

(1998) 10 DEL CK 0070

In the Delhi High Court

Case No : I.A. No"s. 8138, 8138A/97, 712 and 1377/98 and OMP No. 103/97

Biotechnology NV and Another

APPELLANT

Vs

Unicorn GmbH Rahn Plastmaschinen and Another

RESPONDENT

Date of Decision : 13-10-1998

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (1998) 47 DRJ 397

Hon'ble Judges : J.B. Goel, J

Bench : Single Bench

Advocate : A.S. Chandiok and Gaurav Duggal, for the Appellant; Vinay Bhasin and H.L. Raina, for the Respondent

Judgement

J.B. Goel, J.—By this order, petitioners application u/s 9 of the Arbitration & Conciliation Act 1996 (for short "the Act") and two applications is No. 8138/97 and 8138-A/97 of the respondents are being disposed of.

2. Briefly, the facts are that Biotechnology B.V. of Netherlands (KBV), Biotechnology International Corp. of Liberia (KIC), Biotechnology Holdings N.V. of Netherlands (KNV), Biotechnology (UK) Limited of London (KUK), SP Verbunder GmbH (SPVG) and their subsidiaries and associates (hereinafter called the "Kitec Group") had developed and owned patent rights in a system relating to the production of the product, namely, Multi-layered Composite Pipes (MLCP), fittings for use with MLCP and related equipments for the manufacture of MLCP (called the "Kite process"). Kite group had granted licences to third parties to use the Kite process for the manufacture and distribute/sale of MLCP in various territories the world over.

3. Another group of companies, namely, Unicorn Rohn systems GmbH of Germany (URS), Unicorn GmbH Rohn Plastmaschinen of Germany (Plastmaschinen) and their associates etc. (for short "the Unicorn Group") of Germany had also developed similar products and its Equipments etc. (called the "Unicorn process"). Both the parties are foreign groups.

4. Disputes had arisen between Kite Group and Unicorn Group and litigations were pending in some courts in U.K. and Germany. The two groups agreed to settle their disputes and for that purpose entered into settlement/agreement dated 11.11.1994 at Germany (hereinafter called the "Hamburg Agreement") and it was, inter alia, agreed that Kite Group will transfer/assign their aforesaid Kite patent rights to Unicorn Group, close down its production, manufacture and distribution of MLCP and withdraw from direct involvement in the development, manufacture and distribution of the Equipments and MLCP, the licensing of the Kite patents and the Kite-Knowhow, on the agreed terms and conditions for consideration and on royalty basis and on Unicorn Group agreeing to fulfill all obligations arising from the existing Kite License after this agreement and subject to exceptions provided in Clause 9 of the Agreement which provided as under :-

9. EXCLUSIVE LICENSE FOR THE Kite GROUP FOR INDIA,
SOUTH AFRICA AND GUANGDONG

With respect to India..... the following specific provisions shall apply:

9.1 he Kite Group shall have the exclusive right (which also excludes the Unicorn Group and its affiliates) to manufacture and distribute and/or have manufactured or distributed MLCP, provided that the Kite Group and its licensees observe the restrictions set out below.....

9.2 If by 31st December 1996 neither the Kite Group nor a licensee of the Kite Group shall have begun commercial production of MLCP in any such territory, or if such commercial production shall be permanently discontinued at a later stage, then with respect to the territory in question, the Kite Group shall no longer be entitled to manufacture and distribute and/or have manufactured and distributed MLCP.

9.3 If prior to 31st December 1996, a licensee of the Kite Group shall commence commercial production of MLCP in any of the above-mentioned territories, then the following shall apply to the territory in question.

9.3.1. As from the date of signature (but in the case of India: as from the date of delivery of Equipment) of the said License Agreement between the Kite Group and the Kite Licensee, the license shall be deemed to constitute an Existing Kite License. The Kite Group shall immediately inform the Unicorn Group about the conclusion of such license agreements and/or the commencement of commercial production.

9.3.2.....

9.4.....

9.5.....

9.6.....

5. This agreement also contained an arbitration clause providing for the mode and machinery for appointment of arbitrators for resolving the disputes and differences arising out of or in connection with this agreement, the law applicable, and the venue thereof. Relevant Clauses 17 and 18 provided as under :-

"17. GOVERNING LAW, VENUE

17.1 This Agreement and the Agreements at Schedules 5 and 6 as well as any disputes and differences arising out of or in connection with the aforementioned agreements or their performance shall be subject to German law. This does not apply to such agreements or parts thereof which, by virtue of the applicable rules of international private law or by imperative operation of a foreign system of law, are subject to the laws of another country.

17.2 To the extent that this can be validly agreed in accordance with German law or the applicable provisions of the laws of other countries. Frankfurt/Main shall be the exclusive venue.

18. CONCILIATION AND ARBITRATION

18.1. Any disputes arising in connection with this Agreement or the Agreements at Schedules 5 and 6 inclusive shall, wherever this is feasible, first be discussed between the parties, in particular between Mr. Horst Rahn and Mr. Nathan Kirsh. If the efforts to obtain an amicable settlement fail, the parties shall use their best endeavours to solve their disputes by agreeing on a conciliator and on conciliation proceedings in order to avoid formal arbitration. If these efforts do not lead to a satisfactory result within a reasonable period of time, any and all disputes within the aforementioned area shall be finally settled by arbitration in accordance with the provisions set out below.

18.2 The Arbitration Board shall consist of three arbitrators. The party wishing to initiate arbitration proceedings shall notify the other party in writing, nominate one arbitrator and request the other party to nominate its arbitrator within a term of one month from the date of receipt of the written notice. If on the part of the plaintiffs or the defendants, respectively, more than one party is involved in the dispute in question, the respective parties shall be regarded as one party and jointly nominate an arbitrator.

18.3 The two arbitrators shall agree on the third arbitrator (chairman) within one month from the date upon which the party who initiated the arbitration proceedings received the other party's notice concerning nomination of the second arbitrator.

18.4 If the other party fails to nominate its arbitrator in time, or if the two arbitrators fail to agree on a chairman within the additional period mentioned above, the President of the court of Appeals of Frankfurt shall nominate the second arbitrator or the chairman, respectively.

18.5 If, after establishment of the arbitration tribunal, an arbitrator becomes unable to participate, he shall be replaced in accordance with the provisions set out above. Unless otherwise required by mandatory laws, the new arbitration tribunal shall use its reasonable discretion in deciding on whether or not all or certain parts of the previous proceedings need to be repeated.

18.6 In all other respects the arbitration proceedings shall be governed by the German CPC including the provisions on third party intervention, joining of third parties and judgment in default. The arbitration award shall be rendered in writing and substantiate the reasons for the decision. The arbitration tribunal shall also decide on the distribution of costs. Only if a party so requests shall the arbitration award be formally submitted to the competent court.

18.7....."

6. It is alleged that applicant No.1 was a member of Kite group and a party to this agreement and applicant No.2 is a licensee of that group under a separate agreement dated 19.8.1993 entered into with Applicant No. 1 and in pursuance to the said agreement, the applicant No.2 has installed required machinery and incurred huge expenditure in setting up their establishment in India by 24th September 1996 and after trial production for one month has commenced "commercial production" since 25th October 1996, intimation of which had also been given to Unicorn Group. But in breach of the terms of the said agreement, the Unicorn Group has been threatening to resume production and sale of this product in India on untenable grounds, and for that purpose they had participated in an exhibition "Plast India 97" held at Pragati Maidan, New Delhi in 1997 where they have openly displayed their products, they are in contact with Indian parties and vide their letter dated 3.4.1997 have terminated its license illegally. It is further alleged that Unicorn Group have unreasonably demanded proof about achieving "commercial production" from the applicants and the proof furnished has been unreasonably not accepted and also that no standard was prescribed for achieving "commercial production" and for that reason, the license could not be cancelled.

7. They thus allege that Unicorn group have acted in breach of the Hamburg Agreement and are threatening to take over the business covered by this agreement in India from applicant No.2 and give to someone else.

8. The applicants in this application u/s 9 of the Act have sought the reliefs of permanent/ prohibitory injunction against the respondents for restraining them from acting in breach of the said agreements. An ex parte order to the following effect was passed by this Court (per S.N. Kapoor) on June 6, 1997 as under :-

"I feel that in the circumstances pointed out by the learned counsel for the applicant, it is desirable that the respondents should be restrained from finalising any agreement contrary to the terms of the agreement entered earlier in between the parties till the next date."

9. This interim order has been extended from time to time.

10. The respondents have filed two applications, one LA. 8138/97 under Order 39 Rule 4 of the CPC (for short the Code) and Section 9 of the Act for vacation of the ex parte temporary injunction and another application under Order 7 Rule 11 and Section 151 of the Code for rejection of the petition as not maintainable and that this Court also has no jurisdiction to entertain the petition. The main plea of the respondents is that the disputes raised arise out of and relate to agreement dated 11.11.1994; the parties have agreed about the mode and machinery for resolving all the disputes, the law, both German law and German CPC which will apply and the venue for resolving the disputes between the parties as contained in Clauses 17 and 18 of the said agreement. It is also alleged that the petition is a misuse of the process of the Court; that Section 9 of the Act is not applicable in the present case as the parties to the agreement are foreign companies/nationals who are not governed by the Indian Laws and the venue is also not in India.

11. I have heard learned counsel for the parties at length.

12. Learned counsel for the applicants has contended that applicant No.2 is a licensee in India of applicant No.1, one of the parties to the Hamburg Agreement and a valid license was granted in its favor in terms of the Hamburg Agreement and it has fulfilled the conditions contemplated in the said agreement. The respondents have threatened to act in breach of the agreement and as such the applicants are entitled to protect their rights by invoking the remedy available u/s 9 of the Act as talks for settlement have failed and there is no possibility of conciliation between the parties. He also contends that the applicant is doing business in India; it is they whose rights are being adversely affected and the cause of action also arose in Delhi where the respondents have participated in the exhibition (Plast India' 97) and as such they are entitled to the interim remedy provided u/s 9 of the Act in this Court.

13. Whereas learned counsel for the respondents has contended that both the applicants are not parties to the Hamburg Agreement and applicant No.2 is not a lawful licensee contemplated under the said Agreement, that the said agreement was entered into between two groups of foreign companies and their foreign associates/affiliates at Germany, none of whom was Indian nationals, they are not governed by Indian laws and are not subject to jurisdiction of Indian courts; in the said agreement, it was specifically, agreed that disputes and differences arising out of the agreement shall be resolved through arbitration, procedure for appointment of arbitrators is agreed and it was specifically agreed that German Laws, both substantive and procedural will apply and the venue/seat of the Tribunal agreed is Frankfurt Main; that neither Section 9 is attracted nor this Court has jurisdiction, territorial or otherwise, to entertain this petition. He also contends that if at all, which is not admitted, if it is a "international commercial arbitration" within the meaning of Section 2(1) of the Act for that matter this application could be filed before the Supreme Court of India as provided u/s 11

of the Act. He has further contended that Section 9 of the Act could be invoked either when arbitral proceedings are pending or arbitration clause has been invoked by notifying the name of arbitrator and steps for appointment of arbitrator in accordance with the prescribed procedure have been initiated which in this case has not been done, for these reasons also, Section 9 is not applicable.

14. The applicants claim the right under the Hamburg Agreement and want to enforce the rights and obligations alleged to have been created in their favor under the said agreement. The disputes raised arise out of or relates to the said agreement. It is not disputed that none of the parties to the Hamburg Agreement are Indian nationals and the parties are foreign nationals/incorporated in foreign countries. First question is whether the Act and its Section 9 is applicable in the present case or not. The preamble to the Act reads as under :-

"The Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto."

15. This Act thus provides for the law to be applicable in respect of the following subjects in an arbitration matter :-

1.Domestic Arbitration;

2.International Commercial arbitration;

3.Enforcement of foreign Arbitral Awards; and

4.The law relating to conciliation and for matters connected therewith or incidental thereto.

16. The expression "domestic arbitration" obviously means arbitration between the two Indian parties to be held in India, governed by Indian laws. This case, will not fall in this category.

17. The dispute involved also does not relate to enforcement of foreign award.

18. The expression "international commercial arbitration" is defined in Clause (f) of Sub-section (1) of Section 2 of the Act as under:-

"2(1)(f) International commercial arbitration means an arbitration relating to disputes arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is :

(i)an individual who is a national of, or habitual resident, in any country other than India; of

(ii)a body corporate which is incorporated in any country other than India; or

(iii)a company or an association or a body of individuals whose central

management and control is exercisable in any country other than India; or
(iv) the Government of a foreign country."

19. The Act has been divided into four parts. Part I comprising of Sections 2 to 43 deals with "arbitration". Section 9 falls in this part. This Section will be attracted in this case if the present case relates to an "international commercial arbitration" and fulfills other conditions contemplated in this Chapter. Sub-section (2) of Section 2 of the Act provides that Part I shall apply where the place of arbitration is in India.

20. These provisions make it clear that this Act applies in such cases where one or more of the parties is foreigner but the place of arbitration agreed is in India and obviously the law applicable would also be Indian law. It follows that where the parties to the agreement are foreigners and the place of arbitration is not in India and the foreign law is application, then provisions of Part 1 of this Act are not applicable. None of the parties to the agreement are Indian but foreigners.

21. Clause 17.1 provides that the agreement and any disputes and differences arising out of or in connection with the agreement or its performance shall be subject to German law unless by virtue of the applicable rules of international private law or by imperative operation of a foreign system of law, is subject to laws of another country and Clause 17.2 provides that Frankfurt/Main shall be the exclusive venue.

22. Clause 18.1 of this Agreement provides that any and all disputes and differences arising out of or in connection with the said agreement shall be settled by arbitration in accordance with the provisions set out therein. And then the mode for appointment of three arbitrators is provided under Clauses 18.2, 18.3, 18.4 and 18.5 and Clause 18.6 provides that such arbitration proceedings shall be governed by the German CPC including the provisions of third party intervention, joining of third parties and judgment in default.

23. The parties have the freedom to choose the law governing their agreements and the seat of the Tribunal for resolving the disputes arising out of their agreement. They may choose the substantive law governing the agreements as well as the procedural law governing the conduct of the arbitration. Even where there is no express choice of the law governing the contract as a whole or the arbitration agreements in particular, in the absence of any contract, the presumption is that the parties have intended that the proper law of the contract as well as the law governing the arbitration agreement are the same as the law of the country in which the arbitration is agreed to be held. *National Thermal Power Corporation Vs. The Singer Company and others*, .

24. In this agreement, the parties have specifically agreed that the agreement is to be governed by German laws, the disputes to be resolved by arbitration in accordance with the agreed mode to which also German CPC will apply and the seat of the Tribunal to resolve the disputes has been agreed to be Frankfurt/Main.

25. This provision thus provides that the disputes shall be resolved by arbitration and arbitration will be held at Frankfurt/Main and not in India. The German Court have the exclusive and competent jurisdiction in respect of all matters/disputes/differences between the parties. In view of Sub-section (2) of Section 2 of the Act, this is not an "international commercial arbitration" to which Part I will apply. As such it is not governed by this Act. This follows that Section 9 is not applicable in this case.

26. This application u/s 9 of the Act, Therefore, is not maintainable, is misconceived and is liable to be dismissed. In view of this position, it is not necessary to go into the other points raised.

27. LAs. No.8138/97 and 8138-A/97 of the respondents are accordingly allowed and OMP No. 103/97 of the applicants is dismissed with costs. Costs assessed at Rs.20,000/-.

28. Interim order dated June 6, 1997 stands vacated. I.As. No.712/98 & 1377/98 also stand disposed of.