
(2010) 03 DEL CK 0220

In the Delhi High Court

Case No : Arbitration Petition No. 12 of 2009

Magnostar Telecommunications

APPELLANT

Vs

Kotak Mahindra Bank Ltd.

RESPONDENT

Date of Decision : 08-03-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Limitation Act, 1963 — Section 14(2)

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19, 19(10), 19(6), 19(7), 19(8)

Citation : (2010) 03 DEL CK 0220

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Dinesh Agnani, for the Appellant; Jayant K. Mehta, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—This is a petition u/s 11 of the Arbitration and Conciliation Act, 1996, whereby the petitioner, a borrower, seeks reference of certain disputes between it and the respondent bank/lender , to arbitration, in terms of the following Clause:

...Unless the same falls within the jurisdiction of the Debts Recovery Tribunal established under the Recovery of Debts Due to KMBLs (sic) Banks and Financial Institutions Act 1993, any and all claims and disputes arising out of in connection with this Agreement or its performance shall be settled by arbitration by a single Arbitrator to be appointed by KMBL. The arbitration shall be held in Mumbai.

In the event that the claim or dispute does not fall within the jurisdiction of the Debts Recovery Tribunal established under the Recovery of Debts Due to KMBLs (sic) Banks and Financial Institutions Act 1993, for the purposes of arbitration mentioned in above, the Courts aforesaid, or if law does not permit the same, the Courts of the city in which the concerned branch is situated, shall have

exclusive jurisdiction in relation to this agreement, the arbitration and all matters arising in connection herewith and therewith.

2. The petitioner states that disputes have arisen between the parties on account of failure of the respondent, inter alia, to sanction the loan in a timely manner and therefore, the petitioner is alleged to have been caused losses. Paras 5 and 8 of the petition brings into focus the disputes between the parties and the same read as under:

5. That Petitioner always made the payment according to the repayment schedule; however, the Respondent deliberately delayed the sanctioning of the balance loan amount and on some occasions unilaterally decreased the sanctioned credit limits which seriously affected the business prospect of the Petitioner. The Respondent also did not release the mortgaged properties to repay the loan and the business of the Petitioner came to a grinding halt. It is submitted that due to the breach of the terms and conditions of the Agreement/Facility sanction letter Petitioner suffered huge losses and therefore a legal notice dated 18.11.2008 was issued to the Respondent claiming in total sum of Rs. 100,00,00,000/- (Rupees Hundred Crores only) on account of the complete breach of agreement and trust committed by Respondent. A true copy of the legal notice dated 18.11.2008 is annexed herewith as Annexure-P-3.

8. That the Petitioner vide its notice invoking arbitration categorically stated that in view of specific denial of the legitimate claim/demand of Rs. 100 Crores raised by the Petitioner by the Respondent vide their letter dated 2nd Dec 2008, arbitral disputes had arisen between the parties and requested the Respondent to appoint an arbitrator to adjudicate the disputes having arisen between the parties.

3. The respondent has appeared and opposed the reference of the disputes to arbitration. The contention of the respondent is that by virtue of the aforesaid Arbitration Clause, the subject matter of the dispute in the present case, falls within the jurisdiction of the Debt Recovery Tribunal (DRT) and by virtue of the aforesaid agreed Arbitration Clause, the subject matter of the disputes ought to be decided only by the DRT and not by arbitration.

4. The counsel for the petitioner, on the other hand, vehemently disputes the contention of the respondent and strongly placed reliance upon the decision of the Supreme Court in the case of Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation, . Mr. Agnani, on behalf of the petitioner, contends that after the decision of the Supreme Court in the case of Nahar Industrial Enterprises, it is no longer res integra that a civil suit filed by a borrower against a bank has an independent status and an independent existence and the same cannot be transferred to the DRT for decision.

5. The first decision of the Supreme Court with respect to transfer of the proceedings pending in a civil court to the DRT is of the case United Bank of India, Calcutta Vs. Abhijit Tea Co. Pvt. Ltd. and Others, . The Supreme Court in

Abhijit Tea's case has held as under:

The Company's suit insofar it claims a relief for specific performance, perpetual and mandatory injunctions, is in substance under Sub-sections (8) to (10) of Section 19 and is in the nature of a counter-claim. The plea for deduction of damages is in the nature of a set-off falling within Sections 19(6) and (7). Both are equated to cross-suits. If a set-off or a counter-claim is to be equated to a cross-suit u/s 9, a fortiori there can be no difficulty in treating the cross-suit as one by way of set-off and counter-claim, and as proceedings which ought to be dealt with simultaneously with the main suit by the Bank. (Para 41)

In the context, the word "counter-claim" in Sections 19(8) to (11) which is equated to a cross-suit, includes a claim even if it is made in an independent suit filed earlier. An agreement not to charge interest, the specific performance of which is claimed is nothing but a plea that the Bank could not charge interest. A permanent injunction directing the Bank not to charge interest because of an alleged agreement in that behalf is likewise a plea that no interest is chargeable. So far as the plea for further financial assistance is concerned, it is also, broadly, in the nature of a "counter-claim". All these fall under Sections 19(8) to (10). Again, the plea for deducting "damages" though raised in the suit is indeed broadly a plea of "set off" falling under Sub-sections (6) and (7) of Section 19. (Para 41)

It is therefore directed that the Bank's suit be transferred by the Registrar, Calcutta High Court to the appropriate Tribunal under the Act, so far as the debtor Company's suit is concerned, action has to be taken likewise by the Registrar.

The above observations were made in the context of Section 31 of the Recovery of Debts Due to Banks & Financial Institutions Act, 1993 for transfer of pending cases of bank to the DRT on passing of the 1993 Act and when there were two proceedings pending in the civil court: First of a suit filed by the Bank and secondly a suit filed by the borrower against the Bank.

6. The ratio of Abhijit Tea Company's case makes it clear that even a wholly independent claim which has no nexus with the claim of the bank can be treated as a matter in the nature of a set off and a counter-claim u/s 19(8) to (10) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and which is liable to be transferred to the DRT u/s 31 of the said Act.

7. The next judgment on the issue is the decision of the Supreme Court in the case of Indian Bank Vs. ABS Marine Products Pvt. Ltd., . In this case of Indian Bank, the Supreme Court has held that civil suits which are pending before a Civil Court, cannot be transferred to the DRT when the two issues raised by the bank and the borrower were not inextricably connected i.e decision in one would not affect the decision in the other. The relevant portion of the said Supreme Court judgment in Indian Bank reads as under:

9. The issues that arose in the Bank's application were whether the borrower failed to repay the sums borrowed and whether the Bank was entitled to the amounts claimed. On the other hand, the issues that arose in the borrower's suit were whether the Bank had promised/agreed to advance certain monies; whether the Bank committed breach in refusing to release such loans in terms of the sanction letter; whether the borrower failed to fulfil the terms and conditions of sanction and therefore the Bank's refusal to advance, was justified; and even if there was breach, whether the borrower suffered any loss on account of such non-disbursement and if so whether the borrower was entitled to the amounts claimed. While the claim of the Bank was for an ascertained sum due from the borrower, the claim of the borrower was for damages which required firstly a determination by the Court as to whether the Bank was liable to pay damages and thereafter assessment of quantum of such damages. Thus there is absolutely no connection between the subject-matter of the two suits and they are in no way connected. A decision in one does not depend on the other. Nor could there be any apprehension of different and inconsistent results if the suit and the application are tried and decided separately by different forums. In the circumstances, it cannot be said that the borrower's suit and the Bank's application were inextricably connected.

The aforesaid observations were made after noticing the decision in *Abhijit Tea Co.*'s case and it was thus held that when the two suits are not inextricably linked the transfer of the suit of the borrower to the DRT can only be by the consent of the parties.

8. The next judgment which is relevant to the issue is the decision in *State Bank of India Vs. Ranjan Chemicals Ltd. and Another*, . It was held by the Supreme Court in the judgment of *Ranjan Chemicals Ltd.* that a court has the power in an appropriate case to transfer a suit for being tried by the DRT. The relevant portions of the judgment of the Supreme Court in the *Ranjan Chemicals Ltd.* case read as under:

A court has the power in an appropriate case to transfer a suit for being tried with another if the circumstances warranted and justified it. In the light of the conclusion that the claim of the Company in the suit could be considered to be a claim for set-off and a counterclaim within the meaning of Section 19 of the 1993 Act, the only question is whether in the interests of justice, convenience of parties and avoidance of multiplicity of proceedings, the suit should be transferred to the Debt Recovery Tribunal for being tried jointly with the application filed by the Bank as a cross-suit. As the proceedings before the Debt Recovery Tribunal could not be transferred to the civil court since that is a proceeding before a tribunal specifically constituted under the 1993 Act and the same has to be tried only in the manner provided by the Act and by the Tribunal created under the Act, the only other alternative would be to transfer the suit to the Tribunal in case that is found warranted or justified.

Here, the same basic evidence will have to be taken in both the proceedings.

Duplication of evidence could be avoided if the two actions are tried together. If a decree is granted to the Bank on the basis of its accounts, and the damages, if any, are decreed in favour of the Company, a set-off could be directed and an ultimate order or decree passed in favour of the Bank or the Company. In such a situation, this is a fit case where the two actions should be ordered to be tried together. Hence, the money suit of the Company is transferred to the Debt Recovery Tribunal for being treated as a counterclaim by way of a cross-suit and for being jointly tried and disposed of with the application of the Bank.

9. All the aforesaid judgments have been considered and explained by the Supreme Court in the decision of Nahar Industrial Enterprises (supra). The Supreme Court has reaffirmed the ratio of Indian Bank's case and has explained and differentiated the ratio in the case of Ranjan Chemicals Ltd. (supra). The ratio as laid down by the Supreme Court in the case of Nahar Industrial Enterprises is that an independent civil suit, cannot be transferred for being decided by the DRT merely because an application for recovery of the amount is filed by the bank, and which is pending. The Supreme Court however reiterated that transfer of the suit of the borrower to the DRT can take place by consent of the parties. (See para 121 of the said decision)

10. The facts of the present case are different than the facts of all the above said cases of the Supreme Court. As held by the Constitution Bench judgment of the Supreme Court in the case of Padmasundara Rao and Others Vs. State of Tamil Nadu and Others, , each case has to be read in the facts and circumstances particular to it. The Constitution Bench has said that even a single fact can make an entire difference between the decision in two cases and its ratios. The facts of this case are different because the agreed Arbitration Clause envisages that disputes which can be the subject matter of decision by the DRT ought to be tried and settled only by the DRT and since even an independent counter-claim can be decided by the DRT, as held in the aforesaid judgments of the Supreme Court, the matters sought to be referred to arbitration can and ought to be decided by the DRT. It is trite that the jurisdiction of the Arbitration Tribunal arises on account of the Arbitration Clause between the parties. It is the scope of the Arbitration Clause/agreement which determines the matters which can be referred to be decided by the Tribunal. If the subject matter of the disputes are specifically excluded by the Arbitration Clause, then, such disputes cannot be referred to arbitration, because the same, in a way, would be excluded or excepted matters. Also when two or more courts/forums have jurisdiction then parties can agree that any one court/forum will have exclusive jurisdiction and this is so by virtue of the Arbitration Clause in the facts of the present case that once the matters are such that they can be decided by DRT, then only the DRT will have exclusive jurisdiction and consequently there is an express ouster of the jurisdiction of the civil courts/arbitration. In any case, the language of the Arbitration Clause shows the consent of the parties to get the matters which are the subject matters of this petition to be decided by the DRT and therefore it can be said that by consent the parties have agreed that the DRT gets the exclusive

jurisdiction as per Nahar Industrial Enterprises case

11. Mr. Agnani counsel for the petitioner very vehemently contended that on the date when this arbitration petition was filed on 9.1.2009, there were no pending proceedings before the DRT and consequently there was no occasion for the petitioner to file its claims as counter-claims/set off before the DRT. He further contended that in fact on the date when the arbitration was invoked i.e. on 6.12.2008, there were no proceedings pending and consequently, the petitioner had no option but to invoke the Arbitration Clause seeking reference of its disputes to arbitration. Putting it differently Mr. Agnani contends that if there was no Arbitration Clause, the petitioner would have in fact filed a civil suit on 6.12.02008 and since arbitration has been invoked on 6.12.2008 the same would have an independent status, by virtue of the decision in Nahar Industrial Enterprises, and such civil proceedings cannot be transferred for decision by the DRT, more so as the stage in the DRT is of the Bank's evidence.

12. I am afraid that I cannot agree with the contentions as raised by the counsel for the petitioner. This is because of the judgments of the Supreme Court, including the judgments in the cases of Indian Bank and Nahar Industrial Enterprises specifically reserve the position when by consent matters between a borrower and a lender could be referred for decision by the DRT. Meaning thereby, the Supreme Court has said that if the parties" consent to refer the matters pending in a civil suit for decision by the DRT, then, the matters can in fact be referred for decision by the DRT. The only issue is would it make any difference if the borrower is first of the blocks and the bank subsequently files an application for recovery in the DRT. One thing which is absolutely clear is that it is not as if the DRT does not have the jurisdiction to determine the disputes as are sought to be raised by the petitioner, however, the petitioner is contesting the issue with regard to transfer of the present dispute for being decided by the DRT on the ground that the invocation of the arbitration petition is earlier in point of time on 6.12.2008 when, since no application for recovery by the bank was pending, the petitioner had no option but to file the petition seeking reference of the disputes to arbitration.

The facts of the present case throws up an interesting question with regard to whether there can be direction to get the disputes of the petitioner decided by the DRT although there were no pending proceedings before the DRT when the Arbitration Clause was invoked or should the disputes be decided only by the Arbitration Tribunal under the Arbitration Clause in such circumstances. I am of the opinion that once there is an agreed understanding and a consent of the petitioner to refer the disputes which can be the subject matter of decision by the DRT only by the DRT, then once the bank files an application for recovery before the DRT, the Clause of consent requiring the matters raised by the borrower to be decided by the DRT immediately comes into play, and at which stage the present petitioner who would be the respondent in the said proceedings can and ought to file its counter-claims in the DRT because it is not

that its counter-claims which is sought to be referred to arbitration has come to such an advanced stage of decision in arbitration that it would be injustice to the petitioner for transfer of its disputes which are subject matter of decision by the Arbitrator to the DRT. For example, before the Arbitrator, the stage may be the stage of final arguments or stage may be where the evidence is at an extremely advanced stage or more or less concluded and so on. In such circumstances, it possibly may be urged by the petitioner in the facts of a particular case that it should not be forced to get its disputes decided by the DRT because lot of water has flown under the bridge since the invocation, commencement and continuation of the Arbitration proceedings. In the present case however this is not so, and, on the contrary, the respondent, in my opinion, can validly contend that if there is any delay in disposal of the present petition, the same should not be held against the respondent because the response to this petition was filed by the respondent in March, 2009 itself (and in which month also the present petitioner and the respondent in the DRT proceedings was served) and thus the petitioner at that stage could very much have filed its counter-claim in the DRT and also since in March 2009 both the present proceedings and proceedings in the DRT were more or less at the same stage of pleadings. Thus no doubt a suit or arbitration proceedings can be filed by the borrower when there are no pending proceedings in the DRT, but once the DRT proceedings are filed, ordinarily by virtue of the consent contained in the agreed Arbitration Clause, the suit/arbitration proceedings have to be transferred for decision by the DRT as the consent clause gets activated on the Bank initiating the proceedings before the DRT.

13. On the aforesaid facts therefore, the following conclusions emerge:

(i) By virtue of the decision in Nahar Industrial Enterprises case an independent civil suit cannot be referred for determination by the DRT.

(ii) The decision in Nahar Industrial Enterprises however specifically reserves the position that the parties can consent to get decided the subject matter of the suit/arbitration proceedings by the DRT inasmuch as the DRT has inherent jurisdiction to determine the counter-claims and set off of a borrower.

(iii) The Arbitration Clause, between the parties in the present case, in my opinion, shows a consent whereby the petitioner has agreed that the subject matter of its disputes can and ought to be decided by the DRT and it is not necessary that the consent must be given only after a civil suit is already filed or arbitration proceedings are invoked, because the consent can always be a consent which is prior in point of time to the arising of the disputes and which consent gets activated on proceedings by the Bank being filed in the DRT. This position of prior consent is fortified by the fact that in arbitration matters there is a prior consent before arising of disputes necessitating arbitration that the matters would be decided in Arbitration. There is also in many cases a prior consent for a specific person to be an Arbitrator. If therefore, there can be a prior consent to arbitration, I do not see how there cannot be prior consent to decide

the matters and disputes of a borrower by the DRT and which as per the language of the Arbitration Clause in the present case, the petitioner has agreed should and ought to be decided only by the DRT.

(iv) If no application for recovery is filed before the DRT by the Bank, the civil suit/arbitration proceedings can be filed and continued. However once the proceedings by the Bank are filed before the DRT, without the suit/arbitration proceedings having reached the final or very advanced stages, then, the civil suit/arbitration proceedings ordinarily ought to be transferred for being tried and decided by the DRT.

14. In view of the aforesaid, I hold that the Arbitration Clause in the present case amounts to consent to refer the disputes (which are sought to be got referred by the petitioner to arbitration) for decision by the DRT. Since it was not necessary that the consent ought to be given only after the civil suit is filed or arbitration proceedings are invoked, but, the consent can always be a prior consent which comes into operation on filing of proceeding by the Bank before the DRT, the disputes in the present petition ought to be decided by the DRT. There is also ouster of jurisdiction of civil courts/arbitration by the agreed clause reproduced in para 1 above and that the disputes which are sought to be referred for arbitration are by consent of the parties an excepted or excluded matter for being decided only by the DRT.

15. The petition is therefore not maintainable, and the same is therefore dismissed with liberty to the petitioner to file its disputes as a counterclaim/set off in the proceedings before the DRT. Mr. Jayant K. Mehta counsel for the respondent very fairly states that respondent would not raise any objection to the filing of the counter-claims or set off in the DRT whether with respect to limitation or otherwise, subject of course to the respondent's right to take all other defences on merits and otherwise. I also hold that if there is any delay in filing of the counter-claim/set off, the petitioner would in fact be entitled to the benefit of Section 14(2) of the Limitation Act, 1963 because the petitioner has bonafidely filed and pursued its remedy in this Court. I may finally state that as of date there is no suit or arbitration proceedings for being transferred to DRT and therefore I have no option but to dismiss the present petition giving liberty to the petitioner as aforesaid.

16. With the aforesaid observations, the petition stands dismissed leaving the parties to bear their own costs.