
(2010) 05 SC CK 0023
In the Supreme Court Of India
Case No : Arbitration Petition No. 7 of 2008

Anil Kumar

APPELLANT

Vs

B.S. Neelkanta and Others

RESPONDENT

Date of Decision : 07-05-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(5), 11(6), 16, 9

Citation : AIR 2010 SC 2715 : (2010) AIRSCW 3715 : (2010) AIRSCW 2971 : (2010) 5 ALD 62 : (2010) 3 AWC 2811 Supp : (2010) 6 JT 255 : (2010) MPLJ 514 : (2010) 5 SCALE 742 : (2010) 5 SCC 407 : (2010) 3 Supreme 124 : (2010) 5 UJ 2570

Hon'ble Judges : D. K. Jain, J

Bench : Single Bench

Advocate : Rajiv Sawhney, Jyoti Mendiratta and Vineet Jhanji, for the Appellant; C.A. Sundaram Ritu Bhalla, Dhruv Dewan, Monark Gehlot, Anandh Kannan and Roshini Musa for Suresh A. Shroff and Co., for the Respondent

Final Decision : Disposed Of

Judgement

D.K. Jain. J.

1. This is a petition under Sections 11(5) and 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') for appointment of an Arbitrator for adjudication of the disputes which are stated to have arisen between the parties to this petition.

2. Since the case has had a chequered history, it would be appropriate to narrate the background facts, giving rise to this petition, in detail:

On 13th April 1998, the Andhra Pradesh Tourism Development Corporation Ltd. (hereinafter referred to as the "Corporation"), a statutory body owned and controlled by the State of Andhra Pradesh, awarded a lease in favour of one M/s Goldstone Engineering Ltd., presently known as Goldstone Teleservices Ltd. (hereinafter referred to as the "Goldstone") for a piece of land for development

of the existing Hotel Ritz as a "Heritage Grand" category hotel, as notified by the Department of Tourism, Government of India.

On 8th November 1999,. Goldstone entered into an agreement with respondents No. 1, 2 and 3 (hereinafter referred to as the "BSN Group") by which they agreed to execute the said project through a new company known as M/s Varsha Hill Fort Resorts Pvt. Ltd. (for short "Varsha"), respondent No. 4 in this petition. As per the said agreement BSN Group agreed to acquire 74% of equity in Varsha whilst Goldstone agreed to retain 26% of equity in the said Company. On 17th May 2001, the Corporation executed a lease deed for the said site in favour of Varsha. The lease provided in extenso the rights and obligations of the parties with respect to the project. Clause 12(u) of the lease deed provided that there would be no change in the constitution of the Lessee viz. Varsha, without the prior consent of the Corporation and Clause 21 thereof -- the non-assignability clause, provided that neither of the parties to the lease deed shall directly or indirectly sell, transfer, assign or otherwise part with the whole or part of their respective interest and/or benefits or obligations under the lease deed in any manner whatsoever to any other person or party without obtaining the prior written consent of the Corporation. On 29th November 2002, Goldstone and BSN Group entered into yet another agreement whereby the latter agreed to take over the entire stake of Goldstone in Varsha. The Corporation felt that agreements dated 8th November 1999 and 29th November 2002 were in breach of the terms of the lease deed dated 17th May 2001 as no written consent of the Corporation had been sought prior to the purported change of shareholding in Varsha, on 4th August 2003, a notice for termination of the lease deed was issued to Varsha. According to the petitioner, in order to prevent the Corporation from resuming possession of the hotel site, on 22nd November 2003 the shareholders of Varsha, i.e. Goldstone and BSN Group, invited the petitioner to take over shareholding of Varsha, subject to the prior approval of the Corporation. A meeting of the Board of Directors of Varsha was held on 22nd November 2003, where, according to the petitioner, three Directors, namely, B.S. Neelkanta (respondent No. 1), Mr. P. Rameshbabu and Mrs. B. Renuka (respondent No. 2) were present. Minutes of the meeting were duly drawn wherein it was recorded that the petitioner shall be investing funds to the tune of Rs. 15 to 18 crores in the form of equity in Varsha. It was also resolved that the proposal approved by the Board shall be subject to the approval by the Corporation and the execution of the relevant documents. In furtherance of the said Resolution, Varsha requested the Corporation to accord permission for change in the shareholding pattern in favour of M/s Anil Kumar & Associates (hereinafter referred to as "AKA"). The Corporation granted the permission vide their letter dated 10th December 2003.

Pursuant to Corporation's approval, an agreement dated 19th January 2004 was entered into between AKA, BSN Group comprising Mr. B.S. Neelkanta, Mrs. B. Renuka, Amogh Hotels Ltd. and Varsha respectively as parties of the first, second and third part, whereunder BSN Group agreed to transfer 19,68,300 shares in

Varsha to AKA under the terms and conditions of the said agreement. The said agreement was signed on behalf of AKA by Anil Kumar, the petitioner herein and a resident of great Britain, Mr. B.S. Neelkanta (Respondent No. 1) and Mrs. B. Renuka (Respondent No. 2). The agreement contained the following arbitration clause:

41. Any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to this agreement between the parties and so notified in writing by either party to the other (the Dispute) in the first instance shall be attempted to be resolved amicably by them. If the parties are unable to do so, such dispute shall be referred to arbitration by a sole Arbitrator mutually agreed by the parties to the dispute. In the event the parties are unable to agree on an Arbitrator within 15 days, then the arbitrator shall be nominated by Managing Director of APTDCL on the request of any party. The arbitration shall be governed by the provisions of Arbitration and Conciliation Act, 1996 and the venue of arbitration shall be at Hyderabad, and shall be conducted in English Language. Any decision or award resulting from arbitration shall be final and binding upon the parties.

The said agreement was followed up by another agreement dated 23rd January 2004 between AKA represented by Mr. Anil Kumar, Goldstone, BSN Group represented by Mr. B.S. Neelkanta, respondent No. 1 in this petition, and Varsha, represented again by Mr. B.S. Neelkanta, as its Director. Under the said agreement, AKA agreed to purchase 1,00,000 equity shares of Varsha held by Goldstone for a consideration of Rs. 10 lacs. As a result of the aforesaid two agreements, AKA became entitled to acquire 74% equity stake in Varsha whilst the equity shareholding of BSN Group stood reduced to 26%. As per agreement dated 23rd January 2004, upon transfer of shares of Goldstone to AKA, all Directors of Varsha, representing Goldstone were to resign from the Board of Directors of Varsha and AKA was entitled to nominate its directors on the Board of Varsha.

The Corporation withdrew its order cancelling lease deed and signed a supplemental lease deed dated 21st February 2004 with Varsha. The supplemental lease deed recorded the shareholding pattern of Varsha as on that date as Anil Kumar & Associates holding 74% equity shares and Mr. B.S. Neelkanta holding 26% of the equity share capital of Varsha. The said supplemental agreement was signed by the petitioner on behalf of Varsha as its director. The stand of the petitioner is that in furtherance of the said arrangement, he engaged the services of an architect in London to prepare the plans for construction of the Ritz hotel and on 14th March 2004, executed two contracts, being a management agreement and a technical services agreement with Meridien S.A. It appears that as per the understanding between AKA, Varsha and Goldstone, the shares of Varsha, which were to be acquired by AKA under agreements dated 19th January 2004 and 23rd January 2004 were actually subscribed by a Company known as M/s India International Construction Private

Ltd. (for short "IICL"), purportedly belonging to a group called the "Progressive Group".

On 31st August 2005, the petitioner received an email from one Mr. Ashish Kumar attaching a copy of letter dated 22nd August 2005 addressed by Varsha to the petitioner, advising the petitioner that Varsha was contemplating to issue a public notice for the information of the general public that petitioner's association with the hotel project had been terminated and that promoter group, including the BSN Group did not require petitioner's support and association with the hotel project. It was alleged that the petitioner had not invested a single rupee in the project, thus hampering the progress of the hotel project and that the promoter group viz. the BSN group, was forced to mobilize the requisite resources in the form of debt and equity. The petitioner was also informed that he was no longer representing Varsha as its director. A separate email dated 5th September 2005 addressed by Mr. B.S. Neelkanta (respondent No. 1), purportedly on behalf of Varsha, was sent to Le Meridien, informing them that their agreement with Varsha regarding the hotel project had been terminated.

As expected, vide his advocate's letter dated 23rd September 2005, the petitioner objected to the termination of his association with Varsha, as conveyed to him vide respondent No. 1's letter dated 22nd August 2005 and asserted that he, through his nominee and associate IICL is a stake holder of 74% equity in Varsha and would take steps to seek registration of the said shareholding in his own name. The relevant portion of the reply is extracted below:

My client has fully honored his obligations under the Agreement and has through his nominee made substantial investments into the Company. My client is the approved investor in the Company and pursuant to his assurances given to the Andhra Pradesh Tourism Development Corporation Ltd., that Corporation signed the Supplementary Lease Deed dated 21st February, 2004. The said Supplementary Lease is signed by my client as the Director of the Company. As you are fully aware the Andhra Pradesh Tourism Development Corporation Ltd. was holding the Company in breach of the Lease Agreement and had issued a notice terminating the Lease Deed. The notice of cancellation was withdrawn and a Supplemental Lease executed in favour of the Company pursuant to the request and representations made by my client. Further the Corporation has approved my client holding 74% of the Capital and my client has the first preemptive right and option to purchase the 26% shares held by the BSN Group as defined in the Agreement of 19th January, 2004. The BSN Group is obliged to first offer the sale of those shares to my client and is further obliged not to sell those shares to any other party. My client accordingly exercises his rights to purchase the said 26% shares held by the BSN Group directly in his own name.

On 1st October 2005, the petitioner received a letter from the Corporation seeking certain clarifications of documents attached with the letter on the change in shareholding pattern of Varsha. According to the petitioner, it was only on receipt of this letter from the Corporation that he came to know that BSN Group

and Varsha were trying to create rights in the so-called "progressive group", the said group having acquired shares in Varsha. Thereafter, some correspondence ensued between the Corporation and the petitioner with which I am not directly concerned.

3. On 22nd November 2005, the petitioner filed a petition u/s 9 of the Act before the City Civil Court at Hyderabad seeking certain interim reliefs including a direction to Varsha to maintain status quo in connection with the terms and conditions of lease agreement dated 17th May 2001, as amended by supplemental lease deed dated 21st February 2004. Eventually, on 17th December 2005, the petitioner through his Advocate sent a letter to Varsha and the BSN Group calling upon them to confirm the appointment of an Arbitrator within 15 days of the said letter, in terms of the arbitration agreement. Since no reply to the said notice was received, vide his letter dated 30th January 2006, the petitioner approached the Corporation requesting them to nominate an Arbitral Tribunal as per the arbitration agreement dated 19th January 2004. The respondents as also the Corporation having failed to appoint an Arbitrator, the petitioner filed a petition u/s 11(6) of the Act before Hon'ble the Chief Justice of High Court of Andhra Pradesh for appointment of an Arbitrator. Vide order dated 6th February 2007, rejecting the objections raised by the respondents, the learned Single Judge of the High Court allowed the petition and appointed a former Judge of this Court as the sole Arbitrator.

4. Aggrieved by order dated 6th February 2007, respondent No. 4 in this petition, filed a SLP (C) No. 5493 of 2007. This SLP was subsequently amended with the permission of this Court, incorporating the objection of the respondent with regard to the jurisdiction of the High Court to entertain the petition u/s 11(6) for appointment of an Arbitrator. The stand of the said respondent was that the dispute, if any, involved International Commercial Arbitration and, therefore, the jurisdiction to appoint an Arbitrator vested in the Chief Justice of India alone. On 23rd November 2007, leave to appeal was granted to the respondents.

5. On 22nd January 2008, the petitioner filed the present petition under Sections 11(5) and 11(6) of the Act seeking appointment of an Arbitrator in terms of the Arbitration Agreement dated 19th January 2004.

6. A common affidavit has been filed on behalf of the respondents resisting the petition. By way of preliminary submissions, it is pleaded that: (a) the petitioner has no locus standi to file the present petition inasmuch as the Arbitration Agreement dated 19th January 2004 was between the BSN Group, Varsha and a business concern known as M/s Anil Kumar & Associates. Therefore, the petitioner in his individual capacity has no locus standi to file the present petition without specific plea that it was being filed for and on behalf of Anil Kumar & Associates, allegedly a distinct entity and claiming shareholding in his individual capacity; (b) the shares in Varsha were to be acquired by M/s Anil Kumar & Associates under agreements dated 19th January 2004 and 23rd January 2004 which were actually subscribed by yet another company known as IICL, in the

assumed name of the "Progressive Group" - an undertaking of AKA and some others, who have not invoked the arbitration clause and, therefore, the present petition is liable to be dismissed as the petitioner has not brought any documentary record to show that he was authorised by IICL to file the present petition and (c) in the absence of IICL and other associate companies of IICL, holding shares in Varsha, in the arbitration proceedings no declaration can be made by the Arbitral Tribunal to the effect that the petitioner is entitled to 74% shareholding in Varsha. The plea of the petitioner with regard to the minutes dated 22nd November 2003 has also been disputed. Needless to say, at the outset, that all these questions are within the competence of the Arbitrator as u/s 16 of the Act, it is for him to rule on his own jurisdiction, including the question about existence or validity of the Arbitration Agreement.

7. At this juncture, it may be relevant to note that since in the Special Leave Petitions, filed against the orders passed by the Andhra Pradesh High Court including the order appointing the Arbitrator, leave had been granted by this Court vide order dated 23rd November 2007, the hearing in the present petition on 25th August 2008 was deferred with a view to await the decision in those appeals (Civil Appeal Nos. 5645-5647 of 2007 and 5642-5644 of 2007), which were disposed of on 22nd May 2009 as the withdrawal of the original application u/s 11(6) of the Act filed by the petitioner before the High Court was allowed. The effect of the said order is that the order passed by the High Court on petitioner's application u/s 11(6) has been set at naught.

8. I have heard learned Counsel for the parties.

9. Mr. Rajiv Sawhney, learned Senior Counsel appearing for the petitioner, strenuously urged that in terms of agreement dated 19th January 2004, it was agreed that the petitioner and his associates would acquire 74% of equity in Varsha, they having fulfilled their part of the obligation under the said agreement by contributing towards 74% of the equity, respondent No. 1, in breach of the said agreement, has by notice dated 22nd August 2005 sought to unilaterally terminate petitioner's association with Varsha for no rhyme or reason. It was argued that not only the dispute with regard to the validity of the said notice is a live issue, even the genuineness of the minutes dated 22nd November 2003, forwarded by Varsha to the Corporation and agreement dated 23rd January 2004, creating rights in a Group of Companies viz., the "Progressive Group" has been seriously contested by the petitioner, which matters can be resolved only through the medium of arbitration, as stipulated in Arbitration Agreement dated 19th January 2004. It was, thus, submitted that either the Arbitrator appointed by the High Court may be permitted to re-enter the reference or a new Arbitrator be appointed to adjudicate upon the disputes between the parties.

10. Mr. C.A. Sundaram, learned Senior Counsel appearing on behalf of the respondents, on the other hand, vehemently contended that the present petition is utterly misconceived inasmuch as the controversy regarding termination of relationship between the petitioner and Varsha in terms of letter dated 22nd

August 2005 is not connected with agreement dated 19th January 2004 as after allotment of 74% of equity in Varsha to the associates of the petitioner, the agreement dated 19th January 2004 worked itself out and, therefore, there is no subsisting dispute between the parties to the agreement. It was asserted that the agreement was only for transfer of shares of Varsha to Anil Kumar & Associates and with transfer of 74% of equity in favour of the associates of Anil Kumar, the petitioner, no cause of action to file the present petition survived. It was also contended that the disputes now sought to be raised necessarily involve the companies forming the "Progressive Group", who were neither parties to the Arbitration Agreement nor are before me in these proceedings. In support of the proposition that any matter which lies outside the Arbitration Agreement and is also between some of the parties who were not parties to the Arbitration Agreement, there is no question of reference to Arbitration u/s 11(6) of the Act, reliance is placed on a decision of this Court in Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, . Reference was also made to the decision of a Bench of seven Judges of this Court in SBP & Co. v. Patel Engineering Ltd. and Anr. (2005) 8 SCC 618, to contend that the question of subsistence of an arbitrable dispute between the parties is to be demonstrated by the party requesting for arbitration and is required to be decided by me in these proceedings.

11. It is manifest from the pleadings that the parties are ad idem that there is an Arbitration Agreement between them vide Clause 41 of agreement dated 19th January 2004, but the contention of the respondents is that there is no live issue requiring resolution by arbitration.

12. Thus, the question that falls for consideration before me is whether the dispute regarding termination of relationship between Varsha and the petitioner is dead one in the sense that on alleged allotment of equity in favour of an associate of the petitioner, agreement dated 19th January 2004 has worked itself out and no live issue in terms of the said agreement subsists?

13. The controversy in regard to the nature of function to be performed by the Chief Justice or his designate u/s 11 of the Act has been set at rest by a Bench of seven Judges of this Court in SBP case (supra). It has been held, per majority, that the function performed by the Chief Justice or his nominee under the said Section is a judicial function. Defining as to what the Chief Justice or his designate is required to determine while dealing with an application u/s 11 of the Act, P.K. Balasubramanyan, J., speaking for the majority said: (Para 39, SCC)

It is necessary to define what exactly the Chief Justice, approached with an application u/s 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a

long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator u/s 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal.

14. It is clear from the above extracted paragraph that in order to set into motion the arbitral procedure, the Chief Justice or his designate has to decide the issues, if raised, regarding: (i) territorial jurisdiction; (ii) existence of an Arbitration Agreement between the parties and (iii) whether the claim made by the applicant was a dead one in the sense that the parties have already concluded the transaction by recording satisfaction of their mutual rights and obligations or have recorded satisfaction regarding their financial claims. Nevertheless, the Court made it clear that at that stage it may not be possible to decide whether a live claim made, is one which comes within the purview of the arbitration clause and this question should be left to be decided by the Arbitral Tribunal on taking evidence. It is, therefore, plain that purely for the purpose of deciding whether the arbitral procedure is to be set into motion or not, the Chief Justice or his designate has to examine and record his satisfaction that an Arbitration Agreement exists between the parties and that in respect of the agreement a live issue, to be decided between the parties, still exists. On being so satisfied, he may allow the application and appoint an Arbitral Tribunal or a sole Arbitrator, as the case may be. However, if he finds and is convinced that the claim is a dead one or is patently barred by time or that he lacks territorial jurisdiction, he may hold so and decline the request for appointment of an Arbitrator.

15. Having examined the whole matter in the light of afore-noted principles, I am of the opinion that the petition deserves to be allowed. From the material placed on record by the parties, it appears to me that: (i) there are disputes between the parties on the issues/claim raised by the petitioner and countered by the respondents, including whether the claim still subsists or has been extinguished as alleged by the respondents, which cannot be resolved without evidence; (ii) there is an Arbitration Agreement in Clause 41 of agreement dated 19th January 2004, to which the petitioner is a party along with the respondents. The Arbitration Agreement is in clear terms and brings within its ambit the disputes

sought to be raised by the petitioner: whether there was a breach of the terms of agreement dated 19th January 2004, in as much as the petitioner failed to pump in the requisite funds in Varsha either by way of equity or otherwise, as alleged, in Varsha's letter dated 22nd August 2005, would be a matter in the realm of arbitration and this Court cannot go into that question; (iii) the issues/claim raised by the petitioner, on a mere assertion cannot be said to be a dead one without evidence to be produced by the parties in support of and rebuttal thereto, on their respective stands, regarding rights and obligations of the parties under agreements dated 19th January 2004 and 23rd January 2004, on allotment of 74% of equity in favour of IICL and petitioner's right to nominate or being himself on the Board of Directors of Varsha; and (iv) the Arbitrator is competent u/s 16 of the Act to rule on its own jurisdiction, including rule on any objections with respect to existence or validity of the Arbitration Agreement, on a plea being raised before him that he has no jurisdiction.

16. For the foregoing reasons, the petition is allowed and Mr. Justice M. Jagannadha Rao, a former Judge of this Court is appointed as the sole Arbitrator to adjudicate upon the claims/disputes raised by the petitioner, subject to his consent and such terms as he may deem fit and proper. It goes without saying that the learned Arbitrator shall deal with the matter uninfluenced by the observations made by the High Court of Andhra Pradesh in its order dated 6th February 2007 or in this order, on the rival stands of the parties.

17. The Registry is directed to communicate this order to the learned Arbitrator to enable him to enter upon the reference and give his Award as expeditiously as practicable. The petition stands disposed of with no order as to costs.