

(1998) 10 DEL CK 0015

In the Delhi High Court

Case No : I.A. No. 646/98 and Suit No. 2559 of 1997

Kitec Industries (India) Ltd.

APPELLANT

Vs

Unicor Gmbh Rahn Plastmaschinen and Another

RESPONDENT

Date of Decision : 13-10-1998

Acts Referred:

Citation : (1999) 2 AD 537 : (1999) 48 DRJ 316

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

Bench : Single Bench

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

Judgement

J.B. Goel, J.—By this order, the application (I.A. No. 646/98) under Order 7, Rule 11 and Section 151 of the CPC (for short "the Code") filed by the defendants is being disposed of.

2. plaintiff has filed a suit for mandatory injunction seeking the following reliefs :

1. Mandatory and prohibitory injunction restraining the defendants No. 1 and 2 from :

(a) exhibiting, advertising, marketing, selling and promoting the products;

(b) propagating false and detrimental statements against the plaintiff;

(c) encroaching upon the exclusive territory of the plaintiff without first settling the dispute regarding the commercial production by an Arbitrator in breach of agreement dated 11.11.1994.

3. Briefly, the facts are that Kitechnology B.V. of Netherlands (KBV), Kitechnology International Corp. of Liberia (KIC), Kitechnology Holdings N.V. of Netherlands (KNV), Kitechnology (UK) Limited of London (KUK), SP Verbundrohr 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 Equipments for the manufacture of MLCP (called the "Kitec process"). Kitec group had granted licences to third parties to use the Kitec process for the manufacture and distribute/sale of MLCP in various territories the world over.

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

5. Disputes had arisen between Kitec Group and Unicor Group about the use of Patents etc. and litigations were pending in 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 Kitec Group will transfer/assign their aforesaid Kitec patent rights to Unicor 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, and not to further grant license of the Kitec patents and the Kitec-know-how to them, on the agreed terms and conditions and on certain payments by way of lump sum and also on royalty basis, and subject to exceptions provided in Clause 9 of the Agreement which provided as under :

9. EXCLUSIVE LICENSE FOR THE KITEC GROUP FOR INDIA, SOUTH

AFRICA AND GUANGDONG

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

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

9.2. If by 31st December, 1996 neither the KiTec Group nor a licensee of the KiTec 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 KiTec 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 KiTec 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 KiTec Group

and the KiTec Licensee, the license shall be deemed to constitute an Existing KiTec License. The KiTec Group shall immediately inform the Unicolor Group about the conclusion of such license agreements and/or the commencement of commercial production.

9.3.2.....

9.4.

9.5.

9.6.

6. This agreement also contained an arbitration clause providing for the mode and machinery for appointment of arbitrators for resolving the disputes arising out of or in connection with this agreement, the law governing the agreement and the arbitration proceedings 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.".

7. The KiTec Group has not been impleaded as a party in this suit. The plaintiff has alleged that the KiTec Group had appointed the plaintiff as its licensee for the territory of India vide a license agreement dated 19.8.1993 (which was made effective from 31.3.1995) on the terms and conditions mentioned in that agreement (Annexure P-2 to the plaint).

8. It appears that initially this agreement dated 19.8.1993 was entered into between M/s. KiTechnology B.V. of Netherlands as "Licensor" and one Mr. Avinash R. Laddha of Bombay as the "Licensee" and this agreement contemplated that the "Licensee" will form a company by the name of KiTec Industries (India) Limited with the approval of the aforesaid licensor within a specified period. plaintiff appears to have since been incorporated as a company and now plaintiff claims to be the Licensee/assignee/successor under the agreement dated 19.8.1993.

9. The plaintiff claims that being a licensee of the KiTec Group and in pursuance of the agreement of licence, they had installed required machinery and incurred huge expenditure in setting up their establishment in India by 24.9.1996 and after trial production for one month has commenced "commercial production" since 25.10.1996 intimation of which had also been given to the Unicor Group. However, the Unicor Group vide their fax dated 8.1.1997 asked for documentary proof of the "commercial production" and the commencement of the work,

though this demand of the defendants was unreasonable, arbitrary and patently against the terms and spirit of the agreement but the plaintiff in order to avoid any controversy furnished such proof. But defendants repeated their this demand on 10.3.1997 ignoring the plaintiff's fax dated 22.2.1997. The plaintiff came to know in March, 1997 that the defendant No. 1 had participated and openly displayed products similar to those licensed to plaintiff at exhibition "Plast India 97" held at Pragati Maiden, New Delhi. On being apprised, KiTec Group had conveyed their displeasure and anguish for it to the defendants. However, No. 1 vide letter dated 3.4.1997 complained that the commercial production which was to be achieved by 31.12.1996 had not been achieved and purported to terminate the license granted by the KiTec Group to the plaintiff in pursuance of agreement dated 11.11.1994 in respect of the Indian Territory. It is thus alleged that this action of the defendants is illegal, arbitrary and in breach of the terms of agreement dated 11.11.1994. The plaintiff has accordingly filed the present suit.

10. Before the suit was filed by the plaintiff, one foreign company KiTechnology N.V. and A.R. Ladha had filed a petition u/Sec. 9 of the Arbitration & Conciliation Act 1996 being OMP No. 103/97 in which interim injunction was passed by this Court on 6.6.1997. That petition is being dismissed vide separate judgment today.

11. The defendants have not filed their written statement. However, they have filed this application under Order 7, Rule 11 taking objections against the maintainability of the suit and the jurisdiction of this Court to entertain the suit on the following grounds:

1. The plaintiff had earlier filed proceedings u/Sec. 9 of the Arbitration Act being OMP No. 103/97 on the same facts and seeking the same relief. This suit on the same facts and for the same relief is not maintainable;

2. There is no privity of contract between the plaintiff and defendants as the agreement dated 11.11.1994 entered into between KiTec Group and Unicor Group to which the plaintiff is not a party. Hence, the plaintiff has no locus standi;

3. There is an arbitration clause provided in the said agreement and for appointment of Arbitrators, and also that the German Law, both substantive law and procedural law will govern the agreement as also the arbitration proceedings and the venue of the Tribunal agreed is Frankfurt/Main. Hence this Court has no territorial jurisdiction;

4. The plaintiff is not a licensee of KiTec Group as it is not a party to the agreement dated 19.8.1993 relied by the plaintiff;

5. Defendant No. 1 is not a party to that agreement. Hence the plaintiff has no cause of action to institute this suit against the defendants. The suit is barred u/ Sec. 9 of the Code because of exclusivity clause of the disputes being resolved by arbitration, forum being in Germany; the law to be applied also being German and the parties to the agreement dated 11.11.1994 are also foreigners. And this

Court has no jurisdiction for this reason also;

6. No cause of action also arose at Delhi as both the agreements dated 19.8.1993 and 11.11.1994 were not signed at Delhi. The parties also do not reside and carry on their business at Delhi and no cause of action has arisen in Delhi.

12. plaintiff has disputed these averments in its reply and inter alia has led that the plaintiff is a licensee under the agreement dated 19.8.1993 which was initially with Mr. A.R. Laddha who had subsequently incorporated the plaintiff as the company as contemplated under that agreement and as such the plaintiff has succeeded to the rights under the said agreement dated 19.8.1993. I have heard learned Counsel for the parties at length.

13. Order 7, Rule 11 of the Code provides as under :

"The plaint shall be rejected in the following cases:

(a) where it does not disclose the cause of action;

(b)

(c)

(d) Where the suit appears to be barred by any law."

14. In *T. Arivandam Vs. T.V. Satya Pal & Another*, AIR 1977 SC 2421, it was held that if on a meaningful - not formal - reading of the plaint, it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, the Trial Court should exercise his power under Order 7, Rule 11 of the Code.

15. As already noticed, KiTec Group and Unicor Group had entered into settlement agreement dated 11.11.1994 resolving their inter se disputes on the terms and conditions mentioned therein. plaintiff is not a party to that agreement. It claims to be an assignee of the rights of KiTec Group.

16. There does not appear to be an assignment of the whole of the rights and obligations of KiTec Group to the plaintiff nor it could be. Apparently the plaintiff may be a licensee under the KiTec Group. In any case, without going into this controversy, both as a licensee and or as an assignee, plaintiff is bound by the terms and conditions of the said agreement dated 11.11.1994, the breach of which it complains.

17. The parties to an agreement have the freedom to choose the law, both substantive and procedural, the venue and the mode of resolving their disputes. In the present case, the original parties to the Hamburg Agreement were KiTec Group and Unicor Group. Both are foreign Companies incorporated in foreign countries. That Agreement was also signed in Germany. The parties to the said agreement are bound by the terms and conditions of that agreement. The plaintiff is also bound by those terms if it claims to be a successor/assignee of KiTec Group under that agreement. In this agreement dated 11.11.1994, the

parties have specifically agreed that the said agreement as well as any disputes and differences arising out of it or in connection with the said agreement or their performance shall be subject to German Law, both substantive and procedural law, the seat of the Tribunal shall be Frankfurt/Main and the disputes are to be resolved through arbitration which also shall be governed by the German Code of Civil Procedure. It is not disputed and rather it is the case of the plaintiff that the controversy or disputes have arisen out of or in connection with performance of the said agreement. These disputes have to be resolved within the framework of this agreement. These can be resolved through arbitration, for which the mode for appointment of three Arbitrators has been agreed; the seat of the Tribunal being at Frankfurt/Main; and according to German Laws, both substantive and procedural.

18. Learned Counsel for the plaintiff has also contended that in the agreement itself it is provided that applicability of German Law is subject to applicability of international private law and the plaintiff being an Indian Party, Indian Law will apply in the present case.

19. In Clause 17 it is agreed that the agreement is 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, are subject to the laws of another country".

20. The legal position in this respect has been noticed in National Thermal Power Corporation Vs. The Singer Company and others,) as under:

"The expressed intention of the parties is generally decisive in determining the proper law of the contract. The only limitation on this rule is that the intention of the parties must be expressed bona fide and it should not be opposed to public policy. In the words of Lord Wright:

"..... where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy.....".

21. It is not the case pleaded by the plaintiff that the expressed intention of the parties in this respect is not bona fide or that the same is opposed to public policy according to Indian Laws. It is perfectly competent to the parties who enter into a contract, to indicate which system of law they intend to apply to their contract or in other words they may agree to the "proper law of contract" to be applied to the agreement as well as for the enforcement/determination of the rights arising out of the contract. Such a contract is a valid and binding contract between the parties. So also the parties may select a particular place for submission to the jurisdiction of the Courts or for the conduct of arbitration. The parties are foreigners and the agreement was entered into in Germany. They are not governed by the Indian law.

22. Resolving the disputes through arbitration is a legally recognised mode in our

country and such agreements are valid according to Indian law. The legal position has been explained in Food Corporation of India and Anr. Vs. Yadav Engineers & Contractors, as under:

"Ordinarily as provided in Sec. 9 of the Civil Procedure Code, all suits of a civil nature except suits of which cognizance is either expressly or impliedly barred would be triable by the Courts set up for the purpose Arbitration Act carves out an exception to the general rule that the Forum for resolution of civil disputes is the Civil Courts having jurisdiction to deal with the same by providing that the parties to a dispute by agreement into themselves may choose a Forum of their choice for settlement of disputes between them in preference to the State Courts. Undoubtedly, for making these agreements enforceable sanction of law is necessary. That is the object underlying the Act. Industrial revolution bringing into existence international commercial transactions led to a search for finding a Forum outside the Municipal Law Courts involving protracted and dilatory legal process for simple, uninhibited by intricate rules of evidence and legal grammar. This explains resort to Forums for arbitration at international level. No two contracting parties are under any legal obligation to provide for an arbitration agreement. If the parties enter into an arbitration agreement implying that they would like that the disputes covered by the agreement will be resolved by a Forum of their choice, the approach of the Court must be that parties to the contract are held to their bargain. If in breach or derogation of a solemn contract a party to an arbitration agreement approaches the Court and if the other side expeditiously approaches the Court invoking the Court's jurisdiction to stay the proceedings so that by this negative process the Court forces the parties to abide by the bargain, ordinarily the Court's approach should be and has been to enforce agreements rather than to find loopholes therein."

23. The plaintiff complains breach of the Hamburg agreement and claims enforcement of rights arising there from. This agreement not only bars remedy of a civil suit but also the jurisdiction of the Indian Courts to entertain the suit by implication in respect of any disputes or differences arising out of or in connection with the Hamburg agreement.

24. The cause of action contemplated under Order 7, Rule 11 of the Code, in my view, will necessarily be the cause of action or the grounds giving rise to the plaintiff the right which is enforceable according to Indian Laws by Indian Courts and in India. And where the Court is not competent to adjudicate, no suit lies before it. Even no cause of action is alleged nor has any arisen against defendant No. 2. He has been improperly imp leaded as a party apparently to claim the jurisdiction of this Court and as such mere impleadment of defendant No. 2 will not confer jurisdiction in this Court. This suit thus is misconceived, not maintainable and is liable to be dismissed.

25. Defendants' application being I.A. No. 646/98 is accordingly allowed and the suit of the plaintiff for the reasons given above is hereby dismissed with costs.