

(2010) 01 DEL CK 0275
In the Delhi High Court
Case No : CS (OS) 2436 of 2008

Pradyuman Overseas Ltd.

APPELLANT

Vs

Virgoz Oils and Fats Pte Ltd. and Another

RESPONDENT

Date of Decision : 27-01-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 45, 5

Citation : (2010) 01 DEL CK 0275

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Sanjay Poddar, for the Appellant; Manoj Khanna and Atul Bansal for Defendant No. 1, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.

I.A. No. 14260/2008

1. The plaintiff seeks recovery of Rs. 25,00,000/- as damages and also a decree of permanent injunction to restrain the defendants from acting any further on the basis of what are termed as "non-concluded contracts", details of which are set-out in the relevant clause after para 31 of the suit. Briefly, the said documents are dated 23.07.2008, 06.08.2008 and 13.09.2008 (hereafter referred to as "the disputed contracts").

2. The undisputed facts necessary for this order, as is evident from the pleadings in the suit and the present application are that the plaintiff is purchaser/dealer of a variety of commodities, including Palm Oil. The second defendant, according to the suit, acts as an independent agent, who books quantities for sale and purchase of such commodities. The first defendant is concededly a Singapore-based exporter of Palm Oil. The suit states that a firm contract was entered into by the parties on 18.06.2008 by which a quantity of 250 Metric Tonnes of RDB Palm Olein was agreed to be purchased (by the plaintiff). The consideration

agreed upon, according to the suit, was US\$ 1298/- per MT and the shipment was to be done in July 2008. It is contended that delivery was to be at CFR, Kandla. The plaintiff further states that in order to pay the agreed consideration, a Letter of Credit was established through its banker, the HDFC Bank. It is submitted that the Defendant No. 1 sought several amendments to the Letter of Credit. The plaintiff mentions that such amendments were carried out on 12.07.2008, 14.07.2008, 15.07.2008, 07.08.2008 and finally on 08.08.2008. It is not in dispute that the goods which were the subject matter of this contract, alluded to as "the first contract" - were accepted. The plaintiff states that the acceptance was despite the fact that the contracted price was well beyond the prevailing market price.

3. The dispute raised by the plaintiff centres around the subsequent developments. It is contended that the defendants further issued three contract notes/intimation, stating that a quantity of 250 MT was being dispatched by August 2008; this document was dated 23.07.2008. The price indicated in this document - (the first disputed contract) was US\$ 1140 per MT. The plaintiff next talks about the second disputed contract dated 06.08.2008 whereby the price indicated by the plaintiff was US\$ 1012.50 per MT. The total quantity was 125 MT and the shipment had to be completed by September 2008. Likewise, the third disputed contract, says the plaintiff, was in respect of 125 MT of Palm Oil, at US\$ 823 per MT and the shipment was to be in August 2008. It is stated that this document is dated 13.09.2008.

4. The suit alleges that while the admitted contract dated 18.08.2008 was eventually performed, according to the specifications agreed to by the parties, the other documents were never acted upon and the plaintiff never accepted the terms; they remained as mere offers. The defendants sent another document, dated 15.09.2006, purporting to contain revised terms, further to some negotiations between them and the plaintiff. These negotiated terms were different from what had been originally mentioned in the three disputed contracts dated 23.07.2008, 08.08.2008 and 13.09.2008 respectively.

5. The plaintiff further states that the defendants sent e-mails and communications dated 23.09.2008 and 29.08.2008, alleging that it (the plaintiff) was resiling from its obligations, also underlining the contracts and that the shipments had reached the agreed port on 21.09.2009. The plaintiff further submits that the defendant had caused an allegedly libellous publication in an Indian newspaper on 07.11.2008, alleging that the oil exporters were slipping on their contractual obligations, which were affecting Indonesian suppliers. The plaintiff relies upon one such publication, said to have been made by The Economic Times, a daily owned by M/s. Bennett and Coleman Company Limited. The copy of the said press clipping has been produced with the list of documents filed along with the suit. The press clipping specifically mentions the plaintiff and also states that 30 Indian companies had been blacklisted for defaulting in payment. It is alleged that the unwarranted and completely unjustified attack on

the plaintiff has injured its reputation. The plaintiff, therefore, claims the sum of Rs. 25,00,000/- as damages, and permanent injunction to restrain the defendants from acting further on the basis of the disputed contracts.

6. The Defendant No. 1, who is primarily contesting the suit as well as the application for ad-interim injunction, contends that the parties had entered into several binding and negotiated contracts, and not merely one of them. It is submitted that as per prevailing practise, the first defendant would negotiate with the plaintiff and also through its broker, i.e. the second defendant, about the quantities, the schedule of shipment as well as the payment terms, which would be then reduced in the form of a contract. It is pointed out that the four contracts dated 18.06.2008, 23.07.2008, 06.08.2008 and 13.09.2008 do not bear the plaintiff's signature and that the defendants had signed them. The Counsel emphasized that if the plaintiff's contentions are to be accepted, he would be gaining unlawfully, and be permitted to get around binding contracts. The first defendant contends that the plaintiff as well as some other importers, are part of a cartel which negotiates and makes firm bookings for supplies from Indonesian and other countries where there is a ready export market for such commodities, and depending upon prevailing market price, they chose to honour the commitments or resile from them, at their convenience. It is submitted that the plaintiff chose to honour their part in relation to the first contract.

7. The defendants contend that having received the so-called disputed contracts, the plaintiff chose not to dispute them at any stage, even after the goods were shipped and had reached the relevant port. It is contended that the revised terms indicated by the communication dated 15.09.2008 (of the first defendant) were also not disputed by the plaintiff ever, in writing or through any mode of communication and that a look at the said document would reveal that the defendant/supplier had favourably revised the terms to suit the plaintiff's convenience and requirements. This is itself indicative of the fact that the parties were negotiating with each other and had entered into binding commitments that formed the basis of enforceable contracts.

8. The plaintiff's grievance is that the defendants are proceeding ahead to invoke the arbitration agreement, which is embodied in the Additional Term No. 11. It is submitted by the Counsel that the applicant plaintiff has made submissions before the Arbitral Tribunal on 08.07.2009, 17.07.2009 and 31.07.2009, contending that it lacks jurisdiction as there was no concluded contract and that submissions have been made without prejudice to the contentions, in this case. The first defendant has filed copies of the said three letters written to the Arbitral Tribunal.

9. The plaintiff relies upon the judgment of the Supreme Court, reported as Bhagwandas Goverdhandas Kedia Vs. Girdharilal Parshottamdas and Co. and Others, to contend that the terms of the three disputed contracts clearly indicate that the parties had to be ad-idem. At best, says the plaintiff, the suit documents constituted offers which had to be acted upon in order to crystallize into binding

terms. It is pointed-out by the plaintiff, unlike as in the instance of the contract dated 18.06.2008, that it never established any Letter of Credit, or even took any further steps, such as seeking insurance cover as was stipulated in the terms of the three disputed contracts. It also pointed-out that the Defendant No. 1/supplier also never communicated the Expected Time of Arrival (ETA), stipulated for under the said documents, which was a pre-condition for the establishment of Letter of Credit. In the circumstances, says the plaintiff, there was no concluded bargain between the parties; they were only ad-idem at and consequently the entire claim before the Arbitral Tribunal is unfeasible.

10. The plaintiff relies upon decision of the Supreme Court in Modi Entertainment Network and Another Vs. W.S.G. Cricket PTE. Ltd., to say that unless the interim injunction sought for is granted, it would be put to irreparable loss as it would be forced to bear the expense of a foreign-based litigation, i.e. arbitral proceedings, and face all the uncertainties attached to it. It is contended that the materials on record establish prima facie that there was no concluded contract, the performance of which could have been lawfully necessitated upon by the defendants.

11. Learned Counsel for the defendants points out that the plaintiff does not dispute the existence of the first contract or that it was performed in accordance with the terms mentioned. It is stated that the practice in the trade is to negotiate through brokers, who finalised the terms and thereafter the supplier - in the present case - the first defendant, would forward the terms of the contract after duly signing it. It is pointed-out that the last stipulation in each of the three disputed contracts required the plaintiff/purchaser to stamp/sign and return one copy of sales confirmation by fax transmission. It is pointed out crucially that the stipulation about stamping and signing did not mean that the validity of the contracts were affected by the non-return of the formal written confirmation, as is apparent from an express stipulation in the agreements so dispatched.

12. It is thus stated that even though the plaintiff did not sign the three documents, nevertheless, they continued to bind it. More so since the Defendant No. 1 had dispatched the goods and intimated the same at the relevant time. The failure of the plaintiff to take delivery only establishes its motive in resiling from its commitments, since the prevailing international prices for Palm Oil were less than the contracted prices.

13. Learned Counsel reiterated the submissions in the written statement and reply to the application, and further contented that the plaintiff kept silent right through and did not dispute the three documents, nor did it even dispute the revised terms indicated in the letter dated 15.09.2008. It is submitted that the revised terms establish that the parties were negotiating with each other and that the final terms were embodied, after duly accommodating the plaintiff's request. Learned Counsel relied upon the decision in Modi Entertainment Network (supra) and submitted that even if there is some doubt about the binding nature of the three disputed documents, that is not sufficient ground for

this Court to grant the injunction sought for. It was stated that the plaintiff has means to contest the proceedings before the International Arbitral Tribunal. Learned Counsel further stated that this Court should desist from enjoining the defendants, particularly since the subject matter of the dispute are also involved in arbitral proceedings, which is governed by Section 45 of the Arbitration and Conciliation Act, 1996.

14. The above discussion would reveal that the plaintiff is seeking damages and injunction against the defendants, on the basis of what are stated to be libellous references made by the latter. It is also claiming ad-interim injunction to restrain the defendant from invoking, and proceeding with arbitration proceedings, pursuant to what the latter claim to be arbitration agreements, embodied in the contracts. As the previous portions of this order would reveal, there is no dispute between the parties, about the agreement between them, on 18.6.2008. What is in dispute is whether the plaintiff had entered into binding commitments with the defendants, through the three disputed contracts. The plaintiff asserts that the documents sent by the defendants did not result in a promise; the first defendant asserts to the contrary.

15. All the disputed contracts- and they are three of them, are in similar, printed form. Some of the terms are as follows:

5. ...Letter of credit to be established latest 10 days prior to the ETA of the nominated vessel at load port declared by the seller in full operative telex or swift. If letter of credit is not received by seller as mentioned above, buyer is deemed to have defaulted on this contract and seller has the option to declare this contract null and void and claim any price difference of losses incurred from buyer.

....

INSURANCE Buyers to insure the cargo at their own cost and a copy of the insurance certificate to be extended to the seller at the time of vessel nomination. In the event, buyer fails to provide the said insurance cover policy/certificate, the seller(s) reserves the right to cover the insurance cover/policy on buyer's behalf and debit buyer for all costs and expenses accordingly if buyer delays opening the LC.

....

Please stamp sign and return this contract to us by facsimile transmission or electronic mail within 48 hours upon its receipt. However, failure on buyer's side to return a copy of the above confirmation duly countersigned shall not alter or affect the validity of the confirmation or contract, and the terms and conditions are considered as final and binding....

16. This Court is mindful of the circumstance that at this stage, only the prima facie strength of the parties requires consideration, and there cannot be a detailed scrutiny of circumstances, as that would be the subject matter of trial.

The documents suggest that the parties were ad-idem about the first contract, and that the defendant had insisted on changes in the letters of credit, pertaining to that transaction. The letters of credit were finally issued to the satisfaction of the parties, the consignment despatched, and also received. In the meanwhile, the defendant sent other contracts (proposals/forms) to the plaintiff, dated 23.07.2008, 06.08.2008 and 13.09.2008. Concededly, the first defendant had signed on these. The question is, whether such facts are sufficient to disclose that the parties had entered into concluded contracts, whereby the plaintiff accepted the defendant's offer - impliedly, as argued on its behalf.

17. It is now aphoristic that every offer does not result in a contract; the person receiving the offer, (or the offered)should accept it. Absent any indication of such acceptance, the offer does not mature into a binding or enforceable contract. The law in this regard was explained by the Supreme Court, in *Bhagwandas Goverdhandas Kedia Vs. Girdharilal Parshottamdas and Co. and Others*, , in the following words:

Acceptance and intimation of acceptance of offer are therefore both necessary to result in a binding contract. In the case of a contract which consists of mutual promises, the offeror must receive intimation that the offeree has accepted his offer and has signified his willingness to perform his promise. When parties are in the presence of each other, the method of communication will depend upon the nature of the offer and the circumstances in which it is made. When an offer is orally made, acceptance may be expected to be made by an oral reply, but even a nod or other act which indubitably intimates acceptance may suffice. If the offeror receives no such intimation, even if the offeree has resolved to accept the offer a contract may not result. But on this rule is engrafted an exception based on ground of convenience which has the merit not a logic or principle in support, but of long acceptance by judicial decisions. If the parties are not in the presence of each other, and the offeror has not prescribed a mode of communication of acceptance, insistence upon communication of acceptance of the offer by the offeree would be found to be inconvenient. When the contract is made by letters sent by post. In *Adams v. Lindsell* it was ruled as early as in 1818 by the court of King's Bench in England that the contract was complete as soon as it was put into transmission. In *Adam's* case the defendants wrote a letter to the plaintiff offering to sell a quantity of wool and requiring an answer by post. The plaintiff accepted the offer and posted a letter of acceptance, which was delivered to the defendants nearly a week after they had made their offer. The defendants however sold the goods to a third party, after the letter of acceptance was posted but before it was received by the defendants. The defendants were held liable in damages. The court in that case is reported to have observed that if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, they the plaintiffs ought not to be bound till after they had received the notifications that the defendants had received their answer and assented to it. And so it might go on ad infinitum. The rule *Adam's* case was approved by the House of Lord in *Dunlop and Ors. v. Vincent Higgins and Ors.*

The rule was based on commercial expediency, or what cheshire calls empirical grounds. It makes a large inroad upon the concept of consensus, a meeting of minds which is the basis of formation of a contract. It would be futile however to enter upon an academic discussion, whether the exception is justifiable in strict theory, and acceptable in principle. The exception has long been recognized in the United Kingdom and in other countries where the law of contracts is based on the common law of England. Authorities in India also exhibit a fairly uniform trend that in case of negotiations by post the contract is complete when acceptance of the offer is put into a course of transmission to the offeror. A similar rule has been adopted when the offer and acceptance are by telegrams. The exception to the general rule requiring intimation of acceptance may be summarised as follows. When by agreement, course of conduct, or usage of trade, acceptance by post or telegram is authorised, the bargain is struck and the contract is complete when the acceptance is put into a course of transmission by the offeree by posting a letter or dispatching a telegram.

18. In this case, the defendant is unable to demonstrate that the plaintiff had ever accepted the three offers, styled as contracts, (i.e. the disputed contracts). The mere despatch of those documents was insufficient for either of the parties to contend that it constituted a binding bargain. Here, the defendant's reliance on a standard clause, which says that contractual obligations would commence, irrespective of whether the signed contract is received by it, is not of much significance. The standard form agreement itself discloses that the parties - notably the defendant No. 1 had to take steps before the agreement became operational. The first defendant was to intimate the expected time of arrival, in order to give the plaintiff clear ten days notice, to establish a letter of credit. That was the real reckoning point at which the parties' intention to go ahead with the offer, and translate it into a contract, had to be seen. The defendant has nowhere shown that any date or dates of such expected arrival, intimating the despatch of the goods were ever furnished to the plaintiff. Nor is there evidence to show that the plaintiff ever caused letters of credit to be issued in respect of the disputed contracts. Similarly, the defendant has not shown, *prima facie*, that it had to insure the goods, in terms of the contracts due to the plaintiffs' default. In view of all these material circumstances, the Court *prima facie* concludes, on an application of the law declared in *Bhagwandass Kedia* that there were no binding agreements, in relation to the disputed contracts.

19. As far as the question of whether the plaintiff is entitled to claim an anti-suit injunction in respect of the arbitral proceedings, said to have been commenced at the first defendant's behest, is concerned, the law on this aspect has been re-stated in India, in *Modi Entertainment Network*, in the following terms:

From the above discussion the following principles emerge:

(1) In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:

(a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;

(b) if the injunction is declined the ends of justice will be defeated and injustice will be perpetuated; and

(c) the principle of comity - respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained - must be borne in mind;

(2) in a case where more forums than one are available, the Court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum convenience) having regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-convenience;

(3) Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein in regard to exclusive or non-exclusive jurisdiction of the court of choice of the parties are not determinative but are relevant factors and when a question arises as to the nature of jurisdiction agreed to between the parties the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case;

(4) a court of natural jurisdiction will not normally grant anti-suit injunction against a defendant before it where parties have agreed to submit to the exclusive jurisdiction of a court including a foreign court, a forum of their choice in regard to the commencement or continuance of proceedings in the court of choice, save in an exceptional case for good and sufficient reasons, with a view to prevent injustice in circumstances such as which permit a contracting party to be relieved of the burden of the contract; or since the date of the contract the circumstances or subsequent events have made it impossible for the party seeking injunction to prosecute the case in the court of choice because the essence of the jurisdiction of the court does not exist or because of a vis major or force majeure and the like;

(5) where parties have agreed, under a non-exclusive jurisdiction clause, to approach a neutral foreign forum and be governed by the law applicable to it for the resolution of their disputes arising under the contract, ordinarily no anti-suit injunction will be granted in regard to proceedings in such a forum convenience and favoured forum as it shall be presumed that the parties have thought over their convenience and all other relevant factors before submitting to non-exclusive jurisdiction of the court of their choice which cannot be treated just an alternative forum;

(6) a party to the contract containing jurisdiction clause cannot normally be prevented from approaching the court of choice of the parties as it would amount to aiding breach of the contract; yet when one of the parties to the jurisdiction clause approaches the court of choice in which exclusive or non-exclusive

jurisdiction is created, the proceedings in that court cannot per se be treated as vexatious or oppressive nor can the court be said to be forum non-convenience; and

(7) the burden of establishing that the forum of choice is a forum non-convenience or the proceedings therein are oppressive or vexatious would be on the party so contending to aver and prove the same....

Here, as discussed earlier, the materials disclose prima facie, that there was no binding or enforceable contract in relation to the three offers, relied on by the defendants. Therefore, there is no question of the plaintiff having agreed to have the dispute resolved through arbitration. So far as the question of the proceedings being not a domestic arbitration, and therefore, covered by Part II of the Arbitration and Conciliation Act, 1996 is concerned, the Court notices that the extent of jurisdiction is controlled u/s 5 in respect of arbitral proceedings covered by Part I, i.e. in respect of domestic arbitration. However, no such limitation on jurisdiction exists under Part II. This Court is also satisfied the parties personally are amenable to its jurisdiction; the plaintiff resides within jurisdiction; the defendants have offices within territorial jurisdiction of the Court.

20. Having regard to the overall conspectus of circumstances, it is evident that the balance of convenience is in favour of the Court granting the temporary injunction sought for, as its refusal would compel the plaintiff to subject itself to the jurisdiction of a tribunal which is plainly not the consequence of volition of parties. The plaintiff would also be put to the hardship and expense of contesting legal proceedings which are clearly beyond jurisdiction, based on documents which are not binding contracts.

21. In view of the above circumstances, the defendants, and their representatives, or anyone acting on their behalf are hereby restrained by a temporary injunction from proceeding with or prosecuting the arbitral proceedings, initiated by them, pursuant to the disputed contracts, till disposal of the suit. IA 14260/2008 is allowed in the above terms.

CS(OS) No. 2436/2008

List on 11th May, 2010.