

* **HIGH COURT OF DELHI : NEW DELHI**
Judgment reserved on: April 05, 2011
Judgment pronounced on: May 09, 2011

+ **CS (OS) No. 2600/2010**
IA No.17395/2010
IA No.1771/2011 &
IA No.1772/2011

% M/s. Snab Publishers Pvt. Ltd. ... Plaintiff
Through: Ms. Kajal Chandra and Ms.
Prachi Gupta, Advocates.

versus
M/s Variety Book Depot ... Defendant.
Through: Mr. Abhijat and Ms. Fareha
Ahmad Khan, Advocates.

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | } | No. |
| 2. To be referred to Reporter or not? | | |
| 3. Whether the judgment should be reported in the Digest? | | |

SUNIL GAUR, J.

IA No.1771/2011 (u/S. 8 of Arbitration & Conciliation Act)

1. In this suit for recovery of Rs.1,10,16,922.87p. with interest, defendant has come up with this application to invoke the Arbitration Clause as contained in the *Agreement of 9th September, 2008* seeking reference of the dispute raised herein

as well as the proposed counter claims of the defendant, to an Arbitrator who is to be appointed jointly by the parties to this suit.

2. Plaintiff-company is engaged in the business of printing and publishing of books and the defendant firm is in the business of distribution and bankings and the business dealings between the parties related back to the year 1994 when the plaintiff/publisher had approached the defendant for distribution of the books "*Vegetarian Wonders*" etc. Initially there was no formal written agreement between the parties and in the usual and ordinary course of business on account payments were being made by the defendant to the plaintiff who had been maintaining a running account which was continuous, mutual, open and current. However, the present suit is based upon Invoices, which is said to be a written contract.

3. As per the plaintiff, in the year 2009 disputes arose between the parties and the business dealings came to a stand still as the defendant withdrew itself from the distributorship and the plaintiff had stopped supplying the cookbooks. On 14th September, 2009 defendant is said to have conveyed through e-mail to the plaintiff that it is no longer exclusive distributor of the books of the plaintiff. Plaintiff claims the defendant vide letter of 10th October, 2010 had confirmed the liability to pay

Rs.87,78,424.60p as on 31st March, 2010 to the plaintiff. On the aforesaid amount, plaintiff has claimed interest @ 18% w.e.f. 2009 upto December, 2010 i.e. the suit amount.

4. Upon being served, instantly defendant has come up with this application, which has been responded to by the plaintiff who in the reply filed has asserted that the claim in the suit pertains to a period prior to September, 2008 when there was no written agreement between the parties and so the Arbitration clause in the *Distribution Agreement of 9th September, 2008* (Annexure-A) cannot be invoked and the dispute herein is beyond the purview of the aforesaid *Distribution Agreement of 9th September, 2008* (Annexure-A).

5. Clause 17 of the aforesaid *Distribution Agreement of 9th September, 2008* (Annexure-A) contains an Arbitration Clause which is comprehensive one. It reads as under:-

“ARBITRATION: In the event of any dispute, difference or claims arising between the parties hereto in connection with this agreement or the construction or interpretation of any of the clauses hereof, or any rights and entitlements of the respective parties, or anything done or omitted to be done pursuant hereto the parties shall first endeavour to amicably settle such disputes, differences or claims, failing which the same shall be referred to the arbitration of a sole Arbitrator jointly appointed by both the parties under the provisions of the Arbitration and Conciliation Act, 1996 as amended from time to

time or any statutory replacement thereof. The arbitration proceedings shall be held at New Delhi a place to be mutually agreed between the parties. The provision of this clause shall survive the period/termination of this agreement."

6. The conditions which are required to be satisfied for invoking Section 8 of the Arbitration and Conciliation Act, 1996 have been spelt out by the Apex Court in *P.Anand Gajapathi Raju v. P.V.G.Raju (Dead)*, AIR 2000 SC 1886 which reads as under:-

"(5) The conditions which are required to be satisfied under Sub-sections (1) and (2) of Section 8 before the Court can exercise its powers are:

- (1) there is an arbitration agreement;*
- (2) a party to the agreement brings an action in the Court against the other party;*
- (3) subject matter of the action is the same as the subject matter of the arbitration agreement;*
- (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute."*

7. The mandate of the Apex Court in *Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums* AIR 2003 SC 2881 is as under:-

"It is clear from the language of the Section, as interpreted by the Constitution Bench judgment in Konkan Railway (supra) that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the concerned Arbitral Tribunal."

8. Upon having heard learned counsel for the parties on this application and on perusal of the records of this case, I find that the existence of *Distribution Agreement of 9th September, 2008* (Annexure-A) and of its containing Arbitration Clause is not in dispute. However, what is required to be determined is whether the subject matter of this suit comes within the ambit of the aforesaid Distribution Agreement (Annexure-A).

9. As per plaintiff's own showing the disputes arose between the parties in the year 2009. Plaintiff's suit is essentially based upon the crucial averments as contained in paragraph No.8 of the plaint which require to be noticed. Paragraph No.8 of the plaint reads as under:-

"In the year 2009, disputes arose between the parties and business dealings came to a stand still. As the Defendant withdrew itself from the distributorship, the Plaintiff stopped supplying books. On 14.09.2009, the Defendant also through their e-mail admitted that the Defendant is no more the Exclusive Distributor of the Plaintiff.

Though the business transactions were over between the Parties but the Defendant owed a sum of Rs.1,94,95,233.20/- to the Plaintiff. During the period of August to December, 2009, the Defendant returned the stock of unsold books to the tune of a sum of Rs.1,07,60,808.60/- leaving an outstanding sum of Rs.87,78,424.60/- towards the books supplied by the plaintiff to the defendant. Thus, leaving an outstanding of a sum of Rs.87,78,424.60/- along with interest @ 18% due and payable to the plaintiff."

10. The first document relied upon by the plaintiff is the ledger account of the defendant maintained by the plaintiff and this ledger account relates to the period from 1st April, 2009 upto 17th September, 2009. The Credit Notes relied upon by the plaintiff, also pertain to the year 2009. Aforesaid averments and documentary evidence is of the period which is post *Distribution Agreement of 9th September, 2008* (Annexure-A). Simply because some invoices of the pre-*Distribution Agreement of 9th September, 2008* (Annexure-A) have been placed on record, would not take the plaintiff's claim beyond the purview of the *Distribution Agreement of 9th September, 2008* (Annexure-A) which contains an Arbitration Clause. Essentially, plaintiff's claim in this suit is based upon the ledger account of the year 2009 which is clearly covered by the *Distribution Agreement of 9th September, 2008* (Annexure-A).

11. The *Distribution Agreement of 9th September, 2008* (Annexure-A) clearly acknowledges that the business relations between the parties relate back to the year 1993 and for the smooth functioning of the same in future this agreement is being executed. As per Clause 11 of the aforesaid *Distribution Agreement of 9th September, 2008* (Annexure-A) proper and regular account of the business handled by the parties to this suit

is required to be maintained. This agreement was initially for a period of 5 years.

12. Upon plain reading of the plaint and the aforesaid *Distribution Agreement of 9th September, 2008* (Annexure-A), it is found that the terms and conditions mutually agreed between the parties on the pre-Agreement period and a post-Agreement period in question were the same as is evident from the averments made in paragraph No.4 of the plaint and the *Distribution Agreement of 9th September, 2008* (Annexure-A) in question. There was no redefining of the terms and conditions on which business relations of the parties proceeded during the post-Agreement period. Strictly speaking, this aspect is not required to be dwelt upon, as the plaintiff cannot be permitted to improve upon his case as set out in paragraph No.8 of the plaint as noted above. Thus, it is abundantly clear that the subject matter of this suit comes within the purview of the *Distribution Agreement of 9th September, 2008* (Annexure-A) in question and the defendant is justified in invoking the Arbitration Clause contained therein, to seek resolution of the disputes raised in these proceedings.

13. Where the existence of the Arbitration Agreement is not in dispute, Court's intervention should be minimal as the Arbitral

Tribunal is competent to rule on its jurisdiction as per Section 16 of the Arbitration and Conciliation Act, 1996. This is the mandate of law and so this Court is not required to declare whether the disputes herein comes within the jurisdiction of the Arbitral Tribunal which is required to be constituted jointly by the parties to the suit. Therefore, the observations made in this Order are purely tentative and the Arbitrator so named by the parties would be free to decide upon his competence to adjudicate upon the disputes on the subject matter of this suit and the proposed counter claim by the defendant.

14. This application is accordingly allowed and the parties to the suit are referred to an Arbitrator to be named by the parties jointly, within four weeks. Needless to say that in the event of default by either side in agreeing upon an Arbitrator, then it shall be open to either party to invoke Section 11 of the Arbitration and Conciliation Act, 1996.

15. With observations as aforesaid, this application is disposed of while refraining to comment upon the merits of the disputes raised herein.

IA Nos. 17395/2010 (u/O. 39 R. 1&2 of the CPC) and IA No.1772/2011 (u/O. 39 R. 4 of the CPC)

16. In view of the orders passed in IA No.1771/2011 parties are left to invoke Section 17 of the Arbitration and Conciliation Act,

1996 or to take recourse to Section 9 of the Arbitration and Conciliation Act as the case may be. Till such a recourse is taken, the interim order of status quo as granted on 22nd September, 2010 shall continue to operate.

17. With aforesaid observations, both these applications are disposed of.

CS (OS) No.2600/2010

18. In view of the orders passed in IA No.1771/2011, this suit is disposed of while referring the parties to an Arbitrator to be jointly appointed by the parties to the suit.

19. This suit and the IAs stand disposed of accordingly.

Sunil Gaur, J.

May 09, 2011
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