

Sri Narayan Prasad Jalan Vs Sri Chetan P.S. Chauhan and Another

Court: Delhi High Court

Date of Decision: Aug. 18, 2005

Acts Referred: Arbitration and Conciliation Act, 1996 â€” Section 11, 11(10), 11(5), 2, 8
Civil Procedure Code, 1908 (CPC) â€” Section 10
Companies Act, 1956 â€” Section 111, 397, 398, 402, 403

Citation: AIR 2006 Delhi 8 : (2005) 3 ARBLR 212 : (2005) 123 DLT 270 : (2005) 84 DRJ 331

Hon'ble Judges: Ramesh Chand Jain, J

Bench: Single Bench

Advocate: C. Mukund, Ashok Jain, Pankaj Jain and Neeraj Jain, for the Appellant; V.P. Singh Vinay Sharma and Dinkar Singh, for the Respondent

Final Decision: Allowed

Judgement

R.C. Jain, J.

This is a petition u/s 11(5) and (10) of the Arbitration and Conciliation Act, 1996 (for short the "Act") seeking appointment

of an arbitrator in terms of arbitration agreement dated 11.10.2003 and for referring the disputes between the parties to the arbitrator, so

appointed for adjudication.

2. The petition has been made with the averments and allegations that on 11.10.2003 the respondents entered into a Share Purchase Agreement

with the petitioner and to hand over the management of the company to them on the terms and conditions set out in the Term Sheet of the even

date. It is alleged that pursuant to the terms and conditions of the Term Sheet, the petitioner invested a sum of approximately Rs. 403.00 lacs in the

company from 28.10.2003 till 22.5.2004 and took over the possession of the factory on 2.11.2003 and started running the same. It is further

alleged that in spite of infusing the above sum of money, respondents No. 1 and 2 failed and neglected to act in terms of the agreement and to

cooperate in running the unit and also deviated from the terms of the agreement in several respects fully detailed in the petition. The petitioner,

Therefore, filed a petition (OMP 256/2004) u/s 9 of the Act) against the respondents in this Court praying for certain interim measures. It is also

averred that because of mis-management of the affairs and oppression to the shareholders and various decisions taken by respondents No. 1 and

2 in breach and violation of the statutory requirements, the petitioner was compelled to file a petition under Sections 397 and 398 of the

Companies Act, 1956. Clause 10 of the terms of the Term Sheet dated 11.10.2003 contains an arbitration agreement to the following effect:

Clause-10:

In case of dispute or difference by and between the parties concerning or relating to or arising out of completion of transaction contemplated herein

or with regard to interpretation of this Term Sheet or any of the clauses thereof, the same shall be referred to Arbitration as per provisions of the

Arbitration and Conciliation Act, 1996.

3. Vide a communication dated 4.8.2004 the petitioner invoked the arbitration and appointed Shri K. Ramamoorthy (a retired Judge of this Court)

to arbitrate and adjudicate the disputes between the parties. Vide a letter dated 23.8.2004 respondent No. 1 informed the petitioners that he did

not agree to the appointment of Shri K. Ramamoorthy as an arbitrator, as suggested by the petitioner. It is also averred that on 16.8.2004 Shri

Jitender Aggarwal was served with a notice of an advocate purportedly dated 5.8.2004 along with a copy of the order dated 24.7.2004 which

revealed that the respondents have wrongfully, illegally and with ulterior motive caused a civil suit to be filed and obtained ex parte orders that

“no obstruction should be caused in their running of the factory”. The said suit is stated to be not maintainable and is rather an attempt on the

part of the respondents creating obstruction and interference in the petitioner's managing the affairs of the factory.

4. Respondents have contested the petition by filing reply raising preliminary objections to the effect that one of the directors of the company,

namely Shri Yogesh Alawadi, has filed a suit for permanent injunction in a Civil Court at Moradabad, which court is already seized of the matter

prior in time of the filing of the instant petition and, Therefore, the present proceedings are liable to be stayed sine die in accordance with the

provision of Section 10 CPC; the present petition has been filed with mala fide intention and with a view to circumvent the proceedings pending in

the Civil Court at Moradabad; the petitioners have approached this Court with unclean hands and they want to do forum shopping; the petitioner

has filed a petition before the Principal Bench of the Company Law Board at Delhi under Sections 111, 397, 398, 402, 403 and 406 of the

Companies Act, which is pending; the petitioner has not specified any dispute which requires arbitration and, Therefore, the arbitration clause

referred to cannot be invoked in accordance with the provisions of the Act. Validity of the entire Term Sheet dated 11.10.2003 is stated to be sub

judice before the Court of Civil Judge, Moradabad and, as such, the arbitration clause referred to cannot be acted upon. The territorial jurisdiction

of this Court to entertain the present petition is also denied on the premises that the factory premises is situated at Gajraula, District J.P. Nagar. On

merits, the agreement and the Term Sheet dated 11.10.2003 is not disputed but all other allegations in regard to various acts of commission and

omission mentioned in the petition which are stated to be vocative of the terms and conditions of the Term Sheet are denied.

5. I have heard Mr. C. Mukund, learned counsel representing the petitioner and Mr. V.P. Singh, learned senior counsel representing the

respondents at length and have given my thoughtful considerations to their submissions.

6. Mr. V.P. Singh, learned senior counsel representing the respondents has not disputed the existence of arbitration agreement contained in clause

10 of the Term Sheet dated 11.10.2003 which form part of the Share Transfer Agreement of the even date entered between the parties. Though a

vague and half-hearted plea was raised in the reply to the effect that the petitioner has not specified any dispute which requires arbitration, yet the

same was not pressed at the time of hearing and rightly so because the petitioner has pointed out as many as 25 acts of commission of omission on

the part of the respondents, which according to the petitioners, amount to the violation or deviation of the terms and conditions contained in the

Term Sheet dated 11.10.2003. Therefore, it cannot be said that there exists no dispute or differences between the parties. On the face of this

factual and legal position in regard to existence of the arbitration agreement between the parties for settlement of their disputes and having regard to

the scope of the present proceedings, the power and jurisdiction of the Chief Justice or its designate u/s 11 of the Act as more fully laid down by

the Constitution Bench of the Supreme Court in the case of Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., the

only question which falls for consideration is as to whether this Court can refuse to exercise its power u/s 11 of the Act as a designate of the Chief

Justice, merely because a Civil Court under different jurisdiction is seized of a suit filed by another director.

7. Mr. V.P. Singh, learned senior counsel representing the respondents has vehemently urged that in view of the pending civil suit in the Civil Court

at Moradabad and the proceedings taken therein so far, the proceedings in the present case for appointment of an arbitrator are liable to be stayed

or in any case have become infructuous more particularly in view of the order dated 18.7.2005 passed by the Civil Court at Moradabad. On the

other hand, Mr. Mukund, learned counsel representing the petitioner has urged that the pendency of the civil suit in the Moradabad Court cannot

operate as a bar for this Court in exercising its powers as a designate of the Chief Justice u/s 11 of the Act. He has pointed out that though the suit

filed by Mr. Alawadi can be said to be prior in time, but its notices were not served upon the petitioners uptill the filing of the present petition. In

any case it is urged that the petitioners taking note of the said suit had filed an application u/s 8 of the Act before the Moradabad Civil Court for

stay of the said suit in view of existence of an arbitration agreement between the parties for settlement of their disputes and the petitioners having

approached this Court with petitions under Sections 9 and 11 of the Arbitration and Conciliation Act. The said application was opposed on behalf

of the plaintiff of the said suit, still vide an order dated 18.7.2005 the application of the petitioners u/s 8 of the Act has been allowed. The relevant

portion and the operative part of the said order dated 18.7.2005 passed by the District and Sessions Judge, Moradabad is as under:

In the objection it is contended on behalf of the plaintiff that the case of the plaintiff is for possession and running of the factory peacefully. There is

no dispute with regard to ownership. In this regard from the perusal of the plaint it is clear that prayer has been made to declare the agreement

dated 11.10.2003 entered between the parties null and void. Therefore, it is clear that the above deed is disputed and in these circumstances the

application of the defendants is considerable.

It is objected that there is no mention of the name of the arbitrator in the application but this objection is not sustainable. Because the application is

for sending to the arbitration, the name of arbitrator has not mentioned in the agreement. In these circumstances, the arbitrator is to be appointed

with the consent of the parties.

It is objected that the case for appointment of arbitrator is also pending in the Hon"ble High Court of Delhi. In this regard from the perusal of the

pleadings of the parties, it is clear that various cases are pending consideration in the Hon"ble High Court between the parties but in this case no

evidence has been filed that the case with regard to appointment of arbitrator is pending for consideration in the Hon"ble High Court of Delhi. Even

it is pleaded on behalf of the defendants that no matter is pending in the Hon"ble High Court of Delhi in regard to the appointment of arbitrator.

Therefore, this objection is also not sustainable.

During the course of arguments it is stated by the Ld. Counsel for the plaintiff that he has no objection for sending the matter for arbitration. It is

also explicitly stated that he has no objection in accepting the application 24G of the defendants.

Considering all the facts of the case, I found that this is proper ground to send the case for arbitration. Therefore, the application 24G is liable to be

accepted.

The application 24G is accepted. While staying the further proceedings of the cases, the prayer for sending the matter for arbitration is accepted.

The parties suggest the name of the arbitrator. The record of case be put up on 30.7.2005 for further proceedings.

8. Mr. Mukund, learned counsel for the petitioner submitted that having regard to the scope of the proceedings u/s 8 of the Act and the fact that

the Court of District and Sessions Judge, Moradabad has acceded to the prayer of the petitioner contained in application u/s 8 of the Act to refer

the parties to arbitration, the said court was not justified in making the order for staying the further proceedings in the case or to direct the parties

to suggest the name of the arbitrator. This aspect indeed calls for a consideration of the scope of the powers of the judicial authority before which

an action is brought in a matter which is the subject matter of an arbitration agreement. The expression "refer the parties to arbitration"

appearing in Sub-section (1) of Section 8 of the Act necessarily means that the Court if satisfied that the action which has been brought in a matter

is the subject of an arbitration agreement, will ask the parties to have their disputes resolved by the agreed mode of arbitration and not by resorting

to the jurisdiction of the ordinary Civil Courts set up for adjudication of the rights of the parties. This interpretation stands fortified from the

definition of "reference" appearing in Section 2(e) of the Act which means "a reference to arbitration". The word "arbitration" and

"arbitral tribunal" are distinct and have different meaning. It is, Therefore, manifest that "referring the parties to arbitration" cannot amount to

constitution of an arbitral tribunal. In the opinion of this Court, once a judicial authority u/s 8(1) of the Act refer the parties to arbitration, the suit or

the other proceedings comes to an end before the said Judicial Authority and it becomes functus officio after referring the parties to arbitration.

After referring the party to arbitration, it is open to the interested parties to take recourse for settlement of his dispute through the alternative mode

of arbitration and to seek constitution of arbitral tribunal in terms of the provisions of Section 11 of the Act. In some cases where the parties

themselves suggest or consent for the appointment of a particular arbitrator in that case while allowing the application u/s 8 of the Act, it may be

possible for the Judicial Authority to accept the said suggestion of the parties and to constitute the arbitral tribunal. That order will necessarily be a

consent order based on the consensus reached between the parties on the name of the arbitrator rather than in exercise of any power vested in the

Judicial Authority to constitute an arbitral tribunal under the provisions of Section 8 of the Act.

9. Mr. Mukund, learned counsel for the petitioner has next submitted that the Court of District and Sessions Judge, Moradabad was duly notified

about the pendency of the present proceedings u/s 11 of the Act even at the time of making submissions on the application u/s 8 of the Act, but still

the said Court made the directions in regard to the constitution of arbitral tribunal. In the opinion of this Court, once the Judicial Authority (the

Court of the District and Sessions Judge, Moradabad in the present case) had allowed the application of the petitioners u/s 8 and decided to refer

the parties to arbitration, no further directions of the kind, as made in the last two lines of the order dated 18.7.2005, were warranted more

particularly so when this Court is seized of the petition u/s 11 of the Act filed by the petitioner for the last about one year. On the face of this

position, there is no question of this Court not exercising its powers u/s 11 of the Act as the designate of the Chief Justice. This Court must,

Therefore, appoint an arbitrator to settle the disputes/differences between the parties. As the parties could not agree on the appointment of Shri K.

Ramamoorthy, a retired Judge of this Court, as the arbitrator, this Court is of the view that an independent arbitrator needs to be appointed for

settlement of the disputes/differences between the parties.

10. In the result, the petition is allowed and Mr. Justice S.C. Jain (a former Judge of this Court), 34, Gujarat Vihar, I.P. Extension, Delhi-110 092,

is hereby appointed as the sole Arbitrator to settle the disputes/differences between the parties. The Arbitrator shall enter the reference and make

and publish his Award as expeditiously as it may be practicable. The Arbitrator shall be entitled to fix his own fee, not exceeding a sum of Rs.

1,50,000/- (Rs. One lac fifty thousand only) in all, to be borne by both sides in equal proportion. The parties are directed to appear before the

sole Arbitrator on 3rd September, 2005 at 11.00 A.M. A copy of this order shall be forward to the named Arbitrator forthwith and shall also be

given to counsel for the parties dusty.