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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

NOTICE OF MOTION NO. 1333 OF 2018

WITH

SUMMONS FOR JUDGMENT NO. 6 OF 2018

IN

COMMERCIAL SUIT NO. 829 OF 2017

Duflon Industries Pvt. Ltd.

... Plaintiff

vs.

FAAB Industries and Ors.

... Defendants

Mr. Bhavik Manek with Nazneed i/b. MDP and Partners for the Plaintiff.

Mr. Aditya Pimple with Mr. Sachin Chowdhari i/b. Dharam & Co. for the Defendants-applicants.

CORAM : A.K. MENON, J.

DATED : 8TH AUGUST, 2018

P. C.

1. By this Notice of Motion, the defendants-applicants have sought an order referring the suit to Arbitration under Section 8 of the Arbitration and Conciliation Act, 1996 by virtue of a dispute resolution clause contained in a Master Distribution Agreement dated 1st June, 2012 ("the Agreement"). It is the defendants' case that they were appointed as "Master Distributors" under the Agreement in order to assemble and sell products of the plaintiff in Indian markets

in certain designated territories. Disputes arose between the parties on account of non-payment of the price of goods sold by the plaintiff under numerous invoices as set out in the plaint. The plaintiff has claimed an amount of Rs.1,34,97,544.87 and has filed this summary suit in which a summons for judgment had been taken out. The applicants have not filed an affidavit in reply to the summons for judgment.

2. The case of the defendant is that the Agreement contains an arbitration clause which is reproduced below :

“10. Disputes :

10.1 Any claim, controversy or dispute concerning questions of fact or law arising out of relating to this Agreement, shall be decided by the authorized Representative of the Company. The decision of the Company shall be final and conclusive unless, within thirty (30) days from the date of notification of the Company's decision. The Distributor notifies the Company that the Distributor requests arbitration.

10.2 Arbitration shall be concluded in accordance with the rules under Arbitration and Conciliation Act, 1996 at Mumbai. The cost of arbitration shall be borne by both the parties. The decision of the arbitrator shall be final and binding upon the parties unless determined by a court of competent jurisdiction to be fraudulent, capricious, arbitrary, or so grossly erroneous as necessary to imply

bad faith."

3. According to defendant no.2, the plaintiff has breached an exclusivity provision contained in the Agreement as a result of which loss has been caused to the defendants and since the plaintiff claims payment of certain amounts which claim has been denied, a dispute has arisen that must be referred to arbitration. The applicants have vide a letter dated 12th February, 2018 invoked the arbitration agreement, however, the plaintiff vide a letter dated 14th February, 2018 denies that the defendants are entitled to invoke arbitration. It is the case of the applicants that the plaintiff have never disputed existence of arbitration between the parties.

4. On behalf of the defendants, it is submitted that under clause 10.1 if any claim, controversy or dispute arises the same is to be decided by an authorised representative of the company and the decision of the company would be final and conclusive, unless within 30 days of such decision, the Distributor requests arbitration. According to the defendants, clause 10.1 does not prevent the applicants from seeking a reference to be made to the arbitration, since clause 10.2 is a specific provision which provides for conduct of the arbitration proceedings.

5. In support of his contention Mr.Pimple, learned counsel for the applicants relied upon the decision of the Supreme Court in a case of *Hindustan Petroleum Corporation Ltd. vs. Pinkcity Midway Petroleums (2003) 6 SCC 503* in which he relied upon the observations of the Supreme Court in paragraph 13 which refers to arbitration clause for the particular case show that the parties to Dealership agreement had agreed to refer the dispute arising out of the said

agreement to an arbitrator as contemplated in that agreement. Section 8 of the Act in clear terms mandates that a judicial authority before which an action is brought in a manner which is the subject matter of an arbitration agreement shall refer such parties to arbitration.

6. Regarding the peremptory nature of the language of Section 8 in case of *P. Anand Gajapathi Raju vs. P.V.G. Raju* 2(2000) 4 SCC 539, the Supreme Court observed that where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. In that case the arbitration clause in the agreement was accepted by both the parties. The court held that once existence of the arbitration clause is admitted, the mandatory language of the section 8 of the Act requires the Court to refer the dispute to arbitration. Mr.Pimple submitted that in the facts and circumstances of the present case an arbitration agreement exists as seen from clause 10.2 and therefore this Court should refer matter to the arbitration.

7. On behalf of the plaintiff, Mr.Manek, learned counsel submitted that the application is an attempt of the plaintiff to derail the hearing of the suit, inasmuch as the arbitration agreement could have been invoked only in accordance with dispute resolution clause and in the present case no dispute was raised by the defendant till a legal notice was sent on 1st August, 2017 calling upon the applicants to pay over a sum of Rs.1,34,97,544.87. Mr.Manek submitted that the applicants-defendants had not raised any dispute whatsoever till the

demand notice was issued. He submitted that invoices were all dated between 22nd May, 2012 and 31st March, 2015 and although the amounts were payable in accordance with invoices, on their failure to pay the same, that a legal notice came to be issued on 1st August, 2018. He submitted that demand notice in paragraph 4(v) makes reference to clause 10 of the Agreement and records that in event of any controversy relating to the Agreement, the same would be decided by authorised representative of the company which decision shall be final and conclusive.

8. It further records that the authorised representative of the company came to conclusion that defendant nos.1 to 3 were bound and liable to pay the entire outstanding amount. In response to the said demand notice, vide letter dated 25th August, 2017, the applicants disputed liability and alleged that the plaintiff had in complete breach and spirit of the Agreement caused enormous loss and irreparable damage because after some years of the execution of the Agreement and without terminating the agreement, the plaintiff allegedly began contacting and dealing with clients directly within the territory of India without informing the applicants. This is alleged as breach of an express undertaking in terms of the Agreement in respect of which the applicants had a claim against the plaintiff. Reference was also made to a rejoinder dated 13th September, 2017 wherein the plaintiff had denied applicants' claim.

9. In this behalf Mr.Manek contended that the application is dishonest, inasmuch as the arbitration agreement has not been invoked within a period of 30 days as contemplated under clause 10.1. He therefore submitted that the application has no merit since the invocation of arbitration is not in accordance

with the clause 10.1 and 10.2. In the case at hand the demand notice sent on 1st August, 2017 in clear terms mentioning in paragraph 10 that an authorised representative of the company had examined the matter and had come to conclusion that the applicants were bound and liable to pay the amount. This letter was received, if not earlier at least on 25th August, 2017 since the applicants have replied to the plaintiff on that day wherein no attempt is made to invoke arbitration. The period of 30 days from the said letter has also expired. Meanwhile there was no request seeking reference to arbitration.

10. In my view clause 10.1 provided for a method for resolving disputes. It is obvious that the dispute should have been raised in the first instance by resorting to clause 10.1 and seeking a resolution at that stage. In the instant case, it is evident that the applicants have not at any stage raised this defence and it is by now well settled that the arbitration agreement must work itself out in accordance with the provisions of the arbitration agreement. Clause 10.2 would require strict adherence. In the present case, on facts, it is evident that applicant no.1 did not raise any dispute at material time in relation to the damages it had suffered. It has not invoked arbitration clause within the period specified under clause 10.1. In the circumstances, the present application is only by way of an after thought and an attempt to delay the said proceedings. In the case of *Lotus Refineries Private Limited vs. National Spot Exchange Limited* 2014 SCC Online Bom.1060 this court has held that if a party makes an application under section 8 he has to fulfill various conditions and that it is for the Court to decide whether the conditions are been satisfied. In the present case I am firmly of the view that the applicant has not

satisfied the requirements of clause 10.1.

11. In the circumstances, I am of the view that present notice of motion has no merit and since the mandatory nature of the provision of section 8 of the Act will be subject to specific provision of the arbitration agreement, no case is made out for reference to Arbitration.

12. In the circumstances, I pass following order :

- (i) Notice of motion is dismissed.
- (ii) No order as to costs.
- (iii) In view of the dismissal of the motion the defendants shall be at liberty to file their affidavit in reply to summons for judgment within a period of three weeks from today. Rejoinder, if any, to be filed within a period of one week there after.
- (iv) Stand over to 5th September, 2018.

(A.K. MENON, J.)

Hemant
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