(2010) 04 KAR CK 0191

In the Karnataka High Court

Case No : Review Petition No. 8 of 2010 in C.M.P. No''s. 40 and 41 of 2009

Future Metal Private Limited APPELLANT

Vs

STCL Limited RESPONDENT

Date of Decision : 08-04-2010

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 11, 11 (5), 11 (6)

Citation : (2010) 04 KAR CK 0191

Hon'ble Judges : Ajit J. Gunjal, J

Bench : Single Bench

Advocate : Sreevatsa and Anand Mutalli, for Arvind Kamath, ALMT, for the Appellant; H.N. Narendra, for Poovayya and Co., for the Respondent

Final Decision : Dismissed

Judgement

Ajit J. Gunjal, J.—Both these review petitions are disposed of by this common order. The parties will be referred to as per their ranking in the original petition.

2. The matter arises in the following manner:

The petitioner - Company is a subsidiary of STC of India Limited, which is a Government of India undertaking and comes under the Ministry of Commerce and Trade. In the year 2005, the petitioner had contacted the respondent to facilitate the metal scrap trade business through M/S. Wealth Solutions. There was a dispute inter se between the petitioner and the respondent in relation to certain terms of the agreement. Hence, notices were exchanged between the petitioner and the respondent and both of them did not agree upon the name of an Arbitrator. Hence, the petitioner filed an application before this Court in C.M.P. No. 40/2009 and the connected matter. The matter was heard and this Court, having regard to the terms of the contract as well as the dispute inter se between them accepted the petition and appointed a sole Arbitrator to resolve the dispute between the parties. A reference was entered and a contention was taken by the respondent after the claim statement was filed by the petitioner to the effect that the dispute inter se between the petitioner as well as the respondent would involve substantial evidence, having regard to the allegations of fraud, mis-representation etc. The respondent requested the Arbitrator to defer the matter so that necessary clarification can be had by the Court as to whether the arbitral proceedings could be continued in the present situation having regard to the charges of fraud, mis-representation etc. Hence, the present, review petitions are filed.

3. Mr. Sreevatsa, learned Senior counsel appearing for the respondents would vehemently contend that a perusal of the main petition itself and also the notices exchanged between the parties and the complaints lodged by them as against each other would clearly indicate that fraud and serious malpractice are committed. Hence, the said dispute is required to be resolved in a Civil suit and not in a proceeding u/s 11 of the Arbitration and Conciliation Act. He would press into service the ruling of the Apex Court in the case of N. Radhakrishnan Vs. Maestro Engineers and Others, .

4. Per contra Mr. Poovayya, learned Counsel appearing for the petitioners would vehemently submit that a perusal of the petition does not indicate that there is any averment as to the fraud and the malpractice stated to have been committed by the respondents. Even otherwise, he submits that an affidavit would be filed by the petitioners in this Court subjecting themselves to the arbitral proceedings giving up the contentions with regard to the fraud and serious malpractice on the part of the respondents and confine the claim only on the basis of the claim statement filed before the Arbitrator without even remotely suggesting that a fraud has been committed. Another contention raised by him is that a review petition itself is not maintainable under Order 47 Rule 1 of the CPC having regard to the fact that once the order is passed by this Court u/s 11(6) of the Arbitration and Conciliation Act, the question of reviewing the order does not arise having regard to the provisions as contemplated u/s 11 of the Act. Hence, it is not open for this Court to review its own order having regard to the explicit language of Section 11(6) of the Act.

5. I have given my anxious consideration to the submissions made by the learned Counsel appearing for the petitioner as well as the respondent. Before examining whether the petition averments would disclose the allegations regarding fraud or mal practice, the preliminary objection raised by the learned Counsel appearing for the petitioner is required to be answered. The preliminary objection would relate to the maintainability of the review petition. It is well settled that the power of review has to be conferred by a statute. The High Courts being Courts of plenary jurisdiction have inherent powers of review. But however, the question that arises for consideration in the present case is whether an order passed u/s 11(6) of the Act would amount to an order passed by the High Court or for that matter a Court. This query of mine is succinctly answered by the Apex Court in the case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, . It is useful to extract the observations made by the Apex Court at

para. 17:

It is true that the power u/s 11(6) of the Act is not conferred on the Supreme Court or on the High Court, but it is conferred on the Chief Justice of India or the Chief Justice of the High Court One possible reason for specifying the authority as the Chief Justice, could be that i) it were merely the conferment of the power on the High Court, or the Supreme Court, the matter would be governed by the normal procedure of that Court, including the right of appeal and the Parliament obviously wanted to avoid that situation, since one of the objects was to restrict the interference by Courts in the arbitral process. Therefore, the power was conferred on the highest judicial authority in the country and in the State in their capacities of the Chief Justices. They have been conferred the power or the right to pass an order contemplated by Section 11 of the Act We have already seen that it is not possible to envisage that the power is conferred on the Chief Justice as persona designata. Therefore, the fact that the power is conferred on the Chief Justice, and not on the Court presided over by him is not sufficient to hold that the power thus conferred is merely an administrative power and is not a judicial power.

6. A reading of the aforesaid extract from the decision of the Apex Court, it becomes abundantly clear that the powers u/s 11(6) of the Act is not conferred on the High Court, but is conferred on the Chief Justice of the High Court. The Supreme Court has also given one possible reason for specifying the authority as the Chief Justice and for not conferring any power on the High Court. The plain reason given by the Supreme Court is that the power be conferred on the High Court, when the matter is governed by the normal procedure of that Court, including the right of appeal and the Parliament obviously wanted to avoid that situation, since one of the objects was to restrict the interference by Courts in the arbitral process. In this context, the Apex Court concluded that the power was conferred on the highest judicial authority in the country or the State in the capacity of Chief Justice. It is apparent from the reading of the said observations of the Apex Court that the power that is exercised u/s 11(6) of the Act by the Chief Justice or his designate is not the power exercised by them and is not governed by the normal procedure of this Court as well as the power of review etc.

7. In these circumstances, I am of the view that the review petition is not maintainable in respect of the order passed u/s 11(6) of the Act. Having said so, I propose to examine whether the petition averments would disclose the allegations regarding fraud or mal practice, less it is held elsewhere that the orders passed u/s 11(6) of the Act are amenable to Review.

8. The specific case made out by the petitioner in the petition u/s 11(5) of the Act is that in the year 2005 the respondent contacted the petitioner with a request to assist the respondent in the business of merchandising trade transactions for the purpose of purchasing metal scrap from overseas sellers and in turn selling the same to the overseas buyers. It appears the respondent

denoted that he would execute a Back to Back Contract for merchandising trade for each trade assignment with the petitioner - company to insure the petitioner-company from any and all other risks to which the petitioner - company may be exposed. Suffice it to say these Back to Back Contracts for merchandising trade transactions was reduced in writing with an arbitral clause at 11.3.

9. I have perused the papers. Apparently, a perusal of the papers does not indicate that any serious allegations regarding fraud or malpractice has been alleged. The entire petition would relate to the materials supplied as well as the amount payable. It is no doubt true in para 27 of the petition it is stated as follows:

The aforesaid action of the Respondent clearly denotes the malafides of the Respondent. Copy of the Respondent''s letter dated December 26, 2008 is annexed herewith at Annexure ?T?.

10. A perusal of Annexure ''T'' does not indicate that there is any allegation regarding fraud of malpractice stated to have been committed by the respondents. Indeed it is stated that the Consortium of Bankers in the meeting had mentioned and directed that they should talk about the restructuring plan to the STCL directly, as they are a party to it. The phrase "malafides" used in para 27 of the petition cannot in any way be equated with fraud or malpractice. In para 31 it is stated thus:

The respondent with malafide intent of unjustly enriching itself at the cost of the general public are now attempting to defraud the Petitioner Company.

This is a generalized statement made in furtherance of what is stated in the memorandum of petition. It cannot be said that it. would amount to fraud or malpractice as being suggested by the learned Senior counsel.

11. Another factor, which would weigh with the Court in declining to entertain this review petition is the copy of the claim statement filed before the Arbitrator as well as the affidavit filed by the petitioners in this review petition. It is useful to extract the affidavit filed by one Mr. K.L. Anand Sai, who is the authorised signatory of the petitioner - company:

I submit that the accusations of fraud or allegations of serious mal practices, if any, that may have been made by the Respondent against the Petitioner Company in the C.M.P. No. 49/2009 are hereby withdrawn by the Respondent. I submit that the Respondent hereby withdraws all allegations of fraud so far as they relate to the reference of the dispute between the Respondent and the Petitioner to arbitration; the appointment of the sole arbitrator to adjudicate the disputes between the parties and so far as it relates to the arbitration proceedings as a whole. It is submitted that such withdrawal shall, however, not prejudice the legal rights of the Respondent vis-?-vis the Petitioner herein.

12. A perusal of the claim statement made u/s 23 of the Act before the Sole Arbitrator also does not in any way refer to the fraud or malpractice stated to

have been committed by the respondents. Indeed the entire claim statement is based on the contract inter se between the parties and in respect of the terms and conditions relating to performance of the said contract. The claim statement does not even remotely refers to fraud or malpractice stated to have been committed.

13. Insofar as certain criminal proceedings, which are pending inter se between the petitioner as well as the respondent would relate to proceedings u/s 138 of the Negotiable Instruments Act, where certain cheques issued, which were presented for realisation have been dis-honoured. Another complaint would relate to the investigation to be conducted by CBI in respect of the transactions other than which is referable to the Back to Back Contracts. But however, those proceedings would fall in a different realm altogether. The arbitral proceedings are in respect of the terms of the contract and the amount payable by the respondent to the petitioner. Hence, I am of the view that the question of entertaining these review petitions does not arise more so having regard to the affidavit filed by the authorised signatory as well as the claim statement filed before the Arbitrator.

Review petitions stand rejected.

