

(2017) 03 KAR CK 0127
In the Karnataka High Court
Case No : 152 of 2016

NIKE INDIA PRIVATE LIMITED

APPELLANT

Vs

MY STORE PRIVATE LIMITED

RESPONDENT

Date of Decision : 21-03-2017

Acts Referred:

[Arbitration and Conciliation Act, 1996](#), [Section 11](#), [Section 7](#), [Section 11\(6\)](#) -
Appointment of arbitrators - Arbitration agreement - Appointment of arbitrators

Citation : (2017) 03 KAR CK 0127

Hon'ble Judges : A S Bopanna

Bench : SINGLE BENCH

Advocate : ARUN KUMAR K, S.P. SHANKAR, VARADARAJ R HAVALDAR

Judgement

1. The petitioner is before this Court in this petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("the Act" for short) seeking that an Arbitrator be appointed as provided under the Master Store Agreement dated 01.06.2015 to resolve the dispute between the parties.

2. The petitioner, a company incorporated under the provisions of the Companies Act and engaged in the business of design, marketing and distribution of Athletic Footwear and other accessories claims to have entered into a Master Store Agreement dated 01.06.2015 with the respondent for retail sale of the goods manufactured by the petitioner. The petitioner contends that the said agreement is a continuation of the retailer agreement dated 01.06.2010 entered into between the petitioner and the respondent herein.

3. The petitioner in that regard has referred to the transaction towards supply of the products and the invoices raised for which the payment was required to be made within the period of 45 days. The petitioner contends that the respondent has been a chronic defaulter in payment of the money due and as on 03.12.2015 the outstanding was in a sum of Rs.4,22,96,970/-. The respondent is stated to have issued 20 post dated cheques for the total value of Rs.2,58,96,078/- which

were dishonoured for insufficient funds on presentation. The respondent has raised certain contentions in that regard but according to the petitioners since the amount is payable and has remained unpaid despite demand being made, a dispute has arisen between the parties.

4. The petitioner contends that Clause 21 of the Master Store Agreement dated 01.06.2015 amended by the Addendum No.1 provides for resolution of the dispute through the panel of arbitrators to be appointed in the manner as indicated therein. Since at the outset the petitioner is required to nominate their arbitrator, they got issued a notice dated 19.05.2016 suggesting their nominee as the arbitrator and called upon the respondent to exercise their option. The respondent however through their reply dated 21.05.2016 disputed the very existence of the arbitration agreement and in that view declined to nominate an arbitrator. It is in that background, the petitioner is before this Court seeking for appointment of the Arbitrator to resolve the dispute between the parties.

5. The respondent has filed the objection statement. The agreement dated 01.06.2015 is disputed as according to the respondent the same was not signed by an authorized person. It is their contention that the agreement dated 01.06.2015 is not relatable to the agreement dated 01.06.2010 as it does not bridge the transactions under the two agreements. It is averred that through the e-mail dated 13.05.2015 it was clearly stated that the Master Store Agreement is only for the purpose of Oberoi Mall, Mumbai. It is their contention that all other stores under the agreement dated 01.06.2010 except the Oberoi Mall store were opened and the agreement dated 01.06.2010 as per Clause 14.1 is automatically renewed. With regard to the claim of the amount and the cheques that had been issued, though contentions have been urged to dispute the same, the details of the same would not be relevant as what essentially arises for consideration herein is not the merits of the dispute but in view of the denial of the arbitration agreement, that aspect alone requires consideration.

6. Heard Sri Arun Kumar, learned counsel for the petitioner and Sri S.P.Shankar, learned senior counsel who appeared on behalf of Sri Varadaraj Havaladar, learned counsel for the respondent. Perused the petition papers.

7. The respondent as seen from the contentions urged has disputed the existence of the Arbitration agreement and in that light has contended that this petition seeking appointment of an Arbitrator is not maintainable. The learned senior counsel for the respondent in that view has referred to Section 7 of the Act and would contend that the arbitration agreement relied on by the petitioner is not in terms thereof as the respondent has not agreed to the same. In that light on relying on the following decisions of the Hon''ble Supreme Court:

a) Alva Aluminium Ltd, Bangkok vs. Gabriel India Ltd [(2011)1 SCC 167],

b) S.N.Prasad Hightek Industries (Bihar) Ltd. Vs. Monnet Finance Ltd and others (2011)1 SCC 320]

c) Karnataka Power Transmission Corporation Ltd and another vs. Deepak Cables (India) Ltd (2014)11 SCC 148 and

d) Sri B.R.Ganesh and others vs. the Commissioner Bruhat Bengaluru Mahanagara Palike (ILR 2015 Kar 2130) would contend that in a petition filed under Section 11 of the Act, this Court at the outset will have to arrive at a conclusion with regard to the existence or otherwise of arbitration agreement, as reference to arbitration can only be with respect to parties to arbitration agreement and not the non-parties as has been held in the above decisions. That issue has to be decided herein and cannot be left to the Arbitrator, is the contention. On the said proposition of law there can be no quarrel and as such further discussion in that regard is wholly unnecessary since that exercise is exactly being undertaken herein.

8. In that background, in the instant facts, the agreement dated 01.06.2010 whereunder the respondent was permitted the retail sales of the petitioner's products is not in dispute. However, the contention is that the said agreement does not contain an arbitration agreement and the arbitration agreement as contained in the Master Store Agreement dated 01.06.2015 does not relate to the dispute as has been projected. The further contention in that regard is that the Master Store Agreement relates only to the store to be set up at Oberoi Mall, Mumbai which has not been done and further the said agreement is not signed by authorized persons. Reference in that regard is made by the learned senior counsel to Clauses 1.33, 1.34, 2.1, 4.1, 7.1 and 8.1 to contend that it is store specific. Along with the synopsis of the arguments, the learned senior counsel has produced the copy of the plaint to indicate that in respect of the other transactions arising under the agreement dated 01.06.2010, the respondent has filed a suit before the commercial Court at Bhopal in R.C.No.126B/2016.

9. A perusal of the plaint therein refers to the store at Oberoi Mall and the launch date is indicated as 18.05.2015. In addition to the said store 20 other stores have been referred therein. In that light, if the documents along with the petition is perused insofar as the agreement dated 01.06.2010 at Annexure-A there is no dispute. In that background if the Master Store Agreement dated 01.06.2015 in question is taken into consideration and in that light the reference made to Clauses 6.1 and 13.1 as relied on by the learned counsel for the petitioner is taken into consideration and the entire transaction between the parties is kept in perspective, the Master Store Agreement cannot be taken as a separate agreement and in this regard the clause relating to product supply at 6.1 will clarify this position. Even if the reference is to the store at Oberoi Mall, keeping in view the fact that the transaction between the parties is also in respect of the other stores which stems out of the agreement dated 01.06.2010, the entire dispute between the parties will have to be considered as a composite dispute.

10. In that light, if Article 21 and Addendum No.1 to the Master Store Agreement is taken into consideration and the Addendum is taken note, the arbitration agreement as contained therein in Article 21.3 would provide for resolution of

dispute between the parties. The very fact that the respondent claims that they have filed a suit before the Court at Bhopal will indicate that there are certain disputes between the parties and the petitioner herein who is the defendant therein has raised the remedy of arbitration to be availed. Such disputes will have to be therefore resolved through arbitration.

11. It is no doubt true that the respondent has also disputed the very validity of the agreement as according to them the agreement has not been signed by authorized persons. In order to contend that the representative of the petitioner was not the Director as on the date of the agreement, the learned senior counsel for the respondent has sought to rely on the information secured, to point out that the said person viz., Ms. Priya Menon was appointed as a Director only on 29.09.2015 i.e., after the date of Master Store Agreement. Such contention cannot be noticed at this juncture since in what capacity and authority the said person has signed the agreement is a matter of evidence as the petitioner in any event does not dispute that she was authorized to represent them. Insofar as the contention that Sri Rishabh Garg was not authorized to represent the respondents as Sri Sourabh Garg and Smt. Manju Garg were the only Directors of the respondent is also a contention which is a matter of evidence, to be considered by the learned Arbitrator as the respondent having allowed the said person to sign the agreement as the said person being none other than the son, a contention of the present nature only with the intention to oppose a petition under Section 11 of the Act cannot be entertained. As already indicated, such contention is also to be adjudicated by the learned Arbitrator on the basis of the evidence that is to be recorded.

12. In that view of the matter, I am of the considered opinion that the disputes as have arisen between the parties are amenable to the dispute resolution agreement as contained in the Master Store Agreement dated 01.06.2015 and is to be resolved accordingly. Having noticed Article 21.3 therein, though it provides for a panel of the Arbitrators to be appointed in the manner as indicated therein, keeping in view the fact that the parties did not choose to appoint the Arbitral Tribunal in the manner as indicated therein, I am of the view that a sole arbitrator to be appointed by this Court would secure the ends of justice. Further though the said Article provides that the arbitration shall take place in Bengaluru, keeping in view that the respondent has its registered office at Bhopal and the stores were also set up in different parts including Mumbai it would be appropriate to leave it open to the learned Arbitrator to hold the sittings at a place convenient to all the parties on mutual consultation.

13. In the result, the following:

ORDER

i) The petition in CMP No.152/2016 is allowed with no order as to costs in this petition.

ii) Accordingly, Sri Justice N.K.Sodhi, Former Chief Justice of Karnataka High

Court, House No. 36, Sector-4, Chandigarh-160 001, is appointed to act as the sole Arbitrator to resolve the dispute between the parties.

iii) Registry is directed to send a copy of this order to the learned Arbitrator and the petitioner to also file the claim before the learned Arbitrator.

iv) The learned Arbitrator shall thereupon enter reference, notify the parties and consider the matter in accordance with the provisions contained in the Arbitration and Conciliation Act, 1996.