

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.01.2020

Dated : 05.02.2020

Coram

The Honourable Mr.Justice M.M.SUNDRESH
and
The Honourable Mr.Justice KRISHNAN RAMASAMY

Original Side Appeal Nos.240 and 299 of 2019
& CMP No.20905 of 2019

O.S.A.No.240 of 2019

Rasi Travels & Cargo Pvt. Ltd.,
No.498, Karumuthu Centre,
Anna Salai, Chennai-600 035. Appellant
Rep by its Director

Vs.

Interglobe Technology Quotient Pvt. Ltd.,
A company having its Registered Office at
Central Wing, Ground Floor,
Thaper House, 124, Janpath,
New Delhi-110 001. Respondent

O.S.A.No.299 of 2019

Interglobe Technology Quotient Pvt. Ltd.,
A company having its Registered Office at
Central Wing, Ground Floor,
Thaper House, 124, Janpath,
New Delhi-110 001.Rep., by its Director. ... Appellant

Vs.

M/s Indtrust Travels,
No.10, Thiru Vi. Ka Road, Royapettah,
Chennai-600 014. ... Respondent

Original Side Appeals are filed under Order XXXVI Rule 1 of
the Original Side Rules read with Clause 15 of the Letters
Patent against the common order dated 30.04.2019 made in
O.P.Nos.247 and 248 of 2019.

Prayer in OP Nos.247 & 248 of 2019 : Original Petitions filed under Section 34/2 of the Arbitration and Conciliation Act, 1996 seeking to set aside the award dated 20.11.2018 and made in Arbitration Case No.1/2016.

For Appellant : Mr.P.Giridharan
in OSA.240/2019
& respondent in
OSA.299/2019

For Appellant : Mr.Karthik Ram Mohan for
in OSA.299/2019 M/s S.Ramasubramaniam & Associates
& respondent in
OSA.240/2019

COMMON JUDGMENT

M.M.SUNDRESH, J.

As both the appeals arise out of the common order passed by the learned single Judge in O.P.Nos.247 and 248 of 2019 on 30.04.2019 involving the same award, they are taken up together and disposed of by way of a common judgment.

2.For the same of brevity, the appellant in O.S.A.No.299 of 2019 is referred as the claimant and the appellant in O.S.A.No.240 of 2019 is referred as the first respondent while the respondent in O.S.A.No.299 of 2019 is referred as the second respondent.

3.Brief Facts:-

3.1.The claimant is the official distributor of "Global Distribution System"(hereinafter referred to as the 'GDS system') called as 'Galileo system' in Territory of India. The respondents 1 and 2 are engaged in the business of 'Travel Agency'.

3.2.'GDS system' enables the travel agents to make bookings and reservations, such as, flight tickets, hotel rooms, car rentals through a single access point and other travel related services. Accordingly, the travel agent, who receives a request from one of his customers, can make necessary bookings /reservations for travel, stay and transport etc., through it.

3.3.Agreements have been entered into between the claimant on the one hand and the respondents on the other hand on 21.09.2007 for the usage of GDS system of the claimant. As per

the terms of the agreements, the claimant has agreed to provide at his costs a requisite hardware and software for the usage of the system. The needed infrastructure is also provided by them. In furtherance of it, they also paid certain amounts to the respondents.

3.4. In turn, the respondents were to use only the 'Galileo system' of the claimant as the sole GDS in all the offices. The terms of the agreement was 36 months and the respondents were to use it from 01.10.2007. The respondents were also to generate requisite number of segments per quarter, which were nothing but bookings. The following are the relevant clauses contained in the agreements entered into.

"Important: In case of a failure to produce a minimum of 75% of the lowest slab (i.e., 8000 segments a quarter), ITQPL reserves the right to recover the cost of our investments."

"Validity of this Offer:

This offer is valid for a minimum of 12 months and to the maximum of 36 months. Either party wishing to annul the agreement after the expiry of 12 months will have to serve a notice period of three months. If Rasi Travels and Ind Trust Travels decides to move out of Galileo after the completion of 12 months. Then the Sign up amount should be paid back to ITQPL on pro-rata basis for the balance period. Also the unadjusted upfront should be returned to ITQPL. The notice period has been fixed keeping in mind the investment that goes into setting up the terminals at your company location(s)."

"Other terms:

5. It is agreed by Rasi Travels and Cargo Pvt. Ltd., and Ind Trust Travels and Cargo Pvt. Ltd., that they will use Galileo as SOLE GDS in all their offices.

6. This offer is valid for a period of 36 months starting from October 01, 2007."

3.5. The respondents did not comply with the terms of the agreements, legal notices were issued preceded by the communication sent under Exs.C6 and C7. Further legal notices were also issued under Exs.C10 to C12. Exs.C10 and C12 are pertaining to the second respondent. The first respondent has replied under Ex.C14.

3.6. The claimant approached the High Court of Delhi by filing an arbitration application in Application No.56 of 2012 invoking Section 11(5) of the Arbitration and Conciliation Act,

1996. This application was filed against the second respondent. In the said application, the claimant has raised the following averments.

"4.Names and addresses of Arbitrator appointed by the Parties:

The Parties herein have not appointed any arbitrator to adjudicate upon the disputes that have arisen out of and in terms of the Subscriber Agreement.

In view of the disputes and differences that arose between the Parties, as more particularly stated hereinafter, the Applicant invoked the Arbitration Clause as contained in Clause 3 of Other terms of the Subscriber Agreement, vide Notice for Arbitration, dated 21.10.2010 ("Arbitration Notice"), for initiation of arbitration proceedings and appointment of arbitrator in terms of the Subscriber Agreement. Respondent failed to respond to and/or comply with the Arbitration Notice and, consequently, the Applicant issued another notice, dated 02/11/2011, for appointment of an arbitrator ("Notice for Appointment") and proposed that arbitration be conducted under the aegis of the Delhi High Court Arbitration Centre ("DAC"), New Delhi, through a sole arbitrator appointment there from. The Applicant requested the Respondent to accord its consent to the aforesaid proposal for Arbitration by signing and returning to the Applicant, within thirty days from the date of receipt of the Notice for Appointment, the Joint Memorandum of the DAC that had been enclosed therewith. The Respondent failed and neglected to respond to the Notice for Appointment within the 30 days period stipulated therein and, thus, the Parties herein could not reach an agreement with regard to the appointment of a sole arbitrator."

3.7.In the preliminary objection filed, an objection had been raised that the agreement is only an offer and therefore, the application is not maintainable. Consequently, the jurisdictional issue has also been raised. Before the Delhi High Court, the claimant filed requisite document, including the legal notice dated 22.11.2011 (Ex.C12), along with the original postal receipt and original acknowledgement card. Thereafter, the said application was withdrawn in view of the objections raised in the maintainability qua the forum. Orders, thereafter, have been obtained from this Court leading to

arbitration proceedings.

3.8.The claimant initiated arbitration proceedings before the learned Arbitrator against both the respondents. While the first respondent made submissions on merit while taking the plea that the other document filed and marked as Ex.C1 is tampered apart from being a photo copy and therefore, cannot be looked into.

3.9.The first respondent took up the plea of limitation on the premise that the notice mandated under Section 21-A of the Act has not been served.

3.10.The learned Arbitrator framed the following issues.

- "1.Whether the offer made by the claimant under offer Number ITPL/BLR/044-1912 (agreement) was made to the Respondents 1 and 2 jointly or individually?
- 2.Whether the Respondents have used Galileo as the Sole GDS in all their offices as per the terms of the Agreement dated 21.09.2007?
- 3.Whether the Respondents were to jointly or individually generate the segments under the agreement bearing number ITPL/BLR/044-1912 dated 21.09.2007?
- 4.Whether the Respondents have jointly or individually achieved the minimum number of segments per quarters as per the Agreement dated 21.09.2007?
- 5.Whether the Respondents have violated the provisions of the Agreement dated 21.09.2007?
- 6.Whether the Claimant/Respondents have filed a forged/fabricated copy of the agreement entered between the parties?
- 7.Whether the termination of the agreement by the claimant is wrongful?
- 8.Whether the arbitration claim is barred by limitation?
- 9.Whether the Claimant is entitled to interest at the rate of 18% per annum on the amounts prayed for under prayers a,b,c and d of the Claim Statement?
- 10.Whether the Claimant is entitled to costs?
- 11.To what reliefs are the parties entitled to?"

3.11.After answering the issues, it was held that Ex.C1 filed by the first respondent alone is fabricated. On the question of limitation, the learned Arbitrator was pleased to hold that having participated in the earlier proceedings, it

is not open to the second respondent to take a contra stand.

3.12. Accordingly, an award was passed against the respondents. Both of them have filed appeals before this Court invoking Section 34 of

the Arbitration and Conciliation Act. The learned single Judge while dismissing O.P.No.248 of 2019 filed by the first respondent, allowed the O.P.No.247 of 2019 filed by the claimant on the sole ground of limitation on 30.04.2019. Thus, both the appeals are before us.

4.Submissions of the Claimant:-

4.1.The learned counsel appearing for the claimant submitted that there is a concurrent finding given on the genuinity of Ex.C1 as against the first respondent. It is the first respondent, who fabricated the documents. Even otherwise, the learned Arbitrator has given a finding on the question of failure to produce the minimum of 75% of the lowest slab and the usage of the system belonging to others.

4.2.Insofar as the O.S.A.No.299 of 2019 is concerned, it is submitted that the learned single Judge has committed an error in ignoring Ex.C19, which contains entire documents and proceedings before the Delhi High Court pertaining to Section 11 application, this shows not only the legal notice is not in tune with Section 21-A of the Act, but also the original acknowledgement. It is further submitted that as per the clause containing other terms, particularly, sub clause No.6, the offer is valid for a period of

thirty six months starting from October 1, 2007. Thus, looking from any perspective, the claim petition is well within the limitation. The respondent did not even raise any plea before the Delhi High court. Therefore, the appeal in O.S.A.No.299 of 2019 has to be allowed and the appeal in O.S.A.No.240 of 2019 has to be dismissed.

5.Submissions of the learned counsel for the respondents

What has been marked is only a photo copy and objection was raised for its production. Therefore, the learned single Judge was not right in observing that no such objection is raised. Though the rules of evidence are not strictly applicable, the principle governing will have to be taken into consideration. The claim is barred by the limitation. There is no evidence to show that the notice has been served on the second respondent. Thus, O.S.A.No.240 of 2019 has to be allowed and O.S.A.No.299 of 2019 has to be dismissed. To buttress his submissions, he relied on the following decisions.

1.Pradyuman Kumar Sharma and others V.

Jaysagar M.Sancheti and Others
(Manu/MH/0244/2013);
2.J.Naval Kishore V. D.Swarna Bhadran and
others (Manu/TN/9130/2007).

6.DISCUSSION:-

6.1.Let us first take O.S.A.No.240 of 2019. We find, the learned Arbitrator and the learned single Judge has given clear finding with respect to the genuineness of Ex.C1. In the case on hand, both the parties have filed photo copies. The learned Arbitrator found the difference in the fonts. Though the Managing Director of the first respondent has deposed before the learned Arbitrator, he has stated that he did not remember the name of the representative of the claimant who made the interpolation. Secondly, the brother of the second respondent has also not been examined. Before the District Court of Patiyala, Delhi, the claimant filed Arbitration Application under Section 9 of the Act for appointment of Advocate Commissioner and Arbitration application No.56 of 2012 before the Delhi High Court. The photo copy of Ex.C1 was filed therein, for which, no objection was raised. Similarly is the case with respect to the questionings before this Court in O.P.No.206 of 2013. Further more, R.W.1 has even denied the signature and the round seal found in the other documents viz., Ex.C4 to C6. Ex.C7-registered notice was also not objected. In the said legal notice, the claimant has stated that the first respondent has not complied the minimum number of claims in a quarter. There was not even a reply to the legal notice sent by it.

6.2. In such view of the matter, the findings recorded by the learned Arbitrator cannot be assailed as perverse or without any evidence. We may note, the findings of fact are also to the effect that there is a breach on the part of the travel agencies with respect to the segment and usage of others' software. Therefore, the objection raised was rightly found to be not genuine by the learned arbitrator while holding Ex.R1 is a forged and fabricated document of Ex.C1. The judgments relied upon by the learned counsel for the first respondent are not relevant to the facts of the case. In such view of the matter, O.S.A.No.240 of 2019 reserves to be dismissed. Accordingly, the same is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

6.3.O.S.A.No.299 of 2019 is concerned, the learned single Judge allowed the O.P.No.247 of 2019 filed under Section 34 of the Act insofar as the second respondent is concerned. We may note that as per the terms of the agreement, especially clauses governing other terms with respect to the offer, is valid for 36 months starting from October 2007. If this is taken into consideration, the claim is well within the limitation. Much

has been said on the notice sent initiating proceedings under Exs C10 and C12. Insofar as C12 is concerned, it is the second legal notice sent by the claimant's counsel to the respondent dated 01.11.2011. A specific averment has been made in this regard in the petition filed before the Delhi High court while invoking Section 11(5) of the Act. Though a preliminary objection has been raised with respect to the other legal issues, no objection has been raised on this averment. In fact, the entire documents along with Ex.C11 and the original acknowledgement of the legal notice were filed in the form of Ex.C19 before the learned Arbitrator.

7. In such view of the matter, the finding of the learned single Judge that there is no material to establish the service of notice cannot be sustained. Thus, we are of the considered view, the learned single Judge has not taken note of the abovesaid aspects. Accordingly, the order passed in O.P.No.247 of 2019 insofar as the second respondent is concerned stands set aside. Consequently, the said application stands dismissed and O.S.A.No.299 of 2019 is allowed. No costs.

Sd/-

Assistant Registrar (CS-VIII)

//True copy//

Sub Assistant Registrar

raa

To

The Sub Assistant Registrar,
Original Side, High Court, Madras

+2cc to Mr.P.Giridharan, Advocate SR.No.9346

+2cc to M/s S.Ramasubramaniam & Associates, Advocate SR.No.9001,
9002

O.S.A.Nos.240 & 299 of 2019

MP(CO)

GMV(22/09/2020)