

SUPREME COURT OF INDIA

India Industrial Growth Fund Limited

Vs.

Nesanuru Doraswamy

(Surinder Singh Nijjar J.)

09.05.2011

ORDER

SURINDER SINGH NIJJAR, J.

1. Heard learned Counsel for the parties.

2. The instant petition is filed under Section 11(6) and 11(12)(a) of the Arbitration and Conciliation Act, 1996 read with the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996 for appointment of Presiding Arbitrator, in view of the disputes having arisen between India Industrial Growth Fund Limited (hereinafter referred to as "the Petitioner") and Nesanuru Doraswamy and Ors., (hereinafter referred to as "the Respondents") in relation to the Share Subscription Agreement (hereinafter referred to as "SSA") executed between them on 5th June, 2008 and also in terms of the Share Purchase Agreement dated 10th September, 2009 and the Pledge Agreement 5th June, 2008, being agreements interconnected with the Share Subscription Agreement and which can be adjudicated upon by the Arbitral Tribunal sought to be appointed.

3. It is not necessary to make a detailed reference to the pleadings of the parties as the parties have already agreed to nominate their respective Arbitrators. Therefore, this Court is now only required to nominate the third Arbitrator, who shall act as the Chairman of the Arbitral Tribunal. However, we may briefly notice the broad contours of the disputes that have arisen between the parties which led to the instant petition.

4. The Share Subscription Agreement was executed between the Petitioner (as the investor), Mrs. Anitha Doraswamy, Mr. Nesanuru Doraswamy and Krishna Saa Fabs Pvt. Ltd. (Respondents herein). Pursuant thereto, the Petitioner subscribed to

certain Compulsorily Convertible Preference Shares (CCPS) and equity shares of Krishna Saa Fabs Pvt. Ltd. (Respondent No. 3 herein) on terms and conditions as set out in the SSA. The parties also entered into a Pledge Agreement dated 5th June, 2008, wherein Mr. Nesanuru Doraswamy (Respondent No. 1 herein) and Mrs. Anitha Doraswamy (Respondent No. 2 herein) inter-alia pledged shares in the favour of the Petitioner.

5. In terms of the SSA, the Respondents were required to provide the Petitioner an exit after a period of 48 months from the date of receipt of the first tranche closing date. However, Respondent No. 3 was unable to provide an exit to the Petitioner within the stipulated time period. Thereafter, the parties executed a Share Purchase Agreement (SPA) dated 10th September, 2009, wherein the Respondent No. 1 and 2 showed their intention to buy CCPS and the Equity Shares from the Petitioner. The aforesaid CCPS were subscribed pursuant to the SSA. The consideration was payable in tranches with the escrow agent in terms of Escrow Agreement dated 10th September, 2009. The Respondent No. 1 and 2 deposited the first tranche with the Escrow Agent. However, they failed to pay the remaining consideration amount within the stipulated time set out in the SPA. Thereafter, Respondent No. 3 vide letter dated 31st December, 2009 intimated the Petitioner that they do not have the resources nor the reserves to buy back the shares of the Petitioner. Consequently, Petitioner herein sent a Notice dated 15th January, 2010 for the termination of SPA. Subsequently, upon termination of the SPA, Arbitration Petition No. 38 of 2010 was filed by Respondent No. 1 and 2 against the Petitioner before the IVth Additional District Judge at Tirupathi, Andhra Pradesh under Section 9 of the Arbitration Conciliation Act. The petition was filed by Respondent No. 1 and 2 to restrain the Petitioner from taking any further action under the SSA, SPA and Pledge Agreement.

6. The District Judge at Tirupathi by order dated 22nd February, 2010 directed the parties to maintain status quo and also directed the Respondent No. 1 and 2 to initiate arbitral proceedings. Thereafter, the District Court vide order dated 1st April, 2010 observed as follows:

The learned Counsel for the 1st Respondent has submitted that if the order is made absolute it will become a permanent order.

He further submitted a decision reported in: AIR 2004 SC 1433 wherein it is laid down that order passed by the court should fall within meaning of expression an interim measure of protection as distinguished from all time or

permanent protection. In the present case on hand, already matter was heard after filing counter interim protection was granted so as to initiate arbitration proceedings. Thus arbitration proceedings are taken place as the Petitioners as well as the Respondents have appointed their respective arbitrators. So the purpose of the petition is over. Order made 22-2-2010 is made absolute. This petition is accordingly closed.

7. The Respondents have nominated Shri A. Mohan as the Arbitrator for resolution of the disputes only under the SPA. On the other hand, the Petitioner invoked arbitration proceedings under the SSA and nominated Mr. Pankaj Jain, Khandelwal Jain & Co., Chartered Accountant as the Arbitrator. Thereafter, the Respondents vide letter dated 19th April, 2010 reiterated and brought to the notice of the Petitioner that they had invoked arbitration only under the SPA and not under the SSA. Thereafter, the Arbitrator appointed by the Petitioner vide his letter dated 20th April, 2010 addressed the Arbitrator appointed by the Respondents and therewith suggested the names of Mr. Justice D.R. Dhanuka and Dr. B.P. Saraf to be appointed as the Presiding Arbitrator but they failed to agree mutually on the appointment of the Presiding Arbitrator.

8. The parties having failed to agree mutually on the appointment of the Presiding Arbitrator, the Petitioner has approached this Court under Section 11 of the Arbitration and Conciliation Act.

9. This matter was listed for hearing on a number of occasions and adjourned at the request of the learned Counsel for the Respondents. Ultimately, the Counter Affidavit was filed by the Respondents and the matter was listed for final disposal. Again the matter was adjourned on a number of occasions on the request of the learned Counsel for the Respondents. Ultimately on 15th April, 2011, this Court recorded the following order:

The learned Counsel for the Respondent states on instructions from his client that they are making earnest efforts to resolve the dispute without having resort to arbitration or any other legal proceedings. He submits that if three weeks' time is granted the parties will, in all probability, file consent terms regarding the settlement arrived at between the parties. It is made clear that the learned Counsel for the Petitioner has no such instructions but in the interest of justice he does not oppose the adjournment. List on 9th May, 2011

10. Today, when the matter came up for hearing, none is present on behalf of the Respondents. Learned Counsel for the Petitioner submitted that the Respondents are only adopting dilatory tactics to avoid the arbitration proceedings. Resolution of disputes by arbitration is provided in Clause 31 of the Share Subscription and Shareholders Agreements, which is as under:

31.1 Arbitration. In the case of any dispute or differences or claim arising out of or in connection with or relating to this Agreement or in the interpretation of any provisions of this Agreement, or the breach, termination or invalidity hereof (the "Dispute"), the Parties shall attempt to first resolve such Dispute or claim through discussions. If such Dispute is not resolved through such discussions within thirty (30) days after one Party has served a written notice on the other party requesting the commencement of discussions, the Dispute shall be finally settled by arbitration under the Arbitration and Conciliation Act, 1996. For the purpose of such arbitration, the arbitration board shall be presided over by three (3) arbitrators, of which the Promoters and the Company shall jointly appoint one (1) arbitrator and the Investor shall appoint one (1) arbitrator. The two (2) arbitrators shall then jointly appoint a third arbitrator, who shall serve as chairman of the arbitration board.

31.2 Venue and procedure. The place of arbitration shall be Mumbai and the language of arbitration shall be English. The arbitrator's award shall be substantiated in writing. The arbitrators shall also decide on the costs of the arbitration procedure. The Parties shall submit to the arbitrator's award and the same shall be enforceable in any competent court of Law.

11. Pursuing to the aforesaid Arbitration Clause, both the parties have nominated one Arbitrator each as noticed above. The Petitioner has appointed Mr. Pankaj Jain, Khandelwal Jain & Co., Chartered Accountant and the Respondents have nominated Shri A. Mohan as the Arbitrator. Nomination of the Arbitrators by the parties has indicated all the fact that there is a live dispute between the parties. This Court has the necessary jurisdiction as the Petitioner is a company which is incorporated in Mauritius. The venue of the arbitration has been fixed at Mumbai. The two Arbitrators appointed by the parties have failed to reach a consensus with regard to the Chairman of the Arbitral Tribunal.

11A. Therefore, in exercise of the powers of this Court under Section 11(6), I hereby nominate Hon'ble Mr. Justice S.P. Bharucha, Former Chief Justice of India as the Chairman of the Arbitral Tribunal.

12. Any further terms and conditions with regard to the remuneration and other facilities to be made available to the members of the Arbitral Tribunal shall be decided mutually between the parties and the members of the Arbitral Tribunal.

13. The Registry is directed to communicate this order to the members of the Arbitral Tribunal to enable them to enter upon the reference and decide the matter as expeditiously as practicable.

The Arbitration Petition is, accordingly, disposed of.