
(2001) 06 MAD CK 0040
In the Madras High Court
Case No : O.A. No. 460 of 2001

Kamala Solvent

APPELLANT

Vs

Manipal Finance Corporation Ltd., Manipal and Others

RESPONDENT

Date of Decision : 19-06-2001

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 9
Evidence Act, 1872 — Section 115

Citation : AIR 2001 Mad 440

Hon'ble Judges : A. Kulasekaran, J

Bench : Single Bench

Advocate : M.V. Venkataseshan, for the Appellant; V. Kuberan, for Rank Associates, for the Respondent

Final Decision : Dismissed

Judgement

A. Kulasekaran, J.—This application has been filed u/s 9(ii)(e) of the Arbitration & Conciliation Act, 1996 praying to pass an order of

injunction, restraining the respondents 1 and 2 from proceeding with the proposed arbitration proceedings on 14-5-2001 or any other date

subsequent thereto at Udipi pending disposal of the application.

2. It is the case of the applicant herein that the respondents 1 & 2 herein have leased out some machineries under agreement dated 30-12-95 to the

applicant herein. In the said agreement under Clause 32 arbitration is provided. One Mr. B.I. Sharma the 3rd respondent herein was appointed as

arbitrator who has sent notice to the parties including the applicant herein. According to the applicant, the respondents 1 and 2 had unilaterally

chosen to appoint the arbitrator of their choice which is illegal and arbitrary and unsustainable in law. It is the case of the applicant that as per the

Arbitration and Conciliation Act, both the parties have option to choose their respective arbitrators and in turn those arbitrators have a choice to

appoint an umpire to ultimately decide the issue in case there is conflict between them. But according to the applicant herein in this case the third

respondent arbitrator has been appointed unilaterally. Explaining all these aspects the applicant sent a letter dated 27-4-2001 to the respondent

and forwarded a copy to the arbitrator stating that they propose to appoint Mr. R.S. Ramanathan, Advocate, Chennai as their arbitrator. It is also

their case that the cause of action in respect of the transaction arose only at Chennai, that the branch office of the respondents 1 and 2 also situate

at Chennai and not in Udipi or in any other place of Karnataka. According to the appellant on reasonable apprehension they have filed the

application seeking for injunction since they felt the arbitrator may decide the matter ex parte in case if they do not appear on the date fixed on 14-

5-2001 by the arbitrator the 3rd respondent herein, and this Court has granted interim injunction on 8-5-2001 and the same was extended further

3. The respondents 1 and 2 filed a counter-affidavit as follows: The petitioner had availed a lease facility on 30-12-95 and took on lease certain

equipments required for their factory. In the lease agreement there has been a provision for arbitration. Under the said lease agreement a sum of

Rs. 2,47,500/- was payable per month for a period of 60 months. Subsequently the petitioner expressed some difficulty to make payments as

referred above and requested the respondents to make re-schedule of monthly payments in order to enable them to pay a lesser instalment.

Accordingly, a rescheduled agreement (Supplementary Agreement) dated 30-6-99 was entered into between the parties. It is the case of the

respondents that except the re-schedule, of payment the other conditions in earlier agreement dated 30-12-95 are same. Even after the

supplementary agreement, the applicant failed to pay the monthly instalments. Consequently the agreement was terminated by the respondents 1

and 2. Thereafter a notice dated 6-3-2001 was issued to the applicant calling upon them to pay the outstanding amount of Rs. 1,93,59,687/-

within 15 days therefrom. In the said notice they have also pointed out that in the case of non-compliance, the matter would be referred to

arbitrator whose name is mentioned in the agreement dated 30-12-95. The applicant having received the said notice sent a reply with certain false

allegations. No payment was received after the said notice. Therefore the matter was referred to the arbitrator whose name is mentioned in the

agreement dated 30-12-1995. The arbitrator also sent notice to the parties on 10-4-2001 by fixing the hearing on 14-5-2001. The said notice

was served on the applicant herein. According to the respondents 1 and 2 the arbitrator and the venue of arbitration was also fixed by mutual

consent as evident in the agreement. Therefore after agreeing to the venue and the appointment of arbitrator, it is not open to the applicant to

challenge the same. It is also the case of the respondents 1 and 2 that the cause of action or the jurisdiction is not the criteria for fixing the venue of

arbitration, and it is open to the parties concerned to consent on the place for conducting the Arbitration Proceedings. The present application filed

u/s 9(ii)(e) of the Arbitration and Conciliation Act, 1996 is not maintainable. According to the respondents 1 and 2, Section 9(ii)(e) only provides

for various Interim measures for protecting the interest of parties either before commencing the Arbitration proceedings or during the course of

Arbitration Proceedings, that it does not provide for challenging the Arbitration proceedings, as has been done in this case. According to the

respondents, all the matters raised in this application can be agitated before the arbitrator himself. Hence they prayed that the application deserves

to be dismissed and the interim injunction already granted is liable to be vacated.

4. The point for consideration in this application is, "Whether the applicant herein is entitled to an injunction to restrain the respondents 1 and 2

from proceeding further with the proposed arbitration or not.

5. The Point : Learned counsel appearing for both the sides agreed that there is an agreement dated 30-12-95 was entered into between the

parties herein. Under Clause-32 of the said agreement it is provided as follows :

It is expressly agreed that in case any dispute between the parties concerning this agreement or any part thereto the interpretation of any clause of

the Agreement the Court/s in Udipi alone shall have the jurisdiction.

Further under Clause-33, it is provided as under:

(a) All disputes, differences and of claims arising out of this Lease Agreement shall be settled by arbitration, in accordance with the provisions of

the Indian Arbitration Act, 1940 or any statutory amendments thereof and shall be referred to the sole arbitration of Mr. B. I. Sharma, Advocate,

Udipi, or in case of death, refusal, neglect or incapacity to act as an arbitrator to the sole arbitration of Mr. T.M. Puranik, Advocate, Udipi. This

reference to the arbitrator shall be within the Clauses, Terms and Conditions of this agreement. The award given by the Arbitrator shall be final and

binding on all the parties concerned.

(b) Any party desirous of making a reference to the Arbitrator shall give 15 days Registered Acknowledgment Due Notice of his intention to do

so, to the other party at his usual place of business or residence of the place of his last notified address and the notice shall be deemed to have

been served when it would ordinarily have been delivered by post. The notice sent by the Arbitrator to the parties by Registered post at the

address mentioned in the Lease Agreement will be considered sufficient notice on the parties, whether such notice is received by them or not, or is

refused, or is returned undelivered.

(c) All costs and incidental expenses in connection with the arbitration proceedings commencing from the stage of reference to the Arbitrator till the

award is made into a decree of the Court shall be at the cost of the Lessee and shall form part of the amounts due to the company from the

Lessee.

(d) The Arbitrator so appointed shall, after accepting the reference hold such enquiry and adopt such procedures as deemed fit by the Arbitrator.

(e) The Arbitrator shall have power to pass interim order and also interim awards.

(f) The Arbitrator may with the consent of the party or otherwise pass order extending the period of making the award from time to time beyond

the statutory period of four months from the date of acceptance of reference.

(g) Arbitrator may, if he so chooses pass non-speaking award also. The mode of recovery may be separately mentioned in the award.

(h) The Arbitrator may, if so requested by any party to this agreement, file the award to the Court of competent jurisdiction.

6. Further both the parties agreed that the new Arbitration and Conciliation Act, 1996 (Act 26 of 1996) (hereinafter called as "the Act"), is

applicable to this case. Learned counsel for the parties reiterated the contentions of their pleadings.

7. The agreement between the parties herein and the existence of the arbitration clause in the same are admitted. A notice was also issued by the

arbitrator to the parties concerned. The main contention put forth by the applicant herein is that the appointment of the 3rd respondent as arbitrator is not valid under the Act. It is significant to note that Clause 33(a) of the agreement provides that,

All disputes, differences and of claims arising out of this Lease Agreement shall be settled by arbitration, in accordance with the provisions of the

Indian Arbitration Act, 1940 or any statutory amendments thereof and shall be referred to the sole arbitrator of Mr. B.I. Sharma, Advocate, Udipi,

or in case of death, refusal, neglect or incapacity to act as an arbitrator to the sole arbitration of Mr. T.M. Puranik, Advocate, Udipi. This

reference to the arbitrator shall be within the Clauses, Terms and Conditions of this agreement. The award given by the Arbitrator shall be final and

binding on all the parties concerned.

So also Clause 33(b) provides that,

Any party desirous of making a reference to the arbitrator shall give 15 days Registered Acknowledgment Due Notice of his intention to do so, to

the other party at his usual place of business or residence or the place of his last notified address and the notice shall be deemed to have been

served when It would ordinarily have been delivered by post. The notice sent by the Arbitrator to the parties by Registered Post at the address

mentioned in the Lease Agreement will be considered sufficient notice on the parties, whether such notice is received by them or not, or is refused,

or is returned undelivered.

However, it is contended by the learned counsel for the applicant that under the New Act, there should be mutual correspondence between the

disputing parties before appointing an arbitrator and also that both the parties have option to choose their respective arbitrators and in turn those

arbitrators have a choice to appoint an umpire to ultimately decide the issue in case there is a conflict in between them. Therefore it is contended by

the learned counsel for the applicant that in exercising such a right provided under the Act, the applicant has appointed an arbitrator from Chennai

but the same was not agreed to by the respondents 1 and 2. It is also vehemently argued by the learned counsel for the applicant that the 3rd

respondent arbitrator is not vested with the jurisdiction since no part of cause of action arose either in Udipi or any other place in Karnataka, but

only in Chennai.

8. At this juncture, it would be absolutely necessary to refer to Section 11 of the Act which reads thus :

11. Appointment of arbitrators :

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to Sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in Sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the Presiding arbitrator.

(4) if the appointment procedure in subsection (3) applies and--

(a) a party fails to appoint an arbitrator within thirty days from receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in Sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within

thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,--

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure unless the agreement on the appointment procedure provides other means for securing the appointment.

In the case on hand, the parties have agreed upon to appoint the 3rd respondent

as arbitrator under Clause-33 of the agreement dated 30-12-95.

That being so, it is very clear as seen from Sub-section (6) of Section 11 that where the agreement formulated a procedure for appointment of an

arbitrator referable to Sub-section (2) of Section 11, it is open to the parties to take necessary measures for enforcing the procedure laid down in

the agreement for arbitration. It is crystal clear that under Sub-section (6) of Section 11, the Chief Justice or his designate is not to make any

appointment but to enforce or direct the party to appoint in terms of the agreement entered into between them. The Supreme Court in the decision

reported in *Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co.*, : held as follows (Para-5) :

5. ""An analysis of different sub-sections of Section 11 would indicate the character of the order, which the Chief Justice or his nominee passes

under Sub-section (6) of Section 11. Sub-section (3) and Sub-section (4) deal with cases, in which a party fails to appoint an arbitrator or the

arbitrators fail to agree on the third arbitrator and thus seek to avoid frustration or unreasonable delay in the matter of constitution of the arbitral

Tribunal. It authorises the Chief Justice of India or the Chief Justice of a High Court concerned, or any person or institution designated by him to

make the appointment upon request of a party, if the other party has failed to appoint an arbitrator within thirty days from the receipt of a request

to that end. Sub-sections (4)(5) and (6) designedly use the expression ""Chief Justice"" in preference to a Court or other authority as in paragraphs

(3) and (4) of Article 11 of the Model Law, obviously for the reason that the Chief Justice acting in its administrative capacity, is expected to act

quickly without encroaching on the requirements that only competent persons are appointed as arbitrators. Sub-section (4) does not lay down any

time limit within which the Chief Justice or his nominee, designated by him, has to make the appointment. It however expects that these

functionaries would act promptly. While Sub-sections (4) and (5) deal with removal of obstacles arising in the absence of agreement between the

parties on a procedure for appointing the arbitrator or arbitrators, Sub-section (6) seeks to remove obstacles arising when there is an agreed

appointment procedure. These obstacles are identified in Clauses (a), (b) and (c) or Sub-section (6). Sub-section (6) provides a cure to these

problems by permitting the aggrieved party to request the Chief Justice or any person or institution designated by him to take the necessary

measure i.e., to make the appointment, unless the agreement on the appointment procedure provides other means for securing the appointment.

Sub-section (6) therefore, aims at removing any dead-lock or undue delay in the appointment process. This being the position, It is reasonable to

hold that while discharging the function under Sub-section (6), the Chief Justice or his nominee will be acting in his administrative capacity and such

a construction would sub-serve the very object of the new Arbitration Law.

In the above said decision, the Apex Court held that when the parties agreed upon for appointment of the arbitrator and the procedure, the Court

must implement the above procedure. Thus, the above decision of the Apex Court made it clear the difference between the nature of appointment

of the arbitrator under Sub-sections (3), (4), (5) and (6) of Section 11. The nature of order of appointment differs in the case where there is no

procedure agreed upon between the parties and when the procedure had been agreed upon between the parties for the appointment of an

arbitrator. In case, if an agreement is entered into between the parties provides the procedure for appointment of arbitrator, the Court has to

implement the above said procedure, but not to venture upon to pass an order otherwise. That being so, it is significant to note that in the case on

hand, the parties under agreement mutually agreed upon to appoint the 3rd respondent herein as sole arbitrator. Further, not content with that, the

parties also agreed upon for another sole arbitrator in the event of the earlier arbitrator's refusal, neglect or incapacity etc., and that is evident

under Clause 33 (a) of the agreement. Another significant aspect in this case is that a supplementary agreement also has been entered into between

the parties herein on 30-6-99 i.e., subsequent to the enforcement of the new Act (Act 26 of 1996) and the said supplementary agreement

categorically mentions that except the changes mentioned relating to the re-schedule of monthly payment, all other terms and conditions of the lease

agreement dated 30-12-95 shall remain in force, and binding on the parties to the said agreement. Thus it is well settled that where an arbitrator is

named in the arbitration agreement, the provisions of Section 11 of the Act are not attracted and the Court will not have jurisdiction to try and

decide the petition filed by a party.

9. In this case, the applicant herein has invoked the provisions of Section 9(ii)(e) of the Act and has filed the present application seeking for an

injunction restraining the 3rd respondent from proceeding further with the proposed arbitration. Such application itself is unsustainable since under

the agreement dated 30-12-95, admittedly the applicant herein has given consent for the appointment of the 3rd respondent as sole arbitrator and

also for the venue of the arbitration proceedings. That being so, it is not open to the applicant now to challenge the appointment of the arbitrator

and the venue by way of the present application.

10. u/s 9(ii)(e) of the Act, this Court is vested with the jurisdiction to pass interim order to safeguard and protect the interests of the parties, but not

to challenge the appointment of the arbitrator and the venue. In such circumstances, he is not entitled to seek any interim relief u/s 9(ii)(e) of the

Act.

11. Learned counsel appearing for the respondents 1 & 2 relied on the decision of the Apex Court reported in Nimet Resources Inc. and Another

Vs. Essar Steels Ltd., : of the decision it has been held that.

The learned counsel had adverted to the decision of this Court in Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., : in

which the nature of the order passed u/s 11(6) of the Act has been explained and it is also observed therein that in case of dispute between the

parties as to the existence or validity of an arbitration agreement it should be examined by the arbitral Tribunal itself. This is how this Court has

explained the position :

Section 16 empowers the arbitral Tribunal to rule on its own as well as on objections with respect to the existence or validity of the arbitration

agreement. Conferment of such power on the arbitrator under 1996 Act indicates the intention of the legislature and its anxiety to see that the

arbitral process is set in motion. This being the legislative intent, it would be proper for the Chief Justice or his nominee just to appoint an arbitrator

without wasting any time or without entertaining any contentious issues at that stage, by a party objecting to the appointment of an arbitrator. If this

approach is adhered to, then there would be no grievance of any party and in the arbitral proceedings, it would be open to raise any objection, as

provided under the Act. But certain contingencies may arise where the Chief Justice or his nominee refuses to make an appointment or an

arbitrator and in such a case a party seeking appointment of arbitrator cannot be said to be without any remedy.

Thus, in the above decision, the Apex Court held that Section 16 empowers the arbitral tribunal to rule on its own as well as on objection with

respect to the existence or validity of the arbitration agreement.

12. Further it is significant to note that Section 5 of the Act provides that notwithstanding anything contained in any other law for the time being in

force, any matters governed by this part, no judicial authority shall Intervene except where so provided in this part. Further Section 8(3) of the Act

provides that notwithstanding that an application has been made under Sub-section (1) and that the issues pending before the judicial authority, the

arbitration may be commenced or conducted and the arbitral award made. It is further provided u/s 34 that a party aggrieved by such an arbitral

award may make an application for setting aside such an award in accordance with the said provisions. That being so, the averment that the

applicant's interest is affected by the arbitration proceedings initiated by the 3rd respondent cannot be accepted.

13. In the result, the application for injunction is dismissed. No costs. Consequently, the interim injunction already granted is hereby vacated.