

(2014) 01 DEL CK 0344

Delhi High Court

Case No: CS (OS) 1231 of 2013

Himalya International
Ltd.

APPELLANT

Vs

Simplot India Foods
Pvt. Ltd. (Simplot India)
(LLC) and Another

RESPONDENT

Date of Decision: Jan. 17, 2014

Acts Referred:

- Arbitration Act, 1940 - Section 33
- Arbitration and Conciliation Act, 1996 - Section 11 11(5) 11(9) 16 16(1)
- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 11, Order 7 Rule 11(d)
- Specific Relief Act, 1963 - Section 34 41 41(h) 41(i)(h)

Citation: (2014) 2 ARBLR 154 : (2014) 141 DRJ 564

Hon'ble Judges: Jayant Nath, J

Bench: Single Bench

Advocate: V. Shankara, for the Appellant; Neeraj Kishan Kaul , Ms. Madhu Sweta, Ravi Singhania and Mr. Sumit Gupta, for the Respondent

Final Decision: Allowed

Judgement

Jayant Nath, J.

IA No. 12140/2013 (Order 7 Rule 11 of CPC)

1. This is an application filed under Order 7 Rule 11 of CPC for rejection of the plaint. The present suit is filed by the plaintiff seeking a decree against the defendants for permanent injunction to restrain the defendants from proceeding before Singapore International Arbitration Centre for arbitration in alleged violation of Shareholders Agreement dated 6th October, 2011 and Master Agreement dated 24th August, 2012.

2. The averment of the plaintiff is that the plaintiff and the defendant no. 1 entered into a joint venture Shareholder Agreement in October, 2011 and Master Agreement dated 24th August, 2012. The business of the joint venture started in October, 2011. Certain disputes arose between the parties on account of which the defendant no. 1 had got issued a notice dated 22nd March, 2013 to the plaintiff in terms of Clause 12.2 of the Share-Holder Agreement. Thereafter, the defendant no. 1 vide its notice dated 24th May, 2013 invoked clause 12.3 for Singapore International Arbitration Centre for arbitration. Hence, the plaintiff has filed the present suit. It is stated that all kinds of disputes settlement as provided in Clauses 12.0 to 12.4 of the Share-Holder Agreement have been totally ignored by defendant No. 1 rendering the said Clauses redundant and has instead directly approached the Singapore International Arbitration Centre.

3. The defendant has filed the present application seeking rejection of the plaint stating that the suit is hit by Section 5 of the Arbitration & Conciliation Act and barred by law. It is stated that as there is an arbitration clause, the present suit would not be maintainable and all issues including the procedural matters have to be decided by the Arbitral Tribunal itself u/s 16 of the Arbitration and Conciliation Act. The application further states that the grievance of the plaintiff is ill founded inasmuch as it is stated that the defendant no. 1 has adhered to the contractual procedure before invoking the arbitration. It is stated that discussions for amicable resolution commenced between the parties and a meeting was held in Boise on 2-3rd March, 2013 to resolve the disputes. The defendant no. 1 also claims to have sent a letter dated 26th March, 2013 to the plaintiff with the proposal to shorten the disputes resolution process and sought the consent of the plaintiff for waiver of pre-arbitral steps. However, the plaintiff is stated to have not responded, hence, the defendant no. 1 vide its letter dated 24th May, 2013 invoked the arbitration clause.

4. Learned Senior Advocate for the defendant has relied upon the judgments in the case of [Aurohill Global Commodities Ltd. Vs. M.S.T.C. Ltd.](#), , Roshan Lal Gupta Vs. Parasram Holdings, 157 (2009) DLT 712 and [Clearwater Capital Partners \(Cyprus\) Limited Vs. Satyajit Singh Majithia and Others](#), to contend that the present suit is barred u/s 5 of Arbitration & Conciliation Act and that the remedy of the plaintiff is to approach the Arbitral Tribunal.

5. Learned counsel for the plaintiff at the outset submits that he is not challenging the existence or the validity of the arbitration agreement. The submission put forth is that Clause 12.3 of the Share-Holders Agreement which is an arbitration clause is in three parts, namely, Clause 12.3(a), (b) and (c). It is stated that defendant has straightway invoked sub-clause 12.3(c) by-passing Clause 12.3(a) and Clause 12.3(b). It is stated that as the defendant has failed to follow the said procedure, the arbitration cannot be done and hence the present suit would lie. He submits that all the judgments relied upon by the counsel for the defendant pertains to the suits where there was a challenge to the validity of the Shareholders Agreement. He relies on Section 21 of the Arbitration Act and reliance is also placed on the judgment of the Hon"ble Supreme Court in the case of [Venture Global Engineering Vs. Satyam Computer Services Ltd. and Another](#), , where the

Hon"ble Supreme Court held that since all the courts below failed to advert and take into consideration the specific clause in the Shareholders Agreement and the conduct of the parties, it set aside the orders passed.

6. Since the plaintiff argues about non-compliance of Clause 12.3(a) and Clause 12.3(b) of the Shareholders Agreement, the issue would be as to whether this court can go into this contention which is raised by the plaintiff. Clauses 12.3(a) and 12.3(b) reads as under:

12.3. Other Disputes Resolution.

(a) In the event of any other dispute or claim that is not Deadlock matter arising from or related to this Agreement is raised by any Party, including with respect to an Event of Default (a "Dispute"), the Members shall endeavour to settle, through their respective designees to the Board of Directors, the Dispute. All Disputes arising under this Agreement that are not resolved by the Board of Directors shall be resolved as follows: The Company shall first submit the matter to the Senior Representatives of the Members by the providing notice of the Dispute to the members. The Chairmen of the Members shall then make a good faith effort to resolve the Disputes.

(b) If they are unable to resolve the Dispute within 30 days of receiving notice of the Dispute, then the Dispute shall, subject the right of the Non-Defaulting Members to dissolve the Company pursuant to Clause 12.4 below, be submitted to non-binding mediation. Subject to Clause 12.4 either Member may initiate the non-binding mediation by providing to the Singapore Mediation Centre and to the other Member a written request for mediation, setting forth the subject of the Dispute. The Singapore Mediation Centre mediation procedure shall apply to the mediation and the mediation will be held in Singapore unless the Members otherwise agreed. The members covenant that they will participate in the mediation in good faith, and they will share equally in its costs

7. Section 5 of the Arbitration & Conciliation Act reads as under:

5. Extent of judicial intervention. Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

8. This Court in the case of Shri Roshan Lal Gupta vs. Shri Parasram Holdings Pvt. Ltd., 157 (2009) DLT 712 in paras 21 and 23 held as follows:-

21. There is yet another reason for me to hold so and it is reflected in the substantial questions of law framed on 29th January, 2009. The relief of declaration is guided by Section 34 and the relief of permanent injunction by Section 41 of the Specific Relief Act. Grant or non-grant of declaration is in the discretion of the court. A permanent injunction cannot be granted under clause (h) of Section 41 when equally efficacious relief can be obtained by any other usual mode of proceeding except in case of breach of trust. The

discretion of the court ought not to be exercised in a manner so as to adversely affect the arbitral proceedings or to negate the purport of the 1996 Act. Similarly, it is not as if, if injunction restraining the arbitration is not given, the party challenging the validity of the arbitration agreement would be rendered remediless. The said party has the equally efficacious remedy of Sections 16 and 34 of the Arbitration Act. The suit for declaration and permanent injunction is found to be barred by provisions of Specific Relief Act also.

23. In my view, the law with respect to the adjudication by the courts while dealing with an application u/s 8 or Section 11 of the Act would not apply to the suit. Firstly, the proceedings under Sections 8 and 11 are provided for by the Act itself while the suit challenging the validity of the arbitration agreement has not been provided for in the Act and is barred u/s 5 of the Act. Thus merely because while interpreting Section 8 and Section 11 it has been held that the court before referring the parties to arbitration should satisfy itself of the existence of the arbitration agreement would not justify the institution of a suit for the same relief. Section 8 application is filed when a substantive suit is already before court and the question to be determined is whether that suit is to proceed or the parties are to be referred to arbitration. Similarly, Section 11 is an application for appointment of the arbitrator. Merely, because the court when faced with such provisions as provided for under the Act is to satisfy itself of the existence of the agreement cannot be understood to lay down that it is open to a party to even where no suit for substantial relief and application u/s 11 has been filed, an independent suit only for the relief of challenging the validity of the arbitration agreement can be instituted. I, therefore, do not feel the need to refer to the judgments filed by the counsel for the petitioner/appellant alongwith the synopsis on Section 8 and Section 11 of the Act.

9. In those facts, the Court held that a suit for declaration that an agreement containing an Arbitration Clause is forged, fabricated, unenforceable and null and void and for injunction restraining the arbitration does not lie and is barred u/s 5 of the Arbitration and Conciliation Act and under Sections 34 and 41(h) of the Specific Relief Act read with Section 16 of the Arbitration Act. The above judgment was again reiterated by the said Court in the case of [Shree Krishna Vanaspati Industries \(P\) Ltd. Vs. Virgoz Oils and Fats Pte Ltd. and Another](#) .

10. Similarly, the Hon"ble Supreme Court in the case of [Aurohill Global Commodities Ltd. Vs. M.S.T.C. Ltd.](#), in para 13 held as follows:-

13. In the present case, M/s. Aurohill Global Commodities Ltd. has filed this petition u/s 11(9) read with Section 11(5) of the said Act. Section 11 falls in Part I. The alleged contract is an international transaction, therefore, this Court has the power to appoint an arbitrator in accordance with the terms of the contract. Under the said Act, the Arbitral Tribunal has very wide powers. The powers of the courts have been curtailed. The Arbitral Tribunal's authority u/s 16 of the said Act is not confined to the width of its jurisdiction but goes to the very root of its jurisdiction (see Secur Industries Ltd. vs. Godrej & Boyce Mfg. Co. Ltd.). In the present case, therefore, the question as to whether the

draft purchase order acquired the character of a concluded contract or not and the question as to whether the contract was non est. can only be decided by the arbitrator. Therefore, the aforesaid question have got to be decided by arbitration proceedings....

11. The case of Clearwater Capital Partners (Cyprus) Ltd., Vs. Gurmeher Singh Majithia (Supra) also related to a case where the suit was filed seeking the relief of declaration that the Shareholder Subscription Agreement and Shareholder Agreement are illegal and therefore void ab initio and for an injunction restraining defendant No. 1 from initiating any legal action for enforcement of any terms of the said two Agreements including but not limited to invocation of the arbitration clause. This Court held as under:

Under Section 33 of the 1940 Act, the Arbitrator could examine the question of the existence or validity of the arbitration agreement. Section 16 of the Act not only preserves this power of the arbitrator but in fact expands it. The wording of Section 16(1) indicates that the arbitrator could rule on his own jurisdiction "including ruling on any objections with respect to the existence or validity of the arbitration agreement". The word "including" shows that the scope of the examination of the questions concerning the jurisdiction of the arbitral tribunal is not limited to the existence of the arbitration agreement itself. Therefore, it is inconceivable that where there is a violation of mandatory requirement like Section 21 of the Act, the arbitrator cannot examine that question as well. If the existence of the arbitration agreement is a sine qua non for commencement of arbitration proceedings and if such a question is to be examined only by the arbitrator, it is difficult to accept the proposition that the question whether a valid notice u/s 21 has been received by the respondent in a claim petition, cannot be gone into by the arbitrator.

12. Based on the above legal position this Court held that no suit for such a relief can be entertained by the court when defendant No. 1 had prior thereto elected to refer the disputes for arbitration in the manner envisaged in the Shareholder Agreement.

13. The legal position that follows aforesaid is that the issues that are raised by the plaintiff, namely, non-compliance of Clause 12.3(a) and Clause 12.3(b) are issues which have to be gone into by the Arbitral Tribunal. Section 5 of the said Act takes away the jurisdiction of the civil court. The said statutory provision has to be given effect to.

14. The reliance of the learned counsel for the plaintiff on the judgment of the Hon'ble Supreme Court in the case of Venture Global Engineering vs. Satyam Computer Services Ltd. (supra) is of no help to the plaintiff. In that case the issue was as to whether the award in question which was a foreign award, Part I of the Arbitration and Conciliation Act would be applicable. The Court held that Section 34 of the Act would be applicable to Foreign International Awards and this would not be inconsistent with Section 48 of the said Act or any other provision of Part II of the said Act. There is nothing said in the said judgment that would help the plaintiff about the maintainability of the present suit. Hence, the present suit does not lie and is barred u/s 5 of the Arbitration & Conciliation Act and Section 34 and 41(i)(h) of the Specific Relief Act in terms of Order 7 Rule 11(d) of CPC,

the present suit is barred by law and hence, the plaint is liable to be rejected. Accordingly, the application is allowed and the present suit is dismissed.