

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION CASE (CIVIL) NO.11 OF 2013

DEMERARA DISTILLERIES PVT. LTD.
& ORS. ...PETITIONERS

VERSUS

DEMERARA DISTILLERS LTD. ...RESPONDENT

JUDGMENT

1. This application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") has been filed seeking directions for appointment of an Arbitrator to go into the disputes and differences with the respondent - Company that the petitioners claim to have occurred out of a Joint Venture Agreement dated 17th October, 2002

Signature Not Verified

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Madhu Bala
Date: 2014.11.24
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Reason:

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(hereinafter referred to as "the Agreement"). While the petitioner No.1 - M/s Demerara Distilleries Pvt. Ltd. itself is the Joint Venture Company born out of the Agreement, the petitioners Nos. 2 to 4 claim to represent M/s Kanda and Associates on whose behalf the Agreement with the respondent - Company, which is a Foreign Company incorporated in Guyana was

signed by one B.S. Kanda.

2. According to the petitioners, the Agreement contemplated equal participation in the equity of the Joint Venture Company to be set up thereunder as well as transfer of technology, process know-how, etc. Under the agreement, the Joint Venture Company i.e. petitioner No.1 was also entitled to use the trade-marks of the respondent - Company. The petitioners have stated that the respondent - Company failed to fulfill its contractual obligations for equity participation as well as for dissemination of technology. The process know-how imparted by the respondent was claimed to be inadequate and defective hampering the business of the Joint Venture Company. Claims of inadequate assistance to further the business of the Joint Venture Company were also alleged, which, according to the petitioners, hampered the business undertaken. Furthermore, according to the petitioners, as correspondences and negotiations had failed to resolve the impasse, the issues of which the parties were at loggerhead were referable to Arbitration in terms of clause 15 of the Agreement. As the proposal for Arbitration made by the petitioners was not responded by the respondent - Company, the petitioners approached the International Centre for ADR, Hyderabad, who nominated one Mr. Justice T.N.C.

Rangarajan as the Arbitrator. However, the respondent - Company did not respond to the notice issued and did not nominate its Arbitrator leaving the petitioners with no other option but to institute the present proceeding under Section 11(6) of the Act.

3. The application has been resisted by the respondent - Company to contend that the petitioners are not signatories to the Agreement containing the Arbitration Clause. According to the respondent - Company, M/s Kanda and Associates were parties and signatories to the Agreement whereas the present petition has been filed by the Joint Venture Company which has been born out of the Agreement and by three other individuals, who though claim to be a part of M/s Kanda and Associates, were not signatories to the Agreement. Relying on the decisions of this Court in Deutsche Post Bank Home Finance v. Taduri Shah [(2011) 11 SCC 375] and Indowind Energy Limited v. Wescare (India) Limited and another [(2010) 5 SCC 306], it is contended that the petitioners cannot seek to invoke the Arbitration Agreement not being parties or signatories thereto.

4. The respondent - Company further contends that invocation of the Arbitration Clause, even if the same is

held to be applicable, is premature as under clause 3 of the Agreement, differences are required to be resolved first by mutual discussions, followed by mediation, and, only on failure of mediation recourse to Arbitration is contemplated.

It is also contended that the disputes raised are not arbitrable inasmuch as what the petitioners really want is the winding-up of the Company. It

is further submitted that the respondent - Company had initiated a proceeding alleging oppression and mismanagement in the administration of the Joint Venture Company, which is presently pending before

the Company Law Board. It is stated that, in the said proceedings, the petitioners have appeared and sought reference to Arbitration under Section 8

of the Act. All the aforesaid facts have not been stated in the application/petition under Section 11(6) of the Act. It is on the aforesaid broad

basis that the assertions and the claims made in the present petition have been sought to be resisted by the respondent.

5. Of the various contentions advanced by the respondent - Company to resist the prayer for appointment of an Arbitrator under Section 11(6) of the Act, the objections with regard the application being premature; the disputes not being arbitrable, and the proceedings pending before the Company Law Board, would not

merit any serious consideration. The elaborate correspondence by and between the parties, as brought on record of the present proceeding, would indicate that any attempt, at this stage, to resolve the disputes by mutual discussions and mediation would be an empty formality. The proceedings before the Company Law Board at the instance of the present respondent and the prayer of the petitioners therein for reference to Arbitration cannot logically and reasonably be construed to be a bar to the entertainment of the present application.

Admittedly, a dispute has occurred with regard to the commitments of the respondent - Company as regards equity participation and dissemination of technology as visualized under the Agreement. It would, therefore, be difficult to hold that the same would not be arbitrable, if otherwise, the Arbitration Clause can be legitimately invoked. Therefore, it is the objection of the respondent - Company that the present petition is not maintainable at the instance of the petitioners which alone would require an in-depth consideration.

6. The Agreement was signed between the respondent - Company on the one hand and one M/s Kanda and Associates on the other. The present application has been

filed by the Joint Venture Company born
out of the aforesaid Agreement as the
first petitioner and one Tumblalam Gooty
Veera Prasad, T.G. Aruna Kumari and Naag
Rohit respectively as Petitioners Nos. 2,
3 and 4. The petitioners Nos. 3 and 4 are
the wife and son of the petitioner No.2
and all of them claim to represent M/s

Kanda and Associates. Available on record

is a query made by the respondent -
Company with regard to the legal status of
M/s Kanda and Associates on 28th October,
2002 and the reply thereto furnished by
the petitioner No.2, which is to the
effect that "Kanda & Associates is only a
group of people formed for giving birth to
the joint venture company". It has also

been stated in the said reply that "Kanda
is an individual and his associates are
myself and family".

7. From the above, it is crystal
clear that though one B.S. Kanda had
signed the Agreement on behalf of M/s
Kanda and Associates, the said entity also

consist of the petitioners Nos. 2, 3 and

4. In the aforesaid situation, though
the present petition under Section 11(6)
of the Act may not be maintainable at the
instance of the first petitioner, there is
no reason to doubt the maintainability

thereof at the instance of the petitioners

Nos. 2, 3 and 4. The reliance placed on

the decision of the Bombay High Court in

Venkatrao A. Pai v. Narayanlal Bansilar &

Ors. [AIR 1961 BOMBAY 94], to contend that if two or more parties join in an action, dismissal of the action qua one petitioner entails the dismissal qua the others as well is wholly misplaced. No such ratio is discernible in the aforesaid judgment.

8. For the aforesaid reasons, the objections raised by the respondent - Company to the present petition must fail.

9. Shri Justice B.Sudershan Reddy, a former judge of this Court is appointed as the sole Arbitrator.

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10. All disputes including the disputes raised in the present petition are hereby referred to the learned sole Arbitrator. The learned Arbitrator shall be at liberty to fix his own fees/remuneration/other conditions in consultation with the parties.

11. Let this order be communicated to the learned Arbitrator so that the arbitration proceedings can commence and conclude as expeditiously as possible.

12. The Arbitration Petition is disposed of accordingly. No costs.

.....,J.
(RANJAN GOGOI)

