

(2013) 1 CALLT 21

Calcutta High Court

Case No: G.A. No. 3966 of 2008, G.A. No. 3729 of 2008 and C.S. No. 242 of 2008

ABP Private Limited

APPELLANT

Vs

Media Research Users
Council

RESPONDENT

Date of Decision: Sept. 25, 2012

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 45, 7, 7(4)(b), 8, 8(2)
- Contract Act, 1872 - Section 39, 75

Citation: (2013) 1 CALLT 21

Hon'ble Judges: Patherya, J

Bench: Single Bench

Advocate: Anindya Mitra, Adv, Mr. Tilak Bose, Adv, Mr. Anubhav Sinha and Mr. Soumitra Datta, for the Appellant; Rajesh Mehta and Mr. Supriya Ranjan Saha, for the Respondent

Judgement

PATHERYA, J.

This is an application filed u/s 8 of the Arbitration and Conciliation Act, 1996 (1996 Act). The case of the defendant-applicant is that it is registered under the Companies Act, 1925. It was created by the users, for the users and of the users. The plaintiff is a member subscriber and a purchaser of its software which is published on the basis of the readership figures i.e. data based on Media research. Such data in the form of a software is sold to the public at a price and at a subsidized rate to its members. The plaintiff is a member of the defendant-applicant and in 2008 bought its software as a user. The terms and condition of such software is applicable to the plaintiff as a user. One of the terms and condition of the software purchased is to refer disputes to arbitration. The invoice by which the software has been purchased does not contain an arbitration clause but while using the software the user has to either agree or disagree to accept the terms and condition. Only if it agrees to the terms and condition will the data be available to it. Therefore the option exercised u/s 39 of the Contract Act if repudiated u/s 75 of the Contract Act will entitle the user to damages. The IRS annexed to the petition is a

scanned copy of the software under challenge as the software of the plaintiff is with it and the defendant-applicant has no access thereto but the software so also the terms and condition are the same. The main grievance of the plaintiff is that the methodology adopted in round 1 of 2008 was defective, accordingly a new yardstick was adopted in 2009 and such yardstick was as per the suggestion made by it. It is the alleged defective methodology of round 1 of 2008 which is under challenge and although the new methodology has been adopted an adjudication into the methodology of round 1 of 2008 is sought by the plaintiff as otherwise its report for that round will remain incomplete.

2. In view of the arbitration clause and the agreement to refer disputes to arbitration C.S. 242 of 2008 is not maintainable and the parties be directed to proceed to arbitration. For the said proposition, reliance is placed on [Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums,](#)

3. Counsel for the respondent opposes the said application on the ground that Section 8 of the Arbitration Act deals with a "matter which is the subject matter of an arbitration agreement". It is only in respect of matter which is covered by the subject matter of an arbitration agreement shall a party be referred to arbitration. Section 8(2) of 1996 Act is mandatory and for non-filing the original arbitration agreement or a certified copy thereof with the instant application this application cannot be maintained. The relief sought in the suit is qua-member and the articles of association which governs members contains no arbitration clause. The annual fees are regularly paid and only on usage of software will it be required to accept the terms and conditions of user. The rights of a member and user are different. As the certified copy of the agreement has not been annexed in view of [Atul Singh and Others Vs. Sunil Kumar Singh and Others,](#) the application be dismissed.

4. The arbitration clause is contained only in the user agreement and is applicable qua-user and only when the right of user is exercised will the clause be applicable. Reliance is placed on (2009) 1 CLJ 18. It is nowhere pleaded that the methodology will appear from IRS 2008 which contains the arbitration clause. Multiple user will make the arbitration clause applicable manifolds and which user entitles the applicant to invoke the arbitration clause is not known. Section 7(4)(b) of the 1996 Act postulates existence of an arbitration agreement by exchange of letters, telex, telegrams or other means of telecommunication which provides a record of the agreement. There is no record in the instant case as the arbitration agreement is not in material form. The requirement of enclosing the arbitration agreement in original or a certified copy thereof with the application has also not been satisfied. This is to ensure the existence of an arbitration agreement. The electronic media provides for recording and this provision could have been made. As non-filing of the original agreement or certified copy is not a technical lapse the application be dismissed. As a member, if aggrieved the plaintiff can lodge a complaint with the technical committee which has been done. [Shakti Bhog Foods Limited Vs. Kola Shipping Limited,](#) is distinguishable as it supports Section 7(4)(b) of the 1996 Act and is not a case on Section 8(2) or Section 45 of the 1996 Act. It does not in any way militate the submission of the plaintiff. In [Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity](#)

[Midway Petroleums](#), the case of Sukanya Holding was not considered. Reliance is placed on [Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another](#), and (2005) 8 SCC 16. There is no arbitration agreement and it has nowhere been pleaded that methodology is part of IRS 2008. Admittedly IRS 2008 is in respect of user and there has been no violation of any term of user. Therefore no breach of covenant can be alleged by the applicant. The methodology is to be decided by a technical committee and a steering committee and objection has been raised before it therefore the suit filed is qua-member and not user. There is no record to show how the arbitration agreement came into existence.

5. This application can also not be entertained as the authority of Sabina Soloman who has affirmed the affidavit is in question. There is no resolution produced to evidence that the person who has affirmed the affidavit was authorised by the Board of Governors to do so and unless the defect is cured this application cannot be maintained. For all the said reasons the application filed u/s 8 of the 1996 Act be dismissed.

6. Having considered the submissions of the parties the terms and conditions of purchase of the defendant's software has been admitted by it. It is the application of its terms and conditions till user of the software is disputed. The software was purchased in January 2008 and the 1st round of publication for 2008 was in April which was admittedly accessed by the plaintiff. On the methodology of the 1st round the result of the 2nd round of 2008 would be based. Therefore the plaintiffs by user in Round 1 became aware of the arbitration agreement by which the parties are bound and cannot take the plea of Section 7 of the 1996 Act and the non-existence of the arbitration agreement as by virtue of the said software of IRS 2008 the arbitration agreement bound the parties. Maybe the software was not used by it for Round 2 of 2008 but that will not exempt it from the application of the terms and conditions which includes an arbitration clause and reads as follows:-

All differences and disputes arising in connection with or relative to this Agreement between the parties including any dispute or difference in regard to the interpretation of any provision or term or the meaning thereof, whether during the currency/sustenance of this Agreement or after the determination thereof, shall be referred to arbitration by one arbitrator to be jointly and mutually appointed by the parties and the said arbitration shall be governed by the Arbitration and Conciliation Act, 1996. The place of arbitration shall be Mumbai only.

7. The arbitration clause has been couched in the widest possible term and encompasses any dispute or difference that has arisen not only in connection with an existing agreement but includes a dispute arising after the determination thereof.

8. "In connection with this agreement" as held in the case of [Renusagar Power Co. Ltd. Vs. General Electric Company and Another](#), is of the widest amplitude and includes even questions of existence, validity and effect of the agreement.

9. Section 8(2) of the 1996 Act so also the decision reported in [Atul Singh and Others Vs. Sunil Kumar Singh and Others](#), a written arbitration agreement and has not considered an arbitration agreement contained in a software, whose terms and conditions has been accepted by the parties.

10. Purchase of the software is admitted, so also user in April 2008 therefore existence of arbitration agreement is evident.

11. No copy of the software given to the plaintiff can be with the defendant but the object of the software of the defendant is one i.e. to inform the rating of the publications of different publishing House. Therefore the software given to all its members is similar and this alone can at best be in the possession of the defendant and to produce the original or a duly certified copy thereof is impossible. In the application filed u/s 8 of the 1996 Act the Terms and Conditions of the software has been annexed and there is no dispute raised to its existence all that is disputed is the applicability of the said terms and conditions.

12. As held in [Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums](#), so also in view of the arbitration clause of which the petitioner is aware the matter ought to be referred to arbitration.

13. The issue sought to be raised by the plaintiff in C.S. No. 242 of 2008 is covered by the arbitration agreement as the same has been couched in the widest term and encompasses the issue raised, and the same be referred to arbitration. For all the said reasons G.A. 3966 of 2008 succeeds and the interim order passed is vacated.