



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision: 12.12.2023

+ **ARB. P. 337/2023**

IN THE MATTER OF:

PRIME INTERGLOBE PRIVATE LIMITED Petitioner
Through: Mr. Gaurav Gupta, Mr. Nikhil Kohli,
Mr. Tushar Mudgil and Mr. Kushank
Garg, Advocates

versus

SUPER MILK PRODUCTS PRIVATE LIMITEDRespondent
Through: Mr. Aseem Chaturvedi, Mr. Shivank
Diddi and Mr. Milind Jain,
Advocates.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of present petition filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter, the '*A&C Act*'), the petitioner seeks appointment of Sole Arbitrator in the context of disputes arising in connection with the Franchise Agreements dated 10.07.2017 and 15.07.2017 (hereinafter, the '*Subject Agreements*') executed between the parties.
2. Petitioner has claimed that initially a Master Franchise Agreement dated 03.10.2016 was entered into between the parties, whereby the petitioner was appointed as the '*Master Franchisee*' of the franchise business for the territories of Punjab (including Chandigarh Tri-city),



Gujarat and Maharashtra. Subsequent thereto, 14 more Franchise Agreements were entered into between the parties to operate the outlets.

3. Respondent has contested the present petition. Objection has been raised as to the maintainability of the petition on the ground that same is not preceded by a notice under Section 21 of the A&C Act invoking arbitration. Petitioner had earlier filed a petition, which was never pursued. Though the respondent had issued notice under Section 21 seeking to invoke arbitration in relation to the Subject Agreements, the petitioner could not rely on the same as it in its reply, the petitioner had termed respondent's invocation as 'bad in law'.

4. Notably, disputes having arisen between the parties under the Master Franchise Agreement, the same were referred to the Arbitral Tribunal (hereinafter, the 'AT'), wherein an award has also been passed. Disputes in relation to 12 out of 14 Franchise Agreements were also referred to the AT comprising of Sole Arbitrator, wherein the proceedings are statedly pending.

5. Clause 27 of the Subject Agreements provides for reference of disputes arising out or relating to or in connection with the Agreement to arbitration. The clause, being common in both the Agreements, reads as under:-

"27 ARBITRATION

27.1 Any and all disputes ("Disputes") arising out of or in relation to this Agreement between the Parties hereto or arising out of or relating to or in connection with this Agreement or the performance or non-performance of the rights and obligations set forth herein or the breach, termination, invalidity or interpretation thereof, shall be referred for arbitration in



accordance to the provisions of the Arbitration and Conciliation Act, 1996 or any amendments thereof.

27.2 The place of arbitration shall be New Delhi and the language used in the arbitral proceedings shall be English. Arbitration shall be conducted by a sole arbitrator to be appointed by the franchisor herein. One of the three arbitrators offered by franchisor and chose by the franchisee.

27.3 In the event of the Arbitrator to whom the matter is referred to, does not accept the appointment, or is unable to unwilling to act or resigns or vacates his/her office for any reasons whatsoever, the Franchisor aforesaid, shall nominate another person as aforesaid, to act as the Sole Arbitrator.

27.4 The Award of the Sole Arbitrator shall be final and binding on the parties to the Agreement.”

6. A reading of the aforesaid clause would show that the parties had agreed on a procedure for reference of their disputes to arbitration.

7. Records reveal that the respondent vide notice dated 27.05.2019 terminated all the 14 Franchise Agreements and subsequently invoked arbitration vide notice dated 06.06.2019. It further appointed a Sole Arbitrator to adjudicate the disputes with respect to all the franchise agreements. The proceedings before the Sole Arbitrator were terminated in terms of Section 25(a) of the A&C Act vide procedural order dated 22.08.2019 without giving an opportunity to the petitioner to file its claim. Petitioner challenged the aforesaid order vide its petitions filed under Sections 14 read with 15 of the A&C Act, being OMP(T)(COMM.) No.31/2021. This Court vide its order dated 13.05.2022 appointed Justice D.K. Jain, former Judge of Supreme Court of India as the Sole Arbitrator.



The petitioner filed its Statement of Claims in relation to all the 14 franchise agreements. The respondent preferred an application under Section 16 of the A&C Act to contend that the disputes under the Subject Agreements could not have been referred to the arbitration without following the procedure stipulated in Clause 27. As a consequence, petitioner withdrew its Statement of Claims before the Sole Arbitrator in relation to the Subject Agreements.

8. Indisputably, the respondent had invoked arbitration w.r.t all the 14 franchise agreements including both the Subject Agreements on 06.06.2019. The issue that arises for consideration is whether before filing the present petition, the petitioner is also separately required to invoke arbitration afresh by issuing notice under Section 21 of the A&C Act. The answer lies in sub-section 6 of Section 11 of the A&C Act. The issue also came up for consideration before this Court in Zion Promoters and Developers Pvt. Ltd. v. Ferrous Infrastructure Pvt. Ltd.¹, wherein it was observed as under:-

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5.1 There is a clear distinction in the scope of Sections 11(5) and 11(6) of the Arbitration and Conciliation Act. In Datar Switchgears Ltd. v. Tata Finance Ltd. (supra) (paras 5 to 7), the Supreme Court observed that Section 11(5) can be invoked where one party has failed to appoint an arbitrator despite notice to appoint. However, there is no requirement of notice in Section 11(6) which provides for failure of procedure/ mechanism for appointment meaning thereby that a party can invoke Section 11(6) even if no notice has been given. In Datar Switchgears Ltd. v. Tata Finance Ltd. (supra), no notice for appointment of arbitrator was given, yet the Court upheld the appointment

¹ 2016 SCC OnLine Del 1668



of arbitrator. The present case is covered by Section 11(6)(c) and not under Section 11(5).

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5.4. Section 11(6) empowers a "party" to approach the Court for appointment of an arbitrator. The 'party' is defined in Section 2(1)(h) of the Act as "a party to an arbitration agreement". Hence, any party to the agreement can file application under Section 11(6) provided any of the three circumstances mentioned in Clauses (a), (b) or (c) has taken place.

5.5. *In Antrix Corporation Ltd. vs. Devas Multimedia P. Ltd.*

(*supra*), the Supreme Court observed that once an arbitration agreement has been invoked by a party, the arbitration agreement cannot be invoked for the second time by the second party. The Supreme Court further held that where the parties fail to act in terms of procedure agreed upon between them, the provisions of sub-Section (6) may be invoked by any of the parties. Relevant portion of the said judgment is reproduced hereunder: -

“31. once the Arbitration Agreement had been invoked by Devas and a nominee Arbitrator had also been appointed by it, the Arbitration Agreement could not have been invoked for a second time by the Petitioner, which was fully aware of the appointment made by the Respondent.....”

32. Sub-section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of Sub-section (6) may be invoked by any of the parties.....”

(Emphasis supplied)

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6.2. In *Datar Switchgears Ltd. v. Tata Finance Ltd. (supra)*, the appellant filed an application under Section 11 for appointment of the arbitrator before the High Court on the ground of failure of respondent No.1 to appoint an arbitrator within 30 days of the notice. Respondent No.1 appointed an arbitrator after the expiry of 30 days of the notice period but before the filing of the application for appointment of the arbitrator. The question arose with respect to the validity of the appointment made by respondent No.1. The Supreme Court considered the distinction between Sections 11(5) and 11(6) of the Arbitration and Conciliation Act and observed that if the person or institution entrusted with the appointment of an arbitrator fails to discharge such a function, the aggrieved party can approach the Court for appointment of an arbitrator. The Supreme Court observed that though no time limit has been prescribed in Section 11(6), the appointment should be made within 30 days.

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9. Respondent’s reliance on the judgment passed in the prior petition between the parties being ARB.P.608/2022 is misplaced as in the said judgment, the Court had observed that when arbitration proceedings are invoked at the instance of one party, the other party can file counter claims but that does not *per se* signify that the Court has referred the claims of the prospective counter-claimants to arbitration, so as to bar its right to assert his claim at a future date.

10. The case stands squarely covered by the decision in Zion Promoters (Supra). The arbitration having been invoked, it is deemed apposite that the present matters be also referred to the same learned Arbitrator before whom the disputes relating to the other agreements are pending.



11. Accordingly, the disputes arising in relation to the Subject Agreements are referred to the Arbitral Tribunal comprising of Justice D.K. Jain, former Judge of the Supreme Court. The parties shall approach the learned Arbitrator within two weeks from today. The Arbitrator shall furnish the declaration as required under Section 12 of the A&C Act.

12. Petition is disposed of in the above terms.

MANOJ KUMAR OHRI, J

DECEMBER 12, 2023

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