

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+

IA. No.13094/2007 in CS(OS) 1044/2007

%

Date of decision: 28.05.2009

DELHI EXPRESS TRAVELS PVT. LTD.

..... Plaintiff

Through: Mr. Pushkar Sood with Ms. Kanchan
Bala, Advocates.

Versus

INTERNATIONAL AIR TRANSPORT ASSOCIATION

& OTHERS

..... Defendants

Through: Ms. Padma Priya, Advocate for the
defendant No.1.
Mr. K.K. Tyagi, Advocate for defendant
No.3.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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 the judgment should be reported
in the Digest? Yes

RAJIV SAHAI ENDLAW, J.

1. Application of the defendant No.1 under Section 8 of the
Arbitration and Conciliation Act, 1996 is for consideration.
2. The plaintiff has instituted the suit for i) recovery of
Rs.30,35,752/- and for ii) rendition of accounts from the defendant
No.1 (IATA) and for iii) mandatory injunction directing the defendant
No.1 to invoke the insurance the insurance policy given by the
defendant No.3 United India Insurance Co. Ltd. in favour of the
defendant No.1 for recovery of any amounts alleged to be due by the
defendant No.1 from the defendant No.3 and for iv) permanent
injunction restraining the defendant No.1 from taking recourse to
any coercive or other method, civil or criminal, for recovering any

amount from the plaintiff pertaining to the transactions between the plaintiff and the defendant No.1, till the true and proper accounts are rendered by the defendant No.1 to the plaintiff.

3. The aforesaid would show that the reliefs are claimed by the plaintiff against the defendant No.1 only. Besides the defendants No.1&3, the Travel Agent Federation of India has been impleaded as defendant No.2. The defendant No.2 on being served appeared through advocate but has neither filed any written statement/replies and also stopped appearing and was on 18th November, 2008 ordered to be proceeded against ex-parte and remains ex-parte.

4. The plaintiff was carrying on business as travel agent and was the accredited travel agent of the defendant No.1. As per the averments in the plaint, most of the Airlines of the world are members of the defendant No.1 and airline ticketing/sale/payments of tickets throughout the world are routed through the defendant No.1; the defendant No.1 distributes the stocks of tickets to its accredited agents and collects the fortnightly payments from the such agents on behalf of Airlines and distributes the said collection on account of fares to the airlines and the taxes to the to the Government Departments. All adjustments on account of advance, cancellation, incentives qua the travel agents are also pleaded to be done/routed through the defendant No.1. The defendant No.1 is pleaded to be a conduit and responsible for making payments to the concerned airlines as well as the agents. The plaintiff claims to have become accredited agent of the defendant No.1 vide Passengers Sales Agency Agreement dated 12th December, 2001. Disputes and differences are stated to have arisen between the plaintiff and

defendant No.1 with respect to the plaintiff's claims regarding incentives, commission, extra advance, refund etc.

5. The defendant No.2 is stated to be a representative body of Travel Agents in India and the plaintiff claims to be its member. The defendant No.2 is pleaded to have arranged an insurance cover for all its members including the plaintiff with the defendant No.3 Insurance Company so that the members of the defendant No.2 can offset any loss caused to defendant No.1 on account of any alleged act on their part through the Insurance Company. It is the plea of the plaintiff that the defendant No.1 failed to settle the accounts with the plaintiff; that as on 4th May, 2007 the plaintiff had to recover a sum of Rs.30,35,752/- from various airlines/agencies; on the contrary the defendant No.1 was claiming a sum of Rs.1,38,35,897/- to be due from the plaintiff without rendering accounts to the plaintiff and without giving due credit to the claims of the plaintiff; that the defendant No.1 for the reason of its said claims against the plaintiff threatened to cancel the agreement with the plaintiff; that during the discussions the defendant No.1 represented that if the plaintiff hands over to the defendant No.1 a cheque for 50% of the amount claimed, it would settle the accounts and give due credits of the plaintiff's claim before presenting the said cheque; the plaintiff claims to have issued a cheque for Rs.65,55,742/- to the defendant No.1; that the defendant No.1 after receiving the said cheque is pleaded to have renegated on its assurance and without settling the accounts presented the said cheque and which was dishonoured. It is the case of the plaintiff that even if the sum of Rs. 1,38,35,897/- claimed by the defendant No.1 is due from the plaintiff, the defendant No.1 is to recover the said amount under the insurance policy issued by the

defendant No.3 instead of claiming the same from the plaintiff. The plaintiff thus filed the suit aforesaid.

6. The defendant No.3 Insurance Company has filed the written statement as well as IA No.5629/2007 under Order 1 Rule 10 of the CPC for deletion of its name from the array of defendants. It is the case of the defendant No.3 that it is neither necessary nor proper party to the suit and no relief in law is possible directing the defendant No.1 to take legal action against the defendant No.3, in as much as it is the discretion of the defendant No.1 to either take recourse against the plaintiff or the defendant No.3 and the defendant No.1 cannot be compelled to initiate action against the defendant No.3. The defendant No.3 otherwise admits issuing the insurance policy at the instance of the plaintiff in favour of the defendant No.1. The defendant No.3 has further pleaded that the defendant No.1 has lodged a claim for Rs.1,38,35,897/- vide letter dated 5th December, 2006 against the defendant No.3 and which claim was stated to be under process. At another place in the written statement the defendant No.3 has denied that the said sum is covered by the insurance policy.

7. The defendant No.1 before filing its first statement of defence in the suit has applied under Section 8 of the Arbitration Act, 1996 along with the copy of the Passenger Sales Agency Agreement dated 12th December, 2001, the Travel Agent's Handbook. The defendant No.1 has also filed copy of letter dated 1st December, 2006 of the defendant No.1 to the plaintiff terminating the said Passenger Sales Agency Agreement and giving 30 days time to the plaintiff to appeal to the Travel Agency Commissioner for review. The plaintiff has contested the application under Section 8 and denied any Arbitration

Agreement. it is pleaded that the documents filed by the defendant No.1 talk of right of arbitration if the agent as the plaintiff is/was, considers itself aggrieved by the decision of the Travel Agency Commissioner. It is further contended that the disputes, subject matter of the suit are not covered by the matters on which the Travel Agency Commissioner can take a decision.

8. I had inquired from the counsels whether there was any precedent of a dispute concerning IATA (defendant No.1) or in which the alleged arbitration agreement had been invoked. I was informed there are none. It is also the contention of the plaintiff that the claim of the plaintiff is not only against the defendant No.1 but also against the defendant No.3, and the defendant No.2 is also a party to the suit and thus the ambit of the suit was much wider than the Arbitration Clause even if any and the third parties being parties to the suit, the application under Section 8 is not maintainable. Reliance is placed on the ***Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya*** AIR 2003 SC 2252.

9. Though the matter was argued on the premise of the Passenger Sales Agency Agreement aforesaid being between the plaintiff and the defendant No.1 but post hearing on perusal of the same I find that it is not so. The said agreement is between the plaintiff and each member airlines of the defendant No.1, of course represented by the Director General of the defendant No.1 (acting not on behalf of the defendant No.1 but on behalf of the said member airlines). Thus the agreement out of which agreement the disputes are alleged to have arisen by the plaintiff and which agreement the defendant No.1 has set up as containing an Arbitration Clause, is not between the plaintiff and the defendant No.1 but between the

plaintiff and the Airlines who are members of defendant No.1 but who are not parties to the suit. The defendant No.1 is a distinct legal entity from its member Airlines. On finding so, at first blush it was felt that suit as well as the application under Section 8 of the Arbitration Act are misconceived in as much the defendant No.1 in the matter of the said agreement was acting merely as the agent of the airlines; the settled legal principle under Section 230 of the Indian Contract Act being that an agent cannot personally be bound by the contract entered into on behalf of the principal. Here the agreement on the basis whereof the plaintiff is claiming and on the basis whereof the defendant No.1 is pleading arbitration, having been entered into by the defendant No.1 as the agent of the airlines, the defendant No.1 can neither be personally liable to the plaintiff under the said agreement nor can take advantage of the Arbitration Agreement if any between the plaintiff and the airlines whose tickets the plaintiff under the agreement had agreed to sell/market.

10. The aforesaid Passenger Sales Agency Agreement dated 12th December, 2001 also refers to the Travel Agent's Handbook and binds the parties to the agreement, thereto also.

11. However, on delving deeper into the aforesaid document, what emerges is that IATA (defendant No.1) is an association of all/most of the airlines of the world. The defendant No.1 has its Head Office at Montreal – Geneva. The overall decision making authority of IATA lies with the Passenger Agency Conference composed of senior managers drawn from all member airlines of IATA. The said Passenger Agency Conference adopts Resolutions by unanimous vote which upon receipt of approval from concerned governments become binding upon all IATA member airlines and their appointed agents.

The Passenger Agency Conference meets regularly once a year but special meetings can be called at short notice to deal with issues requiring immediate attention. IATA has some 49,000 travel agency locations around the world and more than 260 airlines as members. The day to day operation of IATA are handled by a local IATA Agency Services Office (ASO), generally one for a country or for a group of countries.

12. Under the Passenger Sales Agency Agreement aforesaid the plaintiff was authorized to sell air passenger transportation services of the carriers/airlines who are members of IATA; the plaintiff under the said agreement is required to issue immediately a Traffic Document when money is received by it for specified passenger air transportation or ancillary services sold by it under the agreement and the plaintiff is responsible for remittance to the airlines, of the amount payable in respect of such traffic document. Under the said agreement all monies collected by the plaintiff as accredited agent for transportation and ancillary services sold under the agreement including applicable remuneration to which the plaintiff is entitled, are the property of the Airlines and to be held by the plaintiff in trust and for and on behalf of the Airlines until satisfactorily accounted for and settlement made. It is further a clause of the agreement that for sale for air transportation and ancillary services by the plaintiff under the agreement the Airlines shall remunerate the plaintiff in a manner and amount as may be stated from time to time and communicated to the plaintiff by the Airlines and such remuneration shall constitute full compensation for the services rendered by the plaintiff to the Airlines. Under the agreement, the responsibility of maintenance of records and accounts is of the plaintiff and it is the

plaintiff who is liable for giving inspection thereof to the Airlines.

Clause 14 of the agreement concerns arbitration. It is as under:-

"14. Arbitration

If any matter is reviewed by arbitration pursuant to the Sales Agency Rules, the agent hereby submits to arbitration in accordance with such rules and agrees to observe the procedures therein provided and to abide by any arbitration award made thereunder."

13. The agreement vide Clause 17 thereof is to be interpreted and governed in all respects by the law of the principal place of business of the plaintiff.

14. The Travel Agent's Handbook which is to be read as part of the agreement aforesaid, under the head "The Travel Agency Commissioner" informs that there are three such Commissioners worldwide; "these ombudsmen have been serving the travel industry"; they are appointed jointly by IATA and United Federation of Travel Agents Association; to enable them to serve impartially they are funded by the airlines and the travel agents; their main function is to provide an accessible source of appeal to an accredited agent aggrieved by a decision taken under the Sales Agency Rules; it further provides that the Travel Agency Commissioner's offices was created by the industry as a whole to ensure that due process is afforded by IATA to all accredited agents. It further provides that if the agent remains aggrieved by the review decision of the Commissioner, access to further possible relief is provided by recourse to arbitration.

15. Resolution 810d in the Handbook aforesaid governs the relationship between airlines who are members of IATA and accredited agents in India. Resolution 810i has adopted the

rules mentioned therein as applicable to the Passenger Sales Agency Agreement in India. Section 5 thereof deals with custody and issue of traffic documents and Section 10 with the conditions for payment of commission and other remuneration. Section 13 deals with arbitration. Section 13.1 is as under:-

“13.1 Right to Arbitration

Any agent or applicant which considers itself aggrieved by a decision of the Travel Agency Commissioner (‘The Commissioner’) under Resolution 820e shall have the right to have the decision reviewed by arbitration in accordance with the following procedure (hereafter in this Section the term Appellant is used to designate both an aggrieved agent and an applicant seeking review by arbitration except where the context specifies otherwise)”

Section 13.2 provides for appellant from the decision of the Travel Agency Commissioner sending written notice to the Agency Administrator of its wish to have the decision reviewed by arbitration. The Agency Administrator is to notify all members that arbitration has been requested.

Section 13.3 deals with the setting up of arbitration board.

Section 13.5 concerns the conduct of proceedings and Section 13.6 provides the scope of appeal before the Arbitration Board and Section 13.7 deals with the Award.

16. Resolution 820e deals with review by the Travel Agency Commissioner. The Preamble thereof is as under:-

Resolved that as established under Resolution 820d, the Travel Agency Commissioner (The Commissioner) shall conduct reviews with respect to decisions affecting agents and applicants in the countries where the Sales Agency Rules apply (it being understood that the definition in Resolution 866 apply to this Resolution) in accordance with the following procedure:-

Section 1 – Review Initiated by Agent or Applicant

The Commissioner shall review and rule on cases initiated by:

1.1.1 any Person whose application to become an Accredited Agent has been disapproved by the Agency Administrator, or has been disapproved upon reconsideration;

1.1.2 an Agent whose application for approval of an additional location has been rejected by the Agency Administrator, or has been disapproved upon reconsideration;

1.1.3 any Person who has acquired ownership or is seeking to acquire ownership of an Agent or Location and whose application for change of ownership has been disapproved by the Agency Administrator, either on first consideration, or upon reconsideration;

1.1.4 an Agent who has received notice from the Agency Administrator of impending removal of the Agent or an Approved Location of the Agent from the Agency List, or of any action or impending action by the Agency Administrator with regard to the Agent, that unreasonably diminishes the Agent's ability to conduct business in a normal manner;

1.1.5 an Agent whose application for change of location and/or name has been disapproved by the Agency Administrator;

1.1.6 an Agent from whom stocks of Standard Traffic Documents and Carrier Identification Plates have been withdrawn by ISS Management, or its representative, pursuant to the Accounting Irregularity Safeguards provisions in Subparagraph 1.7.13.1(b) of Resolution 832; provided that any review initiated under this subparagraph shall be interlocutory pending a redetermination of the eligibility of the Agent or the Location to be retained on the Agency List under Paragraph 1.3 of this Resolution;

1.1.7 an Agent who considers that its commercial survival is threatened by a Member's individual decision preventing it from acting as Agent for, or from issuing Traffic Documents on behalf of, such Member;

1.1.8 an Agent who is aggrieved by an impending amendment to its Passenger Sales Agency Agreement."

17. Though the agreement as aforesaid is between the plaintiff and the airlines whose fares the plaintiff was selling under the said agreement but considering the aforesaid nature of the agreement, it contains an agreement contrary to the general principle under Section 230 of the Contract Act i.e. of making IATA signing the agreement as agent of the Airlines personally liable thereunder. Section 230 also provides that a contract making the agent personally liable shall be presumed to exist where the principal is a resident abroad and/or where the principal though disclosed cannot be sued. The agreement in the present case was with all the airlines who were the members of IATA. Most of the said airlines are resident abroad. Moreover the agreement is such that the principal i.e. airlines cannot be sued thereunder in as much as the claim of the plaintiff as made out is for accounts of the transaction of the plaintiff with various airlines who were members of IATA. IATA an agent of all the said airlines had been dealing with the plaintiff. No single airline is in a position to settle accounts with the plaintiff as accounts are of the cumulative transaction of the plaintiff with all the airlines. Thus in my view the Passenger Sales Agreement though entered into by defendant No.1 IATA as agent of its members airlines, binds IATA itself and the plaintiff is competent to make claims for accounts and monies against IATA and IATA is competent to take the plea of Section 8 of the Arbitration Act.

18. The main contention of the counsel for the plaintiff is that the arbitration under the agreement has been provided only against the decision of the Travel Agency Commissioner; the Travel Agency Commissioner is entitled to take a decision only on the matter specified in Section 1 (Supra) of Resolution 820e in the Handbook

aforesaid and which does not contain any express power to take decision on the matter of accounts.

19. However that in my view is not a correct reading of the agreement. The Preamble of Resolution 820e provides that the Travel Agency Commissioner shall conduct reviews with respect to all decisions affecting agents. Such decisions would include the decision of the Airlines acting through IATA claiming sum of Rs.1,38,35,897/- being due from the plaintiff as well as the decision declining the sum of Rs.30,35,752/- to be due from the Airlines through IATA to the plaintiff. The plaintiff could certainly apply to the Travel Agency Commissioner in this regard and if dis-satisfied with the decision of the Travel Agency Commissioner, for arbitration of such disputes. The language of Section 1.1.4 of Resolution 820e is again very wide and covers any action or impending action by the Agency Administrator with respect to the agent and which unreasonably diminishes the agent ability to conduct business in a normal manner. The action of the Agency Administrator claiming Rs.1,38,35,897/- crore from the plaintiff and/or declining to pay the claim of Rs.30,35,752/- of the plaintiff would certainly unreasonably diminish the plaintiff's ability to conduct business in a normal manner.

20. Even otherwise I find the relationship/transaction subject matter of the suit to be of a specialized nature. The said transaction/relationship is governed by norms/rules peculiar to the business and which are not/may not be found in respect of any other business. The agreement provides its own mechanism for resolution of the disputes by experts from the field. The said experts are competent/better equipped to resolve the said disputes

expeditiously. Having thus found the Agreement of Resolution of disputes by arbitration, even otherwise Section 8 of the Arbitration Act becomes applicable immediately.

21. The contention of the counsel for the plaintiff of the disputes being not subject matter of arbitration for the reason of no decision having been given by the Travel Agency Commissioner is also misconceived. Merely because the agreement between the parties provides for a precursor to the arbitration, arbitration cannot be avoided on the ground of the pre requisite step having not been taken. A party cannot be permitted to renege out of the Arbitration Agreement by contending that owing to its own default or otherwise the precursor event to arbitration has not occurred. In the present case it was open to the plaintiff to have applied to the Travel Agency Commissioner for review of the decision of the Agency Administrator with which the plaintiff was aggrieved. The plaintiff having not done has itself to blame for not adopting the course leading to arbitration and cannot maintain a suit on that basis. Even otherwise the only requirement of Section 8 is that the subject matter of the dispute brought before the court is the subject matter of an arbitration. Once the court finds so, the court has no option but to refer the parties to arbitration. The court is not to go into the question whether the party which has applied under Section 8 of the Act has been ready and willing to proceed with the arbitration or not. That is one of the drastic changes made in the 1996 Act from the 1940 Act. Thus even if there had been a default of the Travel Agency Commissioner not attributable to the plaintiff, the disputes raised by the plaintiff against the defendant No.1 in the present suit would still be governed by the Arbitration Agreement and hence this court has no jurisdiction to entertain the suit.

22. The contention of the counsel for the plaintiff that the Travel Agency Commissioner is concerned only with disputes as to termination of the Passenger Sales Agency Agreement is not found correct and is not borne out from the language of Resolution 820e aforesaid.

23. The other contention of the counsel for the plaintiff is of arbitration being not applicable for the reason of defendants No.2&3 who are not parties to the Arbitration Agreement also being parties to the present suit. The counsel for the defendant No.1 has in this regard relied upon ***W.P.I.L. Vs. NTPC Ltd.*** MANU/DE/0078/2009 laying down that where the non parties to the Arbitration Agreement but parties to the suit are neither necessary nor proper for adjudication of disputes, the law as laid down in ***Sukanya Holdings*** would not be applicable. From the narrative facts given herein I am of the opinion that the defendants No.2&3 are neither necessary nor proper parties for adjudication of the accounts/claims of the plaintiff qua the defendant No.1.

24. With respect to the defendant No.2, there is no averment in the plaint save that as per the decision of the defendant No.2, the plaintiff arranged the insurance policy from the defendant No.3 in favour of the defendant No.1. The defendant No.3 Insurance Company was impleaded only because the relief claimed was of directing the defendant No.1 to claim its dues if any from the defendant No.3. It is not as if the plaintiff has claimed any relief against the defendant No.3 directing the defendant No.3 to release any payments to the defendant No.1. In fact it is the case of the plaintiff that on accounts being taken no monies would be found due from the plaintiff to the defendant No.1 when according to the

plaintiff, no monies are due from plaintiff to defendant No.1 and on the contrary Rs.30,35,752/- would be found due from the defendant No.1 to the plaintiff, the question of the defendant No.3 being liable to make any payment to the defendant No.1 would not arise. Even otherwise I find merit in the contention of the defendant No.3 that the plaintiff cannot compel defendant No.1 to make a claim against the defendant No.3.

25. Thus the presence of the defendants No.2&3 in the suit is not found to come in the way of allowing the application under Section 8 of the Arbitration Act.

26. The counsel for the defendant No.1 has also relied upon on a recent dicta of the Apex court in ***VISA International Ltd. v. Continental Resources (USA) Ltd.*** 2009 2 SCC 55 laying down that the existence of a valid Arbitration Agreement should be determined from the facts and circumstances of the case including the intention of the parties covered from the correspondence exchanged between them, surrounding circumstances and conduct of the parties. It was further held that the agreement need not be in any particular form and the use or absence of the word arbitration, arbitrator or arbitrators or reference is immaterial. It was further held that when the intention of the parties is to seek arbitration in case of any further disputes is clear, then inartistic drafting of arbitration clause cannot be taken advantage of by any party. The Arbitration Agreement in the present case though not in the normal/traditional form is nevertheless found to indicate an intention of the parties to arbitrate. The reason for the inartistic language is apparent. The Arbitration Agreement is in the form of Resolutions passed in the Passenger Agency Conference of the Managers of
IA No.13094/2007 in CS(OS) 3094/2007

Airlines. The said managers are not used to astute legal drafting and have in their own commercial way provided for Dispute Resolution Mechanism by experts in the field of travel as also for arbitration. The plaintiff by accrediting itself as an agent with IATA, bound itself with the said agreement and cannot now be heard to contend otherwise.

27. Having held so, the suit of the plaintiff against the defendant No.1 cannot continue and under Section 8 the plaintiff and the defendant No.1 are referred to arbitration.

28. That brings me to the continuance of the suit qua the defendants No.2&3, once the disputes qua the defendants No.1 have been referred to arbitrator. At this stage, it may be stated that vide order dated 9th May, 2008 in the suit the defendant No.3 Insurance Company was directed to place on record the status of the claim in Rs.1,38,35,897/- made by the defendant No.1 on the defendant No.3. It was informed on 18th November, 2008 that the defendant No.3 had offered vide its letter dated 8th July, 2008 to pay a sum of Rs.1,02,48,552/- to the defendant No.1 but the defendant No.1 had not completed the requisite formalities. During the hearing it was informed that the said amount already stands paid. Upon payment thereof by the defendant No.3 to the defendant No.1 the balance claim of the defendant No.1 of Rs.35,87,345/- remains. It was informed by the counsel for the plaintiff that there was no impediment to the payment thereof by the defendant No.3 also and only certain formalities remained to be completed.

29. The only reason for the plaintiff to implead the defendant No.3 in the suit was to have a direction issued to the defendant No.1 to

recover its claims if any against the plaintiff from the defendant No.3 under the insurance policy aforesaid. It has transpired that defendant No.1 in fact has made a claim with the defendant No.3. Upon the said admission, the said relief of the plaintiff against the defendant No.1 stands satisfied. The question of whether the defendant No.3 under its policy is liable to make the payment of the balance amount or not is not the subject matter of this suit and does not fall for adjudication herein. Be that as it may, substantial amounts under the policy have been informed to be paid and the supervision of payment of balance amount and/or of adjudication thereof is not to be done in the present suit.

30. On 18th November, 2008 it was ordered that the application of the defendant No.3 for deletion from array of defendants shall be considered while hearing this application. Though while hearing this application, the counsel for the plaintiff or the defendant No.3 were not called upon to expressly make submissions on this application but since the entire gamut of the controversy has been discussed herein above, it is not felt necessary to post the suit for hearing separately of the application of the defendant No.3, particularly when it was so ordered on 18th November, 2008. I thus find that in view of the admitted position, the suit of the plaintiff qua the defendants No. 2&3 also does not survive.

31. The suit is thus disposed of qua the defendant No.1 by reference to arbitration and qua the defendants No.2 & 3 as not disclosing any cause of action and also as satisfied in view of the admission of the defendant No.3 of the defendant No.1 having lodged a claim under the policy against the defendant No.3.

Decree sheet be drawn up.

In the fact of the case, the parties are left to bear their own costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**May 28, 2009
PP**