(2008) 02 DEL CK 0295

In the Delhi High Court

Case No : Writ Petition (C) No. 3765 of 1998

Ajay Kirti Kumar Dalmia APPELLANT

Vs

Company Law Board and Others RESPONDENT

Date of Decision : 04-02-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8, 9
Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1
Companies Act, 1956 — Section 397, 398
Constitution of India, 1950 — Article 226

Citation : (2009) 148 CompCas 742

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Manmohan, Bina Gupta and Gaurab Singh, for the Appellant; C. Mukund, Pankaj Jain and Ashok Jain, for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—In these writ proceedings under Article 226 of the Constitution, directions are claimed for quashing of an order dated June 15, 1998 in applications, i.e., C.A. Nos. 29-31 of 1996, moved in Company Petition No. 55 of 1996 (1999) 96 CompCas 507 Those applications were moved before the Company Law Board (hereafter referred to as "the CLB") u/s 8 of the Arbitration and Conciliation Act, 1996 (hereafter "the Act").

2. The petitioner alleges to have control over 40 per cent, of the shareholding in respondent No. 26, through his holdings and those of respondents Nos. 27 to 34. It is claimed that another block of shares is held by the second respondent, his family members and associates, i.e., respondents Nos. 3 to 18. It is alleged that the parties had sometime in 1991 joined together with equal shareholding in respondent No. 26 company. It is further averred that to resolve disputes, which had arisen sometime in 1995-96 between the two groups, an arbitration agreement had been entered into between both the parties. Apart from agreeing to refer disputes for settlement through arbitration, the parties further agreed

that the respondent group would bid Rs. 78 per share and that the said price was accepted by the petitioner group. According to the agreement, in the event of non-payment, the respondent group''s shareholding was to be forfeited.

3. The petition alleges that the respondent, disregarding the terms of the agreement, filed a suit before the Calcutta High Court being Suit No. 269 of 1996 in which the petitioners and respondents Nos. 26-34 (for the sake of convenience hereafter referred to as "the AKD group") were impleaded as defendants. It is further alleged that on September 19, 1996, a single judge of the Calcutta High Court directed that the shares, which had been by then referred for arbitration, belonging to the second respondent, ought to be deposited for safe custody with one advocate receiver Shri Paresh Dev. The petitioner preferred an appeal against this order on October 1, 1996, the Division Bench of the Calcutta High Court stayed operation of the order dated September 19, 1996, of the single judge.

4. On October 15, 1996, the second respondent filed a Company Petition No. 55 of 1996 before the Company Law Board in Suresh Kumar Jain v. Hindustan Ferro Industries Ltd. [1999] 96 Comp Cas 507. In these proceedings, orders under Sections 397 and 398 of the Companies Act were sought for by the second respondent; he had impleaded the AKD group as well as others including his associates and relatives, i.e., shareholders in respondent No. 26 company.

5. After the issuance of notice and during the pendency of the proceedings in the Company Law Board, the petitioner filed an application u/s 8 of the Act, seeking a direction that the proceedings before the Company Law Board ought to be stayed pending reference to the arbitrator. By the impugned order, the Company Law Board rejected that application. In the impugned order, the Company Law Board formed an opinion that the application required rejection since it was moved after considerable delay and in any event after the applicant (who was the second respondent before it) had disclosed his defence in the proceedings.

6. The petitioner alleges that the impugned order suffers from an error of law and is also unsustainable because it overlooked that no substantial steps had been taken before the defence in the Company Law Board proceedings had been entered. It is alleged that the affidavit dated December 2, 1996, filed on the petitioner''s behalf only raised preliminary objection regarding maintainability of the company proceedings as is evident by its order. In any event, the affidavit was affirmed and lodged in relation to interlocutory proceedings and cannot, by any stretch of the imagination be construed as reflective of the merits so as to preclude filing of an application u/s 8 of the Arbitration Act. It is also alleged that the parties undisputedly entered into an arbitration agreement; the arbitrator too had entered into reference. In these circumstances, the company proceedings u/s 397 clearly had to yield to the proceedings before arbitrator who was an agreed coram nominated by the parties for resolving their disputes. The disputes included the affairs and management of the company. It is also alleged that the Company Law Board completely ignored that respondents Nos. 2 to 25 indulged

in multiplicity of litigation by first filing proceedings before the Company Law Board and later withdrawing the suit before the Calcutta High Court ex parte, and without notice to them in contravention of provisions of Order 23, Rule 1 of the CPC.

7. In the return filed on behalf of respondents Nos. 2 to 25, it is alleged that sometime in 1996, the writ petitioner had indulged in misappropriation of company funds by not reflecting the products sold in the books. It is also alleged that sale proceeds secured were higher than what were disclosed in the books of account by the writ petitioner. The affidavit also adverts to disputes and differences having arisen between the writ petitioner and respondent No. 2 sometime in 1996 and that in August 1996, the former suggested to the second respondent that both should not continue in the company. The respondents also alleged that the petitioners cannot seek enforcement of the arbitration Clause since Shri Kothari, the nominated counsel, was only empowered to act as a conciliator and hold securities as well as shares in escrow, not adjudicate disputes. It is alleged besides that the petitioner had in effect entered into the merits of the dispute by raising a preliminary objection as to maintainability; the Company Law Board had ruled on it and thereafter the petitioner sought to invoke the arbitration clause. Thus, they contend, the application was rightly rejected. It is lastly averred that all the parties to the alleged arbitration agreement are not parties before the Company Law Board. The subject-matter of the Company Law Board proceedings and the subject-matter of civil disputes between the parties is also different and there cannot be any reference u/s 8 of the Arbitration Act.

8. Mr. Manmohan, learned senior counsel submitted that the Company Law Board fell into error in holding that the petitioner had applied u/s 9 after submitting a first statement on the substance of the dispute. He relied upon Section 8 and the decisions of the Supreme Court in Food Corporation of India and Another Vs. Yadav Engineer and Contractor, , as affirmed by the decision in Rashtriya Ispat Nigam Limited and Another Vs. Verma Transport Company, . Learned Counsel submitted that the expression "first statement on the substance of the dispute" in Section 8 has to be contrasted with the expression "written statement". According to the Supreme Court, it implied submissions of the parties to jurisdiction of the judicial authority. In this context, if an application is filed before actually filing the first statement on the substance of the dispute, the parties seeking enforcement of the arbitration Clause cannot be said to have waived its right to do so. It was, therefore submitted that taking part or moving a supplemental or an interlocutory proceeding did not foreclose the petitioners'' right to seek reference of the dispute to arbitration.

9. Learned Counsel next submitted that the core of the disputes related to differences between the two groups about management of the company. The two groups, i.e., the AKD group and the respondents group had equal control. They had arrived at a settlement which contained an arbitration clause. The settlement

broadly outlined the manner in which the control of the company had to devolve at a subsequent stage. The dispute sought to be raised before the Company Law Board was in truth and reality investigation into the affairs of the companies on allegations of mismanagement. A close analysis of the nature of the relief sought by the respondents before the Company Law Board revealed that they concern the same issues which were the subject-matter of the agreement, which contained an arbitration clause. In these circumstances, the Company Law Board, therefore, ought to have given due weightage to the intent of the parties and refer the disputes to arbitration. By not doing so, it failed to exercise jurisdiction, which it was lawfully bound to. Learned Counsel relied upon the judgment of the Supreme Court in Smt. Kalpana Kothari Vs. Smt. Sudha Yadav and Others, and submitted that every judicial authority before which an action has been brought in respect of a matter which is the subject-matter of an arbitration agreement is under a duty to refer such a dispute to the mechanism agreed upon by the parties. The emphasis is on the parties to the arbitration agreement, and not the dispute. If the true spirit and intention of Section 8 were to be given effect to, the parties to the arbitration were none other than the parties in the Company Law Board that since all the shareholders of both the groups were duly represented. Counsel submitted that the spirit of the provision as well as its true meaning has to be given due effect to by the court wherever the issue of reference u/s 8 is brought up.

10. Learned Counsel contended that the respondents'' conduct did not inspire any confidence. He adverted to the filing of the suit in spite of the arbitration agreement; the interim order made by the single judge which was stayed by the Division Bench; the application filed by the petitioner u/s 9 of the Arbitration Act for interim relief against the respondents relating to shares of the company and the surreptitious withdrawal of the suit with liberty granted ex parte on December 10, 1996, to the petitioner which was later altered, after the filing of the proceedings in the Company Law Board. Learned Counsel submitted that in the application u/s 9 for interim measure filed by the petitioner, the district judge at Kanpur, upheld existence of the arbitration agreement and also observed that the second respondent had failed to perform his obligations. The order permitting ex parte withdrawal was, however, later modified on July 10, 1997. He also submitted that the order dated January 21, 1998, by the Division Bench of the Calcutta High Court clarified its previous orders and permitted the second respondent only to withdraw the suit pending on the file of the High Court without reserving liberty to proceed with the petition, before the Company Law Board. Therefore, these not only underscored the second respondent''s propensity to indulge in litigation, but also that he proceeded with the Company Law Board petition, without liberty not being granted by the Calcutta High Court before which the suit was pending.

11. Mr. Mukund, learned Counsel for the respondents opposed the writ petition. According to him, the conduct of proceedings in the Company Law Board showed that the petitioner had occasion to project his version of the merits and was,

therefore, precluded from filing an application u/s 8 of the Act. He submitted that the decision in Rashtriya Ispat Nigam Ltd., was inapplicable since the petitioner''s preliminary objection to maintainability of proceedings u/s 397 included a defence on the merits. Learned Counsel next urged that the arbitration agreement between the petitioners and the second respondents could at the highest bind only the signatories. However, the proceedings before the Company Law Board included a number of other parties who had no privity of the contract to the arbitration agreement. Therefore, the disputes before the Company Law Board could not be referred to arbitration. In support of this submission, learned Counsel relied upon the judgment reported as Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, He also relied upon a judgment reported as Alankar Global Pvt. Ltd. and Others Vs. Mr. Dinesh Kumar Mathur and Others, .

12. Learned Counsel lastly contended that the disputes that are subject-matter of proceedings u/s 397 of the Companies Act before the Company Law Board are incapable of arbitration as many of the reliefs sought from the Company Law Board cannot be granted by the arbitrator.

13. From the above discussion, two questions arise for decision in these proceedings. One, whether the petitioner lost his right to seek a reference u/s 8 of the Act, for the reason of having submitted to the merits of the dispute before the Company Law Board and thus foreclosing his right to seek reference ; and two, whether the decision of the Company Law Board rejecting the application, amounted to omission to exercise jurisdiction lawfully vested in it.

14. The factual narrative would show that the bone of contention in these proceedings is the submission of disputes to arbitration u/s 8. The existence of the arbitration agreement was not seriously canvassed even though at some stage in the proceedings it had been contended that the agreement was merely one for nominating a conciliator who would hold shares in escrow. The parties undeniably faced each other in litigation in courts in Kolkata and Kanpur. The suit before the Calcutta High Court was due to pendency of the arbitration proceeding. After the initiation of the petition before the Company Law Board those proceedings were abandoned and withdrawn. The petitioner had sought for an interim measure u/s 9 of the Arbitration Act in a Kanpur court. In the midst of these, the second respondent and several other respondents filed the petition u/s 397 of Companies Act before the Company Law Board. Initially, the petitioner objected to maintainability of those proceedings; he invited an adverse finding on that preliminary issue. He later sought for reference u/s 8 of the Arbitration Act.

15. Section 8 of the Act in essence mandates that a judicial authority which includes courts and Tribunal (the Company Law Board, broadly answering this description) should refer disputes pending before them to arbitration, if the litigants were parties to the arbitration clause. The exception carved out is that the notice of the court or the Tribunal should be invited before the parties seeking the reference, filed the first statement on the substance of the dispute.

The Supreme Court in one of its earlier judgments reported as Food Corporation of India''s case, held that filing an application for stay of the proceedings or opposing an application for interim relief made in relation to a contract containing in arbitration Clause would not preclude the party concerned from seeking reference. This view was endorsed in Rashtriya Ispat Nigam Ltd. ''s case where the court had held that what is material is whether the applicant claiming reference had filed his first statement on the substance of the dispute or not. The court also held that taking part in interlocutory or supplemental proceedings by itself would not amount to disclosing the first statement in relation to the substance of the dispute. In this case, all that the petitioner did, was to object to maintainability of proceedings u/s 397. No doubt, it invited an adverse ruling. Yet that preliminary object cannot be characterised as entering into the substance of the dispute, and in my opinion, does not amount to waiver of his right to seek reference u/s 8.

16. The second question needing determination is the correctness of the Company Law Board''s impugned order. The narrative regarding history of disputes between the parties only serves as a backdrop for a decision on this issue; it cannot in the opinion of the court influence the legality or otherwise of the impugned order. One of the basic objections of the second respondent to the proceedings, voiced by it before the Company Law Board and taken in its counter affidavit and also advanced during the hearing was that, a reference of the disputes pending before the Company Law Board to arbitration is not possible because there is no identity of parties in the proceedings with the parties to the arbitration agreement. Strong reliance was placed upon the decision in Sukanya Holdings (supra). The arbitration agreement relied upon in this case, was entered into between the petitioner and some of the respondents, i.e., Raj Kumar Dalmia, Prakash Chandra Jain, Suresh Kumar Jain and Pratul Kumar Birla on August 6, 1998. The agreement no doubt contained a formula by which shares were to be bought by one group. Nevertheless, it was executed by five parties. The Section 397 proceedings before the Company Law Board on the other hand have impleaded a large number of parties which include these five individuals. The company too is included in the array of the parties in the Company Law Board proceedings.

17. The petitioners in the Company Law Board proceedings are not only the two or three members of the second respondents group who had participated in and signed the arbitration agreement; they are greater in number. They seek a large number of reliefs from the Company Law Board. Each of them are parties in their individual capacities as shareholders. Undoubtedly, therefore, there is no identity so far as parties are concerned between the arbitration agreement and the Company Law Board proceedings.

18. In Sukanya Holdings (supra), the Supreme Court had ruled that the mandate of Section 8 is applicable when the subject-matter of the suit or other proceedings, comprised disputes which are fully arbitrable. However, disputes

which cannot be referred to the arbitral tribunal are those where the disputes in the pending legal proceedings are not subject-matter of arbitration and also where one or the other party to the pending litigation has not entered into an agreement to submit disputes for reference to arbitration. That is precisely the case in these proceedings. All the parties to the proceedings before the Company Law Board are not parties to the arbitration agreement. In these circumstances, the disputes pending before the Company Law Board could not have been referred for the arbitration u/s 8 of the Act.

The court in exercising its discretion under Article 226 of the Constitution, especially when it called upon to correct decisions of quasi-judicial or statutory Tribunals, can seek recourse to it where the Tribunal is shown to have acted beyond the bounds of its powers or acted in manifest illegality. In the absence of such infirmity, the High Court would loath invoke its powers to quash the decisions of statutory Tribunal, such as the Company Law Board. For these reasons, the impugned order cannot be faulted as illegal or materially irregular in failing to exercise jurisdiction lawfully vested in the Company Law Board.

19. In view of the above reasons and findings, this petition must fail. It is accordingly dismissed. All interim orders are hereby vacated.

