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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment pronounced on: 08.11.2019

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FAO 411/2016

ALL NIPPON AIRWAYS COMPANY LIMITED Appellant

Through: Mr. Alok Mahajan, Mr. Neeraj Atri, Mr.
Rajesh Arya and Mr. Abhay M., Advocates.

versus

JAPAN TRAVEL SERVICE & ANR.

..... Respondents

Through: Mr. Salman Khurshid, Mr. Anil Kher
and Mr. D.R. Bhatia, Senior Advocates with Mr.
Kunal Kher, Ms. Namita Sharma, Ms. Subiya
Akbar Warsi, Mr. Kapil Kher, Mr. Zulnoor
Ahmed, Mr. Saurav Roy, Mr. Zafar Khurshid and
Mr. Rishi Manchanda, Advocates.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J

FAO 411/2016 & CM APPL. 30975/2016

1. This appeal impugns the order dated 08.06.2016 passed by the learned ADJ in Suit No. 145/2016, dismissing the applicant's application under section 45 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act"). It also allowed the respondents'/ plaintiffs' application under Section 42 of the Act. It held that it had jurisdiction to adjudicate the suit and that the "Jurisdiction Clause" in the agreement between the parties did not confer exclusive jurisdiction upon the Courts in Japan. It noted that since the appellant had already invoked the jurisdiction of the Delhi Courts, therefore, under section 42 of the Act, the suit would be maintainable.

FACTS:

2. The appellant is an airline company incorporated under the laws of Japan. By an agreement signed in 1996, it appointed respondent no. 1 as its General Sales Agent in India for (i) sale of passenger seats, and (ii) sale of cargo space. The agreement was renewed from time to time. The last renewal was on 01.01.2003. The respondents did not remit to the petitioner an amount of about Rs. 9,37,17,690/-, so a dispute arose.

3. The *lis* was referred to Arbitration. An Arbitral Award was made in Tokyo. It was sought to be enforced by the appellant before this Court. The request was declined. By the order dated 10.11.2009, liberty was granted to the redressal of its grievances by involving Disputes Resolution Mechanism in accordance with the agreement between the parties.

4. The appellant sought protection of the amount in dispute in OMP Nos. 300/2008 and 301/2008, wherein the statement of the counsel for the respondents was recorded on 18.11.2008 to the effect that: *“he states that in the meanwhile the respondent nos. 1 to 3 have no intention of selling, or alienating, immovable property No. C-14, Westend, New Delhi, without the permission of this Court .”* Another statement was made by the learned counsel for the respondents to the effect that: *“the statement made on 18.11.2008 in OMP Nos. 300/2008 and 301/2008 shall bind the respondents for a further period of six months from today.”* The said protection was directed to be continued to operate till further orders. On 13.04.2012 in OMP No. 270/2010, it was held that *“interim order passed in the present petition on 14.05.2010 will continue till such time it is modified in the arbitration proceedings, if any, or any of the other proceedings in the Court.”*

5. Pursuant to the liberty granted to the appellants by the aforesaid orders, the appellants, in accordance with the agreements and the laws,

issued a notice on 21.01.2010 to respondent nos. 1 and 2, seeking reference to Arbitration. The latter declined the reference by a letter dated 18.02.2010. The letter was filed before the Tokyo District Court, Japan on 12.04.2010 under Article 17 of the Arbitration Act of Japan seeking the appointment of an Arbitrator, on the ground that there was no agreement between the appellant and respondent nos. 1 and 2 on procedure for appointment of an Arbitrator, to resolve disputes between them. A reply was filed by respondent nos. 1 and 2 before the Tokyo District Court, Japan. The said Court appointed a Sole Arbitrator on 14.11.2011.

6. The respondents filed Suit No. CS (OS) No. 229/2010 before this Court seeking declaration and injunction against the said appointment of the Arbitrator. The appellant filed an application under section 45 of the Arbitration and Conciliation Act, 1996 seeking that the parties be referred to arbitration in view of the arbitration clause contained in the agreement entered into between the parties, whereas, the respondents/plaintiffs filed an application under section 42 of the said Act seeking to restrain the appellant from initiating or continuing the proceedings against them with respect to the Arbitration Agreement dated 01.01.2003, before any other Court than the Delhi High Court.

7. The plaintiff had in the alternative, sought interim orders to the effect that even if the defendant continues with any arbitration proceedings before any other court, such proceedings and subsequent action thereto by the appellant, shall be subject to final disposal of the suit pending before this Court.

8. The appellant had sought dismissal of the suit on the ground that it was identical to the two suits filed earlier, being CS(OS) Nos. 1403/2007

and 1569/2007. The aforementioned suits were disposed off on 13.03.2009 by this Court with the direction that the plaintiff cannot be permitted to continue with two separate set of proceedings for the same relief, one by way of a suit and the other by way of filing of objections against the Arbitral Award. All objections of the plaintiff arising out of the Agreement dated 05.02.2008 were considered while deciding the objection petitions of the plaintiff being OMP Nos. 383/2008 and 384/2008. The said objections were disposed-off by order dated 10.11.2009. It disposed off four OMPs, declining to enforce and execute the earlier arbitral award in favour of the appellant, however, it granted liberty to the parties to seek redressal of their grievances, by invoking the Disputes Resolution Mechanism in accordance with the agreement executed between the parties, as well as in accordance with law. Subsequent to change in pecuniary jurisdiction of courts in Delhi, the said Suit No. C.S. (OS) No. 229/2010 was transferred to the District Court where it was renumbered as Suit No. 145/2016.

9. The learned Sole Arbitrator commenced arbitral proceedings on 06.03.2012; the parties filed their representations and written submissions from time to time; the respondents raised various issues and contentions in their written submissions. The arbitral award was passed on 29.05.2014 against respondent no. 1 determining *inter alia* that: (i) the Arbitrator had jurisdiction to determine the appellant's claim against respondent no. 1, (ii) that respondent no. 1 breached the Agreement dated 01.01.2003 by failing to make payment to the claimant of sums due thereunder, (iii) that respondent no. 1 shall pay the claimants the sum of Rs. 62,598,215.11/- together with simple interest on Rs. 54,128,317.59 at the rate of 18.25% per annum from 01.02.2007 till the date all such amounts are paid in full, and (iv) the

Agreement for appointment of a General Sales Agent in India stood terminated w.e.f 13.07.2007.

ARGUMENTS:

10. It is the appellant's contention that the impugned order has erred in holding that since the earlier round of section 9 proceedings had invoked jurisdiction of Delhi courts, section 42 of the Act would be applicable and the suit would, therefore, be maintainable in Delhi. He contends that Part-I of the Arbitration & Conciliation Act, 1996 is applicable only to domestic arbitration. He relies upon the dicta of the Supreme Court in ***Bharat Aluminium Company vs Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 552*** as well as ***Eitzen Bulk a/S vs Ashapura Minechem Ltd. & Anr. JT 2016 (5) SC 186*** to the effect that Part –I of the Act, which also includes section 42 of the Act, would not be applicable to foreign awards like the one made in the present proceedings. It held as under:

Bharat Aluminium Company (supra)

24. Finally, he submits that the decision in Bhatia International [(2002) 4 SCC 105] is a harmonious construction of Part I and Part II of the Arbitration Act, 1996. He further submits that Venture Global Engg. v. Satyam Computer Services Ltd. [(2008) 4 SCC 190] (hereinafter referred to as “Venture Global Engg. [(2008) 4 SCC 190]”) has been correctly decided by this Court. Mr Subramaniam further pointed out that the judgments of this Court in Oil and Natural Gas Commission v. Western Co. of North America [(1987) 1 SCC 496] and NTPC v. Singer Co. [(1992) 3 SCC 551] have appropriately set aside the awards challenged therein even though the same were not made in India.

28. The Indian law has consciously and correctly departed from the same and chosen only the nationality test for defining an arbitration as “international” as is apparent from Section 2(1)(f) of the Arbitration Act,

1996. Relying on the provision of Sections 2(2), 20 and 28, he further submits that the Arbitration Act, 1996 precludes Indian parties to a purely domestic dispute from choosing a place of arbitration outside India. Mr Kumar goes even further to submit that when both the parties are Indian, the substantive law governing the dispute must necessarily be Indian irrespective of the situs of the arbitration and irrespective of any provision in the contract between the parties to the contrary. He submits that the same principle applies with equal force to the arbitration law too, that is to say, that if it is not open to two Indian parties with regard to an entirely domestic dispute to derogate from the Indian laws of contract, evidence, etc. it is equally not open to them to derogate from the Indian arbitration law either. He relies on the judgment of this Court in *TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd.* [(2008) 14 SCC 271] paras 19, 20 and 23. He, however, very fairly points out that this was a case under Section 11 and the point in issue here did not specifically arise for consideration in the said case.

11. The learned counsel for the appellant also relies upon the dicta of the Supreme Court in *IMAX Corpn. v. E-City Entertainment (India) (P) Ltd.*, (2017) 5 SCC 331, which held as under:

“.... 26. The arbitration clause appears consistent with Section 2(7) of the Arbitration Act, 1996 which recognises the freedom to authorise any person including an institution to determine an issue such as the choice of the place of arbitration.

27. Dr Singhvi rightly submitted that the decisions of the Court in *Sakuma Exports Ltd. v. Louis Dreyfus Commodities Suisse Sa* [*Sakuma Exports Ltd. v. Louis Dreyfus Commodities Suisse Sa*, (2015) 5 SCC 656 : (2015) 3 SCC (Civ) 225] , *Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd.* [*Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd.*, (2015) 9 SCC 172 : (2015) 4 SCC (Civ) 341] , and *Reliance Industries*

Ltd. v. Union of India [Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 : (2014) 3 SCC (Civ) 737] do not help the appellant in view of the main difference between the abovementioned cases and the present one i.e. in all these cases, the parties had specifically agreed that the seat of arbitration will be London. The arbitration clause in these cases itself specified the seat to be at London. In Reliance Industries Ltd. [Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603 : (2014) 3 SCC (Civ) 737] , the agreement that the seat of arbitration would be London was incorporated in the final partial award.

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29. *We find that in the present case, the seat of arbitration has not been specified at all in the arbitration clause. There is however an agreement to have the arbitration conducted according to the ICC Rules and thus a willingness that the seat of arbitration may be outside India. In any case, the parties having agreed to have the seat decided by ICC and ICC having chosen London after consulting the parties and the parties having abided by the decision, it must be held that upon the decision of ICC to hold the arbitration in London, the parties agreed that the seat shall be in London for all practical purposes. Therefore, there is an agreement that the arbitration shall be held in London and thus Part I of the Act should be excluded.*

30. *The construction that the parties agreed to exclude the applicability of Part I of the Act and generally to have the entire agreement governed not according to Indian law is also apparent from the express provision that:*

“This agreement shall be governed by and construed according to laws of Singapore and parties attorn to jurisdiction of the courts of Singapore.”

31. *In para 25 of NTPC v. Singer Company [NTPC v. Singer Company, (1992) 3 SCC 551] , this Court held: (SCC p. 564)*

“25. ... On the other hand, where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract.”

This principle is again reiterated in Sakuma Exports Ltd. [Sakuma Exports Ltd. v. Louis Dreyfus Commodities Suisse Sa, (2015) 5 SCC 656 : (2015) 3 SCC (Civ) 225] This stipulation expressly excludes Part I of the Act because it governs both the principal agreement as well as the accompanying arbitration agreement..”

12. The learned counsel for the respondents refutes the appellant's contentions on the ground that: i) since the application under section 9 of the Act was moved and dealt with by order dated 14.05.2010, therefore, the jurisdiction of this Court had already been secured, and ii) all-the-more because there is no exclusive jurisdiction of the Court's of Japan under Clause-13 of the Agreement between the parties.

ANALYSIS:

13. In the present case, the terms of the contract would be relevant. The agreement governing the relation between the two parties was signed in the year 1996; the last renewal being on 01.01.2003. In it, the relevant provision of the agreement concerning arbitration and the law governing jurisdiction are as under:

“.. Clause 13 – Arbitration

“A) the Principal and the Agent hereby agrees that any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Tokyo, Japan in accordance with the Arbitration Rules of the Arbitration Institute, Ministry of

Justice (Japan) for the time being in force, which Rules are deemed to be incorporation by reference into this Clause. There shall be a sole arbitrator to be appointed by the Director of the Arbitration Office. The language of the arbitration shall be the English Language.

Clause 12 – Governing Law and Jurisdiction

A) Governing Law: This agreement shall be governed by and construed in accordance with the laws of Japan.”

14. The agreement for the appointment for a general sales agent cargo and mail dated 01.01.2003 between All Nippon Airways Co. Ltd. and Stic Travels Pvt. Ltd. governing law and jurisdiction reads as under:

“...Governing Law: This Agreement shall be governed by and construed in accordance with the laws of Japan.

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Jurisdiction: In relation to any legal action or proceedings arising out of or in connection with this Agreement (Proceedings’), each party irrevocably submits to the non-exclusive jurisdiction of the ‘courts of Japan, and waives any objection to Proceedings in any such court on the grounds of venue or on the grounds that the Proceedings have been brought in an inappropriate or inconvenient forum..”

15. The two separate agreements between the appellant and respondent no.1 show from the abovequoted stipulations that the parties had clearly agreed that the dispute shall be resolved by arbitration in Tokyo, Japan in accordance with the Arbitration Rules of the Arbitration Institute, Ministry of Justice (Japan) and that those rules were deemed to be incorporated in the aforesaid agreement dated 01.01.2003. The sole arbitrator was to be appointed by the Director of the Arbitration Office, Japan. Quite unequivocally, the seat of the arbitration, the manner of arbitration and the applicable law was clearly agreed between the parties. This leaves no scope for any doubt or interpretation. All that clause 12A seeks to ensure for the

parties is, that the applicable law of arbitration, is not in conflict with the laws of either of the contracting parties. In the present case, the Japanese law should not be in conflict with the Indian law. While the parties had submitted to the non-exclusive jurisdiction of the Courts of Japan, they had simultaneously and equally unequivocally agreed in clause 13A to the resolution of disputes in terms of the rules of arbitration instituted and its seat being Tokyo, Japan, and that Japanese law would be applicable. By agreeing to the seat of arbitration in Tokyo, Japan, the parties had clearly excluded the applicability of Part-I of the Act. That being the position, relying upon the dicta of the Supreme Court in *IMAX Corpn.* (supra), where the parties had “agreed to exclude the applicability of Part-I of the Act and generally to have the entire agreement governed not according to Indian Law”, this Court is of the view that an application under section 42 of the Act would not be maintainable and the same ought to have been dismissed.

CONCLUSION:

16. The impugned order dated 08.06.2016 has erred in this regard. Accordingly, it is set aside. The respondent’s application under section 42 of the Act should have been dismissed. The appellant’s application i.e. IA No. 15367/2015 in CS(OS) 229/2010 under s. 151 Code of Civil Procedure, 1908, seeking dismissal of the suit ought to have been allowed. Accordingly, the Suit No. 145/2016 stands dismissed.

17. The appeal is allowed and disposed off accordingly.

NAJMI WAZIRI, J

NOVEMBER 08, 2019_{/rw/kk}