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Amardeep Developers Pvt. Ltd. Vs. Oswal Chemicals and Fertilizers Ltd. and anr.

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Court : Delhi

Decided On : Jul-30-2008

Reported in : 2008(3)ARBLR200(Delhi)

Judge : Rajiv Sahai Endlaw, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11 and 11(6); Code of Civil Procedure (CPC) - Order 1, Rule 7

Appeal No. : Arb. P. No. 319/2006

Appellant : Amardeep Developers Pvt. Ltd.

Respondent : Oswal Chemicals and Fertilizers Ltd. and anr.

Advocate for Def. : Rajiv Bansal, ; Harshit Aggarwal and ; Prashant Mehra,

Advocate for Pet/Ap. : Vijay Sharma, Adv

Judgement :

Rajiv Sahai Endlaw, J.

1. The petitioner has applied for appointment of arbitrator under Section 11(6) of the [Arbitration and Conciliation Act, 1996](#). The petitioner claims to have entered

into an agreement with the respondent No. 1 (Oswal Chemicals and Fertilizers Limited) for carrying out the work of civil construction at the factory of the respondent No. 1 at Paradeep, Orissa. It is further the case of the petitioner that after the completion of the work, the said factory of the respondent No. 1 at Paradeep, Orissa has been disposed of to the respondent No. 2, Indian Farmers Fertilizers Cooperative Limited (IFFCO) in the month of September 2005. The petitioner claims monies to be due to it under the contract aforesaid with the respondent No. 1. The said contract/agreement between the petitioner and the respondent No. 1 is stated to be containing an arbitration agreement. The petitioner has filed before this Court a letter dated 1st June, 1998 of the respondent No. 1 to the petitioner in this regard. The said letter contains a clause as under:

Arbitration-In case of any dispute which cannot be settled by mutual negotiations, the matter shall be referred for arbitration in accordance with [Arbitration and Conciliation Act, 1996](#) or any statutory modifications or re-enactment thereof for the time being in force. The venue for arbitration in all cases shall be at Delhi and shall be conducted in English only.

2. The petitioner claims to have issued a legal notice dated 5th January, 2006 to the respondent No. 1 calling upon the respondent No. 1 to agree on the appointment of Justice Usha Mehra (Retd.) as the arbitrator. A copy of the said legal notice is claimed to have been sent to the respondent No. 2 also. Though the respondent No. 2 in its reply had denied service of the said legal notice but during the course of hearing the counsel for the respondent No. 2 has stated that the service of the notice dated 5th January, 2006 on the respondent No. 2 may be accepted. Since neither the respondent No. 1 nor the respondent No. 2 replied to the aforesaid legal notice sent by the petitioner, the petitioner applied to this Court for appointment of arbitrator.

3. The respondent No. 1 did not appear to contest the petition in spite of service and was proceeded ex parte vide order dated 2nd May, 2007. The respondent No. 2 filed reply and contested the petition. It is, inter alia, the stand of the respondent No. 2 that there is no arbitration agreement between the petitioner and the

respondent No. 2 and the petitioner has no claim against the respondent No. 2 and hence no arbitrator vis-a-vis respondent No. 2 can be appointed. The respondent No. 2 has along with its reply also filed the sale agreement dated 13th March, 2006 between the respondent No. 1 and the respondent No. 2. The counsel for the respondent No. 2 placed reliance on Sandeep Kumar and Ors. v. Master Ritesh and Ors. : 2006(11)SCALE350 and Sumitomo Corporation v. CDC Financial Services (Mauritius) Ltd. and Ors. : AIR 2008 SC1594 .

4. The counsel for the petitioner have during the hearing referred to Clauses 2.3.2, 5.1.2, 7.1.6, 7.1.16, 12.1 and to Schedule D of the sale agreement dated 13th March, 2006 between the respondent No. 1 and the respondent No. 2. Admittedly, there is no arbitration agreement in writing between the petitioner and the respondent No. 2. The argument of the counsel for the petitioner, however, is that since the respondent No. 2 has purchased the factory premises of the respondent No. 1, construction whereon was carried out by the petitioner, the petitioner has become entitled to realize/recover the amounts from the respondent No. 2 as well. The counsel for the petitioner has neither pleaded nor argued (as in fact he could not) that the respondent No. 2 is the assignee of the respondent No. 1 with respect to the agreement with the petitioner. In fact, the plea and the argument is that the respondent No. 2 is a necessary party and reliance in this regard was also sought to be placed on Order 1 Rule 7 of the CPC. It was further argued that the respondent No. 2 had, in fact, taken over claims of several others similarly situated as the petitioner, against the respondent No. 1 and for this reason the respondent No. 2 ought to be answerable for the claims of the petitioner as well.

5. The jurisdiction to appoint an arbitrator to adjudicate the disputes between the parties stems from the existence of arbitration agreement. In the absence of an arbitration agreement between the parties, this Court under Section 11 has no jurisdiction to appoint an arbitrator. On the averments and arguments of the counsel for the petitioner alone, no case for appointment of arbitrator to adjudicate the claims, if any, of the petitioner against the respondent No. 2 is made out.

6. Even otherwise a perusal of the sale agreement dated 13th March, 2006 between the respondent No. 1 and the respondent No. 2 shows that under the

said agreement, the respondent No. 1 had sold of its phosphate fertilizer manufacturing complex at Paradeep, Orissa consisting of movable and immovable properties to the respondent No. 2. Under Clause 2.3.2 of the agreement, it was provided that the respondent No. 2 was not assuming any other liabilities/obligations of the respondent No. 1 save those mentioned in the agreement. Counsel for the petitioner agrees that the liability/obligation, if any, of the respondent No. 1 to the petitioner is not mentioned in the agreement. The agreement clearly provides that respondent No. 2 would not be liable for any liabilities pertaining to the period prior to 1st October, 2005. The counsel for the petitioner states that the liability of the respondent No. 1 to the petitioner is of a period prior to 1st October, 2005.

7. Clauses 5.1.2, 7.1.6 and 12 of the agreement contain an indemnity furnished by the respondent No. 1 as vendor to the respondent No. 2 as purchaser with respect to any demands/claims made by third party against the respondent No. 2 which the respondent No. 2 had not undertaken. The counsel for the petitioner submitted that since the respondent No. 2 could under the said indemnity clause recover the amounts claimed by the petitioner, from the respondent No. 1, the respondent No. 2 became liable for the claims of the petitioner. Merely because the respondent No. 2 for its protection has taken indemnities from the respondent No. 1 would not make the respondent No. 2 liable for the claims, if any, of the petitioner against the respondent No. 1 and which under the agreement did not stand assigned to the respondent No. 2.

8. The respondent No. 1 company is stated to be still existing. Merely by sale of an asset by the respondent No. 1 to the respondent No. 2, the respondent No. 2 would not become liable for the claims, if any, of the petitioner, against the respondent No. 1. The petitioner is, therefore, not entitled to invoke the arbitration against the respondent No. 2. The petition, insofar as against the respondent No. 2, is dismissed.

9. As aforesaid, the petitioner has on the documents filed made out a case for appointment of an arbitrator vis-a-vis respondent No. 1. The petitioner had earlier suggested the name of Justice Usha Mehra (Retd.) as the arbitrator. I appoint

Justice Usha Mehra (Retd.) as the sole arbitrator to adjudicate the claims of the petitioner against the respondent No. 1-Oswal Chemicals & Fertilizers Ltd. The arbitrator would fix her own fee in consultation with the parties. The petition stands disposed of.

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