

Appellant Vs. Respondent

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Court : Kolkata

Decided On : Jul-25-2013

Judge : Harish Tandon

Appellant : Appellant

Respondent : Respondent

Judgement :

ORDER

SHEET C.A.No.325 of 2013 C.A.No.157 of 2013 C.P.No.439 of 2012 IN THE HIGH COURT AT CALCUTTA Original Jurisdiction SAMPAD SCALES & SYSTEMS PVT.LTD And HDFC BANK LTD.BEFORE: The Hon'ble JUSTICE HARISH TANDON Date :

25. h July, 2013.

Appearance: Mr.Avik Datta,Advocate Mrs.Baisakhi Singha,Advocate for applicant.

Mr.Sukrit Mukherjee,Advocate Mr.Joydeep Roy,Advocate Mr.Sudeep Kumar,Advocate for HDFC Bank.

The Court : This is an application for referring the parties to the Arbitration as the subject matter of this petition squarely comes within the ambit of an arbitration agreement.

The winding up petition was taken out by the bank as the company is unable to pay its debt.

The winding up petition was admitted ex parte for a principal sum of Rs.5,99,822/- together with the cheque bouncing charges of Rs.18,404/- and the aforesaid sums were directed to be paid with interest at the rate of 12% per annum on and from November 14,2012 till its payment.

Subsequently, the company applied for recalling of the said order.

The said application was disposed of recording the agreement between the company and the petitioning creditor that a sum of Rs.8 lakhs would be paid toward the full and final satisfaction of the petitioners claim by ten equal monthly instalments.

FiRs.of such instalment was directed to be paid on or before June 15, 2013 and all subsequent instalments were directed to be paid within 15th day of each succeeding month.

In the present application taken out by the company it is tried to be contended that the agreement by which the amount claimed by the petitioner was agreed to be paid contains an arbitration clause and therefore, the parties should be directed to be referred to the arbitration.

The learned advocate appearing in support of the instant application relied heavily upon the Special Bench judgement of Delhi High Court rendered in W.P.(C) No.3238 of 2011 decided on 13th September, 2012 to contend that if an agreement specifically provides for adjudication of a dispute through a private forum the winding up petition should not have been entertained because of the embargo created under section 8 of the Arbitration and Conciliation Act, 1996.

The aforesaid argument so advanced by the bank does not appear to hold any water as the case before the Special Bench of the Delhi High Court relates to a recovery proceeding initiated by the financial institution before the Debt Recovery Tribunal.

The Debt Recovery Tribunal was constituted under the recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB Act) to deal with the matters relating to the claim of the financial institutions of an amount more than Rs.10 lakhs which necessarily excludes the jurisdiction of the civil court in relation thereto.

The Debts Recovery Tribunals were having vested with the power to adjudicate the special kind of a dispute which necessarily excludes the jurisdiction of the civil court within the meaning of section 9 of the Code of Civil Procedure.

While deciding the matter in the backdrop of the above facts the Special Bench took note of the judgements of the Apex Court rendered in case of Booz Allen and Hamilton Inc.v.SBI Home Finance Limited & ORS.reported in (2011).SCC 53.wherein the Apex Court in paragraph-36 thereof indicated the matter which is not capable of being determined through a private forum, that is, arbitration.

It would be profitable and relevant to quote parargaph-36 which reads thus : 36.

The well recognized examples of non-arbitrable disputes are : (I) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matteRs.(iv) insolvency and winding up matteRs.(v) testamentary matters (grant of probate, letters of administration and succession certificate).and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

It is explicit from the reading of the said judgement rendered by the Apex Court that the winding up matters do not come within the purview of the Arbitration and Conciliation Act, 1996.

Furthermore, the Companies Act, 1956 provides an exclusive mechanism of the winding up of the company by the High Court if the company is unable to pay its debt.

Chapter II of the said Act deals with the matter relating to winding up which has been vested exclusively on the High Court.

If certain special powers are vested on the High Court, it necessarily excludes the jurisdiction of all other courts including the tribunal and therefore, the provisions of the Arbitration and Conciliation Act cannot be made applicable to those matters. Though at the first blush the arguments advanced by the applicant appears to sound logical but upon reading of the judgement rendered by the Apex Court in case of Booz Allen and Hamilton Inc. (supra). I do not find any substance in the above submission.

The application is devoid of any merit and the same is hereby dismissed.

There will, however, be no order as to costs.

(HARISH TANDON, J.) ssaha AR(CR)

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