

CASE NO.:
Arbitration Petition 8 of 2005

PETITIONER:
SAN-A TRADUBG CO. LTD.

RESPONDENT:
I.C. TEXTILES LTD.

DATE OF JUDGMENT: 28/04/2006

BENCH:
P.P. Naolekar

JUDGMENT:
JUDGMENT

ORDER
ARBITRATION APPLICATION NO. 8 OF 2005
AND
ARBITRATION APPLICATION NO. 9 OF 2005

These applications have been filed by the applicant under Section 11(6)(c) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") to seek appointment of an arbitrator in view of the inability expressed by Mr. Manabu Nonoguchi to act as an arbitrator. The prayer made in the applications is to appoint a suitable person to act as the sole arbitrator in place of the nominated arbitrator under Clause 6 of the Deed of Reserve and Charge of Property dated 22nd February, 2002 (for short "the Deed") and to refer the disputes between the parties to him. The arbitration applications have been filed in the following facts and circumstances. As alleged in the applications, on 7th June, 2001, the applicant entered into a hire purchase agreement titled "Contract of Sale" No. QAC-3372(R) for sale/purchase of 5 sets in 2 lots of Murata No. 7-V Mach-coner automatic cone winder magazine type 60 drums on deferred payment terms. The applicant exported the machinery in two lots. The first shipment (2 sets) was made on 10th July, 2001 under Invoice No. 6321 and the second shipment (2 sets) was made on 5th October, 2001 under Invoice No. 6364. The dispute is in regard to these shipments. In pursuance of the agreement, the physical custody of the machines was handed over to the respondent which was accepted by it. However, the title did not pass, as it was due to pass only on payment of the last hire purchase instalment as envisaged under the agreement. The agreement was approved by the Reserve Bank of India vide approval No. FCB/CO/2001/747. The respondent after paying the first two instalments towards the shipments, did not pay the next two instalments and, therefore, as envisaged in the agreement the respondent became liable to return the custody and possession of the machinery to the applicant. Clause 6 of the Deed provides as under:
"In case of any dispute, difference or issues arising under or in any manner concerning or in connection with this Deed, the same shall be resolved by arbitration by Mr. Manabu Nonoguchi, Area Manager, Sales Department, Murata Machinery Ltd., Textile Machinery Department, 3rd Floor, Osaka Green Building, 2-6-26, Kitahama, Chuo-ku, Osaka 5410041, Japan, on principles of equity and good conscience (ex equo et bono), whose award shall be final and binding."

Vide letter dated 19th June, 2003, the nominated arbitrator Mr.

Manabu Nonoguchi has expressed his inability to discharge his role as arbitrator and left it for the parties to take steps to fill up the vacancy as and when the need arises. On 20th June, 2003, the applicant served a notice of demand under Section 434(1)(a) of the Companies Act for winding up on the respondent. In reply to the said notice of demand, the respondent informed on 10th July, 2003 that it had made a reference to the Board for Industrial and Financial Reconstruction (BIFR) and had also taken the stand that the machines were defective. Thereafter, the applicant filed an application dated 4th August, 2003 before the BIFR for recovery of its unpaid dues and sought impleadment and interim receivership. The applicant sent a notice of demand and arbitration dated 10th December, 2004 to the respondent for return of physical custody and possession of the machines which has not been complied with. As per the applicant, the dispute between the parties is arbitrable and since the title in the hire purchased machines has always been and is with the applicant the machines are not the assets or property of the company so as to be under the purview of the BIFR. The applicant submitted that no other petition under Section 11(6) of the Act in respect of the arbitration clause has been filed or is pending in any other court and since the present applications relate to an international commercial arbitration, the applicant being a body corporate incorporated outside India, the applicant is moving the applications under Section 11(6)(c) of the Act. The applicant prayed for relief as mentioned hereinabove.

The respondent entered appearance and submitted counter statement. Although the sale and export under two shipments respectively on 10th July, 2001 and 5th October, 2001 and the Clause of the Deed are admitted, the exercise of the power of the Court to appoint an arbitrator is disputed on the grounds that the respondent company is a sick company; the respondent company has already approached the BIFR seeking declaration that the company has become a sick unit; a case has been registered under the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "SICA") which is numbered as Case No.231/2003; and the BIFR has declared the respondent company as a sick industrial company and Industrial Development Bank of India (IDBI) has been appointed as the Operating Agency under Section 17(3) of SICA. On these grounds, it is contended that the present applications for appointment of an arbitrator filed under Section 11(6)(c) of the Arbitration and Conciliation Act, 1996 cannot be proceeded with as the dispute raised would be the matter for consideration by the BIFR. It is further contended that once the named arbitrator declined to go into arbitration, it is not open to the applicant to seek appointment of another arbitrator; the terms of the contract entered into between the parties are very specific and clear; it does not contain any clause which would enable the parties to seek arbitration; and that is why the applicant company did not seek the consent of the respondent company for appointment of another arbitrator in place of the named arbitrator when the said arbitrator resigned. The respondent has prayed for dismissal of the present applications filed under Section 11(6)(c) of the Act.

It may be mentioned here that I.A. No. 1 has been filed on 2nd December, 2005 during the pendency of the arbitration applications by the applicant stating that vide letter dated 21st November, 2005, the applicant addressed a letter to Mr. M. Nonoguchi, inquiring as to his availability to act as arbitrator to adjudicate the disputes between the parties so that this Court could be apprised of the current position in this regard and in response thereto vide letter dated 21st November, 2005 Mr. M. Nonoguchi has informed : "\005 subject to orders of the Hon'ble Supreme Court of India, I am available and prepared to act as Arbitrator". The contents of the letter are not denied by the respondent. Thus, it is clear that now Mr. Manabu Nonoguchi, the named arbitrator, is ready and willing to act as an arbitrator to resolve the disputes between the parties.

It is urged by the learned counsel for the respondent that mere reading of Clause 6 of the Deed makes it clear that the parties intended that the arbitration was to be conducted only by Mr. Manabu Nonoguchi and, therefore, no other procedure for appointment of another arbitrator has been provided for under the said clause or anywhere in the agreement. The intention of the parties is clear that none other than Mr. Manabu Nonoguchi 'shall' be the arbitrator to adjudicate upon the disputes arising between the parties. When the named arbitrator withdrew from the office of arbitrator, Clause 6 of the Deed providing for arbitration got exhausted and could not be revived under Section 11(6)(c) of the Act. It is further contended that the respondent company being declared a sick industrial concern, the BIFR being seized of the matter and the dispute between the parties being covered under the provisions of SICA, no arbitrator could be appointed in view of Section 22(1) of SICA. In rejoinder, it is submitted by the counsel for the applicant that the agreement read as a whole does not either expressly or by implication indicate that the vacancy should not be supplied in case the named arbitrator is not willing to act; when the agreement is silent as regards supplying the vacancy, the law presumes that the parties intend to supply the vacancy and as such the arbitrator can be appointed in exercise of powers under Section 11(6)(c) of the Act; the arbitration clause does not stand exhausted and the Court can appoint an arbitrator to adjudicate upon the disputes between the parties. It is further urged that there is a distinction between the expressions 'proceedings' and 'suit' mentioned in Section 22(1) of SICA and the expression 'arbitration proceedings' under the Arbitration and Conciliation Act cannot be termed either as a suit or proceeding and, therefore, pendency of a reference before the BIFR would not debar the arbitration proceedings under the Arbitration and Conciliation Act, 1996.

In the present case, the named arbitrator under the contract, viz., Mr. Manabu Nonoguchi, Area Manager, Sales Department, Murata Machinery Ltd., Textile Machinery Department, Japan vide his letter dated 29th June, 2003 expressed his inability to discharge his role as arbitrator.

Section 15 of the Act providing for termination of mandate and substitution of arbitrator, reads as under:

"15. Termination of mandate and substitution of arbitrator.- (1) In addition to the circumstances referred to in section 13 and section 14, the mandate of an arbitrator shall terminate -

- (a) where he withdraws from office for any reason; or
 - (b) by or pursuant to agreement of the parties.
- (2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.
- (3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.
- (4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."

Under clause (a) of Section 15(1), when the arbitrator withdraws from office for any reason, a substitute arbitrator can be appointed according to the rules that were applicable to the

appointment of the arbitrator being replaced.

The procedure for filling the vacancy arising out of the arbitrator's withdrawal from office is provided under Section 15. It says that in addition to the grounds covered by Sections 13 and 14, the mandate of an arbitrator shall terminate when he withdraws from his office for any reason or under an agreement of the parties. The Section provides that the substitute arbitrator is to be appointed according to the same rules which were applicable to the appointment of the arbitrator who is to be replaced. Sub-section (2) of Section 15 contemplates appointment of the substitute arbitrator in place of the arbitrator who refuses to act as an arbitrator, as per the rules applicable to the appointment of the arbitrator. Sub-section (2) of Section 11 of the Act provides that in the absence of any agreed procedure for appointment of the arbitrator or arbitrators, sub-section (6) of Section 11 would apply whereunder a party may request the Chief Justice or any person or institution designated by him to take necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment. By virtue of sub-section (12) of Section 11, in international commercial arbitration, the reference to Chief Justice in sub-section (6) shall be construed as a reference to the Chief Justice of India.

The submission of the learned counsel for the respondent that as the named arbitrator has refused to act as an arbitrator, the arbitration agreement itself comes to an end, cannot be accepted because Section 15 provides for a remedy for appointment of another arbitrator when the arbitrator appointed by the parties as provided in the agreement refuses to act as an arbitrator. Settlement of dispute between the parties through medium of an independent person in whom both parties repose confidence is the basic foundation on which the law of arbitration stands and is founded. When the agreement provides for reference of a dispute to a particular individual and such agreed arbitrator refuses to act, the next appointment could be made as agreed by the parties, but where no such procedure is prescribed authorizing appointment of another arbitrator then the agreement clause cannot operate. It, therefore, follows that in case where the arbitration clause provides for appointment of a sole arbitrator and he had refused to act, then the agreement clause stands exhausted and then the provisions of Section 15 would be attracted and it would be for the Court under Section 11(6) to appoint an arbitrator on the procedure laid down in Section 11(6) being followed unless there is an agreement in the contract where the parties specifically debar appointment of any other arbitrator in case the named arbitrator refuses to act. In the present case, I do not find any such stipulation in the contract entered into between the parties whereunder the parties have specifically debarred appointment of a fresh arbitrator if the named arbitrator refuses to act and perform his function as arbitrator. In the absence of any specific condition debarring appointment of a fresh arbitrator, it cannot be said that the arbitration clause in the contract agreement stands obliterated on the named arbitrator's refusal to perform his function.

Under Section 22 of SICA, where in respect of any industrial company an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending, then, notwithstanding any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the Companies Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company, shall lie or be proceeded with except with the consent of BIFR. The proceedings in suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advances granted to the industrial company is

prohibited unless consent of BIFR is obtained. Section 22(1) of SICA has specified certain types of proceedings which would come within the purview of the Section, namely, the proceedings for winding up of the company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a Receiver in respect of the properties of the industrial company. In *Maharashtra Tubes Ltd. vs. State Industrial & Investment Corporation of Maharashtra Ltd. and Another.*, (1993) 2 SCC 144 (in para 10), it is held by this Court that the words 'or the like' which follow the words 'execution' and 'distress' are clearly intended to convey that the properties of the sick industrial company shall not be made the subject matter of coercive action of similar quality and characteristic till the BIFR finally disposes of the reference under Section 15 of the said enactment. The legislature has advisedly used an omnibus expression 'the like' as it could not have conceived of all possible coercive measures that may be taken against a sick undertaking. Similarly, in *Shree Chamundi Mopeds Ltd. vs. Church of South India*, AIR 1992 SC 1439, this Court explained the words 'or the like' as follows :

"The words 'or the like' have to be construed with reference to the preceding words, namely 'for execution', 'distress' which means that the proceedings which are contemplated in this category are proceedings whereby recovery of dues is sought to be made by way of execution, distress or similar proceedings against the property of the Company."

It is, thus, apparent from the wording of Section 22(1) and the above decisions of this Court that the proceedings covered under Section 22 are the proceedings of coercive nature, be that legal or otherwise, which would come within the purview of expression 'proceedings' as mentioned in the Section but it would not cover all proceedings. Section 22 (1) incorporated certain types of proceedings which would fall within its ambit and which are the proceedings for winding up of the industrial company or the proceedings for execution and distress against any of the properties of the industrial company or the proceedings for the appointment of a Receiver in respect of the properties of the industrial company. From the nature of the proceedings referred to in this Section, it is clear that only the proceedings which have the shape and effect of coercive nature would come within the ambit of Section 22(1) and for taking up such proceedings the permission of BIFR is required. By Act 12 of 1994, Section 22(1) was amended by insertion whereby a suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advances granted to the industrial company would not be maintainable unless consent of BIFR is obtained. In *Kailash Nath Agarwal and Others vs. Pradeshia Industrial & Investment Corporation of U.P. Ltd. and Another*, (2003) 4 SCC 305, the question arose as to the scope of the protection afforded to the guarantors under Section 22(1) of SICA. The company was declared sick by BIFR in terms of Section 3(1)(o) of SICA. An operating agency was appointed under Section 17(3). While the proceedings before BIFR were pending, three separate notices of demand were served on the appellants as personal guarantors in respect of the loans granted to the company by the respondent Pradeshia Industrial & Investment Corporation of U.P. Ltd. and it was said in the notices that the Corporation would take legal measures to recover its outstanding dues from each guarantor. It was contended by the guarantors that in view of Section 22(1) of SICA, the Corporation could not enforce its demand against the appellants under the permission of BIFR is obtained. This Court has drawn a distinction between the proceedings taken up under the U.P. Public Moneys (Recovery of Dues) Act, 1972 and a suit contemplated under Section 22 of SICA. This Court has held in *Kailash Nath Agarwal (supra)*

that having regard to the judicial interpretation of the word 'suit', it is difficult to accede to the submission of the appellants that the word 'suit' in Section 22(1) of SICA means anything other than some form of curial process and the Court found it difficult to widen the scope of the word 'suit' so as to cover proceedings against the guarantor of an industrial company. By virtue of amendment to Section 22 of SICA, no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advances granted to the industrial company, shall lie and adjudication is prohibited of the liability of the industrial company or the guarantor. Section 22 further prohibits taking up of the proceedings of the nature which would be coercive for recovery of money against a sick undertaking. Proceeding in arbitration is neither a suit under sub-section (1) of Section 22 of SICA nor the proceedings thereunder and, therefore, there is no prohibition under Section 22 of SICA to take up the arbitration proceedings to adjudicate the liability of the parties to the arbitration proceedings. In my view, Section 22 of SICA does not debar the arbitration proceedings under the Arbitration and Conciliation Act, 1996. The objections to the arbitration proceedings raised by the respondent fail for the aforesaid reasons and are rejected.

Mr. Manabu Nonoguchi was appointed as an arbitrator by the parties. Normally, the parties are the best judge for deciding as to who will be the person capable and competent to adjudicate the disputes raised considering his experience, knowledge and competence in a particular trade or business to which the disputes relate and taking these factors into account the parties have appointed Mr. Manabu Nonoguchi as an Arbitrator, in case a dispute arises between the parties. Unfortunately, for some reason, the named arbitrator refused to act as an arbitrator. However, during the pendency of these arbitration applications, I.A. supported by affidavit has been filed stating that the named arbitrator is ready and willing to take up the arbitration. Considering this fact, it would be appropriate if Mr. Manabu Nonoguchi, Area Manager, Sales Department, Murata Machinery Ltd., Textile Machinery Department, Osaka 541-0041, Japan is appointed as an Arbitrator to adjudicate upon the disputes arising between the parties. I, accordingly, appoint him as Arbitrator. He shall take up the steps in accordance with law and shall make all possible endeavour to decide the disputes expeditiously. Arbitration Application Nos. 8 and 9 of 2005 stand disposed of.