

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: 21.1.2008
Date of Order: 30.01.2008

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+ **OMP No. 384/2007 & IAs No. 8419/07 & 12218/07**

MIKUNI CORPORATION ... **Petitioner**
! Through: Mr. A.S.Chandhiok, Sr.Advocate with
Ms. Mohna M. Lal & Mr. Mohit Goel, Advocates

Versus

\$ **1. UCAL FUEL SYSTEMS LIMITED**
2. Carburettors Limited
3. Siemens VDO Automotive ... **Respondents**
^ Through: Mr. S.Sundram Sr. Advocate with
Ms. Sangeeta Bharti & Mr. Birjesh Anand, Advs. For R-2
Mr. Tejas Karia & Ms. Misha, Advocates for R-3

* **JUSTICE SHIV NARAYAN DHINGRA**

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| 1. | Whether reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. | To be referred to the reporter or not ? | Yes. |
| 3. | Whether judgment should be reported in Digest ? | Yes. |

JUDGMENT :

By this order I shall dispose of this application/petition under Section 9 of the Arbitration and Conciliation Act, made by the petitioner against the three respondents. The petitioner had entered into a Joint Venture Agreement (in short 'JVA') with respondent no. 2 on 20th December, 1988. The relevant clauses of the agreement read as under:

1. *DEFINITIONS*

1.1 *The term "PRODUCTS" as used in the joint venture agreement means the products which are shown on the attached Annex 'A' and which UFS plans to manufacture and sell.*

5. *NON-COMPETITON WITH THE BUSINESS OF UFS*

During the term of this agreement each of the parties hereto agrees not to manufacture, have manufactured or sell, have sold, in India any types of products which are the same as the PRODUCTS for which MIC gives technical know-how to UFS under the collaboration agreements. This obligation

is binding on subsidiaries, affiliated companies and holding companies of both parties.

9.0 CONFIDENTIALITY

Each party hereto agrees to keep strictly confidential information acquired from the other parties or from UFS under this agreement. Both parties also agree not to disclose such information to any third party.

Such secrecy obligation shall survive termination of this agreement and thereafter until such information is made public by any third party or parties other than CL, MIC, and UFS.

2. The agreement was between petitioner and respondent no. 2 and countersigned by respondent no. 1. It is stated by the petitioner that respondent no. 1 was attempting to defeat the petitioner's rights under the JVA by trying to enter into a collaboration/tie-up with respondent no. 3 and respondent no. 1 was attempting to indirectly obtain the approval of the board of directors of respondent no. 1 to surpass petitioner's objection against the collaboration agreement. It is stated that respondent no. 1 had obtained technology to manufacture Carburettors as well as the Housing and machine cast and without paying for the petitioner's technology, it was attempting to use the same to help a competitor. It is also stated that respondent no. 3 had also approached petitioner to provide them with the technology to manufacture Air Intake Charge Throttle Body Housing (cast and machined) and ETC5 Housing (cast and machined) and this request of respondent no. 3 was declined by the petitioner. Since respondent no. 3 was unable to obtain technology from the petitioner, the respondent no. 3 devised a method to indirectly obtain this technology from respondent no. 1 & 2. Respondent no. 3 intends to manufacture similar products using the current manufacturing facility of respondent no. 1, developed with the technical expertise provided by the petitioner, so that they can quickly enter the auto-component market in India. It is stated that in order to achieve this, a re-organization of the respondent no. 1 is on the cards and by this re-organization, respondent no. 3 is sought to be inducted into the management of respondent no. 1 through back door. It is also stated that petitioner apprehends that

respondent no. 1 is attempting to set up a competing plant/facility for Siemens i.e. Respondent No.3 either directly or indirectly (at the facility or with the collaboration of UCAL Machine Tools Limited), which is in clear violation of the petitioner's right under the JVA, despite the fact that petitioner has not given its consent to respondents no. 1 & 2 and respondents no. 1 & 2 were proceeding with the proposed JVA with Siemens. Reliance is placed on clause 16 in the JVA which provides for arbitration and reads as under:

16. ARBITRATION

All disputes, controversies or differences which may arise between the parties, out of or in connection with this agreement, shall be settled in good faith by the parties hereto. If any such matter cannot be settled by the parties, the matter shall be referred to the arbitration of the Japan Commercial Arbitration Association if such matter is raised by CL [i.e., Respondent No. 2 herein], and referred to the arbitration of the Indian Council of Arbitration, New Delhi, India, if such matter is raised by MIC (i.e., the Petitioner herein). The decision of the arbitrators shall be final and binding on both the parties”.

3. A prayer is made to restrain the respondents, their associates and subsidiaries either individually or in association with third parties from breaching the Joint Venture Agreement dated 20th December, 1988 and as modified on 30th May, 1989 and 28th December, 1998. The other prayer is to restrain respondent no. 1 from considering the agenda item no. 11 relating to the collaboration with respondent no. 3 in the board meeting and restrain the respondents, their associates, subsidiaries and affiliates from implementing matters relating to the manufacture of Housing (cast and machined) products for Siemens VDO Project and/or supplying Housing (cast and machined) products to respondent no. 3.

4. It is undisputed fact that petitioner and respondent no. 2 has 26% shares each in respondent no. 1 and they have equal number of directors in the management of respondent no. 1. Rest of the 48% shares are held by public. It is not possible for respondents no. 1 & 2 to re-structure the company i.e. Respondent no. 1 without the consent and

permission of petitioner and respondent no. 2, who are managing the company and have equal number of directors and equal number of shares because of the bar of the Companies Act. Respondents No. 1 & 2 in their reply have categorical stated the proposal for re-structuring cannot be carried without the consent of petitioner and therefore has been abandoned.

5. Since the proposal for re-structuring stands abandoned the induction of respondent no. 3 into the management or into the respondent no. 1 company in any other manner is not possible. The fears of petitioner about re-structuring therefore stands dispelled.

6. The JVA which was entered between the parties has with it Annexure 'A'. The JVA is in respect of products mentioned in Annexure 'A' and it does not cover any other product. Annexure 'A' reads as under:

- I. *Products for Maruti Vehicles*
 - a. *Carburettor Model No. 24-30 DIDS Series*
 - b. *Fuel Pumps*
 - Model MDF 72-10*
 - MDF 72-2*
 - MDF 72-1*
- II. *Any other product or products licensed by MIC and approved by the Government of India from time to time.*

7. Clause 1.1 of JVA defines products and Annexure 'A' specifies that product. Thus, products shown in para 6 above are the only products which UCAL Fuel Systems (R-1) is currently manufacturing and selling under JVA. However, respondent no. 1 has other product range also which are not affected by JVA and for which no technical knowhow has been granted to respondent no. 1 by petitioner or respondent no. 2. Respondent No.1 argued that JVA and the clauses referred to by the petitioner were meant to prevent a competition between the petitioner and respondent no. 2 inter se & vis-a-vis respondent no. 1 since both petitioner and respondent no. 2 were prevented from competing with each other by clause 5 stated above. The agreement as seen from clause 5 is clearly between the petitioner and respondent no. 2 and both these parties had agreed not to manufacture, have manufactured or sell, have

sold in India any types of products which were the same products for which Mikuni gave technical knowhow to respondent no. 1 under the Collaboration Agreement. It is obvious that this non-competition clause could not have been with respondent no. 1 because the respondent no. 1 was the company created for manufacture of the products after obtaining technical knowhow from petitioner and respondent no. 2.

8. Clause 9 makes it clear that a confidentiality was to be maintained by both the parties. It specifically provided that both the parties not to disclose any such information to any third party. There could have been no agreement of not disclosing information to respondent no. 1, since respondent no. 1 was to get this information under the agreement. When petitioner and respondent no. 2 entered into JVA with respondent no. 1, respondent no. 1 was already in business and it was not a new company created by joint venture. Respondent no. 1 was having a particular expertise in casting and machining. Respondent No. 2 was also in the business of zinc casting for more than 15 years prior to JVA. Respondent No. 1 was not prevented from continuing its manufacturing activities in these fields. JVA was to take effect in respect of products as mentioned in Annexure 'A'. Therefore, there could have been no non-competition clause between petitioner and respondent no. 2 on one side and respondent no. 1 on the other side. Non-competition obligation was binding only on respondent no. 2.

9. Since respondent no. 1 received technical knowhow from petitioner and respondent no. 2 in respect of certain products, I consider that it becomes obligatory on respondent no. 1 also to honour the JVA to the extent that the technical knowhow which the respondent no. 1 received from the petitioner and respondent no. 2 was not given away to third parties without the consent of petitioner and respondent no. 2. Though practically, respondent no. 1 cannot give away this knowhow to third parties without the consent of petitioner and respondent no. 2 because petitioner and respondent no. 2 are in the management of

respondent no. 1. Petitioner and respondent no. 2 each having 26% shares, have equal number of directors on the board of respondent no. 1. However, I consider that respondent no. 1 is free to deal in the products which are not covered by Annexure 'A' to the JVA and all products other than those mentioned above in para 06 can be dealt with by respondent no. 1 and respondent no. 1 has a right to enhance its business prospectives by dealing in any other products which are not covered by the JVA.

10. Another question raised by respondents no. 1 & 2 is that this Court has no jurisdiction to entertain the application under Section 9. It is stated that application under Section 9 can be entertained by the Court as defined in Section 2(1)(e). Section 2(1)(e) defines the 'Court' as under:

"Court" means the principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal civil court, or any court of small causes."

11. It is clear from reading of Section 2(1)(e) with Section 9 of the Arbitration and Conciliation Act, that the Court where an application under Section 9 can be filed, is the Court which would have jurisdiction to entertain the suit on the basis of facts given in the application under Section 9. This Court in *Inox Air Products Ltd. v. Rathi Ispat Ltd.* 2006(4) Arb. L.R. 40(Delhi) observed that only that Court will have jurisdiction where the cause of action arose in the sense as it would have arisen if the suit had been filed. Reference was made to decisions of this Court in *Gulati Construction Company, Jhansi v. Betwa River Board* AIR 1984 (Delhi) 299, *Interstate Equipment (India) Private Limited v. Bharat Aluminum Company Limited* 2004(1) Arb. L.R 456 (Del.), *Apparel Export Promotion Council v. Prabhati Patni, Proprietor, Comfort Furnishers and Anr.* 2005(3) Arb. L.R. 518 (Del.), *GE Countrywide Consumer Financial Services Limited v. Surjit Singh Bhatia & Jaspal Kaur*, 2006(4) (AD) Delhi 485=2006(2) Arb.L.R.170(Del.)

12. The Counsel for the applicant relied on Jindal Vijayanagar Steel (JSW Steel Ltd.) v. Jindal Praxair Oxygen Company Limited 2006(3) Arb. L.R.340 (SC) wherein the Supreme Court had considered the issue of jurisdiction. A dispute had arisen regarding interpretation of the settlement agreement between the parties. The respondent invoked arbitration clause against the appellant. Respondent filed a petition under Section 9 of the Arbitration and Conciliation Act in Bombay High Court seeking interim relief against the appellant. The Bombay High Court served notice to the appellant in Karnataka. The Appellant had also filed an arbitration petition under Section 9 before the Principal District Judge, Bellary, Karnataka for an injunction restraining respondent from breaching various agreements and obtained an order of interim injunction. The respondent objected to the proceedings before the Bellary Court, without success. The respondent filed appeal before Karnataka High Court which was allowed holding that issue of jurisdiction would have to be decided by Bombay High Court. During the pendency of petition under Section 9 before Bombay High Court, the respondent transferred its registered office to Mumbai and by the impugned order Bombay High Court held that it had jurisdiction to entertain the arbitration petition under Section 9 of the Act on the ground that under clause 12 of the Letters Patent, Bombay High Court had jurisdiction to entertain the petition as the respondent was having its corporate office in Mumbai from where it was carrying on its business.

13. The issue before the Supreme Court was whether Bombay High Court had jurisdiction to entertain the application under Section 9 filed by the respondent. The Supreme Court held that in view of the Section 120 CPC which had specifically excluded application of Section 16, 17 and 20 CPC to Chartered High Courts, Clause 12 of the Letters Patent would be the relevant provision for determining the ordinary original jurisdiction of the Bombay High Court. The Supreme Court also held that under clause 12 of the Letters Patent, the Bombay High Court would have

jurisdiction to entertain the arbitration petition filed under Section 9 of the act, even if no cause of action arose within its jurisdiction since the respondent had its office in Mumbai. The Supreme Court rejected the contention advanced on behalf of the appellant that jurisdiction under Section 2(i)(e) should be interpreted uniformly throughout India and in that case the provision of Section 20 CPC should be invoked and not Clause 12 of the Letters Patent so that the only test for determining jurisdiction, is if cause of action had taken place within the jurisdiction of High Court and not the place of carrying on business.

14. The Counsel for petitioner argued that in case of Delhi, Delhi High Court Rules should apply and this Court will have jurisdiction, since if an award is passed after arbitration only Delhi High Court would be the Court where the award can be challenged. He argued that the place of arbitration can either be Japan or New Delhi and in case the place of arbitration is New Delhi the award can be challenged only in New Delhi and therefore Delhi High Court will have jurisdiction.

15. In order to invoke jurisdiction to entertain an application under Section 9, this Court should look into the Arbitration and Conciliation Act. The Act specifically provides that only the Court as defined in Clause 2(1)(e) will have jurisdiction to entertain the application. Delhi is not a Chartered High Court and there is no Letters Patent Act conferring specific jurisdiction on Delhi High Court. Delhi High Court has original jurisdiction and the original jurisdiction is exercised as per the provisions of CPC and its own rules framed for the purpose. A perusal of rules would show that there is no specific rule conferring jurisdiction on Delhi High Court in a manner in which Clause 12 of Letters Patent conferred original jurisdiction in case of Bombay High Court. Moreover, in Jindal Vijayanagar Steel case, Bombay High Court assumed jurisdiction since the respondent had shifted its office within the jurisdiction of Bombay High Court. In the present case, neither the petitioner nor the respondent had their office or place of business in Delhi, neither any

cause of action or any part of cause of action had arisen in Delhi. The jurisdiction is sought to be invoked on the ground that situs of the arbitrator may be in New Delhi. I consider that the place where the arbitration may take place is not relevant for deciding the jurisdiction of the Court for the purpose of Section 9. The jurisdiction for the purpose of Section 9 can be decided only on the basis of availability of jurisdiction to the Court as defined under Section 2(1)(e) of the Arbitration and Conciliation Act. I, therefore, hold that this Court can have no jurisdiction to entertain the application under Section 9.

16. The other argument advanced by respondent no. 1 is that respondent no. 3 was not a party to the arbitration agreement and no application lies against it merely because respondent no. 3 negotiated with respondent no. 1. There is no arbitration clause between respondent no. 3 and petitioner. Since no arbitration proceedings can take place vis-a-vis respondent no. 3, no application under Section 9 lies against the respondent no. 3. The Counsel for applicant relied upon judgment in CREF Finance Limited v. Puri Construction Ltd. and Ors. 2000(3) Arb. L.R. 331 (Del.) wherein this Court observed as under:

14. Mr. Mohinder Puri, respondent no. 3 herein, was present before the learned Arbitrator and for him to now raise highly technical and suspicious objections that there is no subsisting Arbitration Clause between him and CREF have convinced me of his mala fides and doublespeak. He has invited the orders dated 13.5.2000 from the learned sole Arbitrator, has not assailed these orders before me and in one breath stated their acceptance and applicability to him, in the other has assailed the petition on technicalities. Finally, the argument that L&T is not a party before the learned sole Arbitrator, and that no Arbitration Clause subsists between CREF and L&T would also not come in the way of Court granting equitable relief when circumstances called for it. As has been observed above L&T is not a stranger to the covenants between CREF and PCL. Having appointed the latter as its agent it cannot be permitted to repudiate the agents' actions in the summary and self-serving manner in which it has presently acted. It can also not be permitted to act contrary of the Development Agreement dated 10.3.1998.

17. On the other hand respondent no. 1&3 relied upon National

Highways Authority of India (NHAI) v. M/s China Coal Construction Group Corporation AIR 2006 (Delhi) 134, wherein this Court held that an interim order can be passed only in respect of the parties to the arbitration and in connection with subject matter thereof. No interim order can be passed in respect of the party who had no privity of contract with the petitioner.

18. A perusal of judgment in CREF Finance case would show that this Court categorically observed that the injunction order was being made against L&T, a third party because it was not a totally stranger to the agreement between the two contending parties. L&T was appointed by one of the parties as its agents and this Court observed that having appointed L&T as its agents, respondent cannot be permitted to repudiate the agent's action in a self-serving manner and agent cannot be permitted to act contrary to the development agreement between the parties. In the present case respondent no. 3 has nothing to do with the agreement between the two parties and it is specifically contended by respondents no. 1 & 2 that no restructuring of respondent no. 1 was on the cards to induct respondent no. 3 as it cannot be done without express consent of petitioner. No transfer of technology in respect of the products as mentioned in Annexure 'A' is being negotiated or shall be done. Under these circumstances, I consider that respondent no. 3 cannot be a party to the petition under Section 9 and no injunction can otherwise be issued against respondent no. 3.

19. In view of my discussion, I consider that the present application/petition filed by the petitioner is not maintainable and is hereby dismissed. IAs No. 8419/07 & 12218/07 also stand disposed of.

January 30, 2008.
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SHIV NARAYAN DHINGRA, J.