M/S NANDAN BIOMATRIX LIMITED

v.

D 1 OILS LIMITED

(Arbitration Petition No. 6 of 2007)

FEBRUARY 11, 2009

[S.H. KAPADIA, J.]

ARBITRATION AND CONCILIATION ACT, 1996:

ss. 2 (1) (f), 7, 11 (5) and (9) – International commercial arbitration –Agreement providing for submission of dispute to "institutional arbitration" – Application for appointment of arbitrator – Resisted on the grounds that the expression "institutional arbitration" being vague, the arbitration clause was void and, because of the subsequent termination agreement, the claim stood extinguished – HELD: An arbitration agreement, as defined in s. 7, is not required to be in any particular form – Intention of parties for resolution of disputes through arbitration is relevant – In the instant case, there exists a valid arbitration agreement between the parties – Applicant having denied genuineness of termination agreement, number of issues arise for determination and, as such, there exists a live claim between the parties – Disputes between the parties referred to Singapore International Arbitration Centre, which would nominate an arbitrator from its panel.

The applicant was engaged in the business of seed cloning and production etc. It entered into a Supply Agreement with the respondent, Clause 15.1 whereof stipulated, "any dispute that arises between the parties shall be resolved by submitting to the institutional arbitration in India under the provisions of the Arbitration and Conciliation Act, 1996". Thereafter, a Joint Venture Agreement was entered into between the parties" on

A 30.9.2004. It was followed by a third agreement dated 26.11.2004 called "R & D Agreement". According to the applicant, it noticed only on 24.5.2005 the existence of a termination agreement dated 16.10.2004, which was a fabricated document. A complaint was registered in this B regard. Since dispute arose between the parties due to respondent's non-fulfilling the obligations under the Supply Agreement, the applicant approached the Court for appointment of arbitrator. The stand of the respondent was that the Supply Agreement did not provide for C arbitration by reference to any particular institution nor did it provide for the rules framed by any particular institution and, therefore, the expression "institutional arbitration" used in Clause 15.1 of the Supply Agreement was vague and/or incapable of being made certain and, D as such, was void. It was further submitted that the the Joint Venture Agreement, which superseded and replaced the Supply Agreement, did not contain any arbitration clause and, in any event, by virtue of the Deed of Termination dated 16.10.2004, which was signed by the Directors of the applicant, the claim, if any, of the E applicant stood extinguished.

The questions for consideration before the Court were: (1) "Whether there exists a valid arbitration agreement between the parties" and (2) "Whether there F exists a live claim between the parties".

Allowing the application, the Court

HELD: 1. The Arbitration and Conciliation Act, 1996, which defines 'arbitration agreement' u/s 7, does not G prescribe any form for the purpose nor does it require an arbitration agreement to be in any particular form. What is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration. In the instant case, name of any H specific institution is not indicated in Clause 15.1 of the

Supply Agreement, but the parties unequivocally agreed for resolution of the disputes through institutional arbitration and not through an ad hoc arbitration. Therefore, there exists a valid arbitration agreement between the parties in terms of clause 15.1 of the Supply Agreement dated 10.8.2004. [Para 21] [127-B]

Rukmanibai Gupta v. Collector, Jabalpur & Ors. **(1980) 4 SCC 556; and** *M. Dayanand Reddy v. A.P. Industrial Infrastructure Corporation Limited & others* **- (1993) 3 SCC 137 and** *Bihar State Mineral Development Corporation & Another v. Encon Builders (I) (P) Ltd.* **(2003) 7 SCC 418, relied on.**

M/s. S.B.P. & Co. v. M/s. Patel Engineering Ltd. & Anr. **(2005) 8 SCC 618, referred to.**

2.1. The applicant has claimed compensation/ damages for supply of seeds to the non-applicant under the Supply Agreement. This is the basic claim made on behalf of the applicant. Having regard to the claim made by the applicant and the stand taken by the respondent, a number of issues arise involving genuineness of Deed of Termination, its effect on the Supply Agreement, effect of the R & D Agreement and Joint Venture Agreement etc. In the circumstances, the case involves a live claim between the parties. [Para 23 and 24] [128-B; 128-E]

2.2. The applicant has given an undertaking to the Court to withdraw the criminal complaint instituted by it (registered as FIR No. 902 of 2005 and filed in the Court of Addl. Chief Metropolitan Magistrate XIV, Hyderabad), if the matter is referred to arbitration. Undertaking dated 7.2.2009 would be taken on record. In the circumstances, all disputes and differences between the parties should be referred to Singapore International arbitration Centre, which would nominate an Arbitrator from its panel. [Para 25 and 26] [128-G-H; 129-A-B]

A **Case Law Reference:**

(2005) 8 SCC 618	**referred to**	**para 14**
(1980) 4 SCC 556	**relied on**	**para 17**
(1993) 3 SCC 137	**relied on**	**para 18**
B **(2003) 7 SCC 418**	**relied on**	**para 21**

CIVIL ORIGINAL JURISDICTION : Arbitration No. 6/2007.

Under Section 11(6) of the Arbitration and Conciliation Act, 1996.

C

Bina Madhavan, Prasad, Shwetank Sailakwol and S.U.K. Sagar (M/s. Laywer's Knit & Co) for the Appellants.

ILL Tikku, Atul S. Rajadhyaksha, Ashwani Kumar, Rajneesh Sharma. Debasis Mohapatra for the Respondent.

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The Judgment of the Court was delivered by

S.H. KAPADIA, J.1. This application under sub-section (5) and (9) of Section 11 of the Arbitration and Conciliation Act, 1996 (for short, "the 1996 Act") has been filed with a prayer to E appoint an Arbitrator in terms of clause 15.1 of the Agreement dated 10.8.04 entered into by and between the applicant and the non-applicant.

2. The facts leading to filing of this application may be F briefly noticed.

3. The applicant is *inter alia* engaged in the business of seed cloning and production, nursery development and propagation, plantation management and maintenance and the cultivation of medicinal plants. On 10.8.04 the applicant and the G non-applicant entered into seed supply agreement (Supply Agreement) through which the applicant agreed to establish nurseries and prepare seedling (seed) catering to the requirement of non-applicant. According to the said Agreement the non-applicant promised to make an investment of H Rs.299.35 lakhs with the applicant. The Supply Agreement *inter*

alia contained an arbitration clause 15.1 which reads as under: A

> "**15.1**. Any dispute that arises between the parties shall be resolved by submitting the same to the institutional arbitration in India under the provisions of Arbitration and Conciliation Act, 1996." B

4. Applicant herein entered into a Joint Venture Agreement with non-applicant on 30.09.04. The said Agreement contemplated incorporation of a Joint Venture Company. This second Agreement did not contain an arbitration clause. It may be noted that the applicant has no claim against C the non-applicant under the second Agreement.

5. Besides the Joint Venture Agreement dated 30.9.04, a third Agreement was also entered into on 26.11.04 called as Research and Development Agreement ("R & D Agreement", D in short).

6. In short, there existed three Agreements at the relevant time. The first was the Supply Agreement. The second was the Joint Venture Agreement. The Third was R & D Agreement. In E between the Joint Venture and R & D Agreements there is Termination Agreement dated 16.10.04. Although the applicant has no claim under the Joint Venture Agreement, it is necessary to mention that there were three Agreements by and between the parties because one of the contentions raised by the non-F applicant in its counter (at page 109 of the paper book of Arbitration Application) to the effect that if the applicant genuinely believed that the Supply Agreement had not been terminated by the Termination Agreement dated 16.10.04, it would not have entered into the R & D Agreement under which the applicant had received £40 thousand. G

7. To sum up the chronology of events it may be stated that the Supply Agreement came to be executed on 10.8.04. The Joint Venture Agreement came to be executed on 30.9.04.

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A However, on 16.10.04 a Termination Agreement allegedly has been entered into by and between the parties. After Termination Agreement, parties executed R & D Agreement on 26.11.04.

B 8. There is no dispute regarding execution of the Supply Agreement, the execution of the Joint Venture Agreement and the execution of R & D Agreement. The dispute is regarding the execution of the Termination Agreement dated 16.10.04. The dispute is regarding the effect of that Termination Agreement by which purportedly the Supply Agreement stood C terminated. The dispute is also whether in view of the specific clauses mentioned in the Termination Agreement, all claims ceased to exist.

9. The entire controversy revolves around the purported D Deed of Termination dated 16.10.04.

The claim of the applicant

10. The claim made by the applicant concerns willful breach of obligations by the non-applicant under the Supply E Agreement. Applicant says that they have exhausted all the available remedies before approaching this Court for appointment of Arbitrators under Section 11 of the 1996 Act. It is their submission that the Supply Agreement dated 10.8.04 has not been terminated by the purported Termination F Agreement dated 16.10.04. It is their claim that the alleged Deed of Termination is brought about by the non-applicant by forging the signatures of its Directors only to avoid the liabilities and obligations under the Supply Agreement between the parties. It is their claim that the existence of the Termination G Agreement came to be noticed by them only on 24.5.05 when the non-applicant representatives forwarded the alleged Termination Agreement. It is only then that they noticed that the document was false and fabricated. The applicant's claim that the Termination Agreement was not signed by two of its

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Directors whose signatures had been forged and that in any event the said two Directors had no authority to sign the said Agreement. In fact a criminal complaint has been registered on 1.9.05 in Hyderabad and the same is under investigation. The applicant claims that they have also forwarded the forged document to a private investigating agency with the specimen signatures of their two Directors together with the admitted signatures which, according to the applicant, reveals that the signatures on the Termination Agreement were forged between 16.10.04 being the date of the Termination Agreement and 24.5.04 being the date on which the applicant noticed the existence of the Termination Agreement for the first time. There has been lot of correspondence between the parties on the basis of which the claimant claims damages for not being paid for supply of Jatropha seedlings. In short, the claim for damages is for reimbursement of expenses incurred by the applicant as part of the total investment under the Supply Agreement. It may be noted that in the Arbitration Application, the claim for damages based on reimbursement of expenditures incurred by the applicant is confined to the Supply Agreement. However, in the Written Statement, the claim refers to the Supply Agreement as well as the R & D Agreement. In this connection, it is alleged that in the original R & D Agreement dated 26.11.04, there was no arbitration clause, however, in the R & D Agreement read with the modification in the form of Addendum dated 9.4.05, an arbitration clause was incorporated. The claim of the applicant is set out in its letter dated 17.6.05 by which the applicant has claimed compensation in respect of breach of obligations by the non-applicant under the Supply Agreement and under the R & D Agreement. It is also set out in the letter dated 4.7.05. By notice dated 10.8.05 the applicant called upon the non-applicant to agree for appointment of M/s. Jupiter Legal Services Pvt. Ltd. to conduct arbitration under 1996 Act to which the non-applicant did not agree. Suffice it to state that after exhausting all available remedies the applicant have approached this Court for appointment of Arbitrators under Section 11 of the 1996 Act.

A **Response of the non-applicant**

11. By way of counter, non-applicant at the outset submits that the Supply Agreement did not provide for arbitration by reference to any particular institution nor did it provide for the rules framed by any particular institution and, therefore, the expression "institutional arbitration" used in clause 15.1 of the Supply Agreement is vague and/or uncertain and/or incapable of being made certain and, therefore, clause 15.1 was void under Indian Contract Act and consequently the Arbitration Application was not maintainable under Section 11 of the 1996 Act. It is further stated that the Arbitration Application was liable to be dismissed as it sought an appointment of an Arbitrator in respect of claims for which there was no arbitration agreement between the parties. In this connection, reliance was placed on the Joint Venture Agreement which does not provide for arbitration. Similarly reliance was placed on the R & D Agreement to show that it was a separate agreement which did not provide for arbitration nor was there any reference to clause 15.1 mentioned in the Supply Agreement. Therefore, on the aforestated *inter alia* grounds, the non-applicant submits that the Arbitration Application was not maintainable.

12. On merits, the non-applicant has stated in its counter that prior to 16.10.04 parties were involved in discussions relating to commercial necessity warranting variation in the terms of Supply Agreement resulting in the applicant agreeing to execute a deed of variation dated 14.10.04. That deed did not meet the requirements of the parties. Therefore, it was suggested to the applicant by the non-applicant that the Supply Agreement be terminated. According to the non-applicant, there was correspondence in that regard through internet between the parties. That correspondence showed that the applicant had received the Deed of Termination on 16.10.04. That correspondence showed that the applicant had agreed to terminate the Supply Agreement and had in fact signed the Termination Agreement and the same was mutually accepted

by both the parties. Therefore, the non-applicant has denied all the allegations of the applicant in regard to the invalidity and the illegality of the Deed of Termination dated 16.10.04. According to the non-applicant, the contentions raised by the applicant stating that the Deed of Termination has not been executed, that it was forged and in any event that it was signed by Directors who were not authorized to sign was an after-thought. According to the non-applicant, it was agreed between the parties that the Joint Venture Agreement would supersede the Supply Agreement. The Joint Venture Agreement would replace the Supply Agreement. The applicant could not have pursued the Joint Venture Agreement on and after it came to replace the Supply Agreement. According to the non-applicant, the applicant continued to pursue the Joint Venture Agreement. According to the non-applicant, the applicant was specifically advised not to act in furtherance of the Supply Agreement till the Joint Venture Company is incorporated. The Termination Agreement was signed by the parties with the intention that such execution would void the Supply Agreement. According to the non-applicant, the correspondence between the parties shows that the applicant was fully aware of the Termination Agreement. It shows that the Deed was signed on 16.10.04. It shows that all issues/claims under the Supply Agreement stood resolved. The correspondence shows that after 16.10.04, the parties discussed implementation of the Joint Venture Agreement rather than the Supply Agreement. Lastly, according to the non-applicant, it would be commercially inconsistent and illogical for parties to enter into R & D Agreement while the Supply Agreement still continues to exist. According to the non-applicant, it was highly inconceivable that the parties would have entered into R & D Agreement if it thought that the Supply Agreement was still in existence or if it thought that the Joint Venture Agreement was legally binding. According to the non-applicant, the Supply Agreement dated 10.8.04 stood validly terminated on 16.10.04, that the Joint Venture Agreement dated 30.9.04 consisted of heads of terms only whereas the R & D Agreement dated 26.11.04 stood implemented. According to

A the non-applicant, amounts have been received by the applicant under the third Agreement. That, the applicant had failed to meet their obligations under the R & D Agreement. That, the applicant was in breach of the R & D Agreement. That, under the Deed of Termination dated 16.10.04 all claims in respect
B of alleged expenditure for alleged supply of seedlings stood satisfied/ceased. For the aforestated reasons, the non-applicant submits that the Arbitration Application No.6 of 2007 deserves to be dismissed with costs.

C **Issues which arise for determination**

13. Having regard to the pleadings and contentions, the following issues arise for consideration:

(a) Whether there exists a valid arbitration agreement
D between the parties.

(b) Whether there exists a live claim between the parties.

14. It is now well-settled that the power exercised by the
E Chief Justice of India or the designated judge under Section 11(6) of the 1996 Act is not an administrative power. [**See:** *M/s. S.B.P. & Co. v. M/s. Patel Engineering Ltd. & Anr.* – (2005) 8 SCC 618]

F **Findings on Issue No.(a) – Whether there exists a valid arbitration agreement between the parties**

15. The disputed arbitration clause in the present case is clause 15.1, mentioned in the Supply Agreement, which is reproduced as under:

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"**15.1**. Any dispute that arises between the parties shall be resolved by submitting the same to the institutional arbitration in India under the provisions of Arbitration and Conciliation Act, 1996."

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16. Arbitration agreement is defined under Section 7 of the 1996 Act. It does not prescribe any particular form as such. In terms of the said provision, arbitration agreement means:

> *"Section 7 - Arbitration agreement*
>
> (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing.
>
> (4) An arbitration agreement is in writing if it is contained in-
>
> (a) a document signed by the parties;

17. This Court in *Rukmanibai Gupta v. Collector, Jabalpur & Ors.* – (1980) 4 SCC 556, has held that what is required to be ascertained, while construing a clause is : whether the parties have agreed that if disputes arise between them in respect of the subject matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement.

18. In *M. Dayanand Reddy v. A.P. Industrial Infrastructure Corporation Limited & others* – (1993) 3 SCC 137, this Court has held that *an arbitration clause is not required to be stated in any particular form.* If the intention of the parties to refer the dispute to arbitration can be ascertained from the terms of the agreement, it is immaterial whether or not the expression "arbitration" or "arbitrator" or "arbitrators" has been used in the agreement.

A 19. The Court is required, therefore, to decide whether the existence of an agreement to refer the dispute to arbitration can be clearly ascertained in the facts and circumstances of the case. This, in turn, may depend upon the intention of the parties to be gathered from the correspondence exchanged between B the parties, the agreement in question and the surrounding circumstances. What is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration. What is required to be decided in an application on Section 11 of the 1996 Act is : whether there C is an arbitration agreement as defined in the said Act.

20. Mr. H.L. Tikku, learned senior counsel appearing on behalf of the non-applicant submitted that clause 15.1 did not contain any arbitration clause, that clause 15.1 was vague as it did not provide for arbitration by reference to any particular D institution nor did it provide that the rules framed by any particular institution shall govern the arbitration between the parties. According to the learned senior counsel, in absence of a reference to any particular institution providing for arbitration or in absence of rules framed by it, the expression E "institutional arbitration" used in clause 15.1 of the Supply Agreement was vague and/or uncertain and/or incapable of being made certain.

21. I do not find any merit in the above contentions raised F on behalf of the non-applicant. The question which needs to be asked is : what did the parties intend at the time of execution of the Supply Agreement dated 10.8.04? What did the parties intend when clause 15.1 came to be incorporated in the said Supply Agreement? The answer to the said questions G undoubtedly is that any dispute that may arise between the parties shall be resolved by submitting the same to the Institutional Arbitration in India under the provisions of the 1996 Act. It may be mentioned that the name of a specific institution is not indicated in clause 15.1. The 1996 Act does not prescribe any form for an arbitration agreement. The arbitration H

agreement is not required to be in any particular form. [See : *Bihar State Mineral Development Corporation & Another v. Encon Builders (I) (P) Ltd.* - (2003) 7 SCC 418]. What is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration. In my view, in the present case, the parties unequivocally agreed for resolution of the disputes through Institutional Arbitration and not through an ad hoc arbitration. Therefore, in my view, there exists a valid arbitration agreement between the parties vide clause 15.1 in the Supply Agreement dated 10.8.04. The first issue is accordingly answered in favour of the applicant and against the non-applicant.

Findings on Issue No.(b) – whether there exists a live claim between the parties

22. On going through the pleadings and the case of the parties before me, I find that the following amongst other points indicate that there exists a live claim between the parties. As can be seen from the above facts, in this dispute there are three agreements. The first is the Supply Agreement. The second is the Joint Venture Agreement. The third is the R & D Agreement. It is the case of the non-applicant that vide the Termination Agreement dated 16.10.04, the Supply Agreement stood terminated. It is the case of the non-applicant that the Termination Agreement has been signed by two of the Directors of the applicant company. It is the case of the non-applicant that the Termination Agreement was signed by the parties with the express intention that such execution would void the Supply Agreement. It is the case of the non-applicant that the intention behind entering R & D Agreement was to put an end to the Supply Agreement. It is the case of the non-applicant that in view of the Termination Agreement, the claim of the applicant towards alleged expenditure incurred by it stood extinguished/waived/satisfied. It is the case of the non-applicant that the Termination Agreement indicates accord and satisfaction of all the claims of the parties under the Supply

A Agreement. It is the case of the non-applicant that under the Deed of Termination any claim on account of alleged expenditure stood extinguished.

23. Having regard to the claim made by the applicant and the response of the non-applicant, number of issues arises for determination. Some of them are as follows, namely, whether the Deed of Termination stood forged as claimed by the applicant? If not, whether it has been signed by the two Directors who were not authorized to sign on behalf of the applicant? Effect of the R & D Agreement and its implementation on the Supply Agreement? Whether Joint Venture Agreement replaced the Supply Agreement? Whether the Supply Agreement should be read along with the Joint Venture Agreement and the R & D Agreement or whether the Supply Agreement should be read as a stand-alone item? Whether the claim for alleged expenditure incurred by the applicant for supply of seedlings under the Supply Agreement stood extinguished by the Deed of Termination dated 16.10.04? Whether claims, if any, under the Supply Agreement had ceased in view of the Termination Agreement dated 16.10.04?

24. In my view, if these questions are to be looked into, the conclusion is that the case involves a live claim between the parties. The applicant has claimed compensation/damages for supply of seeds to the non-applicant under the Supply Agreement. This is the basic claim made on behalf of the applicant. Accordingly, Issue No.(b) is also answered in favour of the applicant and against the non-applicant.

25. Before concluding, it may be mentioned that the applicant has given an undertaking to this Court to withdraw the criminal complaint instituted by it, if the matter is referred to arbitration. That criminal complaint registered as FIR No.902 of 2005 has been filed in the Court of Additional Chief Metropolitan Magistrate No.XIV at Hyderabad. The complaint has been filed under Section 200 for offences punishable under Section 406, 420, 468, 471 r/w 120B of Indian Penal Code.

Applicant undertakes to withdraw the said complaint. Registry is directed to take the Undertaking dated 7.2.09 on record. A

26. In the light of the foregoing discussion, I am of the opinion that all disputes and differences between the parties should be referred to Singapore International Arbitration Centre, which would nominate an Arbitrator from its panel to decide all disputes and differences. B

27. Accordingly the Arbitration Application No.6 of 2007 is made absolute with no order at to costs. C

R.P. Application allowed.