(2000) 05 DEL CK 0060

In the Delhi High Court

Case No : A.A. No. 262 of 1997

Dabur India Ltd. APPELLANT

Vs

BSI Ltd. RESPONDENT

Date of Decision : 26-05-2000

Acts Referred:
Arbitration and Conciliation Act, 1996 — Section 11, 8

Citation : (2000) 56 DRJ 497 : (2001) 4 RCR(Civil) 220

Hon'ble Judges : S.N. Kapoor, J

Bench : Single Bench

Advocate : Sudhir K. Makkar, for the Appellant; Ajit Warrior, for the Respondent

Judgement

S.N. Kapoor, J.—The petitioner has filed an application u/s 8 read with Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter called "the Act" for short). The applicant company clams its registered office at 8/3, Asaf Ali Road, New Delhi. The applicant company placed an order for supply of 4,500 MT of India Toasted Yellow Soyabean Extraction with the respondent vide confirmation Note No. SS/1402/96 dated 16.9.96 through M/s. S.S. Mercantile Export Intermediates & Produce Brokers and the confirmation note dated 16th September, 1996 was signed and executed by both the parties. The respondent was to dispatch the material to the destination to be notified by the applicant by Railway rake. The applicant was to make payment equivalent to 90% of the invoice value of the first consignment. This agreement clause provided that in case of any dispute, arbitration would be last resort to both the parties, if both the parties are unable to resolve mutually. The said confirmation note in Annexure A-1. Accordingly, certain supplies were made but the respondent failed to supply the third consignment in terms of the agreement which was to be dispatched by the respondent for Attari between 15th December, 1996 to 15th January, 1997. The respondent was supposed to dispatch the rake up to 15th February, 1997 whichever allotted first The Railway Authorities had allotted the rake in the last week of March, 1997 which was actually surrendered by the respondent and the respondent had already diverted the material to be supplied by the consignment in favor of the petitioner. Numerous disputes mentioned in para 7 of the petition which led the petitioner to file this petition arose in between the parties.

2. The main objection of the respondent related to the territorial jurisdiction.

3. It may be worthwhile to reproduce para 23 of the petition in this regard. This reads as under:

"23. That the petitioner/applicant carries on its business at New Delhi and has its registered office as well as its corporate office at New Delhi. The entire negotiations for supply of material was finalised between the parties at New Delhi and the order for delivery of the material was also placed from New Delhi, The confirmation note which is the basis of the agreement between the parties was also signed and executed by the applicant at New Delhi. The payment against the material purchased was also to be remitted from New Delhi. The respondent also has an office at New Delhi. As such the cause of action for the present proceedings partly arose at New Delhi and, Therefore, this Hon''ble Court has jurisdiction to try and entertain the present proceedings."

On this basis, petitioner-applicant seeks to claim that the disputes mentioned in para 7 of the petition be referred to Arbitrator to be appointed by this Court.

4. Insofar as the respondent is concerned, it is contesting the petition basically on the ground that this Court has no jurisdiction to try this application. According to the defendant, the contract contained in the confirmation note dated 16th September, 1996 were negotiated between the parties at Bhopal between the respondent on the one side and the petitioner through M/s. S.S. Mercantile Export Intermediates & Produce Brokers in Indore, Madhya Pradesh. The goods were to be delivered by Railway Authorities at Attari. Thus, no part of the contract was entered into and was to be performed within the territorial jurisdiction of this Court. Merely because the respondent has an office in Delhi, the jurisdiction of this Court would not automatically be attracted in the absence of any part of the cause of action arising in Delhi. The confirmation noted dated 16th September, 1996 showed that the same was written on the letter head of M/s. S.S. Mercantile Export Intermediates & Produce Brokers, Indore. The confirmation note was sent to the seller and buyer. It expressly stated that the failure to return the same would not affect the validation of the confirmation note. Consequently, the contract was concluded between the parties on 16th September, 1996, at Indore and not at Delhi as claimed by the plaintiff. The arbitration clause is not denied though all the factual allegations relating to the claim were denied.

5. The first point for consideration is whether the contract took place at Indore or at Delhi. From the confirmation note Annexure A-1, it is evident that it was signed on 16th September, 1996 at Indore for Jagmanek Solvent Extraction Plant. The confirmation note reads as under:

"We hereby confirm on behalf and on account and risk of the under mentioned buyer and seller the following transaction:

SELLER:

Jagmanek Solvent Ext. Plant 5, Zone-II, 2nd Floor, Maharana Pratap Nagar,

Bhopal-462011

PH : 557091 FAX: 550922

BUYER:

Dabur India Limited Harsha Bhawan, Block-E, Connaught Place,

New Delhi-110 001.

PH : 3329021 (4 lines) FAX: 33-20613

COMMODITY:

Indian Toasted Yellow Soyabean extraction warranted to contain protein min. 58% Fat 1.5% max., Sand and Silica max. 2%, Fibre max. 6% moisture max 11% free from Castor seed/Husk & Lumps. Urease activity not to exceed 0.30 unit on EEC method.

QUALITY ALLOWANCE:

Protein below 48% up to 46% and fraction thereon 1:1 Moisture & Silica over 2% up to 2.5% and fraction thereof 1:1 Urease activity : 0.330 mg N2/gm/min. at 30 degree C, EEC acceptable up to 0.35.

Rebate 0.30 to 0.35, 0.1% for each 0.01 unit.

Goods reject able at Buyer''s option if contents found less and more than above mentioned limits.

PACKING:

In sound second hand jute bags or in New Jute bags. (Buyer''s option).

QUANTITY:

4500 MT (four thousand five hundred MT only) + -2%-Gross weight with bags.

ADVANCE PAYMENT:

Buyer shall make 90% payment against proforma invoice, duly sealed and signed contract and a cheque of equivalent amount to seller in between 10 to 15 October, 1996 for the first rake. This 90% advance will be adjusted in the payment of third rake. Buyer Will charge interest @ 13.50% p.a. on this advance till dispatch of the third rake. In case due to non-despatch, if the first rake will be cancelled then this advance will be treated as advance for the second rake. Seller will make payment of interest calculated up to date of cancellation. And if the second rake will be cancelled then it will be treated as advance for third rake. Seller will make payment of interest calculated up to date of cancellation.

PRICE AND DELIVERY PERIOD:

Seller shall dispatch first lot (1500 MT) @ Rs. 10,000.00'' PMT F.O.R. Attari in sound second hand jute bags by railway rake from 15.10.1996 to 15.11.1996. In case rake not allotted up to 15.11.1996 then delivery period will be extended up to 30.11.1996. If still rake not allotted then buyer will change destination either Mumbai, Gandhidham or Windmill and the same time Attari indent will remain pending. Then seller will dispatch the rake up to 15.12.1996 whichever rake allotted first. Even if the rake not allotted then at buyer''s option delivery period will be further extended or first rake will be cancelled at par.

Seller shall dispatch second lot (1500 MT) for Attari in sound second hand jute bags or New jute bags (buyer''s option), at the market rate which will be decided between 5 to. 1.5 November, 1996, (an addendum to contract will be issued separately) by railway rake from 15.11.1996 to 15.12.1996. In case rake not allotted up to 15.12.1996 then delivery period will be extended up to 31.12.1996. If still rake not allotted then buyer will change destination either Mumbai, Gandhidham or Windmill and the same time Attari indent will remain pending. Then seller will dispatch the rake up to 1.5.1,1997 whichever rake allotted first. Even if the rake not allotted then at buyer''s option delivery period will be further extended or second rake will be cancelled at par.

Seller shall dispatch third lot (1500 MT) for Attari in sound second hand jute bags or New jute bags (buyer''s option), at the market rate which will be decided between 5 to 15 December, 1996 (an addendum to contract will be issued separately), by railway rake from 15.12.1996 to 15.1.1997. In case rake not allotted up to 15.1.1997 then delivery period will be extended up to 31.1.1997. If still rake not allotted then buyer will change destination either Mumbai, Gandhidham or Windmill and the same time Attari indent will remain pending. Then seller will dispatch the rake up to 15.2:1997 whichever rake allotted first. Even if the rake not allotted then at buyer''s option delivery period will be further extended or third rake will be cancelled at par.

WEIGHMENT, SAMPLING AND ANALYSIS:

Weighment, Sampling and Analysis will be done at the time of loading by M/s. SGS India Ltd., at seller cost and report thereupon given by them will be final and acceptable to both buyer and seller, in case rakes will be dispatched for Attari. In case rakes will be dispatched for other destination then weighment will be final at the time of unloading and Sampling and Analysis will be done as per SOPA model contract Sampling & Analysis clause.

PAYMENT:

Buyer will make 98% payment against Railway Receipt and invoice and balance as per weight and quality report of M/s. SGS India Ltd., when rakes will be dispatched to Attari. And in case rakes dispatched for changed destinations then Buyer will make 95% payment against Railway Receipts and Invoice and balance as per final weight and quality report and account statement. As price is fixed for Attari so actual freight difference between Attari and changed destination will be added or deducted from the price. Buyer will adjust interest @ 13.50% p.a. on advance in both rake''s 98% or 95% payment.

The advance will be adjusted in 98% (if rake dispatched to Attari) or 95% (if rake dispatched to changed destination) while making payment of third rake.

TAXES & DUTIES:

Buyer shall issue form ''H'' to the Seller.

BANK CHARGES:

All Bank charges on seller''s account.

OTHER TERMS :

In case of cancellation of all the three rakes due to non-despatch then seller will refund advance with 13.50% p.a. interest to buyer. In case of any dispute arbitration will be the last resort, if both parties are not able to settle the same mutually.

Please send us the copy of Invoice and Weight & Quality Report for necessary follow up.

BROKERAGE:

Rs. 10/0 PMT (Rs. Ten PMT Only)

Seller and buyer to return two copies of this confirmation note duly sealed and signed in confirmation. However, failure to return the same in any way will not affect or alter the validity of this confirmation note.

for DABUR INDIA LTD.

(As Buyers)

(unsigned)

for S.S. MERCANTILE

Sd/-

(as Brokers)

for JAGMANEK SOLVENT EXTRACTION PLANT

Sd/-

(As Sellers)"

7. It may be noted here that the confirmation note was not signed by anybody as

authorised signatory of M/s. Dabur India Ltd., the petitioner excepting the broker at Indore. It is on the letter head of S.S. Mercantile the Brokers. This specifically mentioned that "However, failure to return the same in anyway will not affect or alter the validity of this confirmation note". Therefore, the alleged acceptance of the contract by the plaintiff at Delhi after it stood confirmed by the broker on their behalf, would not confer any territorial jurisdiction on this Court.

8. However, there is no dispute in between the parties that the respondent has a branch office in Delhi and the payments were also sent from Delhi. Now, let us consider how far these two factors can confer jurisdiction on this Court. Insofar as the existence of Branch Office is concerned, in terms of Section 20 of the CPC, a suit can be instituted in a Court within the local limits of whose jurisdiction the defendant or each of the defendants, where there are more then one, voluntarily resides or carries on business or works for gain. Under Clause (c) of Section 20, a suit can also be instituted in a Court within the local limits of whose jurisdiction the cause of action is whole or in part arises. Explanation of Section 20, CPC clarifies that a corporation shall be deemed to carry on business at its sole or principal office in India. Obviously, it means that in ordinary course, it shall not be deemed to carry on business at any other place including a place where it has a subordinate office also. Therefore, Explanation in ordinary course does not confer any jurisdiction on the Court where the principal officer of a corporation is not located. However, there is an exception to this general rule in the latter part of the Explanation. It clarifies that a corporation could be sued at a place other than the place of its principal office subject to two specific conditions, (i) that at the place subordinate office of the defendant is located; and (ii) that at least a part of cause of action has also arisen. If no part of the cause of action arises at a place where subordinate office of the corporation is located, the suit cannot be filed in a Court having territorial jurisdiction over its subordinate office. But in case cause of action or part of it has also arisen where its subordinate office is located, then the Court having jurisdiction over that place shall have territorial jurisdiction. In this view of the matter, I find support from the judgment of B.B. Verma Vs. National Projects Construction Corporation Limited,

9. It is an undisputed fact that the cheques as well as the notice has been sent from Delhi. It has not been proved that any cheque or draft has been handed over to the respondent personally at Delhi. Sending cheques etc. from Delhi through post is an act of the petitioner performed by the post office or courier as agent of the petitioner. Obviously they had been received by the respondent outside Delhi, i.e. at the head office of the respondent. It does not amount to payment and payment would be completed on receipt of cheque etc. by the respondent. It may be mentioned that since the contract was to be performed at Bhopal and at Attari and at the most at Mumbai, Gandhidham or Windmill just by sending payment from Delhi for the performance of contract at Bhopal and also just by sending notice from Delhi the petitioner could not confer jurisdiction on Delhi Courts.

10. For the aforesaid reasons, it is apparent that Delhi Courts do not have jurisdiction. Accordingly, the petition be returned for presentation before the Court of competent jurisdiction. The petition is disposed of accordingly. In the peculiar facts and circumstances of the matter, the parties are left to bear their own costs.