
(2002) 01 AP CK 0022
In the Andhra Pradesh High Court
Case No : AA No. 84 of 2001

Mahendra R. Saraf and Others	Vs	APPELLANT
Goldstone Technologies Limited and Another		RESPONDENT

Date of Decision : 09-01-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 10, 11, 11(6), 2, 2(1)(e)
Arbitration and Conciliation Rules, 1996 — Rule 3(1)

Citation : (2002) 1 ALD 824 : (2002) 1 ALT 516 : (2002) 1 APLJ 65

Hon'ble Judges : Ar. Lakshmanan, C.J

Bench : Single Bench

Advocate : K.K. Waghray, for the Appellant; S. Ravi, for the Respondent

Judgement

1. The petitioners filed the above application u/s 11(6) of the Arbitration and Conciliation Act, 1996 read with Rule 3(1)(d) of the Scheme for Appointment of Arbitrators, 1996. The petitioners were holding 100% of the equity shares of M/s. Natural Technologies Private Limited and were also promoters/ shareholders/ directors of the said Company. The petitioners negotiated with the respondents and arrived at an understanding wherein the respondents agreed inter alia to (i) buy 100% equity shares of the petitioners held in Natural Technologies Private Limited along with product rights, patent and trade marks; (ii) meet the running expenses of the banking division (NTPL) and to (iii) share the profit with the petitioners in an agreed manner for a period of three years apart from some other terms and conditions.

2. An agreement was entered into between the petitioners and the respondents on 22-2-2000 under which the petitioners have sold 100% of the equity shares of NTPL with product rights, patent and trade mark to the respondents. The agreed operational terms and conditions were incorporated in the agreement dated 22-2-2000 which were required to be performed and discharged by both the parties of the agreement. The petitioners as required by the respondent Company opened a Bank account with the State Bank of Bikaner- and Jaipur and

it was resolved that it would be operated on behalf of the respondent company by petitioner No. 2 as an authorized signatory of the Company, the office of the respondent company started functioning at Jaipur with the employees of NTPL who were given appointment letters by the respondent company and some more employees were employed for running the business. The amount of cash of Rs. 100 lakhs and its mode of payment were also incorporated in the agreement. According to the petitioners, right from the beginning, the respondents have been committing breach of the contract to discharge their obligations under the contract in many ways and more prominently in respect of not properly setting up the office of the banking division (NTPL), not developing the manpower infrastructure for various jobs of development, customization, implementation and marking, non-clarification of the marketing strategy, non-setting up of the testing lab, etc.

3. In view of the same, differences arose between the parties on various aspects, such as, lack of perception of division of the functional responsibilities, lack of commitment about the product, lack of understanding of the processes of the development, testing in the lab/site, customization, implementation, after sales service of an application software particularly in banking non-implementation of action points commonly arrived at in various meetings.

4. Under the agreement dated 22-2-2000, clause 12 contemplates resolving of the disputes or difference through discussions at appropriate level or through an independent arbitrator. The petitioners issued a legal notice to the respondents on 8-6-2001 in terms of Clause 12 of the agreement for referring the disputes and differences to an independent arbitrator and also nominated Justice M.L. Shrimai, former Chief Justice of Sikkim High Court and former Lok Ayukta of Rajasthan as an Arbitrator to resolve the disputes. The petitioners expressed their readiness to resolve the dispute through the Arbitrator. The legal notice was received by the respondents and the respondents got issued reply notice on 19-6-2001 admitting the fact that there is a dispute between the parties and it would be necessary to have the dispute arbitrated. However, they did not agree for the appointment of Justice Sri M.L. Srimai and on the other hand, it is stated that they will be moving this Court for the purpose of appointment of an arbitrator. Therefore, the petitioners have filed the present application seeking appointment of arbitrator for resolving the disputes and the differences that have arisen due to breach of the conditions of the agreement.

5. The respondents filed a counter affidavit dated 2-1-2002. Para 2 of the counter affidavit reads, thus:

The above application has been filed for the purposes of appointment of an Arbitrator. I submit that the agreement dated 22-2-2000 does provide for resolution of disputes by appointment of an Arbitrator. Therefore, I pray that this Hon"ble Court may be pleased to appoint a retired Judge of this Hon"ble Court to be the sole Arbitrator in the matter. This is however without prejudice to the contentions of the respondents with respect to the claim of the petitioner, In

other words, the respondents do not admit the claim of the petitioner. In other words, the respondents do not admit the claim of the petitioner at all.

6. As already noticed, the agreement provides for resolution of the disputes by appointment of an Arbitrator and the respondents have also agreed for the appointment of a retired Judge of this Court to be the sole Arbitrator in the matter.

7. In view of the agreement reached between the parties, I hereby appoint Sri Justice T.N.C. Rangarajan, a retired Judge of this Court residing at 502, Capri Towers, Srinagar Colony, Hyderabad as sole Arbitrator to resolve the disputes between the parties. The Arbitrator immediately after entering upon the reference may issue notice to both the parties and proceed further. The Arbitrator is at liberty to fix his fee and collect the same from both the parties equally. However, both the parties are directed to deposit with the Arbitrator a sum of Rs. 25,000/- each as initial remuneration within four weeks from today.

8. The learned Counsel for the petitioners however pressed for the relief by way of interim measure u/s 9 of the Arbitration and Conciliation Act, 1996 by restraining the respondents from either terminating the services of any of the employees or closing or shifting of Jaipur Office and further to direct the respondents to pay the salaries and expenses of the employees of Jaipur Office till the disposal of the Arbitration proceedings are finalized in the interest of justice.

9. This interim relief was opposed by the respondents stating that the interim relief cannot be granted u/s 9 of the Arbitration and Conciliation Act and that the authority designated u/s 11 of the Arbitration and Conciliation Act, 1996 is not a "Court." for the purpose of Section 9 of the said Act and therefore, it is submitted that the application for interim relief in this Court is wholly misconceived.

10. There is merit and substance in the submission made by the learned Counsel for the respondents.

11. Section 9 of the Act reads as follows:

9. Interim measures etc., by Court:--A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a Court--

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:--

(a) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of . protection as may appear to the Court to be just and convenient,

and the Court shall have the same power for making orders as sit has for the purpose of, and in relation to, any proceedings before it.

12. This section corresponds to Article 9 of the UNCITRAL Model Law. It also corresponds to Section 41(b) read with Second Schedule to the Act of 1940. Somewhat similar provision is contained in Section 44 of the English Arbitration Act, 1996. u/s 41(b) of the Act, 1940, the Court had powers to grant interim reliefs for the purpose of and in relation to arbitration proceedings. Section 41(b) was interpreted to mean that the Court could grant interim relief if the arbitration proceedings were pending either before the arbitrator or before the Court. Pendency of any proceedings in Court in relation to the arbitration proceedings was a pre-condition for the exercise of power by the Court to grant interim relief u/s 41(b) of the Act of 1940.

13. u/s 9 of the Act, the Court may, on application by a party, grant interim relief "before or during arbitral proceedings or at any time after making of the arbitral award but before it is enforced". Thus, u/s 9 of the Act, a party can make application for grant of interim reliefs of protection as provided therein not only during the arbitral proceedings but even before commencement of arbitral proceedings, and the court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceeding before this Court.

14. As per Section 9, a party to the arbitration agreement may either before the Commencement of arbitral proceedings or during arbitral proceedings or after making of the award but before it is enforced in accordance with Section 36 of the Act. apply to a Court for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or for an interim measure of protection in respect of any of the following matters, namely:--(a) the preservation interim custody or sale of any goods which are the subject matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein; (d) interim injunction or the appointment of a

receiver; (e) such other interim measure of protection as may appear to the Court to be just and convenient.

15. While dealing with such an application, the Court shall have the same power for making orders as it has for the purpose of and in relation to, any proceedings before it. Section 9 empowers a party even to make an application to the Court for grant of measures after making of the arbitral award but before it is enforced in accordance with Section 36 of the Act.

16. While granting interim measures of protection u/s 9 of the Act, the Court may pass order--

(i) of attachment before judgment u/s 9(ii)(b) the Act;

(ii) granting temporary injunction;

(iii) appointing receiver;

(iv) restraining encashment of a bank guarantee.

17. When a party applies u/s 9 of the 1996 Act, it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the arbitral tribunal. If an application is so made the Court will first have to be satisfied that there exists a valid arbitration agreement. On being so satisfied, the Court will have the jurisdiction to pass orders u/s 9 giving such Interim order. The source of power of the Court to make orders by way of interim measures is only in section 9 of the Act and there is no independent power de hors Section 9. But the question in the instant case is whether the Andhra Pradesh High Court can exercise jurisdiction when the application u/s 9 is made.

18. The "Court" is defined u/s 2(1)(e) of the said Act which reads as under:

"Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil Court of a grade inferior to such principal civil Court, or any Court of Small Causes."

19. The forum for seeking interim measure pending arbitration will be the same to whose jurisdiction, the contract given rise to the arbitral dispute is subjected.

20. The State of Andhra Pradesh has enacted civil Courts Act wherein three types of Courts are established and the High Court has power u/s 33 of the civil Court Act to receive suit, appeal or other proceeding only when District Court or the Court of Senior Civil Judge or the Court of Junior Civil Judge to which appeal, suit or other proceeding lies, is adjourned and when a particular Court is closed during vacation and no vacation Civil Judge has been appointed to act during such vacation period in that Court. Thus, under the Civil Court Act, the High

Court has not been conferred with powers to try original civil suits and/or other proceedings of civil nature.

21. We have already extracted the definition of the "Court". The dispute is about the jurisdiction of the Court. If it is found that the High Court does not exercise ordinary original civil jurisdiction, it will not come within the meaning of the word "Court" as defined in Section 2(1)(e) of the new Arbitration Act. The High Court of Andhra Pradesh does not exercise ordinary original jurisdiction. The Andhra Pradesh High Court is the successor of the Madras High Court in respect of the territories transferred from Madras and included in the Andhra Pradesh which was formed by the Andhra State Act, 1953, but the Court has not exercised original jurisdiction as mentioned in Clauses 11 and 12 of the Madras Letters Patent as from time to time with the aforementioned enactments of the civil Court Act, the Legislature has brought deprivation of such jurisdiction.

22. A learned single Judge of this Court Krishna Saran Shrivastav, J., in the decision in Bommisetty Prasada Rao, and others Vs. SAS Mines and Minerals Ltd., Hyderabad and another, , has also taken the same view in his considered judgment.

23. Under Clause (11) of the Letters Patent for the High Court of Judicature at Madras, it is provided that the High Court of Madras had ordinary original civil jurisdiction which it shall exercise within such local limits as may from time to time be declared and prescribed by law made by the Governor in Council. The Madras High Court (Jurisdictional Limit) Act, 1927 was enacted and the ordinary original civil jurisdiction of the High Court of Madras extended within the limits set out in the schedule of Section 2. The Madras Civil Court Act, 1873 was enacted and it came into force with effect from 1-3-1873. The local jurisdiction of every civil Court had been fixed u/s 10 of the said Act. The High Court of Andhra Pradesh exercises original jurisdiction under the Indian Companies Act, Indian Divorce Act and in respect of the election petitions filed under the Representation of Peoples Act. The Chief Justice under Clause 3(e) of the Scheme for Arbitration has designated a Judge of the High Court who at the relevant time has been allotted original side work in the High Court for the purpose of appointment of arbitrator u/s 11 where the value of the subject matter exceeds rupees five lacks but does not exceed rupees one crore. But it does not mean that the original side work in the High Court means civil suits of all or any type including proceedings, civil in nature, but it relates to exercising original jurisdiction under special enactments like the Indian Companies Act, the Indian Divorce Act, the Representation of Peoples Act. Because the High Court does not exercise any ordinary original civil jurisdiction, therefore, for the purpose of Section 9 of the new Arbitration Act, it cannot be said to be a "Court" within the meaning of Section 2(e) of the new Arbitration Act and consequently, the application for interim relief u/s 9 of the Act does not lie in the High Court. Hence, the interim relief application is rejected. However, the learned Counsel for the petitioners is at liberty to move the Arbitrator for any interim relief.

24. The Arbitration Application is accordingly, disposed of.