

THE HON'BLE THE CHIEF JUSTICE SRI THOTTATHIL B. RADHAKRISHNAN

ARBITRATION APPLICATION No.62 OF 2018

ORDER:

This is an Application under Section 11(6) of the Arbitration and Conciliation Act, 1996; hereinafter referred to as 'the Act'.

2. The applicant is a proprietary concern. According to it, a Sales Exclusivity Agreement; for short, 'SEA'; dated 02.07.2013 was entered into between the applicant and the respondent, which is also a proprietary concern. Disputes have arisen in relation to the said transaction and that there is an arbitration agreement between the parties, which is to the following effect:-

“Any dispute, controversy or claim arising out of or relating to the Agreement or breach thereof, that the Parties are not able to settle in a satisfactory manner, shall be finally settled by arbitration which consist of two arbitrators, each party appoints one and the two arbitrators nominate the third arbitrator. The place of Arbitration will be Hyderabad & Pune and the Arbitration shall be conducted as per the Indian Arbitration & Conciliation Act, 1996. The Arbitration shall be in English Language. The cost of Arbitration including except the fees of the Parties Arbitrator shall be paid equally. The Award passed by the majority shall be final and binding on all the parties. The award shall, except for reasons recorded in writing by the Tribunal shall be passed within a period of six months.”

3. On the plea that the respondent has failed to abide by the terms of the SEA and has also failed to appoint an Arbitrator in spite of the applicant having invoked the arbitration clause had appointed an Arbitrator, the requisite measure is sought for through this Application.

4. It is also placed on record that O.P.No.623 of 2016 seeking measure under Section 9 of the Act filed by the applicant is pending before the Chief Judge, City Civil Court, Hyderabad.

5. According to the respondent, there were business transactions between the applicant and the respondent for about two years prior to the SEA and that the said agreement was got prepared by the involvement of the son of the proprietor of the applicant and the son of the proprietor of the respondent for a period of five years and the respondent's signature was taken, but the agreement was not returned to her up to first week of September, 2013. It is the plea of the respondent that the terms of that agreement are one-sided and amounts to restriction of free trade and business, and it will affect the business of the respondent. According to the respondent, the said agreement would cause damage to her business in future and therefore, she had shown her intention to the applicant as per e-mail, dated 03.09.2013, to dissolve the agreement. The respondent also refers to proceedings under Section 9 of the Act and the appellate proceedings, which arose therefrom. According to the respondent, this application is barred by limitation and no cause of action survives since the SEA, dated 02.07.2013 between the parties was cancelled long back on 03.09.2013 by written intimation given by the respondent to the applicant and that as per further e-mails, dated 25.10.2013 and 26.10.2013, there was an understanding to finally stop the business.

6. Hearing the learned counsel for the appellant and the learned counsel for the respondent, it is demonstrated that the parties had entered into the SEA on 02.07.2013 at Hyderabad and the term of

that agreement is for five years going by clause 1.7 of that document. There is a provision for arbitration in the form of an arbitration agreement, which provides that any dispute, controversy or claim arising out of or in relation to the agreement or breach thereof, that the parties are not able to settle in a satisfactory manner, shall be finally settled by arbitration which consists of two arbitrators, each party appoints one and the two Arbitrators nominate the third Arbitrator. The place of arbitration was agreed to be Hyderabad and Pune and the arbitration to be conducted in terms of the Act. The language of arbitration is to be in English. Such clause also speaks about the cost of arbitration and other aspects. The arbitration agreement is part of that SEA, dated 02.07.2013, which is signed by both the parties and is attested by two witnesses.

7. The learned counsel for the respondent made reference to **Inder Singh Rekhi v. D.D.A.**¹, **Administrator of Union Territory of Daman and Diu v. R.D.Valland**², **State of Goa v. Praveen Enterprises**³, **Young Achievers v. IMS Learning Resources (P) Ltd.**,⁴ and **A.Ayyasamy v. A.Paramasivam**⁵ and argued that the claims raised are hopelessly barred by limitation and that the agreement stands cancelled. It was also suggested through the course of arguments on behalf of the respondent that the situation is one of novation of contract. Another contention raised is that on account of breach, the contract has been cancelled.

8. The contract having come into being with an arbitration agreement on 02.07.2013 as noted above, the said arbitration clause

¹ (1988) 2 SCC 338

² 1995 Supp (4) Supreme Court Cases 593

³ (2012) 12 SCC 581

⁴ (2013) 10 SCC 535

⁵ (2016) 10 SCC 386

between the parties is wide enough to take within its sphere all issues arising for decision, including the arbitrability of the claims and question whether there is breach of contract or even discharge of obligations of one party on account of breach of the other. The plea that the claims are barred by limitation are not of such nature which could be treated as those eligible to be dealt with as objections in opposition to Application under Section 11 of the Act by treating the claims as patently time barred. The issues raised are referable to the transactions between the parties in terms of the SEA. The plea of limitation is also one, which can be decided only by answering questions of fact as well on the basis of evidence that may have to be considered. This is not one of those cases where the applicant can be accused of pushing stale claims, which cannot be permitted to be carried forward by invoking Section 11 of the Act. For these reasons, the plea of the respondent in opposition of the application for appointment of Arbitrator is liable to be rejected.

9. Since the parties have not been able to follow the procedure for arbitration prescribed in the agreement, on the facts and in the circumstances of the case, I am satisfied that the requisite measure that is to be taken in terms of sub-sections (5) and (6) of Section 11 of the Act is to appoint a sole Arbitrator to decide on the issues with venue of arbitration being Hyderabad and/or Pune as may be found feasible by the learned arbitrator in the context of the contents of the arbitration agreement.

10. In the result, this Arbitration Application is allowed appointing an Arbitrator.

11. Accordingly, Sri Justice M.N.Rao, former Chief Justice of High Court of Himachal Pradesh, is appointed as Arbitrator to arbitrate on the disputes between the applicant and the respondent, including the claims and counter claims of both sides. The said Arbitrator shall enter on reference and proceed with, as enjoined by the Arbitration and Conciliation Act, 1996. No order as to costs.

THOTTATHIL B. RADHAKRISHNAN, CJ

02.11.2018
pln

