
(2011) 10 MP CK 0014

In the Madhya Pradesh High Court

Case No : Arbitration Case No. 10 of 2010

M/s. Sahara India Commercial Corp. Ltd.

APPELLANT

Vs

Dr. (Smt.) Rashmi Pathak, Advocate

RESPONDENT

Date of Decision : 20-10-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 8
Penal Code, 1860 (IPC) — Section 120, 406, 420, 467, 468

Citation : (2012) 1 MPHT 178

Hon'ble Judges : Rajendra Menon, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon"ble Mr. Rajendra Menon, J.—This is an application filed by the petitioner u/s 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of an arbitrator for resolution of the dispute existing between the parties.

2. Applicant M/s Sahara India Commercial Corporation Ltd. claims to be a company registered under the Companies Act, 1956 and carrying out various commercial activities. It is stated that the non-applicant advanced a sum of ` 10,000/- and ` 9,848/- on 28-2-2003 and 31-12-2003 and became a member of "Sahara Rajat Yojna" and "Silver Year Yojna". Under the Yojna, a person who has subscribed and becomes a member of the Scheme is entitled to purchase certain product marketed by the Sahara India Ltd., including immovable property or to avail the services being rendered by the Sahara India Ltd., and its subsidiary. It is stated that under the Scheme, various options were available to the non-applicant to utilize the amount advanced and the non-applicant was required to exercise her option subject to availability of the services, product or the property. The terms and conditions of the services and the agreement are Annexure A-1. Clause 10 of agreement (Annexure A-1), contains an arbitration clause. It is the case of the applicant that non-applicant after subscribing to the scheme did not avail of the facilities available under the scheme nor did she submit the option for

converting her advance into Sahara City Home Scheme for allotment of the housing unit.

3. It is stated that in spite of repeated request from the applicant, the non-applicant did not exercise the option available under the Scheme instead, she sent two notices on 16-10-2009 and 28-10-2009 misinterpreting the terms and conditions of the Scheme and sought for various information from the applicant for furnishing internal reports regarding various schemes, particularly the Sahara City Home and when she refused to adhere to the terms and conditions of the Sahara Rajat and Silver Year Yojna and when she was threatening to take civil and criminal action against the applicant, the applicant vide Annexure A-3, dated 20-11-2009 refunded her the entire amount advanced by her. It seems that instead of accepting the amount given and closing the matter, respondent issued legal notice and filed complaint case against the petitioner for various criminal offences under Sections 406, 420 read with Section 120, IPC, she also lodged a FIR in appropriate police station against the applicant.

4. It is the case of the applicant that the respondent is not accepting the benefit under the Scheme and is misinterpreting the Scheme, therefore, they have filed this application seeking appointment of an arbitrator for resolution of the dispute under Clause 19. It is stated that under Clause 19, the respondent vide Annexure A-4, dated 17-11-2009 appointed Shri S.P. Shrivastava as an arbitrator and when the respondent was not co-operating they have proceeded to file this application. Inter alia contending that a dispute has arisen between the parties and therefore, the same be resolved by constituting an Arbitral Tribunal, this application has been filed.

5. The respondent on being noticed has filed reply and it is stated that the Company under the garb of floating of Housing Scheme, by misinterpreting the Scheme collected more than ` 14000.00 crores from the general public and in view of the aforesaid misrepresentation, it is stated that the respondent had lodged a report with the Deputy Superintendent of Police (Crime), Jabalpur, dated 15-4-2010. When the police has not taken any action, it is stated that she got registered a criminal case against the petitioner, the same has been registered and the matter is pending before the Judicial Magistrate First Class, Jabalpur, accordingly, contending that a Complaint Case No. 16967/11 for offence under Sections 406, 420, 467 and 468 is pending against the respondent before the Competent Court of jurisdiction in Jabalpur and therefore, no case is made out for appointment of an arbitrator, respondent resists the claim of the petitioner. Inviting my attention to the principles laid down by the Supreme Court in the case of N Radhakrishnan Vs. M/s Maestro Engineers and others. Civil Appeal No. 7019/2009, decided by the Supreme Court on 22-10-2009 reported in 2010 Arb. W.L.J. 45 (SC) , and further placing reliance on the various judgments namely, Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, , Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums, Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak, , Haryana Telecom

Ltd. Vs. Sterlite Industries (India) Ltd., , learned Counsel for the respondent submits that when the matter is already sub-judice before the Criminal Court and as the allegation against the applicant amounts to criminal offence, arbitrator cannot be appointed for resolving the dispute, accordingly learned Counsel for the respondent prays for dismissal of this application.

6. Shri T.K. Modh, learned Counsel for the petitioner refuted the aforesaid and submits that as arbitration clause exists between the parties, dispute has to be resolved by the arbitrator and placing reliance on the following judgments he submits that the matter be referred to the arbitration :-

- (1) Das Consultants Pvt. Ltd. Vs. National Mineral Development Corporation Ltd.,
- (2) M/s Oriental Fire & General Insurance Co. Ltd. and another Vs. M/s New Suraj Transport Co. (P) Ltd. AIR 1985 All 146
- (3) Jupiter Chit Fund Pvt. Ltd. Vs. Dwarka Diesh Dayal and Others,

7. Having heard the learned Counsel for the parties and on perusal of the record, it is clear that in pursuance to the agreement entered into between the parties, respondent has advanced a sum of ` 10,000/- and ` 9848/- on 28-2-2003 and 31-12-2003 under the "Sahara Rajat Yojna" and "Silver Year Yojna". According to the applicant, the respondent had optioned to avail the service product of the property but it was not a scheme whereby she was promised any house under the Scheme of Sahara City Home, accordingly, it seems that when the non-applicant demanded her share of plot/house under the Housing, Scheme, the non-applicant on 20-11-2009 refunded to her the amount advanced as is evident from Annexure P-3 and when the respondent insisted upon getting the house one S.P. Shrivastava, Advocate was appointed as an arbitrator vide Annexure A-4 on 17-11-2009. Under Clause 19 of the agreement (Annexure A-1), there is an arbitration clause and the arbitration clause contemplates that the Company and the non-applicant together may request for appointment of an arbitrator, according to the petitioner respondent does not dispute deposit of the amount of ` 10,000/- and ` 9848/- as claimed but it is her claim that the applicants committed fraud and an offence by misrepresenting. This according to the applicant is not correct. However, it is the claim of the respondent, the applicants have committed fraud and therefore, she has filed a criminal complaint and as the matter is pending before the Competent Court of jurisdiction in Jabalpur, it is her objection that arbitrator cannot be appointed. In such circumstances, the question is as to whether an arbitrator can be appointed to resolve the dispute between the parties.

8. In the case of N. Radhakrishnan (supra), relied upon by the non-applicant the question with regard to appointment of an arbitrator and the cause of action accruing before the various forum including arbitrator and Civil Court was taken note of and in Para 7 of the aforesaid judgment, the Hon''ble Supreme Court laid down the following principles :-

7. In our opinion, the contention of the respondents relating to the jurisdiction of the arbitrator to decide a dispute pertaining to a matter of this proportion should be upheld, in view of the facts and circumstances of the case. The High Court in its impugned judgment has rightly held that since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in Court through furtherance of detailed evidence by either parties and such a situation cannot be properly gone into by the arbitrator.

In the present case also, similar situation has arisen. It is not in dispute that the non-applicant had advanced the amount and the applicants have refunded the amount. The question is with regard to allegation of fraud and misrepresentation as canvassed by the respondent and refused by the applicants. The Supreme Court after making the aforesaid observation in the case of N. Radhakrishnan (supra), has taken note of certain principles laid down in the case of Hindustan Petroleum Corporation Ltd. (supra), wherein in Para 14, the Supreme Court has held as under:-

If in an agreement between the parties before the Civil Court, there is a clause for arbitration, it is mandatory for the Civil Court to refer the dispute to an arbitrator. In the instant case, the existence of an arbitral clause in the agreement is accepted by both the parties as also by the Courts below. Therefore, in view of the mandatory language of Section 8 of the Act, the Courts below ought to have referred the dispute to arbitration.

Thereafter in the case of N. Radhakrishnan (supra), after observing the principles laid down in the case of Hindustan Petroleum (supra), in Paras 9, 10 and 11 the matter is dealt with the following manner:-

9. The learned Counsel for the appellant relying on the above-mentioned observations of this Court in the aforesaid judgment submitted that the High Court was wrong in ignoring the ratio of the case and should have accordingly allowed the petition of the appellant for setting aside the order of the Trial Court.

10. The learned Counsel appearing on behalf of the respondents on the other hand contended that the appellant had made serious allegations against the respondent alleging that they had manipulated the accounts and defrauded the appellant by cheating the appellant of his dues, thereby warning the respondents with serious criminal action against them for the alleged commission of criminal offences. In this connection, reliance was placed on a decision of this Court in the case of Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar Oak,

11. In our view and relying on the aforesaid observations of this Court in the aforesaid decision and going by the ratio of the above mentioned case, the facts of the present case does not warrant the matter to be tried and decided by the arbitrator, rather for the furtherance of justice, it should be tried in a Court of law which would be more competent and have the means to decide such a complicated matter involving various questions and issues raised in the present dispute.

9. If the case in hand is evaluated in the back drop of the principles as laid down hereinabove, the question would be as to whether an arbitrator to be appointed as prayed for by the respondent can adjudicate upon the question with regard to allegation of misrepresentation of fraud or can the arbitrator simply say that there was no misrepresentation of fraud and the offer or Scheme in question was not as contended by the applicant. In order to refer a dispute for arbitration the entire subject or cause of the dispute between the parties should be subject to arbitration agreement and within the competence of the arbitrator to decide the same, there can be no bifurcation of the cause of action with regard to civil liability under the agreement or the criminal liability as alleged by one of the parties. While interpreting the provision of Section 8 of the Arbitration and Conciliation Act. The Supreme Court in the case of Sukanya Holdings Pvt. Ltd. (supra), has laid down the following principles in Para 16 :-

16.....In our view, it would be sufficient to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject-matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject-matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject-matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the Arbitral Tribunal and other to be decided by the Civil Court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums.

10. If the aforesaid principle is applied in the present case then the dispute to be adjudicated in the present case will have to be bifurcated into two parts, namely adjudicate by the arbitrator about the nature of the scheme and the offer made by the applicant and the other part with regard to misrepresentation, fraud etc., i.e., offence if any by the Criminal Court. That apart, the applicants have come out with a case that they have paid all the amount due to the respondent as per agreement but because the respondent is not accepting the same and is alleging misrepresentation and fraud they now want to appoint of an arbitrator to resolve the dispute. The question of misrepresentation and fraud and commission of offence if any by the applicant Company or its officer is a complicated question of law and fact and cannot be adjudicated upon by an arbitrator. Even if, the police authorities after investigation have not registered any case the Criminal Court on the basis of the material adduced by the non-applicant may or may not register a criminal case and prosecute the applicant but at this stage as the question of misrepresentation and fraud or the commission of a criminal offence is pending

consideration on the complaint filed by the non-applicant. In the light of the principles of law as detailed hereinabove, this Court does not find any ground to appoint an arbitrator for resolving the dispute between the parties, as the question whether there has been any misrepresentation or fraud in the matter as alleged by the non-applicant is already pending in consideration before the Criminal Court on the complaint filed by the petitioner. That being so finding much force in the objections raised by the respondent, I am of the considered view that it is not a fit case where the dispute in question can be resolved by the arbitrator and therefore, no case is made out for constituting an Arbitral Tribunal for adjudication of the dispute.

11. Accordingly, finding no case for exercising jurisdiction u/s 11 of the Arbitration & Conciliation Act, the application is dismissed.