

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO. 75 OF 2016

Apcotex Industries Limited	]	Applicant
Vs.		
M/s. Unisol Corporation	]	Respondent

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Mr. Swanand Ganoo a/w Ms. Anita Irani i/b Kanga & Co., for petitioner.

Mr. Devasis Mitra a/w Mr. Kewal Sanghvi i/b Legal Assistance, for respondent.

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CORAM : R.G. KETKAR, J.

DATE : 7th JULY, 2017.

P.C.

Heard Mr. Ganoo, learned Counsel for the petitioner and Mr. Mitra, learned Counsel for the respondent at length. Rule. Mr. Mitra waives service. Having regard to the nature of the controversy involved in this Petition and by consent of the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

2. By this Petition under Section 11 of the Arbitration and Conciliation Act, 1996 [for short 'Act'], the petitioner has prayed for appointment of a fit and proper person to act as a sole arbitrator to adjudicate claims of the petitioner against the

respondent and in the alternative, has suggested appointment of Mr. Snehal K. Shah, Advocate of this Court as nominee of the petitioner. The relevant and material facts, giving rise to the present petition, briefly stated, are as under.

3. Agency agreement dated 21st April, 2012 was entered into between Omnova Solutions India Private Limited and respondent M/s. Unisol Corporation. As per the agreement dated 21st April, 2012, respondent was appointed as an agent of Omnova Solutions India Private Limited. Clause 3 thereof recited that agreement will be effective from 21st April, 2012 and to continue the arrangements for a term of three years renewable with mutual consent and upon the terms and conditions hereinafter appear. Clause 40 provided for referring all disputes and differences which may arise between the parties to two arbitrators, one to be appointed by each party to the disputes. Place of arbitration is fixed at Mumbai and is governed by provisions of the Act or statutory modification or re-enactment thereof for the time being in force. Clause 41 recited that all the disputes between the parties shall be subject to the jurisdiction of a competent Court at Mumbai.

4. On 5th March, 2016, Deputy Registrar of Companies issued Certificate of Incorporation pursuant to change of name as per Rule-29 of the Companies [Incorporation] Rules, 2014 certifying that name of Company 'Omnova Solutions India Private Limited' has been changed to 'Apcotex Solutions India Private

Limited' with effect from the date of the certificate. Apcotex Solutions India Private Limited instituted Company Petition Scheme for amalgamation of Apcotex Solutions India Private Limited with Apcotex Industries Limited[petitioner herein].

5. Omnova Solutions India Private Limited addressed a letter dated 1st September, 2016 to the respondent. It was set out therein:

“In connection with audit of our books of accounts as on 31.03.2015, our auditors desire to have debit balance for Rs. 4,16,20,663.00 is receivable from you. You are requested to confirm this balance. If, the balance does not match with your books, you are requested to give the complete details as per your books so that we can reconcile the same at the earliest”.

Respondent was requested to sign on the duplicate copy of the letter attached therewith and send the same immediately to it.

On 14th September, 2015, respondent confirmed that balance mentioned above as on 31st March, 2015 is correct.

6. On 5th February, 2016, Omnova Solutions India Private Limited addressed a letter to the respondent setting out therein:

“Our records on Feb, 05, 2016 showed Rs. 36,920,663/- as receivable from you”.

Respondent was requested to confirm that they owe that amount. On 18th March, 2016, respondent confirmed the said fact.

7. On 31st March, 2016, Apcotex Solutions India Private

Limited issued notice to the respondent calling upon it to make payment of Rs. 3,69,20,663/- along with interest @ 24% per annum within 14 days on receipt of the notice, failing which, Apcotex Solutions India Private Limited will be constrained to initiate legal proceedings.

8. On 16th April, 2016, respondent gave reply, inter alia, referring to fresh agreement dated 21st April, 2012 entered into between Omnovo Solutions India Private Limited and the respondent on 21st April, 2012 which was effective for a period of three years as also further contending that,

“There was not a single communication from Omnovo Solutions Private Limited that the business was taken over by Apcotex Solutions India Private Limited. Resolution to that effect was also never communicated. Nor any agreement was ever entered by and between Apcotex Solutions India Private Limited and Unisol Corporation. As such allegations as levelled against Unisol Corporation do not and could not or never arise at all. As such, the aforesaid letter under reference caused by Mr. Rajesh Desai, Learned Advocate of his client(s) Apcotex Solutions India Private Limited is void ab-initio”.

An amount of Rs. 3,00,000/- was transmitted by way of RTGS to Omnovo Solutions India Private Limited vide cheque dated 5th April, 2016 from Yes Bank, Kolkata.

9. On 9th June, 2016, Apcotex Solutions India Private Limited issued notice to the respondent suggesting resolution of disputes in a cost effective manner by appointing a sole arbitrator. If appointment of sole arbitrator is acceptable to the respondent, name of Advocate Mr. Snehal K. Shah as a sole arbitrator was

suggested. In case, appointment of sole arbitrator was not acceptable to the respondent, respondent was requested to treat Mr. Snehal K. Shah, Advocate as its nominated arbitrator and was requested to nominate their arbitrator so that two arbitrators appointed could appoint a presiding arbitrator. By e-mail dated 1st July, 2016, respondent acknowledged receipt of letter dated 9th June, 2016 and noted the contents therein. It was further set out therein:

“regarding the on going issue of clearance of payment I would like to inform you that I am fully aware of the positions and facts as I have given the balance confirmation. I would like to state that I would clear o/s for which I am trying to dispose of my property which would gather amount payable to you. The process is on and would take 90-120 days to complete the transaction and clear o/s fastest possible. In the meantime, I would try & deposit any extra fund which would be available to me, which would be intimated to you in advance. Considering relationship with the erstwhile organization, I would thank you for this small accommodation”

10. On 30th July, 2016, respondent remitted amount of Rs. 5,00,000/- by way of RTGS to Apcotex Solutions India Private Limited. Copy whereof was sent to A.V. Kumashi, Companies Secretary of Apcotex Solutions India Private Ltd. As respondent has neither concurred with appointment of a sole arbitrator nor nominated their arbitrator, petitioner has instituted this Petition under section 11 of the Act.

11. In support of this Petition, Mr. Ganoo submitted that respondents have admitted their liability as also confirmed outstanding amount payable by them. He submitted that Omnovo Solutions India Private Limited was changed to Apcotex Solutions India Private Limited and to that effect, Deputy Registrar of Companies issued certificate of incorporation on 5th March, 2016. As per the order dated 27th October, 2016 passed by this Court in Company Scheme Petition No. 574 of 2016, Apcotex Solutions India Private Limited was amalgamated with the petitioner Company. He invited my attention to clause 9.1 of the Scheme of Amalgamation of Apcotex Solutions India Private Limited with the petitioner herein. Clause 9.1 provides that all legal proceedings, including arbitration proceedings, of whatsoever nature, by or against Apcotex Solutions pending and/or arising at or after the appointed date, as and from the Effective Date shall not abate or be discontinued or be in any way prejudicially affected by reason of the Scheme. He submitted that petitioner is successor or assigns of Omnovo Solutions India Private Limited and as such is entitled to maintain Petition under section 11 of the Act.

12. Mr. Ganoo submitted that there is arbitration clause i.e Clause No. 40 in the Agency Agreement dated 21st April, 2012. He relied upon Section 16 (1) (a) of the Act to contend that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. He invited my attention to additional affidavit dated 22nd April, 2017 made by Anand V. Kumashi, Director of the petitioner Company as also resolution dated 5th February, 2016 and 10th August, 2016

passed by the petitioner. By resolution dated 5th February, 2016, Mr. A.V. Kumashi is appointed as Director of the petitioner-Company. By resolution dated 10th August, 2016, A.V. Kumashi is authorized to represent company in legal proceedings including High Courts. In any case, under Order-29, Rule-1 of the Code of Civil Procedure, 1908, Mr. A.V. Kumashi being Director of the Company is authorized to sign and verify the Petition on behalf of the petitioner-Company. He, therefore, submitted that this Court may be pleased to appoint Mr. Snehal K. Shah as nominee of the petitioner and direct the respondent to nominate their arbitrator within a particular time, failing which this Court may be pleased to appoint arbitrator on behalf of the respondent Company and two arbitrators in turn to appoint a presiding arbitrator.

13. On the other hand, Mr. Mitra submitted that Petition at the instance of Apcotex Industries Limited is not maintainable. He submitted that Section 2 (h) of the Act defines expression 'party' to mean a party to an arbitration agreement. Section 7 deals with arbitration agreement. Section 7 (1) lays down that in this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. He submitted that basically Agency Agreement dated 21st April, 2012 was entered into by and between Omnova Solutions India Private Limited on one part and respondent on the other part. Neither Apcotex Solutions India Private Limited nor petitioner Apcotex Industries Limited is party to the agreement. He submitted that Apcotex Solutions India

Private Limited as also petitioner are totally new Companies having separate share capital and different Directors. Their policies are also different. Their formulae are also different. He further submitted that there is no privity of contract between Apcotex Industries Limited-petitioner herein and the respondent. He further submitted that Agency Agreement was effective from 21st April, 2012 and continued for a period of three years. In the present case, agreement was not renewed and by efflux of time, it came to an end on 20th April, 2015. Even, on this count, Petition is not maintainable.

14. Mr. Mitra invited my attention to scheme of amalgamation of Apcotex Solutions India Private Limited with petitioner, Apcotex Industries Limited and in particular clauses 12.1, 12.4, 14.1, 14.3 and 15. He further submitted that even Petition was verified by Mr. A.V. Kumashi. No resolution authorizing Mr. Kumashi is produced on record. In fact, respondent is no way concerned with Mr. Kumashi. Mr. Mitra relied upon decision of this Court in case of **Rajesh Construction Co. Ltd Vs. Ravilal Nanji**, LEX (BOM) 2008 10 176 and in particular paragraphs 21 and 32 thereof.

15. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused material on record. As noted earlier, Agency Agreement was entered into between Omnova Solutions India Private Limited as principal [which expression shall unless repugnant to the context or meaning thereof be deemed to mean and include its successors and

assigns of one part. Agreement became effective from 21st April, 2012 and the term of the agreement was three years renewable with mutual consent and upon the terms and conditions appearing in that agreement. Clause 40 deals with referring disputes to arbitration and reads thus:

“All disputes and differences which may arise between the parties hereto touching these presents or the construction or application thereof or of any clause or thing therein contained or as to any act, deed or omission of either of the parties hereto or the rights, duties or liabilities of any party under these presents, shall be referred to two arbitrators one to be appointed by each party to the disputes. The arbitration proceedings shall be at Mumbai and be subject to the provisions of the Arbitration and Reconciliation Act, 1996 or statutory modification or re-enactment thereof for the time being in force”.

16. On 5th March, 2016, Deputy Registrar of the Companies issued certificate of incorporation pursuant to change of name from 'Omnova Solutions India Private Limited' to 'Apcotex Solutions India Private Limited' and the said was effective from the date of the certificate. It has come on record that Company Scheme Petition No. 574 of 2016 was filed by Apcotex Solutions India Private Limited proposing Scheme of amalgamation with Apcotex Industries Limited, petitioner herein. Clause 9.1 reads thus:

“9.1. All legal proceedings, including proceedings, of whatsoever nature, by or against Apcotex Solutions

pending and/or arising at or after the Appointed Date, as and from the Effective Date shall not abate or be discontinued or be in any way prejudicially affected by reason of the Scheme or by anything contained in this Scheme but shall be continued and enforced by or against Apcotex in the manner and to the same extent as would or might have been continued and enforced by or against Apcotex Solutions”.

17. A perusal of the record also indicates that by communication dated 1st September, 2015, respondent confirmed that an amount of Rs. 4,16,20,663.20 is due and payable by the respondent to Omnova Solutions India Pvt. Ltd. By communication dated 5th February, 2016, respondent confirmed that an amount of Rs. 3,69,20,663/- is due and payable to Omnova Solutions India Pvt. Ltd.

18. Apcotex Solutions India Private Limited called upon the respondent to pay amount of Rs. 3,6,920,663.00 along with interest @ 24% per annum. This was replied by the respondent on 16th April, 2016. A perusal of reply shows that respondent transmitted amount of Rs. 3,00,000/- to Omnova Solutions Private Limited vide cheque on 5th April, 2016. On 9th June, 2016, on behalf of Apcotex Solution India Pvt. Ltd, respondent was called upon to nominate arbitrator. By that letter, Mr. Snehal K. Shah, Advocate was nominated by Apcotex Solution India Pvt. Ltd. This was replied by the respondent by e-mail dated 8th July, 2016 and in fact, time of 90-120 days was sought for paying outstanding

dues. A perusal of this e-mail shows that it was sent by the respondent to Mr. A.V. Kumashi. On 8th August, 2016, once again request was made for appointing Mr. Snehal K. Shah as a sole arbitrator. It was further informed that in the event of failure of the respondent, appropriate legal proceedings for appointment of arbitrator to decide the disputes and differences would be initiated. On 30th July, 2016, respondent remitted an amount of Rs. 5,00,000/- to Apcotex Industries Limited. In view thereof, it is now too late in the day to the respondent to contend that Petition at the instance of Apcotex Industries Limited is not maintainable. There is no explanation as to why respondent has transmitted amount of Rs. 5,00,000/- to Apcotex Solutions India Private Limited with whom there is no privity of contract as per the respondent's contention. In my opinion, having regard to the certificate dated 5th March, 2016, namely certificate of incorporation for change of name as also order dated 27th October, 2016 passed by learned Judge of this Court in Company Scheme Petition No. 574 of 2016 and more particularly, clause 9.1, I do not find any merit in the submission of Mr. Mitra that Petition at the instance of M/s. Apcotex Industries Limited is not maintainable. Mr. Mitra relied on decision of this Court in case of **Rajesh Construction Co. Ltd.** [supra] and in particular paragraph 21 thereof.

19. In that case, Division Bench on facts found that there was no valid arbitration agreement duly executed by the parties. In my opinion, the said decision is not applicable in the facts of the present case. Hence, Petition succeeds. Mr. Snehal K. Shah is

appointed as nominee of the petitioner. Respondent shall appoint their nominee within four weeks from today, failing which, Mr. N.P. Engineer, Advocate of this Court shall stand appointed as nominee of the respondent. Two arbitrators in turn will appoint a Presiding Arbitrator. Rule is made absolute in above terms with no order as to costs. Parties to act upon authenticated copy of this order.

[R.G. KETKAR, J.]