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

+ **O.M.P. 1105/2013**

% Judgment reserved on: 06.08.2014

Judgment pronounced on: 12.09.2014

M/S P-KAL INFOTECH PVT LTD Petitioner

Through : Mr.Sudhir Nandrajog,
Sr.Advocate alongwith Mr.Mukul
Chandra and Mr.Ajay Yadav,
Advocates.

versus

M/S PERTO S.A.& ORS. Respondents

Through : Mr.Rajiv Nayar, Sr.Advocate
alongwith Ms.Ritu Bhalla,
Ms.Sweta Kakkad and Mr.Gaurav
Vig, Advocates.

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HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

1. The present petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter called as “the Act”) with the prayer that respondents be directed to issue equity for the

outstanding amount of USD 1,90,000 (@0.5% for each USD 100000 as provided under Clause 5.3 of the Agreement to the petitioner.

2. The case of the petitioner is that it is a private limited company and its registered office is at J-1/15A, DLF City, Phase-II, Gurgaon, Haryana - 122002. The petitioner is engaged in providing business consultancy services. In the agreement (effective from 1st February, 2011) executed between the petitioner and the respondents whereby the petitioner was required to provide business consultancy services in relation to setting up a company and manufacturing facilities for the banking industry products of the respondent no.1 i.e. PERTO S.A, besides providing all the support, advice and guidance in India.

3. The respondents were required to make the payment for the services of the petitioner as per Clause 5 of the Agreement. The petitioner had been providing services as per the agreement and to the satisfaction of the respondents and the respondent no. 1 was also making payments from time to time until 31st January, 2013 when certain issues regarding non-cooperation and lack lustre interest on the part of the petitioner were raised by the respondent no.2 through his email. The

said email was duly replied on 1st February, 2013. However, another email dated 2nd March, 2013 was received from respondent no.3 whereby the agreement was terminated.

4. It is submitted that the petitioner was not satisfied with the said termination and entered into communication with the respondents and also personally visited them at Mumbai. It is submitted that termination had been done with some ulterior motive. It is further submitted that as per the terms of the agreement, the respondents had attained the first milestone as the government approvals are in place and the land for the factory was also acquired. It is submitted that the agreement was not terminable at will nor at the whims and fancies of the respondents.

5. It is further submitted that since the respondent no.1 has not accomplished the milestones contained under Clause 5.2 (iii) of the agreement, the term of the agreement continues to be valid as per Clause 11 thereon. The petitioner issued the legal notice dated 25th March, 2013. The interim reply dated 9th August, 2013 was received by the petitioner. It is submitted that sum of USD 1,90,000/- had become due and outstanding in respect of the services rendered by the petitioner for

the months of February to October, 2013 for which the invoices were duly raised by the petitioner but the same are not paid upto now. Under Clause 5.3 of the agreement, the petitioner was provided with option of converting the aforesaid payments into equity at the rate of 0.5% for each USD 100000. It is submitted that under Clause 5.4 of the agreement, the petitioner was also entitled to subscribe up to 3.5 % of equity of the respondent no.1 by payment in cash subject to certain conditions.

6. Under the agreement, the exit right options were also available to the petitioner. The petitioner, desirous of exercising its rights under Clause 5.3 of the agreement, sent another legal notice dated 5th August, 2013 to the respondents through its Advocate requesting the respondents to issue equity for the outstanding amount and not to further transfer the equity to any other person and/or dilute the shareholding of the petitioner in respondent no.1 in terms of the agreement. Vide their reply dated 10th September, 2013, the respondents had raised the bogey that the services rendered by the petitioner were inadequate and unsatisfactory and also listed out the failures/breaches of the agreement. On these

facts, it is further submitted that the respondent no.1 has its registered office in India at 629, DDA Flats, Sector 22, Dwarka, Delhi within the territorial limits of the jurisdiction of this court and the cause of action had also arisen in Delhi and, therefore, the courts of Delhi has jurisdiction.

All the respondents have filed their reply.

7. Several preliminary objections have been raised by the respondents. It is contended that there is no arbitration agreement between the parties and hence this court has no jurisdiction.

8. It is submitted that Clause 13 of the Agreement dated 17th November, 2010 does not show the intention of the parties to submit to arbitration their disputes, controversy or claims. It is further argued that the parties had only agreed that the disputes relating to the agreement that could not be amicably settled, may be submitted to the Singapore International Chamber of Commerce by either party for settlement. It is also contended that the Singapore International Chamber of Commerce does not provide any arbitration services. Its website reveals that it is a business forum providing opportunities for its members for liaising and

developing business contacts.

9. It is further contended that this court has no territorial jurisdiction. It is argued that the respondents do not have any registered office in Delhi and that no part of cause of action has arisen in Delhi. It is submitted that respondent no.1 is a company incorporated in Brazil and does not have any registered office in Delhi and infact, has no office in India for that matter. It is submitted that the memo of parties filed by the petitioner itself describes the respondent no. 1 as a company registered in Brazil. None of the other respondents are residents of India. Respondent nos.2 and 3 are residents of Brazil. Respondent no. 4 is an independent juristic entity and is not a party to the agreement. Respondent no. 4 is also not an Indian National who is working in India and he is the resident of Jaipur, Rajasthan and has no place of residence within the local limits of territorial jurisdiction of this court.

10. It is further submitted that no part of cause of action has arisen within the territorial jurisdiction of this court. The agreement dated 17th November, 2010 was executed at Gurgaon which was mutually terminated at Mumbai on 18th January, 2013. It is further submitted that

parties by way of an agreement cannot confer jurisdiction to a court which otherwise does not have territorial or pecuniary jurisdiction.

11. It is further submitted that the case is bad for misjoinder of the parties for the reasons that respondent nos. 2 to 4 had no privity of contract and had been wrongly impleaded. It is further submitted that the reliefs sought by the petitioner are incapable of being granted in law because there is no term or condition in the agreement whatsoever which provided that the petitioner would be entitled for allotment of equity shares in the respondent no. 1 company which is a Brazilian Company. It is submitted that the petition is liable to be dismissed.

I have heard the arguments and perused the relevant documents.

12. The main question that needs consideration, before proceeding to deal with matter on merit, is whether there is any arbitration agreement between the parties. The existence of arbitration agreement is *sine qua non* to invoke jurisdiction of this court under Section 9 of the Act.

13. The arbitration agreement is defined under Section 2(1) (b) of the Act as under:-

“(b) “arbitration agreement” means an agreement referred to in Section 7.”

Section 7 of the Act reads as under:-

“7 Arbitration agreement. —

(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

14. The petitioner has relied on Clause 13 of the Agreement dated 17th November, 2010 and alleges that this Clause constitutes an arbitration agreement and is reproduced as under:-

“13. Arbitration:

Any dispute, controversy, or claim arising out of, or relating to this Agreement that cannot be amicable settled, may be submitted to the Singapore International Chamber of Commerce by either Party for settlement.”

15. It is argued on behalf of the respondent that it is not an agreement to submit to arbitration as the word used is “*may be*” and this clearly establishes that there was no binding contract to arbitrate between the parties.

16. Reliance has been placed on findings in the case of *M/s Linde Heavy Truck Division Ltd Vs. Container Corporation of India Ltd. & Anr. reported in (2012) 195 DLT 366.*

I have given careful consideration to the contentions of the parties.

17. In the *Linde case (supra)*, this court has interpreted the clauses 15.3 to 15.6 of the contract. These clauses as reproduced in the judgment are reproduced as under:-

“Para 3- Clauses 15.3 to 15.6 of the contract are relevant and read as under:-

"15.3 Jurisdiction of Courts: the Courts of the place from where the acceptance of tender has been issued shall alone have jurisdiction to decide any dispute arising out of or in respect of the contract i.e. New Delhi (INDIA)

15.4 In case of any dispute or difference whatsoever arising between the parties out of the relating to the construction, interpretation, application, meaning, scope operation or effect of this contract or the validity or the breach thereof, CONCOR and supplier shall make very effort to resolve amicable by direct

informal negotiation any disagreement or dispute arising between them under or in connection with the contract.

*15.5 If, after 30(thirty) day from the commencement of such informal negotiation, CONCOR and the supplier have been unable to resolve amicably the contract dispute, **either party may require that the dispute be referred for resolution by arbitration in accordance** with the rules of Arbitration of the "Standing Committee on Public Enterprises" of India (SCOPE) from the "Conciliation and Arbitration" and award made in pursuance thereof shall be binding on the parties.*

15.6 During settlement of disputes in arbitration proceedings, both parties shall be obliged to carry out their respective obligation under the contract."

(emphasis is mine)

18. This court has relied upon the cases titled as Wellington Associates Ltd. Vs. Kirit Mehta, (2000) 4SCC 272; B Gopal Das Vs. Kota Straw Board; Jyoti Brothers Vs. Shree Durga Mining Co., AIR 1956 Calcutta 280; Sudarshan Chopra Vs. Company Law Board, 2004 (2) Arb.LR 241 and Jagdish Chander Vs. Ramesh Chander, (2007) 5 SCC 719 and has held as under:-

"12. From careful scrutiny of clauses 15.3 to 15.6 of the agreement between the parties, it would be seen that the expression "may" has been used only in clause 15.5. In clause 15.3, relating to jurisdiction of the Courts, the expression used is "shall" which indicates mandatory nature of the term agreed between the parties with respect to territorial jurisdiction of the Court. Similarly, in clause 15.4 dealing with negotiations, the

expression uses is “shall”, clearly implying that it would be mandatory for the parties to make efforts to resolve their disputes by way of negotiations. On the other hand, though clause 15.5 gives an option to one of the parties to seek reference of the disputes to arbitration as per the rules of Standing Committee on Public Enterprises, it does not mandate a compulsory arbitration for adjudication of such disputes. In case arbitration is sought by one party to the dispute, the other parties had an option, whether to agree for resolution by arbitration or not and the party seeking arbitration could not compel the other party to go through the process of arbitration. Normally, the arbitration clause stipulates that the disputes between the parties shall be referred to arbitration and the expression “may” is not used in such clauses, though it can hardly be disputed that mere use of the expression “may” is not used in such clauses, though it can hardly be disputed that mere use of the expression “may” would not be determinative in every case and in a given case, the terms and conditions and/or the conduct of the parties may lead to an inference that despite using the expression “may” the parties had, in fact, agreed for a compulsory arbitration to resolve their disputes. The arbitration clause in the case before this Court is more or less similar to the arbitration clause in Wellington Associates Ltd. (Supra). This clause, in my view, does not indicate a firm determination of the parties and binding obligation on their part to resolve their disputes through arbitration. It merely gives an option to either of them to seek arbitration and on such an option being exercised, it would be for the other party whether to accept it or not. As held by Supreme Court in Jagdish Chander (supra), if the agreement between the parties requires or contemplates a further or fresh consent for reference to arbitration, it would not constitute an arbitration agreement. The view taken by the Apex Court was that if the agreement between the parties provides that in the event of any dispute, they may refer the same to arbitration that would not constitute a binding arbitration agreement. In the case before this Court, clause 15.5 of the agreement envisages a fresh consent for

arbitration, in case the option for arbitration is sought to be exercised by one of the parties to the disputes. Therefore, it does not constitute a binding arbitration agreement.”

19. The present case is on a better footing than all the cases referred above. In this case, the arbitration clause 13 not only uses the expression “may be” but it does not stipulates to submit to arbitration at any stage. What it requires is to submit to Singapore International Chamber of Commerce for “settlement”. The clause nowhere uses the word that the dispute be referred for arbitration. There is also no denial by petitioner to the contention of the respondent that the Singapore International Chamber of Commerce, as per their website, does not provide for arbitration but only provides a forum to its members of liaising and developing business contacts.

20. Clause 13, although starts with arbitration as a heading, but the body of clause does not show any agreement between parties to submit to arbitration. It only refers to submitting the dispute to ‘settlement’. It is, therefore, clear that clause 13 of the agreement cannot be formed as ‘Arbitration Agreement’.

Hence, this court has no jurisdiction to deal with this matter under
Section 9 of the Act.

In view of these, petition stands disposed of.

DEEPA SHARMA
(JUDGE)

SEPTEMBER 12, 2014
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