonyme, & Ors., AIR 1965 Bom 114, Josef Meisaner GMBR & Co. v. Kanoria Chemicals & Industries Ltd. & Anr., AIR 1986 Cal 45 and Mukesh H.Mehta & Ors. v. Harendra Mehta, (1998) 92 Comp Cases 402. It was submitted by the counsel that in the above cases, it has been held that if the work undertaken by a person is of a professional character and does not involve business or trade, the contract cannot be said to be of `commercial' nature. Such contract does not involve business or trade and there is no element of participation in commercial activity or in profit. Remuneration, if any, is in the nature of `fees'. A person scrupulously keeps himself away from any commercial relationship. As such, provisions relating to arbitration agreement in the field of commercial arbitration are not attracted to these cases.

16. It may, however, be profitable to refer to a decision of this Court in R.M. Investment & Trading Co. Pvt. Ltd. v. Boeing Co. & Anr., (1994) 4 SCC 541. There this Court was called upon to consider the provisions of Foreign Awards (Recognition and Enforcement) Act, 1961. The question before the Court was whether there was commercial relationship between the parties as defined in Section 2 of the Act and whether the Act would apply. In that case, an Indian Company entered into an agreement with a Company registered in USA. The Indian Company agreed to provide Boeing with consultancy services for sale of Boeing Aircraft in India. Agreement for purchase of two Boeing Aircrafts was executed. A dispute arose and the appellant claimed compensation and remuneration for consultancy services. In view of arbitration clause, the matter was referred to arbitrator. It was contended by the foreign Company that there was no `commercial element' and hence the application was liable to be dismissed.

17. This Court, however, rejected the contention. It was held that the agreement to render consultancy service by the appellant to the respondent was `commercial' in nature and there was commercial relationship between the parties.

18. Referring to earlier cases, this Court stated;

"It is not disputed that the sale of aircraft by Boeing to customers in India was to be a commercial transaction. The question is whether rendering of consultancy services by RMI for promoting such commercial transaction as consultant under the Agreement is not a "commercial transaction". We are of the view that the High Court was right in holding that the agreement to render consultancy services by RMI to Boeing is commercial in nature and that RMI and Boeing do stand in commercial relationship with each other. While construing the expression "commercial" in Section 2 of the Act it has to be borne in mind that the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction." [See: Renusagar Power Co. Ltd. v. General Electric Co. (SCC at p. 723-24 : SCR at p. 492) and Koch Navigation Inc. v. Hindustan Petroleum Corpn. Ltd.6 (SCC at p. 262 : SCR at p. 75).] The expression "commercial" should, therefore, be construed broadly having regard to the manifold activities which are integral part of international trade today". (emphasis supplied)

19. It was further observed;

"While construing the expression `commercial relationship' in Section 2 of the Act, aid can also be taken from the Model Law prepared by UNCITRAL wherein relationships of a commercial nature include "commercial representation or agency" and `consulting'".

20. Now, UNCITRAL Model Law on International Commercial Arbitration as adopted by the United National Commission on International Trade Law defines the term `commercial' thus;

"The term `commercial' should be given a wide interpretation so as to cover matters arising from all relationship of a commercial nature, whether contractual or not. Relationship of a commercial nature include, but are not limited to, the following transactions; any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring leasing, construction of works; consulting; engineering, licensing; investment, financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road." [Foot-note to Article 1 (1)] (emphasis supplied)

21. Before more than three decades, in Union of India v. D.N. Revri & Co., (1976) 4 SCC 147, this Court stated;

"It must be remembered that a contract is a commercial document between the parties and it must be interpreted in such a manner as to give efficacy to the contract rather than to invalidate it. It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach and it must not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation".

22. Very recently, in Citibank N.A. v. TLC Marketing PLC & Anr., (2008) 1 SCC 481, this Court held that commercial contract must be broadly construed with a view to give efficacy to such contract rather than to invalidate it. Clauses of the contract must be liberally interpreted. Narrow and technical approach should be avoided. [see also Russel on Arbitration (1997); p.60]

23. The other issue which has been raised by the learned counsel for the respondent is that the respondent was appointed as an employee by the applicant-Company and there is relationship of master and servant between the parties. A contract in question is a contract of employment to which the Act does not apply. The submission of the Company, on the other hand, is that looking to the agreement as a whole, it cannot be said that the respondent was a mere employee. The relevant clauses of the agreement go to show that it was a contract of trade and business, which is a commercial transaction and Clause 2 clearly gets attracted.

24. It has not been disputed by the applicant-Company that if the contract is merely of an employment and the relationship between the parties is of master and servant, the matter cannot be referred to Arbitral Tribunal. But if the respondent is engaged by the applicant Company to perform functions which are inextricably linked with functions which could be undertaken by a businessman or by a Company and such activities form an integral part of his activities, there is element of `commerce'. In that case, the provisions of the Act would clearly apply.

25. In the instant case, the respondent has been appointed as Director (Technical) and has been allotted 40% equity shares in the subsidiary Company (Comed Bio-Tech Ltd.). Over and above that, he was to be paid salary and other benefits in lieu of services rendered by him. Para 3 of the Agreement required the respondent to undertake certain responsibilities.

26. They are as under;

"Responsibility of DR. C.N. RAMCHAND

1. Will be responsible for the selection of machineries, instruments, staff selection including technical staff and arrange for the same.

2. He will arrange for successful operation of the research center.

3. To arrange and coordinate with the group companies in the area of the product planning, product development and arrange for the stage up the level of the launching in the market.

4. He will be chief executive officer in the Comed Bio Tech Ltd. in all operational matters.

5. He will be responsible to develop new bio molelcules as per the discussion with his utmost care integrity.

27. The applicant-Company wanted to venture into the field of bio-technology which was not previously chartered or traversed by it (novel bio-products). The respondent possessed special knowledge and to get the benefit of such research and expertise, an agreement had been entered into by the parties and respondent had been appointed Director of the subsidiary Company.

28. Now, it is well settled that a Director is not a mere employee or servant of the Company. In Lee v. Lee's Air Framing Ltd., 1961 AC 12, it was held that a Director is a controller of the company's affairs and is not a mere servant of the Company. Such Director may have to work also as an employee in a different capacity. Gower and Davies' Principles of Modern Company Law, (17th Edn. pp. 370-76) also deals with duties of Director viz-a-viz as an employee of the Company and makes it clear that a Director per se cannot be said to be an employee or servant of the Company.

29. In Ram Pershad v. Commissioner of Income Tax, New Delhi (1972) 2 SCC 696, this Court held that a Managing Director may have a dual capacity. He may be both, a Director as well as an Employee.

30. The Court stated;

"7. Though an agent as such is not a servant, a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant. It is again true that a director of a company is not a servant but an agent inasmuch as the company cannot act in its own person but has only to act through directors who qua the company have the relationship of an agent to its principal. A Managing Director may have a dual capacity. He may both be a Director as well as employee. It is therefore evident that in the capacity of a Managing Director he may be regarded as having not only the capacity as persona of a director but also has the persona of an employee, as an agent depending upon the nature of his work and the terms of his employment. Where he is so employed, the relationship between him as the Managing Director and the Company may be similar to a person who is employed as a servant or an agent for the term "employed" is facile enough to cover any of these relationships. The nature of his employment may be determined by the articles of association of a company and/or the agreement if any, under which a contractual relationship between the Director and the company has been brought about, whereunder the Director is constituted an employee of the company, if such be the case, his remuneration will be assessable as salary under Section 7. In other words, whether or not a Managing Director is a servant of the company apart from his being a Director can only be determined by the article of association and the terms of his employment".

31. The Court then referred to Anderson v. James Sutherland (Peterhead) Limited where Lord Normand at p. 218 said:

"... the managing director has two functions and two capacities. Qua Managing Director he is a party to a contract with the company, and this contract is a contract of employment; more specifically I am of opinion that it is a contract of service and not a contract for service."

32. Thus, from settled legal position as also from the functions to be performed by the respondent, I hold that the respondent was working in dual or double capacity, i.e. (i) as an employee, and (ii) as a Director. In the later capacity, however, he was the Chief Executive Officer of the subsidiary Company and had to look after all operational matters. The functions to be performed by him were supervisory and related to policy making decisions in the affairs of the Company, as observed by this Court in Ram Pershad. Any dispute between the applicant-Company and the respondent would, therefore, be covered by Clause 12 of the Agreement which provides for arbitration. Hence, the contention of the learned counsel for the respondent that the respondent was merely an employee and there was no element of business, trade or commerce has no substance and must be rejected.

33. For the foregoing reasons, in my opinion, the application filed by the Company must be allowed by holding that the case is covered by clause (f) of sub-section (1) of Section 2 of the Act. It is a case of International Commercial Arbitration and is covered by Clause 12 of MoU. Since there is a dispute between the parties, it has to be decided by an arbitrator. The clause extracted hereinabove provides for an arbitrator i.e. sole arbitrator and hence only one arbitrator should be appointed. I, therefore, appoint Mr. Madhukar Fanse, retired Judge, City Civil Court, Ahmedabad as the sole arbitrator to decide the dispute between the parties.