

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Present:

The Hon'ble Justice Shekhar B. Saraf

A.P. No. 578 of 2022
Subir Kumar Mukhopadhyay
VS
Kesoram Industries Limited

For the Petitioner : Mr. Gopal Ch. Ghosh, Adv
Mr. Rajkrishna Mondal, Adv.

For the Respondent : Mr. Tridib Bose, Adv.
Mr. Debjyoti Saha, Adv.

Last heard on: April 25, 2023

Judgement on: May 3, 2023

Shekhar B. Saraf J:

1. The petitioner, Mr. Subir Kumar Mukhopadhyay, resides at Flat nos. 1 and 2, second floor, 28/2 Onkarmal Jetia Road, near Nabanna bus stand, P.S. Shibpur, Howrah- 711103.
2. The respondent is a public limited company, Kesoram Industries Limited, having its office at 9/1 R.N. Mukherjee Road, P.S. Hare Street, Kolkata-700001.

Relevant facts

3. The petitioner entered into a written contract of service with Kesoram Industries initially for a period of 1 year for a remuneration of Rs. 5,00,000 (Rupees five lakhs) per month from June 1, 2015 to May 31, 2016. Such time period was later extended from time to time but the terms and condition for the contract remain unchanged, except for the remuneration.
4. The last such extension was granted by Kesoram Industries on April 1, 2019 for the Financial Year 2019-2020 with a consolidated pay of Rs. 7,37,500 (Rupees seven lakhs thirty-seven thousand five hundred) per month. The petitioner concluded his service on July 12, 2019 upon acceptance of his proposal to release him by Kesoram Industries. The release formalities were consequently completed with a promise to remit all the dues including a month's notice pay separately.
5. The petitioner received his remuneration from 1st June 2015 to 20th April 2019 but the remuneration for the months of May, June and July 2019 has fallen in arrears. Kesoram Industries has deducted TDS on the amount payable to the petitioner as reflected in the Form 26AS. The petitioner also had to deposit a sum of Rs. 2,70,000 in total out of his own funds to deposit a sum of Rs. 2,70,000 for GST.

6. For the months for which the petitioner is yet to receive his pay, the petitioner sent several verbal and written requests through e-mail. Ultimately, the petitioner issued a demand notice on 27th August 2021. The respondent's representative replied to such letter on 6th August 2021 stating that the respondent company has undergone demerger and the unit in which he was assigned, that is Birla Tyres, has been demerged.
7. Thereafter on 4th February 2022 another letter was sent to the respondent asking for payment for the arrears due under the contract with the intent to initiate arbitral proceedings if the demand is not met. The respondents' representatives replied on 10th March 2022 denying their liability but did not mention anything about the arbitration clause.
8. Thereafter when the petitioner sought to invoke the arbitration clause, the petitioner found that the sole arbitrator named in the agreement of service was one Mr. Prasun Ghosh who is acting as a legal retainer for Kesoram Industries and also acts as an Advocate on Record in many suits and litigations for Kesoram Industries. With all these facts and circumstances the petitioner again on 24th May 2022 wrote to the respondents' legal representatives with the proposed name of Mr. Anindya Halder as the arbitrator to which they faced opposition and objection vide letter dated 7th June 2022 and it was communicated to

the petitioner that since the companies are now demerged his claims has now shifted to the demerged unit i.e., Birla Tyres.

9. Thereafter, the petitioner has preferred the instant application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') for appointment of an arbitrator.

Rival Submissions

10. Mr. Gopal Chandra Ghosh, counsel appearing on behalf of the petitioner has made the following submissions :-

- a) The petitioner received his remuneration from June 1, 2015 to April 20, 2019 but the remuneration for the months of May, June and July 2019 has fallen in arrears. Kesoram Industries has deducted TDS on the amount payable to the petitioner as reflected in the Form 26AS.
- b) The petitioner concluded his service on July 12, 2019 upon acceptance of the proposal to be released from Kesoram Industries which was communicated by Mr. Goutam Ganguli. The petitioner hereby completed all the formalities for conclusion of his contract for retainer-ship. Thus, his contract was always with Kesoram Industries and it was also terminated by the same entity.

Correspondingly, it has a right to pursue arbitration against the same.

- c) The petitioner was also shocked to know that a claim of Rs. 17,70,000 has been lodged before the Interim Resolution Professional in the name of the petitioner out of which Rs. 16,20,000 has been allowed but the petitioner has no knowledge of such claim and has never lodged any such claim for the Resolution Professional. Later, it was withdrawn and the withdrawal was accepted by the Interim Resolution Professional.

11. Mr. Tridib Bose, counsel appearing on behalf of the respondent has made the following submissions :-

- a) The respondent is no longer a party to the arbitration agreement as pursuant to the scheme of arrangement the tyre business of the respondent has been demerged into a new body corporate being Birla Tyres Limited.
- b) The respondent engaged the petitioner to provide service as a consultant and was deputed to its tyre business which included its unit at Balasore. The petitioner hence was duly engaged to render services to the respondent's tyre business at Balasore i.e., Birla Tyres.

- c) The scheme was approved by NCLT on November 8, 2019 and the certified copy was obtained on December 3, 2019 and the tyre business of the respondent stood demerged and transferred into a separate company from the appointed date. The Learned NCLT was pleased to order that all debts, liabilities, duties and obligations stood transferred and vested without further act or deed into Birla Tyres Limited.
- d) It is evident that the entire tyre business including respondent's unit at Balasore stood transferred along with rights, liabilities and contractual obligations. Henceforth, as on the appointed date January 1, 2019, all employees of the respondent were subsumed into Birla Tyres Limited on the same terms and conditions as they were with the respondent.
- e) The respondent denied the claims of the petitioner and reiterated that by virtue of the scheme, any obligation of the tyre business on and from the appointed date became the obligation of Birla Tyres Limited which was the company liable to pay his dues. The respondent also indicated that the NCLT order dated 8th November 2019 was an order *in rem* and the same was binding on all concerned parties.
- f) Revised list of creditors of the respondent as acquired from the IBBI website shows that the petitioner has duly lodged his claim of

which Rs. 16,20,000 is already admitted. This evidences that the petitioner has admitted to the facts that the purported dues would lie against the demerged Birla Tyres Limited and not the respondent.

- g) The respondent was statutorily obligated to make payments on accounts of TDS arising out of the purported unpaid salary dues of the petitioner, default of which would have attracted legal consequences.
- h) Vide order dated May 5, 2022 Birla Tyres Limited was admitted to CIRP and a moratorium on all legal proceedings under section 14 of the Code was imposed against Birla Tyres Limited.
- i) The petitioner cannot proceed both against the respondent and Birla Tyres Limited at the same time seeking recovery of its purported dues.
- j) It is clear from the series of the communication that there is no chance of amicable settlement and the dues would only be paid by Birla Tyres Limited and not the respondent.

Analysis and Conclusion

12. It is indisputable that the contract of retainer-ship was with Kesoram Industries. During his service, he may have been deputed to work for different divisions, for example, the tyre division, which later became Birla Tyres. However, this did not and does not wipe out the contractual arrangement with the respondent, nor the intention to arbitrate between both the parties, that is, the petitioner and the respondent. The privity of contract between the two is further established by the fact that the TDS for each and every month's remuneration of the petitioner was deducted by the respondent. Additionally, the extension of the petitioner's service and acceptance of his release, all were acted upon by the respondent.
13. The contractual arrangement was not with Birla Tyres, nor has it been shown that he was exclusively an employee of Birla Tyres. The claim, that was submitted by the petitioner before the Interim Resolution Professional administering Birla Tyres, was also withdrawn. Therefore, it is not the case that the petitioner is pursuing its claim before both the entities, Kesoram Industries and Birla Tyres.
14. At this stage, the scope of examination should be confined only to the existence of the arbitration agreement, which did exist between the petitioner and the respondent. In ***Duro Felguera S.A. vs Gangavaram Port Limited (2017) 9 SCC 729***, the Supreme Court held that the

intention of the legislature is evident from reading Section 11(6-A) of the Act and that the court should and need only look into one aspect, which is the existence of an arbitration agreement. In light of the above facts, I am of the view that this dispute must be sent to arbitration.

15. Accordingly, I appoint Mr. Ishaan Saha, Advocate, Mob. No. 9836011990 as the sole arbitrator to resolve the dispute between the parties. The appointment is subject to submission of declaration by the arbitration in terms of Section 12(1) in the form prescribed in the Sixth Schedule of the Act before the Registrar, Original Side of this Court within four weeks from today.
16. Let this order be conveyed to the arbitrator by the Registrar, Original Side forthwith.
17. In light of the above, the petition (A.P. 578 of 2022) is disposed of.
18. An urgent Photostat-certified copy of this order, if applied for, should be made available to the parties upon compliance with requisite formalities.

(Shekhar B. Saraf, J.)