
(2014) 11 CAL CK 0006
In the Calcutta High Court

Case No : A.P.O.T. No. 296 of 2013 and G.A. No. 1886 of 2013

M.A.K. (India) Chemicals Private Limited	APPELLANT
Vs	
Kesoram Industries Limited	RESPONDENT

Date of Decision : 12-11-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2015) 2 CHN 406

Hon'ble Judges : Subhro Kamal Mukherjee, J; Asim Kumar Mondal, J

Bench : Division Bench

Advocate : Joydip Kar, Kishore Datta and Sumita Shaw, Advocate for the Appellant; S.B. Mukherjee, Hiram Mitra, D. Sen, S. Chatterjee, P. Ghosh and M.K. Seal, Advocate for the Respondent;

Final Decision : Dismissed

Judgement

Asim Kumar Mondal, J.

1. This is an appeal against order dated June 10, 2013 passed by the Hon'ble Single Judge in connection with an application, in substance, for vacating an ad interim order of injunction granted on May 17, 2013 in the form of status quo with regard to the arbitral proceedings. The appellant, that is, M.A.K. (India) Chemicals Private Limited, entered into two agreements dated May 28, 2008 and June 4, 2008 respectively with Birla Tyres, which is a unit of Kesoram Industries Limited, for manufacturing of tyre flaps and for manufacturing of motorcycle tubes.

2. The terms of the agreements are similar.

3. We are concerned in this appeal with the Arbitration clauses.

The clauses 13 of the arbitration agreements run as under:

"If any time, any question or difference or dispute whatsoever shall arise between parties arising out of or in connection with this contract, the parties

thereto shall use their best efforts to settle such question or difference or dispute amicably by mutual negotiations."

4. Deepak Tandon, the defendant No. 1, joined Kesoram Industries Limited in 1991 and, subsequently, he became the President of the Tyre Unit of the said company some time in January, 2010. He was, thereafter, appointed as the whole time Director of the company. However, Deepak Tandon resigned on April 14, 2011.

5. Since disputes and differences cropped up between the parties, the appellant filed applications under section 11 of the Arbitration and Conciliation Act, 1996. The applications were registered as A.P. No. 995 of 2011 and A.P. No, 996 of 2011 respectively.

6. Both the applications were listed before Sanjib Banerjee, J. His Lordship on December 4, 2012, allowed both the applications and appointed Mr. Bimal Kumar Chatterjee, senior advocate and the present Advocate General of the State, as the learned arbitrator to adjudicate upon the disputes between the parties covered by the said agreements.

7. We are informed that the learned arbitrator has entered upon the reference and the appellant has submitted its statements of claims before the arbitral tribunal.

8. On May 16, 2013 a suit was instituted by Kesoram Industries Limited against M.A.K. (India) chemicals Private Limited, the appellant herein, and some other persons including the said Deepak Tandon and his family members. The suit was filed on the ground that the arbitration clause in the agreements was vitiated by fraud. It was alleged that the said Deepak Tandon practised fraud upon the company inasmuch as he did not disclose that his family members were the real beneficiaries of the said two agreements dated May 28, 2008 and June 4, 2008. Such non-disclosure was opposed to the Code of the Conduct of a director of the plaintiff-company and was, also, against the provisions of the Companies Act, 1956. In the said suit the plaintiff prayed, inter alia, for a declaration that the agreements dated May 28, 2008 and June 4, 2008 were void. Alternatively, the plaintiff claimed that the said two agreements were voidable at the instance of the plaintiff, which the plaintiff has duly avoided.

9. In such a suit, as we have, already, indicated hereinabove, the Hon"ble Single Judge passed an ad interim order in the form of status quo with regard to the arbitral proceeding.

10. The appellant came up with an application, which was, in substance, an application for variation of the said interim order.

11. The Hon"ble Single Judge, by the order impugned, rejected such application and, inter alia, held that, prima facie, case of fraud has been made out in the pleadings and, accordingly, the order dated May 17, 2013 would continue.

12. Mr. Joydeep Kar appears in support of this appeal and submits that the plaintiff was conscious that non-disclosure of alleged interest of the said Deepak Tandon in M.A.K. (India) Chemicals Private Limited at best could make the agreements voidable. He submits that section 299 of the Companies Act, 1956 speaks of disclosure of interest by a director in a company. Mr. Kar, also, draws our attention to a letter dated August 29, 2011 by the Birla Tyres addressed to the appellant. In the said letter, it was stated that the agreements were not terminated even verbally.

13. Mr. Kar relies upon a decision of the Court of Appeal in *Helyhutchinson v. Brayhead Limited* and another reported in 1967 (3) All England Law Reports 98. Our attention was specifically drawn to the observations of Lord Denning that non-disclosure of interest by a director did not render the contract void and a nullity. It rendered contract voidable at the instance of the company. The director was accountable for any secret profit, which he has made. A suggestion was made that there could be no contract unless the director disclosed his interest. In other words, it was suggested that disclosure was a condition precedent to the formation of a contract. Lord Denning held that "I do not think that, that is correct. All that article 99 does is to validate every contract when the director makes proper disclosure. If he discloses his interest, the contract is not voidable, nor is he accountable for profits. But, if he does not disclose his interest, the effect of the non-disclosure is as before: the contract is voidable and he is accountable for secret profits."

14. Mr. Kar, finally, submits that the Hon"ble Single Judge ought not to have granted, in substance, stay of all further proceedings before the arbitral tribunal.

15. Mr. S.B. Mukherjee, learned senior advocate, on the contrary, argues that since fraud has been practised by setting up of companies by the defendant No. 1 at the cost of the plaintiff/company, the agreement is void or alternatively voidable. The defendant No. 1 was in de facto control of the tyre division of the plaintiff/company and taking advantage of the confidence reposed on him, he has practiced fraud on the plaintiff/company. Mr. Mukherjee submits that the plaintiff borrowed money from the bank on payment of interest of 15 (fifteen) per centum per annum, but advanced Rs. 8,50,00,000/- (Rupees eight crore fifty lakh) only, which would carry meagre rate interest of 10(ten) per centum per annum. Mr. Mukherjee submits, referring to vari (sic) averments in the plaint, that non-disclosure of interest by the defendant No. 1 is not the only ground of fraud.

16. Mr. Mukherjee, finally, submits that the learned Trial Judge exercised her discretion properly and it is not a fit case where the order impugned is to be interfered with.

17. It appears from the aforementioned discussions that the plaintiff wanted to avoid the aforementioned agreements on the ground of fraud. It appears to us from the plain reading of the plaint averments that non-disclosure is not the only

the ground of fraud. When the impugned agreements were executed in 2008, it has been alleged that the defendant No. 1 was in de facto control of the tyre unit of the plaintiff/company. It is alleged that the agreement between the parties for arbitration is vitiated by fraud. Such plea is only available in the Civil Court by filing a civil suit.

18. A Division Bench of this Court in G.E. Capital Transportation Financial Services Ltd. Vs. Amritajit Mitra, held that the plea that the agreement between the parties for arbitration has been vitiated by fraud is only, available in the Civil Court by filing a regular civil suit.

19. The Hon''ble Single Judge, in the order impugned, held that the, prima facie, fraud has been reflected in the pleading. It has been, further, observed that when fraud vitiates the agreement, it would, also, vitiate the arbitration clause.

20. Therefore, the Hon''ble Single Judge passed the impugned order in the form of status quo in relation to the arbitration proceeding.

21. The relief of injunction is a discretionary relief. While granting a relief of temporary injunction, the Court must be satisfied that the party applying for injunction has established prima facie case in the proceedings. It must, also, be established that the balance of convenience and inconvenience is in favour of granting such plea.

22. It is, also, settled law that in order to get a temporary injunction, it is not necessary to prove the concrete fool-proof case of fraud. The question of fraud can be decided, prima facie, at the stage of disposal of the application for injunction and finally after full-fledged trial.

23. We are of the opinion that the Hon''ble Single Judge did not exercise the discretion erroneously. Once the Court of first instance exercises its discretion to grant or refuse to grant relief of injunction and said exercise of discretion is based upon objective consideration of materials placed before the Court and is supported by cogent reasons, the Appellate Court will be loath to interfere simply because on a de novo consideration of the matter it is possible for the Appellate Court to form a different opinion on the issues of prima facie case, balance of convenience, irreparable injury and equity.

24. Therefore, we do not find any merit in the appeal.

25. The appeal is, thus, dismissed. We make no order as to costs.

Subhro Kamal Mukherjee, J.

I agree.