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Madras High Court

Case No: O.A. No. 468 of 2006 and A. No''s. 3018 and 3225 of 2006

E. Logistics Private Limited and		APPELLANT
	Vs	
Sanjeevi Vs Financial Technologies India Ltd. and Others		RESPONDENT

Date of Decision: Nov. 14, 2006

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 10, 12, 13, 14, 16

Hon'ble Judges: S. Rajeswaran, J

Bench: Single Bench

Advocate: R. Venkatavaradan, for the Appellant; Arvind P. Datar P.A. Arvind Pandian and P. Valliappan and R.M. Palaniappan for respondents 2 to 5, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

S. Rajeswaran, J.
O.A. No. 468/2006 has been filed for an order of interim injunction restraining the respondents from interfering in the day today business and operations of the 1st applicant company pending disposal of arbitration proceedings.

2. Application No. 3018/2006 has been filed to direct the respondents to repay the sum of Rs. 2,01,00,000/- (Rupees Two crores and one lakh) taken from the 1st applicant company pending disposal of arbitration proceedings.

3. Application No. 3225/2006 has been filed to declare the termination of the mandate of the 6th respondent as the sole arbitrator.

4. The brief facts are as under:

The applicants approached the respondents to make financial investment in the 1st applicant company in order to augment and expand its operations. 3 agreements were entered into between the applicants and respondents which are as under:

1) Term sheet dated 27.12.2005 pursuant to which the business and commercial terms of the financial investments to be made by the respondents in the 1st applicant''s company are recorded and agreed to.

2) Investor Rights Agreement dated 28.12 2005. which provided for the respective rights and obligations of the respondents and the 2nd respondent as shareholders and directors of the 1st applicant''s company and other aspects relating to the management and governance of the 1st applicant company.

3) Reciprocal Obligations Agreement, which provides for representations and warranties made by the 1st applicant Company

5 After the execution of the above said agreements the nominee directors of the respondents were appointed on the Board of Directors of the 1st applicant company. The shareholding in the 1st applicant company was agreed to be maintained at 50% for each of the group. In accordance with the terms of the agreement, the respondents invested a sum or Rs. 2.78 crores in the share capital of 1st applicant company and accordingly allotted shares representing 50% of the paid up equity share capital in the 1st applicant company.

6. In February/March 2006, according to the applicants, the respondents started creating an unpleasant atmosphere and they were questioning each and every action taken by the 2nd applicant as Managing Director of the 1st applicant with the sole intent of harassing and frustrating the functioning of the 1st applicant. The respondents did not respond to the notice for convening the Board Meeting. In April 2006, the respondents put enormous pressure to hand over the control of the day to day finance of the 1st applicant to the 1st respondent company. The 2nd applicant was made to transfer the funds available in the 1st applicant''s current account and a fixed deposit aggregating 2.01 crores to the 1st respondent company. Thereafter the 1st applicant company requested the 1st respondent company to approve various payments to be made as a part of the operating expenses which was approved by the first respondent. When the 1st applicant requested the 1st respondent to transfer the equivalent amount to 1st applicant''s current account, the 1st respondent failed to respond to the aforesaid request. Therefore, the 1st applicant is not able to meet its operating expenses. All requests made by the applicants to return the sum of Rs. 2.01 crores were not considered at all by the 1st respondent. Instead of refunding the sum of Rs. 2.01 crores, the 1st respondent sent a mail dated 25.5.2006 claiming that the sum of Rs. 2.01 crores transferred to them was towards part payment of their indemnity claim for damages suffered on account of loss on investment.

7 Thus dispute arose between the parties and the respondents referred the matter to Mr. P.G. Kakodkar as the sole arbitrator to decide the disputes. On receipt of letter of appointment of the arbitrator, the applicants sent a letter dated 7.6.2006 informing the arbitrator that the agreements provide for a different procedure for appointment of an arbitrator and his appointment is contrary to law and to the terms of the agreement. The applicants have also attributed bias to the arbitrator as they believed that he is the director of the 1st respondent company. But without considering the applicants objections, the arbitrator sent a letter dated 9.6.2006 fixing the date of hearing for the arbitration.

8. Now the 1st applicant''s company is starved of funds to meet the day to day expenses and is not in a position to conduct its business operations. Hence the applicants filed O.A. No. 3018/2006 to direct the respondents to repay a sum of Rs. 2.01 crores pending arbitration proceedings and filed O.A. No. 468/2006 for an injunction restraining the respondents from interfering in day to day business of the 1st applicant company.

9. The 1st respondent entered appearance through their counsel and filed a common counter in O.A. No. 468/2006 and A. No. 3018/2006.

10. In the common counter the 1st respondent stated, that the internal auditors of the applicant No. l, for the period 1.4.2005 to 31.12.2005 qualified a report with respect to infusion of funds and their applications, purchases, related party transactions, collection of tax, shortage of cash, inventory verification, lapses and delay in payment, dismal performance of sales, status of books of accounts and compliance to shareholders and investors. This report points out so may omissions and commissions on the part of the applicants necessitating the 1st respondent to file a Company Petition bearing No. 32/2006 for oppression and mismanagement of the company. The Company Law Board, Chennai by order dated 16.6.2006 appointed an advocate-commissioner to authenticate the statutory records and to submit his report and further directed that the shareholding pattern in the company shall not be disturbed till the disposal of the Company Petition. In the very same order dated 16.6.2006, the Company Law Board directed that any resolution which may be passed at the Board meeting proposed to be held on 17.6.2006 in relation to refund of Rs. 2.01 crores will not be implemented until further orders. It is denied by the 1st respondent that their investment is only Rs. 2.78 crores as alleged by the applicants. According to them, the respondents made investment to the tune of Rs. 8.30 crores. The findings of the internal auditors show that the affairs of the applicant company were not handled properly and hence the applicants were questioned for the action taken which are prejudicial to the interest of the 1st applicant company. The 1st applicant has specifically stated that a sum of Rs. 2.01 crores was paid as part payment of 1st respondent''s claim for indemnity for the loss suffered by the 1st respondent. It is further stated that they invoked arbitration clause as per Clause 28 of the Investors Rights Agreement according to which Mr.

Kakodkar alone can be appointed as sole arbitrator. Therefore they prayed for the dismissal of the above two applications.

10. A rejoinder has been filed by the applicants reiterating their early stand. When these two applications are pending the applicants filed A. No. 3225/2006 u/s 14 read with Section 12 of the Act, 1996 to declare the termination of the mandate of the 6th respondent as the sole arbitrator.

11. In this application it was stated that the 6th respondent was appointed contrary to the provisions of the agreement and he was not only the director in 1st respondent company but is also a part of the audit committee and receiving remuneration towards sitting fees as director of the 1st respondent company. Even though all their objections were sent to the 6th respondent, the 6th respondent has not responded to the charge of bias and therefore they approached this Court to declare that the mandate of the arbitrator stands terminated.

12. A counter affidavit was filed by the 1st respondent stating that the 6th respondent was validly appointed as per Clauses 28 and 44 of the Investor Rights Agreement. The 6th respondent was the ex-chairman of State Bank of India and he is the independent Director of the 1st respondent. It is further stated that Section 14 of the Act, 1996 will not apply to the facts of this case and even otherwise the applicants should agitate this matter only before the arbitrator u/s 16 of the Act. Therefore they prayed for dismissal of this application also.

13. Heard the learned Counsel for the applicants Mr. Arvind P. Datar, learned Senior Counsel for the 1st respondent and the learned Counsel for respondents 2 to 5 I have also perused the documents filed and the judgment referred to by them.

14. I have considered the rival submissions carefully.

15. The prayer asked for in A.468/2006 is for an injunction restraining the respondents from interfering in the day to day business and operation of the 1st applicant company. It is an admitted fact that 3 agreements namely, No. 1 Term Sheet dated 27.12.2005, Investor Rights Agreement dated 28.12.2005 and Reciprocal Obligations Agreement dated 27.12.2005 were entered into between the parties to reflect their mutual rights and obligations. In such circumstances the applicants cannot ask for a blanket injunction against the respondents. The parties are bound by their agreements and subject to their agreements the respondents could question the administration and management of the 1st applicant company. It is also admitted by the applicants that the nominee directors of the respondents were appointed on the Board of Directors on the 1st applicant and the respondents invested an aggregate sum of Rs. 2.78 crores in the share capital and respondents were allotted shares representing 50% of the paid up equity share capital

16. Even though it was claimed by the applicants that the affairs of the 1st applicant company were being conducted in the true spirit of the agreements, the report of

the internal auditors points but certain irregularities resulting in C.P. No. 32/2006 filed before the Company Law Board and the Company Law Board on 16.6.2006 passed an interim order appointing an advocate to authenticate the statutory records. In such circumstances, the applicants have not made out a prima facie case for granting an order of injunction as prayed for. Therefore O.A. No. 468/2006 is dismissed. No costs.

17. Insofar as Application No. 3018/2006 is concerned the applicants prayed for a direction to direct the respondents to repay a sum of Rs. 2.01 crores taken from the 1st applicant company. It is the case of the applicants that a sum of Rs 2.01 crores was transferred, to the 1st respondent company as per their request and the 1st respondent assured them that as and when required to meet the operating expenses, they would release the same to the first applicant company. But in spite of such assurance, the 1st respondent is not releasing the fund to meet the operating expenses and therefore the 1st respondent should be directed to repay the sum of Rs. 2.01 crores.

18. The 1st respondent denied that a sum of Rs. 2.01 crores is in the nature of temporary loan as alleged by the applicants. It is categorically stared by the 1st respondent that the amount was paid as part payment of 1st respondent''s claim for indemnity for the loss suffered by the 1st respondent.

19. No materials were filed by the applicants to prove that the said sum of Rs. 2.01 crores is in the nature of a temporary loan given to respondents. In fact the very dispute seems to arise from the non-release of funds by the 1st respondent to the applicants from the said sum of Rs. 2.01 crores transferred from the account of the 1st applicant company. When one party claims that it is like a loan and the same has to be repaid, the other party paid that it is a part payment for its claim for indemnity for the loss suffered by them. Therefore the nature of the transaction is to be gone into in detail by going through the relevant records and documents by the arbitrator in the arbitration proceedings and until a finding is arrived at it is not possible at this juncture to direct the respondents to repay the sum of Rs. 2.01 crores to the applicants. Therefore the applicants have not made out a prima face case to grant this prayer and application No. 3018/2006 is also dismissed. No costs.

20. In Application No. 3225/2006, the applicants prayed to declare the termination of the mandate of the 6th respondent as the sole arbitrator. The contention of the applicants is that No. (1) his appointment is not in accordance with the agreement and No. 2 he is a director of the 1st respondent company and therefore biased

21. Section 14 of the Act, 1996 reads as under:

14. Failure or impossibility to act:

(1) The mandate of an arbitrator shall terminate if-

(a) The becomes de jure or de facto unable to perform his function or for other reasons fails to act without undue delay; and

(b) The withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in Clause (a), of Sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or Sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or Sub-section (3) of Section 12.

22. A close reading of Section 14 of the act would make it clear that the mandate of an arbitrator shall terminate if Sub-clause (a) and (b) of Sub-section (1) is attracted. An arbitrator should be unable to perform his function de jure or de facto or for other reason, he should fail to act without undue delay and the arbitrator should withdraw from his office on the parties should agree to the termination of his mandate. Only these happenings are contemplated u/s 14 of the Act and the applicants herein have not made out a case for the termination of the contract by bringing in any one of the grounds enumerated u/s 14 of the Act.

23. The only objection raised by the applicants is that his appointment is not in accordance with the agreement and he is a paid director of the 1st respondent.

24. Insofar as the allegation of the appointment of arbitrator contrary to agreement is concerned, it is open to the applicants to file an application u/s 16 of the Act questioning the jurisdiction and hereafter the procedure contemplated u/s 16 of the Act is to be followed.

25. Insofar as the allegation of bias is concerned, the applicants have to send a written statement of the reasons for the challenge to the arbitral tribunal u/s 13 of the Act, 1996 and has to follow the further procedure contemplated u/s 13 of the Act.

26. But the applicants without following the procedure contemplated u/s 13 and 16 of the Act, have straight away filed the above application u/s 14 read with 12 of the Act, 1996 which is not maintainable. The scope of judicial intervention is very minimal under the Act, 1996 and as per Section 5 of the Act courts shall not intervene where adequate procedures are contemplated in the Act. Therefore I am not inclined to terminate the mandate of the 6th respondent as prayed for.

27. The learned Counsel for the applicants relied on the decision of this Court, reported in C.V. Krishna Vs. State of Madras, . In that decision, the Division Bench of this Court held as follows:

3. We are unable to agree with the conclusion of the learned Subordinate Judge. There was no argument before us as was attempted in the written statement that the suit has not been property framed. It is by now clear that if the parties to a contract voluntarily incorporated as one of its terms a clause which obliges one or the other of them to refer such disputes, arising under it or to seek for an interpretation of the terms of such a contract to or from an arbitrator specified or named by them, then the mandate imposed upon themselves by the parties is inescapable and has to be given effect to. To this general principal there is an exception. If it is satisfactorily proved and established that the person named or specified as the arbitrator under the contract is biased towards one of the parties or the arbitrator overtly or covertly involved himself in the subject-matter of the contract from the time of its inception and during the course of its working so as to give an impression to a reasonable person that a reference to him of the disputes that have arisen between the parties in relation to the contract would be futile and it the ultimate analysis would not be a means to secure justice to the complaining party, then the courts have carved out an exception to the general application of the mandate as above and has allowed parties to come to court to seek for the appointment of an arbitrator other than the named arbitrator before whom the differences between the parties could he laid for final adjudication....
A reading of the above decision will make it clear that this is not helpful to the case of the applicants as in the present case it is not satisfactorily proved and established that the 6th respondent/arbitrator is biased or overtly or covertly involved himself in the subject matter of the contract.

28. Even in the other decision relied on by the learned Counsel for the applicants reported in (2001) 103 Com Cas 1097, the Bombay High Court held that if the tribunal is constituted contrary to Section 10 of the Act, 1996, the arbitrators de jure will not be able to perform those functions.

29. In the present case, it is not established that the 6th respondent is constituted contrary to Section 10 of the Act, 1996. Therefore A. No. 3225/2006 is also dismissed. No costs.

30. In view of the above, all the three applications ate dismissed as devoid of merits. No costs.