

(2018) 02 DEL CK 0678

In the Delhi High Court

Case No : Civil Suit (COMM) No. 379 Of 2017, Miscellaneous Application No. 8483, 9152, 10033, 10034, 11188 Of 2017

Modtech Furniture Private Ltd.

APPELLANT

Vs

Ncube Planning Design Private Limited & Anr

RESPONDENT

Date of Decision : 28-02-2018

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 8
Arbitration Act, 1940 — Section 21, 23
Code Of Civil Procedure, 1908 — Order 37

Citation : (2018) 02 DEL CK 0678

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Vikas Mehta, Rajat Sehgal, Ambar Qamaruddin, Ajay Talesara, Tejasvi Kumar, Syed Sarfarz, Chetan Roy, Ria Anand

Judgement

Rajiv Sahai Endlaw, J

1. Though applications of the two defendants for leave to defend are for consideration but during the hearing it transpires that the contract, monies

whereunder are claimed to be due to the plaintiff, was between the plaintiff and the defendant no.1 only and there is no privity of contract between the

plaintiff on the one hand and defendant no.2 Prime Focus Technologies Pvt. Ltd. on the other hand.

2. The plaintiff however in the plaint has made the claim jointly and severally against both the defendants.

3. It is the requirement of Order XXXVII of the CPC that no claim which does not fall within the ambit of Order XXXVII should have been made in

the suit. The plaintiff having made a claim, besides against the defendant no.1, against whom according to the counsel for the plaintiff, suit under

Order XXXVII of the CPC is maintainable, also against defendant no.2, the suit is not maintainable under Order XXXVII of the CPC and ought not to

have been entertained by the learned Joint Registrar under Order XXXVII of the CPC.

4. This is yet another case where the Joint Registrars have entertained a suit under Order XXXVII of the CPC, without examining the maintainability

thereof under Order XXXVII of the CPC, resulting in the matter coming up for consideration before the Court only at the stage of leave to defend and

axiomatically leading to delay in the disposal of the suit.

5. A copy of this order be placed before Honâ??ble the Chief Justice for appropriate action.

6. The suit is accordingly converted into an ordinary suit and IAs No.8483/2017, 9152/2017, 10033/2017 and 11188/2017 are disposed of.

7. The defendant no.1 has filed IA No.10034/2017 under Section 8 of the Arbitration & Conciliation Act, 1996.

8. The counsel for the plaintiff and the counsel for the defendant no.1 have been heard on the said application as well.

9. The counsel for the defendant no.1 draws attention to Clauses 68 and 69 of the Agreement between the plaintiff and the defendant no.1 and which

are as under:

â??68. ARBITRATION

Any dispute arising out of this Contract Agreement shall be resolved amicably with in 30 days. Disputes shall be referred to the decision

makers of both parties for resolution. If any disputes still remain unresolved it will be referred for adjudication to the sole arbitrator to be

appointed by mutual consent of client and contractor.

The arbitration shall be conducted by three arbitrators, one each to be nominated by the contractor and the Employer and the third to be

appointed by both the arbitrators in accordance with the Indian Arbitrations Act. The language of the arbitration proceedings and that of

the documents and communications between the parties shall be English. The arbitration shall be conducted in accordance with the

provisions of the Indian Arbitration and Conciliation Act, 1996 or any statutory modification thereof. The venue of arbitration shall be New

Delhi.

The decision of the majority of the arbitrators shall be final and binding upon the parties. In the event of any of the aforesaid arbitrators

dying, neglecting, resigning or being unable to act for any reason, it will be lawful for the party concerned to nominate another arbitrator

in place of the outgoing arbitrator. During settlement of disputes and arbitration proceedings, both parties shall be obliged to carry out

their respective obligations under the contract.

Following matters shall not lie within the preview of Arbitration:

a. Any dispute in respect of substituted, altered. Additional work / omitted work / defective work referred by the contractor for the decision

of Contractor / Client if it is being heard or has been decided by Contractor / Client.

b. Any dispute regarding the Scope of Work or its execution or suspension or abandonment that has been referred by the contractor for the

decision of Contractor / Client and has been so decided finally by Contractor / Client.

69. JURISDICTION

The parties to this Contract Agreement unequivocally agree that that the Courts at N.C.T. of Delhi alone shall have jurisdiction to entertain

and try any dispute and / or difference arising out of or in connection with the terms of this Deed and other related documents, if any.â??

and argues that the claim, subject matter of the present suit, is liable to be referred to arbitration in terms thereof.

10. The counsel for the plaintiff has firstly contended that the aforesaid arbitration clause is vague and ambiguous inasmuch as it in the first part

provides for arbitration of a sole arbitrator and in second part thereof provides for arbitration by three arbitrators.

11. I am unable to agree.

12. The same would not invalidate the Arbitration Agreement unequivocally contained in the clause.

13. The settled principle of interpretation of contracts is that in the event of inconsistency between two clauses thereof, the earlier of the two clauses

prevails. Reference can be made to Radha Sundar Dutta Vs. Mohd. Jahadur Rahim AIR 1959 SC 2 4and Kerala State Mktg. Fed. Ltd. Vs. Union of

India (2010) 172 DLT 691. Thus, in accordance with the said interpretation, the

clause has to be read as of arbitration by a sole arbitrator.

14. Even otherwise, it has been held by the Supreme Court in M.M.T.C. Limited Vs. Sterlite Industries (India) Ltd. (1996) 6 SCC 71 6that the validity

of arbitration agreement does not depend on the number of arbitrators specified therein and merely because the contract provides for arbitration of

even number of arbitrators, does not render the Arbitration Agreement invalid. Applying the said ratio, even if the contract is inconsistent as to the

constitution of the arbitral tribunal, it would not invalidate the agreement to arbitrate.

15. The counsel for the plaintiff has next contended that the parties are not liable to be referred to arbitration for the reason of the claim subject matter

of the suit being not in dispute.

16. I have enquired from the counsel for the plaintiff, whether not the aforesaid interpretation was of Sections 21 and 23 of the Arbitration Act, 1940

and would not be applicable to Section 8 of the 1996 Act, which does not refer to any dispute and which only mandates the Court to refer the parties

to arbitration if the subject matter of the action brought before the Court is the subject matter of the Arbitration Agreement.

17. The subject matter of the claim of the plaintiff against the defendant no.1 is clearly the subject matter of the agreement containing the arbitration

clause aforesaid.

18. The counsel for the plaintiff has in this regard referred to Fenner (India) Ltd. Vs. Brahmaputra Valley Fertilizer Corporation Ltd. 227 (2016) DLT

285 applying the interpretation as of Section 21 and 23 of the 1940 Act to Section 8 of 1996 Act also.

19. Though I am unable to agree with the said interpretation and have in this context enquired from the counsel for the plaintiff that if the Court,

before deciding an application under Section 8 were to be required to first determine whether there is any dispute or not, whether not the same would

entail a written statement to the plaint being necessarily required to be filed to determine whether there is any dispute or not and thereby setting at

naught the legislative intent in making the change in language in Section 8 of the 1996 Act from that used in Sections 21 and 23 of the 1940 Act.

20. However, the need to go into this matter further has not arisen for what is stated hereinafter.

21. I may also notice that in the facts of the present case, it cannot be said that there is no dispute as to the amounts claimed in the suit as was the case in Fenner (India) Ltd. *supra*. Here, the defendant no.1 with whom alone the plaintiff has an arbitration agreement has filed application for leave to defend the claim made by the plaintiff in the suit under Order XXXVII of the CPC and during the hearing of which application the counsel for the defendant no.1 has disputed and denied the liability of the defendant no.1 for the amounts claimed in the plaint.

22. The counsel for the plaintiff has drawn attention to pages 102 and 105 of Part-II(A) file being communications from the defendant no.1 to the plaintiff and on the basis of which the counsel for the plaintiff has stated that the defendant no.1 therein has admitted liability in the suit amount.

23. The counsel for the defendant no.1 has contended that the promise of the defendant no.1 in the said letters to pay is conditional upon receipt of payment from the defendant no.2 and which has not been received.

24. The counsel for the plaintiff contends that the defendant no.2 in its application for leave to defend has claimed having paid 95% of the amounts due to the defendant no.1.

25. The counsel for the defendant no.1 controverts and states that the defendant no.1 along with leave to defend application has filed its ledger and which does not show any payments to have been made after the dates of the communications at pages 102 and 105 *supra*.

26. The plaintiff in the present case has made a claim, besides against the defendant no.1, also against the defendant no.2. In the facts aforesaid, it is found that for adjudication of the claims of the plaintiff, even if only against defendant no.1, the presence of defendant no.2 is essential. The plaintiff as a sub-contractor has however made a claim for payments jointly and severally against its contractor defendant no.1 and against the principal employer defendant no.2 even though there is no privity of contract between the plaintiff and the defendant no.2. However it cannot be lost sight of that the benefit of works, price of which is claimed by the plaintiff in the present suit, has flown to the defendant no.2 and it needs to be examined, whether the defendant no.2, if the plaintiff otherwise proves its claim, is liable to the plaintiff or not.

27. Once it is found that the defendant no.2 is a necessary party to the present

suit and it is not in dispute that there is no Arbitration Agreement

between the plaintiff and the defendant no.2, the question of referring the parties to arbitration in terms of the Arbitration Agreement between the

plaintiff and the defendant no.1 only, does not arise.

28. Thus IA No10034/2017 is dismissed.

29. The defendants to file their written statement within 30 days.

30. The plaintiff to file replications if any to the written statements of defendants no.1&2 within further 30 days.

31. The parties to file affidavits of admission / denial of each others' documents before the next date of hearing.

32. List on 23rd August, 2018, for framing of issues, if any.

33. It is made clear that any observation hereinabove will not come in the way of defendant no.2 contending that it is not a necessary or proper party.