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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 3rd August, 2018

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O.M.P. (I) (COMM.) 127/2018

AVANTIKA ELCON PRIVATE LIMITED Petitioner

Through: Mr.Ashim Vaccher, Mr.P.Piyush,
Mr.Sumeet, Advs.

versus

MIRAENAN TECH CO, LTD

..... Respondent

Through: Mr.Kamal Mehta, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner *inter alia* making the following prayers:-

“a. pass an order thereby restraining the Respondent, its successors, employees, representatives, assigns etc. from entering into any agreement with any other third party for the products i.e. Retro Reflective Conspicuity Tapes for which approval have been obtained by the Petitioner Company; and

b. in the alternative and without prejudice to the prayer clause (a), as detailed hereinabove, in the event of Respondent Company having already entered into an Agreement with a Third Party including M/s. Ajit Industries Pvt. Ltd., an order is liable to be passed thereby restraining the Respondent Company, its employees, representatives, assigns, successors, etc. from selling its products, including Retro Reflective Conspicuity Tapes in India, either directly or by entering into any Agreement with any third party, including M/s.

Ajit Industries Pvt. Ltd.; and”

2. It is the case of the petitioner that the petitioner had been appointed as an exclusive agent/distributor by the respondent for its product ‘Retro-Reflective Conspicuity Tapes (Class C) RV-5000 series’ vide Agency Agreement dated 10th October, 2013. In terms of the said Agency Agreement, though the initial term of the agency was provided as two years, under Clause 3.2 thereof, there was to be an automatic renewal of the Agreement on the same terms and conditions save and except the Minimum Annual Performance Requirements.

3. It is contended by the counsel for the petitioner that the Agreement, therefore, was automatically renewed upon expiry of the period on 9th October, 2017.

4. The petitioner further contends that while the petitioner was performing its obligations under the Agreement, the respondent without any cause sought to terminate the Agreement vide its notice dated 13th February, 2018. It is submitted that such termination cannot be given effect to, as it was in violation of clause 14.4 of the Agreement, being not preceded by any notice of default granting the cure period to the petitioner. Relying upon clause 14.6.2 of the Agreement, it is further contended that even if the termination is held to be valid, the respondent cannot apply for a fresh approval of its products with the Government agencies and/or sell their products in India for a period of two years.

5. On the other hand, counsel for the respondent submits that upon

the expiry of the initial period of the Agency Agreement, the parties had entered into an Agreement providing for its renewal on 11th September, 2015. Therefore, from the conduct of the parties, it is apparent that even incase of an automatic renewal, the parties do execute a document evidencing the same. This was admittedly not done thereafter as there was no automatic renewal of the Agreement agreed to by the respondent. The learned counsel further, relying upon clause 3.2 of the Agreement, submits that the automatic renewal could have taken place only if the petitioner had not only complied with the terms and conditions of the Agency Agreement, but had also achieved the Minimum Annual Performance Requirements.

6. It is alleged by the respondent that in the present case, the petitioner is not only in default of payment of the price of the products delivered by the respondent to the petitioner but also failed to achieve the Minimum Annual Performance Requirements. It is further submitted that, without prejudice to its submission the Agreement had come to an end with the efflux of time, the respondent, as abundant caution, vide its notice dated 13th February, 2018 terminated the Agreement in exercise of its power under clause 14.2 read with clause 14.2.1 of the Agreement.

7. As far as Clause 14.6.2 of the Agreement is concerned, the counsel for the respondent submits that the said clause would be void in terms of Section 27 of the Indian Contract Act, 1872.

8. Counsel for the petitioner disputes the submissions made by the respondent and submits that there was no default in payment or in meeting with the Minimum Annual Performance Requirements. He

further submits that the notice dated 13th February, 2018 cannot be given effect to as it did not provide for a cure period as provided in Clause 14.4 of the Agreement.

9. As far as Clause 14.6.2 is concerned, the counsel for the petitioner places reliance on the judgment of this Court in ***Wipro Ltd. vs. Beckman Coulter International S.A.*** 131 (2006) DLT 681, to submit that in case of a commercial contract, the reasonableness of such condition has to be judged. In the present case, such condition of restraint is reasonable and therefore, cannot be held as falling foul of Section 27 of the Contract Act. He further submits that in any case, Clause 14.6.2 restricts the respondent from carrying on its business in India only and with respect to only one of its products, and there is no restraint on the respondent from carrying on its business in other parts of the world or in other products.

10. I have considered the submissions made by the counsels for the parties.

11. A few terms of the Agreement need notice. Clause 3 of the Agreement provides that the term of the Agreement is to be two years and Clause 3.2.2 provides for an automatic renewal, however, on fulfilment of certain conditions. Clause 3.2 is produced hereinbelow:

3.2 this Agreement shall be automatically renewed at the end of the Initial Term or any Renewal Term, as the case may be, if AVANTIKA shall have complied with all the terms and conditions hereof, and achieved the Minimum annual Performance Requirements. The renewal shall be on the same terms and conditions as set forth herein, save and except the Minimum Annual Performance Requirements which shall be increased in

accordance with the terms hereof, for successive periods of 2(two) year(s) (in each case a "Renewal Term"), unless either party shall have provided written notice to the other party that it does not intend to renew this Agreement at least [ninety(90)] days prior to the expiration of the Initial Term, or any Renewal Term, as the case may be or further provided written notice to the other party requiring revision in the terms which may be mutually agreed to by both the parties."

12. Counsel for the respondent has placed reliance on certain e-mails exchanged between the parties, more particularly e-mail dated 7th August, 2017 from the petitioner to the respondent and the e-mail dated 26th September, 2017 from the respondent to the petitioner, which *prima facie* show that the petitioner was in default of the payment terms under the Agreement.

13. Counsel for the respondent has further drawn my attention to Schedule B of the Agreement, which provides for the Minimum Annual Performance Requirements to be achieved by the petitioner. He further places reliance on the contents of paragraph 16 of the petition, which shows that the petitioner was unable to achieve the Minimum Annual Performance Requirements as stipulated in the Agreement.

14. Counsel for the petitioner submits that the Minimum Annual Performance Requirements could not be met as the State of Maharashtra refused permission to sell the product of the respondent on account of certain deficiencies being noted in the same, this was pointed out to the respondent, however, the respondent did not rectify the deficiencies and did not make further supplies of the goods.

15. In my opinion, as there is a *prima facie* case made out by the respondent with respect to the default in making payment in terms of the Agency Agreement as also the failure of the petitioner to achieve the Minimum Annual Performance Requirements, it cannot be said that the Agreement stood automatically renewed in terms of Clause 3.2 of the Agreement. Whether there was a justified cause for the petitioner to have not achieved the Minimum Annual Performance Requirements, is a dispute to be adjudicated by the Arbitrator on receiving evidence of the parties.

16. In this regard, reliance is also placed on Clause 14.2 read with clause 14.2.1 of the Agreement, which are reproduced herein below:

*“14.2 **MNTECH** may, without prejudice to any other rights, immediately terminate this Agreement by notice to **AVANTIKA** if;*

*14.2.1 **AVANTIKA** fails to achieve the Minimum Annual Performance Requirement in any year during the Term as set forth in Schedule “B” hereto (as deemed to be amended by Section 4.7 hereof); or”*

17. The respondent, relying upon the said clause (s) had issued a notice dated 13th February, 2018 terminating the Agreement. Whether such termination is valid or not is again a question to be determined by the Arbitrator. At this stage, *prima facie*, it cannot be said that such termination was invalid or cannot be given effect to.

18. In *Indian Oil Corporation Ltd. vs. Amritsar Gas Service & Ors.* (1991) 1 SCC 533, it was held that a contract, which is determinable in nature cannot be specifically enforced. Equally,

where the petitioner can be compensated in terms of money, the order of injunction cannot follow, even if the termination of the Agreement is held to be invalid. In this regard reference can also be made to judgment of this Court in *Classic Motors Ltd. vs. Maruti Udyog Ltd.* 65 (1997) DLT 166.

19. Clause 14.6.2 on which reliance has been placed by the counsel for the petitioner is reproduced hereinbelow:

“14.6.2 AVANTIKA shall have the rights to get the Type Approval Certificate, and other registrations cancelled / terminated, by virtue of which MNTECH shall not apply for a new fresh approval with any Govt. agencies through any source and will not sell the product in the territory for 2 years.”

20. Section 27 of the Contract Act provides that any Agreement by which one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. In *Gujarat Bottling Co. Ltd. v. Coca Cola Co.* (1995) 5 SCC 545, the Supreme Court held that:

31. If the negative stipulation contained in paragraph 14 of the 1993 Agreement is considered in the light of the observations in Esso Petroleum Co. Ltd., it will be found that the 1993 Agreement is an agreement for grant of franchise by Coca Cola to GBC to manufacture, bottle, sell and distribute the various beverages for which the trade marks were acquired by Coca Cola. The 1993 Agreement is thus a commercial agreement whereunder both the parties have undertaken obligations for promoting the trade in beverages for their mutual benefit. The purpose underlying paragraph 14 of the said agreement is to promote the trade and the negative stipulation under challenge seeks to achieve the said purpose by requiring GBC to wholeheartedly apply to promoting the sale of the products of Coca Cola. In that context, it is also relevant to mention that

the said negative stipulation operates only during the period the agreement is in operation because of the express use of the words “during the subsistence of this agreement including the period of one year as contemplated in paragraph 21” in paragraph 14. Except in cases where the contract is wholly one sided, normally the doctrine of restraint of trade is not attracted in cases where the restriction is to operate during the period the contract is subsisting and it applies in respect of a restriction which operates after the termination of the contract. It has been so held by this Court in N.S. Golikari wherein it has been said: (SCR p. 389)

“The result of the above discussion is that considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract than those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and therefore do not fall under Section 27 of the Contract Act. A negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one sided as in the case of W.H. Milsted and Son Ltd. [W.H. Milsted and Son Ltd. v. Hamp and Ross and Glendinning Ltd., 1927 WN 233] ”

32. *Similarly, in Superintendence Co. A.P. Sen, J., in his concurring judgment, has said that “the doctrine of restraint of trade never applies during the continuance of a contract of employment; it applies only when the contract comes to an end”.*

33. *Shri Shanti Bhushan has submitted that these observations must be confined only to contracts of employment and that this principle does not apply to other contracts. We are unable to*

agree. We find no rational basis for confining this principle to a contract for employment and excluding its application to other contracts. The underlying principle governing contracts in restraint of trade is the same and as a matter of fact the courts take a more restricted and less favourable view in respect of a covenant entered into between an employer and an employee as compared to a covenant between a vendor and a purchaser or partnership agreements. We may refer to the following observations of Lord Pearce in Esso Petroleum

“When a contract ties the parties only during the continuance of the contract, and the negative ties are only those which are incidental and normal to the positive commercial arrangements at which the contract aims, even though those ties exclude all dealings with others, there is no restraint of trade within the meaning of the doctrine and no question of reasonableness arises. If, however, the contract ties the trading activities of either party after its determination, it is a restraint of trade, and the question of reasonableness arises.”

34. *Since the negative stipulation in paragraph 14 of the 1993 Agreement is confined in its application to the period of subsistence of the agreement and the restriction imposed therein is operative only during the period the 1993 Agreement is subsisting, the said stipulation cannot be held to be in restraint of trade so as to attract the bar of Section 27 of the Contract Act. We are, therefore, unable to uphold the contention of Shri Shanti Bhushan that the negative stipulation contained in paragraph 14 of the 1993 Agreement, being in restraint of trade, is void under Section 27 of the Contract Act.”*

21. In ***Percept D’Mark (India) (P) Ltd. vs. Zaheer Khan & Anr.***, (2006) 4 SCC 227, the Supreme Court has held as under:-

“54. *On the pleadings contained in the arbitration petition, there can be no escape from the conclusion that what the appellant sought to enforce was a negative covenant which,*

according to the appellant, survived the expiry of the agreement. This, the High Court has rightly held is impermissible as such a clause which is sought to be enforced after the term of the contract is prima facie void under Section 27 of the Contract Act.

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56. The legal position with regard to post-contractual covenants or restrictions has been consistent, unchanging and completely settled in our country. The legal position clearly crystallised in our country is that while construing the provisions of Section 27 of the Contract Act, neither the test of reasonableness nor the principle of restraint being partial is applicable, unless it falls within express exception engrafted in Section 27.”

22. In the present case as the restraint on the respondent would operate after the termination of the Agency Agreement, Clause 14.6.2 of the Agreement shall be void in terms of Section 27 of the Contract Act. As held by the Supreme Court in ***Percept D’Mark***’(Supra), the applicability of Section 27 of the Act cannot be withered by applying test of reasonableness or the partial applicability of the restraint. The petitioner is therefore, not entitled to seek an injunction relying upon Clause 14.6.2 of the Agreement.

23. In view of the above, I find no merit in the present petition and the same is accordingly dismissed with no order as to costs. I may hasten to clarify that all observations made by me are only *prima facie* in nature and shall not bind or influence the Arbitral Tribunal that may be constituted by the parties in accordance with the Agency Agreement.

NAVIN CHAWLA, J.

AUGUST 03, 2018
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