

M/S Bhardwaj India Pvt Ltd vs M/S Revacure Lifesciences Llp on 28 September, 2021

Author: Vibhu Bakhru

Bench: Vibhu Bakhru

\$~13

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

ARB.P. 947/2021

M/S BHARDWAJ INDIA PVT LTD

Through: Mr. Ashish Chauhan, Advoca

versus

M/S REVACURE LIFESCIENCES LLP

Through:

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

%

28.09.2021

I.A. 12593/2021

1. Exemption is allowed subject to all just exceptions.

2. The application stands disposed of.

1. The petitioner has filed the present petition under Section 11(6) of Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act') praying that an Arbitrator be appointed to adjudicate the dispute between the parties arising in connection with the Technical Agreement dated 05.12.2017 and Supply Agreement dated 31.03.2018.

2. The petitioner's case is that the said agreements were based on certain representations and assurances made by the respondent. The petitioner claims that he has placed orders for manufacture of drugs namely Gemcitabine and Docetaxel and in terms of the said Supply Agreement, it released a sum of 47,27,000/- being 50% of the advance payment for the supplies. It is claimed that despite the assurances held out by the respondent, there was a significant delay in supply of the said material. It is further alleged that the material supplied by the petitioner was sub-standard and has resulted in a significant loss to the petitioner.

3. In view of the said dispute, the petitioner sent a notice dated 09.07.2021 invoking the said agreement to refer the disputes to arbitration. It had also proposed the name of an Advocate to be

appointed as its nominee arbitrator. Further, it is also suggested that instead of a panel of three arbitrators, a sole arbitrator may be appointed for adjudication of the said claims. Since the respondent neither nominated its arbitrator nor concurred with the petitioner's suggestion that a sole arbitrator be appointed, the petitioner has filed the present petition.

4. The learned counsel for the respondent has opposed this petition on the ground that the disputes raised by the petitioner are not arbitrable. He states that in terms of the Drugs and Cosmetics Act, 1940 as well as the Rules made thereunder, the respondent cannot be held responsible for any alleged offence regarding sub-standard or spurious drugs. He further submits that the respondent had merely provided its manufacturing facility to the petitioner and has not taken undertaken any liability in respect of the drugs supplied. He has also referred to decision of the Supreme Court in *Vidya Drolia v Durga Trading Corporation*: (2021) 2 SCC 1, wherein the Court had held that in cases in which disputes are not arbitrable, the Court would not relegate the parties to a protracted litigation.

5. The Supply Agreement contains an Arbitration Clause, which reads as under:-

18.3 "ARBITRATION / DISPUTE RESOLUTION 18.3.1 The Parties recognise that disputes as to certain matters may from time to time arise during the term which relate to a Party's rights and/or obligations hereunder or to the interpretation, performance, breach, or termination of this Agreement. It is the objective of the Parties to establish procedures to facilitate the resolution of a Dispute in an expedient manner by mutual cooperation and without resort to litigation. To accomplish this objective, the Parties agree to follow the Arbitration procedures set forth in this Article, if and when a Dispute arises under this Agreement.

18.3.2 The Arbitral Panel shall consist of 3 arbitrators and each party shall be entitled to nominate one arbitrators. The arbitrator thus appointed by the parties shall further appoint one presiding arbitrator.

18.3.3 The arbitration Proceedings shall be conducted in accordance with Arbitration and Conciliation Act, 1996 or any amendment thereof.

18.3.4 The place of arbitration shall be at Delhi, India only.

18.3.5 Each Party shall bear its own costs, fees and expense in the arbitration and shall share equally the Panel's fees, unless the Panel determines that its fees are to be paid by the non-prevailing."

6. There is no dispute that the parties had entered into the Supply Agreement dated 31.03.2018 or that the same embodies an agreement to refer the disputes to arbitration. There is also no dispute that the petitioner had invoked the Arbitration Clause and called upon the respondent to nominate its arbitrator.

7. The respondent has opposed the present petition on the sole ground that the disputes sought to be raised are not arbitrable and the respondent is absolved from any liability towards the petitioner under the said agreements by virtue of the Drugs and Cosmetics Act, 1940 and the Rules made thereunder.

8. Prima facie, the aforesaid contention is unmerited. The petitioner had undertaken specific contractual obligations under the Supply Agreement and plainly any dispute as to the performance of the petitioner's obligations under that Agreement would be contractual disputes capable of being adjudicated by an Arbitral Tribunal. The reliance placed by the learned counsel appearing for the respondent on the decision of the Supreme Court in *Vidya Drolia v Durga Trading Corporation* (supra), is misplaced. It is only in cases where the disputes, ex facie, are not arbitrable that the court would refrain from passing any order for constitution of the arbitral tribunal as there could be no agreement to refer such disputes to arbitration. However, in cases, the question where the disputes are arbitrable is a contentious one, the same has to be considered by the arbitral tribunal on the principles of kompetenz-kompetenz.

9. In *Vidya Drolia v Durga Trading Corporation* (supra), the Supreme Court had referred with approval to the following passage from the decision of this Court in *NCC Ltd. v Indian Oil Corporation Ltd*: 2019 SCC OnLine Del 6964.

"107. In my view, the scope of examination as to whether or not the claims lodged are Notified Claims has narrowed down considerably in view of the language of Section 11(6- A) of the 1996 Act. To my mind, once the Court is persuaded that it has jurisdiction to entertain a Section 11 petition all that is required to examine is as to whether or not an arbitration agreement exists between the parties which is relatable to the dispute at hand. The latter part of the exercise adverted to above, which involves correlating the dispute with the arbitration agreement obtaining between the parties, is an aspect which is implicitly embedded in sub-section (6-A) of Section 11 of the 1996 Act, which, otherwise, requires the Court to confine its examination only to the existence of the arbitration agreement. Therefore, if on a bare perusal of the agreement it is found that a particular dispute is not relatable to the arbitration agreement, then, perhaps, the Court may decline the relief sought for by a party in a Section 11 petition.

However, if there is a contestation with regard to the issue as to whether the dispute falls within the realm of the arbitration agreement, then, the best course would be to allow the arbitrator to form a view in the matter.

108. Thus, unless it is in a manner of speech, a chalk and cheese situation or a black and white situation without shades of grey, the court concerned hearing Section 11 petition should follow the more conservative course of allowing parties to have their say before the Arbitral Tribunal."

10. In the given facts, this Court is unable to accept that ex-facie the disputes sought to be raised by the petitioner are not arbitrable.

11. In view of the above, the Arbitral Tribunal is required to be constituted to adjudicate the disputes between the parties.

12. Since, the value of the claims raised by the petitioner is low, this Court had suggested that a Sole Arbitrator be appointed to adjudicate the disputes between the parties. However, the said suggestion is not acceptable to the respondent.

13. Considering there is no dispute as to the existence of an agreement to refer the disputes to arbitration in terms of Clause 18.3 of the Supply Agreement as set out above, this Court considers it apposite to allow the present petition.

14. Accordingly, Mr Lokesh Bhola, Advocate is appointed as the respondent's nominee Arbitrator. The nominated Arbitrator shall within a period of fifteen days from today shall jointly appoint a presiding Arbitrator within a period of thirty days from today.

15. It is clarified that the appointment of the Arbitrator is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act.

VIBHU BAKHRU, J SEPTEMBER 28, 2021 Aj