
(2015) 01 SC CK 0075

In the Supreme Court Of India

Case No : Arbtr. Case(C) Nos. 11 and 12 of 2014

Purple Medical Solutions Pvt. Ltd.

APPELLANT

Vs

MIV Therapeutics Inc and Others

RESPONDENT

Date of Decision : 27-01-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6)

Citation : (2015) 2 SCALE 127

Hon'ble Judges : Ranjan Gogoi, J.

Bench : Single Bench

Final Decision : Allowed

Judgement

Ranjan Gogoi, J.—Both these applications/petitions Under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, "the Arbitration Act") have been filed by the Petitioner seeking appointment of an Arbitrator to go into the disputes and differences that have arisen between the Petitioner and the Respondents under the Share Purchase Agreement dated 11th July, 2011 (for short "SPA") and a Licence Royalty Agreement of even date (for short "LRA"). The aforesaid agreements which were executed by and between the Petitioner and the first Respondent i.e. MIV Therapeutics Inc., Canada (for short "MIV Canada"), a Canadian Company, was signed by the second Respondent who was the Chairman of the Board/President/CEO/CFO/Treasurer and Secretary of the first Respondent Company until he had resigned on 18th May, 2013. Under the SPA 99.96% shares in a Company called MIV Therapeutics India (for short "MIV India") was to be purchased by the Petitioner from the Respondents for a sum of US\$ 3.17 million. Under the LRA the Petitioner was to be given the right to use "products" as defined in the LRA. Both the agreements contained identical Dispute Resolution clauses, which, inter alia, contemplated settlement of disputes arising out of and from the Agreements through a process of Arbitration. In view of the identity of the language of the relevant clauses providing for Arbitration in the two agreements it will be suffice to extract herein

below Clause 9 of the SPA:

"9. DISPUTE RESOLUTION

9.1 In the case of any dispute arising out of or in connection with this Agreement or its performance, including any question regarding its existence, validity or termination, either the Seller or the Purchaser (as the case may be) shall issue a notice to the other Party stating the nature of the dispute (the "Dispute Notice") and the Parties shall first attempt to reach an amicable settlement through mutual consultations and conciliations between their respective senior officers. If however, the Parties are unable to reach an amicable settlement within 30 (thirty) Business Days from the date of Dispute Notice; either of the Parties may make a reference to arbitration in accordance with the following Section 9.2 by giving a notice to the other in this regard.

9.2 Arbitration

9.2.1 All disputes, differences, controversies and questions, directly or indirectly, arising at any time under, out of, in connection with or in relation to this Agreement (or the subject matter of this Agreement) including, without limitation, all disputes, differences, controversies and questions relating to the validity, interpretation, construction, performance and enforcement of any provision of this Agreement, shall be finally, exclusively and conclusively settled by reference to binding arbitration under the Indian Arbitration and Conciliation Act, 1996 and to be administered by the arbitral tribunal by reference to three arbitrators, one arbitrator to be appointed by the Purchaser, one to be appointed by the Seller and the third to be appointed by the two appointed arbitrators (who shall serve as the presiding arbitrator) before commencement of the arbitration within 30 (thirty) days from the date of Dispute Notice Under Section 9.1, failing which the arbitrator(s) shall be, appointed in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996.

9.2.2 The Parties agree that:

- (a) They shall be bound by any arbitral award or order resulting from any arbitration conducted hereunder;
- (b) Any judgment on any arbitral award or order in any arbitration held pursuant to this Section 9 may be entered in any Court having jurisdiction in relation thereto or having jurisdiction over any of the Parties or any of their assets or an application may be made to such court for a judicial recognition of the award or an order of enforcement thereof, as the case may be;
- (c) All proceedings in any such arbitration shall be conducted in English;
- (d) The Arbitration award shall be final and binding on the Parties, and the Parties agree to be bound thereby and to act accordingly;
- (e) The venue of arbitration shall be Mumbai, India;

(f) Nothing shall preclude either Party from seeking interim or permanent equitable or injunctive relief, or both, from any Court having jurisdiction to grant the same;

(g) The arbitral tribunal shall award the successful Party their costs and expenses of the arbitration including the reasonable fees and disbursement of their legal counsel, whether solicitors, barristers and/or attorneys; and (h) The provisions contained in this Section shall survive the termination or expiration of this Agreement."

2. The Petitioner claims that the disputes between the parties have arisen in the following facts:

3. Under Clause 2.2 of the SPA the Petitioner was entitled to receive the Shares free from any encumbrances and receive full and clear ownership as the sole legal and beneficial owner of such Shares subject to payment of consideration.

4. Under Clause 6.1 of the SPA "MIV Canada" was required to transfer the shares to the Petitioner free from all encumbrances whereas Under Clause 4.1(g) of the LRA on consummation of the Share transactions the Petitioner was entitled to grant of licence. According to the Petitioner there were gross misrepresentations by the second Respondent acting on behalf of the first Respondent. Specifically it is stated that on 12th July, 2011 the Petitioner was informed by a United States attorney that an injunction had been granted by District Court in Massachusetts, United States of America, against the Respondents restraining them, inter alia, from transferring any shares, etc. until a sum of US\$ 480,000/- was paid into an escrow account as designated by the Court. The claim in the United States District Court had been brought against the Respondents by a firm Rissman Hendricks and Oliverio LLP (for short "RHO"). According to the Petitioner on an assurance given by the first Respondent that the above litigation would be settled, between August 2011 and September, 2012, the Petitioner had transferred US\$ 2.34 million to the Respondent and had acquired 82.95% of the shares. According to the Petitioner, it had also paid to the Respondents a sum of US\$ 200,000 as part of the consideration under the SPA and LRA on assurances/representations made by the Respondent inducing the Petitioner to believe that the said payment would be used to resolve the litigation involving the Respondent. It is stated that in breach of faith the second Respondent used the consideration to obtain a settlement and a no-sue covenant only for himself in execution proceedings initiated before the Supreme Court of British Columbia against the assets of second Respondent for the execution of judgment delivered by US federal Court awarding an amount of US\$ 547,091.88 in the litigation against the first Respondent. Second Respondent in his e-mails dated 29th, 30th and 31st January, 2013 falsely represented that the litigation was settled on behalf of all parties.

5. On 8th May, 2013 the Petitioner received a notice from the lawyer of RHO, demanding a sum of US\$ 480,000 from MIV India. The Petitioner expressed its

discontent to the second Respondent on 17th May, 2013 and was again given assurances. Subsequently, on 21st May, 2013, the lawyer for RHO informed the Petitioner that they had moved an application for transfer of all assets of MIV India, including the remaining 1,401,159 shares (which were yet to be transferred to the Petitioner), owing to the default of the Respondents in making payment as per the default judgment.

6. Further on 23rd July, 2013, RHO initiated RICO (Racketeer Influenced and Corrupt Organizations Act) proceedings against MIV India and the Petitioner, before the Federal Court. That on making representations to the second Respondent they were informed that he had resigned as a director of the first Respondent. The Petitioner had never interacted with any other person on behalf of the first Respondent Company.

7. According to the Petitioner, the aforesaid action of the Respondents were in contravention of Clause 6.1 (c and d) of the SPA and Clause 4.1 (c and g) of the LRA. Accordingly, a dispute notice was issued on 4th October, 2013, calling upon the Respondents to expeditiously clear their dues as per the judgment and resolve the dispute as well as allot the pending shares. Having received no response to the dispute notice, the Petitioner issued a Notice of Arbitration on 16th October, 2013, appointing Mr. Justice S.H. Kapadia, a former Chief Justice of India, as their nominee arbitrator. Subsequent to the said appointment, the Petitioner has been noticed by one Mr. Alan Lindsay claiming to be an assignee of the rights of RHO against the Respondents and MIV India of an entitlement to receive a sum of US\$ 850,000. Legal action for recovery of the aforesaid sum of money was threatened in the event of the claim remaining unpaid.

8. It is in the aforesaid circumstances that the two applications have been filed Under Section 11(6) of the Arbitration Act for appointment of Arbitrators) on behalf of both the Respondents.

9. According to the Petitioner, the second Respondent is an alter-ego of the first Respondent. The first Respondent is merely a corporate veil of the said Respondent. All acts/deeds/transactions on behalf of the first Respondent was performed by the second Respondent including signing of the two agreements; the representations made; and the commitments and undertakings furnished. It is, therefore, submitted that the appointment of an Arbitrator to be made by the Court should not only be on behalf of the first Respondent but also on behalf of the second Respondent. To support the above reliance has been placed on the decision of this Court in Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc. and Others, . The relevant paragraphs placed before the Court may be extracted herein below:

"102. Joinder of non-signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration

agreement could be read as being in conflict with the requirement of written agreement Under Article I of the Convention, the most compelling answer is "no" and the same is supported by a number of reasons.

103. Various legal basis may be applied to bind a non-signatory to an arbitration agreement:

103.1 The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

103.2 The second theory includes the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

104. We may also notice the Canadian case of *The City of Prince George v. A.L. Sims and Sons Ltd.* (1998) 23 YCA 223 wherein the Court took the view that an arbitration agreement is neither inoperative nor incapable of being performed if a multi-party dispute arises and not all parties are bound by the arbitration agreement: the parties bound by the arbitration agreement are to be referred to arbitration and court proceedings may continue with respect to the other parties, even if this creates a risk of conflicting decisions.

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107. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to an arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are that when a third party, i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration."

10. The Respondents have not appeared before this Court in spite of service being effected by courier and e-mail under orders of the Court. The process was repeated before the hearing began. Even after the hearing commenced the matters were kept partially heard and the fact that the hearing had commenced

was directed to be intimated to the Respondents by courier and e-mail which direction has been duly complied with. In spite of the above the Respondents have chosen not to contest the proceedings.

11. A perusal of the relevant clauses of the Agreements providing for Arbitration and the facts set out herein adequately satisfies the Court that disputes and differences between the Petitioner and the Respondents have arisen which require resolution by a process of Arbitration as contemplated in the Agreements between the parties. The Petitioner had appointed its Arbitrator (Mr. Justice S.H. Kapadia, a former Chief Justice of India) and despite notice, the Respondents have failed to make the requisite appointment. The said lapse/failure would confer jurisdiction Under Section 11(6) of the Arbitration Act to appoint an Arbitrator on behalf of the Respondents. The facts stated in the present applications showing the involvement of the second Respondent and the decision of this Court in Chloro Controls India Private Limited (supra), in my considered view, would justify appointment of an Arbitrator on behalf of both the Respondents and permit the process of Arbitration to be conducted by lifting the corporate veil to ascertain the role of the second Respondent in the transactions in question as claimed by the Petitioner.

12. I, therefore, appoint Shri Justice A.K. Patnaik, a former judge of this Court, to act as the arbitrator on behalf of both the Respondents. The two learned Arbitrators will now proceed to appoint a third Arbitrator i.e. Umpire and thereafter the arbitration proceedings will commence and conclude as expeditiously as possible. The terms of appointment of the Arbitrator(s) will be decided by the parties in consultation with the learned Arbitrators. Consequently and in the light of the foregoing, the arbitration petitions are allowed in the above terms.