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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on : May 24, 2012
Judgment Pronounced on: May 31, 2012

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FAO(OS) 224/2012

PANTALOON RETAIL INDIA PVT. LTD. Appellant
Represented by: Mr. Rajiv Nayar and Mr. Chetan
Sharma, Senior Advocates
instructed by Mr. Rishi Agrawala,
Ms. Malavika Lal and Mr. Arnav
Kumar, Advocates.

versus

AMER SPORTS MALAYSIA SDN BHD & ANR... Respondents
Represented by: Mr. Sudhir Chandra Agarwala and
Mr. Jayant Bhushan, Senior Advocates
instructed by Mr. Sanjeev K. Kapoor,
Mr. Rajat Jariwal and Ms. Saman
Ansari, Advocates.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

PRADEEP NANDRAJOG, J.

1. The learned Single Judge has allowed I.A.No.3347/2012 filed by the respondents, holding that the suit was not maintainable in India. It has been held that in view of Clause 22 of the Agreement dated April 01, 2010 only courts at Malaysia would have the jurisdiction to decide the issue raised in the plaint.

2. Clause 22 of the Agreement in question reads as under:-

"22. GOVERNING LAW.

This Agreement shall be governed by the laws of Malaysia and the parties hereby submit to the non-

exclusive jurisdiction of the Courts of Malaysia residing at Kuala Lumpur.”

3. Noting the decisions reported at (2004) 4 SCC 341 Modi Entertainment Network & Anr. Vs. W.S.G. Cricket Pte Ltd, 172 (2010) DLT 131 Parimal Healthcare Ltd. Vs. Diasorin S.P.A. and relying upon them and distinguishing the decisions reported as (2008) 1 SCC 618 Laxman Prasad Vs. Prodigy Electronics Ltd. & Anr., 2006 Can L J 37880 Gary Sugar Vs. Megawheel Technologies Inc., (2012) SGC AA 16 Orchard Capital I Ltd. Vs. Ravindra Kumar Jhunhunwala, (1992) 3 SCC 551 NTPC Vs. Singer Com. and 2009 (3) Arb. Lr. 162 (Delhi) Max India Ltd. Vs. General Binding Corporation, the learned Single Judge has taken the view that where by consent, even with respect to a non-exclusive jurisdiction clause, parties by consent vest jurisdiction in a foreign court, the principles of private international law would require parties to litigate only at the forum of their choice.

4. Suffice would it be for us to note that the two decisions relied upon by the learned Single Judge do hold that even a non-exclusive jurisdictional clause would require the dispute to be resolved at the forum of the choice, but we find in the instant case, that the learned Single Judge has not noted a prior clause in the contract, being Clause No.18 which reads as under:-

“18. SEVERABILITY

Should any section, sentence, provision, paragraph or part of this Agreement, for any reason whatsoever, be adjudged by any court of competent jurisdiction, or be held by any other competent authority in the Territory having jurisdiction in the premises, to be invalid, unenforceable or illegal, such judgment or holding shall not affect, impair or invalidate the remainder

of this Agreement but shall be confined in its operation to the section, sentence, provision, paragraph or part of this Agreement directly involved in the matter, controversy or proceeding in which such Judgment, holding, finding or ruling shall have been rendered, and the remainder of this Agreement shall remain in full force in effect.”

5. A bare perusal of Clause 18 would reveal that the parties have envisaged a situation where either party has got adjudged from any Court of competent jurisdiction a provision of the Agreement to be invalid, unenforceable or illegal, requiring the same not to affect the remaining agreement.

6. Ex-facie, the parties have retained jurisdiction in the courts of competent jurisdiction to try issues pertaining to any provision of the contract between the parties on the subject of it being invalid, unenforceable or illegal.

7. In sub para (a) to (h) of para 5 of the impugned order, the learned Single Judge has succinctly penned the relevant facts, and we quote the same:-

“5. The brief facts of the matter are that:-

(a) Defendant No.1 had entered into a “Distributor Agreement”, on 01.04.2010 with effect from 01.01.2010, with the plaintiff being the exclusive licensee to market and distribute the products of defendant No.2 in the territory of India bearing the trademark “WILSON” or “W” in block letter/stylized formats on an exclusive basis. It is stated by the plaintiff that it was agreed that the defendant would not establish their business directly or indirectly other than the agreement with the plaintiff.

(b) As per the agreement the following products of the defendant were obtained by the plaintiff for marketing/sale:-

a. Foot wear basic and mid range as determined by defendant

b. Backpack basic and mid range as determined by defendant

c. Foot wear and backpack premium range as determined by defendant

(c) The plaintiff states that certain terms were amended in the Distributor Agreement vide letter dated 26.04.2010. The defendant also entered into a Supplementary Agreement dated 26.04.2010, amending certain commercial terms relating to the advertisement and promotional expenses.

(d) It is submitted by the plaintiff that as per the agreements (Distributor Agreement, License Agreement and Supplementary Agreement) the plaintiff has goods of defendant worth ₹42 crores and plaintiff has paid the consideration to defendant No.1 and the plaintiff is in possession of the goods.

(e) It is further submitted by the plaintiff that defendant No.1 and plaintiff had a meeting on 15.12.2011. In that, meeting the representative of defendant No.1 Mr.Rajiv Narayanswamy, Director Finance and Operations, informed the plaintiff that defendant was willing to expand and explore the business operations in India directly and hence, wanted to terminate the Distributor Agreement and the License Agreement. The plaintiff further submits that defendant No.1 had planned to set up business in India directly in September 2010 and this fact was concealed and suppressed and the plaintiff kept purchasing goods from defendant No.1 even after 30.09.2010.

(f) The plaintiff stated that termination would not be possible as there are substantial stock lying with the plaintiff and the same has to be disposed. The plaintiff further states that the plaintiff offered defendant No.1 to buy back the products.

(g) Through the letter dated 23.12.2011, the defendant No.1 unilaterally and illegally rescinded the contract. The plaintiff submits that defendant No.1 has no right to do so, as the plaintiff is fully protected under the agreement, and the defendants cannot cause monetary damage to the plaintiff. The defendant also cannot direct the plaintiff to sell the goods within 6 months, which is not possible. It is submitted that plaintiff is willing to adhere to the terms and conditions of the contract till all the goods are sold in the market. It was also agreed that defendants No. 1 and 2 would provide warranties to such goods to the consumers.

(h) The goods purchased by plaintiff will be of no use if the defendants do not provide any warranty from their end and that will cause a huge financial loss to the plaintiff company. The said agreements are valid 3 years from the date of the execution and hence, still continuing, the plaintiff apprehended that the defendants have entered into further agreements with some 3rd party thereby depriving the rights of the plaintiff.

Therefore, the present suit has been filed by the plaintiff along with the interim application.'

8. Suffice would it be to state that the said facts do bring out Courts in India having jurisdiction as per the Code of Civil Procedure, inasmuch as admittedly, a part of a cause of action has arisen in India.

9. With respect to the facts noted by the learned Single Judge and the decision we need to highlight that the learned Single Judge has ignored prayer (b) in the plaint, which reads as under:-

"A decree for declaration against the Defendants, their associates, licensees, agents, servants, assignees, that the Defendants are not entitled to

restrict the right of the Plaintiff to sell the goods purchased by the Plaintiff from the defendant No.1 under the logo and trademark of the Defendant No.2, in any manner whatsoever including by prescribing a specific time period or restricting the Plaintiff's right to sell the same through its appointed distributors and sub agents and consequently declare any such restriction in the Said Agreements or letters of the Defendants more particularly letter dated 23.12.2011, to be null and void, inoperative and unenforceable."

10. The Agreement in question, as per Clause 3.1 is to last upto December 31, 2012. As per Clause 9, the Agreement is terminable upon the conditions prescribed under Clause 9.1 and the consequences of the termination are as provided in Clause 10.1, sub-para (d) whereof reads as under:-

"Distributor shall after expiration or termination allow Amer at Amer's sole option to repurchase any or all of Distributor's inventories of Products at Distributor's landed cost. However, Amer shall have absolutely no obligation to do so. For a period of six (6) months after such expiration or termination, Distributor shall have the right to sell its inventories of Products if Amer does not repurchase them. Distributor's right to sell its inventories of Products as provided above shall expire at the end of the said six (6) months."

11. A perusal of the pleadings in the plaint would reveal that the principal grievance of the appellant is not so much to the Agreement being terminated but to the fact that the respondents have not agreed to re-purchase the unsold inventory lying with the appellant, valued at ₹42 crores; landed cost being ₹18 crores, and since it would probably not be

possible to dispose of the stock within six months of the termination, its right to sell the unsold inventory being taken away. We highlight that averments to said effect are to be found, though most inarticulately stated, in paras 4.vii, 4.xii, 4.xiii, 9 and 10 of the plaint.

12. Meaningfully read, the appellant has pleaded that para (d) of the Clause 10 of the Agreement offends Section 27 of the Indian Contract Act.

13. In para 4.xi, it is categorically pleaded that in case the defendants re-purchase the unsold inventory, the appellant would have no grievance.

14. Seen in light of prayer clause (b) of the plaint and the averments in the afore-noted paragraphs of the plaint, it become manifestly clear that the dispute raised squarely falls within what is contemplated by Clause 18 of the Agreement between the parties.

15. Unfortunately, neither has the learned Single Judge noted Clause 18 of the Agreement, nor has the learned Single Judge noted the pleadings in the various paragraphs of the plaints as noted in para 11 above.

16. Suffice would it be to state that Clause 22, vesting non-exclusive jurisdiction in Courts in Malaysia, has to be read in light of Clause 18 of the Agreement and highlighting the fact that the proper law of the contract would be the India law, since the principal relief claimed by the appellant is to declare void the offending clause 10.1(d) alleging the same to be violative of Section 27 of the Indian Contract Act, we hold that the suit is maintainable in India.

17. We note that without any prior discussion or noting any fact, and there being no pleadings on the subject, in para 35(c), the learned Single Judge has, in a rolled over manner,

opined that since appellant has a subordinate office in Gurgaon where the Agreement was signed, Courts at Delhi would have not any jurisdiction.

18. Said finding is not based on the pleadings of the parties. Admittedly, the appellant carries on business even in the city of Delhi and has exclusive sales outlets in Delhi and the prohibition in the contract restraining it from selling the goods after six months of the termination would equally apply to sales in Delhi.

19. The appeal is allowed. Impugned order dated May 09, 2012 is set aside. I.A.No.3347/2012 filed by the respondents is dismissed. Plaint is restored for adjudication on merits.

20. Since a serious and a triable issue with respect to the legality of Clause 10.1(d) of the contract is raised, and since, though not expressly stated by the learned Single Judge, appellant's application being I.A.No.820/2012 under Order 39 Rule 1 & 2 CPC would automatically stand dismissed as a consequence of the impugned order, we hold that said application needs to be decided on merits by the learned Single Judge and for which we direct the matter to be listed before the learned Single Judge on July 03, 2012 and till then we permit the appellant to sell the unsold stock but requiring accounts to be maintained, should they be needed by the learned Single Judge.

21. We are passing the interim order realizing that as per the contract between the parties the appellant is permitted to sell the unsold stock for a period of six months of the Agreement being terminated and since the date of termination is December 23, 2011, six months time would expire on June 23, 2012, till which date the appellant has in any case a right

to sell the unsold inventory, and the Delhi High Court closes for summer vacations on June 02, 2012 and shall remain closed till July 01, 2012.

22. We direct the suit to be listed before the learned Single Judge on July 03, 2012.

23. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

MAY 31, 2012
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