(2010) 11 KAR CK 0099

In the Karnataka High Court

Case No : C.M.P. No. 49 of 2010

Texport Overseas Pvt. Ltd. APPELLANT

Vs

Canara Bank RESPONDENT

Date of Decision : 25-11-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11 (5), 16, 9

Citation : (2010) 11 KAR CK 0099

Hon'ble Judges : Mohan Shantanagoudar, J

Bench : Single Bench

Advocate : Basavaprabhu S. Patil for Sri Brijesh Patil, for the Appellant; Udaya Holla for V. Haridas Bhat, for the Respondent

Judgement

Mohan Shantanagoudar, J.—The Petitioner is a company registered under the Companies Act, 1956. It is engaged in the business of manufacturing and exporting of readymade garments. It is the case of the Petitioner that in connection with its business, it has been availing working capital limits from Canara Bank, Overseas Branch since the year 1996 from time to time. At present, the Canara Bank has granted working capital limits to the Petitioner In terms of the sanction letter dated 10.10.2008, the copy of which is produced at Annexure-''B'' to the petition. As per the sanction letter, the sanction limit was to be secured by various securities. In terms of the said sanction letter, Petitioner has executed the loan documents, including Common Hypothecation Agreement governing the relationship between the parties. Copy of the Common Hypothecation Agreement is produced at Annexure-''C'' to the petition. The rights and obligations of the parties as regards the securities and the amount available in current account of the Petitioner are governed by the terms of the Common Hypothecation Agreement and other security documents. In the course of its business, the Petitioner had booked several Forward Merchant Contracts through Foreign Department of Canara Bank during the financial year 2007-08, ending on 29.2.2008. According to the Petitioner, though most of the Contracts came to be utilised or cancelled, 25 Forward Merchant Contracts, despite lapse of maturity date, remained outstanding. The said 25 Forward Merchant Contracts were cancelled subsequently and consequently, the current account of the Petitioner has been debited. When the facts stood thus, the Petitioner received an e-mail communication from the Respondent dated 7.9.2009 wherein it was claimed that totally 51 Forward Merchant Contracts as per the list attached to the communication has been booked by the Petitioner through Respondent during the year 2008-09. Copy of the said e-mail communication is produced at Annexure-''F'' to the petition. It is the case of the Petitioner that, in the list attached to the communication, except for 10 Forward Merchant Contracts, rest of the 41 contracts were never booked by it. Further in the list attached, 5 Forward Merchant Contracts having OBFC Nos. 7883, 7790, 7718, 7741 and 7789 were shown outstanding though the same had been duly cancelled and the amount had been remitted by the Petitioner. The Petitioner replied to the said e-mail communication by its letter dated 17.9.2009 clarifying its position. It also requested the Respondent to furnish the records to ascertain the correctness of their claim as regards the rest of the contracts which were not even booked by the Petitioner. Certain other averments are also made in the petition with regard the business transactions between the parties. According to the. Petitioner, excess debit is also made in respect of OBFC. No. 7883.

Since this Court will not go deep into the merits of the matter in this petition filed u/s 11(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as ''the Act'' for short), it is wholly unnecessary for this Court to mention ail the details of the business transactions between the two parties. The sum and substance of the Petitioner''s case is that the Respondent-Bank has not performed its part of the obligations as per the contract entered into between the parties and consequently, the disputes have arisen between the parties. With a view to get interim orders urgently, the Petitioner approached the District Court, Bangalore, by filing A.A. No. 1071/2009 u/s 9 of the Act. The learned District Judge has issued an order of temporary injunction on 29.12.2009 and the same is being continued from time to time.A.A. No. 1071/2009 is said to be still pending consideration before the District Court. In the light of the fact that the disputes have arisen between the parties, the Petitioner has approached this Court seeking reference of the dispute to Arbitral Tribunal for adjudication.

2. The Common Hypothecation Agreement dated 30.1.2009 contains the arbitration clause at Paragraph-8. The Petitioner has issued notice to the Respondent by invoking the arbitration clause. However, the Respondent-Bank has sent its reply notice dated 9.2.2010 contending that the dispute raised is not covered by the arbitration clause in Common Hypothecation Agreement, inasmuch as, the Forward Merchant Contracts are not part of the credit facilities and not governed under Common Hypothecation Agreement.

3. The statement of objections are filed by the Respondent-Bank in this petition. According to the Respondent-Bank, the disputes referred to in the petition have not arisen in respect of the transaction referred to in the Common Hypothecation

Agreement dated 30.1.2009, but have arisen out of the Forward Merchant Contracts entered into between M/s. Nisha Designs, a partnership firm and the Canara Bank during the year 2007-08; that the Common Hypothecation Agreement was entered into between the Petitioner and the Respondent in respect of credit facilities/loans i.e., the Packing Credit (BC) limit of `25 crores, Letter of Credit (LC) and Bank Guarantees (BG) of `11 crores sanctioned by the Respondent-Bank on 10.10.2008; that the Forward Merchant Contracts are not referred to in the Common Hypothecation Agreement; and that since the disputes are in respect of Forward Merchant Contracts entered in to between M/s. Nisha Designs and the Respondent-Bank, the Petitioner cannot press into service the arbitration clause found in Common Hypothecation Agreement dated 30.1.2009 which is entered into between the Petitioner and the Respondent. According to the Respondent, the transactions between M/s. Nisha Designs and Respondent-Bank took place in the financial year 2007-08, whereas, the Common Hypothecation Agreement between the Petitioner and the Respondent was entered into on 304.2009, The sum and substance of the case of the Respondent is that arbitration clause found in the Common Hypothecation Agreement cannot be invoked in respect of the dispute in question, inasmuch as the Common Hypothecation Agreement is not applicable to Forward Purchase Contracts in question.

4. It is not in dispute that M/s. Nisha Designs is a sister concern of the Petitioner, inasmuch as, the said M/s. Nisha Designs is taken over by the Petitioner. According to the Petitioner, the dispute is between the Petitioner and the Respondent whereas according to the Respondent, the dispute is in fact between M/s. Nisha Designs and the Respondent-Bank. Since the Common Hypothecation Agreement dated 30.1.2009 is entered into by the Petitioner with the Respondent, according to the Respondent, the same cannot be pressed into service in the dispute between M/s. Nisha Designs and the Respondent.

5. While deciding the petition filed u/s 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as ''the Act'' for short), this Court will not go deep into the facts. Section 16 of the Act makes it clear that the Arbitral Tribunal is competent to rule on its jurisdiction. The Arbitral Tribunal is also competent to decide on any objection with respect to the existence or validity of the arbitration agreement. That the Arbitral Tribunal may rule "on any objection with respect to the existence or validity of the arbitration agreement", shows that the Arbitral Tribunal''s authority u/s 16 of the Act is not confined to the width of its jurisdiction, but goes to the very root of its jurisdiction. Therefore, there is no impediment on the part of any party to the litigation in contending before the Arbitral Tribunal that it had been wrongly constituted and that it had no jurisdiction. (See the judgment in the case of Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd., and also in the case of Secur Industries Ltd. v. Godrej and Oyce MFG. Co. Ltd. and Anr. (2004) 3 SCC 447). Consequently, the Arbitral Tribunal can go into the question as to whether it has or has no jurisdiction to deal with the matter.

6. According to the Petitioner, the dispute in question relates to the Common Hypothecation Agreement dated 30.1.2009 entered into between the Petitioner and the Respondent. However, according to the Respondent, the dispute in question relates to M/s. Nisha Designs and not to the Petitioner. Curiously, the Respondent has not produced before the Court anything to show the nature of agreement entered into between the Respondent and M/s. Nisha Designs. The Respondent being the Bank could not have held up or would not have kept it secret, if really the dispute in question relates to M/s. Nisha Designs.

7. It is by now well settled that this Court has to decide in the petitions arising u/s 11(5) or (6) of the Act as to whether there is an arbitration agreement as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is also necessary to decide the question whether the claim was a dead one or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording the satisfaction of the mutual rights and obligations. It will not be possible at this stage to decide whether a live claim made is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. This Court has to decide whether the applicant has satisfied the conditions for appointing an Arbitrator u/s 11(6) of the Act. (see the judgment reported in the case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, .

In the matter on hand, though the Respondent contends that the dispute actually involved or raised is in between Respondent and M/s. Nisha Designs, but the Respondent has not produced anything on record to show as to what is the agreement between those two. In the absence of any material in support of the Respondent''s contentions, this Court does not wish to comment anything on the question as to whether the litigation in question is between the Respondent and M/s. Nisha Designs. The said question also may have to be decided by the Arbitral Tribunal.

In the absence of any agreement/document on record to show the relationship between M/s. Nisha Designs and the Respondent, this Court is unable to accept the contention made on behalf of the Bank that the dispute relates to between M/s. Nisha Designs and the Respondent. Be that as it may, since it appears prima facie, that too, in the absence of any agreement between the Bank and M/s. Nisha Designs, the dispute relates to the Common Hypothecation Agreement dated 30.1.2009, this is a fit case to refer the matter to Arbitral Tribunal for adjudication. By the said process, no prejudice or injustice will be caused to any of the parties, inasmuch as, the Arbitral Tribunal may also decide on its own jurisdiction. At that point of time, the Arbitral Tribunal will take into consideration all the facts and contentions raised before it relating to the jurisdiction or otherwise to decide the dispute between the parties In view of the totality of the facts and circumstances and in view of availability of arbitration clause in the

Common Hypothecation Agreement (Clause No. 8), since this Court is of the prima facie opinion that the dispute exists between the parties, the same shall be referred to Arbitral Tribunal for adjudication. Accordingly, the following order is made:

Sri K. Shivashankar Bhat, Retired Judge, High Court of Karnataka, residing at No. 401/29, 12th Main, R.M.V. Extension, Sadashivanagar, Bangalore-80, is appointed as Sole Arbitrator, to resolve the dispute between the parties. The learned Arbitrator, on receipt of a copy of this order shall enter upon the reference, issue notice to the parties and then proceed to resolve the dispute, in accordance with the Arbitration and Conciliation Act, 1996.

Office is directed to send a copy of this order to the learned Arbitrator, forthwith. It is further directed to return all the original papers, if any, filed along with the petition to the Petitioner to enable them to produce before the learned Arbitrator.

Petition is disposed of accordingly.