OC-25 & 26 ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
(COMMERCIAL DIVISION)
ORIGINAL SIDE

AP/117/2021

UNITED SPIRITS LMITED
VS
SALSON LIQUORS PRIVATE LIMITED

AP/130/2019

UNITED SPIRITS LMITED
VS
SALSON LIQUORS PRIVATE LIMITED

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 11th February, 2025.

Mr. Dhruba Ghosh, Sr. Adv.
Mr. Sarathi Dasgupta, Adv.
Mr. Zulfiqar Ali Alquaderi, Adv.
Mr. Altamash Alim, Adv.
Mr. Aditya Sarkar, Adv.
... for the petitioner

Mr. Dipanjan Dutta, Adv.
Mr. Baidurya Ghosal, Adv.
Mr. Saikat Mukherjee, Adv.
For respondent

The Court : AP/117/2021 is an application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act), for appointment of a learned Arbitrator to adjudicate the dispute between the parties. The disputes allegedly arise out of a termination agreement dated May 8, 2017 (hereinafter referred to as the said agreement).

The petitioner contends that the said agreement contains an arbitration clause i.e. Clause 4(f). The said clause provides that any dispute, claim, controversy or other difference arising out of the said agreement, including without limitation any dispute concerning the existence or enforceability thereof whether alone or in relation to the Tie-Up agreement, shall be exclusively resolved by arbitration in Kolkata. The sole Arbitrator shall be appointed and the rules of the said Act would be followed. According to the petitioner, differences and disputes allegedly arose between the parties with regard to non-refund of the excise duty, taxes etc. paid to the State of Bihar by the petitioner. By a letter dated December 19, 2019, the arbitration clause was invoked. The petitioner nominated a sole Arbitrator. The respondent was called upon to concur with the nomination of the petitioner within 30 days from the date of receipt of the said notice.

By a letter dated January 14, 2020, the respondent replied to the said notice and denied the existence of the termination agreement alleging that the agreement was forged and fabricated.

The petitioner claimed to be the largest spirits company in India, involved in the manufacture, sale and distribution of alcoholic beverages. The respondent was engaged in the manufacturing and/or bottling of Indian Made Foreign Liquor (in short IMFL) and had its manufacturing unit at Bihar. On account of the excise policy, the manufacture of IMFL in the State of Bihar could only be carried out in a manufacturing plant having the requisite licenses. The respondent possessed the requisite licenses and had a manufacturing unit at Danapur, Bihar. As such, the petitioner entered into a Tie-Up agreement and a Usership Agreement on July 1, 2014, with the respondent.

Clause 16 of the Tie-Up agreement between the parties contained a stipulation relating to the commercial arrangement, whereunder, the respondent was to receive the sale proceeds for the IMFL invoiced by it and from the sale proceeds so received, the respondent was entitled to deduct certain contractually permitted deductions including taxes, duties, cess, fees as the agreed retention as per the third schedule to the said agreement. The balance amount remaining with the respondent after making the aforementioned deductions was to be forwarded to the petitioner's bank account. It was specifically stipulated in the Tie-Up agreement that no part of the balance amount could have been dealt with or withheld for any reason whatsoever by the respondent.

According to the petitioner, the invoices raised by the respondent on the petitioner and/or Bihar State Beverages Corporation Limited were inclusive of the applicable taxes, duties, cess and fees, which were subsequently deducted by the respondent in terms of the Clause 16 of the Tie-Up agreement. The respondent was under an obligation to keep valid and renewed all regulatory and governmental consents, necessary for manufacturing, storage and delivery of the raw materials, packaging materials, manufacturing materials and IMFL. The respondent was also responsible for timely and full payment of annual license fees and other dues and fees as would be levied or imposed by the government authority under the relevant Excise Laws.

The petitioner contends that on the request of the respondent certain payments were made in advance for onward payment of VAT, Label Renewal Fee, 19C License Fee, Advance Excise Duty, Bottling Fee and Import Pass Fee etc. By a notification dated April 5, 2016, the Government of Bihar imposed a ban on the wholesale and retail trade and consumption of foreign liquor in the State of Bihar. Upon such imposition or prohibition, the arrangement between the respondent and the petitioner as regards the Tie-Up agreement and the Usership agreement were frustrated and the parties could not continue the transactions as envisaged under the said agreement. Under such compelling circumstances, it became necessary for the parties to formally terminate the two agreements by entering into a termination agreement dated May 8, 2017.

The petitioner states that one Mr. Binod Kumar, the representative of the respondent visited the office of the petitioner at Bengaluru and the issue was discussed and finalised. Binod Kumar did not have proper authority to sign the agreement. By an electronic mail dated May 19, 2017, the respondent forwarded a copy of its Board resolution dated May 1, 2017 to the petitioner, authorizing Mr. Sanjay Kumar to sign the termination agreement. A printout of the electronic mail dated May 19, 2017, was sent by the respondent to the petitioner, attaching the resolution. Mr. Sanjay Kumar was one of the directors of the respondent company.

The petitioner submits that owing to the ban, the stocks on which the taxes, duties and levies etc. were allegedly paid could not be sold in the State of Bihar. The same were either sold outside the State of Bihar or were destroyed. The termination agreement, inter alia, provided the mechanism to be followed, *inter se,* between the parties qua refund of the taxes, duties and levies which were paid by the petitioner. Clause 2(d) of the said agreement would indicate that, the respondent allegedly acknowledged the fact that the petitioner had made the advances. The petitioner contends that substantial amount was refunded by the Excise and Prohibition Department on various dates to the respondent under various heads, but the respondent did not pay the dues of the petitioner. In terms of the termination agreement, the petitioner was allegedly entitled to more than Rs.26 crores from the respondent as refund.

In a nutshell the background of the dispute has been narrated hereinabove.

Mr. Ghosh, learned Senior Advocate submits that in terms of Clause 4(f) of the termination agreement the dispute between the parties with regard to the non-fulfilment of the obligations by the respondent arising out of the said agreement, non-payment of the amount paid towards VAT, taxes, etc., and the denial of the respondent, should be referred to arbitration.

Mr. Datta, learned Advocate for the respondent submits that the termination agreement was never signed by the parties. The parties did not enter into any such agreement amongst themselves. The signatures on the said documents were forged. The said submission is sought to supported by the fact that the petitioner submitted different copies of the same documents at various stages of the litigation which either did not contain signatures of the parties or contained the signature of only one party. For the third and final time, the document has been annexed to this application wherein the signatures of both the parties appear. This entire process indicates that there was foul play and as such this Court should not hold that there is existence of an arbitration clause. On the merits, it is submitted by Mr. Dutta that no refund of taxes was ever received from the State of Bihar with regard to the payment and transactions arising out of the Tie-Up agreement and Usership Agreement entered into between the petitioner and the respondent. Thus, nothing was payable to the petitioner. It is further submitted by Mr. Dutta that, the respondent has a claim of around Rs.14 crores from the petitioner.

Heard the parties.

The termination agreement contains an arbitration clause. The notice invoking arbitration was also issued. Annexure G to this application indicates that the respondent had proposed a draft of the said agreement, which was sent by email to the petitioner's representative. Annexure H is an email containing the resolution of the respondent's Board, authorizing Sanjay Kumar and Upendra Kukar to sign the agreement. The contention of Mr. Dutta that the said termination agreement was not signed by the parties is be decided upon appreciation of evidence. The allegation of fraud or fabrication etc. is within the jurisdiction of the Arbitral Tribunal. This can also be decided as a preliminary issue. The respondent can make such a prayer. The petitioner has narrated in detail as to how the said agreement was signed by the parties. The petitioner also relies on an e-mail communication authorising Mr. Sanjay Kumar and Upendra Kumar to be signatories on behalf of the respondent. The objection of Mr. Dutta cannot be decided without evidence.

The objection with regard to existence of the arbitration agreement will include the aspect of validity of an arbitration agreement, albeit the court at the referral stage will apply the prima facie test. In case of debatable and disputable facts, the court will ask 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. The restricted and limited review by the referral court 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, will refer the matter when contentions relating to non-arbitrability are plainly arguable, when consideration in summary proceedings will be insufficient and inconclusive and when facts are contested. 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. The Court must affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

A deeper consideration of whether an arbitration agreement exists between the parties must be left to an Arbitrator who is to examine the documentary and oral evidence produced before him in detail, after witnesses are cross-examined on the same.

Under such circumstances, all objections including the validity, arbitrability, existence of the arbitration agreement etc. are left open to be adjudicated by the learned Arbitrator. The respondent can file an appropriate application challenging the jurisdiction of the Arbitrator.

Under such circumstances, the application is allowed without any observation on merits and leaving all points to be raised by respective parties open.

Hon'ble Justice Pinaki Chandra Ghose, former Judge of the Hon'ble Supreme Court of India, is appointed as the learned Arbitrator to arbitrate upon the dispute between the parties.

This order is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996.

The learned Arbitrator shall fix his own remuneration as per the Schedule of the Act.

AP/117/2021 is, accordingly, disposed of.

RE: AP/130/2019

AP/130/2019 is an application for injunction directing the respondent to furnish security for a sum of Rs.26,64,31,308.82/-and for an order of injunction, restraining the respondent from dealing with their immovable properties.

This Court has already referred the dispute between the parties to a learned Arbitrator. Under such circumstances, this application is disposed of, leaving it open to the petitioner to approach the learned Arbitrator by filing appropriate application for interim orders.

Accordingly, the application being AP/130/2019 is disposed of.

It is recorded that this Court has not gone into the merits of the claims of the petitioner in the said application.

(SHAMPA SARKAR, J.)

Sb/pa