

CASE NO.:
Arbitration Petition 8 of 2006

PETITIONER:
SVG Molasses Co. B.V.

RESPONDENT:
Mysore Mercantile Co. Ltd. & Ors.

DATE OF JUDGMENT: 16/11/2006

BENCH:
S.B. SINHA

JUDGMENT:
Judgment

O R D E R

Petitioner and First Respondent entered into a contract of supply of 16,000 metric tonnes of Blackstrap Cane Molasses of Iranian origin.

Petitioner contends that it performed its obligations under the contract and delivered molasses in terms thereof. However, Respondent No.1 had arranged for its financiers M/s Hazoor Sahib Chemicals Private Limited to open an irrevocable letter of credit. Respondent No.1 and the said financier failed to perform its obligations to pay in terms of the letter of credit.

It is alleged that the Respondent Nos.1 and 2 in collusion with said Hazoor Sahib Chemicals caused Petitioner to part with possession of molasses by deceit and sold the same to Respondent No.3. Respondent No. 3 caused the molasses to be stored in custom bonded tanks belonging to Konkan Storage Systems Private Limited, who fraudulently represented itself to be the importer of the molasses.

An application under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, 'the 1996 Act') was filed before the District Court at Ernakulam in January 2005, which was marked as Arbitration OP No. 9 of 2005. An order of status quo was passed. The parties thereafter sought to settle their dispute, wherefor an agreement was entered into on or about 15.02.2005.

Clause 6 of the said agreement reads as under :

"The parties hereby agree to have the Arbitration O.P. No.9 of 2005 before the District Court at Ernakulam disposed in terms of this agreement and seek directions to Konkan Storage Systems (P) Ltd., to hold the Cargo at the instance of the First Party and to deliver the same only on the instructions of the First Party, also requiring Konkan Storage Systems Pvt. Ltd., to disregard any instructions from Hazoor Sahib Chemicals Pvt. Ltd."

Clause 9 of the said contract provides that the agreement shall be governed by and construed in accordance with Indian law.

Allegedly, in terms of the said agreement, Respondents herein conceded that none of them had acquired any right, title or interest in molasses and recognized the title of Petitioner therein. Respondent No. 3 also allegedly undertook to pay for the entire molasses at the rates stipulated in the agreement within a period within a period of 75 days from the date of the agreement, in regard where to Respondent Nos. 1 and 2 agreed to

underwrite the performance of the said obligation.

In terms of the said agreement, the District Court, Ernakulam, passed a consent order. Petitioner, however, alleges that Respondent No.3 only paid for 5500 metric tonnes of molasses and failed to fulfill the other terms of the said consent order.

On expiry of the period fixed for compliance of the terms thereof, Petitioner approached the District Court seeking permission to act in terms of the agreement. However, Respondent No.3 filed an Interlocutory Application seeking for modification thereof as also for restraining it from invoking its contractual rights. The application filed by Respondent No.3 was dismissed. The Interlocutory Application filed by Petitioner was allowed by an order dated 02.06.2005. The legality and/or validity of the said order was questioned by Respondent No.3 by preferring appeal thereagainst before the High Court of Kerala in terms of Section 37 of the 1996 Act.

The Division Bench of the Kerala High Court by its order dated 01.12.2005 opined that the learned District Court exceeded its jurisdiction in permitting Petitioner to sell the goods itself, opining :

"\005By judgment dated 29.06.05 all these appeals were dismissed. The Court also held "in this case, whether time is essence of contract, whether the appellant or other parties to the settlement violated the terms of the settlement, if so there is any justification etc. are all matters to be decided by the arbitrator if such issues are raised before the arbitrator". So the contention as to who has committed the breach, who all had violated the terms of the agreement are all subject matter of arbitration. When it is so, the court cannot enforce the agreement in terms of clause 4 in favour of any party and grant permission to the 1st respondent to sell the Molasses. In other words, when it is asserted by one party and denied by other regarding the right under clause 4, and thus there arises a dispute pending resolution by arbitration, it will be in excess of jurisdiction under section 9 of the Act to permit the party to sell the goods and thus enforce the contract. It has to be borne in mind that clause 7 gives the power to arbitrate and it is by virtue of an arbitration clause that Arbitration OP itself is filed. So the court below erred in enforcing clause 4 in permitting the petitioner himself to sell the goods. The court in exercising the jurisdiction under section 9 only by way of an interim measure, till the disputes are finally resolved by the Arbitrator. Hence the order passed by the court below to the extent it permitted a party to the agreement to sell the goods is concerned, is liable to be set aside."

An interim order passed by the District Court was set aside and it was directed to appoint a commissioner to sell the cargo in public auction after due notification.

Disputes and differences, thus, having arisen between the parties, the arbitration agreement contained in Clause 7 of the agreement dated 15.02.2005 was invoked, which was in the following terms :

"Any dispute, difference of opinion or question as to the meaning, interpretation or execution of this agreement that the parties hereto may be unable to settle by mutual agreement shall be submitted to arbitration in the City and country of the choice of the First Party, by a Committee of three Arbitrators, one to be appointed by

the First Party and one to be appointed jointly by the Second, Third and Fourth Parties and the third Arbitrator to be appointed by the first two Arbitrators or, failing agreement between them, by the President of the Chamber of Commerce of the City, which is to be the venue of Arbitration. Any majority decision reached by the Committee of Arbitrators so set up, shall be final and binding on all Parties hereto."

In terms of the said arbitration agreement, by a letter dated 04.11.2005, Petitioner herein appointed an arbitrator. It also specified the venue of the arbitration, stating :

"Please note that the venue of arbitration shall be Amsterdam in the Netherlands. Please further note that SvG in exercise of their right under the arbitration clause contained in the Agreement have nominated Mr. S.J. Hoekstra residing at klipper 79, 2991 KL, Barendrecht, The Netherlands as one of the arbitrators."

By reason of the said notice, Respondents herein jointly were asked to nominate their arbitrator and communicate the nomination to Petitioner as also to the arbitrator nominated by it, so that the third arbitrator could in turn be appointed and the process of adjudication of the dispute commences.

However, notices were not served upon all the respondents. Respondent No.3 responded to the said notice. However, notice could not be served upon the Second Respondent. In the aforementioned situation, an application under sub-section (6) of Section 11 has been filed, praying :

- "a. Appoint an arbitrator on behalf of the respondents.
- b. Direct the appointment of the third arbitrator in terms of clause 7 of the Agreement and the Act.
- c. Pass any other or further orders and directions that this Hon'ble Court may deem just fit and proper in the interests of justice and equity."

Before us no counter affidavit has been filed by Respondents despite opportunities having been granted in that behalf. Respondent No.3 was not a party to the original agreement. However, the parties hereto entered into an arbitration agreement when the matter was pending in the Court of the District Judge. Clause 7 of the agreement contained the arbitration clause, as referred to hereinbefore. It is this clause which is sought to be enforced.

Section 11 of the 1996 Act provides for appointment of arbitrators. Sub-section (2) of Section 11 postulates that the parties are free to agree on a procedure for appointing the arbitrator or arbitrators, subject, of course, to the provisions of sub-section (6) thereof. Sub-sections (5) and (6), which are relevant for the purpose of this case, read as under :

"(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him."

(6) Where, under an appointment procedure agreed upon by the parties, -

- (a) a party fails to act as required under that procedure; or
- (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,
- a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

The 1996 Act envisages party autonomy. The constitution of the arbitral tribunal in the manner in which it is to be appointed concededly depends upon the type of substantive agreement. When the parties to the agreement are to nominate one arbitrator each on their behalf, the third arbitrator is appointed by the nominated arbitrators.

It is not in dispute that Respondents herein have failed and/or neglected to appoint an arbitrator in terms of the arbitration agreement.

A submission was made by the learned counsel appearing on behalf of Respondents that they would face immense difficulties in proceeding before an arbitral tribunal at Amsterdam in Netherlands; but this Court in exercise of its jurisdiction under Section 11(6) of the 1996 Act cannot supplant the agreement of the parties.

The parties entered into the Arbitration Agreement with their eyes wide open. They knew the terms thereof. This Court in exercise of its jurisdiction under Section 11(6) of the 1996 Act cannot alter the terms of the contract.

It is idle to contend that there is no arbitration clause. It is furthermore not in dispute that the applicant is a company carrying on business from Netherlands. The goods are also said to be of Iranian origin. It would, therefore, not be correct to say that the agreement does not fall within the scope of International Commercial Arbitration as defined in Section 2(1)(f) of the 1996 Act. The identity and location of the Petitioner being a foreign country would bring the case within the purview of International Commercial Arbitration.

In this case, we are not concerned as to whether any of the respondents has complied with his obligations under the contract or not, the same would fall for determination by the Arbitral Tribunal, nor are we concerned with under what circumstances the said agreement was entered into. The plea raised on behalf of the respondents that by shifting the scene of activity to the Netherlands would be getting undue advantage of situation to the Petitioner is again a matter wherewith we are not concerned at this stage. The law applicable to the agreement may be the Indian law but the same would not mean that the arbitration agreement is invalid.

This Court cannot also direct appointment of a single Arbitrator in place of three Arbitrators or change the place of Arbitration as provided for in the agreement. The same would amount to alteration of terms of the agreement entered into by and between the parties. In terms of Section 11(6) of the 1996 Act, the Court would derive jurisdiction only when a person being a party to the Arbitration agreement fails to perform a function entrusted to it thereunder. It is, therefore, not possible to accede to the request of the learned counsel for the Arbitrator.

In Punj Lloyd Ltd. v. Petronet MHB Ltd. [(2006) (2) SCC 638], this Court cited with approval the ratio laid down in Datar Switchgears Ltd. v. Tata Finance Ltd. [(2000) 8 SCC 151] which was in the following terms :

"\005So far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases."

Yet again in You One Engineering & Construction Co. Ltd. & Anr. v. National Highways Authority of India (NHAI) [(2006) 4 SCC 372], a learned Judge opined:-

"10\005The Arbitration agreement clearly envisages the appointment of the presiding arbitrator by IRC. There is no qualification that the arbitrator has to be a different person depending on the nature of the dispute. If the parties have entered into such an agreement with open eyes, it is not open to ignore it and invoke exercise of powers in Section 11(6)."

In National Highways Authority of India & Anr. v. Bumihiway DDB Ltd. (JV) & Ors. [(2006) 9 SCALE 564], it was opined:-

"44\005The parties have entered into a contract after fully understanding the import of the terms so agreed to from which there cannot be any deviation. The Courts have held that the parties are required to comply with the procedure of appointment as agreed to and the defaulting party cannot be allowed to take advantage of its own wrong."

It is also not a case where Petitioner has waived its right under the arbitration agreement, as was the case of B.S.N.L. & Ors. v. M/s Subhash Chandra Kanchan & Anr. [2006 (9) SCALE 217].

This Court appoints Justice R.C. Chopra, a former Judge of the High Court of Delhi as an Arbitrator on behalf of Respondents herein. The learned Arbitrator shall fix the quantum of his fees and other expenses. The learned Arbitrators indisputably would appoint a third Arbitrator in terms of clause (vii) of the agreement dated 15.2.1995. However, keeping in view the peculiar facts and circumstances of this case to which, I had adverted to, the Arbitral Tribunal may consider the desirability of making an award as expeditiously as possible. The Respondents shall bear the cost of the applicant which is quantified at Rs.10,000/-.

The learned Arbitrators shall, however, be at liberty to determine their venue in regard to sub-Section (1) of Section 20 of the 1996 Act as and when necessary.