
(2008) 09 DEL CK 0229

Delhi High Court

Case No: A.A. No. 121 of 2008

Hero Exports

APPELLANT

Vs

Tiffins Barytes

RESPONDENT

Date of Decision: Sept. 2, 2008

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 16, 45, 6

Hon'ble Judges: S. Ravindra Bhat, J

Bench: Single Bench

Advocate: Amit S. Chadha, Nikilesh R. and Puspha, for the Appellant; Tomy Sebastian Kiran Suri and Kirti Mishra, for the Respondent

Final Decision: Allowed

Judgement

S. Ravindra Bhat, J.

The petitioner claims an order for appointment of an arbitrator. Reliance has been placed on Memorandum of Understanding entered into with the respondent on 08.07.2007 which contains the following arbitration Clause:

In the event of any future disputes including any disputes, doubt or question that may or shall arise between the said PARTIES or their administrators, or legal representatives or successor-in-interest, either arising out of this MOU, including but not limiting to the interpretation of this MOU, then every such dispute, doubt or question shall be referred to the Arbitration of a Sole Arbitrator, and in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The venue of the Arbitration shall be at New Delhi.

2. The petitioner adverts to certain transactions whereby the respondent had represented that it owned mines at Bellary and that it could generate about 500,000 metric tonnes per annum. The petitioner alleges having paid Rs. 14.5 crores to the respondent pursuant to an understanding concerning supply of iron ore. It is alleged that the respondent did not honour the commitment and also did not return

the money. The petitioner, therefore, alleges that a Memorandum of Understanding containing an arbitration Clause was entered into with the respondent on 08.07.2007. In terms of the said agreement, it is alleged that the respondent agreed to pay Rs. 9.5 crores in a time bound manner. The petitioner alleges that cheques were issued to it; however, all of them were dishonoured except one cheque for Rs. 1 crore. On the strength of these allegations, the petitioner seeks appointment of an arbitration u/s 11 of the Arbitration and Conciliation Act, 1996.

3. The respondent contends that the Memorandum of Understanding was procured under coercion and extortion and therefore unenforceable. It is alleged that cheques and Memorandum of Understanding were signed on the date alleged when the respondent was forced to do so with the connivance of a police officer. The respondent adverts to a complaint having been lodged in that regard with the Police at Chennai on 23.07.2007. It also relies upon a notice dated 24.07.2007 whereby the invalidity of Memorandum of Understanding was set up.

4. It is urged by the respondent that Chennai Police has filed the charge-sheet before the competent Court on 02.07.2008 and the Court has taken cognizance and issued a notice/summons to the accused. It is also urged that the respondent has recently filed a suit seeking declaration that the Memorandum of Understanding is not binding and also sought recovery of Rs. 6.5 crores. On the basis of these contentions, it is submitted that the Court should desist from passing the order u/s 6 of the Act. Learned Counsel further relies upon the judgment of the Supreme Court, reported as [India Household and Healthcare Ltd. Vs. LG Household and Healthcare Ltd.](#),

5. The factual narrative indicates that the respondent is setting up nullity of the document which contains the arbitration Clause. Yet, interestingly, the said respondent issued the arbitration notice on 24.07.2007. Of course, that notice also adverts to the Memorandum of Understanding being void. However, the claim for arbitration cannot be ignored by this Court.

6. The jurisdiction of an arbitrator to decide upon arbitrability of the dispute after considering evidence, in terms of Section 16 of the Arbitration and Conciliation Act, 1996, is no longer undeniable. The respondent itself invoked the arbitration Clause, even while impeaching the validity of the Memorandum of Understanding. This Court is of the opinion that till date, there is finding of any criminal court - even charges have not been framed against the petitioner. In such circumstances, the Court cannot refuse to exercise its discretion.

7. As far as the order in Household and Healthcare Ltd case (supra) is concerned, no doubt some observations were made by the Supreme Court about fraud vitiating agreements and being a valid defence where appointment of arbitrator is sought. Significantly however, the court rested its decision on the non-obstante provisions, i.e. Section 45 of the Act, concerning international arbitration, for this case such

considerations do not exist. Furthermore, departure of the respondents' plea would mean giving credence to interested and unadjudicated allegations, which would be destructive of the speedy mechanism contemplated under the Act.

8. For the above reasons, this Court is of the opinion that the objections of the respondent are insubstantial, and cannot hinder the Court from appointing an Arbitrator. However, nothing in this order shall be construed as precluding the respondent from setting up a case of invalidity of the Memorandum of Understanding, or the non-existence of the same, as the case may be, in accordance with law.

9. Subject to the observations, in the preceding paragraph, the Court hereby appoints Mr. Justice P.K. Balasubramaniam, (Retd. Judge of the Supreme Court), Chairman, E. Committee, Room No. 313, IIIrd floor, Lok Nayak Bhawan, Khan Market, New Delhi, PH: 24632072, 22774177, as Sole Arbitrator to adjudicate the inter se disputes between the parties. The learned Arbitrator shall fix his fees and indicate other terms.

10. The petition is allowed in the above terms. No costs.

Order Dasti.