

Geep Batteries (India) Pvt. Ltd. vs Gillette India Ltd. on 7 April, 2005

Equivalent citations: 2005(2)ARBLR316(DELHI), 120(2005)DLT387, 2005(30)PTC597(DEL)

JUDGMENT

S.K. Agarwal, J.

1. By this petition under Section 9 of the Arbitration and Conciliation Act, (for short 'the Act') M/s. Geep Batteries (India) Pvt. Ltd. (hereinafter referred, as 'petitioner/buyer') has prayed for an interim injunction restraining M/s. Gillette India Ltd. (hereinafter referred as 'respondent/ seller'), from disposing of or alienating or encumbering its Intellectual Property Assets, covenanted to be transferred to the petitioners, in terms of agreement dated 28.12.2002.

2. Facts essential for disposal of this petition are as follows --The respondent (seller) is engaged, inter alia in the business of manufacturing and distribution of blades, razors, toiletries, dry cell batteries, oral care products and small electrical appliances. In 1998 the respondent acquired Geep business, comprising Geep brand name and Distribution Network from M/s. Shervani Industrial Syndicate Ltd. (hereinafter "SISL"). They also entered into a long term sourcing agreement with SISL, for supply of flashlights and some other special batteries. They have also been sourcing certain batteries from Gillette Diversified Operation Pvt. Ltd. (hereinafter GDOPL') at Mysore. The respondent agreed to sell above business, including the Intellectual Property Assets, Customer Contracts, Marketing and Distribution Network and Access to Sourcing arrangements to the petitioner, as per terms and conditions contained in Asset Purchase Agreement dated 28.1.2002 (herein "the agreement"). This agreement sets out in detail, rights and liabilities of the parties under broad headings. Article 1 provides definitions and interpretation of the various terms used in the agreement. "Intellectual Property Assets" is defined to include the Geep Trade Marks, Geep Copyrights and Geep Designs. "Inventory" is defined to mean, the inventory of the seller consisting of finished goods, work in progress, raw materials, packaging materials and goods in transit, but excluding finished goods work in progress and raw material of the seller at the transit SISL. Article 2 states that seller shall sell, transfer, convey, assign and deliver, as the case may be, to the buyer and the buyer shall purchase, acquire, accept, as the case may be, from the seller free from all encumbrances (except as expressly provided in the agreement or disclosed in the Disclosure Schedule), all rights, title and interest of the seller in Intellectual Property Assets (Clause 2.1.1), Distribution Network (Clause 2.1.2), Access to Sourcing (Clause 2.1.3), and Current Assets (Clause 2.1.4). The seller also agreed to execute the related agreement, including Deed of Assignment of the Geep Trademarks, Geep Copyrights and Geep Designs subject to the payment of the amounts payable under the agreement. Article 3 contains the purchase price and the mode of payments -- (a) Rs. 18.0 crores (Rupees eighteen crores only) as consideration for sale, assignment, transfer and

delivery of the "Intellectual Property Assets" (Clause 3.1.1); (b) Rs. 4.0 crores (Rupees four crores only), as consideration for sale of "Distribution Network" (Clause 3.1.2), (c) Rs. 8.84 crores representing the value of the Inventories prepared in accordance with Article 3.2, payable in 12 monthly Installments (Clause 3.1.3); Rs. 9.0 crores towards Current Assets other than the Inventories determined, in accordance to Article 3.3 which was payable within 15 days from the date of delivery of the Chartered Account's certificate. Article 4 deals with the employees; Articles 5, 6 and 8 deal with pre-closing, closing and post-closing obligations; Article 7 provides penalty for default. It states that in the event of the buyer failing to make payments due from it under the agreement on due dates and does not cure the breach within thirty (30) days of the notice having been served by the seller, the seller would be released from its further obligations to the buyer under the agreement, in particular, the obligation to transfer Intellectual Property Assets or any of them to the buyer. It further provides that the seller shall be owing no obligation of refunding or reimbursing the amounts or any part thereof, until then received by the seller. Articles 9, 10 and 11 provide representations and warranties of the seller, buyer, and indemnity. Articles 9.11 empowers the buyer to recover damages towards the claims of the distributors, etc. upon the closing date. Article 12 contains miscellaneous provisions. Article 12.7 states that various provisions in the agreement are severable. It may be noted here that on the representations made by the buyer to the seller to revise payment schedule, as well as to make certain amendments in the Assets Purchase Agreement, the parties entered into Supplementary Agreement on 19.9.2003, but the basic conditions of the earlier agreement remained unchanged.

3. The case of the petitioner is that in terms of the said Assets Purchase Agreement, petitioner purchased three items from the respondent -- (i) Intellectual Property Asset comprising Geep Trademarks, Geep Copyrights and Geep Designs for a total price of Rs. 18.0 crores (vide Clauses 2.1.1. and 3.1.1.); and this amount has already been paid; (ii) The Distribution Network was purchased for Rs. 4.0 crores (vide Clauses 2.1.2 and 3.1.2.); and this amount has also been paid; (iii) The Current Assets comprise two components, (a) the Inventories for Rs. 8.84 crores (vide Clauses 2.1.4 and 3.1.3). This amount is payable in Installments. There is a dispute about payments made under the head; (b) Assets other than Inventories (vide Clauses 2.1.4 and 3.1.4.) for Rs. 9.0 crores. This amount has also been paid. In short the dispute between the parties pertains to the amount of Rs. 8.84 crores payable for inventories in Installments from 15.9.2003 to 31.3.2006, in terms of para 5 of Supplementary Agreement. It is pleaded that out of this amount, respondents have been paid a sum of Rs. 1.26 crores; respondents admit petitioner's claim for Rs. 1.0 crore for the dud stocks, dealers claim, etc. (as against the petitioners claim for Rs. 11.0 crores). The arbitration clause for resolution of this dispute has already been invoked.

4. In reply respondents have pleaded to the contrary inter alia stating that Intellectual Property Assets were to convey only after receipt of full payment under the Assets Purchase Agreement, and in the interregnum petitioner is only a licensee. The Assets Purchase Agreement is a composite agreement having one composite consideration, despite extension of time by way of Supplementary Agreement. Petitioner's cheques have been dishonoured due to insufficiency of funds and in view of default in payment respondents are relieved from their obligations under Assets Purchase Agreement, including the obligation to transfer Intellectual Property Assets, and is entitled to deal with Intellectual Property Assets under Article 7 of the agreement. The agreement is determinate

and cannot be specifically enforced, therefore, injunction cannot be granted and that petitioner's remedy is only by way of damages.

5. Learned Counsel for the petitioners argued that the respondents have expressly represented that they had no liabilities in respect of the transaction under the agreement for the period up to the date of closing and the seller agreed to indemnify the buyer against all liabilities, demands, claims of Geep business assets for the period up to and including the date of closing (Article 9.11). In terms of Article 12.7 each of the provisions contained in the agreement are severable and unenforceability of one does not affect the enforceability of any other or of the remainder of this agreement. Petitioners have claimed Rs. 11.0 crores from the buyer against the various liabilities and demands, which can only be adjudicated through arbitration and in case the respondents dispose of the Intellectual Property Assets in the meantime the petitioner would suffer irreparable loss and injury. On the other hand, learned Counsel for the respondents argued that it was a composite agreement under Article 7.1 and that the petitioners having admittedly failed to pay the entire amount, the respondents/buyers are relieved from its further obligation to the seller under the agreement, particularly the obligation to transfer the Intellectual Property Assets or any of them to the buyer and that they are entitled to forfeit the amount so far received by them. Reliance was placed on decision of this Court in Rajasthan Breweries Ltd. v. Stroh Brewery Company, AIR 2000 Delhi 450.

6. In order to appreciate the rival contentions, reference to some of the articles of the Asset Purchase Agreement would be necessary. The same run as under:

"Article 3: Purchase Price and Payment--

3.1. In consideration of the assets, right, title and interest agreed to be transferred by the seller, the buyer a consideration to the seller (hereinafter the "Purchase Price") as follows--

3.1.1. Rs. 18,00,00,000/- (Rupees eighteen crores only) being the consideration for sale, assignment, transfer and delivery of the Intellectual Property Assets in terms thereof at closing;

3.1.2. Rs. 4,00,00,000/- (Rupees four crores only) being the consideration for sale, transfer, assignment and delivery of Distribution Network and all other assets, rights and interest not elsewhere specified in this article, at closing; and 3.1.3. An amount representing the value, as at closing, of the inventories determined in accordance with Article 3 below to be paid in twelve (12) equal monthly Installments commencing from July, 2003 and ending with June, 2004. Each Installment shall be paid on or before 7th day of the calendar month with the first Installment being paid on or before July, 7, 2003.

3.1.4. An amount representing the value, as at closing, of the Current Assets other than the inventories, determined in accordance with Article 3.3 below, to be paid within fifteen (15) days of the delivery of the certificate referred in Article 3.3 below.

3.2 & 3.3 xxx xxx xxx Article 7: Termination and Default--

7.1. Without prejudice to any other rights or remedies the seller may have, in the event the buyer fails to make payments due from it under this agreement on the due date/s and does not cure the breach within a period of 30 (thirty) days of a notice having been served by the seller, the seller shall be relieved from its further obligations to the buyer under this Agreement and in particular the obligation to transfer the Intellectual Property Assets or any of them to the buyer and the seller shall have no obligation of refunding or reimbursing the amounts or any part thereof until then received by the seller. Further, the seller shall be free to deal with the aforesaid Intellectual Property Assets or any of them including sale or any other disposal thereof.

Article 9 Representations and Warranties of the Seller--

9.11. The seller has expressly represented that there are no liabilities in respect of the transactions under this agreement for the period up to the date of closing which the buyer has to undertake or which would be imposed on the buyer. The seller agrees to indemnify and hereby indemnifies the buyer against all liabilities, demands and claims of or against the Geep Business Assets for the period and including the date of closing.

Article 12: Miscellaneous--

12.7. Each of the provisions contained in this agreement shall be severable, and the unenforceability of one shall not affect the enforceability of any other or of the remainder of this agreement.

12.8 to 12.16. xxx xxx xxx."

7. The questions which fall for consideration are whether respondent is entitled to determine the contract in exercise of power conferred under Article 7.1 of the Assets Purchase Agreement dated 28.12.2002 and appropriate the entire amount so far received? And whether in the facts of this case, respondents are liable to be restrained from invoking this clause pending adjudication of petitioner's claim of damages for Rs. 11.0 crores?

8. The cardinal principles of interpretation of deeds and instruments are (i) to construe them according to their natural meaning if the words used are plain and unambiguous and not to bend its language in order to give effect to an interpretation sought to be given by a party; (ii) to adopt an interpretation that gives effect to the entire contract and not the interpretation that seeks to make any part of the contract redundant or meaningless; and (iii) to construe the deed in favor of the grantee if the same is found to be ambiguous or defective. Law with regard to grant of interim injunction while exercising jurisdiction under Section 9 of the Arbitration and Conciliation Act, 1996 is also settled. The protection under this section can be granted only when prima facie case, balance of convenience and possibility of irreparable loss and injury is made out. Section 23 of the Specific Relief Act, 1963 provides, the liquidation of damages is not a bar to the specific performance. The general rule of equity is that if a thing is agreed upon to be done, though there is a penalty attached thereto to secure its performance, yet the Court in its discretion enforce specific performance

thereof. The jurisdiction of the Court is discretionary and it must be exercised on the settled judicial principles.

9. In this case, as noted above, Article 3.1 provides separate sale consideration of Rs. 18.0 crores towards Intellectual Property Asset, which has been paid. The Sale Consideration for Distribution Network was for Rs. 4.0 crores, which has also been paid. The value of the Assets other than inventories was determined at Rs. 9.0 crores, which also stands paid. The only dispute is with regard to the amounts payable for inventories, which is admittedly payable in Installments, from 15.9.2003 to 31.3.2006 as per Supplementary Agreement. The petitioners claim Rs. 11.0 crores, which, of course, has been vehemently denied by the respondents. But there is no dispute that under Article 9.11 of the agreement, Seller is required to indemnify the buyer (petitioner) against all liabilities, demands and claims of or against Geep Business Assets up to the date of closing. Further, Article 12.7 provides that different components of the agreement are severable and disputes between the parties can be determined only through arbitration proceedings. The issue whether petitioners are entitled to damages of Rs. 11.0 crores, being claimed by them under Clause 9.11, is yet to be adjudicated by the Arbitrator. Therefore, prima facie, it cannot be held that petitioners have failed to make payment due from them under the agreement, entitling the respondents to invoke the termination clause under Article 7.1 and forfeit the entire amount of Rs. 36.0 crores by way of penalty. Taking into consideration the language of the entire agreement, particularly the articles quoted above and applying the principle that all provisions of the deed should be given effect to, I am persuaded to hold that Articles 7.1 of the agreement cannot operate independently and it has to be read along with Articles 9.11 and 12.7.

10. The duty not to enforce the penalty clause but only to award compensation is statutorily imposed on the Courts by Section 74 of the Contract Act. In all cases where there is a stipulation in the nature of penalty for the forfeiture of the amount deposited in pursuance of the terms of the contract, which expressly provides forfeiture, the Court has jurisdiction to award such sums as it considers reasonable. Reference in this regard can be made to the decision of the Supreme Court in *Fateh Chand v. Balkishan Das*, AIR 1963 SC 1405. It was held:

"11. Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether Section 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. It was urged that the section deals in terms with the right to receive from the party who has broken the contract of reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that Section 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon Courts by Section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms

of contract which expressly provides for forfeiture, the Court has jurisdiction to award such sum only as it considered reasonable, but not exceeding the amount specified in the contract as liable to forfeiture."

11. It may also be noted here that on 8.12.2004 petitioners made an offer that a sum of Rs. 36.0 crores paid by the petitioners to the respondents be returned to them; and that the petitioners would be willing to cancel the Asset Purchase Agreement, subject to return of Rs. 36.0 crores paid by them. This offer was rejected by the respondent. On 25.1.2005, after hearing learned Counsel of the parties at length, interim injunction was granted to the petitioners, and they were directed to deposit Rs. 1.5 crores, without prejudice to their rights and contentions, which is lying in the fixed deposit. The petitioners have succeeded in making out a prima facie case and have shown balance of convenience in their favor. They have also demonstrated that they would suffer irreparable loss and injury in case interim injunction as prayed for, is not granted. The observations made in Rajasthan Breweries Ltd. v. Stroh Brewery Co. (supra), cited by learned Counsel for the respondents, are not applicable to the facts at hand.

12. For the foregoing reasons, the petition is allowed. Interim injunction restraining M/s. Gillette India Ltd. ('respondent/seller'), in any manner from disposing of or alienating or encumbering Intellectual Property Assets, covenanted to be transferred to the petitioners, by the respondents, in terms of agreement dated 28.12.2002, is confirmed, pending final disposal of the arbitration proceedings between the parties. However, respondents would be entitled to receive Rs. 1.5 crores deposited by the petitioners in this Court, on furnishing security to the satisfaction of the Registrar General, without prejudice to the rights and contentions of the parties. With these directions petition stands disposed of. Any observation made herein would not affect merits of the case during arbitration proceedings. No order as to costs.