IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) No. 1305 of 2012

Reserved on: July 15, 2013
Decision on: July 25, 2013

JOINT INVESTMENTS PVT. LTD. & ANR. ..... Plaintiffs
Through: Mr. Ashim Vachar and
Mr. Achal Gupta, Advocates.

versus

FEDERAL MOGULGOETZE (INDIA) LTD. & ORS..... Defendants
Through: Mr. Parag P. Tripathi, Senior Advocate
with Mr. Yashwant Mathur and
Mr. Vishal Dass, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
25.07.2013

IA No. 19957 of 2012

1. The background facts leading to the present application by the Defendant under Section 45 of the Arbitration and Conciliation Act 1996 ('Act') are set out in an order dated 11th May 2012 passed by this Court while directing summons to issue in the suit and notice in the application, IA No. 8697 of 2012 under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 ('CPC'). The said order reads as under:

"**I.A. No.8697/2012 (u/o XXXIX, R.1 and 2 CPC)**

Issue notice to the defendants for the date fixed.

Mr. Neeraj Kishan Kaul, learned Senior counsel appearing on behalf of the plaintiffs, has referred to various paras of the plaint as well as the documents placed on record by the plaintiffs. The main facts are

that somewhere in the year 2006, it was decided that the Federal Mogul Group, through defendant No.2, will purchase the entire shareholding of the plaintiff No.1 in defendant No.1. For the said purpose, a Securities Purchase Agreement (for short 'SPA') dated 08.05.2006 was entered into between the defendant No.2 and the plaintiffs herein. Transaction was closed on or around 12.05.2006 as per the terms of said SPA. Pursuant to the purchase of shareholding of plaintiffs held in defendant No.1 by the defendant No.2, the defendant No.1 was renamed as Federal Mogul Goetze India Limited and the whole-sole management, operations and conduct of the business of the defendant No.1 was taken over by Federal Mogul Group through defendants No.2 and 3.

The case of the plaintiffs is that during first week of April, 2012, the plaintiffs received an e-mail from Mr Pynnonen Brett, Senior Vice President and General Counsel, defendant No.3, thereby calling upon the plaintiffs to execute a Tolling Agreement for extending the period for filing claims by both Federal Mogul Group as well as the plaintiffs. Mr Kaul submits that since the original Securities Purchase Agreement had been concluded and exhausted six years prior to receiving the said e-mail, there was no occasion for executing the alleged Tolling Agreement. The plaintiffs did not agree to sign the Tolling Agreement as limitation in the SPA could not have been extended since the said SPA already stood concluded and closed more than six years prior to the request made by the defendants. Mr Kaul further submits that the suit filed by the plaintiffs is maintainable in view of the judgment passed by the Division Bench of this Court in a batch of matters, particularly, in the case of *Dr. Devinder Kumar Gupta Vs. Realogy Corporation and Anr.*, in FAO(OS) No.268/2011 and CM No.10057/2011. The said appeal was filed by Dr. Devinder Kumar Gupta for challenging the order dated 04.05.2011 passed by the learned Single Judge, who came to the conclusion that the Court cannot go into the controversy concerning the existence or validity of the arbitration clause invoked by one of the parties; nor can it issue an injunction restraining that party from continuing with the arbitration proceedings initiated by that party before the American Arbitration Association. After hearing the parties, the said appeal was allowed by the Division Bench and in exercise of powers under Section 45 of the Arbitration and Conciliation Act, restrained Realogy Corporation, respondent

No.1, from preferring or prosecuting any claim against the plaintiff/appellant in proceedings under the aegis of the American Arbitration Association. The reason for the same, inter alia, is given as under:

> "A perusal of Section 45 of the A & C Act makes it palpably clear that the Court must refer the parties to the arbitration if it finds that an efficacious, operative and performable agreement for arbitration exists. It matters little if this exercise is supplicated for by the party asserting the non-existence of the Arbitration Agreement or, as in the present case, by a Plaintiff praying for a Declaration to like effect. It is fortunate that the Judge has, whether exercising jurisdiction as a civil judge or under the A and C Act, power to return the requisite finding. Since we are of the unequivocal opinion that an Arbitration Agreement did not come about vis-a-vis the Petitioner, we must accept the Appeal"

Mr Kaul, by relying upon the above said judgment, has also submitted as the facts of this case are stronger than the case referred to above as the SPA in the present matter was concluded in the year 2006 and the e-mail for certain compliance is received in the month of April 2012.

Considering the facts of the present case and documents placed on record, till the next date of hearing, the defendants are restrained from initiating or pursuing the subject matter before the American Association of Arbitration/International Centre for Dispute Resolution by virtue of agreement dated 08.05.2006.

Compliance of Order XXXIX, Rule 3 CPC be made within one week.

Dasti."

2. Thereafter, the Defendants entered appearance and filed the present application under Section 45 of the Act. Notice was directed to issue in the

application on 6th November 2012. Thereafter, the Plaintiff filed IA No. 21269 of 2012 under Order VIII Rule 10 CPC contending that since the Defendants have not filed the written statement within the time stipulated under the CPC, a judgment should be pronounced against them. The said application was listed along with the application filed by the Defendants under Section 45 of the Act. The Defendants have also filed IA No.1771 of 2013 under Order VIII Rule 1 CPC for condonation of delay of 91 days. Enclosed with the application is a written statement of the Defendants containing preliminary objections including one regarding maintainability of the suit in view of the arbitration agreement between the parties.

3. The facts that are relevant for the purposes of the present application are that Plaintiffs entered into a Securities Purchase Agreement ('SPA') dated 8th May 2006 with Defendant No.2 which contains an arbitration clause, i.e., Clause 10.6 whereby the parties agreed that all disputes arising out of or in connection with the Agreement shall be finally settled under the Rules of Arbitration of the American Arbitration Association and that the place of arbitration would be New York. Clause 10.6 reads as under:

> "10.6 The Agreement shall be governed by, and all disputes arising or in connection with the Agreement shall be resolved under, the laws of the State of New York. All disputes arising out of or in connection with the Agreement shall be finally settled under the Rules of Arbitration of the American Arbitration Association by three arbitrators appointed in accordance with the said Rules. The place of arbitration shall be in New York. The language of the arbitration shall be English. Any award entered in such arbitration may be enforced in any jurisdiction in which the party against which it is sought to be enforced has or may have assets."

4. The case of the Plaintiffs is that by virtue of the aforementioned SPA, the entire shareholding of Plaintiff Nos.1 and 2 in Defendant No.1 was purchased by Defendant No.2 and Plaintiff No.2 divested himself of all his shareholding in Defendant No.1. According to the Plaintiffs, since the transaction contemplated in the SPA was duly consummated and the entire consideration was paid by Defendant No.2, there were no rights or liabilities left against each other. It is stated that prior to entering into the SPA, the Federal Mogul Group ('FMG') had carried out a detailed investigation and due diligence with respect to the affairs of Defendant No.1. Consequent upon the SPA the Plaintiffs had no concern left in the affairs or the management of Defendant No.1, which was taken over by the FMG. It is stated that in the first month of April 2012, the Plaintiffs received an e-mail from the General Counsel of Defendant No.3 calling upon them to execute a Tolling Agreement ('TA') for extending the period for filing claims by both FMG and the Plaintiffs. On making inquires, it came to the knowledge of the Plaintiffs that there was an alleged dispute with respect to some chrome acid discharge in the unit of Defendant No.1 situated at Bangalore, Karnataka. The Plaintiffs did not agree to execute the TA, particularly since the limitation in the SPA could not have been extended and particularly since the SPA had been consummated more than six years prior to the request. The Plaintiffs were sent a reminder on 3rd May 2012 by the Defendants stating that if the TA was not signed by the Plaintiffs by the following morning, the Defendants would file an arbitration claim. The stand of the Plaintiffs in their note dated 30th April 2012 was that Defendant No.1 had taken all the requisite approvals and consents from Karnataka State Pollution Control Board ('KPSCB') had been taken from time to time and if there is

any violation of the said permissions, it can only be attributed to the existing management and not the liability of the Plaintiffs. Defendant No.1 had applied on 19th April 2007 for running the factory and the permission was granted to it on 5th May 2008 for the period 1st July 2006 till 30th June 2008 based on standard conditions being imposed on KPSCB. Defendant No.1 has been getting regular renewal of the permission from KPSCB till 2012. On 15th February 2011, consent had been granted by KPSCB for the period 1st July 2011 to 30th June 2012. It is stated that with a view to arm twist the Plaintiffs and succumbing to their illegal demands, the Defendants are threatening the Plaintiffs of a potential legal action if they did not accept the liability. It was in those circumstances that the present suit was filed.

5. While the order passed by the Court on 11th May 2012 does not explicitly refer to Clause 10.6, in para 25 of the plaint a reference was made to an earlier arbitration proceedings initiated under the SPA by Defendant Nos.2 and 3 in 2008 wherein the said Defendants had raised no issue about the management of the plant situated in Bangalore and that the said arbitration proceedings stood settled between the parties in the year 2009 itself. It is pointed out that in the said arbitration proceedings "no such issue of chrome discharge was ever raised by the Defendants."

6. In the present application, the Defendants have stated that the suit is not maintainable as the disputes between the parties have been referred to arbitration. It is stated that Defendant No.2 has acted without delay and has initiated arbitration proceedings before the American Arbitration Association ('AAA') in New York on 4th May 2012. A photocopy of the

demand for arbitration has been enclosed. It is stated that the present suit was filed on or about 7th May 2012, after the arbitration proceedings were initiated. Defendant No.2 filed an amended demand for arbitration on 20th July 2012 with the sole purpose of deleting FMG from the arena of claimants since there was no privity of contract between it and the Plaintiffs. It is stated that since this Court had by an order dated 11th May 2012 injuncted the further arbitration proceedings, the said application seeking impleadment has not yet been considered by the Arbitral Tribunal ('AT'). It is stated that the claims have been preferred before the AT "within the period of limitation as envisaged by the laws of New York." It is, accordingly, contended that the AT is fully competent to adjudicate the disputes.

7. In reply to this application, it is contended by the Plaintiffs that the present application has been filed to delay the outcome of the suit. It is contended that the Defendants are liable for contempt for violating the order dated 11th May 2012 of this Court. The Plaintiffs came to know of the request for initiating arbitration proceedings only on 16th May 2012, when a notice was issued by ICDR.

8. This Court has heard the submissions of Mr. Asim Vachar, learned counsel for the Plaintiffs and Mr. Parag Tripathi, learned Senior counsel for the Defendants.

9. The arbitration clause of the SPA, Clause 10.6, makes it clear that the parties have agreed to refer all the disputes arising therefrom to arbitration

under the aegis of the AAA. The place of arbitration was also New York. Importantly, it was agreed that the disputes were to be resolved "under the laws of State of New York" and "settled under the rules of arbitration of the American Arbitration Association."

10. In a recent decision in ***Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. 2012(4) Arb LR 1 (SC)***, the Supreme Court has discussed Section 45 of the Act and in paras 57 and 58 of the said decision observed as under (Arb LR at p. 41-42):

> "57. For proper interpretation and application of Chapter I of Part II, it is necessary that those provisions are read in conjunction with Schedule I of the Act. To examine the provisions of Section 45 without the aid of Schedule I would not be appropriate as that is the very foundation of Section 45 of the Act. The International Council for Commercial Arbitration prepared a Guide to the Interpretation of 1958 New York Convention, which lays/contains the Road Map to Article II. Section 45 is enacted materially on the lines of Article II of this Convention. When the Court is seized with a challenge to the validity of an arbitration agreement, it would be desirable to examine the following aspects:
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> "1. Does the arbitration agreement fall under the scope of the Convention?
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> 2. Is the arbitration agreement evidenced in writing?
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> 3. Does the arbitration agreement exist and is it substantively valid?
>
> 4. Is there a dispute, does it arise out of a defined legal relationship, whether contractual or not, and did the parties intend to have this particular dispute settled by arbitration?
>
> 5. Is the arbitration agreement binding on the parties to the dispute that is before the Court?

6. Is this dispute arbitrable?

58. According to this Guide, if these questions are answered in the affirmative, then the parties must be referred to arbitration. Of course, in addition to the above, the Court will have to adjudicate any plea, if taken by a non-applicant that the arbitration agreement is null and void, inoperative or incapable of being performed. In these three situations, if the Court answers such plea in favour of the non-applicant, the question of making a reference to arbitration would not arise and that would put the matter at rest."

11. In para 141 of the decision in ***Chloro Controls India Pvt. Ltd.*** the Supreme Court concluded (Arb LR p. 68):

"131…..determination of the fundamental issues as contemplated under Section 45 of the 1996 act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent. Even the language of Section 45 of the 1996 Act suggests that unless the court finds that an agreement is null and void, inoperative and incapable of being performed, it shall refer the parties to arbitration."

12. In arriving at the above conclusion, the Supreme Court in ***Chloro Controls India Pvt. Ltd.*** took a view different from the view expressed by one of the judges (Srikrishna J.) in the three-judge bench decision in ***Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. (2005) 7 SCC* 234** that at the stage of considering an application under Section 45 of the Act the Court has to only *prima facie* be satisfied about the existence of an arbitration agreement.

13. This Court is, therefore , required to examine the questions posed in para 57 of the decision in ***Chloro Controls India Pvt. Ltd.*** as extracted above. As far as the above questions are concerned, in the instant case it is

not in dispute that there exists an arbitration agreement in writing. The agreement is within the scope of New York Convention. It is in writing and is binding on the parties to the dispute. The mere fact that the obligations of the parties under the SPA may have concluded does not bring the arbitration agreement contained therein to an end *per se*. The arbitration agreement survives the SPA. Therefore disputes that may arise from the SPA might still be referable to arbitration under the arbitration agreement contained in Clause 10.6. In the instant case, it is not the plea of the Plaintiffs that the said arbitration agreement is null and void. The Plaintiff has been unable to persuade the Court to hold that arbitration agreement is not valid or binding on the Plaintiff for any reason. The plea that the agreement is inoperative or incapable of being performed is, for the reasons noted, not tenable.

14. The case of the Defendants is that the representations and warranties under Clause 5 of the SPA have subsequently been found to be not true. The Defendants could raise a claim that the Plaintiffs had made a false and misleading representation and/or that the warranty given by the time at the time of entering into the SPA was misleading. This might arise even after the respective obligations under the SPA have concluded. The specific case of the Defendant No.2 is that it is only after it took over the ownership and management of Defendant No.1 that it was advised by the KSPCB about the presence of hexavalent chromium at 15 milligrams per liter (mg/l) in the groundwater sample taken from a borewell near the Bangalore site of Defendant No.1. The Defendants reasonably believed that the Plaintiff had information regarding historic disposal of hexavalent chromium on the property of Defendant No.1prior to its purchase in 2006 by Defendant No.2.

It is contended that the Defendants have spent over 2 million to remedy the historical environmental issues undisclosed by the Plaintiffs and the Defendants are likely to incur significant additional costs. It is further asserted that the claims are legally valid and subsisting as per the State of New York under which the limitation period of six years now constitute a limitation. It is stated that since the limitation period of the claims of the Defendants as per the laws of the State of New York was about to expire, the Defendants requested Plaintiffs to execute a TA, which request was valid. In the circumstances, the Court is satisfied that the disputes that have arisen are arbitrable.

15. The question whether the claims of the Defendants in the arbitration proceedings are time barred would be examined by the AT as and when that ground is urged by the Plaintiffs before it in accordance with law.

16. I.A. No. 19957 of 2012 is allowed and the parties are referred to the AT constituted under the aegis of the AAA for resolution of their disputes in accordance with Clause 10.6 of the SPA. Consequently, CS (OS) No. 1305 of 2012 and all the pending applications are dismissed. The interim order stands vacated.

S. MURALIDHAR, J.

July 25, 2013
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