
(2005) 07 DEL CK 0047

In the Delhi High Court

Case No : CP 240 of 1998

Aturia Pompe S.P.A

APPELLANT

Vs

Aturia Continental Ltd.

RESPONDENT

Date of Decision : 01-07-2005

Acts Referred:

Companies Act, 1956 — Section 434

Citation : (2005) 07 DEL CK 0047

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : B. Mohan, for the Appellant; Chetan Sharma A.K. Aggarwal and Umesh Mishra, for the Respondent

Judgement

A.K. Sikri, J.—The petitioner is a foreign company incorporated in Italy and is engaged in the business of manufacture, sale and supply of various types of Motors and Pumps. It claims exclusive knowhow for the products it is manufacturing and marketing for which it has market all over the world. It has the patent rights in the design of Motors and Pumps and has also right to use the trade mark of Aturia/Rotos alone or in combination with each other. As per the averments made in the petition, some time in December 1991 the respondent company (hereinafter referred to as `the company") approached the petitioner and another sister concern, namely, Rotos S.P.A. for obtaining the latest technology and transfer of technical knowhow for different types of pumps and motors manufactured by them. Discussions and negotiations took place which culminated in collaboration agreement dated 18.6.92 entered between the petitioner and Rotos S.P.A. on the one hand and the company on the other hand.

2. On the same day i.e. 18.6.92, another agreement was entered into between the same parties known as technical knowhow agreement. In the year 1994 Rotos S.p.A. got merged with the petitioner and all rights, interests etc. of Rotos S.p.A. including the `Rotos" logos, its brand name and trade name `Rotos" stood vested in the petitioner. As per this technical knowhow agreement, the

petitioner and Rotos S.p.A had to provide technical knowhow to the company for which company was to pay lump-sum fee of US 3,20,000. Since this involved payment of foreign exchange by the company to the petitioner, approval of Government of India to this agreement was necessary. The said technical collaboration agreement was approved by the Government of India on 19.11.1992 and after this approval a supplementary knowhow agreement dated 19.2.1993 was also entered into between the parties. As per this supplementary knowhow agreement dated 19.2.1993 the knowhow fee of US \$ 3,20,000, subject to taxes, was payable by the company to the petitioner in the following manner:

- (a) First 1/3rd Installment after the agreement is filed with Reserve Bank of India / authorised Foreign Exchange dealer.
- (b) Second 1/3rd Installment on delivery of technical documentation.
- (c) Final 1/3rd Installment on commencement of commercial production or four years after the agreement is filed with Reserve Bank of India / authorised Foreign Exchange dealer whichever, is earlier.

The company paid first Installment of 1/3rd fee amounting to US \$ 74,666.67 on 5.5.1993.

3. As per the petitioner between the period March,1993 and July,1996 it supplied all technical drawings and documentation in respect of Submersible Motor 6, Submersible pumps 6 and some Monobloc pumps to the company. Although range of products was varied, parties accepted and proceeded on the basis that the main thrust of the business would be the aforesaid two categories of pumps. The company agreed to get its products tested after their manufacture on the basis of technical knowhow provided by the petitioner in the petitioner's factory at Italy and thereafter locally tried in the market in India so as to go into commercial production at competitive prices. However, despite various reminders the company did not get the quality of its products checked and verified by the petitioner. The company also failed to make payment of second and third Installments of technical knowhow fee although the same had become payable after the petitioner had fulfilled its obligation under the technical knowhow agreement. The company also declared closure of its factory on 11.6.1996. The petitioner submits that because of the failure on the part of the company to make the payment and closure of its factory for which company was primarily responsible, the consequence was suspension of manufacturing activities. This prompted the petitioner to terminate the collaboration agreement/technical knowhow agreement vide letter dated 27.6.1997 which was duly served on the company.

4. It is stated that pursuant to collaboration agreement the petitioner had made necessary investment by way of subscribing to the equity capital of the company of the value of Rs. 8,20,000/- by purchasing 82,000 equity shares of Rs. 10/- each. As, vide Clause-D of the collaboration agreement, provided that in the

event of technical knowhow agreement is terminated, collaboration agreement could also be terminated, the petitioner had terminated both the agreements.

5. Thus, according to the petitioner, Technical Know-how was supplied by the petitioner to the company in all respects and, Therefore, Technical Knowhow Fee of US \$ 3,20,000 became payable. The Company has, however, paid only first Installment of US \$ 74,666.67 and has not made payments towards second and final 1/3rd Installments each. Therefore, petitioner's case is that the respondent company is indebted to the petitioner. In the circumstances, petitioner vide notices dated 27.2.98 and 4.4.98 issued u/s 434 of the Companies Act called upon the company for payment of the dues of balance Technical Knowhow Fee of US \$ 2,13,334 with interest @ 24% p.a. The company replied to first notice vide letter dated 18.3.98 and did not dispute the demand. However, no reply was sent to second notice. Since the company neglected to pay the amount, the petitioner has filed this petition invoking deeming provisions contained u/s 434 of the Companies Act contending that respondent company is unable to pay the debts. It is also stated that the company has not filed any detailed balance sheet and other statutory documents as required under law after September,1993; has been irregular in holding statutory meetings and AGMs; the petitioner as shareholder has not received any intimation and notices for any such meetings; record filed before Registrar of Companies reveals that the company is heavily indebted to banks and financial institutions; it has no immovable assets and moveable assets, completely charged against loans/advances are of no sufficient value to meet the liabilities. According to the petitioner sundry debtors and loans and advances as per abridged balance sheet as on September,1994 shows an aggregate of Rs. 5,18,21,226 as recoverable and out of the aforesaid a sum of Rs. 5,34,212 and Rs. 1,53,856 is recoverable from companies under the same management. The Company is severely indebted to the respondent of Rs. 1,35,89,000/- and it has no sufficient assets to meet the liabilities. Therefore, it would be just and equitable to wind up the company, urges the petitioner.

6. In the reply filed by the respondent objections to the maintainability of the petition are taken up and the liability is also denied on various grounds. However, I would be taking note of those averments which were pressed at the time of hearing. According to the respondent company the petition is not maintainable as there are bona fide disputes between the parties and Article 6.12 of Collaboration Agreement dated 18.6.92 provides for resolution of such disputes by means of arbitration and that to in accordance with the laws of Switzerland and Article XIII of Knowhow Agreement dated 18.6.92 makes laws of Switzerland applicable to such an arbitration. Therefore, according to the respondent Agreement is not governed by the Indian Companies Act or is to be construed and interpreted in accordance with the prevalent laws of India. Therefore, it is contended, this petition, enforcing rights and obligations between the parties in Indian Court applying Indian Law, when the applicability of such law is excluded, should not be entertained. The submission of learned counsel was that Delhi may be natural jurisdiction having regard to Section 10 of the Companies Act but this Court

should not exercise its discretion to exercise such jurisdiction in view of aforesaid position and relied upon judgment of Supreme Court in the case of Modi Entertainment Network and Another Vs. W.S.G. Cricket PTE. Ltd., and particularly paras 10 and 25 thereof, which reads as under:

"10. The courts in India like the courts in England are courts of both law and equity. The principles governing grant of injunction-an equitable relief-by a court will also govern grant of anti-suit injunction which is but a species of injunction. When a court restrains a party to a suit/proceeding before it from instituting or prosecuting a case in another court including foreign court, it is called anti-suit injunction. It is a common ground that the courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction, in an appropriated case. This is cause courts of equity exercise jurisdiction in personam. However, having regard to the rule of comity, this power will be exercised sparingly because such an injunction though directed against a person, in effect causes interference in the exercise of jurisdiction by another court.

25. Now advertent to the facts of this case, the jurisdiction clause in the contract runs thus:

"This agreement shall be governed by and construed in accordance with English law and the parties hereby submit to the non-exclusive jurisdiction of the English courts (without reference to English conflict of law rules)."

7. On merits it is averred that proper technical know-how was not provided by the petitioner as per technical know-how agreement between the parties. In the absence, the respondent company could not go into the production on profitable basis and, Therefore, the petitioner would not be entitled to second and third Installments of know-how fee. As per the petitioner, it fulfilled its obligation by providing necessary technical know-how whereas the respondent disputes the same.

8. The relevant clauses of the agreement are the following:-

"1.1 "Products" shall mean only the types of pumps and motors listed and described in the annexure A hereto including (1) Submersible Pumps and Motors, (4 inch pump included), (2) Horizontal or Vertical Split Case Pumps, (3) Deep Well Turbine, Mixed-Flow and Propeller pumps, (4) Monobloc Pumps, (5) Single Phase Pumps, (6) Horizontal, Vertical or Barrel Multistage pumps, (7) Horizontal, Vertical, Ebonized and not Ebonized pumps for industries, (8) Centrifugal Pumps according to ISO Standards 2858 for Chemical and Petrol Chemical industries, (9) Centrifugal Process Pumps according to API Standard 610, VII Edition.

1.3 Technical Know-how shall mean all information such as : Detailed designs and drawings with complete specifications, Manufacturing Know-how, Procedure for testing, inspection, to control quality in various stages of manufacturing, Product specification, operation and maintenance, manual of the products and instructions and all other related technical information and data whether

patented or otherwise.

4.1 ATURIA/ROTOS shall supply, furnish and impart to CONTINENTAL, the Technical Know-how and all documentation in respect thereof within 2 years at New Delhi, or such other place outside India as the parties may mutually agree.

The Technical Know-how include but not be limited to the following and shall be completed in all respects and shall be such as shall enable CONTINENTAL to design, engineer and to manufacture the Products:

- a) Process, technical information data, design and engineering.
- b) Detailed specifications of raw material, components and products.
- c) Manuals, instructions and information relating to quality control and testing procedure and methods for the Product.

The Technical know-how and the Documentation shall start to be delivered to CONTINENTAL within 3 months from the Effective Date of this Agreement.

4.3 The Technical Know-how and related documentation will be supplied to two sets of reproducible transparencies and shall be in English language and in metric system of measurement.

4.5 ATURIA/ROTOS shall as provided in Article V. familiarize CONTINENTAL technicians at ATURIA/ROTOS's plant at Milano or any other manufacturing facility with Technical Know-how so as to enable CONTINENTAL to undertake the manufacture of Products.

ARTICLE VII: CONSIDERATION AND TAXES

7.1 CONTINENTAL shall in consideration of the grant of the Technical Know-how and documentation hereunder, the technical services (except services rendered of ATURIA/ROTOS technicians) and all other obligation of ATURIA/ROTOS hereunder pay to ATURIA/ROTOS a lump sum of USA \$ 320,000 (U.S. Dollars Three Hundred and Twenty Thousand) subject to applicable Indian taxes in the manner to be mutually decided by the parties hereto."

Admittedly, payment of technical know-how fee of US \$ 3,20,000 was subject to approval by the Government. The Government gave its approval vide letter dated 19th November 1992 and changed the modalities for making the payment of this fee. Instead of making lump sum payment it was to be given in three Installments in the manner already indicated above.

9. Although nine products are mentioned in article 1.1 of the agreement, the respondent vide its letter dated 18th October 1994 conveyed to the petitioner that it had decided to concentrate presently on 6 inches and 8 inches submersible pumps. In the said letter the respondent also stated that:

"(11) In the meantime, to honour our commitment in the market, I requested you to send at least 6 radial flow drawings as requested as this will enable to

cater to 80% requirement of submersible pumps which we have already announced in the market. Batliboi has already started booking orders both for mixed flow and radial flow pumps.

(12) Balance drawings as asked by us may be sent after our personal meeting.

(13) We are in fact very keen to find out way to remit your 2nd Installment. We have discussed this matter with the Government and it will only be possible to send you the 2nd Installment by showing some volume of commercial production and sales through Batliboi as also some export business. We may be able to send this Installment by December 94. We will discuss this further in our personal meeting."

10. The receipt of the drawings in respect of the aforesaid two products was also acknowledged but it was pointed out that drawings sent by the petitioner for 6 inches radial pumps were with fabricated impellers and diffusers made out of stainless steel which technology was not acceptable in India. Learned counsel for the respondent pointed series of correspondence which followed thereafter and on the basis thereof he argued that proper technical know-how was never provided. These letters are dated 23rd July 1993, 10th February 1994, 15th April 1994, 5th July 1994, 13th June 1994, 6th August 1994, 10th October 1994 and 4th March 1996, Learned counsel also pointed out that thereafter MOU dated 6th December 1991 was signed between the parties and clause of the said MOU reads as under:-

"5. In consideration of above, CONTINENTAL shall pay a technical know-how fees to ATURIA/TOROS equivalent to an amount which will enable ATURIA/ROTOS to acquire 10% shareholding in the existing company, i.e. CONTINENTAL PUMPS and MOTORS LTD. The figure of 10% is subject to further discussion."

11. On the basis of aforesaid correspondence, it was argued that there was serious dispute about providing of proper drawings to the respondent and, Therefore, there was no question of making any further payment towards technical know-how fee. Since the disputes raised by the respondent were bona fide, the only option for the petitioner was to get the same settled by means of arbitration, in view of arbitration agreement between the parties.

12. If one were to look into the correspondence in isolation, the argument of the respondent company would impress. However, this argument glosses over two significant aspects, namely, (i) learned counsel for the respondent referred to the correspondence for the period up to 1994 only. Subsequent correspondence would show that further drawings were sent to the satisfaction of the respondent and even commercial production started; (ii) the respondent in subsequent letters even acknowledged its liability and agreed to make the payment. These two aspects could be demonstrated from the following communications exchanged between the parties.

13. It may first be noted that drawings were sent by the petitioner to the

respondent vide letters dated 18th March 1993 and 6th April 1993. The respondent vide letter dated 11th May 1993 informed the petitioner that on the basis of said drawings the respondents were making samples. Thereafter vide letter dated 6th May 1994 the respondent reported the following facts to the petitioner:

"Further due to drop in water level gradually, people are now shifting to installation of Submersible Pumps except for low-level Indo-Gangatic areas. Hence for Dealers Sale we are diversifying into Submersible and High Head Monobloc Pump which have been well accepted in Indian Market as far as design and quality is concerned.

Fortunately, we have been able to finalize an agreement with Batliboi and Company whose profile I am sending to you separately.

For this year, following products have been identified for development and sales in the market with a big publicity thrust. The campaign will be launched in a period of 3 months time.

1. Submersible Pumps (4 to 10)
2. Monobloc Pumps (1 to 6 up to 30HP)
3. Vertical Turbine Pumps (6 to 24)
4. Horizontal Split case Pumps (21/2 to 12)
5. Vertical Hollow Shaft Motors (10 HP to 250 HP) Product No. 3, 4 and 5 are already developed with us with good technology. 60% of Monoblock Pumps are also developed except that we have to supplement them with some Aturia models especially in High Head range.

12. Reading of the aforesaid portions of the letter would indicate that even commercial production had started and for the purpose of sales agreement with Batliboi and Company had been finalised. No doubt, thereafter in some of its letters written in the year 1994, the respondent has expressed its dissatisfaction about the drawings provided and wanted the petitioner to clear the cob-webs. However, it seems that pursuant thereto the petitioner cleared the doubts and remedied the situation. That is why in the year 1996 the respondent even informed the petitioner that it was satisfied about the technical documentation etc. given by the petitioner and customers were highly satisfied with the quality of the product. This would be borne from the following extracts of letter dated 9th February 1996:-

(1) I am thankful to the assistance given to us in respect of technical documentation, testing of submersible motors and initial order of machined castings placed on us.

(7) As far as using the word "In collaboration with Aturia Pompe S.P.A. , Italy", the usage of the same was clarified and permitted by Dr. Alessandro Rent During

his visit to Delhi. However, I can assure you that there will never be any risk to ATURIA/ROTOS image in Indian market as our future is also linked in developing and upgrading the image of Aturia/Rotos in the Indian market. Only a good image can be helpful to us. Wherever we have supplied submersible pumps under your know-how, the customers are highly satisfied with the quality of the product and have placed repeat orders for the same. Further once Aturia name is popular in India market, we have plans to import certain sophisticated pumps manufactured by Aturia, Italy for refinery, Oil and Natural Gas, Petrol-Chemicals and other products for which there is a big scope in India. As a matter of fact, we are thinking of recruiting a person to handle import of such special pumps in India and send him to Aturia, Gestate factory for one month training in order to upgrade his knowledge and expertise in selling such pumps in India.

13. This letter would make entire correspondence relied upon by the respondent as history and would signify that even if there were initial hiccups in acting on the basis of technical know-how and the drawings provided by the petitioner, this problem was ultimately sorted out; the respondent company went into commercial production; tie up with other parties and not only the respondent itself was satisfied from the products but even its customers were highly satisfied with the quality of the product and had placed repeat orders for the same. The respondent at that time had even boasted about its future plans to import sophisticated pumps manufactured by the petitioner once Aturia name (which is the name of the petitioner company) becomes popular in Indian market. In the wake of this letter, its stand in letter dated 4th March 1996 appears to be afterthought.

14. It may not be out of place to mention that in its letter dated 18th October 1994 the respondent had shown keenness to remit second Installment and stated that it would be only possible to send the same by showing some volume of commercial production and sales through Batliboi as well as export business and the respondent would be in a position to remit this Installment by December 1994. Thus, not only the respondent confirmed receipt of technical documentation vide letter dated 9th February 1996 but its satisfaction about the technical know-how provided by the petitioner was also clearly indicated. Therefore, at least after 9th February 1996 the respondent could not say that technical know-how was not provided.

15. It seems that within few months of writing letter dated 9th February 1996 there was closure of the respondent's factory and this information was supplied by the workers' union of the respondent's factory to the petitioner with request to intervene in the matter and impress upon the management to reopen the factory in the interest of business as well as workers. Thereafter the respondent confirmed this fact vide letter dated 27th July 1996 and reason stated was that the requirement of pumps by the Government had gone down substantially because of elimination of aids previously given to them and the new economic policy guided by the World Bank had laid great emphasis on shifting from

Government purchase to privatisation. It can, Therefore, be concluded that because of closure of factory, which was occasioned due to economic policy of the Government, as per the respondent's allegations, the respondent could not make the payment. Non-payment, Therefore, cannot be attributed to alleged non-supply/incomplete supply of drawings/know-how. This would also be clear from the reading of reply dated 18th March 1998 given by the respondent to the petitioner's legal notice u/s 434 of the Companies Act, as in this reply the respondent only expressed bad financial position and did not raise other disputes. The defense now raised is, Therefore, clearly sham and a ploy to deny the alleged dues of the petitioner which became payable in terms of Technical Know-How Agreement after proper technical know-how with complete drawings was provided by the petitioner to the respondent.

16. In view of this discussion, the argument of the learned counsel for the respondent that it is matter which should have been remitted for arbitration does not cut any ice. No doubt, Article 6.12 of the Agreement provides for resolution of disputes by means of arbitration and the arbitration has to proceed in accordance with the laws of Switzerland. However, only when it is found that the defense of the respondent company raises bona fide disputes which cannot be adjudicated in these proceedings which are of summary nature and require evidence that the petitioner could be relegated to the arbitration. Further, the question of applicability of laws of Switzerland would arise only when there are such disputes which are to be resorted to by means of arbitration. It is settled proposition of law that notwithstanding the arbitration clause, company petition seeking winding up of a company is maintainable. The judgment of the Supreme Court on the point is *Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd.*, . While entertaining such a petition the Court has to, naturally, apply the provisions of the Companies Act. Therefore, there is no conflict of laws as tried to be projected by the learned counsel for the respondent and the judgment of the Supreme Court in *Modi Entertainment Network (supra)* shall not be applicable. That was a case where suit was filed in an Indian Court (i.e. Bombay High Court) claiming damages, although the contract contained a non-exclusive jurisdiction clause of English court in accordance with English law. It was in this context the Apex Court held that the civil suit in Bombay High court was not maintainable and remedy was to go to English Court, as dispute between the parties was also governed by English law. Present case is not one for recovery but for winding up of the respondent company. It is trite law that company proceedings are not in the nature of recovery suits. Present petition is one which is for winding up of the respondent company. As respondent company is having its registered office in Delhi, winding up petition can be filed only with this Court, which is the mandate of Section 10 of the Companies Act.

17. The factory of the respondent is closed since July 1996 and no production is resumed. There is no possibility of such resumption either. On direction respondents filed Annual Reports for the year 2001-2002 and 2002-2003. Annual Report for the year 2002-2003 shows a loss of Rs. 3 crores and liability of Rs. 27

lacs. There is huge liability of other creditors also. The company is heavily indebted to banks and financial institutions; it has no immovable assets and movable assets, completely charged against loans/advances are of no sufficient value to meet the liabilities. According to the petitioner sundry debtors and loans and advances as per abridged balance sheet as on September, 1994 shows an aggregate of Rs. 5,18,21,226 as recoverable and out of the aforesaid a sum of Rs. 5,34,212 and Rs. 1,53,856 is recoverable from companies under the same management. The Company is severely indebted to the respondent of Rs. 1,35,89,000/- and it has no sufficient assets to meet the liabilities. These facts could not be disputed by the respondent. Therefore, it would be just and equitable to wind up the company. This petition was admitted vide order dated 26th October 1998 and citations were directed to be published in "The Statesman" (English) and "Vir Arjun" (Hindi). These citations have been published and placed on record. I am, Therefore, of the opinion that the company is indebted to the petitioner and is unable to pay the debts. It would also be just and equitable to wind up the respondent company. It is ordered accordingly. The Official Liquidator attached to this Court is appointed as the Liquidator, who shall take charge of the assets and records of the company forthwith and submit his report within 8 weeks. No further citations need to be published in the facts and circumstances of the case. Intimation be sent to the Registrar of Companies.

18. The petition is disposed of.