

CASE NO.:
Arbitration Petition 15 of 2006

PETITIONER:
National Agricultural Co-op. Marketing Federation India Ltd

RESPONDENT:
Gains Trading Ltd

DATE OF JUDGMENT: 22/05/2007

BENCH:
R. V. Raveendran

JUDGMENT:
J U D G M E N T

R.V. RAVEENDRAN, J.

This petition under section 11(5) of the Arbitration and Conciliation Act, 1996 ('Act' for short) is filed for appointing a sole arbitrator to adjudicate upon the disputes between the petitioner and respondent.

2. The petitioner alleges that the respondent entered into an agreement dated 28.2.2005, agreeing to purchase from the petitioner 40,000 MT (plus or minus 10%) of iron-ore fines at FOB price of US\$ 50 per dry MT, subject to the terms and conditions of the said agreement. Clause 17 of the said agreement providing for settlement of disputes by arbitration is extracted below :

"17. Arbitration: Any dispute arising out of or in this connection with this contract or the execution thereof shall, to the extent possible, be settled amicably by negotiation and mutual agreement between the Seller and the Buyer. If no settlement can be reached in this way, the matter in dispute shall then be referred to and finally resolved by arbitration in Hong Kong in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any other statutory modification, enactment or amendment thereof for the time being in force."

3. The petitioner alleges that respondent failed to nominate the vessel in terms of the contract in spite of several reminders and ultimately refused to take delivery of the cargo; that in view of breach by the respondent, the petitioner had to sell the cargo at Rs.1010/- per MT (as against the contract price of Rs.2190/-) incurring a loss of Rs.1180/- per MT; that it had to incur storage charges for storing the cargo for more than five months; that it had to incur freight charges for moving a part of the cargo from Karwar Port to Mangalore Port; that the amount invested in the cargo was locked up for considerable period involving loss of interest on the value; and that as a consequence, respondent is liable to pay a sum of Rs.11,50,57,488/- (= US \$26,27,568). The alleged refusal/repudiation by the respondent gave rise to a dispute and the petitioner by a notice dated 21.9.2005 through counsel, invoked the arbitration agreement and furnished a panel of three names to enable the respondent to give concurrence for appointment of any one of them as the sole arbitrator. The respondent sent a reply refusing to comply. This led to the filing of the present application under section 11(5) of the Act, seeking appointment of the sole arbitrator.

4. The respondent has resisted the petition. The contentions of respondent in brief are :

(a) It had complied with its contractual obligation by nominating a vessel to collect the cargo, but the petitioner failed to accept in time; that the port was subsequently closed due to monsoon and therefore it was no longer feasible to continue the contract on FOB terms; and that at a meeting held at Shanghai on 25.4.2005, the representatives of parties had agreed to cancel the contract dated 28.2.2005 which was on FOB terms and decided to enter into new negotiations for a fresh contract on CFR terms. As a result, the agreement dated 28.2.2005 including the arbitration agreement which is apart of it, is no longer in force and therefore, the petition for appointment of an Arbitrator in terms of the clause 17 of the agreement was not maintainable.

(b) Part I of the Act applies only where the place of arbitration is in India. As place of arbitration is Hong Kong, outside India, the provisions in Part I including section 11 of the Act are inapplicable and this Court has no jurisdiction to appoint an arbitration. The arbitration agreement requires that the disputes to be referred and resolved at Hong Kong. Therefore, the law of arbitration, as in force in Hong Kong, will govern the arbitration. Consequently, the reference to "Arbitration and Conciliation Act, 1996" in clause 17, is meaningless and redundant. As per the Hong Kong law, the Arbitrator can be appointed only by the Hong Kong International Arbitration Centre.

5. On the aforesaid contentions, the following questions arise for consideration:

(i) Whether an arbitration clause comes to an end, if the contract containing such arbitration agreement, was abrogated?

(ii) Whether section 11 of the Act is inapplicable in regard to the arbitrations which are to take place outside India?

(iii) Whether the appointment of the Arbitrator, and the reference arbitration are governed by the laws in force in Hong Kong and not by the Arbitration and Conciliation Act, 1996?

Re : Point (i)

6. Respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. [Vide : Heymen vs. Darwins Ltd - 1942 (1) All ER 337, Union of India vs. Kishori Lal Gupta & Bros. - AIR 1959 SC 1362 and The Naihati Jute Mills Ltd. vs. Khyaliram Jagannath - AIR 1968 SC 522]. This position is now statutorily recognized. Sub-section (1) of section 16 of the Act makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contract, has to be treated as an agreement independent of the other terms of the contract; and a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. The first contention is, therefore, liable to be rejected.

Re : Points (ii) and (iii)

7. Part I of the Act deals with Arbitration. Part-II deals with enforcement of certain foreign awards. Sub-section (2) of section 2 provides that Part I of the Act dealing with Arbitration shall apply where the place of arbitration is in India. Section 11 dealing with appointment of arbitrators is

contained in Part I. As the venue of arbitration is outside India, it is contended by respondent that entire Part I including section 11 will not apply and therefore neither the Chief Justice of India nor his designate will have the jurisdiction to appoint the arbitrator.

Such a contention is already considered and negated by this Court in *Bhatia International v. Bulk Trading S.A.* [2002 (4) SCC 105]. This Court has held:

"Sub-section (2) of section 2 provides that Part I would apply where the place of arbitration is in India. To be immediately noted, that it is not providing that Part I shall not apply where the place of arbitration is not in India. It is also not providing that Part I will "only" apply where the place of arbitration is in India (emphasis supplied). Thus the legislature has not provided that Part I is not to apply to arbitrations which take place outside India. The use of the language is significant and important. The legislature is emphasizing that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations which take place out of India. The wording of sub-section (2) of Section 2 suggests that the intention of the legislature was to make provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by agreement, override or exclude the non-derogable provisions of Part I in such arbitrations. By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to allow parties to provide by agreement that Part I or any provision therein will not apply. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."

8. Let me now examine whether the arbitration procedure and appointment of arbitrator is governed by the Act, or by the laws in Hong Kong. This depends on the interpretation of the arbitration clause in particular the following words : "the matter in dispute shall then be referred to and finally resolved by arbitration in Hong Kong in accordance with the provisions of the Arbitration and Conciliation Act, 1996." The respondent wants to read this provision thus :

- (i) the matter in dispute shall be referred to arbitration at Hong Kong;
- (ii) the matter in dispute shall be finally resolved by arbitration at Hong Kong; and

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The respondent wants to ignore the words "in accordance with the provisions of Arbitration and Conciliation Act, 1976 or any other statutory modification, enactment or amendment thereof for the time being in force" in clause 17 as a meaningless addition. The use of the words 'referred to and finally resolved by arbitration in Hong Kong', according to respondent, shows an intention that the arbitration has to take place in Hong Kong in accordance with Hong Kong Laws.

9. The rules of interpretation require the clause to be read in the ordinary

and natural sense, except where that would lead to an absurdity. No part of a term or clause should be considered as a meaningless surplusage, when it is in consonance with the other parts of the clause and expresses the specific intention of parties. When read normally, the arbitration clause makes it clear that the matter in dispute shall be referred to and finally resolved by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (or any statutory modification, enactment or amendment thereof) and the venue of arbitration shall be Hong Kong. This interpretation does not render any part of the arbitration clause, meaningless or redundant. Merely because the parties have agreed that the venue of arbitration shall be Hong Kong, it does not follow that Laws in force in Hong Kong will apply. The arbitration clause states that the Arbitration and Conciliation Act, 1996 (an Indian Statute) will apply. Therefore, the said Act will govern the appointment of arbitrator, the reference of disputes and the entire process and procedure of arbitration from the stage of appointment of arbitrator till the award is made and executed/given effect to.

Conclusion

10. As none of the objections of the respondent has any merit, this petition deserves to be allowed.

11. The petitioner has suggested three names in its letter dated 21.12.2005. Learned counsel for the respondent submitted that in view of the bona fide objections raised by the respondent, it had not suggested any one for being appointed as Arbitrator. He also submitted that the respondent was not willing for any of the persons suggested by the petitioner being appointed as Arbitrator. He stated that an independent arbitrator may be appointed as the sole Arbitrator, keeping in view sub-section (9) of section 11 which provides that in the case of appointment of a sole arbitrator in an international commercial arbitration, the Chief Justice of India or his designate may appoint an arbitrator of a nationality other than the nationality of the parties if the parties belong to different nationalities.

12. For the reasons stated above, this petition is allowed. Let this matter be listed on 24.5.2007 for appointment of the Arbitrator. The parties may also, if possible, suggest the name of a person finding mutual acceptance, by that date for appointment as arbitrator.