(2013) 02 BOM CK 0134

In the Bombay High Court

Case No : Chamber Summons No. 714 of 2012 in Arbitration Application No. 112 of 2011

Rosy Blue (India) Pvt. Ltd. APPELLANT

Vs

Orbit Corporation Ltd. RESPONDENT

Date of Decision : 27-02-2013

Acts Referred:

Citation : (2013) 02 BOM CK 0134

Hon'ble Judges : Dr. D.Y. Chandrachud, J

Bench : Single Bench

Judgement

D.Y. Chandrachud, J.—The Applicant to these proceedings had invoked arbitration by a notice dated 31 March 2011. A Memorandum of Understanding was executed between the parties on 23 October 2006. An additional Memorandum of Understanding was entered into on 27 March 2008. Following this, a Deed of Conveyance was executed on 28 March 2006 which has admittedly been registered. In pursuance of the agreement, the applicant to the Chamber Summons has been paid an amount of Rs. 87.70 crores leaving a balance of Rs. 22.99 crores for which cheques have been placed in deposit with an escrow agent. The Applicant to the Chamber Summons ("the Applicant") invoked arbitration on 31 March 2011. By that letter, the Applicant expressed its readiness and willingness to deliver possession of the building which forms part of the agreement against the payment of the sum of money for which cheques were lodged with the escrow agent. Failing this, it was stated that recourse would be taken to arbitration. An Arbitration Application u/s 11 of the Arbitration and Conciliation Act, 1996, was instituted before this Court by the Respondent to the Chamber Summons in which an order was passed by the designate of the Chief Justice on 1 July 2011, appointing a sole Arbitrator by consent of parties. Since the sole Arbitrator indicated his unwillingness to act, by a subsequent order dated 22 July 2011, a substitute Arbitrator was appointed, once against by consent of parties.

2. The claim and counter claim have been lodged before the Arbitrator. The sole Arbitrator has passed an interim order on 5 January 2012 u/s 17 requiring the Applicant to hand over possession of the building to the Respondent to the Chamber Summons, subject to condition including that the Respondent should furnish an irrevocable Bank Guarantee of Rs. 27 crores.

3. The Chamber Summons before the Court has been instituted by the Applicant seeking to: (i) Withdraw the consent granted by it for the appointment of an Arbitrator, on the basis of which the orders dated 1 July 2011 and 22 July 2011 were passed in the Arbitration Application; (ii) Recall of the orders dated 1 July 2011 and 22 July 2011. The basis on which the Chamber Summons has been taken out is that when the Applicant furnished its consent before the Court to the appointment of an Arbitrator, the Respondent had failed to disclose three documents dated 24 December 2008, 31 July 2009 and 6 December 2010 under which the Respondent had created equitable mortgages in favour of ABN Ambro Bank (under the first two documents) and a simple mortgage in favour of a consortium of twelve banks in consideration for loans or credit facilities. According to the Applicant, these three mortgages were executed on the premise that the Respondent is the absolute owner of the properties involved in the dispute under the Deed of Conveyance dated 28 March 2008. According to the Applicant, the Deed of Conveyance is not absolute, but conditional and that title to the Respondent has not been conveyed. In the alternative, the Applicant states that it is entitled to seek rescission of the conveyance and has filed a counter claim on 30 November 2011. According to the Applicant, the fact that these mortgages had been created was disclosed by the Respondent on 24 February 2012 in certain proceedings arising out of an appeal against the interim order of the sole arbitrator. The contention of the Applicant is that if these facts were known, it would not have accorded its consent to the appointment of an arbitrator and since the order has been obtained without a full disclosure of facts, the consent should be permitted to be recalled and the order be recalled.

4. On the other hand, it has been urged on behalf of the Respondent that: (i) The application is in the nature of a review and in view of the judgment of the Allahabad High Court in Manish Engineering Enterprises Vs. The Managing Director, Indian Farmers Fertilizer Cooperative Limited and Senior General Manager, IFFCO, a substantive review on merits is not available in respect of an order passed u/s 11; (ii) In any event, in view of the provisions of Section 5, a judicial authority cannot intervene in matters governed by Part-I except where so provided in the Part; (iii) As a matter of fact, the Applicant had invoked arbitration. The respondent filed a Petition u/s 11 because parties could not agree on the name of the Arbitrator and the consent that was indicated before this Court on 1 July 2011 and 22 July 2011 was only to the appointment of the named Arbitrator; (iv) The scope of an application u/s 11 is far more restricted than proceedings u/s 8 and the only role of the Chief Justice or his designate is to determine as to whether an arbitration agreement exists and whether an application has been filed before the High Court having jurisdiction. The

arbitration agreement being undisputed and since this Court has jurisdiction, a reference was made u/s 11. The issue of arbitrability has to be determined by the Sole Arbitrator.

5. In a petition u/s 11 of the Arbitration and Conciliation Act, 1996, the jurisdiction of the Chief Justice or, as the case may be, of his designate is to determine whether (i) An arbitration agreement exists between the parties; (ii) Whether the party who has applied, is a party to the agreement; and (iii) Whether the party making an application has approached the appropriate High Court. These are matters which by the judgment of the Supreme Court in National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., are issues which the Chief Justice or his designate will have to decide. The second category of issues consists of those matters which the Chief Justice or his designate may decide or leave to the decision of the arbitral Tribunal, these being: (i) Whether a claim is barred by limitation; and (ii) Whether there has been an accord and satisfaction. Issues of the third category are those which the Chief Justice or his designate should leave exclusively to the arbitral Tribunal and these issues are: (i) The arbitrability of the claim; and (ii) The merits of the claim involved in arbitration. In the present case, there is absolutely no dispute about the factual position that there exists an arbitration agreement between the parties; that the invocation of jurisdiction u/s 11 was by a party to the agreement and that the invocation was before the appropriate High Court. The jurisdiction u/s 11 is not as wide as the jurisdiction which the Court exercises on an application u/s 8. In an application u/s 8 in a pending suit, as the Supreme Court held in Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others, "all aspects of arbitrability will have to be decided by the Court seized of the suit, and cannot be left to the decision of the Arbitrator. At para 33 page 545" Consequently, even if there is an arbitration agreement, the Court before which the civil suit is pending will refuse an application u/s 8 "if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal" At para 33 page 546. On the other hand, as the Supreme Court emphasised, the jurisdiction u/s 11 is altogether of a different nature and far more restricted:

The nature and scope of issues arising for consideration in an application u/s 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application u/s 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application u/s 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of "arbitrability" or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application u/s 34 of the Act, relying upon sub-section (2)(b)(i) of that section. At para 32 page 545.

6. The contention of the Applicant before the Court is that it has a counter claim against the Respondent in the arbitral proceedings and the counter claim cannot be arbitrated upon in the absence of the mortgagee, namely, the financial institutions in whose favour the Respondent has created a mortgage. Even on this aspect, the law as laid down in Booz Allen and Hamilton Inc. by the Supreme Court is clear. What cannot be referred to arbitration is a mortgage suit for sale of mortgaged property since it is an action in rem for the enforcement of a right in rem. A suit for enforcement of a mortgage being one for enforcement of a right in rem has to be decided by a court of law and not by an arbitral tribunal. On the other hand, it was held that even an agreement to sell or an agreement to mortgage which does not involve a transfer of a right in rem but only creates a personal obligation can be the subject matter of an arbitration if specific performance is sought of such an agreement. In view of this position in law and particularly since issues of arbitrability in respect of the claim and counter claim will have to be decided not by this Court in the exercise of its jurisdiction u/s 11 but by the sole arbitrator, it is not possible to accept the contention which has been urged on behalf of the applicant. At this stage, it must be only clarified that it would be inappropriate for the Court to enter upon the merits of the claim or counter claim on the issues which may arise in the course of that determination.

7. In the view which I have taken above, the application cannot be entertained even on merits. However, it must also be emphasized that the Chamber Summons which has been taken out, is a procedure which is unknown to the provisions contained in Part-I of the Arbitration and Conciliation Act, 1996. Section 5 of the Act restricts the scope of judicial intervention only in respect of those matters which are specifically provided for and in respect of no other matters. In a judgment of the Chief Justice of the Allahabad High Court construing the provisions of Section 11 in Manish Engineering Enterprises Vs. The Managing Director, Indian Farmers Fertilizer Cooperative Limited and Senior General Manager, IFFCO, , it has been held that there is a distinction between a procedural review and a review on merits and that a substantive review on merits is unavailable in respect of an order passed u/s 11.

8. Finally, it may be noted that proceedings have already commenced before the Sole Arbitrator. Parties have lodged their claim and the counter claim. These proceedings have been initiated only after the interim order of the Sole Arbitrator requiring the Applicant to hand over possession, subject, however, to conditions which have been spelt out therein. No case for interference is made out. The Chamber Summons is accordingly dismissed.