

(2015) 10 DEL CK 0109

In the Delhi High Court

Case No : I.A. No. 23068/2014 in CS (OS) No. 2749/2014

Amira Pure Foods Pvt. Ltd.

APPELLANT

Vs

Precious Sapphires Ltd. and Others

RESPONDENT

Date of Decision : 29-10-2015

Acts Referred:

Arbitration Act, 1940 — Section 34

Arbitration and Conciliation Act, 1996 — Section 19, 44, 45, 5, 8

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 151, 16, 17, 18

Foreign Awards (Recognition and Enforcement) Act, 1961 — Section 3

Citation : (2015) 10 DEL CK 0109

Hon'ble Judges : Manmohan Singh, J.

Bench : Single Bench

Advocate : Aditi Sharma, Advocate, for the Appellant; Diya Kapur, Shyel Trehan and Tejaswi Shetty, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Manmohan Singh, J.—The plaintiff in the present suit has claimed recovery of US \$101,304 along with @ 18% interest from defendant No. 1 for the alleged short supply of 3780 bags (189MT) of the cargo to defendant Nos. 2 and 3.

2. No relief is sought against the defendant Nos. 2 and 3. The defendant No. 1 has filed its written statement on 5th November, 2014 along with two applications, the first one being I.A. No. 23114/2014 under Order VII Rule 11 read with Section 151 CPC for rejection of plaint on the ground that the suit is barred by the law of limitation and the second application being I.A. No. 23068/2014 under Section 45 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act").

3. In the application filed under Order VII Rule 11 CPC, it is stated that the present claim is barred by limitation. Under Article 3 Rule 6 of the Indian Carriage of Goods by Sea Act, 1925 it is laid down that "In any event, the carrier and the ship shall be discharged from all liability in respect of loss or damage

unless suit is brought within one year after delivery of the goods or the date when goods should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen; provided that the suit may be brought after the expiry of the period of one year referred to in this sub paragraph within the further period of not more than three months as allowed by the Court." The discharge, in this case, is said to have been completed on 8th July, 2013. The present suit was however filed only on 4th September, 2014. It is understood that no extension of the additional three months period has been sought for, or granted by this Court even the plaint does not contain any grounds on account of which such extension ought to be granted.

4. The second application has been filed under Section 45 of the Act praying that subject matter of the suit be referred to arbitration and suit proceedings be stayed. It is averred that the plaintiff had entered into a Charter Party Agreement with the defendant No. 1 herein for the shipment of 12,500 MTS of Indian Long Grained Milled par boiled rice. The shipment arrived in Benin on 10th May, 2013 and was discharged by defendant No. 1 on 8th July, 2013. The plaintiff had notified the defendant No. 1 that there was a shortage of 3780 bags of the cargo, which amounted to 189 MT. However, the defendant submits that there was no such shortage in the quantity of the cargo shipped by the defendant No. 1 for the plaintiff. For the said dispute the plaintiff has filed the present suit in this Court for recovery of USD 101,304 from defendant No. 1 on the basis of the shortlanding claim.

5. Ms. Diya Kapur, learned counsel appearing on behalf of the defendant No. 1, has submitted that the present suit is not maintainable in the light of the fact that the Charter Party and the Bills of Lading contain arbitration clauses. The Charter Party and the Bill of Lading contain the following arbitration clauses:

(i) Clause 38 of the Charter Party, provides ".BIMCO standard law and arbitration clause 1998 to apply"

(ii) Clause 45 of the Charter Party states ""Following clauses are deemed to be incorporated and form part of the Charter Party - BIMCO Dispute Resolution Clause / Law and arbitration clause 1998: (a) this contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with the contract shall be referred to arbitration in London in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this clause. The Arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) terms current at the time when the Arbitration proceedings are commenced The Bill of Lading incorporates the said arbitration clause, ""All terms and conditions, liberties and exceptions of the Charter Party dated as overleaf, including the Law and Arbitration Clause are herewith incorporated. "

6. It is submitted that earlier some disputes arising out of the same transaction

have already been adjudicated in arbitral proceedings, which culminated in Arbitration Award dated 4th April, 2014. The Plaintiff participated in the said proceedings and are well aware of the fact that all disputes between the relevant contracting parties arising out of the transaction are governed by an arbitration agreement.

7. In its reply, it is stated by the plaintiff that there is no valid and enforceable arbitration agreement as stipulated under Section 44 of the Act amongst the plaintiff and the defendants which covers the subject matter of the present suit. The subject matter of the instant suit cannot be referred to arbitration as alleged by the defendant No. 1. In the absence of a valid and enforceable agreement the present Application is not maintainable and is liable to be dismissed.

8. It is further submitted that Charter Party Agreement dated 8th March, 2013 was entered into between the plaintiff and the defendant No. 1 only and the defendant No. 2 and 3 are not parties to the said agreement. As such there is no arbitration agreement stipulated under Section 44 of the Act amongst the plaintiff and all the defendants except defendant No. 1. The defendant Nos. 2 and 3 are not parties to the Charter Party Agreement and the terms of the Charter Party Agreement including the alleged arbitration clause are not binding upon the said defendants. Therefore, neither the subject matter of the present suit nor the parties to the suit can be referred to arbitration under Section 45 of the Act. In any event, the arbitration agreement relied upon by the defendant No. 1 is unenforceable in law.

9. It is further submitted that Section 45 of the Act comes into play only in the event when a party makes a request before the Court (judicial authority) which is seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44 of the Act. In the present case, admittedly the defendant Nos. 2 and 3 have not made any arbitration agreement referred to in Section 44 of the Act in respect of short supply under the Charter Party Agreement and as such Section 45 of the Act is ex-facie inapplicable to the present case.

10. It is averred in the plaint that part of cause of action for the present suit arose when the defendant No. 2 & defendant No. 3 apprised the plaintiff about the short supply by the defendant No. 1 and claimed the amount towards the said short supply from the plaintiff. As such the liability to the extent of USD 101,304 of the defendant No. 1 on account of short supply to defendant No. 2 and defendant No. 3 cannot be adjudicated in absence of the defendant No. 2 & 3. Thus clearly the defendant No. 2 and the defendant No. 3 are proper and necessary parties for the effective adjudication of the present suit who admittedly are not the signatories of the Charter Party Agreement and as such neither the parties to the present suit nor the subject matter of the present suit can be referred to arbitration under Section 45 of the Act.

11. Learned counsel for the plaintiff has admitted that no relief is sought in the

present suit against the defendant Nos. 2 and 3. They are even not served. It is also not disputed about the existence of the arbitration clauses. Let me first take the second application filed by the defendant No. 1 under Section 45 of the Act. In case, the prayer in the second application is allowed, there is no need to go into the merit of the first application.

There is also no force in the submission of the plaintiff that the present application is not maintainable as on one hand the plaintiff is alleging that in the absence of the defendant Nos. 2 and 3 the dispute cannot be determined, on the other hand the plaintiff himself in the present suit has not sought any relief against defendant Nos. 2 and 3, thus, the objection is an afterthought as the case of the plaintiff is that the agreement in question is between the plaintiff and defendant No. 1.

12. Section 45 provides that when a judicial authority is seized of an action in a matter in respect of which the parties have an agreement of arbitration, the judicial authority at the request of either of the parties, shall refer the dispute to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

13. The Division Bench of this Court in an appeal filed by Max India Limited Vs. General Binding Corporation, has held as under:

"28. There is a fundamental and practical difference between the court proceedings on the one hand and the arbitration on the other. Should the parties wish to opt for arbitration with regard to a particular contract, in practice the decision must be taken where the contract is drafted and a clause must be inserted in the form of a contractual provision. No doubt, parties may agree for arbitration even if originally not agreed to, even after the dispute has actually arisen. However, generally and particularly in international arbitrations, important feature of arbitration is to decide before hand for settlement of disputes that may arise, through means of arbitration. In contrast, it is well known that courts are available to hear a case even in the absence of a particular clause referring to their jurisdiction. Another peculiar feature of arbitration, particularly international, is that parties may not only chose the arbitral forum which shall decide the dispute, but also the law that would govern the contract and also the arbitration proceedings. Whereas the territorial jurisdiction of a particular Court is governed by law, namely, Sections 16 to 24 of the Code of Civil Procedure, in case of international arbitration the litigating parties may agree to confer the jurisdiction on a particular arbitral tribunal as well as particular courts, including applicable law.

30. In National Thermal Power Corporation v. Singer Company (supra) also the Apex Court held that in international commercial arbitration agreement the parties have liberty to make choice, expressly or by necessary implication of the proper or substantive law as well as procedure law to be applicable. The Court also held that in the absence of express choice, a presumption arises that the

laws of a country where the arbitration is to be held would be the proper law which presumption, of course, is rebuttable having regard to the true intention of the parties. The principles which are culled out from the reading of this judgment can be summarized as under:

(a) to (h) xxxxxxxx

i) The arbitration proceedings are to be conducted in accordance with the law of the country in which the arbitration is held unless the parties have specifically chosen the law governing the conduct and procedure of arbitration. Normally, the appropriate courts of the seat of arbitration will have jurisdiction in respect of procedural matters concerning the conduct of arbitration.

(j) to (l) xxxxxxxx"

14. These principles were acknowledged by the Supreme Court in the case of Modi Entertainment Network and Another Vs. W.S.G. Cricket PTE. Ltd., which reads as under:

"26. A plain reading of this clause shows that the parties have agreed that their contract will be governed by and be construed in accordance with English law and they have also agreed to submit to the non-exclusive jurisdiction of English courts (without reference to English conflict of law rules). We have already observed above that recitals in regard to submission to exclusive or non-exclusive jurisdiction of a court of choice in an agreement are not determinative. However, as both the parties proceeded on the basis that they meant non-exclusive jurisdiction of the English courts, on the facts of this case, the court is relieved of the interpretation of the jurisdiction clause. Normally, the court will give effect to the intention of the parties as expressed in the agreement entered into by them except when strong reasons justify disregard of the contractual obligations of the parties. In Donohue case although the parties to the agreement stipulated to submit to the exclusive jurisdiction of the English courts, the House of Lords found that it would not be in the interests of justice to hold the parties to their contract as in that case strong reasons were shown by the respondent. It was felt necessary that a single trial of all the claims of the parties by one forum would be appropriate and as all the parties to the New York proceedings were not parties to the agreement stipulating exclusive jurisdiction of the English court and as all the claims before the New York court did not arise out of the said contract so they could not have been tried in the English court. It was urged that in the circumstances parallel proceedings " one in England and another in New York " would have to go on which might result in inconsistent decisions. Those facts were considered as strong reasons to decline to grant anti-suit injunction though the parties had agreed to the exclusive jurisdiction of the English court."

15. The governing law, in the case at hand, is English law. The place or venue of the arbitral proceedings is also clearly mentioned as England. Therefore, dispute clearly excludes this Court's jurisdiction in the present matter.

16. In the case of Bharat Aluminium Company and Others Vs. Kaiser Aluminium Technical Service, Inc. and Others etc. etc., , the Supreme Court held as under :

"125. We are unable to accept the submission that the use of expression "notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908", in Section 45 of the Arbitration Act, 1996 necessarily indicates that provisions of Part I would apply to foreign seated arbitration proceedings. Section 45 falls within Part II which deals with enforcement proceedings in India and does not deal with the challenge to the validity of the arbitral awards rendered outside India. Section 45 empowers a judicial authority to refer the parties to arbitration, on the request made by a party, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44 . It appears that inclusion of the term "judicial authority" in Sections 5 and 8 of the Arbitration Act, 1996, has caused much confusion in the minds of the learned counsel for the appellants. In our opinion, there is no justification for such confusion. Such use of the term "judicial authority", in Section 5 and Section 8 of the Arbitration Act, 1996, is not a recognition by Parliament that Part I will apply to the international commercial arbitrations held outside India. The term "judicial authority" is a legacy from the 1940 Act. The corresponding provision of Section 34 of the 1940 Act, which covered purely domestic arbitrations, between two or more Indian parties, within the territory of India, also refers to "judicial authority". It is nobody's contention that by using the term "judicial authority", Parliament had intended the 1940 Act to apply outside India. In our opinion, the term "judicial authority" has been retained especially in view of policy of least intervention, which cannot be limited only to the courts. This is clearly in recognition of the phenomenon that the judicial control of commercial disputes is no longer in the exclusive jurisdiction of courts. There are many statutory bodies, tribunals which would have adjudicatory jurisdiction in very complex commercial matters. Section 5 would be equally applicable to such bodies. The use of the term "judicial authority" in no manner has any reference to arbitrations not held in India It is in conformity with clause (v) of the objects and reasons for the Arbitration Act, 1996, which has been given statutory recognition in Section 5 .

126. The learned Senior Counsel had also pointed out that since Section 19 of the Arbitration Act, 1996 clearly provides that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908, there was no need for the non obstante clause. But the reason, in our view, is discernible from Section 3 of the 1961 Act, which also contains a non obstante clause with reference to the Arbitration Act, 1940. Section 45 in the Arbitration Act, 1996 is a repetition of the non obstante clause in Section 3 in the 1961 Act. It is not unusual for a consolidating Act to retain the expressions used in the previous Acts, which have been consolidated into a form of principal Act. A consolidating Act is described in Halsbury's Laws of England, 4th Edn. Reissue, Para 1225 as under:

"A consolidation Act is a form of principal Act which presents the whole body of

the statute law on a subject in complete form, repealing the former Acts. When drafting a consolidation Act the practice is not to change the existing wording, except so far as may be required for purposes of verbal "carpentry", and not to incorporate court rulings. This is known as "straight" consolidation, the product being a form of declaratory enactment. The difference between a consolidating Act and a codifying Act is that the latter, unlike the former, incorporates common law rules not previously codified. It can be determined from the long title whether or not an Act is a consolidation Act."

(emphasis supplied)

127. Similarly, a certain amount of "carpentry" has been done in the Arbitration Act, 1996 whilst consolidating the earlier three Acts. Therefore, in Section 45 of the Arbitration Act, 1996, the reference to the 1940 Act has been replaced by reference to Part I, which now covers the purely domestic arbitrations, earlier covered by the 1940 Act and the new additions i.e. the international commercial arbitrations, which take place in India. It appears that Parliament in order to avoid any confusion has used the expression "notwithstanding anything contained in Part I" out of abundant caution i.e. *ex abundanti cautela*.

128. A three-Judge Bench of this Court in *R.S. Raghunath Vs. State of Karnataka* and another, , considering the nature of the non obstante clause observed that: (SCC pp. 346-47, para 11)

"11. But the non obstante clause need not necessarily and always be coextensive with the operative part so as to have the effect of cutting down the clear terms of an enactment and if the words of the enactment are clear and are capable of a clear interpretation on a plain and grammatical construction of the words the non obstante clause cannot cut down the construction and restrict the scope of its operation. In such cases the non obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the legislature by way of abundant caution and not by way of limiting the ambit and scope of the Special Rules."

129. We are, therefore, of the opinion that existence of the non obstante clause does not alter the scope and ambit of the field of applicability of Part I to include international commercial arbitrations which take place out of India. We may further point out that a similar provision existed in the English Arbitration Act, 1950 and the English Arbitration Act, 1975. Section 4(1) of the English Arbitration Act, 1950 was similar to Section 34 of the Arbitration Act, 1940 in India. Section 1(2) of the English Arbitration Act, 1975 was similar to Section 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961.

130. In view of the above, it would not be possible to accept the submission of the learned counsel for the appellants that the aforesaid non obstante clause in Section 45 would indicate that provisions of Part I would also be applicable to arbitrations that take place outside India."

17. In Videocon Industries Limited Vs. Union of India (UOI) and Another, , which related to a dispute also under a Production Sharing Contract, the question of-whether this Court had jurisdiction to entertain the said petition under Part I of the 1996 Act, the Supreme Court decided "it did not", because the parties had agreed to exclude Part I of the 1996 Act. It held as under :

"The parties had agreed that notwithstanding Article 33.1 (which is almost identical to Article 32.1 of the PSCs and states that the governing law of the PSC is Indian law the arbitration agreement contained in Article 34.12 (which is almost identical to Article 33.12 of the PSCs and states that the arbitration agreement shall be governed by English law) shall be governed by the laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act."

18. In Prima Buildwell Private Ltd. & Ors. v. Lost City Developments LLC & Ors., OMP 614/2010 decided on 16th August,2011 wherein it was held as "It is correct that choosing a seat of arbitration is akin to choosing an exclusive jurisdiction clause. Therefore, it is rightly held in the case of A v. B (2007) 1 All E.R. 591 "an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause.") Looked I this light when the parties by express agreement have agreed that the law juridically controlling the arbitration being English law, the seat of arbitration to be in London and by all references agreeing that the curial law or law which governed the arbitral proceedings that of England and Wales, thus impliedly one can easily say that they have excluded Part I of the Act. Although, it is not expressly excluded.

19. It is evident that the plaintiff and defendant No. 1 by agreement have expressly and impliedly included the provisions of the Act. Accordingly, the suit is not maintainable. The plaint is rejected against the defendant No. 1. Incase the plaintiff proposes to take necessary steps to initiate the arbitration or if the same are already pending between the plaintiff and defendant No. 1, the same would continue before the arbitral tribunal in accordance with law and it would be decided as per its own merits. The defendant No. 1 would be entitled to raise all objections before the Arbitral Tribunal, as mentioned in the plaint about the impugned clause that the same is null or void or inoperative or incapable of being performed.

20. No relief is sought against the defendant Nos. 2 and 3. They are also not served. The suit against the said defendants cannot continue as no relief is sought against them. The same is accordingly disposed of.

21. The pending applications also stand disposed of.