CASE COMMENT: ANTIKEROS SHIPPING CORPORATION V. ADANI ENTERPRISES

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INTRODUCTION

A disagreement between Adani Enterprises Limited, an Indian corporation incorporated under Indian law, and Antikeros Shipping Corporation, a body corporate formed in Liberia. Before the Bombay High Court, Antikeros Shipping Corporation (hereinafter referred to as the "Respondent") submitted an application for the appointment of an arbitrator under section 11 of the Act. The High Court designated an arbitrator and issued an order on April 21, 2011, in accordance with section 11 of the Act. It is important to remember that Adani Enterprises Limited, the party being sued in the arbitration, did not show up in court for the aforementioned arbitration application before the High Court.

The Petitioner filed a Review Petition dated August 24, 2018 (the "Review Petition") with the High Court while the arbitration was still pending. The Petitioner requested a review of the Order on the grounds that the arbitration was an "international commercial arbitration" and that the High Court lacked jurisdiction to appoint an arbitrator in such an arbitration. In the review petition, the petitioner also submitted a Notice of Motion dated August 24, 2018, asking for a delay forgiveness.

The High Court ruled, among other things, that the Respondent should have filed the Arbitration Application with the Hon'ble Supreme Court of India rather than the High Court since the arbitration qualified as an ‘International Commercial Arbitration’ under Section 2(1)(f) of the Act.

FACTS OF THE CASE

Eight years after the panel's formation, on March 22, 2019, a Bombay High Court single judge recalled the arbitral panel's appointment in Adani Enterprises Ltd v. Antikeros Shipping Corporation.

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The Bombay High Court ordered the appointment of an arbitrator on April 21, 2011, at the request of Antikeros Shipping, after Adani Enterprises Ltd. (Adani) refused to consent to the appointment of an arbitrator.

Similar to Article 11 of the UNCITRAL Model Law, Section 11 of the Arbitration & Conciliation Act, 1996 (Act) states that the Supreme Court of New Delhi has the competence to appoint parties in "international commercial arbitrations," or cases in which one of the parties is a foreign person. Antikeros is a corporation that owns ships registered in Liberia. At Antikeros' request, the Bombay High Court (erroneously) appointed an arbitrator in violation of the statutory requirement of Section 11 of the Act because Adani had neglected to choose its candidate. The arbitral tribunal was legally established and entered on the reference. It consisted of three arbitrators, including the umpire that the other two arbitrators had agreed upon.

The Bombay High Court's order of appointment under Section 11 of the Act gave rise to the tribunal's authority, which is why it denied Adani's jurisdictional challenge to the incorrect constitution of the panel under Section 16 of the Act (Article 16 of the Model Law). The panel reasoned that its appointment remained valid unless modified or annulled by a court decree.

Adani went forward with the arbitration instead of first filing a legal challenge to the Bombay High Court's appointment ruling. On the grounds that the Bombay High Court had overreached its authority and the tribunal's composition was fundamentally flawed, Adani filed an application to revoke the appointment order dated April 21, 2011, at some point in 2018. The cross-examination of witnesses had already begun, and the closing arguments were in progress.

Adani argued that the delay should be excused because a previous ruling in Roptonal Ltd v. Anees Bamzee, a case decided in a similar situation, had held that the tribunal lacked jurisdiction in the event that the appointment was faulty and that the parties could not grant the High Court jurisdiction to appoint an arbitrator in violation of Section 11 of the Act through conduct, waiver, or acquiescence.

Despite concurring with Adani, the Single Judge dismissed Antikeros's claim that Adani's recall order was a ploy to delay, have unfavourable time and cost consequences, and jeopardise the arbitration, which was already well along.

According to the Single Judge's decision, the Supreme Court's appointing authority under Section 11 of the Act could not be usurped. The Judge believed that the parties could not derogate from Section 11 of the Act. Nonetheless, the Judge came up with a workable solution considering the negative effects of recalling the panel's appointment at this late date. The court, recalling the arbitral tribunal's appointment, recommended that Antikeros file an application with the Supreme Court to uphold the tribunal's appointment and allow the arbitration to proceed.

Adani on one hand argued for condoning a delay based on a Bombay High Court precedent, while the Single Judge, rejected Antikeros' complaints about delays. The Judge acknowledged the Supreme Court's authority in appointing arbitrators and suggested a practical solution: recalling the tribunal's appointment and advising Antikeros to seek Supreme Court validation for the existing tribunal, allowing the arbitration to continue as it is.

ISSUES OF THE CASE

The following questions came up for the High Court to decide:

(i) Whether the Order in the instance of an 'International Commercial Arbitration' as that term is defined in Section 2(1)(f) of the Act is ab initio null and void.

(ii) Whether the High Court has the authority to conduct a procedural review.

(iii) Whether delay or latches can be a ground to deny review of an Order, which ex-facie is void ab initio.

JUDGEMENT OF THE CASE

PRADEEP NANDRAJOG, J. - (1.) An agreement was made on February 28, 2008, between the respondent, an Indian corporation, and the appellants, a firm formed under the laws of Liberia and beyond the territorial jurisdiction of India. The respondent was supposed to provide bunker fuel at Mundra Port to the appellants' vessel M.T. Antikeros. The gasoline was delivered by the respondent on March 5, 2008. Twelve days later, on March 17, 2008, there was a disagreement between the parties about the amount and calibre of the fuel that was provided. The appellant made a demand for damages in the amount of $1,040,400.00 on June 3, 2008. In a reply dated August 25, 2008, the respondent disputed any obligation and filed a counterclaim for $90,325.00, which was applied to the adjusted cost of the gasoline that was offloaded in the

United Arab Emirates, the location of the vessel's diversion. The agreement, which was signed on February 28, 2008, called for the issue to be settled in Mumbai under the Arbitration and Conciliation Act, 1996 ("Act"), in front of a tribunal made up of three arbitrators. The three will be chosen by the aforementioned two arbitrators, with the first two to be proposed by the contractual parties.

(2.) In order to save arbitration fees, the appellant suggested a single arbitrator on March 21, 2009, after invoking the arbitration provision on March 19, 2009. There was no reply. The appellant named Mr. R.S. Cooper as its arbitrator on May 13, 2009, and urged the respondent to follow suit. In order to designate an arbitrator, the respondent did not reply. Invoking the appointment of an arbitrator on behalf of the respondent, the appellant filed Arbitration Application No. 57/2011 in this court on February 28, 2011, in accordance with Section 11 of the Act. Despite being served, the respondent failed to attend; hence, on April 21, 2011, this Court's learned Single Judge decided Arbitration Application No. 57/2011, appointing Ms. J.K. Bhatta as an arbitrator on the respondent's behalf. The Presiding Arbitrator, Mr. T.V. Shanbhag was appointed by Mr. R.S. Cooper and Ms. J.K. Bhatt. The Arbitral Tribunal was established.

(3.) The appellant submitted their Statement of Claim to the Arbitral Tribunal on July 5, 2012, and it was received on October 15, 2012. In an application submitted to the Arbitral Tribunal, the respondent requested that the appellant provide certain papers. The respondent presented the Arbitral Tribunal with its Statement of Defence and a Counter-Claim on October 23, 2012, without challenging the Arbitral Tribunal's establishment or its authority to resolve the issues.

OBJECTIVITY OF THE JUDGEMENT

From the beginning, the court was heavily involved in choosing the arbitrators under Section 11. Nonetheless, it is currently under the jurisdiction of the arbitral institutions. It is evident that the 2019 Amendment Act constituted a watershed in the history of Section 11, institutionalizing the arbitration process and assisting in the achievement of the objective of reducing the role of the courts. However, there are certain problems with the Act's wording. The uncertainty in the text of the 2015 and 2019 amendments calls for further judicial action, thus it should be explained.

The judiciary's historical influence on arbitrator selection under Section 11 has significantly shifted to arbitral institutions, a transformation catalyzed by the pivotal 2019 Amendment Act. This amendment marked a decisive moment in Section 11's evolution, formalizing the

arbitration process and advancing the objective of reducing court interference. Despite this positive shift, concerns linger regarding the Act's drafting, particularly in the language introduced through amendments in 2015 and 2019. The persisting ambiguity poses a challenge, inviting further judicial intervention to address interpretational nuances and streamline the application of the legislation.

CONCLUSION

The Review Petition was granted, the delay was forgiven, and the High Court revoked its Order in the Arbitration Application since it was determined that the Order did not exist based on the facts. As a result, the Respondent's application for costs was rejected by the High Court. It stated that the Respondent could not profit from its own mistake because it had submitted the Arbitration Application in the incorrect court. Although it took eight years for both parties to clear up their legal misunderstanding, the High Court did not rule on expenses. The ruling of the High Court was informed by the well-established legal doctrine that states that an order issued without jurisdiction is invalid. The High Court underscored that laches or delays cannot justify an Order that is otherwise nonexistent and legally erroneous by justification of the delay in submitting the Review Petition. The appointment of the third member of the tribunal is also null and void, making the constitution of the tribunal nonexistent, as the appointment of the first member has been deemed null and void. As such, the tribunal would be deemed to have no jurisdiction, and the proceedings before it would be deemed to have ended.

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