

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.06.2017

PRNOUNCED ON : 23.08.2017

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

O.P. No.103 of 2017

Vasanth Guruvayur Balakrishnan
having residence at
27/11, 1st Seaward Road,
Chennai 600 041.

.. Petitioner

-VS-

1.Velankani Software Private Limited
43, Electronics City, Phase-II,
Hosur Road, Bangalore 560 100.

2.Velakani Communications Technologies Inc.
80, Cottontail Lane, Suite 420
Somerset, NJ 08873 USA.

.. Respondents

Prayer: Petition filed under Section 11(5) of the Arbitration & Conciliation Act, 1996 to appoint a sole Arbitrator to adjudicate upon the disputes between the petitioner and the respondents pursuant to Employment Agreement dated 09.07.2014 and to direct the respondents to pay costs.

For Petitioners : Mr.T.K.Baskar

For Respondents : Mr.Arunkumar
for Mr.Janavi Raghauraman
for Crest Law Partners

ORDER

This petition has been filed seeking to appoint a sole Arbitrator to adjudicate upon the disputes that have admittedly arisen as between the parties in terms of employment agreement dated 09.07.2014.

2. Heard Mr.T.K.Baskar, learned counsel appearing on behalf of the petitioner and Mr.Arunkumar appearing for the respondents.

3. The parties in this Original Petition had entered into an employment agreement on 09.07.2014. The terms of agreement have been adverted to in extenso by the parties. The respondent was appointed as a Chief Operating Officer of the petitioner company and in terms of article 14 thereof, will report to the Chief Executive Officer. The scope of his duties and responsibilities were set out in Annexure-I to the Agreement. The Agreement provides for remuneration in terms of Clause-II thereto in the following terms:

'In consideration of and subject to the due performance of the Employee's services and obligations, the Employee shall be paid remuneration by way of cash compensation from the Company as detailed in Annexure 2A to this Agreement and stock options in the Parent Company as detailed in Annexure 2B and an Incentive Stock Option Agreement ("ISO Agreement") to be executed in that behalf.'

4. In reply to notice dated 28.10.2016, the respondent replied in detail vide letter dated 16.11.2016, denying all averments contained in the legal notice issued by the petitioner. On account of the dispute that had admittedly arisen inter se the parties, the arbitration clause was invoked on 22.12.2016 by the petitioner which was also objected to by the respondents vide letter dated 06.01.2017 only with respect to the person nominated by the petitioner as an arbitrator. However, the factum of disputes *inter se* is admitted.

5. The arbitration clause governing the parties is extracted below:

'Governing Law and Dispute Resolution: The laws of India shall govern the Agreement, Disputes shall be referred to binding arbitration under the Arbitration and Conciliation Act, 1996 and an independent arbitrator shall be mutually appointed by the Company and the Employee to conduct such arbitration. The venue of arbitration shall be Bangalore. The language of arbitration shall be English. Provided that the Company or Employee may apply to any court of competent jurisdiction to restrain the other Party from committing a breach of this Agreement.'

6. The respondent has filed a counter affidavit. The main objection raised is that the proposed arbitration would be an international commercial arbitration, within the meaning of that expression under Section 2(f) of the Arbitration & Conciliation Act, 1996 (in short, the Act), that would lie only before the Hon'ble

Supreme Court of India under Section 11(g) of the Act and not before this Court. This argument is based on the premise that the dispute between the parties arises from out of a commercial relationship so as to bring it within the ambit of Section 2(f) of the Act, extracted below:

'International commercial arbitration' means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-

- (i) An individual who is a national of, or habitually resident in, any country other than India; or*
- (ii) A body corporate which is incorporated in any country other than India; or*
- (iii) A company or an association or a body of individuals whose central management and control is exercised in any country other than India; or*
- (iv) The Government of a foreign country;*

7. The response of the petitioner to the objection raised is that the contract between the parties is a pure contract of employment that cannot, under any circumstances, be considered to be a commercial agreement as understood under Section 2(f) of the Act. Mr. T. K. Baskar would place reliance on various documents in this regard:

- (i) The Analytical Commentary on draft text of a Model Law on International Commercial Arbitration [Report of the Secretary General] - issued by the United Nations General Assembly as document A/CN.9.264, dated 25.03.1985. Paragraph 18 of the

commentary no doubt reflects legislative intent to construe the term 'commercial' in a wide manner. However, specific exclusions are labour or employment disputes, ordinary claims and consumer claims.

(ii) The 'Uncitral Model Law on International Commercial Arbitration 1985, that defines the term 'commercial' thus:

'The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationship of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency: factoring : leasing: construction of works: consulting: engineering: licensing: investment: financing: leasing: construction of works: consulting: engineering: licensing: investment: financing: banking: insurance: exploitation agreement or concession: joint venture and other forms of industrial or business co-operation: carriage of goods or passengers by air, sea, rail or road.'

The definition, an inclusive one, brings within its scope various relationships of a commercial nature whether contractual or not and concludes by including joint ventures and all other forms of industrial or business cooperation, carriage of goods by air, sea, rail or road. The last limb thereof, 'all other forms of industrial or business co-operation' should, according to him, be read *ejusdem generis* with the earlier part. Seen in this light an employment contract would stand

outside the ambit of the term 'commercial matter'.

(iii) The judgement of the Alberta Court of Queen's Bench in *Borrowski V. Heinrich Fiedler Perforiertechnik GmbH*, where Murray J. speaking for the Bench states thus:

'In my opinion, the evidence before this Court does not alter the fact that this was a contract of employment giving rise to the status of master and servant and was not a contract for services to be performed either by an agent or by an independent contractor. This is not the type of relationship which one would consider to be a "commercial" legal relationship or as containing an agreement which one might describe as an "International commercial arbitration agreement'.

(iv) The decision of the House of Lords in the case of *Johnson (AP) vs. Unisys Limited* (2001 UKHL 13), to the same effect as the case cited above.

(v) The decision of the Ontario Supreme Court in *Ross V. Christian & Timbers Inc.* to the effect that labour or employment contracts were not intended to be included in the definition of commercial contracts.

In arriving at this conclusion the Bench relies upon precedent to the same effect.

(vi) Closer home, the judgment of the Supreme Court in *R.M. Investment & trading Co. Pvt. Ltd. vs. Boeing Co. and another* (AIR 1994 SC 1136) wherein, according to learned counsel, the Supreme Court has considered a similar question. The conclusion of

the Court is to the effect that the term 'commercial' should be construed broadly and having regard to the manifold activities which constitute an integral part of international trade today.

8. Both parties will refer to and rely upon the judgement of the Supreme Court in the case of *Comed Chemicals Limited vs. C.N.Ramchand* (Manu/SC/4677/2008) dealing with a similar situation as the one before me now. Comed Chemicals had entered into a Memorandum of Understanding appointing Dr.C.N.Ramchand for the development of products in the field of bio-industry and manufacturing and marketing of the same. The terms between the parties revealed that the services of Mr.Ramchand were engaged for a minimum of eight years as the Director (Technical).

9. On account of disputes that arose between the parties, the company had originally filed an application in terms of Section 11 of the Act before the High Court of Gujarat at Ahmedabad seeking the appointment of an Arbitrator. A stand was taken by the respondent before the Gujarat High Court to the effect that the matter would come within the ambit of Section 2(1)(f) of the Act and accordingly, only an application in terms of Section 11(9) of the Act before the Hon'ble Chief Justice of India would lie. Consequently, the application was withdrawn with leave to move the Hon'ble Chief Justice of India for appropriate orders. However, before the Supreme Court the

respondent took a contra stand stating that no dispute arose out of the legal relationship between him and the company that could be considered as commercial and hence, the application was not maintainable.

10. The Bench, in the aforesaid circumstances and upon consideration of the terms of the Agreement between the parties as also the UNCITRAL Model Law (supra) came to the conclusion that the respondent was not a mere employee or servant of the company. An Arbitrator was thus appointed as sought for by the petitioner.

11. The matter thus turns on the exact legal relationship between the parties. As such, the terms of employment between the parties in the present case, is revealing. The role of the petitioner is that of a Chief Operating Officer who is to report to the Chief Executive Officer of the Company. Annexure 1 of the Employment agreement enumerates the roles and responsibilities of '*an employee*'. The areas of activities are those that would be engaged in by an employee. The remuneration is divided into two components - cash and stock options in the parent company.

12. It is thus clear to me that the agreement between the parties is premised upon the legal relationship of a Master and Servant and as such, the contract is one of employment. In fact, the respondent has, in correspondence with the company, referred to the

amount of 'salary' due to him and as such there appears to have been no doubt in his mind till the filing of counter in the present petition, that he was, in fact, an employee of the petitioner company. I thus hold that clause 2(1)(f) of the Act does not stand attracted. The petition is held to be maintainable.

13. Without prejudice to the stand taken by the respondent in counter, the parties have expressed agreement for appointment of an Arbitrator in order to resolve the disputes speedily.

14. By consent of both parties I thus appoint Mr. Justice S. Venkataraman, Former Judge of Karnataka High Court, No.161, II Block, III Stage, West of Chord Road, Judge's Colony, Basaveshwara Nagar, Bangalore 560 079 as sole Arbitrator to enter upon reference and adjudicate the disputes between the parties. He is requested to endeavour to conclude the proceedings as expeditiously as possible, and within a period of six (6) months from the date of first sitting. He is at liberty to fix his remuneration and schedule of expenses, that shall be borne by both parties equally.

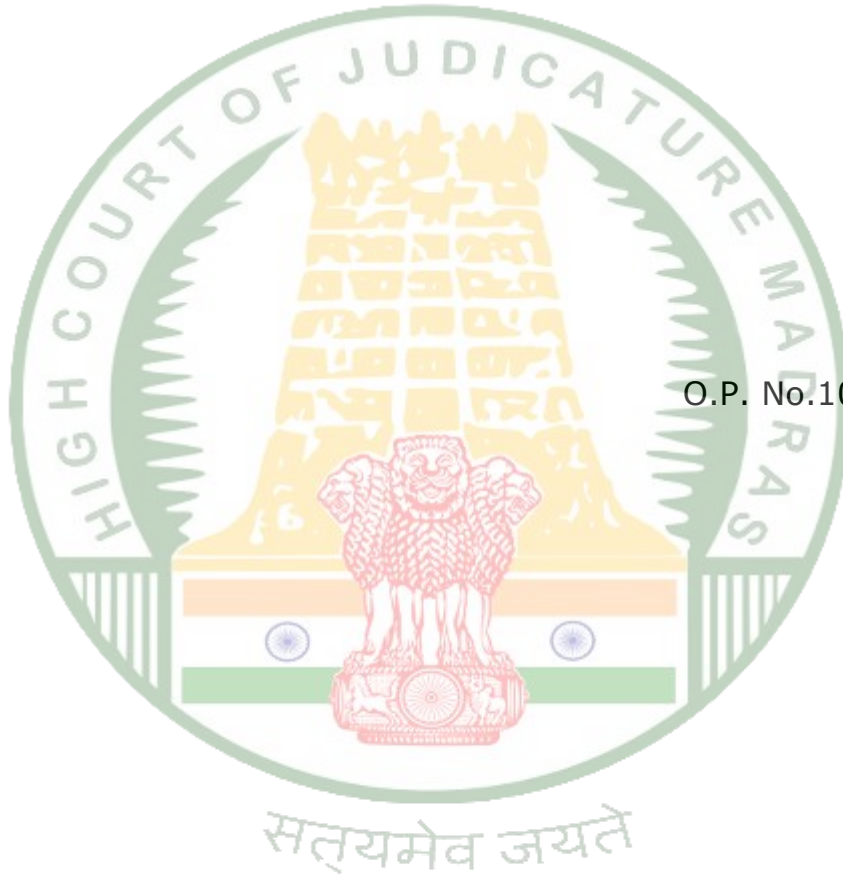
15. The above Original Petition is ordered accordingly with no order as to costs.

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Dr.ANITA SUMANTH, J.

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