Sent by Jerere

7. The Supreme Court in the case of *B.R. Enterprises* (supra), while considering the validity of ban imposed by one State over lotteries of another State examined the nature of the so called lottery trade, or business and it was not only found to be not recognizable as a fundamental right but also found to be immoral with pernicious effect on the society. The Supreme Court observes the object of legislation on the subject of lotteries as permitted in the State and Central List as under (Para 35 of AIR) :

> "With is the reason for gambling to be legitimized, if in a given situation it has to be for a wider and purposeful objectives which leads to imposing conditions to reduce its evil consequences as suggested by this Court through *Suman Enterprises* (supra), adopted through Section 4 of the impugned Act, does it lose its original character of being pernicious. Even if it could be said to have diluted it, could it still be classified as commercium and equated with every other form of trade and commerce ? Its effect on its citizens has been cause of concern which had drawn attention of the kings and his subject since ancient time, the Government and the Courts of various countries including ours."

From the above observations and the other discussion made by the learned Judges in the Supreme Court case of *M/s. B.R. Enterprises* (supra), it is clear that the nature of the agreement for payment of a prize won on a lottery ticket continues to be in the nature of a wager to which the provisions of Section 30 of the Contract Act would be applicable irrespective of the fact that in order to check, reduce or control the evil of such gambling both Centre and the State have been permitted legislative powers in the Constitution.

8. For the aforesaid reasons, we find that the learned trial Judge was fully justified in refusing to grant any relief to the plaintiff on the basis of his claim for recovery of prize money on the lottery ticket sold to him. Consequently, the appeal is dismissed, but without any order as to costs.

Appeal dismissed.

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2000(2) Arb. LR 64 (Delhi) Articles I and II of N.Y. Convention

DELHI HIGH COURT

Before S.K. Mahajan, J.

Brawn Laboratories Limited —Plaintiff

Versus

Fittydent International GMBH and another —Defendants

I.A. Nos. 6318 of 1998, 192 and 871 of 1999 and Suit No. 1568 of 1998

VA - India

on the plea of non-commencement of commercial production—Clause 18.4 of the agreement—Injunction—Alleged that agreement invalid due to non-approval of the Government of India—Plaintiff failed to make out the case for grant of relief. ***Suit dismissed.***

Held—Moreover, a sea-change has been made in the law of arbitration after the passing of the Arbitration and Conciliation Act, 1996. Under Section 5 of the Arbitration and Conciliation Act no Judicial Authority shall intervene in the proceedings except where so provided in the Act. Moreover, while under the old Arbitration Act, a question relating to the jurisdiction of the Arbitrator could not be decided by him except when it was referred to him as a specific question of law, under Section 16 of the new Arbitration Act, the Arbitral Tribunal has the power to rule on its own jurisdiction including ruling on any objection with respondent to the existence or validity of the arbitration agreement and for that purpose an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and decision by the Arbitral Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. It is, therefore, clear that even assuming for the sake of arguments that the agreement dated 20.05.1994 between the parties was illegal and *non-est*, the same shall not on its own render the arbitration clause invalid and it is still within the competence of the Arbitrator to decide the validity of the same. It is, therefore, for the Arbitrator to decide as to whether the arbitration agreement between the parties still survives even assuming that the agreement dated 20.05.1954 was rendered invalid because of non-approval of the Government of India. In my opinion, this Court will not interfere in the proceedings before the Arbitrator and it will be open for the plaintiff to take all such pleas before the Arbitrator as it may be advised to take and have a decision thereon. (Para 11)

Further held, in my opinion, the plaintiff has not been able to make out any case for the grant of any relief in his application for injunction and this Court will not interfere with the proceedings before the Arbitrator. In my opinion, the suit by the plaintiff is also misconceived and is barred by the provisions of Section 16 of the Arbitration and Conciliation Act. While, therefore, dismissing the application of the plaintiff for the grant of injunction, I allow the application of defendant No. 1 under Order 7, Rule 11 and dismiss the suit with no order as to costs. (Para 12)

(ii) Foreign Exchange Regulation Act, 1973, Section 47—Provision of the agreement—Approval of Central Government or Reserve Bank of India—Agreement shall not be invalid even if such conditions incorporated in the agreement—Proceeding before the arbitrator cannot be stayed—Clauses of the section discussed.

Cases referred :

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Sh. U.K. Chaudhary and Sh. Sangram Patnaik —For the Plaintiff

Sh. T.K. Ganju and Sh. A.D. Patra —For the Defendants

JUDGMENT

S.K. MAHAJAN, J.—On 20.5.1994 the plaintiff entered into an agreement with defendant No.1 whereby the plaintiff was granted he exclusive right to manufacture and market denture cleansing tablets and adhesive powder in India on the technical know-how, trade marks and trade names of the product being provided to the plaintiff by defendant No. 1. The agreement was subject to terms and conditions contained therein. According to Clause 18.5 the agreement was subject to requisite approval of Government of India and/or Reserve Bank of India as the case may be. Plaintiff is stated to have applied to the Secretariat for Industrial Approvals of the Government of India for approval of the licence agreement *vide* its letter dated 25.03.1994. It is alleged in the plaint that in complete breach of the agreement defendant No. 1 failed to supply the technical know-how has for manufacturing adhesive powder and denture cleansing tablets. The Government also did not give requisite approval to the agreement. On 25.4.1996 the agreement was terminated by defendant No. 1 on grounds that the plaintiff did not commence commercial production nor did it use its best efforts to promote the sales and use of the products in India. The plaintiff has alleged this termination of the agreement to be false and frivolous and according to the plaintiff the fact was that it was defendant No. 1 who had committed breach of the agreement inasmuch as it had failed to provide required technical know-how for commencement of commercial production. On account of the alleged illegal termination of the agreement the plaintiff is alleged to have suffered losses and it is stated in the plaint that it contemplates to take legal action to recover a sum of Rs. 1 crore along with interest from defendant No. 1.

2. In the meantime, it appears that defendant No. 1 had initiated proceedings for arbitration before the International Court of Arbitration of I.C.C., Paris raising a demand of US $ 1,75,000 plus 8% interest thereon towards lumpsum licence fee and for restraining the plaintiff from using the trade mark "Fittydent". On receipt of this notice from the I.C.C. of Paris the plaintiff filed this suit for a declaration that as no concluded agreement for want of Government approval, required to be obtained under Clause 18.5 of the agreement, had come into existence between the parties the matter could not be referred to the International Court of Arbitration under Clause 18.4. A mandatory injunction restraining the defendants from proceeding with the arbitration proceedings in I.C.C. Case No. 9714/JK based on the alleged non-concluded contract was also claimed in the suit. Along with the suit the plaintiff also filed an application under Order 39, Rules 1 and 2 of the Code of Civil Procedure for an *ad interim* injunction restraining the defendants from proceeding with the arbitration case before the International Court of Arbitration, I.C.C., Paris.

3. Summons of the suit having been served upon the defendants, defendant No. 1 besides filing reply to the application of the plaintiff under Order 39, Rules 1 and 2, Code of Civil Procedure for the *ad interim* injunction, also filed an application under Order 7, Rule 11 of the Code of Civil Procedure read with Sections 44 and 45 of the Arbitration and Conciliation Act, 1996 for rejection of the plaint of dismiss the suit and/or in the alternative to stay the suit of the plaintiff under Sections 44 and 45 of the Arbitration and Conciliation Act, 1996.

4. By the order I propose to dispose of all these applications, namely, the application filed by the plaintiff for the grant of *ad interim* injunction and the application of defendant No. 1 for rejection of the plaint and/or for stay of the suit.

5. The case set up by the defendant in the application is that disputes having arisen between the parties under the arbitration agreement as contained in Clause 18.4 of the agreement dated 20.05.1994 the suit was not maintainable and in any case was required to be stayed. Under Section 45 of the Arbitration and Conciliation Act, 1996 a Judicial Authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. The arbitration agreement as contained in Clause 18.4 of the agreement dated 20.05.1994 between the parties was as under :

> "18.4. Arbitration—All disputes and differences of any kind arising under this agreement, or arising between the parties including the existence or continued existence of this agreement and the arbitrability of a particular issue which cannot be settled amicably by the parties shall be submitted to arbitration. The arbitration shall be conducted in Vienna, Austria and shall finally be settled in accordance with the Rules of Arbitration of the International Chamber of Commerce in Vienna by one more Arbitrators appointed in accordance with the above-mentioned rules. The decision of the arbitration Tribunal shall be final and binding upon the parties and may be enforced in any Court of competent jurisdiction, and no party shall seek redress against the other in any Court or Tribunal except solely for the purpose of obtaining execution of the arbitral award or of obtaining a judgment consistent with the award."

It is, therefore, not disputed between the parties that in case this Court holds that the parties are governed by the agreement dated 20.05.1994 and this agreement was binding between the parties inspite of the permission alleged to have not been given by the Government or by the Reserve Bank of India under the Foreign Exchange Regulation Act, 1973, the suit cannot proceed and the parties will be bound by the aforesaid arbitration agreement. The only question, therefore, before the Court is whether the agreement in the absence of approval of the Central Government and permission from the

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Reserve Bank of India is *non-est* and was not effective. Another question which may also arise is even if the agreement between the parties was not effective, whether the arbitration agreement as contained in Clause 18.4 of the said agreement could still be looked into by the Court and still he held to be binding between the parties.

6. Clause 18.4 of the agreement provided that the agreement was subject to requisite approval of the Government of India and/or Reserve Bank of India as the case may be. This being an industrial licence it requires the approval of the Central Government under the Industrial Policy Resolution, 1991 of the Government of India. This also requires approval of the Reserve Bank of India under Sections 8 and 9 of Foreign Exchange Regulation Act, 1973. It is not denied that an application for approval was made with the Government of India in 1994, however, no approval was received till 1998. It is the case of the plaintiff that when this application was followed in 1998 the Government of India rejected the application for approval *vide* its letter dated 01.09.1998. Contention of Mr. Chaudhary, learned Advocate appearing on behalf of the plaintiff, therefore, is that as the agreement itself was not effective because of the approval having not been granted by the Government of India in terms of Clause 18.5 of the agreement the arbitration agreement as contained in Clause 18.4 cannot be looked into and as such the matter could not be referred to the arbitration of the International Court of arbitration, ICC, Paris. Mr. Chaudhary has relied upon the judgment reported as *Alliance Mills (Lessees) Pvt. Ltd. vs. M/s. Madan Gopal & Sons*[1], in support of his submission that if the agreement itself is void arbitration clause contained therein cannot be relied upon.

7. In *Alliance Mills (Lessees) Pvt. Ltd.* (supra), the Calcutta High Court relying upon the judgments of the Supreme Court reported as AIR 1962 SC 1810 and AIR 1963 SC 90, held that if the contract itself was void, the question of submitting to the jurisdiction of Arbitrator was of no avail and that the arbitration clause cannot be enforced when the agreement of which it forms an integral part is held to be illegal. Mr. Chaudhary, therefore, contends that even assuming that the plaintiff has submitted to the jurisdiction of the Arbitrator as contended by the defendant, the same would be of no avail and this Court, therefore, should stay the proceedings before the International Court of Arbitration.

8. Before I deal with the contentions raised by Mr. Chaudhary it will be useful to give herein below the grounds on which the plaintiff has challenged the existence of the arbitration agreement.

9. In paragraph 18 of the plaint it is stated that the proceedings before the I.C.C., Paris is a nullity and not maintainable for the following reasons :

(a) That there exists no valid arbitration agreement between the parties

(b) That the request for arbitration by the defendant No. 1 is based on the licence agreement of May 20, 1994. That the said agreement had never come into existence as requisite approvals from the Government of India and the Reserve Bank of India had not been given by these authorities to the proposed agreement.

(c) That the defendant No. 1 has no basis for instituting the arbitration proceedings as the arbitration agreement itself does not exist.

(d) That it is the settled law that if the arbitration agreement is illegal and therefore legally non-existent the fountain head of the Arbitrator's jurisdiction disappears.

(e) That it also lies for consideration that the validity of the alleged arbitration agreement has to be taken up in a Court of Law and the Arbitrator has no power to decide its own jurisdiction.

In paragraph 2 of its reply to the application of the plaintiff under Order 39, Rules 1 and 2, defendant No. 1 has stated as under :

"The claim of the defendant No. 1 arises out of the licence agreement dated May 20, 1994 under which the plaintiff was provided by defendant No. 1 with certain rights to manufacture and market Fittydent products (adhesive powder and denture cleansing tablets) , technical know-how on the concerned Fittydent denture cleansing tablets and adhesive powder as well as applicable. Trade marks were also provided to the plaintiff. In consideration of the said licence, the plaintiff was to pay a sum of US $ 1,75,000. The plaintiff had committed breach of this licence agreement which was terminated on April 25, 1996. As a result of the said breach, the reference to arbitration was made by the answering defendant against the plaintiff. It is denied that plaintiff had objected to the said arbitration proceedings as alleged or at all. As a matter of fact, he had sought time to deposit the arbitration fee and also to raise their claim/counter claim. The plaintiff has deliberately suppressed their earlier letters dated February 25, 1998 and March 26, 1998 and therefore, they in any event are not entitled to the discretionary relief. The plaintiff has also not disclosed the letter dated September 03, 1998 written by the learned Arbitrator to the parties, which was sent in reply to the plaintiff's communication of April 06, 1998. The alleged letter dated September 1, 1998 filed by the plaintiff along with the application for approval which was alleged to have been filed on March 25, 1994 was responded only on September 01, 1998. The plaintiff has deliberately suppressed the other records and correspondence during intervening period. It is denied that the licence agreement between the parties is not valid and/or enforceable without the approval of Reserve Bank of India and/or Central Government as alleged. The plaintiff cannot be permitted to benefit from their own wrong. They had acted under

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of the plaintiff only. In any event, it is stated that the licence agreement is valid and enforceable and did not require any approval from the Central Government. Further, in any event, Section 47 of the Foreign Exchange and Regulation Act, makes it clear that proceedings for recovery of any amount which is due whether as debt or damages shall not be barred and/or prevented, even if the permission, if any, required under the said Act by the Central Government or Reserve Bank of India is not granted. Such a permission, if any, may be required and/or granted by the Central Government or Reserve Bank of India at the time and for the purpose of enforcing any judgment or order for payment of any sums and not otherwise."

The plaintiff has not filed any rejoinder to this reply inspite of an opportunity having been given for the same. It can, therefore, be taken that defendant No. 1 had provided to the plaintiff the technical know-how on the Fittydent adhesive powder and denture cleansing tablets as well as applicable trade marks. In consideration of this technical know-how and trade marks having been provided by defendant No. 1, the plaintiff was required to pay a sum of US $ 1,75,000 to the said defendant. It is for the recovery of this amount that defendant No. 1 has initiated proceedings before the ICC, Paris.

10. Under Section 47(2) of the Foreign Exchange Regulation Act, 1973 any provision of, or having effect under the Act that a thing shall not be done without the permission of the Central Government or the Reserve Bank, shall not render invalid any agreement by any person to do that thing, if it is a term of the agreement that thing shall not be done unless permission is granted by the Central Government or the Reserve Bank as the case may be. Under sub-section (3) of Section 47 of thee Act neither thee provisions of the Act nor any term contained in any contract that anything for which the permission of th Central Governmnt of the Reserve Bank is required by the said provisions shall not be done without that permission, shall prevent legal proceedings being brought in India to recover any sum which, apart from the said provisions and any such term, would be due, whether as debt, damages or otherwise. Under Clause (b) of Section 47(3) of the Act, the judgment or order for payment of any sum, to which the Act applied, cannot be enforced without permission of the Central Government or the Reserve Bank, as the case may be. The effect of sub-section (3) of Section 47 is that legal proceedings can be brought to recover from the debtor a sum due as debt, damages or otherwise but no step will be taken for enforcing the judgment passed pursuant to such proceedings having been taken by the creditor. A plain reading of Section 47 of the Act, therefore, shows that the proceedings before the Arbitrator cannot be stayed. The judgment in *Alliance Mills (Lessees) Pvt. Ltd.* (supra), cited by Mr. Chaudhury is, therefore, not applicable to the facts of this case inasmuch as the judgment in that case was passed by interpreting the provisions of the Arbitration Act, 1940.

11. Moreover, a sea-change has been made in the law of [illegible]tration after the passing of the Arbitration and Conciliation Act, 1996. Under Section 5 of the Arbitration and Conciliation Act no Judicial Authority shall intervene in the proceedings except where so provided in the Act. Moreover, while under the old Arbitration Act, a question relating to the jurisdiction of the Arbitrator could not be decided by him except when it was referred to him as a specific question of law, under Section 16 of the new Arbitration Act, the Arbitral Tribunal has the power to rule on its own jurisdiction including ruling on any objection with respondent to the existence or validity of the arbitration agreement and for that purpose an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and decision by the Arbitral Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. It is, therefore, clear that even assuming for the sake of arguments that the agreement dated 20.05.1994 between the parties was illegal and *non-est*, the same shall not on its own render the arbitration clause invalid and it is still within the competence of the Arbitrator to decide the validity of the same. It is, therefore, for the Arbitrator to decide as to whether the arbitration agreement between the parties still survives even assuming that the agreement dated 20.05.1954 was rendered invalid because of non-approval of the Government of India. In my opinion, this Court will not interfere in the proceedings before the Arbitrator and it will be open for the plaintiff to take all such please before the Arbitrator as it may be advised to take and have a decision thereon.

12. In my opinion, the plaintiff has not been able to make out any case for the grant of any relief in his application for injunction and this Court will not interfere with the proceedings before the Arbitrator. In my opinion, the suit by the plaintiff is also misconceived and is barred by the provisions of Section 16 of the Arbitration and Conciliation Act. While, therefore, dismissing the application of the plaintiff for the grant of injunction, I allow the application of defendant No. 1 under Order 7, Rule 11 and dismiss the suit with no order as to costs.

Suit dismissed.

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2000(2) Arb. LR 71 (Gauhati)

GAUHATI HIGH COURT (Agartala Bench)

Before A.K. Patnaik & H.K.K. Singh, JJ.

Food Corporation of India and another —Appellants

Versus

Sujit Roy —Respondent

Writ Appeal No. 99 of 1998—Decided on 01.09.1999

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Constitution of India, Articles 226 and 299—Tender—Clause of the tender—Forfeiture of earnest money—Tenderer modified the offer—State can forfeit earnest money if loss suffered—No loss was suffered due to modification—Action of authority arbitrary—Directed to refund earnest

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