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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 11th October, 2018

+ ARB.P. 525/2018 & CrI.M.A. 34071/2018

ICETRAIL LOGISTICS PVT. LTD. Petitioner

Through: Mr.Dayan Krishanan, Sr.
Adv.with Mr.Vijay Kaundal
and Mr.Nitish K.Sharma,
Advs.

versus

KUEHNE +NAGEL PVT. LTD. Respondent

Through: Mr.Sudhir Nandrajog, Sr. Adv.
with Ms.Radhika Dubey,
Ms.Ruchi Choudhary and
Mr.Gaurav Gupta, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner seeking appointment of a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Agreement dated April, 2013. The said Agreement contains an Arbitration Agreement in form of Clause 22 thereof, which is reproduced hereinbelow:

“22.It is mutually decided by both the parties that in case of any dispute or difference of opinion arising out of or in connection with this agreement (including the

validity or interpretation hereof) shall be referred for settlement to Mr. Peter Gaehwiler, who is presently the Asia Pacific CFO of the Second Party. Only if the difference is not resolved, the unresolved issue, dispute or difference of opinion shall be settled through arbitration in India in accordance with the provisions of the Indian Arbitration & Conciliation Act, 1996. The venue of the arbitration shall be Delhi/NCR. The arbitration award shall be fully binding on both the Parties.”

2. The disputes having arisen between the parties, the petitioner invoked the Arbitration Agreement vide notice dated 09.05.2018.
3. The respondent in its reply dated 24.05.2018, while dealing the claims of the petitioner, *inter-alia* stated as under:

“3 a. Recently, KN has learned certain information that raises suspicions regarding the validity of the Agreement and the manner in which it was executed. Our investigation into this matter is ongoing, and we hereby reserve the right to challenge the Agreement itself and its signing as procured by fraud on the part of Icetrail and those acting in concert with it. Given that the surrounding circumstances may permeate the Agreement itself and the Agreement may be fraudulent and therefore invalid, the Parties cannot be relegated to arbitration with respect to issues or disputes arising from and/or connected with the Agreement.”

4. As the respondent did not agree on the appointment of an Arbitrator, the present petition was filed by the petitioner.
5. The respondent in its reply to the petition has again reiterated that the Agreement in question is a result of fraud exercised by Mr. Peter Gaehwiler who was the Director of the respondent company. In support of this contention, learned senior counsel for

the respondent draws my attention to the Minutes of Meeting of the Board of Directors of the respondent Company held on 09.04.2013 and submits that by way of said Minutes, Mr.Peter Gaehwiler authorised himself to execute the contract with the petitioner without disclosing that he had an interest in the petitioner company inasmuch as he was dealing with the Directors of the petitioner company in relation to some business transaction. He places reliance on e-mails dated 09.11.2012 and 25.11.2012 addressed by Mr.Peter Gaehwiler to certain persons including the Directors of the petitioner company.

6. He further submits that though the Minutes of Meeting of the Board of Directors records that the final copy of the Agreement has been placed before the Board, the e-mail of the same date shows that only a draft of the proposed Agreement had been exchanged. He submits that the recording in the Minutes of Meeting is itself incorrect.

7. Learned senior counsel for the respondent has further stated that when the said Agreement was signed, the respondent was already in the process of carrying out due diligence of the petitioner company and as a matter of internal policy of the respondent, the respondent does not execute any Agreement before the completion of such due diligence process. Mr.Peter Gaehwiler was aware of the pendency of the due diligence process and also the policy of the respondent company and still entered into and executed the said Agreement. He also places reliance on an e-mail dated 05.11.2015 purportedly received by the respondent from one Mr.Suranjan De, former CEO of the petitioner company, making complaints regarding

procedural violations committed by the petitioner in relation to the various statutory compliance.

8. He further submits that the petitioner did not even have the necessary licence for carrying out the work of custom clearing agent and realising this fact, an employee of the respondent company had been transferred to the rolls of the petitioner thereby causing legal ramifications to the respondent inasmuch as it has been made subject to penalty proceedings vide order dated 10.01.2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi.

9. I have considered the submissions made by the learned senior counsel for the respondent, however, I do not find any reason for denying the appointment of an Arbitrator to adjudicate the disputes that have arisen between the parties in relation to the Agreement dated April, 2013.

10. Section 11(6A) of the Act confines the scope of scrutiny of this Court only to the extent of the existence of an Arbitration Agreement between the parties. Such existence cannot be denied and is not disputed by the respondent. The only allegation is that the Agreement has been obtained as a result of fraud exercised on the respondent.

11. I have already narrated the above circumstances that have been alleged by the respondent in support of this plea of fraud. Only to form a *prima facie* opinion, it is seen that the Agreement was executed in April, 2013. Admittedly, it was given effect to by the respondent as well. The Agreement got its approval from the Board of Directors of the respondent and presently there is no allegation against the other Members of the Board of Directors of the

respondent company. The due diligence on which reliance has been placed is also dated 16.08.2013. It is not shown why the Agreement was not terminated by the respondent, though at least five years have passed since then.

12. As far as the e-mail received from Mr.Suranjan De is concerned, it is also dated 05.11.2015. It is again not shown what further action has been taken by the respondent to avoid the Agreement after receipt of the said e-mail.

13. On the other hand, learned senior counsel for the petitioner has drawn my attention to the e-mail dated 26.12.2017 by which the petitioner had raised certain claims on the respondent. This was followed by a letter dated 08.01.2018 and a notice dated 20.01.2018. The respondent replied to the said notice vide its letter dated 06.04.2018, however, there was no allegation of the Agreement executed between the parties being vitiated by fraud. It is only after the petitioner had invoked the Arbitration Agreement that a vague allegation of fraud, as has been reproduced hereinabove, was raised by the respondent in its reply dated 24.05.2018.

14. Therefore, *prima facie* at this stage the plea of the respondent that the Agreement between the parties is vitiated by fraud cannot be accepted. In any case this is a matter for trial and for the Arbitrator to adjudicate after receiving the evidence from the parties.

15. The Supreme Court in ***A.Ayyasamy v. A.Paramasivam and Ors.***, (2016) 10 SCC 386, has summarised the law as to when allegations of fraud vitiate the Arbitration Agreement and stated as under:

“25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simpliciter may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the court has to be on the question as to whether jurisdiction of the court has been ousted instead of focusing on the issue as to whether the court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of non-arbitrable subjects are carved out by the courts, keeping in mind the principle of common

law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, courts i.e. public fora, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject-matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected.”

16. It was further held as under:

“53. The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. Minimising the intervention of courts is again a recognition of the same principle.”

17. In view of the above, I see no impediment in appointing a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the abovementioned Agreement.

18. I appoint **Justice D.K.Jain**, Former Judge of the Supreme Court of India, (C-4/3, Ground Floor, Safdarjung Development Area, New Delhi-110016 Mobile-9999922288) as an Arbitrator for adjudicating the disputes that have arisen between the parties.

19. The Arbitrator shall give his disclosure under Section 12 of the Act before proceeding with the reference.

20. All the pleas of the parties shall remain open before the Sole Arbitrator, who shall consider the same without being influenced by any observation made in the present order.

21. The petition is allowed in the above terms with no order as to costs.

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Learned counsel for the petitioner does not press the present application. In view of the same the application is dismissed.

NAVIN CHAWLA, J

OCTOBER 11, 2018/Arya