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

COMMERCIAL APPEAL (L) NO. 403 OF 2018

WITH

NOTICE OF MOTION (L) NO. 1333 OF 2018

WITH

NOTICE OF MOTION (L) NO. 902 OF 2018

IN

COMMERCIAL SUMMARY SUIT NO. 829 OF 2017

FAAB Industries & Anr.

...Appellants

Registered office at B-4/8, B K Chabbra
Industrial Estate, Shiv Nagar, Vakola Bridge,
Santacruz (E), Mumbai – 400 055.

Versus

Duflon Industries Pvt. Ltd. & Ors.

...Respondents

Registered office at C-101, MIDC, Mahad
Raigad, Dist. Pin 402 309.

Mr. Nirman Sharma, Mr. Aditya Pimple, Ms. Uma Sharma and Mr.
Sachin Chowdhari I/b. M/s. Dharam and Com. for the
Appellants.

Mr. Mustafa Doctor, Senior Counsel with Mr. Bhavik Manek, Mr.
Ashok Paranjape and Ms. Ekta Tripathi I/by M/s. MDP and
Partners for the Respondent No.1.

CORAM:

**B.R. GAVAI &
RIYAZ I. CHAGLA, JJ.**

DATE :

22ND NOVEMBER, 2019

O R A L J U D G M E N T :- (Per Riyaz I. Chagla J.)

1. This Appeal challenges an order passed by the learned
Single Judge of this Court dated 8th August, 2018 (“the impugned

order”) by which the Appellants application by way of Notice of Motion seeking referral of the Suit to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996 as amended (“the Act”) was dismissed on the ground that the application had no merit considering the mandatory nature of the provision of Section 8 of the Act being subject to the specific provision of the Arbitration Agreement. Hence, no case was made out for reference to arbitration.

2. The Appellants were appointed as “Master Distributors” under a Master Distribution Agreement dated 1st June, 2012 (for short “the agreement”) for assembling and sale of products of the Respondents in the Indian market in certain designated territories. Disputes had arisen between the parties to the agreement on account of non-payment of price of goods sold by the Respondents under numerous invoices. The Respondent No.1 issued a legal notice on 1st August, 2017 calling upon the Appellants to pay over the sum of Rs.1,34,97,544.87 which was payable to the Respondents under the numerous invoices. The said notice expressly referred to clause 10 of the agreement and records that the disputes relating to the agreement would be

decided by the authorised representative of the Company viz. Respondent No.1 whose decision shall be final and conclusive.

3. Clause 10 of the agreement reads thus:-

“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 or 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.”

4. It is the case of the Respondents that the Appellants failed to notify the Respondent No.1 – Company of their request for arbitration within the stipulated period of 30 days from the date of the Company's decision on 1st August, 2017. In fact, the Appellants through their Advocates' letter dated 25th August, 2017 responded to the demand notice of the Respondent No.1 –

Company and disputed their liability by alleging that the Respondent No.1 had in breach of the agreement caused enormous loss and irreparable damage because after some years of execution of the agreement and without terminating the agreement, the Respondent No.1 began contacting and dealing with clients directly within the territory of India without informing the Appellants. This was alleged to have been in breach of express undertaking in terms of the agreement which provided for exclusivity. This letter has been responded by the Advocates of the Respondent No.1 and it is categorically stated therein that there is no question of withdrawing the demand notice / decision dated 1st August, 2017 of the Respondent No.1 – Company and that the allegations made by the Appellants are frivolous and baseless and that the Respondent No.1 – Company is left with no choice but to proceed further and take appropriate action. It was only on 12th February, 2018 i.e. after the filing of the Summary Suit by the Respondent No.1 – Company that the Appellants invoked arbitration under clause 10 of the agreement on 12th February, 2018. The Respondent No.1 – Company had by then also taken out summons for judgment in the Summary Suit filed by them. Thus, the Appellants instead of filing a reply to the Summons for Judgment, invoked arbitration. The Appellants are

aggrieved by the impugned order which rejects their application under Section 8 of the Act to refer the Suit to arbitration. Hence this Appeal.

5. Shri Nirman Sharma, the learned counsel for the Appellants has contended that clause 10.1 of the agreement which provides for the decision of the Respondent No.1 – Company to be final and conclusive unless within 30 days from the date of invocation of the Company's decision, the Appellant distributor notifies the Respondent No.1 – Company of its request for arbitration cannot be read as being mandatory. He has submitted that under Section 8 of the Act, it is in fact mandatory for the Court to refer the parties to arbitration where the party applies not later than the date of submitting his first statement on the substance of the dispute unless the Court finds that *prima facie* there is no valid arbitration agreement in existence. He has submitted that there is no dispute in the present case as to a valid arbitration agreement being in existence and hence this Court should have referred the dispute in the Suit to arbitration by allowing the Appellants application under Section 8 of the Act. He has placed reliance upon the judgment of the Supreme Court in ***Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums***¹ in support of his contention that

1 (2003) 6 Supreme Court Case 503.

even where an objection to the applicability of the arbitration clause is raised, the same will have to be raised before the Arbitral Tribunal. He has also relied upon the judgment of the Delhi High Court in the case of ***Union of India Vs. M/s. Baga Brothers and Anr.***² wherein the Delhi High Court has held, that an arbitration clause providing for conciliation is only directory and not mandatory, where there is no provision to exclude the period spent in conciliation proceedings as valuable rights of getting disputes decided by arbitration will get extinguished, which is not a position acceptable in law. The Delhi High Court upheld the impugned order by which an application under Section 8 of the Act had been allowed. He has submitted that, in the present case also the stipulated period of 30 days provided for under clause 10.1 of the Act, cannot be treated as mandatory and is only directory as otherwise the valuable rights of the Appellant to have the disputes referred to arbitration under Section 8 of the Act would be defeated. He has thus submitted that the impugned order ought to be set aside.

6. We have considered the submissions. We are of the view that clause 10.1 of the agreement is a method for resolving

2 Decided on 7th July, 2017.

disputes and that this method should have been first resorted to. This clause provides that the decision of the Respondent No.1 – Company shall be final and conclusive unless within 30 days from notification of the decision, the Appellant – Distributor notifies the Company of its request for arbitration. The learned Single Judge has accordingly held that the Appellants ought to have complied with the said clause and / or notify the Company of its request for arbitration within the stipulated 30 days from notification of the Company's decision. It is well settled that the arbitration agreement must work itself out in accordance with the provisions of the agreement. We do not accept the submissions on behalf of the Appellant that the dispute clause be treated as directory. The dispute clause in fact provides for a method of resolving disputes by giving an opportunity to the party aggrieved by the decision of the Company to request for arbitration within the stipulated period. It cannot be stated that the resolution of disputes by the Company would in any manner defeat the parties right to request for arbitration under clause 10 of the Act. In fact, it was only after Respondent No.1 – Company had filed the Summary Suit claiming an amount of Rs.1,34,97,544.87 in respect of the agreement i.e. for the price of goods sold by the Respondent No.1 – Company under numerous invoices, and had taken out Summons for

Judgment, that the Appellants instead of filing a reply to the Summons for Judgment purported to invoke arbitration under clause 10 of the agreement. It is to be noted that the Summary Suit was filed on 1st November, 2017 and the Summons for Judgment was also taken out prior to the purported invocation of the arbitration by the Appellants on 12th February, 2018. It has thus been correctly held by the learned Single Judge of this Court that the present application of the Appellants under Section 8 of the Act to refer the disputes in the Suit to arbitration is only by way of an after thought and an attempt to delay the Summary Suit proceedings.

7. The Supreme Court in ***Hindustan Petroleum (Supra)*** had in paragraph 14 held as under:-

14. This Court in the case of P. Anand Gajapathi Raju Vs. P.V.G. Raju (2000) 4 SCC 539 has held that the language of Section 8 is peremptory in the nature. Therefore, in cases 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. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the Civil Court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. In the

instant case the existence of an arbitral clause in the Agreement is accepted by both the parties as also by the courts below but the applicability thereof is disputed by the respondent and the said dispute is accepted by the courts below. Be that as it may, at the cost of repetition, we may again state that the existence of the arbitration clause is admitted. If that be so, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration.

8. It is thus clear that the Supreme Court has held that it was obligatory for the Court to refer the parties for arbitration “in terms of their arbitration agreement”. The terms of the arbitration agreement would necessarily have to be considered and particularly where the terms in Clause 10.1 of the agreement expressly provides for the stipulated time period of 30 days from the notification of the Company's decision for the Distributor to notify the Company of its request for arbitration. Hence, unless the request for arbitration is made within 30 days from the date of notification of the Company's decision, the decision taken by the Company shall be final and conclusive. In our considered view the learned Judge has correctly considered Clause 10.1 of the agreement. We find that there was no request for arbitration made within the prescribed period of 30 days and it was only after the filing of Summary Suit and taking of Summons for Judgment that the Appellants have sought the invocation of the arbitration

agreement. We further find that the decision of the Delhi High Court in ***Union of India (Supra)***, is inapplicable to the facts of the present case as in that case the Delhi High Court was considering the clause in the agreement which provided for conciliation. There was no time period provided for conciliation process or no provision to exclude the period spent in conciliation proceedings. Hence, it was in this context that the Delhi High Court held that if conciliation proceedings continue it was possible that the limitation period for filing arbitration may expire and that valuable rights of getting the disputes decided by arbitration will be extinguished. Thus, the Court held that such a pre-condition of mutual discussion cannot be held as mandatory. The Delhi High Court accordingly upheld the decision of the learned Single Judge who had allowed application under Section 8 of the Act. In the present case there is no exclusion of the Appellants right to request for arbitration and on the contrary clause 10.1 of the Act provides for the request for arbitration to be made within the stipulated period of 30 days from the date of notification of the Company's decision and if not made the decision of the Company shall be final and conclusive. Hence, it cannot be said that there has been any exclusion of arbitration by the dispute clause of the agreement in the present case.

9. We find no infirmity in the decision of the learned Single Judge who has correctly held that the Appellants have not satisfied the requirements of clause 10.1 of the agreement. We are also of the view that the Notice of Motion under Section 8 of the agreement has no merit taking into account the mandatory nature of the provision of Section 8 of the Act which shall be subject to the specific provisions of the Arbitration Agreement / Dispute Clause. The Appellants have not complied with the provisions of the dispute clause of the agreement by making its request within the stipulated period of 30 days from the date of notification of the Respondent No.1 – Company's decision. Hence, no case is made out for reference to arbitration.

10. The Appeal is accordingly dismissed.

(RIYAZ I. CHAGLA J.)

(B.R. GAVAI, J)