Bombay High Court
Bharat Kantilal Bussa vs Sanjana Cryogenic Storage Ltd on 4 March, 2013
Bench: R.D. Dhanuka

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 156 OF 2012

1. Bharat Kantilal Bussa,
2. Rita Bharat Bussa,

Both residing at 801, Nepean House,
85, Nepean Sea Road,
Mumbai 400 006 ... Applicants

Versus

1. Sanjana Cryogenic Storage Ltd.

Having its registered office at
116, Bajaj Bhavan, 11th Floor,
Nariman Point, Mumbai 400 021

2. Mr. Sanjay Ramavatar Goenka,
Managing Director,
116, Bajaj Bhavan, 11th Floor,

Nariman Point, Mumbai 400 021

3. Mrs.Rachana Sanjay Goenka,
141-C, Grand Paradi Apartments,
A.K. Marg, Mumbai 400 036

4. Mr. Ramavatar Nathumal Goenka,

Director,
116, Bajaj Bhavan, 11th Floor,
Nariman Point, Mumbai 400 021 ... Respondents

Mr. S.C. Naidu alongwith Mr. Sourabh Kulkarni i/by M/s. C.R. Naidu & Co. for petitioner.

Mr. N. Engineer along with Mr. A. Mithe i/by M/s.Desai & Diwanji for respondent nos. 1 to 4.

CORAM : R.D. DHANUKA,J.

DATED : MARCH 04, 2013 2/15 5-ARBP-156.2012.sxw ORAL JUDGMENT :

By this application filed under section 11 of the Arbitration & Conciliation Act, 1996, the applicant seeks appointment of an arbitrator by invoking clause 17 of the Agreement dated 14th October 2009 at Exh. A1 of the application read with another agreement also dated 14th October, 2009 annexed at Exh. A to the application.

2. The applicant had 10,000 shares of the company known as M/s. RRS Mineral Resources Pvt. Ltd. (hereinafter referred to as "said RRS"). On 14 th October, 2009, the applicant and the first respondent entered into two agreements.

In the first agreement which was to be referred as main agreement, it was agreed that the respondent had intention to acquire entire paid up share capital and control of the said company M/s. RRS. It was recorded that the aggregate consideration in respect of acquiring the said 10,000 shares was Rs.34.5 Crores payable by the respondent to the applicant in the manner prescribed therein. By another agreement dated 14th October, 2009 between applicant, respondent and M/s. RRS, the parties made various declarations in respect of the said transactions.

The said agreement recorded arbitration agreement under clause 17 which reads as under :

> "17. In the event of any dispute or difference arising between the parties concerning the meaning or interpretation of this Agreement or the rights and obligations of the

parties hereto, the same shall be referred to arbitration according to the provisions of the Arbitration & Conciliation Act, 1996. The Arbitral Tribunal shall have summary powers including powers listed in the Schedules to the aforesaid Act. The Arbitration proceedings shall be held in Mumbai and shall be conducted in English language. The rights of the parties 3/15 5-ARBP-156.2012.sxw hereto shall be governed by the laws in India as applicable I the city of Greater Mumbai."

3. It is not in dispute that both these agreements were signed by the applicants and the respondents. It is the case of the applicant that pursuant to the said agreements, the respondent paid sum of Rs.31.50 Crores to the applicant. It was agreed that the applicants would keep in deposit Rs. 75 lacs each aggregating to Rs. 1.5 Crores with the said Ms/. RRS on and upto March, 2012. It is the case of the applicant that the said amount of Rs.1.5 Crores have been lying deposited with the said M/s. RRS.

4. Vide letter dated 9th March, 2012, the applicants requested the first respondent to pay the balance amount on or before 31 st March, 2012. Vide letter dated 11th April, 2012 the first respondent informed the applicant that one Mr. Faiyaz Shaikh and others had filed a suit in the court of Civil Judge, Senior Division, at Panaji being Civil Suit No. 1 of 2011 claiming sum of Rs.2 Crores.

The parties thereafter entered into further correspondence. The applicants continued to raise the demand for recovery of the balance amount under the said two agreements whereas respondent continued to deny the same. The applicants vide their letter dated 21st March, 2012 invoked arbitration clause and called upon the respondent to appoint an arbitrator. The said request of the applicant was turned by the respondents. Hence, this application under section 11(6) for appointment of the arbitrator has been filed by the applicant.

5. The respondents have filed affidavit in reply to this application. The learned counsel for the respondent submits that there is no arbitration agreement 4/15 5-ARBP-156.2012.sxw between the parties in so far as agreement at Exh. A is concerned. The learned counsel submits that as far as agreement dated 14 th October, 2009 at Exh. A1 is concerned, which records arbitration clause, entire consideration agreed to be paid by the respondent to the applicant in the said agreement has been already paid. It is submitted that the dispute raised by the applicant does not pertain to the agreement dated 14th October, 2009 at Exh. A1 to the application but pertains to the agreement dated 14th October, 2009 which is at Exh. A which does not record any arbitration agreement.

6. The next submission of the learned counsel for the respondent is that under the agreement dated 14th October, 2009 at Exh. A1, the respondents had disclosed that there was no loss or liability of any kind whether statutory or otherwise of the company otherwise than disclosed in the provisional account of company for the period ended on 13th October, 2009. The learned counsel also placed reliance upon clause 5(g) of the said agreement to canvass his submission that though the applicant had disclosed that there was no pending suits, litigation, prosecution or proceedings filed by or against the company nor were there any contingent liability or claims not acknowledged as debts by the company otherwise than disclosed in the said Accounts nor has the Company or any of its

existing Directors been served with any notice of demand. The respondent's learned counsel agrees that the suit filed by Faiyaz Shaikh before the Civil Court, Panaji is for recovery of about Rs. 2 Crores.

7. The learned counsel thus submits that there was false declaration made by 5/15 5-ARBP-156.2012.sxw the respondents in the agreement at Exh. A1 to the petition and in view of such false declaration and in view of the serious allegations of fraud and non disclosure deliberately with the intention to cheat the respondents, the arbitrator cannot be appointed to arbitration and such allegations can be tried only by the Civil Court.

9. The learned counsel placed reliance upon the judgment of the Supreme Court in the case of Bharat Rasiklal Ashra Vs.Gautam RasiklalAshra and another, (2012) 2 SCC 144 and more particularly Para 15 in support of his proposition that if there were two agreement and the arbitration clause contained only in one agreement, in respect of which there was no dispute raised, arbitration clause in that agreement cannot be invoked for the purpose of referring the dispute to arbitration and the learned Chief Justice under section 11 of the Arbitration Act, 1996 in such event cannot refer the matter to arbitration relying upon the arbitration clause in the agreement in respect of which there was no dispute. Para 15 of the said Judgment reads thus :

> "15. It is well settled that an arbitrator can be appointed only if there is an arbitration agreement in regard to the contract in question. If there is an arbitration agreement in regard to contract A and No. arbitration agreement in regard to contract B, obviously a dispute relating to contract cannot be referred to arbitration on the ground that contract A has an arbitration agreement. Therefore, where there is an arbitration agreement in the partnership deed dated 12.6.1988, but the dispute is raised and an appointment of arbitrator is sought not with reference to the said partnership deed, but with reference to another partnership deed dated 19.5.2000, unless the party filing the application under Section 11 of the Act is able to make out that there is a valid arbitration clause as per the contract dated 19.5.2000, there can be No. appointment of an arbitrator."
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> 6/15 5-ARBP-156.2012.sxw
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> 10. The learned counsel placed reliance on the judgment of the Supreme Court in N. Radhakrishan Versus Maestro Engineers and Others (2010) 1 SCC 72 and more particularly Para 23 to 26 in support of the plea that as the respondent had made serious allegations against the applicant regarding false representation and in not disclosing true and correct affairs of the company and more particularly loans and debts, the said issue cannot be referred to arbitration. Paragraph 23 to 26 read thus:
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> "23. The learned Counsel appearing on behalf of the respondents on the other hand contended that the appellant had made serious allegations against the respondent alleging that they had manipulated the accounts and defrauded the appellant by cheating the appellant of his dues, thereby warning the respondents with serious

criminal action against them for the alleged commission of criminal offences. In this connection, reliance was placed in a decision of this Court in the case of Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak and Anr. MANU/SC/0363/1961 : AIR 1962 SC 406 in which this Court under para 17 held as under: There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference....

In our view and relying on the aforesaid observations of this Court in the aforesaid decision and going by the ratio of the above mentioned case, the facts of the present case does not warrant the matter to be tried and decided by the Arbitrator, rather for the furtherance of justice, it should be tried in a court of law which would be more competent and have the means to decide such a complicated matter involving various questions and issues raised in the present dispute.

24. This view has been further enunciated and affirmed by this Court in the decision of Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd. MANU/SC/0401/1999 : AIR 1999 SC 2354 wherein this Court under para 4 observed:

7/15 5-ARBP-156.2012.sxw Sub-section (1) of Section 8 provides that where the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in our opinion, that what can be referred to the Arbitrator is only that dispute or matter which the Arbitrator is competent or empowered to decide.

25. The learned Counsel for the respondent further elaborated his contention citing the decision of the High Court of Judicature at Madras in the case of Oomor Sait HG v. Asiam Sait wherein it was held:

...Power of civil court to refuse to stay of suit in view of arbitration clause on existence of certain grounds available under 1940 Act continues to be available under 1996 Act as well and the civil court is not prevented from proceeding with the suit despite an arbitration clause if dispute involves serious questions of law or complicated questions of fact adjudication of which would depend upon detailed oral and documentary evidence.

Civil Court can refuse to refer matter to arbitration if complicated question of fact or law is involved or where allegation of fraud is made.

...Allegations regarding clandestine operation of business under some other name, issue of bogus bills, manipulation of accounts, carrying on similar business without consent of other partner are serious allegations of fraud, misrepresentations etc., and therefore application for reference to Arbitrator is liable to be rejected.

We are in consonance with the above-referred decision made by the High Court in the concerned matter.

26. In the present dispute faced by us, the appellant had made serious allegations against the respondents alleging him to commit malpractices in the account books and manipulate the finances of the partnership firm, which, in our opinion, cannot be properly dealt with by the Arbitrator. As such, the High Court was justified in dismissing the petition of the appellant to refer the matter to an Arbitrator. In this connection, it is relevant to refer the observation made by the High Court in its impugned judgment:

The above decision squarely applies to the facts of the present case. In the present case as well there is allegation of running rival firm, interference with the smooth administration of the firm. As already stated since the suit has been filed for declaration to declare that the revision petitioner is not a partner with effect from 18.11.2005, and for consequential injunction restraining the petitioner from disturbing the smooth functioning 8/15 5-ARBP-156.2012.sxw of the first respondent firm, the issue relates to the causes which compelled the respondents to expel the revision petitioner from the partnership firm and the necessity to reconstitute the firm by entering into a fresh partnership deed. Therefore such issues involve detailed evidence which could be done only by a civil court...."

11. Mr. Naidu, the learned counsel for the applicant on the other hand submits that the agreement at Exh. A annexed to application cannot be read in isolation.

The learned counsel submits that agreement at Exh. A1, to which admittedly the applicant and respondents were parties and signatories records that the said agreement forms integral part of the agreement dated 14 th October, 2009 which is annexed at Exh. A to the application. The learned counsel submits that the entire transaction entered into between the parties was one transaction recorded in two agreements entered into simultaneously. The learned counsel invited my attention to clause 1 to 3 of the agreement at Exh. A to the application in support of his plea that intention of the parties is clear that the applicant had agreed to sell 10,000 shares of M/s. RRS on payment of the agreed consideration. Certain amount out of the said agreed consideration was to be kept deposited with the respondents. The learned counsel placed reliance upon section 7(3), 7(4)(c) and 7(5) of the Arbitration Act, 1996 which reads thus :

"7. Arbitration Agreement - (1) .....

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(3)    An arbitration agreement shall be in writing.
(4)    An arbitration agreement is in writing if it is
contained in -
(a)...
(b)..
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(c) an exchange of statements of claims and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if 9/15 5-ARBP-156.2012.sxw the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

12. The learned counsel submits that though in the application filed under section 11, the applicant has pleaded existence of arbitration agreement between the parties as recorded in clause 17, in the reply filed by the respondent there is no denial to the existence of arbitration agreement and thus in view of section 7(4)(c) arbitration agreement can be considered as in existence.

13. The learned counsel submits that in addition to the arbitration agreement which exists as per provisions of section 7(4)(c), in view of the reference to the agreement dated 14th October, 2009 at Exh. A to the application, in the agreement dated 14th October, 2009 at Exh. A1 to the application and in view of the obligations of both the parties recorded inter se and that being one composite transaction, doctrine of incorporation will apply as the arbitration agreement admittedly recorded in Exh. A1 stood incorporated in the agreement at Exh. A to the application.

14. Perusal of the agreement at Exh. A to the application indicates that the purchasers who are respondents to this application had agreed to acquire entire paid up share capital and control of M/s. RRS being 10,000 equity shares admittedly then held by the applicants at the agreed consideration of Rs.34.5 Crores. The said consideration of Rs. 34.5 Crores was agreed to be paid by the respondents to the applicants in the manner set out therein. It was agreed that Rs.31.5 Crores was payable to the applicants by the respondents under former agreement of sale of shares and controlling interest in the company agreed to be 10/15 5-ARBP-156.2012.sxw separately executed between the parties with an understanding that simultaneously applicants shall deposit an aggregate sum of Rs.1.5 Crores with the company. It was agreed that the balance consideration of Rs.4.5 Crores shall not carry interest and shall be paid by the respondents to the applicant on the execution of the deed of transfer after receipt of permission under Mineral Concession Rules, 1960. Perusal of the agreement at Exh. A1 entered into between the parties which is admittedly signed by the applicant and respondents and also M/s. RRS, indicates that the said agreement is in continuation of the agreement at Exh. A to the application and records ig remaining obligations between the parties. The applicants have invoked arbitration clause recorded in clause 17 of the agreement at Exh. A1 which refers to the transaction recorded under the agreement annexed at Exh. A to the application. In my view, the doctrine of incorporation would apply to the facts of this case by applying section 7(5) of the Arbitration Act, 1996 and by applying such doctrine, the arbitration agreement admittedly recorded in Clause 17 of the agreement at Exh. A1 would stand incorporated also in agreement annexed at Exh. A to the application. In any event, the dispute raised by the applicant is arising out of both the agreements and not on the basis of isolated agreement at Exh. A to the application.

15. It is not in dispute that the agreements at Exh. A and A1 were executed on the same day and simultaneously. In the agreement at Exh. A, it was agreed that the respondent shall pay Rs.31.5 Crores to the applicants under formal agreement of sale of shares and controlling interest in the company to be separately executed. In Agreement at Exh. A1 it was recorded that the said agreement

11/15 5-ARBP-156.2012.sxw forms integral part of the agreement dated 14 th October, 2009. In the said agreement, there is reference to the transaction in respect of sale of 10,000 equity shares as recorded in agreement at Exh. A. Perusal of the agreement at Exh.

A indicates that the consideration of Rs.31.5 Crores as agreed to be paid by the respondents to the applicants under the formal agreement of sale be executed is incorporated in clause 2 of the agreement at Exh. A1 in the manner set out therein. It is thus clear that when one document refers to another and the documents form part of one transaction and are contemporaneously executed, all such documents have to be read together and shall have the same effect as if one document.

16. Even otherwise, the applicants have referred to clause 17 of the agreement in the application filed under section 11 of the Arbitration Act which has not been denied by the respondent in the reply.

17. In so far as judgment in case of Bharat Ashra (supra) relied upon by the learned counsel for the respondents is concerned, there were two separate agreements and arbitration clause was admittedly recorded in one agreement The dispute was sought to be referred to arbitration by invoking arbitration clause in the agreement in respect of which there was no dispute raised. There was no issue before the Supreme Court in that case that arbitration agreement recorded in one agreement stood incorporated in the other agreement which was sought to be invoked by the applicant. In my view, facts of the judgment in the case of Bharat Ashra (supra) before the Supreme Court are clearly distinguishable with 12/15 5-ARBP-156.2012.sxw the facts of this case and reliance thus placed by the learned counsel appearing for the respondent on the said judgment is of no assistance to the respondents.

18. As far as submission of the respondent that in view of serious allegations of fraudulent non disclosure of the liability on the part of M/s. RRS by the applicant and no such issue can be referred to arbitration is concerned, perusal of clause 5(e) and (g) of the agreement at Exh. A1 to the application indicates that the respondents had disclosed that there were no losses or liabilities on any count whether statutory or otherwise and the company otherwise than was disclosed in the provisional accounts of the company. The respondents had also disclosed that there were no pending suits, litigations, prosecutions or proceedings filed by or against the company nor were there any contingent liabilities or claims acknowledged as debts by the company other than those disclosed by the said accounts. It is not in dispute that when the said agreements were entered into, there was no pending suit which has come to the notice of the respondents after execution of the agreement in question. The learned counsel for the respondents placed reliance upon the writing dated 25 th October, 2007 at Exh. B at Page 100 of the affidavit in reply filed by the respondent. It is the case of the respondents that the applicant as Chairman and Managing Director of RRS had acknowledged the liability in the sum of Rs. 2 Crores to Mr. Faiyaz Shaikh and Manoj Chari on sale of shares of private limited company. It is submitted that on the basis of the said acknowledgement of liability by the applicant no. 1 as Chairman and Manging Director of RRS, said Faiyaz and Chari have filed a suit in the Civil Court at Goa for the sum of Rs. 2 Crores and odd in which the said company 13/15 5-ARBP-156.2012.sxw M/s. RRS which is now under the control of respondent, has been impleaded as respondent and decree has been sought against them based upon such acknowledgement of liability by the applicant. It is submitted that as this writing recording

acknowledgement of debt by the applicant was not disclosed and as a consequence thereof M/s. RRS which is now under the control of the respondents has faced the suit for the claim of more than Rs. 2 Crores.

19. Mr. Naidu, the learned counsel for the applicant on the other hand invited my attention to the written statement filed by the respondents in the said suit (1 of 2011) filed before the Civil Judge at Panaji, Goa. The learned counsel submits that it is the case of the respondents themselves in the said suit in their written statement that the alleged writing dated 25th October, 2007 signed by the applicant do not constitute part of enforceable and concluded contract. The respondents also contended that there was no resolution passed by the Board of Directors of the company authorizing the applicant to give any such undertaking on behalf of the said company. It is submitted that there was no privity of contract between the company and the plaintiff in the said suit. The respondents disputed the entire transaction and the liability of the company in the said written statement. It is denied that the applicant by acting in the capacity of Director of the company agreed to pay any commission/service charges of Rs. 2 Crores to the said third party.

20. The learned counsel submits that there is no substance of any nature whatsoever in so far as allegations of non disclosure of accounts and or alleged 14/15 5-ARBP-156.2012.sxw contingent liabilities of the company in the agreement in question on the part of the applicant.

21. In view of the stand taken by the respondents themselves in the pending suit at Goa, disputing the liability of the company and also disputing the authority of the applicant in executing any such writing at Exh. B at Page 100 of the application, in my view, allegations of alleged non disclosure of the alleged liabilities of RRS as sought to be raised in the affidavit in reply, prima facie does not appear to be of any substance or construed serious allegation which can not be referred to arbitration by appointing arbitrator.

22. In my view, except a bald plea of willful non disclosure of the accounts of the liability of the company against the applicant by the respondent, the respondents have not placed any material in this proceedings. The Supreme Court in the judgment of Union of India and Ors. Vs. M/s. Master Construction Co.

delivered on 25th April, 2011 in Civil Appeal No. 3541 of 2011 has held that bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such plea must prima facie establish the same by placing material before the Chief Justice/his designate. It has been held that if the Chief Justice/his designate finds some merit in the allegation of fraud, coercion, duress or undue influence, he may decide the same or leave it to be decided by the Arbitral Tribunal. It has been further held that on the other hand if such plea is found to be an after-thought, make-believe or lacking in credibility, the matter must be set at rest than and there. In my view, the allegations of willful non-

disclosure of the liability or accounts made by the respondents against the

applicant lacks credibility and without any material placed in this proceedings and is thus required to be rejected.

23. In view of the facts of this case, in my view, reliance placed by the learned counsel on the judgment of the Supreme Court in the case of N. Radhakrishnan (supra) is of no assistance.

24. It is made clear that this court has not decided merits of the claim made by the applicant and the same has to be decided by the learned arbitrator.

25. Mr. Justice F.I. Rebello, Former Judge of this Court and Former Chief Justice of Allahabad High Court is appointed as sole arbitrator. Application is disposed of. There shall be no order as to costs.

(R.D. DHANUKA,J.)