

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :09.11.2016

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THE HONOURABLE MR. JUSTICE RAJIV SHAKDHER

O.A.No.51 of 2012

1.N.Jayasankar
2.N.Jaiyumar
3.G.Vimal Raj
4.V.S.M.Mohan

[APPLICANTS]

Vs

1.K.B.Vijay
2.N.Sharadha

[RESPONDENTS]

Original Application filed under Order XIV Rule 8 of O.S.Rules read with Section 9 (2) (a) (b) & (e) of the Arbitration and Conciliation Act, 1996.

For Applicants : Mr.Sarath Chandrasekar

For Respondents : Mr.T.Mahendra

ORDER

1. In the captioned application, the following relief is sought:

“to grant an order of ad-interim injunction restraining the respondents, their men, agent and or other person acting through or in their behalf in any way interfering with the rights of the applicants in and over Exertion Technology Pvt. Limited including writing and sending emails disparaging the applicant's pending the arbitration may not be allowed.”

2. Vide order dated 03.02.2012, my predecessor had directed as

follows:

“There will be an order of injunction restraining the respondents from writing and sending emails disparaging the applicants. Order 39 Rule (3) is to be complied with. Notice.”

3. Admittedly, more than four (4) years have passed and, no steps whatsoever, have been taken by the applicants to initiate arbitration proceedings.

3.1. I may only indicate that, the application, which has preferred under Section 9 of the Arbitration and Conciliation Act, 1996, (in short “the 1996 Act”) is, pivoted on a Memorandum of Understanding (in short, the MOU). According to the applicant the MOU was executed on 31.08.2011.

3.2. A copy of the MOU is appended at page 211 of the typed set of documents, while the said date is not found on the document, there is a handwritten date appended on it which reads as: 05.02.2011.

3.3. There is no dispute raised before me, by the counsel for the parties, with regard execution of the MOU though there is no clarity qua the date of its execution.

4. The arbitration clause contained in the MOU, on which, reliance is

placed by the applicant reads as follows:

“Except in the event the other party doesn't agree, any dispute concerning the validity the interpretation of the execution of the present MOU shall be definitively settled in accordance with the rules of India, by three arbitrators appointed in accordance with these rules. The place of arbitration shall be Chennai. The language of the proceedings shall be English. The applicable law shall be exclusively the Indian Law. Besides the event of arbitration, the Indian Courts are exclusively competent.” (emphasis is mine)

5. To be noted, this MOU is executed between the applicants herein, who have been described collectively in the MOU as party 'A' and the respondents, who, in turn, have been described, in the very same MOU, as party 'B'.

6. The MOU, broadly, provides for resolution of disputes, pertaining to two entities. The first entity goes by the name Exertion Technology Private Limited (in short, the Indian Entity), while the second entity is adverted to as Exertion Technologies Singapore Private Limited (in short, the Singapore Entity) The parties 'A' and 'B' i.e., the applicants and the respondents herein, as it appears provided for their rights and obligations, according to the terms set out in the MOU. Broadly, under MOU party 'B', (i.e., the respondents herein) was to purchase the shares held by party 'A' (i.e. the applicants herein) in the Indian and Singapore entity, as per the

payment terms set out therein.

7. The record also shows that respondent No.2 in the present proceedings i.e. N.Sharadha, has filed a suit on the original side of this Court, which is numbered as: C.S.68 of 2016.

7.1. Furthermore, counsel for the respondents also placed before me, an order dated 18.10.2016, passed in C.A.No.17 of 2012 (renumberd as TCP 84 of 2016). This application was lodged by respondent No.1 herein (i.e. K.B.Vijay) with the then subsisting Company Law Board (CLB) [now National Company Law Tribunal (NCLT)].

8. A perusal of the copy of the order dated 18.10.2016 would show that the proceedings filed with the CLB stood transferred to the NCLT, Chennai Bench.

8.1. Furthermore, a perusal of the order dated 18.10.2016, would show that the applicants herein had moved C.A.17 of 2012 for referring the parties herein to arbitration. The NCLT, however, vide the aforementioned order i.e. order dated 18.10.2016, dismissed the said application.

8.2. The rationale provided by NCLT appears to be that as per the arbitration clause obtaining in the MOU, parties can be referred to arbitration, only if, all parties agree to such a reference. This conclusion has been arrived at by NCLT upon a bare reading of the arbitration clause.

9. I have considered the arbitration clause obtaining in the MOU.

9.1. My reading of the clause leads me to the same conclusion which, the NCLT, has arrived at, that is, parties can be relegated to arbitration, only if, all agree to the adoption of such a mechanism for resolution of disputes.

9.2. De-hors this aspect of the matter, what is come through, is that, the applicants, over past four years, have taken no steps, whatsoever, to initiate the arbitration proceedings.

9.3. Clearly, if the applicants were convinced of their case under the MOU and arbitration clause incorporated therein, they ought to have taken steps in that behalf. Therefore, on both counts, I am of the opinion that the interim order dated 03.02.2012 cannot be continued. Interim protection under Section 9 of the 1996 Act is granted to aid the prosecution of arbitration proceedings; delay in prosecution of arbitration works to the detriment of the opposing party.

9.4. Accordingly, interim order dated 03.02.2012 is vacated.

10. Furthermore, in view of the conclusion reached by me, that the arbitration clause appearing in the MOU cannot be taken recourse to by the applicants for having their disputes referred to arbitration, unless the

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opposing parties agree to such a reference, the main application would also not be maintainable. Consequently, the main application is closed. The case is confined to record.

11. At this stage, the counsel for the applicants say that he would approach the Court, where the suit filed by the respondent No.2 is pending adjudication of their claims and, therefore, the observations made above should not come in the way of the prosecution of the suit.

12. Having regard to the aforesaid submission, it is clarified that any observation made by me herein above, is made only for the purpose of disposal of the captioned applications.

09.11.2016

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