

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

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CS(OS)1101/2009

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Date of decision: 29th May, 2009

SPENTEX INDUSTRIES LTD

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Plaintiff

Through: Mr. Sudheer Pandey, Advocate.

Versus

DUNAVANT SA & ANR

..... Defendants

Through: None.

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. The counsel for the plaintiff has been heard on the aspect of maintainability of the suit on the first date of hearing of the suit itself. Yet another suit being CS(OS)1038/2009 involving the similar question as to maintainability as in the present suit was listed yesterday for admission. Doubts having been expressed as to the maintainability of that suit, the same was also posted for hearing on maintainability today. The senior counsel for the plaintiff in CS(OS)1038/2009 has also been heard alongwith the counsel for the plaintiff in the present suit. However, separate order is pronounced with respect to CS(OS) No. 1038/2009.

2. The plaintiff herein, an Indian company, inter alia, carrying on business as manufacturer and merchandiser of yarn and yarn products has instituted the present suit against the defendant No.1, CS(OS)1101/2009

a Swiss company trading in Uzbek raw cotton crop, also through their Indian agent an Indian company impleaded as defendant No.2. It is the case of the plaintiff that the defendant No.1 through the defendant No.2 had approached the plaintiff for sale and Uzbek raw cotton crop; that the defendant No.2 on behalf of the defendant no.1 had negotiated with the plaintiff; a sample was also supplied to the plaintiff; the plaintiff got the said sample tested and found the same as per its requirement; that the plaintiff thereafter expressed interest to purchase 750 MT of the said goods in three instalments; that the defendant No.1 through the defendant No.2 placed sales confirmation on the plaintiff; that the said 750 MT of Uzbek Raw Cotton was to be shipped in three consignments of 250 MT each; in pursuance to the sale confirmation, a standard form of contract was issued by the defendant No.1; the said contract had some errors and it was reissued; that though it was contemplated that each of the three installments shall be of 250 MT each, but subsequently the first two consignments were agreed to be of 225 MT each for which the plaintiff was to open independent Letter of Credit (LC) and the last consignment of 300 MT; that it was further agreed between the plaintiff and the defendant No.2 that only after the first two consignments had been received and found to be as per specifications and sample, the Letter of Credit for the third consignment of 300 MT would be opened; that variation in the agreement with the defendant No.2 as the agent of the defendant No.1 was in consonance with the market custom and the practice of trade and not documented, though emails in confirmation of the same are pleaded to have been exchanged.

3. It is the case of the plaintiff that the first two consignments were delivered but were found not to be as per the specifications and sample and the defendants were immediately notified of the same and thus the LC for the third consignment was not issued; that the defendants, however, contrary to the agreement called upon the plaintiff to open the LC for the third consignment also; that though the plaintiff was entitled to repudiate the contract for the first two consignments and not bound to accept the defective goods but the same were utilized for production of yarn with a view to mitigate losses, as the plaintiff would have incurred far greater costs by incurring demurrage in storing the goods and in shipment costs for shipping the goods back to defendant No.1. It is further the case of the plaintiff that the defendant No.1 notwithstanding the aforesaid position and further notwithstanding that the purported contract for delivery of the remaining 300 MT was in the nature of a letter of intent only and was to become binding only upon the plaintiff opening a LC with respect thereto, and further notwithstanding the oral agreement of the plaintiff with the defendant No.2 that the venue of adjudication of disputes arising out of the contracts shall be Delhi, the defendant No.1 in accordance with the written agreement providing for arbitration of International Cotton Association, approached the said Association for resolution of its claims for the reason of the plaintiff having not opened the LC for the third consignment of 300 MT and appointed an arbitrator.

4. The plaintiff, upon the receipt of communication from International Cotton Association to appoint the plaintiff's arbitrator, admits to have been constrained to appoint an arbitrator. The International Cotton Association appointed the third

arbitrator/chairman. The plaintiff has in the plaint in para 24 averred that the plaintiff had owing to the defective quality of goods of the first two consignments suffered loss of USD 3,52,378. The plaintiff has in para 27 of the plaint further averred that the arbitral tribunal so constituted “on the said filing of the claim and counter claim by the parties, ignoring and declining the plaintiff’s request to represent and explain the chairman/arbitration tribunal in person, passed an arbitral award in haste vide order/award dated 9.4.2009”.

5. The plaintiff has contended that the arbitral award without giving an opportunity of hearing is against the principles of natural justice and public policy and could not be given any credit. From the averments aforesaid in the plaint it appears that the plaintiff had also preferred its claims for damages for defective quality of the first two consignments to the arbitral tribunal. A reading of the arbitration award, copy of which, has been filed before this court also suggests so.

6. The plaintiff after making further averments challenging the arbitration award aforesaid has sought the following reliefs in the plaint:

- “a. declare the purported contract/letter of intent dated 24th July, 2008 and 20.08.2008 as null and void;
- b. Declare the purported Arbitration Clause (Arbitration Agreement) contained in the purported contract dated 24th July, 2008 and 20.08.2008 as non-est and unenforceable;
- c. Declare the arbitral award dated 09.04.2009 as null and void and unenforceable;
- d. Pass a decree of permanent injunction against the enforcement of the Arbitral Award;
- e. Pass a decree for damages of rupees twenty two lakhs only;

- f. Pass a decree for recovery of Rupees five lakhs for the excess payments made towards the substandard goods supplied;
- g. Pass such other/further order as this Hon'ble court deems fit and proper in the facts and circumstances of this case."

The plaintiff has also applied for interim relief of restraining the defendants from enforcing the arbitral award.

7. As aforesaid, yesterday doubts were expressed as to the maintainability of CS(OS)1038/2009. It was informed to the senior counsel for the plaintiff in that suit that I have recently in **Roshan Lal Gupta vs. Sh. Parasram Holdings Pvt. Ltd.** 157 (2009) DLT 712, in relation to a domestic arbitration held that a suit for declaration that an agreement containing an arbitration clause relied upon by the other party was fabricated, forged and thus void and for perpetual injunction restraining the other party as well as the arbitrator named in the agreement (in that case 'Stock Exchange) from taking any arbitration proceedings did not lie. While holding so, reliance was inter alia placed upon the judgment of the Apex Court in **K.V. Aernar Cementation India Ltd. vs. Bajranglal Agarwal**, IV (2001) SLT 535= 2001 (6) Supreme 265, and which for easy reference is set out hereinbelow:-

- "1. These special leave applications are directed against an order of a learned Single Judge of Bombay High Court refusing to interfere with an order of the Civil Court vacating an interim order of injunction granted by it earlier. The suit in question had been filed for a declaration that there does not exist any arbitration clause and as such the arbitral proceedings are without jurisdiction. The learned Single Judge of Bombay High Court came to hold that in view of Section 5 of the Arbitration and Conciliation Act, 1996 read with Section 16 thereof since the arbitral Tribunal has the power and jurisdiction to make rule on its own jurisdiction, the Civil Court would not pass any injunction against an arbitral proceeding.

2. Mr. Dave, the learned Senior Counsel appearing for the petitioner contends that the jurisdiction of the civil Court need not be inferentially held to be ousted unless any statute on the face of it excludes the same and judged from that angle when a party assails the existence of an arbitration agreement, which would confer jurisdiction on an arbitral Tribunal, the Court committed error in not granting an order of injunction. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an arbitral Tribunal. **But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the arbitral Tribunal to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the Civil Court cannot have jurisdiction to go into that question.** A bare reading of Section 16 makes it explicitly clear that the arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised and a conjoint reading of Sub-section (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act. In this view of the matter, we see no infirmity with the impugned order so as to be interfered with by this Court. **The petitioner who is a party to the arbitral proceedings may raise the question of jurisdiction of the Arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question and such an objection being raised, the Arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings."**

8. I had thus enquired from the senior counsel for the plaintiff in other suit and from counsel for the plaintiff in this suit as to why the aforesaid law in relation to domestic arbitration, will not apply to international commercial arbitration as well.

9. The senior counsel for the plaintiff in other suit and counsel for the plaintiff in this suit have today made the following contentions:-

A. Firstly it is contended that the Apex Court in **K.V. Aernner** (supra) has inter alia relied upon Section 5 and Section 16 of the Arbitration and Conciliation Act, 1996 and both of which are contained in part I of the said Act and which as per Section 2 (2) thereof applies only when the place of arbitration is in India. It is contended that in the present case as per the agreement alleged by the defendants the place of arbitration is not in India but in England.

B. Secondly it is contended that Section 45 in part II of the Act relating to Enforcement of Certain Foreign Awards is in diversion from the para materia Section 8 in part I relating to domestic awards. Under Section 45, the judicial authority seized of a matter, which is the subject matter of an agreement for arbitration, is on the request of either party required to refer the parties to arbitration “ unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

C. Reliance is also placed on para 18 of **S.B.P. & Co. Vs. Patel Engineering Ltd.** AIR 2006 SC 450 to contend that the court loses the jurisdiction only when the other party applies for reference to arbitration owing to existence of an arbitration agreement; else the suit is maintainable.

D. The counsel for the plaintiff in this suit has in support of the aforesaid proposition also referred to **Roshan Lal Gupta** (supra) and **Ministry of Sound International Ltd. vs. Indus Renaissance Partners** 156 (2009) DLT 406 also holding that the suit even if subject matter thereof is subject matter of arbitration agreement is not barred at the threshold.

E. The senior counsel for the plaintiff in other suit also relies on order dated 17th April, 2009 in CS(OS) No. 682/2009 **Union of India vs. Cairn Energy India PTY. Limited** whereby a Single Judge of this Court had registered the plaint and restrained the defendants therein from taking any further steps to prosecute any arbitration proceedings and restrained the defendant No. 3 in that case from constituting an arbitral tribunal.

F. Reliance is also placed on the order dated 27th January, 2009 of a Single Judge of the Calcutta High Court in CS No. 11/2009 **SESA International Ltd. vs. Macsteel International FZCO** whereby also ex parte injunction informed to be in restraint of arbitration pursuant to international commercial arbitration was, issued.

G. The counsel for the plaintiff in this suit also relied upon **Bharti Televentures Ltd. vs. DSS Enterprises P. Ltd.** 123 (2005) DLT 532, whereby another Single Judge of this Court had restrained arbitration by ICC, International Court of Arbitration during the pendency of the suit.

H. The counsel for the plaintiff in this suit also referred to **Shin-Etsu Chemical Co. Ltd. vs. M/s. Aksh Optifibre Ltd.** 2005 (6) SCALE 561 where the Apex Court by majority of 2:1 held that when a suit is filed for a declaration and injunction for cancellation of document and declaration that long term sale and purchase agreement including arbitration clause was void on the ground that terms of agreement are unconscionable, unfair and unreasonable and an application under Section 45 of the Arbitration Act is moved therein, the findings therein are only prima facie and not final.

10. The contention, of this Court being required to take a different view in relation to International Commercial Arbitration than that taken by the Apex Court in **K.V. Aernier** (supra) for the reason of Sections 5 and 16 being applicable only to Part I relating to domestic arbitration and not to an International Commercial Arbitration in Part II of the Arbitration Act is not found to be correct or in accordance with the law. The Apex Court in **Bhatia International vs. Bulk Trading S.A.** 2002 (4) SCC 105 has held that the provisions of part I of the Arbitration Act apply to all arbitrations and to all proceedings relating thereto; where such arbitration is held in India the provisions of part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of part I; in cases of international commercial arbitrations held out of India, the provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions and in that case the laws or rules chosen by the parties would prevail; any provision in Part I, which is contrary to or excluded by that law or rules will not apply. Section 9 was thus held applicable to International Commercial Arbitrations.

11. The Apex Court again in **Venture Global Engineering vs. Satyam Computers Services** Ltd. AIR 2008 SC 1061 not only followed **Bhatia International** (supra) and further held that the provisions of Section 34 of the Act to be also applicable to International Commercial Arbitrations but otherwise also, in my view, the said judgment squarely applies to the facts of the present case. In that case a suit was filed before the Civil Court Secunderabad seeking a declaration to set aside the Award, and permanent injunction on the transfer of shares under Award. An application under Order 7 Rule 11 of the CPC was filed for rejection

of the plaint. The trial court allowed the said application and rejected the plaint. The challenge thereto before the High Court did not succeed. The High Court held that the Award cannot be challenged even if it is against the public policy and in contravention of statutory provisions. Against the said order the appeal was preferred to the Apex Court. The Apex Court did not interfere with the rejection of the plaint and proceeded on the premise that though the suit was not maintainable but the same could be converted into objections to the Award under Section 34 of the Act. The Apex Court thus upheld the non-maintainability of a suit and provided for the remedies under the Arbitration Act only.

12. In view of the aforesaid settled position of law, I am not persuaded to hold otherwise on the basis of the ex parte orders of this Court and Calcutta High Court cited above or the judgment in **Bharti Televentures (supra)**.

13. As far as the reliance on the observations in **SBP & Co. (supra)** is concerned, the same is in relation to an application under Section 8 of the Arbitration Act. In fact Section 8 of the Arbitration Act as now interpreted is not different from section 45. Though the language as in Section 45 and as quoted above does not form part of Section 8 but the courts have nevertheless held that the court can refer the parties to arbitration only upon being satisfied of the existence of the arbitration agreement and not mechanically.

14. Though in **Shin-Etsu Chemical (supra)**, a suit as in the present case and/or as in **K.V. Aerner (supra)** had been filed but the same cannot be said to be a judgment on the maintainability of such a suit. The Apex Court in that case only proceeded to adjudicate the nature of the Order under Section 45 of the Act. It is well settled that

a judgment of the Court has to be read in the context of question which arose for consideration in the case in which the judgment was delivered. The detailed discussion in this regard in para 4 of **Bharti Televentures** (supra), need not to be repeated herein.

15. There is yet another consideration which prevails upon me to hold the suit to be not maintainable. The reliefs of declaration and injunction claimed in the suit fall within the domain of Specific Relief Act and are discretionary reliefs and circumscribed by the provisions of the Specific Relief Act, to be available only when there is no alternative efficacious remedy available. The remedy of taking the plea as by way of the present suit, by way of objection to the arbitral award or at the time of enforcement thereof is found to be alternative efficacious remedy.

16. Even otherwise, the plaintiff having participated in the arbitration proceedings in terms of the arbitration agreement between the parties is now not found entitled to maintain the present suit and remedy, if any, of plaintiff is under the Arbitration Act itself.

17. The counsel for the plaintiff at the fag end of the hearing had contended that even if the suit for declaration qua the arbitration clause and the arbitration agreement and for injunction against the enforcement thereof was found to be not maintainable, insofar as for the relief of recovery of damages ought to be entertained. Though I had indicated at that time that if it was so, the plaintiff would be called upon to delete the averments in the plaint for the relief qua declaration and injunction and confine the suit to that for claim of damages but on further consideration I find that the plaintiff having participated in the arbitration proceedings and having preferred a claim for damages allegedly suffered, in the arbitration proceedings

and the arbitral award having found that the plaintiff is not entitled to recover any damages, is not entitled to re-litigate and that too by way of this suit or claim damages again on account of the defective goods supplied by the defendants. The plaintiff made a choice, upon the defendant No.1 invoking the arbitration clause in the written contract signed by the parties. The plaintiff not only appointed its own arbitrator in terms of the rules of the International Cotton Association but also preferred its claims against the defendant No.1 before the arbitral tribunal so constituted. The plaintiff after having lost in its claims in the said proceedings cannot now make the same claims the subject matter of the present suit.

The plaintiff is thus not found to relief in that regard also.

IA.No. 7773/2009 (of the plaintiff u/S 149 CPC)

18. The plaintiff has valued the suit for the purposes of court fee and jurisdiction at Rs 27,04,000/- and as per the averments in the plaint, the court fee of Rs 31,692/- is payable thereon. The plaintiff however did not pay the requisite court fee on the plaint and filed this application stating that the plaintiff is undergoing a cash liquidity crunch and could not arrange the funds and gave an undertaking to make good the aforesaid deficiency in court fee within the time directed by this court. Though the suit of the plaintiff has not been found to be maintainable but the plaintiff is nevertheless liable to pay the court fee. In fact, the suit has been considered on the basis of this application of the plaintiff, else it would not have been listed even before this court. The plaintiff is thus nevertheless to pay the court fee. A time of four weeks is granted to the plaintiff to pay the said court fee. The undertaking of the plaintiff through its representative Mr Ranjan Mangtani whose affidavit has been filed alongwith the application is accepted by this

court and the said Mr Ranjan Mangtani and other directors of the plaintiff are ordered to be bound by the same. If the court fee is not deposited by the plaintiff within four weeks, the registry to list the matter before the court for appropriate action for breach of undertaking against the directors aforesaid of plaintiff.

**RAJIV SAHAI ENDLAW
(JUDGE)**

May, 29 2009
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