

**IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
ORIGINAL SIDE**

Present:

The Hon'ble Justice Krishna Rao

**GA 2 of 2022
In
CS 118 of 2021**

Suresh Dhanuka

Versus

Shahnaz Husain

Mr. Sabyasachi Chowdhury

Mr. Chayan Gupta

Mr. Rajesh Upadhyay

... For the plaintiff.

Mr. Dyutiman Banerjee

Mr. Arnab Sinha

Mr. Soumajit Majumdar

Mr. Amartya Basu

... For the defendant.

Hearing Concluded On : 10.01.2024

Judgment on : 24.01.2024

Krishna Rao, J.:

1. This is an application filed by the defendant under Section 8 for referring the parties to the suit for Arbitration in terms of the clause of the agreement dated 16th April, 2008.
2. The plaintiff has filed the Civil Suit No. 118 of 2021 against the defendant for a decree of Rs. 1,29,39,103/- along with interest at the rate of 12% per annum. The plaintiff is carrying the business of stockiest and distributor of consumer goods. The defendant is carrying the business of manufacturing in diverse ayurvedic, herbal and cosmetic goods under the name and style of “Shahnaz Ayurvedics” and “Shahnaz Herbals” as a sole proprietor of the business.
3. The defendant had entered into an agreement on 16th April, 2008 with the plaintiff by appointing the plaintiff as distributor of its goods in the Territory of the “State of West Bengal”. The agreement entered between the plaintiff and the defendant was for the period of 36 months from 1st April, 2008 to 31st March, 2011.
4. The defendant claims that the agreement was extended by virtue to mutual consent of the parties and the said agreement is still in force and the relationship between the parties were governed by the terms stipulated in the agreement dated 16th April, 2008. The agreement is a standard form of contract used by the defendant for the purpose of appointing distributors for sale of its manufactured goods all over the

country. Only the name of the distributor and the date of execution which may vary from agreement to agreement.

5. The agreement contained a specific clause of arbitration, according to which, all the disputes arising out of the said agreement shall be first attempted to be settled by an amicable negotiation within twenty business days or within such later date, as might be unanimously agreed upon by the parties. On failure to reach a settlement by the said period, the dispute may be referred to arbitration and the arbitral award shall be final and binding upon the parties.
6. Mr. Dyutiman Banerjee, Learned Advocate representing the defendant submitted that the plaintiff has admitted that though the agreement having its date of expiry on 31st March, 2011 but the agreement was extended by virtue of mutual consent of the parties. He submits that the arbitration clause read with the forum selection clause contained in the agreement, elects New Delhi as the situs of the arbitration, thus limiting the jurisdiction of all other courts in respect of any dispute arising out of the said agreement.
7. Mr. Banerjee submits that the claims made by the plaintiff in the plaint is solely on the basis of the agreement which is a continuation of the agreement and thus the claim of the plaintiff can be resolved by an arbitrator as stipulated in the agreement.
8. Mr. Banerjee relied upon the judgment in the case of **(Roshin Lal Gupta & Sons Pvt. Ltd. -vs- Delhi Tourism and Transportation**

Development Corporation & Anr.) reported in **2009 (109) DRJ 456** and submitted that the Delhi High Court held that the arbitration clause constitutes a self-contained contract collateral or ancillary to the underlying or “main” contract. Under the doctrine of implied terms, it has long been held that an arbitration agreement can continue to be implied as one of the terms of the relationship between the parties after the formal expiry of an agreement between them containing an arbitration clause.

9. Mr. Banerjee relied upon the judgment in the case (**M.R. Engineers and Contractors Private Ltd. -vs- Som Datt Builders Limited**) reported in **(2009) 7 SCC 696** and submitted that the Hon’ble Supreme Court had summarized the scope and intent of Section 7(5) of the Arbitration and Conciliation Act, 1996 which reads as follows :

“24. *The scope and intent of Section 7(5) of the Act may therefore be summarised thus:*

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled:

(1) the contract should contain a clear reference to the documents containing arbitration clause,

(2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,

(3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(ii) *When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.*

(iii) *Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.*

(iv) *Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.*

(v) *Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where the Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.”*

- 10.** Mr. Sabyasachi Chowdhury, Learned Advocate representing the plaintiff submitted that the claim of the plaintiff in the suit does not arise out of any agreement in writing. He submits that the agreement dated 16th April, 2008 was valid only up to 31st March, 2011 and the terms of the said agreement were continued only up to March 2014 and the alleged agreement is not in force. He submits that the defendant has not disclosed the entire agreement. As per the agreement, the plaintiff was appointed as distributor over the entire territory of the State of West Bengal as per Annexure-II of the agreement.
- 11.** Mr. Chowdhury submitted that the defendant taking advantage of validity of the written agreement had lapsed thus started appointing other distributors over the state West Bengal and prior arrangement of having distributorship for the entire West Bengal was discontinued. He submits that the defendant discontinued the policy of single distributor for the entire West Bengal since April, 2014 and thus there was no agreement in existence. He submits that on and from April, 2014, the relationship between the parties continued without any written agreement and only on the basis of oral agreement.
- 12.** Mr. Chowdhury submitted that a new oral agreement was entered between the plaintiff and the defendant with new terms and conditions. In the year 2017, a huge inventory had accumulated with respect to damaged and unsold expired goods in the market but the defendant had neither issued credit notes nor had replaced the said goods with equivalent goods and accordingly, the defendant came out with an offer

titled “1:5” Scheme wherein it was agreed that the defendant would replace 20% of the expired or damaged goods with every new goods lifted by the stockist or in other words, for every 100% of fresh goods that would be lifted, payment would be made for only 80% of the same”.

- 13.** Mr. Chowdhury submitted that the plaintiff did not agree to the said Scheme as offered by the defendant but the plaintiff consented to the replacement of the expired or damaged goods on the prevalent trade scheme and to lift five (5) times of the returned goods value on the payment of four (4) times value. He submits that in the month of December, 2017, the plaintiff and the defendant have agreed with the following terms and conditions:

“i. The Applicant would issue credit notes (CRN) for all the said goods which have since expired at the retailers’ outlets.

ii. The plaintiff shall provide a list of such expired goods along with necessary details of the retailers.

iii. On approval by the Applicant’s local managers and representatives the expired/damaged goods would be sent to the factory of the Applicant as specified.

iv. The plaintiff on every 100% goods purchased, would have to pay for 80% of the value thereof, 20% being adjusted with that of the cost of the returned goods and thereafter sell the same in the market with the coordination of Applicant’s sales team.

The aforesaid terms and conditions between the parties would be evident from exchange of correspondence including electronic mails between the parties. In any event such terms are to be expressed and/or implied by the conduct of the parties and/or to give business efficacy.

Such agreement was concluded, inter alia, in the office of the plaintiff at B& C, 106. The Air Conditioned Market, 1, Shakespeare Sarani, Kolkata – 700071 and 19 R.N. Mukherjee Road, Kolkata – 700001 both within the aforesaid jurisdiction and also from various offices of the Applicant including the office at New Delhi.”

- 14.** Mr. Choudhury relied upon the several correspondences made between the plaintiff and the defendant through mail appearing at pages 35 to 46 and submitted that none of the correspondences were in connection or continuation of the agreement dated 16th April, 2008 and the defendant has admitted the Scheme of 1: 5 as offered by the defendant in the said correspondences.

- 15.** Section 8 of the Arbitration and Conciliation Act, 1996 reads as follows:

“8. Power to refer parties to arbitration where there is an arbitration agreement.- [(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.]

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a

copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3)Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.”

- 16.** The defendant has relied upon Clause X of the agreement dated 16th April, 2008 which reads as follows:

“X. ARBITRATION

(i) All disputes arising in connection with this MOU shall be settled, if possible, by amicable negotiation of the parties.

(ii) If the matter is not resolved by amicable negotiations within 20 (twenty) business days or such later date as may be unanimously agreed upon, then the dispute shall be finally settled by arbitration in accordance Indian.

Arbitration and Conciliation Act 1996. It is specifically agreed between the parties that the Arbitrator shall be of Indian origin.

(iii) The arbitration shall be conducted in the English language in New Delhi. The laws of India shall govern the validity, Interpretation, construction, performance and enforcement of the arbitration and the conduct of any arbitration proceedings hereunder, including making the arbitral award.

(iv) The arbitration award shall be final and binding upon both the parties.”

- 17.** The agreement was only for the period of 36 months with effect from 1st April, 2008. Both parties have admitted with regard to execution of agreement dated 16th April, 2008 but the plaintiff says that though the

agreement was valid up till 2011 but the terms thereof were continued up to 2014 thereafter no agreement in writing between the parties on the other hand the defendant says that the agreement was still in force.

- 18.** In the case of **(Vidya Drolia -vs- Durga Trading Corporation)** reported in **(2021) 2 SCC 1** at paragraphs **152 and 154** held as follows:

“152. Which approach as to interpretation of an arbitration agreement should be adopted in a particular case would depend upon various factors including the language, the parties, nature of relationship, the factual background in which the arbitration agreement was entered, etc. In case of pure commercial disputes, more appropriate principle of interpretation would be the one of liberal construction as there is a presumption in favour of one-stop adjudication.

153. Accordingly, we hold that the expression “existence of an arbitration agreement” in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.

154. Discussion under the heading **“Who Decides Arbitrability?”** can be crystallised as under:

154.1. Ratio of the decision in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under

Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. *Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.*

154.3. *The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.*

154.4. *Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.*

In paragraph 244, it is held that :

“244. Before we part, the conclusions reached, with respect to Question 1, are:

244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.

244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a *prima facie* (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a *prima facie* basis, as laid down above i.e. “when in doubt, do refer”.

244.5. The scope of the court to examine the *prima facie* validity of an arbitration agreement includes only:

244.5.1. Whether the arbitration agreement was in writing? or

244.5.2. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?

244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?”

- 19.** The claim of the plaintiff in the suit is that the plaintiff has returned damaged or date expired goods having MRP value to the defendant and is entitled to reimburse the actual purchase value of the goods from defendant. As per the documents relied by the plaintiff in support of his case, the plaintiff has returned the damaged and expired goods to the defendant in the year 2017 which is appearing from page Nos. 35 to 84.

From the said details, it reveals that manufacturing date of the products starts from 2008 to 2014 and date of expiry are from 2010 to 2015. It is clear from the above mentioned details that the plaintiff has returned the goods to the defendant which the plaintiff has taken delivery even prior to the year 2014. It also reveals that there are many goods which the plaintiff had returned to the defendant were having expiry date of 2010 to 2015 that is within the extended time of the agreement as admitted by the plaintiff.

- 20.** The communication of the plaintiff appearing in the e-mails also from the month of February 2014 and all the e-mails are connected with the initial e-mail which reveals that the said e-mails are in connection with the agreement dated 16th April, 2008 and not as per the case made out by the plaintiff. As per the case made out by the plaintiff is that the defendant has appointed other distributors along with the plaintiff in the State of West Bengal and not clearing the dues of the plaintiff with respect of damaged goods and expiry goods. The both conditions are connected with the agreement dated 16th April, 2008.
- 21.** As per Clause IX of the agreement, if the agreement is terminated either by efflux of time or earlier termination, the distributor has to fulfill some conditions mentioned in the agreement but the plaintiff has not satisfied that the plaintiff has complied with the conditions on termination of agreement by efflux of time or any other means. As per agreement, the plaintiff deposited Rs. 3,00,000/- with the defendant but the plaintiff has not stated anywhere, whether the plaintiff has

received the said amount back from the defendant in terms of the agreement.

22. The e-mails relied by the plaintiff appearing at pages 35 to 46 of the affidavit in opposition are from 24th February, 2014 to 21st June, 2014 which all are connected with the agreement and the defendant had admitted that the period of agreement was extended till 2014. The documents, that is the e-mails and the invoices submitted by the plaintiff claiming return of amount with respect of damaged goods and expired goods it prima facie appears that the disputes connected with the agreement dated 16th April, 2008.

23. In Section 16 of the Arbitration Act gives immense powers to the Arbitral Tribunal, including power to rule on its own jurisdiction. Section 16 of the Arbitration Act reads as under:

“16. Competence of arbitral tribunal to rule on its jurisdiction.—(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or subsection (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.”

24. All jurisdictional issues including the existence and the validity of an arbitration clause can be gone into by the Arbitral Tribunal. In other words, the Arbitral Tribunal is competent to decide on its own competence. This aspect has been dealt by the Hon’ble Supreme Court in **Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455**. This is what has been stated:

“7.11. The doctrine of “kompetenzkompetenz”, also referred to as “compétence-compétence”, or “compétence de la recognized”, implies that the Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties. The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration

agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified [Dresser Rand S.A. v. Bindal Agro Chem Ltd., (2006) 1 SCC 751. See also BSNL v. Telephone Cables Ltd., (2010) 5 SCC 213 : (2010) 2 SCC (Civ) 352. Refer to PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust, (2018) 10 SCC 525 : (2019) 1 SCC (Civ) 1]. If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement “is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”.

7.12. The legislative intent underlying the 1996 Act is party autonomy and minimal judicial intervention in the arbitral process. Under this regime, once the arbitrator is appointed, or the tribunal is constituted, all issues and objections are to be decided by the Arbitral Tribunal.

7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention

at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, “including any objections” with respect to the existence or validity of the arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator.”

25. The purpose behind giving these powers to the Arbitral Tribunal is to minimise judicial interference in arbitration matters. In ***Weatherford Oil Tool Middle East Ltd. v. Baker Hughes Singapore PTE, 2022 SCC OnLine SC 1464***, the Hon’ble Supreme Court had observed that a bare perusal of Section 16 of the Arbitration and Conciliation Act would indicate that the arbitration clause in a contract would be an independent agreement in itself and the arbitrator is empowered to decide upon its existence and validity.
26. Objections will nevertheless be raised both on Section 8 and Section 11 applications. These objections can be genuine, such as where there is no arbitration clause or where the matter is itself non-arbitrable, but often these objections could be only to wriggle out of the statutory commitment of parties to a defined process of redressal mechanism.

27. Considering the above facts and circumstances of the case, this Court finds that the plaintiff has not established a prima facie case of non-existence of the agreement. The agreement dated 16th April, 2008 provides for arbitration clause and thus the parties to the suit are referred to the arbitration.

28. In view of the above, **G.A No. 2 of 2022** is **allowed** in terms of prayer (a) and (b) of the application. **C.S. No. 118 of 2021** is thus **dismissed**.

(Krishna Rao, J.)