

Cico Technologies Ltd. Vs. M/S Shriram Enterprises and ors.

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Court : Delhi

Decided On : May-31-2013

Judge : Manmohan Singh

Appellant : Cico Technologies Ltd.

Respondent : M/S Shriram Enterprises and ors.

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment Reserved on:

14. h May, 2013 Judgment delivered on:

31. t May, 2013 % + Arb.P.No.342/2012 CICO TECHNOLOGIES LTD
Petitioner Through Mr.Ramesh Singh, Adv. with Ms.Megha Mukerjee, Adv. versus
M/S SHRIRAM ENTERPRISES & ORS Respondents Through Mr.Ravi Gupta,
Sr.Adv. with Mr.Mohit Gupta, Mr.Aditya Singh & Mr.Aman Garg, Adv. + O.M.P.
No.786/2012 CICO TECHNOLOGIES LTD Petitioner Through Mr.Ramesh
Singh, Adv. with Ms.Megha Mukerjee, Adv. versus M/S SHRIRAM ENTERPRISES
& ORS Respondents Through Mr.Ravi Gupta, Sr.Adv. with Mr.Mohit Gupta,
Mr.Aditya Singh & Mr.Aman Garg, Adv. CORAM: HON'BLE MR. JUSTICE
MANMOHAN SINGH MANMOHAN SINGH, J.

1. By this order, I propose to decide the two petitions filed by the petitioner, CICO Technologies Ltd.; the first one is under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) being Arb.P.No.342/2012

for appointment of sole Arbitrator, and second petition is under Section 9 of the Act (being OMP No.786/2012) seeking interim orders. I have heard the arguments in both the petitions, addressed by the learned counsel for the parties. Since the facts in both the matters are common, thus, the same are being disposed of with single order.

2. The petitioner and respondent No.1, M/s Shriram Enterprises, which is a Partnership Firm, entered into a Distributorship Agreement dated 5th November, 2009 for the supply of Water Proofing Chemicals. As per the agreement, the respondents would submit purchase orders, which would be acted upon by the petitioner and goods would be supplied. A transport slip and a purchase order would be accompanied with each transaction. The agreement was signed in New Delhi; the petitioner has its registered office in New Delhi and the respondents also carry out their work in New Delhi itself.

3. The petitioners case is that the respondents had defaulted upon their payments, total outstanding amount being `3.32 crore. The legal notice served by the petitioner on 6th August, 2012 to the respondents was returned unserved. Consequently, on 18th August, 2012, the petitioner sent the notice invoking arbitration as the preferred means of dispute resolution under Clause 18 of the Distributorship Agreement and nominating Justice V.N. Khare as the sole Arbitrator. In response to this notice, on 3rd September, 2012, the respondents sent the reply through their counsel and in counter alleged that the petitioner had unilaterally withdrawn the supply which caused losses to the respondents. OMP No.786/2012 & Arb.P.No.342/2012 existence of a concluded Distributorship Agreement. Importantly, they challenged the existence of a valid and subsisting arbitration agreement in Clause 18 of the Distributorship Agreement. The respondents also informed the petitioner that they are not agreeable to the appointment of Justice V.N.Khare, Former Chief Justice of India, as sole Arbitrator.

4. After their refusal, the petitioner first filed the OMP No.786/2012 under Section 9 of the Act which was listed before the Court first time on 29th August, 2012 and the Court passed the interim order against respondents to 1 to 3 restraining them

from selling, alienating, transferring, creating any third party right/claim/interest in any manner whatsoever, in respect of the following properties:(i) (ii) Shop No.54, Jagat Farm, Block-E, Gama-1, Kasna Road, Greater Noida-201302. (iii) 5. B-9, Rajouri Garden, New Delhi-110027. Shop Nos.23 and 24, Vashist Complex, M.G.Road, Sikander Pur, Gurgaon-122002 (Haryana). Admittedly, respondent No.1 is a partnership firm. Respondents No.2 & 3 are the partners of respondent No.1 who have acknowledged the delivery of the goods. The respondents have also not denied the outstanding amount dues which have not been paid by them to the petitioner despite of several reminders issued to them, nor have they provided the C-Forms to the petitioner. The explanation given by the respondents is that the said amount was not paid to the petitioner due to malicious trade practice adopted by the petitioner who has been trying to strictly supply the goods to the respondents clients in the area of distribution of respondents by sending its representative and on the other hand, the petitioner has also miserably failed to make supplies despite the respondents making various purchase orders.

6. During the course of arguments, some dates were also sought by the parties for settlement, as the petitioners counsel has given the offer to the respondents that they are free to purchase the material from the petitioner against the instant payment. As far as the outstanding amount due, the respondents have to pay the same within reasonable time. After considering the proposal given by the petitioner, the respondents were not agreeable to the same. Therefore, this Court has no option but to pass the order on merits.

7. Clause 18 of the Distributorship Agreement reads as under:18. Arbitration: In case of any dispute and differences, we request that the arbitrator should be appointed with mutual consent of both the parties.

8. The Distributorship Agreement, which was signed by the parties, originally contained an arbitration clause which nominated the MD of the Company to appoint an arbitrator. After deliberations, Clause 18 was changed to what is reproduced above. This page with the changes contained the signatures of both the parties.

9. The petitioner contends that there is a concluded Distributorship Agreement which contains a valid arbitration clause. As per the Agreement, the respondents are liable to pay an amount of `3.32 crores at an interest rate of 25% apart from providing C-Forms for the amount of `19.6 crores.

10. It is pertinent to mention that the relevant clause of the Distributorship Agreement dealing with C Forms. Clause 20 has been stricken out by hand and instead, not applicable was written. This page also contains the signatures of the representatives of both the parties. The petitioner therefore, requests this Court to appoint a sole arbitrator to settle the disputes between the parties.

11. The respondents allege that the relationship between the parties is to be governed by custom for the past 16 years. They further allege that there is no concluded Distributorship Agreement itself, since the existing document is only in its draft stage and never finalized. They further argued that there is no amount outstanding due to certain payments made by them in June.

12. Another argument raised regarding the validity of the Distributorship Agreement, is that, it contains the signature of only one partner, who was not even authorized by the rest of the firm to conclude the contract. Therefore, as per the respondents, there is no concluded agreement.

13. The respondents argument with regard to the arbitration agreement is two-fold. First, they alleged that as per Section 8(2), the original arbitration agreement has to be filed, failing which an order cannot be passed under Section 11. This is another faulty argument. Section 8(2) clearly says that a certified copy of the agreement can be produced as well. Moreover, Sections 8 and 11 deal with completely different issues. Section 8 is for kick-starting the process of arbitration and this proceeding is used to determine the intent of the parties to arbitrate a given matter. Section 11 is relevant at a later stage when the parties are unable to appoint a Tribunal. However, for both Sections, the arbitration agreement has to be scrutinized.

14. The next argument taken up by the learned counsel for the respondents is regarding the wording of Clause 18 of the Distributorship Agreement. He argued

that the intention of the party behind the document is limited only to creating a draft limited only to deliberations over an arbitration clause. He also stressed upon the phrase we request in the inserted arbitration clause and argued that this indicated the respondents willingness to take part in negotiations only. This clause did not constitute a concluded contract as there was no meeting of the minds. Learned counsel for the respondents relied upon a judgment of the Supreme Court in the case of Jagdish Chander vs. Ramesh Chander & Ors., 2007(6) SCALE 325 to indicate that mutual consent is a necessity for the conclusion of a valid arbitration agreement. He further alleged that there has been a unilateral modification of the arbitration clause, which cannot be re-written without the consent of both the parties.

15. With regard to the matter of an arbitration clause, attention needs to be paid to the rest of the sentence that the respondent relies on. The phrase we request is to be read in light of arbitrator should be appointed which comes immediately after. This indicates that the consent of the parties is only required for the appointment of a suitable arbitrator. The consent for arbitration as a dispute resolution procedure is already present. An established principle in arbitration jurisprudence is that, there needs to be a clear indicator of intent to deviate from the public system in order to have the dispute adjudicated by a private Tribunal. The exact specifics of this Tribunals procedure need not be given in the arbitration agreement. The important requirement is that there must be a clear intention to deviate from the Court system. In the present case, this was satisfied with the presence of the word arbitration. The phrase relied upon by the learned counsel of the respondents cannot be taken to mean that there was no consent for having the dispute settled by arbitration.

16. The learned counsel for the respondents made another argument based on procedural requirements under Section 8(2) of the Act. He relied upon N.Radhakrishnan vs. Maestro Engineers, (2010) 1 SCC 72.to substantiate his claim that a reference to arbitration cannot be made if the procedural requirements (of filing the original arbitration agreement) have not been satisfied.

17. The final argument of the learned counsel for the respondents is hinged on the Indian Partnership Act. He argued that the Partnership Deed (which has not been put on record) did not give implicit consent for a partner to represent the firm. Therefore, the argument is that, since only Respondent No.2 has signed the Distributorship Agreement, respondent No.1 (the firm) and Respondent No.3 (another partner) are non-parties to the agreement and thus, cannot be forced into arbitration. This argument again can be rebutted by the fact that the Distributorship Agreement clearly states that it is between the petitioner and respondent No.1 and mentions respondent No.2 to be the authorized signatory. Therefore, the agreement is between the petitioner and Respondent No.1. Respondents No.2 and 3 are not independent from the firm and therefore, cannot be seen as separate parties, since a firm cannot have an independent existence from its constituent units.

18. Existence of agreement containing the arbitration clause is not denied by the respondents. Admittedly, dispute between the parties arose. The conduct of the respondents shows that despite of above, they are not willing to go for arbitration. It is settled law that if the arbitration clause is capable of being made certain having regard to the language used therein as well as to the provisions of Sections 10 & 11 of the Act, then the same would be valid and binding upon the parties.

19. There is no force in the contention of the respondents that the said agreement was finalized. The said document is duly signed by one of the partners. The signature appearing on the agreement is not denied by the respondents. The argument of the respondents has also no force that it was not the concluded agreement, as the said agreement was duly approved and corrected by the respondents. Even otherwise, it is open to the respondents to raise such plea before the learned Arbitrator. It is not necessary to determine the defence of the respondents in this petition at this stage, as this Court has to examine the conduct of the parties and their intentions to determine the disputes, if any.

20. Considering the overall facts and circumstances of the case, I am of the view that the prayer made in the Arb.P.No.342/2012 should be allowed. Accordingly, Justice M.K.Sharma, a retired Judge of Supreme Court of India, R/o S-306,

Panchsheel Park, New Delhi (Mob.No.9818000190), is appointed as sole Arbitrator for adjudicating upon all the disputes and differences as referred to in the present petition between the petitioner and the respondents in terms of the agreement in question. Both the parties would be entitled to raise their claims and counter-claims before the learned Arbitrator. The Arbitrator shall conduct the proceedings under the provisions of the Arbitration and Conciliation Act, 1996 and shall give prior notice before commencing the proceedings. The fee of the learned Arbitrator shall be payable to the tune of as per rules of Delhi High Court Arbitration Centre which shall be borne by both the parties in equal proportion.

21. With regard to the interim order already passed in OMP No.786/2012 on 29th August, 2012, the same shall continue during the arbitration proceedings unless the said order is vacated or modified by the sole Arbitrator if any application filed by the respondents.

22. Both the petitions are disposed of in the above said terms.

23. Copies of this order be communicated to the learned Arbitrator as well as to the Secretary of the Delhi High Court Arbitration Centre. Copies of the same should also be given dasti to the learned counsel for the parties. (MANMOHAN SINGH) JUDGE MAY 31.2013

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