

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO(OS) NO. 515/2009 and CM No. 15503/2009**

Reserved on : November 09, 2009

Date of Decision: November 16, 2009

M/s. I.C. Textiles Ltd.

Through : Appellant
Mr. R.K. Handoo,
Advocate.

versus

San-A-Trading Company Ltd.

Through Respondent

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be
reported in the Digest? Yes.

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JUDGMENT

16-11-2009

MUKUL MUDGAL,J.

1. This appeal challenges the judgment of the learned Single Judge dated 4th August, 2009 dismissing the objections to an interim award dated 13th November, 2007 passed by the Arbitrator. The said interim award directed the handing over of the two machines out of the five sets of machines to the respondent, the subject matter of the disputes between the parties.

2. The facts of the case briefly stated are as follows: -
- a. The appellant - I.C. Textiles Ltd. and the respondent - SAN-A Trading Company Ltd. entered into a contract of sale and purchase dated 7th June, 2001 whereunder the respondent was to sell five sets of Murata No.7-V-Mach-Coner automatic Cone Winder Type Magazine (machines). The shipment of these five sets of machines was to be made in two parts. The first part consisting of two machines was to be shipped by 15th June, 2001 and the second part consisting of the remaining three machines was to be shipped by the end of December, 2001. The delivery of these machines was to be made on receiving initial payment of around 16% of the total amount. The balance payment for the machines was to be made by the appellant in four installments.
 - b. The first set of two machines was shipped by the respondent and received by the appellant under bill of lading dated 10th July, 2001. The second shipment was made only of two machines instead of the three machines vide bill of lading dated 6th October, 2001. The appellant failed to open the Letter of Credit for the third machine, the same was not shipped.
 - c. The first two installments pertaining to the first shipment of two sets of machines, were paid, however, the next two installments of DM-1,48,617/- and DM-1,45,078/- were not paid. Similarly, with respect to the second shipment also, two installments were paid and the two installments of the similar amount were not paid.
 - d. The appellant entered into a separate agreement titled 'Deeds of Reserve and Charge of Property' with the respondent on 22nd February, 2002 for each shipment which provided that the machines in possession of the appellant shall stand charged as reserve of property in favour of the respondent to secure deferred payment of the price due in terms of the invoices and the appellant shall get the Deed of Charge registered with the Registrar of Companies at its own expense. By this agreement, the appellant was restrained from selling, transferring or parting with the

possession, pledging, charging, mortgaging or hypothecating these machines to any third party or in any way transferring the rights in the machines to any third party till the entire outstanding amount of DM 5,66,160/- for each shipment was paid to the respondent. The Deed also provided that in case of any default in making of payment of these installments by the appellant, the entire outstanding amount shall become payable forthwith to the respondent as liquidated damages. It also provided that in case the liquidated damages are not paid within two weeks of becoming due, the appellant shall return the custody and possession of the machines to the respondent and the respondent shall then be entitled to dispose of the machines as it deemed appropriate and it shall have unrestricted right of sale of the machines and apply the proceeds towards realization of the amount of liquidated damages.

- e. The 'Deed of Reserve and Charge of Property' also had an arbitration clause which provided that all disputes concerning the Deed were to be resolved through arbitration of Mr. Munabu Nonoguchi, Area Manager, Sales Department of Murata Machinery Ltd.
- f. On failure of the appellant to pay the remaining two installments of each of the machines, the respondent invoked the arbitration clause. Mr. Munabu Nonoguchi, the named Arbitrator expressed his inability to conduct the arbitration proceedings.
- g. The appellant moved an application under Section 11(6) of the Arbitration and Conciliation, 1996 (for short 'the Act') before the Hon'ble Supreme Court. During the pendency of the proceedings, Mr. Nonoguchi gave his consent to conduct the arbitration proceedings. The Supreme Court therefore, appointed him as the arbitrator under Section 11(6) of the Act. The arbitrator passed an interim award on 13th November, 2007 in favour of the claimant – SAN-A Trading Company Ltd. The respondent therein – M/s. I.C.Textiles Ltd. preferred an appeal against the said interim award passed by the Sole Arbitrator.

3. The main plea raised by the learned counsel for the appellant before the learned Single Judge was that the Arbitrator had no jurisdiction to entertain the claim of the respondent as the contract of the sale provided for a different arbitration clause requiring each of the parties to appoint one Arbitrator. It is also urged that the arbitration clause existing in the 'Deeds of Reserve and Charge of Property' being a clause contrary to the main contract clause of the impugned contract was to govern the arbitration proceedings. The above plea was dismissed by the learned Single Judge based upon the principles of constructive *res judicata*. While dealing with the above plea, the learned Single Judge held as follows: -

“I consider that this objection is not tenable and cannot even be raised at this stage because of principle of constructive *res judicata*. The petitioner was at liberty to raise this question before the Supreme Court when the application under Section 11(6) of the Act was pending and the Supreme Court was to consider whether there was an arbitration clause between the parties and whether there was a valid dispute existing between the parties. Since the petitioner did not raise the issue before the Supreme Court that the arbitration clause under which Mr. Munabu Nonoguchi was appointed as Arbitrator was not the valid arbitration clause, the issue cannot be raised now.”

4. The appellant herein who was the petitioner before the learned Single Judge was free to raise this question before the Hon'ble Supreme Court when an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 was pending and the Hon'ble Supreme Court was considering the fact whether there was an arbitration clause between the parties or a valid dispute existed between the parties.

5. The said issue not having been raised before the Hon'ble Supreme Court, it was not open to the appellant to raise this issue either before the Arbitrator or before the learned Single Judge. In our view, the above plea has been rightly

rejected by the learned Single Judge. The said plea was forcefully sought to be urged before us overtly on the ground that such a plea was raised before the Arbitrator on 26th August, 2006, as is discernible from the minutes of the said proceedings. The said proceedings reads as follows: -

“SUB: Arbitration

San-A Trading Co. Ltd. vs. I.C. Textiles Ltd.

Minutes Dated : August 26, 2006

Attendance: Attached

1. Mr. Sachin Datta, lawyer for SAN-A, read the order of the Supreme Court of India appointing me as arbitrator. I had received the order directly from the Supreme Court of India and have read it. In last paragraph, I have been directed to decide the disputes expeditiously. Under arbitration clause 6, I have to decide on principles of equity and good conscience.
2. A ‘Statement of Claim’ was submitted for each of the 2 cases. An application under Section 17 of the Arbitration and Conciliation Act, 1996 was also submitted in each of the 2 cases. Copies were given to Mr. R.K. Handoo, lawyer for ICTL. Mr. Sachin Datta requested that urgent orders are necessary to preserve the subject matter of arbitration.
3. Mr. R.K. Handoo handed over copies of two letters dated 28.6.2002 and 12.8.2002 respectively. He stated that I should withdraw from arbitration. The first letter ICTL/STH/2002 to Murata Machinery Ltd. claimed a debit for inefficiency/defects of machines as accruing between September 2001 to May 2002. The second letter is Murata’s reply fax under my sign addressing the issue of technical defects in the machines. Murata is the manufacturer of the machines. I have read the order of Supreme Court of India. The Supreme Court of India was aware that I work for Murata. ICTL and SAN-A were also always aware that I work for Murata. I understand the machines and have been in the textile machinery business for 18 years. I was named as arbitrator in clause 6 and signed the Agreement on

request of both parties. Anyway, I have requested Mr. R.K.Handoo to make a written application on behalf of ICTL. Mr. R.K. Handoo said that he would do so within one week. Mr. Sachin Datta for SAN-A said that the Supreme Court of India had considered all aspects. Mr. Sachin Datta may file reply on behalf of SAN-A within one week of receiving such application.

4. Mr. R.K. Handoo said that he would file a reply on behalf of ICTL to the application under Section 17 within one week. I permit him to do so. I will consider the reply before passing any order.
5. Mr. R.K. Handoo stated that he would submit his reply to the 'Statement of Claim' before the next date of hearing. However, I direct him to submit within one month from today so that I can study before the next date of hearing.
6. With the consent of parties, I fix the next date of hearing on October 7, 2006. The hearing will be held at the same venue at 10:30 AM.
7. The parties are requested to exchange any documents with each other before sending them to me. Documents can be sent to me either by courier or e-mail. In case anything is sent to me by e-mail, parties are requested to ensure that they mark a copy to each other also.
8. I requested the parties to pay Rs.5,000 each towards my fees. Mr. R.K. Handoo said that his was not in a position to pay any fees and that the entire fees should be paid by SAN-A. Mr. Sachin Datta said this was not acceptable. I direct SAN-A to bear my expenses for this and the next hearing but I shall study the matter and order suitably in the next hearing.

M. NONOGUCHI
Sole Arbitrator

Copy by fax and courier

1. Mr. Sachin Datta
2. Mr. Himinder Lal

3. Mr. R.K. Handoo
4. Mr. K.V. Mohan
5. Mr. S.D. Jain.”

6. In our view, the learned Single Judge is absolutely justified in rejecting this plea. The aforesaid order clearly shows that the basis of the objection to the continuation of Mr. Munabu Nonoguchi were the two letters dated 28th June, 2002 and 12th August, 2002. The learned Arbitrator held, and in our view rightly, that the aforesaid letters merely showed that the Arbitrator worked for Murata Machinery Limited. The Arbitrator was named as an Arbitrator in the agreement of the parties as reflected in clause 6 and both the parties had signed the agreement.

7. In our view, both the Arbitrator and the learned Single Judge have rightly precluded the appellant from challenging the appointment of the Arbitrator, Mr. Munabu Nonoguchi. In our view, permitting any party to do so would amount to sitting in judgment over the order of the Hon’ble Supreme Court appointing Sh. Munabu Nonoguchi as the Arbitrator. In a paper book running into 133 pages, the appellant has been careful not to file the order of the Hon’ble Supreme Court. However, a portion of the Hon’ble Supreme Court’s order is available in the proceedings dated 7th October, 2006 which reads as under: -

*“It is urged by the learned counsel for the respondent that mere reading of clause 6 of the Deed makes it clear that the parties intended that the arbitration was to be conducted only by Mr. Manabu Nonoguchi and, therefore, no other procedure for appointment of another arbitrator has been provided for under the said clause or anywhere in the agreement. **The intention of the parties is clear that none other than Mr. Manabu Nonoguchi ‘shall’ be the arbitrator to adjudicate upon the disputes arising between the parties.** When the named arbitrator withdrew from the office of arbitrator, Clause 6 of the Deed providing for arbitration got exhausted and could not be revived under Section 11 (6)(c) of the Act.”*

8. The aforesaid portion of the order of the Hon'ble Supreme Court clearly shows that the plea of the eligibility of the arbitrator was raised before the Supreme Court by the respondent and declined as is evident from the said order which appointed Mr.Manabu Nonoguchi as the Sole Arbitrator in spite of such pleas having been raised before it by the appellant.

9. We are surprised how the counsel has chosen to raise the said objection before the arbitrator, the learned Single Judge and indeed before this Bench. The order of the Hon'ble Supreme Court has not been sought to be reviewed or modified upto now and therefore, this plea of the appellant is wholly devoid of any merit and has been solely raised with a view to delay the arbitration proceedings. It is not open to any Court in India to sit in judgment over the order of the Hon'ble Supreme Court. Admittedly, no proceedings for review/modification of the said order were filed before the Hon'ble Supreme Court and the attempt to open the issue of appointment of Mr. Nonoguchi as an arbitrator amounts to reopening the issue settled by the Supreme Court.

10. The other objection raised by the appellant before the learned Single Judge was whether the title of the property/machines vested in the appellant or the respondent. The appellant urged that this issue was not referred to the Arbitrator and hence could not have fallen within the ambit and scope of 'Deeds of Reserve and Charge of Property'. However, it is urged that this issue could have been decided on the basis of the terms and conditions of the contract of sale. In our view, the learned Single Judge has described the issue between the parties as the right of the respondent to seek possession of the machines in terms of the 'Deeds of Reserve and Charge of Property' to realize the amount and the possession of the machines could be granted only after finding that the 'Deeds of Reserve and Charge of Property' had been rightly looked into by the Arbitrator after taking into consideration the terms of the said contract of sale.

11. The learned Single Judge has extracted the relevant terms of the Contract of Sale dated 7th June, 2001 as follows: -

“5. The all contracted goods shall be belonging to the SELLER, until the BUYER completely finished the payment of full contracted amount. The BUYER shall accept and sign “Reserve of Property” of which shall be made by the BUYER’s cost.”

12. The learned Single Judge affirmed the finding of the Arbitrator that the intention of the parties was clear from the above terms that the title in the machinery was to pass to the appellant only on payment of full price by the appellant to the respondent and the title was not to pass until and unless the full price was paid to the respondent.

13. It was also argued by the learned counsel for the appellant before the learned Single Judge that the non-payment of installments would only enable the respondent to claim the balance due amount and the respondent could not have asserted his right to possess machines since the machines became the property of the appellant. The case of **Damodar Valley Corporation vs. The State of Bihar AIR 1961 SC 440** cited by the appellant was rightly distinguished by the learned Single Judge as the said contract related to selling of the goods on deferred payment with an option to re-purchase the goods at residual price. In the aforesaid case, the Hon’ble Supreme Court, for the purposes of sales tax, held the transaction to be that of sale and not a transaction of hiring.

14. However, in our view, the present case specifically provided that the title of the property/machines was to pass to the appellant only when the entire purchase price had been paid by the appellant. Since the title to the property/machines, in terms of the contract of sale dated 7th June, 2001 and the ‘Deeds of Reserve and Charge of Property dated 22nd March, 2002 was clearly to remain with the respondent, there is absolutely no merit in this plea of the appellant and the above judgment of the Hon’ble Supreme Court is inapplicable to the facts of the present case.

15. The plea that the Arbitrator did not give sufficient opportunity to the appellant to place his point of view was also raised before the learned Single

Judge. The learned Single Judge has recorded a clear finding that the proceedings before the Arbitrator clearly show that sufficient opportunity was given to the parties. We have ourselves perused the proceedings and it is evident that the appellant had sufficient and ample opportunity in the present case as the entire pleadings were exchanged and filed and the appellant had even filed written submissions. In such a circumstance, to find fault with one of the orders, as not recording the proceedings fully, cannot in any event, be termed as a violation of principles of natural justice and denial of hearing to the appellant. The arbitrator was a technical person fully aware with the practices of the trade and the learned Single Judge has rightly upheld the order of the Arbitrator. The appellant's plea of denial of opportunity is, thus, wholly unsubstantiated by the records and is a clear attempt to somehow delay the proceedings as evident from the appellant's untenable and uncalled plea of attempting to revisit and challenge the appointment of Sh.Munabu Nonoguchi as Arbitrator by the Hon'ble Supreme Court by its order dated 28th April, 2006.

16. In light of the above findings, we find absolutely no merit in the appeal which appears to be a calculated attempt to delay the proceedings further and accordingly dismiss the same in *limine*. All the pending applications also stand dismissed and disposed of.

(MUKUL MUDGAL)
JUDGE

(REVA KHETRAPAL)
JUDGE

November 16, 2009
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