

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

% Judgment delivered on: 22.11.2012

+ W.P.(C) 5527/2012 & CM 11291/2012

NATIONAL TEXTILE CORPORATION LTD. PETITIONER

versus

UNION OF INDIA AND ORS

..... RESPONDENTS

Advocates who appeared in this case:

For the Petitioner: Mr. Sanjay Ghose and Mohd. Farrukh, Advocates

For the Respondents: Mr. Ruchir Mishra, Advocate for R-1

Mr. Kamal Khurana, Advocate for R-2

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1. The present writ petition has been filed to assail the notice dated 17.10.2011, issued by the Arbitrator, who is acting under the aegis of the Permanent Machinery of Arbitrators (in short PMA), established by the Govt. of India vide Office Memorandum dated 22.01.2004, in respect of disputes, concerning Central Public Sector Undertakings, Banks, Trusts and/or other Government departments.

2. The Petitioner/National Textile Corporation Ltd. (in short NTC) has, at stage of issuance of notice by the learned Arbitrator, approached this court to lay challenge to her jurisdiction to proceed further with the matter.

2.1 As per the impugned notice, the first date of hearing was fixed on 17.02.2012.

2.2 In accordance with the notice dated 17.10.2011, Respondent no.2, which is the UCO Bank, filed its statement of claim on 17.11.2011. It appears that on 23.12.2011, the Petitioner/NTC filed its reply to the statement of claim in which several defences have been taken including the defence that the Petitioner/NTC is not a party to the arbitration proceedings. Pivoted on this basic plank, and the submission that PMA no longer exists, the Petitioner/NTC has deemed it fit to approach this Court. Briefly, this submission is made in the background of the following brief facts :-

3. The claimant before the Arbitrator is Respondent no.2/UCO Bank. The statement of claim which has been filed and placed on record before this court, indicates that there are two respondents in the action filed before the Arbitrator. The first respondent, is the Union of India which is, sued through the Ministry of Textiles, Govt. of India, while the second respondent is an entity by the name of Sita Ram Mills Limited (in short SRML).

3.1 In order to appreciate the objection taken on the learned Arbitrator's jurisdiction, it would be important to examine the broad framework of the Statement Of Claim filed by Respondent no.2/UCO Bank. The essential ingredient of the Statement of Claim are as follows:-

3.2 SRML was nationalized w.e.f. 01.04.1994 under the Textile Undertakings (Nationalization), Act, 1995 (in short Nationalization Act); that prior to the take over of the management of SRML, a sum of Rs.11,70,39,000/- became due and payable by SRML to Respondent no.2/UCO Bank; post the take over of management of SRML by the Petitioner i.e., the National Textile Company Ltd. (in short NTC) under the Textile Management Act, 1984 (in short TM Act), Respondent no.1/ Union

of India (in short UOI) issued a guarantee for a sum of Rs.1,73,00,000/- in favour of Respondent no.2/UCO Bank: since the Petitioner / NTC did not pay the sum to Respondent no.2/UCO Bank, a suit was filed by Respondent no.2/UCO Bank being : Suit No.4489/1996 in the Bombay High Court, on 21.11.1996, for recovery of a sum of Rs.3,19,09,000/-; as the Petitioner was declared a sick industrial company under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 (in short SICA), the proceedings in the suit filed against the Petitioner / NTC were stayed; in terms of the provisions of the Nationalization Act the properties of SRML vested with the Government and therefore, in terms of the said Act, claims pertaining to pre and post takeover in terms of the said Act were required to be lodged with the Commissioner of Payment (in short COP) in terms of the date specified, as per the notification issued in that behalf; Respondent no.2/UCO Bank submitted its claim with COP on 17.01.2002, which was registered, after an initial hesitation, on 04.07.2005; in pursuance of the said claim an affidavit of proof of claim dated 13.07.2005 was filed, ***wherein a sum of Rs.1,05,35,86,783.47 was claimed towards pre and post take over liability under the Nationalization Act***; the COP vide award dated 13.03.2006 allowed a part of the claim under Category 1 of the Nationalization Act to the tune of Rs.70,23,025/- towards principal; the claim of Rs.1,18,80,098/- was relegated to Category II(b) being an outstanding liability against unserviced interest; the balance claim in the sum of Rs.103,46,83,660.47 towards interest beyond appointed date, was rejected; the claimant received a sum of Rs.70,23,025/- by way of a cheque dated 20.03.2006; by a subsequent award dated 28.03.2007 a further sum equivalent to Rs.89,59,609/- was awarded by the COP towards pending

liability of interest till the appointed date; the said sum was received by the claimant vide cheque dated 30.03.2007; therefore, in ***all Respondent no.2/UCO Bank has received a total sum of Rs.1,59,82,634/- against the total claim of Rs.1,05,35,86,783.47***; Respondent no.2/UCO Bank lodged its request for initiation of arbitration with Respondent no.1/UOI vide communication dated 30.08.2004.

3.3 It is in the background of the aforementioned assertions made in the statement of claim by Respondent no.2/UCO Bank that it sought the recovery of a balance sum of Rs.103,76,04,149.47 from Respondent no.1/UOI and SRML jointly and severally with further interest @ 16.5% p.a. with quarterly rests from 01.01.2002 till the date of payment and / or realization.

4. The Petitioner/NTC in its reply sought to take the following broad defences :-

- (i). it is not a party to the Statement of Claim filed by Respondent no.2/UCO Bank, therefore, no notice could have been issued to the Petitioner / NTC nor could have any liability been foisted on it;
- (ii). the details of guarantee furnished by Respondent no.1/UOI have not been set out in the Statement of Claim;
- (iii). there is non-disclosure of the fact that, the suit filed in the Bombay High Court was transferred to the Debt Recovery Tribunal (in short DRT), which adjourned the same sine *die* vide order dated 16.04.2002, on account of proceedings qua Petitioner/NTC pending under the provisions of SICA. To be noted, this application was admittedly filed by the petitioner before the DRT, on the ground, as per their own averment, its application for

revival was pending before the Board of Industrial and Financial Reconstruction (in short BIFR);

(iv). Petitioner / NTC was not a party before the COP;

(v). the claim preferred (before the Arbitrator) was subject matter of adjudication before the COP;

(vi). it is denied that SRML was nationalized. It is stated that only a textile undertaking: “Sita Ram Mill”, belonging to SRML was nationalized;

(vii) SRML, is an independent entity under the Companies Act, 1956, which continues to exist. The Petitioner / NTC is in no way concerned with the debts of SRML under the provisions of the Nationalization Act;

(viii) that w.e.f. 18.10.1983, under an ordinance titled: “Textile Undertaking (Taking Over of Management) Ordinance, 1983 (in short the 1983 Ordinance), the Central Government took over the management of Sita Ram Mills as against SRML. Under the 1983 Ordinance, the Central Government appointed the Petitioner / NTC as the custodian of the said Mill. The ordinance was replaced by the TM Act of 1983;

(ix). Sita Ram Mills was nationalized under the Nationalization Act w.e.f. 01.04.1994 and therefore, liabilities pertaining to the period prior to 01.04.1994 were those of the erstwhile owners and could not be foisted on the Petitioner/NTC;

5. In the rejoinder filed by SRML, the contentions raised, (apart from the usual rebuttal) specifically dealt with and brought forth the following aspects:-

(i). the *National Textile Corporation (South), Maharashtra* was appointed as an “*additional custodian*” to assist the Petitioner / NTC vide order dated 19.10.1983. The Board of the Directors of the Petitioner / NTC

(which was appointed as a custodian), at their meeting of 25.10.1983, passed a resolution which inter alia resolved as follows :-

“...To borrow or raise or secure the payment of any money from any Bank or financial institution or any other source except various Bank limits required for running of mills and suppliers, credit for supplies to be made to the textile undertakings in due course”.

In pursuance of the said board meeting, the additional custodian has with the prior approval of the custodian requested the Claimant to grant working capital facility for the said textile undertaking by way of Cash Credit and Discount/Purchase of bills / cheques to the extent of Rs.142 Lakhs on the hypothecation of the whole of the stocks of raw materials, stocks in process, finished goods, stores, spares and present and future debts and other assets presently with the said Unit (but excluding stocks of raw materials, finished goods, dyes and chemicals and spares and book-debts which were already hypothecated and pledged to the Bank on the date of take-over of the management of the textile undertaking of the said Company) and the Bank agreed to accede to the said request on condition that the said loans facilities shall be guaranteed by the President of India...
(emphasis supplied)

(ii). Based on the above, it claimed that the additional custodian i.e., National Textile Corporation (South) Maharashtra which was operating in consonance with the resolution passed by the Petitioner / NTC, borrowed monies from Respondent no.2/the claimant.

(iii). The arbitration proceedings were initiated at a time when COP had refused to entertain the entire claim of Respondent no.2/UCO Bank. However, since the COP, made payment to the extent of Rs.1,59,82,634/-, the claim is maintained for the balance sum of Rs.105,35,86,783.47, which pertains to dues qua various credit facilities granted in the ***pre / post takeover period***.

(iv). The Arbitrator by its notice of 17.10.2011 has made Petitioner / NTC a party in addition to Respondent no.2/UCO Bank.

(v). *Since, the petitioner has taken over Sita Ram Mill, it is liable to pay the outstanding dues of Respondent no.2/UCO Bank. The contention that the petitioner is not concerned with the debts owned by SRML under the provisions of the Nationalization Act, is erroneous. Post the Nationalization Act i.e., w.e.f. 01.04.1994, the Petitioner / NTC having taken over Sita Ram Mill, it is liable for payment of outstanding dues of Respondent no.2/UCO Bank.*

(vi). Since, proceedings before the DRT are adjourned *sine die*, without prejudice to the rights of Respondent no.2/UCO Bank, it is entitled to pursue the arbitration route.

6. It appears that the Petitioner/NTC thereafter moved an application on 17.02.2012, calling upon the Arbitrator to decide the issue of maintainability of the arbitral proceedings as a preliminary issue and thereupon, recall the impugned arbitration notice dated 17.10.2011.

6.1 It is important to note that this application was premised on the fact that the Supreme Court vide judgment rendered on 17.02.2011 in the case of ***Electronics Corporation of India Ltd. Vs. Union of India and Ors. (2011) 3 SCC 404*** having done away with the mechanism of the Committee on Disputes (in short COD), the present arbitral process should not continue any further as the earlier judgments of the Supreme Court, which are compenditiously referred to as the **ONGC** cases, stand overruled. The said judgments being :

(i). ***Oil and natural Gas Commission vs CCE (ONGC-II) 1995 Supp (4) SCC 541;***

- (ii). *Oil and Natural Gas Commission vs CCE (ONGC-III) (2004) 6 SCC 437*; and
- (iii). *Oil and Natural Gas Commission vs City & Industrial Development Corporation Maharashtra Ltd. (2007) 7 SCC 39.*

6.2 In the application of 17.2.2012, it is further averred that since, the process is not based on any “statute” or “consent” but on the basis of the mandate of the court which stood withdrawn on 17.02.2011, the present proceedings which were initiated by notice dated 17.10.2011 are without jurisdiction and therefore, should be terminated. It was further submitted that proceedings before the Arbitrator are governed by the Arbitration and Conciliation Act, 1996 which requires the existence of a written arbitral agreement, as the basic pre-requisite for commencement of an arbitral process. A reference was also made to section 28 of the Indian Contract Act, 1872 and the right to seek access by way of judicial review.

6.3 A reply was filed to the same by Respondent no.2/UCO BANK, which was followed by a rejoinder by the Petitioner/NTC.

7. The learned Arbitrator on her part vide notice dated 28.06.2012, indicated that she was inclined to decide all issues simultaneously and publish one single award in that behalf. The learned Arbitrator indicated that this procedure was being followed to save time and to avoid avoidable delay in adjudication. The learned Arbitrator has thus fixed three continuous days, out of Delhi, in Mumbai for hearing the matter. The dates given by the learned Arbitrator are 18th to 20th December, 2012.

8. On the very first date, in the present proceedings, it was indicated that the question revolved around the Constitution of the PMA. Thus, Union of India was directed to assist in the matter. The perusal of material placed

before me seems to suggest that, PMA was constituted by the decision of the Cabinet Secretariat of the Govt. of India as reflected in its Office Memorandum (OM) dated 22.01.2004. It will be noticed that, though undoubtedly, the COD was formed based on the ONGC judgments, which have been reversed by the Supreme Court by its own judgment in the case of Electronics Corporation of India Ltd. (supra); it did not comment or deal with Constitution of PMA.

8.1 The judgment in the Electronics Corporation of India Ltd. (supra) undoubtedly, even according to the petitioner, does not deal with the mechanism of PMA. The PMA, as indicated above by me, was constituted by virtue of an office memorandum dated 22.01.2004 issued by the Govt. of India, Ministry of Heavy Industries and Public Enterprises, Department of Public Enterprises. It is, therefore, in my view not a mechanism which stands effaced by virtue of dissolution of the COD. This is made clear, on a perusal of yet another OM dated 01.09.2011, issued by the Cabinet Secretariat of the Govt. of India which supersedes the provision in the OM, which required the public enterprises to approach the COD before approaching courts or Tribunals. The OM of 01.09.2011 does not envisage the dissolution of PMA. All that, it does is that, Government Departments and Public Enterprises qua disputes concerning them would not be required to approach the COD, if they wish to approach the PMA. The supersession of OM dated 22.01.2004 by OM dated 01.09.2011, is only to that limited extent and no more.

8.2 It cannot be disputed that both the Petitioner/ NTC and Respondent no.2/UCO Bank are covered under the OM dated 22.01.2004; the Petitioner being a Central Public Sector Enterprise, while Respondent No.2/UCO Bank

is a Nationalised Bank. If that is so, then no consent is required for initiation of arbitration proceedings under the PMA mechanism.

9. The other issue qua jurisdiction which is raised: that the petitioner / NTC is not responsible for the debts owed by SRML, as it is not a party to the claim lodged with the learned Arbitrator or on the ground that the debts, if any, owed to respondent no.2/UCO bank are owed by SRML and not the Petitioner / NTC is, according to me, a mixed question of fact and law, and thus, cannot be determined without looking into various factual and legal aspects which would include interpretation of the Nationalization Act and the TM Act. This is precisely, the reason that I have set out the framework of the claim made by Respondent no.2/UCO Bank, in the foregoing paragraphs, as also, the reply and rejoinder filed thereafter; to bring to fore the fact that various issues emerge which require consideration by the learned Arbitrator even to come to the conclusion: as to whether she has the jurisdiction to deal with the matter, as contended by the Petitioner / NTC.

9.1 To cite one example, SRML contends the National Textile Corporation (South) Maharashtra was appointed an additional custodian to assist the Petitioner / NTC vide order dated 19.10.1983; whereupon the Board of Directors of the Petitioner / NTC passed a resolution dated 25.10.1983 – based on which, it sought additional working capital facility “vis-à-vis [the] textile undertaking” from Respondent no.2/UCO Bank with approval of the Custodian i.e., petitioner / NTC. Among, several issues which would arise are:-

- (i). Do all dues claimed, pertain to pre or post take over or, a bit of both?
- (ii). Did the petitioner / NTC avail of any credit facility in respect of textile undertaking taken over by it?

(iii). If the Petitioner / NTC was not responsible for the debts owned by SRML, why did it move the DRT to seek stay of proceedings in the DRT based on the fact that proceeding qua itself were pending before SICA. The contents of the application and order passed by DRT, will require scrutiny. To be noted, the DRT did not stay the proceedings only qua the Petitioner /NTC but adjourned it *sine die*.

10. Though, M. Ghose in his submissions before me contended that provisions of the Arbitration and Conciliation Act, 1996 (1996 Act) were not applicable as they are sought to be excluded under the PMA mechanism, there is a liberal reference to the provision contained in the 1996 Act in the Petitioner / NTC's application dated 17.02.2012, which seeks decision on the preliminary issue of jurisdiction.

10.1 I would therefore, take it that the 1996 Act has no application. Since the PMA mechanism itself excludes its applicability; even so, principles analogous to those evolved by courts under the 1996 Act, would have me hold that, where a party approaches an Arbitrator, without the intervention of the Court, the Arbitrator is empowered to ascertain both the existence and validity of the Arbitration agreement. The principle is evolved to ensure quick and effective adjudication of disputes by the Arbitrator. The observations of the Supreme Court, in the case of, ***National Insurance Company Ltd. Vs. Bhogra Polyfab Private Limited (2009) 1 SCC 267***, which in turn are based on the Constitution Bench judgment in the case of ***SBP & Co. vs Patel Engineering Ltd. (2005) 8 SCC 618*** deal with this aspect quite clearly, in the context of section 16 of the 1996 Act, which relates to the power of the Arbitrator to rule on his own jurisdiction. The

observation being apposite are extracted hereinbelow for the sake of convenience:-

“...20. This Court in *SBP & Co.* also examined the 'competence' of the arbitral tribunal to rule upon its own jurisdiction and about the existence of the arbitration clause, when the Chief Justice or his designate had appointed the Arbitral Tribunal under Section 11 of the Act, after deciding upon such jurisdictional issue. This Court held: (SCC pp. 644 & 649, paras 12 & 20)

"12. We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the Arbitral Tribunal.....

20. Section 16 is said to be the recognition of the principle of *Kompetenz - Kompetenz*. The fact that the Arbitral Tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can and possibly, ought to decide them. This can happen when the parties have gone to the Arbitral Tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these Sections, before a reference is made, Section 16 cannot be held to empower the Arbitral Tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the arbitral tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act, are incapable of being reopened before the Arbitral Tribunal."

21. It is thus clear that when a contract contains an arbitration clause and any dispute in respect of the said contract is referred to arbitration without the intervention of the court, the Arbitral Tribunal can decide the following questions affecting its jurisdiction: (a) whether there is an arbitration agreement; (b) whether the arbitration agreement is valid; (c) whether the contract in which the arbitration clause is found is null and void and if so whether the invalidity extends to the Arbitration clause also. It follows therefore that if the respondent before the Arbitral Tribunal contends that the contract has been discharged by reason of the claimant accepting payment made by the respondent in full and final settlement, and if the claimant counters it by contending that the discharge voucher was extracted from him by practicing fraud, undue influence, or coercion, the Arbitral Tribunal will have to decide whether the discharge of contract was vitiated by any circumstance which rendered the discharge voidable at the instance of the claimant. If the Arbitral Tribunal comes to the conclusion that there was a valid discharge by voluntary execution of a discharge voucher, it will refuse to examine the claim on merits, and reject the claim as not maintainable. On the other hand, if the Arbitral Tribunal comes to the conclusion that such discharge of contract was vitiated by any circumstance which rendered it void, it will ignore the same and proceed to decide the claim on merits...”

(emphasis supplied)

10.3 The only distinction between the case cited above and the instant case is that the PMA mechanism is not based on a contract but on an executive order which adverts to attributes of entities, for it get triggered. Apart, from that distinction, the principle, in my view, should squarely apply. There is no challenge to the PMA mechanism before me, except to say it has dissolved. The Union of India i.e., respondent No.1 has taken no such stand before me.

11. The argument that Petitioner / NTC is not party to the proceedings is dependent on whether or not the Petitioner/ NTC is the owner of SRML. The Arbitrator has thought it fit to issue notice to the petitioner/ NTC. In the given facts, this issue cannot be examined by learned Arbitrator, in a summary manner, as is sought to be contended by Mr. Ghose, without appreciating the full contours of the claim set up by Respondent no.2/UCO Bank.

11.1 The interesting aspect is that the defence of the Petitioner/ NTC qua the claim set up by Respondent no.2/UCO Bank, is based mainly on one particular fact, which is that, it is not liable for the debts due. There is no defence on merits, therefore, bifurcation of issues would only delay the proceedings before the Arbitrator.

12. In my view, therefore, for this court to interdict the proceedings before the learned Arbitrator, at this stage, under Article 226 of the Constitution of India would result in delaying the adjudication of the disputes. In my opinion, the learned Arbitrator is right in holding that, to avoid delay, in a matter, all issues need to be decided together. As discussed above, the issue of jurisdiction, which is being raised by the petitioner / NTC, is dependent on facts and, the evidence which the parties may lead. Therefore, the sensible course would be the one adopted by the learned Arbitrator, which is, to decide the all issues at one-go.

13. For the reasons stated hereinabove, the writ petition is dismissed.

RAJIV SHAKDHER, J

NOVEMBER 22, 2012

yg