

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
PETN. UNDER ARBITRATION ACT No. 44 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

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1 Whether Reporters of Local Papers may be
allowed to see the judgment ? NO

2 To be referred to the Reporter or not? NO

3 Whether their Lordships wish to see the fair
copy of the judgment ? NO

4 Whether this case involves a substantial
question of law as to the interpretation of
the constitution of India, 1950 or any order
made thereunder ? NO

5 Whether it is to be circulated to the civil
judge ? NO

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NIMISH K VASA - Petitioner(s)
Versus

ANIL JAIN - Respondent(s)

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Appearance :

MR MIHIR THAKORE, SENIOR ADVOCATE WITH MR MANAV A MEHTA for
Petitioner(s) : 1,

MR MIHIR JOSHI, SENIOR ADVOCATE, MR PERCY KAVINA, MR RASHESH
SANJANWALA, MR SANDEEP SINGHI WITH MR A.M.HAVA FOR SINGHI & CO
for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 29/02/2008

ORAL JUDGMENT

1 On 26.04.2006 the Designated Judge had made an order appointing sole Arbitrator. However, when the said order was carried by way of appeal before the Apex Court, vide order dated 18.09.2006 in Civil Appeal No. 4175 the following order came to be made by the Apex Court :

“We, accordingly, set aside the order passed by the learned Single Judge dated 26.4.2006 and remit the case back to the learned Single Judge to decide the issue afresh in light of the decision of this Court in the case of Patel Engineering Ltd. (supra) by a detailed reasoned order. It is expected that the learned Single Judge will dispose of the matter expeditiously”.

Hence, this matter has been heard afresh and the following order is made :

2 This petition for appointment of an Arbitrator under the provisions of section 11(6) of *The Arbitration and Conciliation Act, 1996* (the Act) is based on a share holders agreement (the Agreement) stated to have been entered into by the parties on 04.04.2000 (when the said Agreement has been actually executed sometime in October/November 2001) and Memorandum of Understanding (MoU) executed on 10.04.2000.

3 On 10.04.2000 when the MoU between the petitioner and the respondent was entered into the project was for manufacture and sale of Para Anisic Aldehyde and other related products and the objective was : *"To float a joint venture company, 50:50 equity sharing by NKV and AMJ for entering into a new product line of PAA and its related derivatives. NKV & AMJ to invest an amount of Rs.10 lacs each as equity in the new JV Company Profit and Loss will be equally shared (50:50) by NKV/AMJ"*. Pursuant to the MoU a sum of Rs.10 lacs in the form of share application money was forwarded by the petitioner by two cheques of Rs. 5 lacs each to the respondent. According to the petitioner the MoU was acted upon by the parties and for this purpose various inter office correspondence has been relied upon by the petitioner. According to the petitioner the share holders agreement though shown to have been executed on 04.04.2000 was admittedly executed on or around October/November, 2001 and this fact has been accepted in paragraph No. 6 of the additional affidavit dated 28.06.2007 filed by the petitioner. This additional affidavit came to be preferred because a preliminary objection was raised on behalf of the respondent that the petition is required to be rejected solely on the ground that the petitioner has made false statements in the petition (Paragraph Nos. 2 and 10) which are

contrary to the record. According to the respondent though the petitioner claims that the statement by the petitioner that the MoU was in furtherance of the Agreement was made as per oral understanding, the said statement is false, and the petitioner, knowing such averment to be false made the statement consciously because in absence of the MoU being linked up with the Agreement, Clause No.10 of the Agreement relating to appointment of an Arbitrator could not have been invoked by the petitioner.

4 In additional affidavit dated 28.06.2007 filed by the petitioner the averments made in paragraph Nos. 2 and 10 of the petition have been explained in the following manner :

"3. I state that from the above paragraphs of the petition it would be evident that I have stated as under : (i) The share holder agreement was entered into on 4.4.2000 at Ahmedabad, (ii) immediately after the execution of the share holders agreement the petitioner and the respondent entered into a Memorandum of Understanding on 10.4.2000 (iii) The MOU is in furtherance of the agreement.

4. I say that the aforesaid statements were made on the apparent reading of the aforesaid documents. More than four and half years had elapsed since the execution of the document and I

did not remember the exact sequence in which the same were executed. I state that had I remembered the sequence I would have stated : (i) Memorandum of Understanding was entered into on 10.4.2000 (ii) the Share Holders Agreement was entered into in furtherance of the MOU (iii) The Share Holder's agreement though entered into in furtherance of the MOU was to also govern the relations between the parties. The parties felt that it should be predated to the MOU and accordingly by mutual understanding it was predated.

5. I state that there was absolutely no oblique motive in making statement made by me in para 2 and 10 of the petition. The incorrect sequence makes absolutely no difference in so far as the relief sought in the petition is concerned for the only relief which I am seeking is appointment of arbitrator pursuant to the Clause 10 of the share holder's agreement for determination of my civil rights. I state that such error in stating the sequence of the execution of agreements more so when parties mutually agreed to predate it cannot deprive me to my rights to obtain adjudication from an appropriate forum.

6 I say in the affidavit in reply, the respondent stated (i) that no company by the name of Ascent Fine Chemicals Pvt. Ltd. , was at all in existence on the purported date of the alleged share holders agreement i.e. on 4.4.2000 (ii) no reference to the clause of the said agreement can be made since it

was not acted upon or implemented at all and subsequently abandoned (iii) there is no Arbitration Agreement at all (iv) disputes raised do not even purport to have arisen in respect of legal relationship contemplated under the share holders agreement (v) that it is denied that MOU was executed after the share holders agreement or that it was in furtherance of share holders agreement (vi) the dispute raised are under the MOU and not under the share holders agreement (viii) MOU was only partly acted upon for a limited period and then given a go by (vii) to avoid my obligations under the MOU, I requested the respondent to execute a share holders agreement in or about October/November 2001, in a manner to be purportedly effective from the beginning”.

5 In light of the fact that the petitioner has accepted that though the Agreement is dated 04.04.2000 despite having been executed in October/November 2001, the Agreement is admittedly predated it is not necessary to record the facts and evidence, available on record, as contended by the respondent. Suffice it to state that the only question that would then survive is whether MoU and the Agreement are required to be read in conjunction so as to bring the MoU within the scope of Clause No.10 of the Agreement.

6 For this purpose the relevant part of the Agreement may

be considered. Clause No. 1.2 of the Agreement under the head 'BUSINESS OF THE COMPANY' stipulates that each of the party agrees to exercise its rights hereunder and as a shareholder so as to ensure that AFPL performs and complies with all obligations on its part under this Agreement and complies with the restrictions imposed upon it herein. Under Clause No. 2.3.1 relating to 'MANAGEMENT OF THE COMPANY' it is provided that the Board shall comprise of 2 Directors or such other number as mutually agreed, subject to a maximum of 12 Directors unless the parties agree otherwise in writing. Mr. Anil Jain/Mr.Nimish K Vasa will be appointed as Managing Directors and they shall not be liable to retire by rotation. Thereafter under Clause No. 2.3.4 the rights of both the parties to act as Directors have been specified. However, what is material is that the rights available both to the petitioner and the respondent are available so long as the petitioner and the respondent own 50% shares of AFPL. The 'TERM' of the Agreement is specified vide Clause No.8 of the Agreement. Under the 'GENERAL' clause viz. Clause No.9 none of the parties to the Agreement are entitled to assign or transfer its rights or obligations under the Agreement without the prior written consent of the parties to the Agreement, except as expressly provided in the Agreement.

7 Clause No. 10 relating to 'ARBITRATION' reads as under :

"10 ARBITRATION

This Agreement shall be governed by and construed in accordance with the substantive laws of India and any dispute or difference of whatever nature arising under out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Arbitration and Reconciliation Act, and the place of Arbitration shall be in Ahmedabad".

8 If the Agreement and the MoU are read closely there is nothing to indicate that the MoU is in furtherance of the Agreement, as claimed by the petitioner. This is not only apparent from the language employed both in MoU and the Agreement, but also from the fact that the Agreement was in fact executed almost after a year and half from the date of execution of the MoU. It is in this context that the contention of the petitioner as regards the dispute stated to have arisen between the parties regarding the profits from the joint venture shall have to be appreciated.

9 Though the correspondence on record might prima facie reveal that certain steps were taken to give effect to MoU

those steps cannot go to establish that the MoU has to be read as being either dependent on the Agreement or vice versa; OR the MoU being in conjunction with the Agreement or vice versa; OR the MoU being in furtherance of the Agreement. According to the petitioner, AFPL was not being properly run and this was because the respondent was not serious in implementing the Agreement and the MoU. That in fact the proprietary information regarding "*Para Anisic Aldehyde and other related products*" provided by the petitioner was being used by the respondent in collusion with one other company named "*Metro Chem Industries Ltd.*", wherein the elder brother of the respondent was Chairman/Managing Director. Therefore, the petitioner was entitled to the share of profits which were being earned by such user but the respondent was not parting with such profits. Another claim made by the petitioner was that the petitioner having proposed and initiated the joint venture the petitioner was entitled to be adequately compensated for such efforts.

10 As against that according to the respondent due to prevalent market situation there was steep fall in the realisable price of the products and therefore the respondent had at one point of time suggested payment of fixed

commission to the petitioner on the sales made for a period of five years. That till the date the dispute was raised by the petitioner viz. sometime in April, 2002, the respondent was ready and willing to pay Rs. 20 lacs to the petitioner being one-half of profits stated to have been earned by AFPL. The offer made by the respondent was not acceptable to the petitioner. According to the petitioner, the petitioner was entitled to atleast a sum of Rs.20 crores by way of compensation for the product manufactured by the respondent otherwise than as per the Agreement and the MoU. The basis for such computation, according to the petitioner is 50% of the profits on the estimated manufacture of such product for a period of ten years from 01.04.2003. According to the petitioner this claim arises because of breach of the MoU and the Agreement and the manufacture being not undertaken by AFPL. The respondent on the other hand submits that the Agreement was never effective and there is no breach of the Agreement. It was therefore contended on behalf of the petitioner that whether the petitioner was entitled to compensation/damages as claimed, or any lesser amount, can be decided by the Arbitrator to be appointed.

11 It is an accepted position between the parties that the

amount of Rs.10 lacs paid by the petitioner towards share application money has been returned to the petitioner and deposited by the petitioner in his Bank Account on 15.05.2003. This has been followed by an amount of Rs.1,10,384/- paid to the petitioner towards interest on the equity contribution made by the petitioner as the funds were utilised in the meantime without any shares being allotted to the petitioner. The record further reveals that the petitioner has received in all sum of Rs.20 lacs in two tranches, each of Rs. 10 lacs, on 01.07.2003 and 9.7.2003 towards share of past profits arising out of the joint venture. Further sum of Rs. 8.88 lacs towards the amount of commission on sales has also been paid to the petitioner on 19.08.2003.

12 In light of the aforesaid position the respondent has resisted appointment of an Arbitrator as according to the respondent nearly after 13 months of accepting aforesaid payments, on 14.09.2004, the petitioner for the first time claimed a sum of Rs.20 crores as compensation while seeking appointment of an Arbitrator by suggesting name of one Shri Mahendrabhai G. Lodha. The respondent has resisted the claims made by the petitioner pointing out that in so far as MoU is concerned there is no clause for arbitration and the

Agreement (which has an arbitration clause) does not talk of any distribution of profits. That in fact the Agreement was never given effect to in as much as no shares were allotted to either of the parties and only because of payment of share application money the Agreement which was between proposed share holders cannot be given effect to so as to read the same in conjunction with MoU.

13 Though both the sides have placed reliance on various decisions it is not necessary to enumerate the same. Suffice it to state that all the cited decisions have been taken into consideration bearing in mind the ratio laid down in each of the judgments. The only question as a Designated Judge, in exercise of powers u/s. 11 of the Act, which is required to be considered and decided is whether [a] there is an existence of arbitration agreement between the parties; [b] the contract between the parties stands concluded/exhausted by the parties having mutually satisfied their rights and obligations under the contract without any demur; [c] the dispute, if any, is within the scope of the arbitration agreement;[d] the claim for arbitration is not barred by limitation.

14 As already noticed hereinbefore, Agreement dated

04.04.2000, admittedly executed in October/November, 2001 was in relation to subscribing to the share capital of the company to be floated by the parties to the Agreement for which the petitioner had paid Rs. 10 lacs. However, no shares were in fact issued, not only to the petitioner but to anyone else, including the respondent. Therefore, neither the petitioner nor the respondent could describe themselves as shareholders in strict sense of the term qua the Agreement. A faint attempt on behalf of the petitioner was made to contend that the term 'shareholder' has to be understood in context of each of the parties being shareholders of some other limited companies. The said contention does not merit acceptance when one reads Agreement as a whole. In the circumstances, it cannot be stated that the Agreement had come into effect.

15 The alternative contention of the respondent in this regard also merits acceptance. Even if the Agreement had come into existence the day the petitioner was refunded the share application monies without any issuance of shares at any point of time the Agreement stood terminated as the petitioner could no longer describe himself as a shareholder of AFPL. Even otherwise by virtue of the correspondence exchanged between the parties, the Agreement came to be substituted by

a novatio when the petitioner agreed to accept the commission on sales at a stipulated percentage and in fact accepted the payment of Rs.8.88 lacs.

16 In light of the facts recorded hereinbefore, and more particularly in light of the payments received by the petitioner, it becomes apparent that the contract between the parties exhausted itself as the mutual rights and obligations were satisfied by the conduct of the receiving party. The respondent is right in contending that thereafter, after a span of nearly a year and half, the petitioner could not have raised a fresh claim dehors the Agreement, more particularly considering the fact that the MoU and the Agreement are not shown to be operative in conjunction.

17 Lastly, it is not possible to accept the submission of the petitioner that the claim of Rs.20 crores viz. disputed amount, is an issue which arises either from the Agreement or MoU. In fact in none of the documents is there any clause which stipulates compensation towards future profits on an estimated basis. Therefore, it is not possible to state that any dispute in relation to such sum of Rs.20 crores arises between the parties. In fact, as admitted by the petitioner, the said figure

has been worked out on the project profits for the future period of 10 years from 01.04.2003. In the circumstances, it is not possible to accept the stand of the petitioner that the petitioner has been deprived of such future profits, which may or may not be earned by the respondent, as a consequence of termination of the Agreement between the parties.

18 In the circumstances, in light of settled legal position, more particularly the Apex Court decision in the case of *SBP & Co. Vs. Patel Engineering Ltd.& Anr. (2005) 8 SCC 618* the petition does not merit acceptance as prima facie no case is made out by the petitioner for appointment of an Arbitrator in light of the parameters enunciated by the Apex Court.

19 The petition is accordingly rejected with no order as to costs.

Sd/-
(D.A. Mehta, J.)

M.M.BHATT