
(2015) 02 DEL CK 0268
In the Delhi High Court
Case No : CS (OS) 1309/2012

International Hispacol S.A.

APPELLANT

Vs

Castmaster Enterprise Pvt. Ltd.

RESPONDENT

Date of Decision : 18-02-2015

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2 (f), 2(f), 45, 8

Citation : (2015) 4 ARBLR 328

Hon'ble Judges : Indermeet Kaur, J.

Bench : Single Bench

Advocate : Amit Bansal, Saurabh Bindal, Madhu Sweta and Rohit Jain, for the Appellant; Sandeep Sethi, and Vineet Jhanji, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.

I.A. No.1455/2014

1. This is an application filed by the defendant under Section 45 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act) seeking reference of their disputes (subject matter of the suit) to Arbitration. Submission is that the parties are governed by Part-II and under Section 45 of the said Act where there is an "international commercial arbitration" {within the meaning of Section 2 (f) of the said Act} therefore proceedings before this Court cannot continue.

2. Application has been opposed.

3. Learned counsel for the plaintiff submits that there is no dispute to the proposition that the Joint Venture Agreement between the parties dated 05.7.2008 is an "international commercial arbitration" within the meaning of Section 2(f) of the said Act but it is disputed that the provisions of Section 45 of the said Act are applicable.

4. After some arguments, both the parties concede that the present application be treated as an application under Section 8 of the said Act.

5. Pleadings are complete.

6. Learned counsels for the parties also agree that no fresh pleadings are required. Accordingly, arguments have been heard on the merits of this application.

7. Learned counsel for the defendant has drawn attention of this Court to the Joint Venture Agreement dated 05.7.2008. This agreement was entered into in Spain on the said date. The parties were CASTMASTER ENTERPRISES PRIVATE LIMITED (plaintiff) and INTERNATIONAL HISPACOLD S.A. (defendant). HISPACOLD is a leading manufacturer of climate system for passenger transport vehicles and has considerable experience in the field of manufacture supply of these products. CASTMASTER HISPACOLD PRIVATE LIMITED is a reputed supplier of automotive components, systems and other automotive products to original equipment manufacturers in the Indian automotive sector such as TATA Motors, Suzuki, Honda, Yamaha and Mazda and had developed considerable goodwill and reputation for its products. Parties, in principle, had agreed to collaborate together in the development of a company (Corporation) to serve as a legal entity in order to undertake design, development, manufacture, assemble, market, sale and service of the complete range of HISPACOLD products, present and future, manufactured or commercialized by HISPACOLD.

8. Clause 2 of this agreement deals with the organization of the Corporation. Clause 2.1 deals with its formation and reads as under:

"2.1 Formation:

The parties shall cause the Corporation to be incorporated in India as a private limited company limited by shares in accordance with the Act, and to be called "CASTMASTER HISPACOLD PRIVATE LIMITED".

or any other similar name that may be approved by the Registrar of Companies, New Delhi. All preliminary expenses incurred for forming and registering the Corporation and all expenses incurred after the formation of the Corporation incidental to the establishment of the Corporation and its office etc. shall be borne and paid by the Corporation."

9. Clause 2.3 defines the purpose of the Joint Venture Agreement.

10. Clauses 2.3.1 and 2.3.2 read herein as under:

"2.3.1. The objects of the Corporations shall be set down in its Memorandum of Association and shall include to design, develop, manufacture, assemble, market, sell and service of Products, in the Territory under a trade name such as "HISPACOLD-CASTMASTER" or any other name agreeable to parties and to obtain satisfactory economic benefits for the Parties.

2.3.2. The Corporation shall be managed and operated in accordance with prudent financial and business principles and with reference to an objective of profitability."

11. Under Clause 2.4 it was agreed that the Corporation would sell the products in the Territory which meant India, Nepal, Bhutan, Bangladesh and Srilanka.

12. Clause 4.1 deals with the intellectual property rights of the Corporation. The functions and obligations of the plaintiff (HISPACOLD) and that of the defendant (CASTMASTER) were defined in Clauses 5 and 6.

13. Clause 9 contains the dispute resolution and arbitration clause. Relevant extract reads hereinafter as under:

"9. DISPUTE RESOLUTION AND ARBITRATION

In the event of any dispute, differences or claims arising between the Parties to this Agreement or in any way relating to any terms, conditions or provisions herein mentioned, or in the construction or interpretation of any of the Clauses herein, the Parties shall use their best consultations and conciliation between one director each of HISPACOLD AND CASTMASTER.

In the event no amicable settlement is reached by the Parties hereto within thirty (30) days, the dispute shall be referred to arbitration, to be conducted under the provisions of the (Indian) Arbitration and Conciliation Act, 1996. The place and venue shall be for Arbitration, FICCI Building, Tansen Marg, New Delhi-110001. Each party hereto shall have the right to appoint one (1) arbitrator each, with a third arbitrator to be appointed with the mutual consent of the two (2) arbitrators. The decision of the arbitrators shall be entered as a final judgment in any court of competent jurisdiction, in Delhi.

Notwithstanding the provision that any disputes or controversies between the Parties relating to, or arising out of this Agreement shall be referred to and settled by an arbitration, the Parties may seek any such temporary or provisional relief or remedy including injunctions, provided for by the laws of the Republic of India, which would ordinarily be available in an action based upon such disputes or controversy in the absence of an agreement for arbitration.

The arbitration award rendered by the arbitrators shall be final and binding upon the Parties hereto. The language of the arbitration proceedings shall be English. The Parties shall each bear their own legal costs, and the fees and expenses of the arbitration shall be borne equally by the Parties, unless otherwise decided by the arbitrators."

14. Termination clause was contained in Clause 20.

15. This is the gist of the agreement highlighted by the parties.

16. The counsel for the defendant has drawn attention of this Court to an e-mail exchanged between the parties on 06.2.2009. This e-mail was sent by defendant

no.2 to the plaintiff; the reply was also forwarded by the plaintiff to the defendant. This mail stated that the parties had agreed that the new company (Corporation) HISPACOLD- CASTMASTER would come into legal existence soon. Counsel for the defendant has also placed reliance upon a communication dated 19.11.2009 written by the plaintiff to the defendant wherein the plaintiff had terminated the Joint Venture Agreement dated 05.7.2008 holding that it is not binding upon the parties. Learned senior counsel for the defendant states that this letter was actually an ineffective communication as the Joint Venture Agreement between the parties had in fact not taken off and as such, its cancellation does not arise. The trump card of the defendant is the legal notice sent by the counsel for the plaintiff to the defendant on 08.9.2011. Attention has been drawn to para 2 and 3 of the said notice. Relevant extract herein read as under:

"5. In furtherance of the aforesaid agreement and during the course of business, you the Noticee required certain quantities of HVAC Units from our Client to be delivered to Ashok Leyland for installation in the DTC buses. That our Client had duly supplied the requisite HVAC Units to you the Noticee for which you had duly received the payment from Ashok Leyland. That our Client raised certain invoices for supply of HVAC Units to you the Noticee, the details which are stated below:

Pursuant thereto, several reminders were sent by our Client but you the Noticee have not yet responded to the same and no payment has been received by our client against the aforesaid invoices till date."

17. It is this contention in the legal notice which has been vehemently highlighted by the learned senior counsel for the defendant to submit that it was in furtherance of the Joint Venture Agreement dated 05.7.2008 that the plaintiff has supplied goods to the defendant and the claim of the plaintiff seeking recovery of the money based on those invoices are admittedly even as per the case of the plaintiff in continuation of the aforementioned Joint Venture Agreement.

18. Learned counsel for the defendant has placed reliance upon a judgment of this Court reported as Ramesh Chander Vs. Jagdish Chander and Others, to support his arguments that the rule of interpretation in an arbitration agreement is to give a positive meaning to it and the underlying intent and object has to be gathered from the terms of the document. Submission being that the conduct of the parties and the communication exchanged between them clearly show that the parties had entered into a Joint Venture Agreement and the present transaction is clearly covered by that agreement; since the dispute is arbitral, the present suit is not maintainable.

19. This position is disputed. Learned counsel for the plaintiff does not dispute the legal notice sent by the counsel for the plaintiff to defendant on 08.9.2011. His submission, however, is that it the terms and conditions of the agreement which have to be looked into to decide and conclude as to whether the claim of the plaintiff in the present suit is covered by the Joint Venture Agreement or not.

Submission being reiterated that the present suit is a suit for recovery based on four invoices dated 19.12.2008, 27.02.2009, 27.02.2009 and 30.10.2009 which are independent transactions which the plaintiff had with the defendant and have no concern with the arbitration agreement. As per the plaintiff goods were received by the defendant for which four invoices dated 19.12.2008, 27.02.2009, 27.02.2009 and 30.10.2009 had been issued; Payment for these goods had not been made by the defendant. The gist of the plaint is based on this amount which the plaintiff has to recover from the defendant.

20. The scope and applicability of Section 8 of the said Act has been considered by various judicial pronouncements. Essential ingredients for invocation of Section 8 are:

- (i) That there is an arbitration clause.
- (ii) A party to the arbitration agreement brings an action in court against other party;
- (iii) The subject matter of the action be same as subject matter of the arbitration agreement: and
- (iv) The other party moves the court for referring the parties to arbitration before he submits his first statement on the substance of the dispute.

All these conditions must co-exist.

21. This Court is foremost concerned with sub-clause (iii) i.e. the subject matter of action in the present suit and the subject matter of the arbitration agreement. The Joint Venture Agreement has been detailed above. The gist of this Joint Venture was that the parties had agreed that a third company (Corporation) be created which will sell the goods of the plaintiff in the market i.e. in the territory in India, Nepal, Bhutan, Bangladesh and Srilanka. This agreement even as per the defendant did come into effect, it did not take off.

22. The ambit of the present suit can in no manner be equated with the terms contained in the arbitration agreement. The arbitration agreement had been entered into between the parties to make a third company i.e. the Corporation to sell the goods of the plaintiff to be marketed by the defendant in India. It was nowhere connected with the independent supply of the goods made by the plaintiff to the defendant on the dates as aforementioned. The relevant language used in Section 8 is - "in a matter which is the subject matter of an arbitration agreement"; therefore, the suit should be in respect of "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and even through it is between the same parties, there is no question of application of Section 8. The word "a matter" clearly indicates that the entire subject matter of the suit should be a subject of the arbitration agreement as well.

23. It is this backdrop, this Court has to consider the prayer made by the defendant in his application filed under Section 8 of the 1996 Act. This application is filed in a suit filed by the plaintiff for recovery of money. Arbitration clause contained in the Joint Venture Agreement is invoked, but not a single dispute is delineated which would arise out of this agreement. The arbitration clause in the agreement categorically states that those disputes or differences arising between the parties to this agreement or in any way relating to any terms, conditions or provisions having mentioned or in the constructions or interpretation of any of the clauses herein, the same shall be settled by arbitration.

24. The present suit is a suit for recovery of 1,36,340 Euros which is the outstanding payment raised by way of these invoices along with interest; it is an independent supply of goods by the plaintiff to the defendant. In no manner can it be said that the dispute raised in the present suit would be covered by the Joint Venture Agreement. This is a clear case where the dispute is not covered by the arbitration clause; the suit has to proceed. Application is without any merit. It is dismissed.

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25. Written statement be filed by the defendant within four weeks from today with advance copy to the plaintiff who may file rejoinder before next date.

26. List on 08.7.2015.