
(2014) 02 AP CK 0032

In the Andhra Pradesh High Court

Case No : Company Application No. 1190 of 2013 in Company Petition No. 180 of 2013

M/s. Empee Sugars and Chemicals Limited

APPELLANT

Vs

M/s. Paharpur Cooling Towers Limited

RESPONDENT

Date of Decision : 04-02-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8
Civil Procedure Code, 1908 (CPC) — Section 89

Citation : (2014) 5 ALD 277 : (2015) 2 ALT 55 : (2015) 4 ARBLR 287 : (2014) 123 CLA 406 : (2014) 187 CompCas 28 : (2015) 2 CompLJ 136 : (2015) 129 SCL 656

Hon'ble Judges : C.V. Nagarjuna Reddy, J

Bench : Single Bench

Advocate : N.V. Shravan Kumar, Advocate for the Appellant; Deepak Bhattacharjee, Advocate for the Respondent

Judgement

C.V. Nagarjuna Reddy, J.—This application is filed u/s 8 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act") read with Section 89 of the Code of Civil Procedure, 1908, and Rule 9 of the Companies (Court) Rules, 1959, for reference of the disputes to arbitration.

2. Heard Sri N.V. Shravan Kumar, learned counsel for the applicant, and Sri Deepak Bhattacharjee, learned counsel for the respondent/petitioner in C.P. No. 180 of 2013.

3. For convenience, the parties are referred as they are arrayed in the Company Petition.

4. The respondent was incorporated on 24.11.1988. The petitioner has participated in a bid for installation of two Air Cooled Condensers (ACC) for sugar manufacturing unit of the respondent at Ambasamudram and emerged as the successful bidder. On 18.09.2008, a letter of intent was issued by the respondent to the petitioner for supply of two ACC units for a total price of Rs.

14,85,80,000/-. The first ACC unit was commissioned in April, 2010 and the second ACC unit was commissioned in June, 2010. The petitioner attributed the delay in commissioning the ACC units to various departments of the respondent-company. By 31.03.2010, the respondent has paid Rs. 12,32,87,146/- to the petitioner as against the bill amount of Rs. 16,24,95,783.05 ps. On 05.11.2012, the respondent filed an application for its demerging, in which the petitioner has filed an impleadment application. On 14.06.2013, the petitioner issued a statutory notice for winding up of the respondent- company for non-payment of Rs. 3,92,08,637.05 ps with interest at the rate of 18% per annum from 01.04.2013 till the date of payment. Subsequently, after passing a resolution on 26.06.2013 for filing a petition for winding up of the respondent-Company, the petitioner has filed C.P. No. 180 of 2013 for winding up of the respondent. The respondent entered appearance on 28.08.2013 and started taking time for filing counter-affidavit. After taking four adjournments, the respondent has filed this application, to which the petitioner filed its counter-affidavit.

5. In this application, the respondent has averred that while it has fulfilled its contractual obligations and paid more than 85% of its dues, the petitioner-company has failed to fulfill its obligations and has caused substantial loss to the respondent-Company; that the petitioner-company has neglected rectification of the defects, on account of which, the respondent has issued legal notice, dated 05.09.2012, calling upon the petitioner either to rectify the defects or replace the ACC units; and that finally, in order to put the two ACC units in workable condition, the respondent has placed Purchase Order for an amount of Rs. 31,00,000/- on other suppliers at a higher cost and already incurred an expenditure of Rs. 18,00,000/- for replacing the fans. The respondent has further averred that in view of breach of contract by the petitioner, it has suffered loss and is entitled to claim costs and damages from the petitioner. The respondent denied the petitioner's claim by stating that the same is a disputed claim. It has referred to Clause 32 of the Purchase Order, dated 20.11.2008 and Clause-1.26 of the Work Order, dated 20.11.2008, and pleaded that as the parties agreed for reference of all the disputes or differences, whatsoever, arising between them, for arbitration, the petitioner is not entitled to file the Company Petition. Accordingly, it has invoked the provisions of Section 8 of the Arbitration Act for reference of the disputes to arbitration.

6. The petitioner filed a counter-affidavit, wherein it has raised a preliminary objection to the maintainability of the application. The petitioner averred that Section 8 of the Arbitration Act does not take away the jurisdiction of this Court for winding up as, this is the only forum having exclusive jurisdiction to decide whether the company shall be wound up or not. Since the other averments touching on the merits of the case are not relevant for disposal of this application, it is not necessary to advert to the same.

7. Having regard to the respective pleas of the parties, the issue that arises for consideration is whether the application made u/s 8 of the Arbitration Act is

maintainable in a Company Petition.

8. Sri Deepak Bhattacharjee, learned counsel for the petitioner, placed reliance on the judgments of the Supreme Court in *Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd.*, , *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others*, and a learned single Judge of this Court in *Integrated Broadcasting Co. P. Ltd. Vs. Nettlinx Ltd.*, , in support of his submission that the present application is not maintainable.

9. Sri N.V. Shravan Kumar, learned counsel for the respondent, however, placed reliance on the judgment of a learned single Judge of Punjab and Haryana High Court in *Honeywell Automation India Ltd. Vs. DLF Unviersal Ltd.*, , to buttress his submission that an application made u/s 8 of the Arbitration Act is maintainable.

10. Before adverting to the above-mentioned judgments cited by the learned counsel for the parties, it is apposite to refer to the provisions of Section 8 of the Arbitration Act, which read as under:

Power to refer parties to arbitration where there is an arbitration agreement - (1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

11. The Arbitration Act has been conceived with a view to facilitate parties to an agreement to settle their disputes through alternative dispute resolution mechanism. Therefore, when an agreement for resolution of the disputes through arbitration exists between the parties, if any dispute arising or in connection with the agreement is raised by a party before a Court bypassing the arbitral forum, the other party to the dispute is entitled to make an application u/s 8 of the Arbitration Act for reference of the dispute to the arbitral forum. The sine qua non for maintainability of an application u/s 8 of the Arbitration Act is that the dispute raised by one party before a forum other than the arbitral forum must be comprehended by arbitration agreement and the arbitral forum must have been conferred with the power and jurisdiction to decide such dispute.

12. It is indubitable that under the scheme of the Companies Act, 1956, as it now stands, the only forum which is conferred with the jurisdiction to order winding up of a company is the High Court. Therefore, the Company Petition filed under Chapter-II of the Companies Act, 1956 for winding up of the Company has to be exclusively adjudicated by the High Court and no other forum has such

jurisdiction.

13. In *Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd.*, , an application similar to the present one was filed by a party in a pending Company Petition seeking reference of the dispute u/s 8 of the Arbitration Act to arbitration. While rejecting the said application, the Supreme Court held:

Sub-section (1) of Section 8 provides that the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the arbitrator is only that dispute or matter which the arbitrator is competent or empowered to decide.

The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company is contained under the Companies Act and is conferred on the Court. An arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company. The matter which is pending before the High Court in which the application was filed by the petitioner herein was relating to winding up of a company. That could obviously not be referred to arbitration and, therefore, the High Court, in our opinion was right in rejecting the application.

(emphasis added)

14. In *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others*, , the Supreme Court dealt with non-arbitral disputes in paragraph Nos.35 and 36 of its order, which read as under:

The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of Courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a Court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (Courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the Court where a suit is pending, will refuse to refer the parties to arbitration, u/s 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

The well-recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of

conjugal rights, child custody; (iii) guardianship matters, (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred

jurisdiction to grant eviction or decide the disputes.

(emphasis added)

15. Thus, my view, referred to above, is fortified by the ratio laid down by the Supreme Court in the above-mentioned judgments.

16. With respect to the judgment in the Honeywell Automation India Ltd. Vs. DLF Unviersal Ltd., , a learned single Judge of the Punjab and Haryana High Court relying upon the judgment of the Supreme Court in Amalgamated Commercial Trades (P) Ltd. Vs. Krishnaswami (A.C.K.), wherein it was held that a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company, opined that there is no overwhelming public interest to continue the winding up proceedings and deny the opportunity to the parties to settle their dispute through arbitration. The learned single Judge "under the facts and circumstances" referred the dispute to arbitration in view of Clause-16 of arbitration agreement between the parties.

17. Interestingly, the learned single Judge has referred to the judgment in Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., , but did not explain as to how an order allowing the application u/s 8 of the Arbitration Act could be justified in the face of the dicta laid down by the Supreme Court in the said case.

18. It is one thing to dismiss the Company Petition on its own merits if the Court feels that there is a bona fide dispute, while it is quite another thing to refer the parties to arbitration on an application made u/s 8 of the Arbitration Act, merely because the debt is disputed.

19. In the face of the authoritative pronouncements of the Apex Court as referred above, the High Court while dealing with a Company Petition filed under the Companies Act cannot entertain an application u/s 8 of the Arbitration Act and compel the unwilling party to submit himself to the jurisdiction of the Arbitrator.

20. On the above analysis, the Company Application fails and the same is, accordingly, dismissed.