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(2022) 02 TEL CK 0077

In the Telangana High Court

Case No : COMCA No. 50 Of 2019

Suprema Inc., A Korean Company APPELLANT

Vs

4G Identity Solutions Private Limited RESPONDENT

Date of Decision : 22-02-2022

Acts Referred:

Arbitration And Conciliation Act 1996 — Section 2(e), 2(f), 4, 11(6), 34, 37

Citation : (2022) 02 TEL CK 0077

Hon'ble Judges : Satish Chandra Sharma, CJ;Abhinand Kumar Shavili, J

Bench : Division Bench

Advocate : Rusheek Reddy, Boddipalli Ramesh

Final Decision : Allowed

Judgement

The present appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, "the Act"), being aggrieved by the judgment and decree dated 25.04.2019 passed in C.O.P.No.173 of 2017 on the file of the Commercial Court for Trial and Disposal of Commercial Disputes at Hyderabad (hereinafter referred to as, the Commercial Court).

The undisputed facts of the case reveal that the appellant company, which is also a claimant, is a company incorporated under the laws of the Republic of Korea and is engaged in the business of research, development and manufacturing of biometrics and biometric instruments. The respondent No.1 company (hereinafter referred to as, the respondent company) is a company incorporated under the Companies Act, 1956, and is also engaged in the business of supply of biometric instruments. The facts further reveal that the Electronic Corporation of India Limited (ECIL) has issued a tender for supply of Real Scanner G10 fingerprint scanner and the manufacturing company i.e., the appellant company has entered into an agreement with the respondent company. A dispute arose between the parties and finally the matter has travelled to the Singapore International Arbitration Centre. The proceedings before the Singapore International Arbitration Centre were objected by the respondent company and the Singapore Arbitral Tribunal, by an award dated 08.04.2014, held that it does not have the jurisdiction to decide the dispute. Thereafter, an application was preferred before the Hon'ble Supreme Court under Section 11(6) of the Act and the Hon'ble Supreme Court has passed an order on 13.05.2015 in Arbitration Case (Civil) No.8 of 2015 appointing Hon'ble Sri Justice B.Sudershan Reddy (former Judge of the Hon'ble Supreme Court of India) as an Arbitrator. The order passed by the Hon'ble Supreme Court appointing Arbitrator in paragraphs 9 to 11 is reproduced as under:-

"9. In the above view of the matter, there can be no manner of doubt that the petitioner is entitled to have its claim to receive the aforesaid amount of the bills adjudicated by an Arbitrator appointed by the Court under Section 11(6) of the Act. Consequently, we allow the present petition and appoint Shri Justice B. Sudershan Reddy, a former judge of this Court as the Arbitrator and request him to resolve the dispute between the parties at an early date. The terms of appointment of Shri Justice B. Sudershan Reddy as the Arbitrator will be settled in consultation with the parties.

10. Let this order be communicated to the learned Arbitrator so that the arbitration proceedings can commence and conclude as expeditiously as possible.

11. The arbitration petition is disposed of in the above terms."

Thereafter, an award was passed by the learned Arbitrator on 26.03.2017 and the respondent company preferred a petition under Section 34 of the Act i.e., C.O.P.No.173 of 2017 before the Commercial Court. The same was disposed of by the Commercial Court by an order dated 25.04.2019 and the award passed by the learned Arbitrator dated 26.03.2017 has been set aside. The relevant portion of the order passed by the Commercial Court in C.O.P.No.173 of 2017 is reproduced as under:-

"32. The other allegation made by the respondent against the Arbitrator is that the claimant company has directly transferred US Dollars 1279 to the account of the learned Arbitrator. However, the learned Arbitrator has informed to the respondent and it's counsel on the next date and attached the e-mail with a letter, dt.28-12-2016 stating:-

"....Dear Ritesh Singh,

I have received letter from Supreme Inc. Dated 7th December, 2016 along with remittance advice. I have checked with my banker and a sum of USD 1279 have been deposited into my account on 27th October, 2016 (converted into INR Rs.84,925/-). Evidently this has nothing to do with my fee. The said amount of INR Rs.84,925/- is being sent in the name of SK Attorneys through Account payee cheque bearing No.000091, dt.28-12-2016 of HDFC Bank, Jubilee Hills Branch, Hyderabad. Kindly acknowledge and send a receipt.

(Justice B.Sudershan Reddy)

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Sole Arbitrator

28th December, 2016

33. The counsel for the respondent contended that the learned Arbitrator has failed to explain the contents of the letter received from the claimant on 7-12-2006 along with the claimant advice and the respondent has serious doubts about the transparency proceedings right from the beginning starting from the hearing on 18-12-2015 held at Taj Group of Hotels. It is to be noted that the learned Arbitrator with a bonafide intention brought to the notice of both the parties about the amount transferred to his account by the claimant company. The transparency should be not only appears to be fair but also appears to be justice oriented to show that one cannot show any doubt against the Arbitral Tribunal. The learned Arbitrator has failed to explain the contents of the letter received from the claimant on 7-12-2016. It is to be noted that the above two contentions i.e., receiving of questions in advance and non disclosing of contents of the letter, dt.7-12-2016 certainly creates doubt in the minds of the party but the manner in which the learned Arbitrator has disclosed in the subsequent proceedings shows that the learned Arbitrator wanted to clarify the doubts created in the minds of the parties but he has not fully succeeded in rectifying the doubts in the minds of the respondent i.e., non disclosure of contents of letter, dt.7-12-2016, how the claimants are having direct interaction with Arbitrator, whether Ritesh Singh is the counsel or henchman of claimant, what is the e-mail sent by the Arbitrator as referred in the e-mail, dt.20-6-2016 sent by Mr. Young Yu and who are Saurab, Ritesh Singh which shows there is a correspondence between Arbitrator and claimant and their henchmen, the acts of the learned Arbitrator appeared to be biased. Apart from that the respondent has not insisted for the disclosure of contents in the letter dt.7-12-2016 before the Tribunal as party may suffer. Hence, the contentions raised by the respondents has some force and something fishy. The clarification by Arbitrator does not appear that it is intentional and it is a bonafide one and these acts reflected on the findings of the Award.

34. In view of the above discussions, the learned Arbitrator, without considering that the claimant has supplied the real scan G-10 instead of real scan 10 and also failed to provide assistance to rectify the defects and also failed to cope up with the real need of the E.C.I.L., the respondent having accepted whatever the goods supplied by the claimant, simply thrown on the clients which clearly shows that not only the claimant, the respondent also equally suffered in handling the situation. Therefore, they has to suffer their individual losses.

Hence, the claimant as well as the respondent are not entitled for the claim and the counter claim made by them. Therefore, the learned Arbitrator without considering the same has passed the Award which is having patent illegality. Hence, the Award passed by the learned Arbitrator has to be set aside as already held that the respondent is also at fault. Therefore, he is not entitled for any counter claim as held by the learned Arbitrator.

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IN THE RESULT, the petition is disposed of with the following observations:-

The Award passed by the Arbitrator, dt.26-3-2017 in Arbitration Case No.1/2015 is set aside with costs. The petitioner is not entitled for the counter claim made by them before the Arbitrator. Accordingly, COP No.173/2017 is disposed of."

The present appeal has been filed under Section 37 of the Act and the learned counsel for the appellant, Sri Neil Hildredh, has argued before this Court that the Commercial Court was not having jurisdiction in the matter to decide the petition preferred under Section 34 of the Act keeping in view the statutory provisions as contained under the Act. His contention is that the statutory provisions governing the field provide that it is only the High Court, in the case of an international commercial arbitration dispute, where a petition under Section 34 of the Act can be preferred.

The statutory provisions which are necessary to decide the dispute, as contained under Sections 2(e) and 2(f) of the Act, are reproduced as under:-

"2(e) "Court" means-

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;

(f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is—

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country;"

The aforesaid statutory provisions of law make it very clear that in the case of an international commercial arbitration, the Court means the High Court for filing an application under Section 34 of the Act.

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Learned counsel appearing for the other side has argued before this Court that in the light of Section 4 of the Act, as the appellant company, which is a foreign company, has waived its right in respect of jurisdiction, the question of interference by this Court in respect of jurisdictional aspect does not arise.

Section 4 of the Act reads as under:-

“4. Waiver of right to object.—A party who knows that—

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.”

Section 4 of the Act deals with the provisions as contained in Part - II of the Act and it does not deal with the jurisdictional aspect. The issue of jurisdiction goes to the root of the matter and in the present case, the Commercial Court was not having jurisdiction to decide the matter and the order passed by the Commercial Court is a nullity.

Therefore, the impugned order passed by the Commercial Court is set aside and the parties shall be free to take recourse to the legal remedies available under the law.

The appeal is accordingly allowed.

The miscellaneous applications pending, if any, shall stand closed. There shall be no order as to costs.

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