

(2018) 08 P&H CK 0392

In the Punjab And Haryana At Chandigarh

Case No : Civil Revision No. 548 Of 2016, 6163 Of 2015

M/S Iprosugar Engineering Private Limited

APPELLANT

Vs

Spray Engineering Devices Limited And Others

RESPONDENT

Date of Decision : 09-08-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 8, 7

Citation : (2018) 08 P&H CK 0392

Hon'ble Judges : Amol Rattan Singh, J

Bench : Single Bench

Advocate : Anuj Raura, Amit Parashar

Judgement

Amol Rattan Singh, J

The issue in these two revision petitions is as to whether or not the two suits filed by the petitioner in CR no.548 of 2016, i.e. M/s IPROSUGAR Engineering Private Limited, are maintainable, in the face of an arbitration clause (clause 17) contained in the agreement entered into between M/s IPRO Industrieprojekt GmbH (a Company incorporated under the provisions of German law, and having its registered office at Celler Strasse 67, 38114 Braunschweig, Germany) and M/s Spray Engineering Devices Limited, having its registered office at Plot no.25, Industrial Area, Phase-II, Chandigarh, on June 14, 2006.

The orders impugned in both these petitions were passed in two applications filed by M/s Spray Engineering Devices Limited, in the two civil suits filed by M/s IPROSUGAR Engineering Private Limited (one application in each suit), the said applications having been filed under Section 8 of the Arbitration and Conciliation Act, 1996, seeking that both the disputes as arise in the suits, be referred to an Arbitrator, in terms of the aforesaid arbitration clause.

In one suit the plaintiff sought recovery of certain amounts it claimed were due to it from the defendant company, whereas in the other suit the same plaintiff company sought a declaration that the defendant company, in terms of the

aforementioned agreement dated June 14, 2006, was bound to pay royalty for the use of technology stated to have been imparted by the plaintiff to the respondent.

Both the suits being tried by different Civil Judges, the applications were decided differently, with the application as is subject matter of Civil Revision No.548 of 2016 having been allowed by the Civil Judge (Jr.Divn.), Chandigarh, vide the impugned order dated 29.09.2015, the said order therefore having been challenged by the plaintiff in the suit i.e. M/s IPROSUGAR Engineering Private Limited.

The application filed in the other suit as is subject matter of Civil Revision no.6163 of 2015, was decided vide the order impugned in that petition, dated 12.08.2015, by a different Civil Judge (Jr.Divn.), Chandigarh, holding that the arbitration agreement "shows that relief para and head note of the present suit does not cover arbitration clause. Hence, the present application is hereby declined."

Consequently, the revision petition against that order has been filed before this Court by the defendant company.

The contention of Mr. Amit Parashar, learned counsel appearing for M/s Spray Engineering Devices Ltd., (the partner in CR no.6163 of 2015) is to the effect that as per the aforesaid cooperation agreement (Annexure A-1 annexed with CM no.26197-CII of 2017), clause 1 states as follows:-

"1. Incorporation of JVC

The partners shall take necessary steps to incorporate the JVC and to bring the JVC under this cooperation agreement through the deed of adherence as specified in Annexure 4."

Annexure 4, referred to hereinabove, is the format for a "Deed of Adherence", by which the new joint venture company (JVC) which was to be incorporated in terms of clause 1, would adhere to the said terms of the deed, as also the agreement dated June 14, 2006, with both documents also binding on M/s Spray Engineering Devices Ltd.

2. What is important to be noticed is that in the aforesaid deed of adherence as was to be entered into by the new joint venture company to be created and M/s Spray Engineering Devices Ltd., clause 2 reads as under:-

"2. The [name of JVC] /transferee hereby covenants and agrees with each of the Beneficiaries and the Company that as from the date of its incorporation/transfer, it will observe and discharge all the terms and conditions of the Agreements which are applicable to it in all respects as if it had been originally named in the Agreements as a party and the Agreements shall be construed accordingly."

Undoubtedly, the joint venture company (JVC) came into existence in the form of

the petitioner in CR no.548 of 2016, i.e. M/s IPROSUGAR Engineering Pvt. Ltd. However, whether due to oversight or otherwise, again admittedly the aforesaid deed of adherence was never actually signed by M/s IPROSUGAR Engineering Pvt. Ltd and M/s Spray Engineering Devices Limited.

3. Despite the above, learned counsel for M/s Spray Engineering Devices Limited submits that the JVC having come into existence, it would be bound by the terms of the agreement entered into between M/s IPRO Industrieprojekt GmbH and M/s Spray Engineering Devices Limited, especially in view of the fact that even in the civil suits filed by M/s IPROSUGAR Engineering Pvt. Ltd, it is this very agreement which is relied upon in one suit filed to seek recovery of the amounts which are disputed, as also to seek a declaration (in the other suit) to the effect that the technology "owned by the JVC", i.e. M/s IPROSUGAR Engineering Pvt. Ltd., be not used by M/s Spray Engineering Devices Ltd., unless it pays royalty in terms of the aforesaid agreement. (The said technology is stated to be one for manufacturing of 'Falling Film Evaporators').

4. The contention of Mr. Raura, learned counsel appearing for M/s IPROSUGAR Engineering Pvt. Ltd. on the other hand, is that the said deed of adherence, the form of which is annexed as Annexure 4 with the agreement entered into between M/s IPRO Industrieprojekt GmbH and M/s Spray Engineering Devices Limited, never having actually been signed, the arbitration clause is not binding upon the new company (JVC) that came into existence, i.e. M/s IPROSUGAR Engineering Pvt. Ltd., and consequently the only remedy available for resolving any dispute between the parties, would be a civil suit which is what has been resorted to by the said JVC, i.e. M/s IPROSUGAR Engineering Private Limited.

5. Mr. Raura next has produced a copy of the civil suit by which M/s IPROSUGAR Engineering Pvt. Ltd sought a recovery of a total amount of Rs.37,45,856/-, in which learned counsel submits that the reliance for such recovery is not on the agreement dated 14.06.2006, but on the fact that the principal amount due was admitted by M/s Spray Engineering Devices Limited, in support of which contention he refers to Annexure P-4 (annexed with CR no.548 of 2016), which is a tripartite agreement entered into at Braunschweig, Germany, between M/s IPRO Industrieprojekt GmbH, M/s Spray Engineering Devices Limited and M/s IPROSUGAR Engineering Pvt. Ltd, in which the following was agreed:-

"The following agreement is accepted by all parties:

The IPROSUGAR invoices and debit notes (Overview attached) with a total of 4580171 INR are accepted by SED and required to be paid to IPROSUGAR.

It is agreed that SED will pay the total amount in installment of 10% of the total value over a period of 10 months starting in April 2010 to IPROSUGAR. The payment will be submitted by SED on the 5th of every month to IPROSUGAR. SED may also pay faster. The IPRO invoices 02/09 (27,400.54 Euro) and 06/09 (16,995.00 Euro) with a total amount of 44,395.54 Euro (Forty Four Thousand Three Hundred Ninety Five and Fifty four cents) are accepted by SED and require

to be paid to IPRO.

It is agreed that SED will pay the total amount in installment of 10% of the total value over a period of 10 months starting in April 2010. The payment will be submitted by SED on the 5th of every month to IPRO. SED may also pay faster.

It is agreed that SED will hand over all IPROSUGAR original documents, file and required passwords any other documents required by IPROSUGAR to Mr. Harjeet Singh Bola until 25th March 2010."

6. He next refers to Annexure P-5, which is a document dated 17. 08.2010, in which it is stated as follows:-

"1) All pending payments to IPRO and IPRO Sugar will be settled by SEDL until 30.08.2010 (35,30,551 INR) +28.131.54 Euro tax subject to receipt of the payment from Greece Party."

(SEDL being M/s Spray Engineering Devices Ltd.)

Mr. Raura next refers to Annexure P-8 (which is a part of the reply filed by M/s IPROSUGAR Engineering Private Limited to the application filed by M/s Spray Engineering Devices Ltd. (CM no.7409-CII of 2018), seeking vacation of the stay granted by this Court in this petition).

The said Annexure is seen to be a letter dated August 1, 2012, written by the authorized signatory of M/s Spray Engineering Devices Limited addressed to M/s IPROSUGAR Engineering Pvt. Ltd., stating therein that as on 31.03.2012, an amount of Rs.19,88,726/- out of a total amount of Rs.35,30,551/- was payable to M/s IPROSUGAR Engineering Pvt. Ltd.

He also refers to some amounts stated to have been paid as are given in para 12 of his reply, which learned counsel for M/s Spray Engineering Devices Limited refutes. However, that issue is not being gone into by this Court, which is on the merits of the dispute between the parties, which is not subject matter of these revision petitions, the issue in these petitions only being whether the dispute is to be settled by the civil court or by an Arbitrator.

7. The contention of Mr. Raura is that once certain amounts were agreed to be paid and a dispute has arisen as to amounts as had been paid and as are still to be paid, and further, on whether royalty is still to be paid by M/s Spray Engineering Devices Limited to M/s IPROSUGAR, or not, such dispute would not be referable to an Arbitrator, the joint venture company not having entered into the deed of adherence as is Annexure 4 with the cooperation agreement entered into between IPRO Industrieprojekt GmbH and Spray Engineering Devices Limited, despite the fact that the said agreement has been referred to in the suits filed by M/s IPROSUGAR Engineering Private Limited. He submits that this would be so because payments to be made were omitted (as per Annexures P-5 and P-8 with the present petition).

8. In support of his contention, he relies upon a judgment of the Supreme Court

in Karnatka Power Transmission corporation Limited and another v. M/s Deepak Cables (India) Ltd., AIR 2014 SC 1626.

Paragraph 9 of the said judgment, as has been referred to by Mr. Raura, reads as follows:-

"9. From the aforesaid provision, it is graphically clear that unless an arbitration agreement stipulates that the parties agree to submit all or certain disputes which have arisen or which may arise in respect of defined legal relationship, whether contractual or not, there cannot be a reference to an arbitrator. To elaborate, it conveys that there has to be intention, expressing the consensual acceptance to refer the disputes to an arbitrator. In the absence of an arbitration clause in an agreement, as defined in sub-section (4) of Section 7, the dispute/ disputes arising between the parties cannot be referred to the arbitral tribunal for adjudication of the dispute."

He next refers, also to the same effect, to another judgment of the Supreme Court in Travancore Devaswom Board v. Panchami Pack Pvt. Ltd., (2004) 13 SCC 510.

He also relies upon a judgment of a coordinate Bench of the Madras High Court in M/s Sankar Sealing Systems P. Ltd. v. M/s Jain Motor Trading Co. and another, AIR 2004 Madras 127.

He then refers to a judgment of a coordinate Bench of the Delhi High Court in Maruti Udyog Ltd. v. Mahalaxmi Motors Ltd. and another, 2002 (2) RAJ 533, in which it was held as follows:-

"3. It is settled law that the arbitration clause can be invoked only when there are differences and dispute, with regard to certain payments or breach of obligation of the respective parties of the terms of the agreement. However, wherever there is an admitted liability, the arbitration clause cannot be invoked. The very connotation "admitted liability" suggests that there are no disputes or differences with regard to the said admitted liability."

He lastly cites a judgment of a Division Bench of the Andhra Pradesh High Court in Coramandal Marketing (India) Pvt. Ltd. v. Andhra Pradesh Lighting Ltd., 1995 (3) Andh LD 24.

9. Mr. Raura also refers to Section 7 of the Arbitration and Conciliation Act, 1996, which reads as follows:-

"7 Arbitration agreement. -

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a

contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

10. In a nutshell, his contention is that no agreement having been signed by M/s IPROSUGAR Engineering Pvt. Ltd., with M/s Spray Engineering Devices Limited, to that effect. There is no arbitration clause existing.

11. In rebuttal, Mr.Parashar, learned counsel appearing for M/s Spray Engineering Devices Limited, submits that, firstly, the liability of payment is disputed, and therefore the contention that once there is an admitted liability an arbitration clause is not invocable, is a contention that is wholly unfounded; because despite the letter, Annexure P-5, referred to by Mr. Raura, showing that M/s Spray Engineering Devices Limited had in the year 2012 admitted to Rs.35 lacs approximately being payable to M/s IPROSUGAR Engineering Private Limited, other than the fact that the said letter itself may be disputed in any civil or arbitration proceedings, it is a letter of the year 2012 and whether or not any payment was made thereafter, would be gone into by the appropriate forum, which as per the learned counsel would be an Arbitrator.

Other than, he reiterates that once the agreement dated 14.06.2006 has been admitted and in fact is being relied upon by M/s IPROSUGAR in the suit filed by them, both for seeking recovery of the disputed amount, as also for seeking a declaration that they be paid royalty for use of any technology referred to in the said agreement, by M/s Spray Engineering Devices Ltd., then they cannot approbate and reprobate in the same breath say that one part of the agreement is applicable (as regards royalty to be paid and money to be recovered), while denying the arbitration clause in the same very agreement.

12. Having considered the contentions of both sides, though undoubtedly a tripartite agreement is also shown to be in existence (copy Annexure P-4 referred to herein above), between three parties, including M/s IPROSUGAR Engineering Private Limited, that is an agreement with regard to the amount required to be paid by M/s Spray Engineering Devices Limited to M/s IPROSUGAR Engineering Private Limited, which does not override the agreement dated June 14, 2006.

In fact in the opinion of this Court, had the suits of the plaintiff, i.e. M/s IPROSUGAR Engineering Private Limited, not been based upon the agreement between M/s IPRO Industrieprojekt GmbH and M/s Spray Engineering Devices Limited, dated 14.06.2006, the contention of Mr. Raura would have been absolutely correct, to the effect that the 'Deed of Adherence' (the form of which is annexed as Annexure 4 with the said agreement), not having been entered into between the parties, the arbitration clause could not be invoked, as M/s IPROSUGAR Engineering Private Limited is admittedly a different incorporated entity to M/s IPRO Industrieprojekt GmbH.

13. However, I agree with the learned counsel for M/s Spray Engineering Devices Limited, that once the agreement dated 14.06.2006 itself is the basis for the claim made in the suits filed by M/s IPROSUGAR Engineering Private Limited, it cannot approbate and reprobate to get out of the arbitration clause in the said agreement as regards any dispute arising with even the subsequently created joint venture company, i.e. M/s IPROSUGAR Engineering Private Limited, which is admittedly a company incorporated pursuant to the said agreement.

14. As regards Section 7 of the Arbitration and Conciliation Act, 1996, obviously there is no dispute with what is stipulated therein, but in the opinion of this Court, in view of what has been observed herein above, M/s IPROSUGAR Engineering Private Limited would still be bound by the agreement as an agreement between the parties, once the reliance by the said company, in respect of the relief claimed by it in the civil suits filed by it, is in terms of that very agreement dated 14.06.2006.

In other words, it cannot rely on certain clauses of an agreement not signed by it, to say that M/s Spray Engineering Devices Limited, is bound by those clause and has to pay royalty accordingly; and then say that the Arbitration clauses in that very agreement, is not binding as it (M/s IPROSUGAR Engineering Private Limited) is not a signatory thereto, (even though it is a company incorporated as a JVC pursuant to that very agreement).

Consequently, Civil Revision No.548 of 2016 filed by M/s IPROSUGAR Engineering Private Limited is dismissed and the impugned order dated 29.09.2015 passed in Civil Suit no.12173 of 17.10.2013 (Annexure P-1A), is upheld, with the matter referred to the Arbitrator in terms of agreement dated 14.06.2006. As regards CR no.6163 of 2015, it is allowed and the impugned order 12.08.2015 passed by the learned Civil Judge (Jr. Divn.), Chandigarh (in Civil Suit no.12881 of 2013), is set aside, with again the matter to be referred to the Arbitrator.

The interim orders stand vacated.