

SUPREME COURT OF INDIA

Sirajuddin Kasim

Vs.

Paramount Investment Ltd.

Arbitration Petition No.17 of 2009

(Asok Kumar Ganguly J.)

02.08.2010

ORDER

A.K.Ganguly, J.

1. This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter, "the said Act") by the Petitioner praying for appointment of an arbitrator to adjudicate the claims and disputes between the petitioner and the respondent as the parties have been unable to concur upon the arbitrator.

2. The first petitioner (hereinafter, P1) is Sirajuddin Kasim, an Indian, who is the Director, Promoter and shareholder of the second petitioner holding 75% of issued share capital of the second petitioner (hereinafter P2). P2 is a company incorporated under the laws of the Republic of Singapore and inter alia deals and trades in cotton, timber, logging, acquisition, operation and sale of oil and gas assets, mining of Manganese and other metals. The respondent on the other hand is a company incorporated under the Laws of Mauritius. The respondent is engaged inter alia in the business of making investments by way of equities in private and public companies on a negotiated basis.

3. The petitioners' case is that the understanding between the parties was that the respondent would procure farm out transactions of oil and gas blocks for P2.

“For such farm out transactions, the respondent would be paid a commission separately. On the date of the Shareholders' Agreement (SHA), P2 was allotted oil and gas blocks in the Republic of Gabon. There were proposed oil blocks to be procured by execution of Production Sharing Contract ("PSC") in Brunei as well as in Tajikistan.

In their affidavit the respondent admitted this arrangement between the petitioners and the respondent and also admitted the receipt in the name of Valpro, a sum of US \$

625,000, claiming that the same was paid by the petitioners for services rendered in relation to the farm out contracts.”

4. In March, 2006 the respondent was successful in farming out the oil blocks of P2 through Oil India Limited and Indian Oil Corporation Limited for which their company Valpro Private Limited was paid a commission of US \$ 625,000 i.e. 5% of the value of the farm out.

“Subsequently, attempts were purported to be made by the respondent to farm out oil and gas blocks for P2, but the respondent could not procure any farm out transaction. Between March, 2006 and 23rd April, 2008 correspondence was exchanged between the parties i.e. P1 and P2 and the respondent.

From that correspondence, it will appear that disputes and differences cropped up between the parties. Allegations were made by the respondent that P1 was allegedly falsifying and manipulating the accounts of P2. There were several other allegations which are not required to be discussed in detail.”

5. The petitioners' case is that the respondent was deliberately postponing and delaying the holding of the AGMs of P2 and was thereby delaying the finalization of accounts which was absolutely necessary for submission of proposals to foreign Governments for procuring oil block. The petitioners' further case is that the respondent through its representatives, Anshuman Khanna, Santosh Gadia and their company Seana Energy Pte. Ltd. were making presentations to prospective purchasers/operators for farming out assets of P2 in breach of the Shareholders' Agreement and was unjustifiably demanding remittances without the desired business for P2. The correspondence exchanged between the petitioners and the respondent between 28th August, 2006 and 22nd April, 2008 would show that disputes were brewing between the parties.

6. On 23rd April, 2008 a Settlement Agreement (Annexure-P8 pg. 116 Vol.1) was executed between P1 and the respondent; Clause C thereof stipulates that there have been disputes and differences between P1 and the respondent in relation to SHA and the management of the company and with a view to amicably resolve the same, P1 agreed to purchase the entire interest of the respondent in P2.

7. Clause 2(c)(i) and (ii) of the Settlement Agreement stipulates:

“2(c) An amount equal to 10% of the gross amount received by Marvis or any other company in which Siraj Kasim holds an equity interest, whether directly, indirectly or deemed (Marvis and such company being referred to herein as the Siraj Kasim Investments) in relation to or arising or accruing from the farm-out of part or whole of the participating interest in oil & gas assets of the Siraj Kasim Investments. The amounts payable under this clause 2(c) shall be paid within 5 business days of actual receipt of the gross amount by the Siraj Kasim Investments save and except that (i) if, for any reason whatsoever, the farm-out does not take place on or before 23rd

February 2009, or (ii) 10% of the gross receipts on account of such farm-outs as on 23rd February 2009, aggregates to less than USD 1,500,000 (USD One Million Five Hundred Thousand only) the amounts payable under this clause 2(c) shall be USD 1,500,000 (USD One Million Five Hundred Thousand only) which shall be payable in cash by way of irrevocable wire transfer to PIL's account set out in Schedule I the wire transfer being for value on a date which is on or before 28th February, 2009.

Where full payment of any of the above amounts is not received in the due date for such payment, the amount unpaid shall bear simple interest at the rate of 12% p.a. from the due date of payment to the date of actual payment, as well after as before judgment (the interest).”

8. It is submitted by the petitioners that all rights of P1 and the respondent under the SHA were to remain operative despite the Settlement Agreement.

9. Clause 4C of the Settlement Agreement gave an option to the respondent to acquire 10% participating interest of P2 in the asset named Shakthi in Gabon.

10. Further disputes cropped up between the parties out of the SHA between 23rd April, 2008 and 17th April, 2009. To various letters written by the petitioners, the respondent by its letter dated 8th May, 2009 replied to the petitioners' letter dated 15th April, 2009 and 17th April, 2009; and the respondent by its letter dated 8th May, 2009 called upon the petitioners to appoint an independent accounting firm for a thorough investigation of the accounts.

11. The notice invoking the arbitration clause was given by the petitioner No.1 on 15th April, 2009 and in the said letter, it was contended by petitioner No.1 that the name of Mr. Gadia be deleted as an arbitrator from the SHA, as he has acted on behalf of the respondent. Therefore, a prayer was made for the appointment of an impartial arbitrator.

12. Another letter dated 17th April, 2009 was written by the advocate of petitioner No.1 to the respondent and Mr. Anshuman Khanna, representative of the respondent. In the said letter a further request was made for the appointment of an independent arbitrator and it was reiterated that petitioner No.1, by its previous letter dated 15th April, 2009 terminated the Settlement Agreement dated 23rd April, 2008 and the Power of Attorney of the same date.

13. Thereafter, on 14th May, 2009 the respondent filed a suit against P1 before the High Court of Republic of Singapore, claiming damages to the extent of USD 4,850,000/- and interest at the rate of 12% and prayed for specific performance of the Settlement Agreement dated 23rd April, 2008.

14. The case of the Respondent is that the Settlement Agreement has no arbitration clause. On the other hand, Clause 10 of the said agreement provides as follows:

“This Agreement shall be governed by the Singapore law. Notwithstanding any provision in the Shareholders Agreement, the parties agree that in relation to any legal action or proceedings arising out of or in connection with this Agreement, each of the parties hereby irrevocably submits to the non-exclusive jurisdiction of the courts of Singapore and any party who is not resident or in the case of a corporation, not incorporated, in Singapore hereby consents to service of process by post or in other manner permitted by the relevant law.”

15. It may be noted that the said Settlement Agreement is between petitioner No.1 and respondent and petitioner No.2 is not a party to this Agreement.

16. The respondent's case is that only after the Singapore Court decreed the suit and the same was confirmed in appeal, the petitioner sought to invoke the arbitration clause under the SHA.

17. In the conspectus of these facts, the question is whether the arbitration clause in the SHA still survives. The arbitration clause in SHA runs as under:

“If any dispute, difference or question shall, at any time hereinafter arise between the parties in respect of the construction of this Agreement, or concerning anything contained or arising out of these presents as to rights, liabilities or duties of the said parties hereunder, which cannot be mutually resolved by the parties within a period of thirty days, the same shall be referred to arbitration in accordance with

shall be resolved by a sole arbitrator in accordance with the provisions of the Model Law of Arbitration adopted by the United Nations Commission on International Trade Laws. The sole arbitrator shall be Mr. Santosh Gadia, Chartered Accountant having address at F-45, Bhagat Singh Market, New Delhi- 110001, India or in case of his inability to act as such, such sole arbitrator shall be appointed jointly by the parties. The seat of arbitration shall be New Delhi. The arbitration proceedings shall be conducted in English.”

18. From a perusal of clause 10 of the Settlement Agreement and the Arbitration Clause in SHA, both set out hereinabove, it does not appear prima facie that the rights of the petitioners - both petitioner Nos.1 and 2, under SHA have been superseded by the arbitration clause. In any event the question whether the rights of the petitioners under SHA have been superseded is an arbitrable dispute.

19. Admittedly, petitioner No.2 is not a party to the settlement agreement. Therefore, its rights under the arbitration clause are prima facie not superseded by the settlement agreement. Under Section 2 (h) of the Arbitration and Conciliation Act, 1996 party means a party to an arbitration agreement.

“The petitioner No.2 is a party to an arbitration agreement within the meaning of Section 2(h) but he is not a party to the settlement agreement. Therefore, whether his rights have been superseded by the settlement agreement also may be an arbitrable dispute.”

20. From the sequence of events discussed above, prima facie, it appears that respondent filed a suit on 14th May 2009 before the High Court of Republic of Singapore, inter alia, claiming damages after receiving the letters of the petitioner dated 15th April, 2009 and 17th April, 2009, whereunder the arbitration clause has been invoked. It also appears that prior to the filing of the suit, the settlement agreement dated 23rd April, 2008, as also the Power of Attorney dated 23rd April, 2008, were revoked by the letters dated 15th and 17th April, 2009 and the request to appoint an impartial arbitrator in terms of clause 8.4 of SHA was made in the letter dated 15.4.2009 and then reiterated in the letter dated 17.04.2009.

21. The learned counsel for the respondent, in view of the facts stated above and in view of his subsequent suit filed by them, argued that the rights of the petitioners under the arbitration agreement does not survive and in support of his contention reliance was placed on the decision rendered in *Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya and another*¹.

22. This Court is of the opinion that the reliance by the respondent on *Sukanya Holdings* (supra) is not of much help to the respondent in the facts and circumstances of the case. First of all in the instant case Section 8 of Arbitration and Conciliation Act is not attracted. It is nobody's case that matter was placed before the judicial authority before invoking the arbitration clause. In the instant case arbitration clause was invoked earlier than the filing of a suit as noted above. On the other hand the ratio in the case of *Sukanya Holdings* (supra) is against the contention of the respondent in as much as it has been held, in paragraph 16 at 536 of the report, that it would be difficult to give an interpretation to Section 8 of the Act for bifurcation of the cause of action between the Civil Court and the arbitral forum.

23. In the case of *Sukanya Holdings* (supra) the dispute was over dissolution of the partnership firm and over accounts filed by one partner against the defendants who were admittedly not partners in the firm.

“Therefore, the Court held that the meaning of the term "in a matter" must indicate that the entire subject matter of the suit should be subject to arbitration agreement.”

24. In the instant case admittedly petitioner No.2 is neither a party to the settlement agreement nor was he impleaded in the suit.

“Therefore, the ratio in *Sukanya Holdings* (supra) does not help the respondent.”

25. In the instant case the petitioners have alleged that there was economic duress in the matter of execution of the settlement agreement. Therefore, following the ratio of this Court in the case of *National Insurance Company Ltd. vs. Boghara Polyfab Pvt. Ltd.*² reported in,

this Court is of the opinion whether rights of the parties under SHA have been superseded by the subsequent settlement agreement may be an arbitrable issue and that issue can be examined by the arbitrator.

26. In this case there are disputes between the parties and there is a valid arbitration clause and the clause has been invoked prior to the filing of the suit. It is also not in dispute that the arbitration procedure between the parties has failed. Therefore, this Court cannot accept the contention of the respondent as there is valid invocation of the arbitration clause prior to the filing of suit by the respondent.

27. In that view of the matter, this Court appoints Justice S.B. Sinha, a former Judge of this Court, the sole learned arbitrator in this case. The learned arbitrator is requested to decide the dispute as early as possible and preferably within a period of four months from the date of entering upon the reference. The remuneration of the learned arbitrator and all the incidental costs are left to be decided by learned arbitrator and are to be jointly shared by the parties.

28. The petition for appointment of an arbitrator is thus allowed. No order as to costs.

¹(2003) 5 SCC 531

²(2009) 1 SCC 267