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....Petitioner

accordance with the agreement with the respondent is not entitled to invoke any proceedings in India and if wants resolution of the disputes ought to approach the Arbitral Tribunal in accordance with the agreement. In view of the said reply of the respondent, the respondent having been duly served and having refused to appear, is proceeded against ex-parte. The senior counsel for the petitioner has been heard today also.

2. The petitioner is a company incorporated under the laws of India. The respondent is a company organized under the laws of Delaware, USA. An agreement dated 24th October, 2007 was entered into between the parties whereunder the respondent, itself a licensee of a plan for the establishment, development and operation of real estate brokerage offices under the trademark "CENTURY 21" and the "CENTURY 21 System", with further rights to grant international sub franchisees, has granted sub-franchise to the petitioner of the said trademark and system and on the terms & conditions contained therein. Though the agreement initially was not for the entire territory of India but by a subsequent amendment thereto was extended to the entire territory of India. Dr. Devinder Kumar Gupta having substantial interest in the petitioner also agreed to stand as guarantor for due compliance of all the terms & conditions of the agreement by the petition. Under the said agreement, the petitioner was to pay to the respondent an amount towards initial franchise fee. It is the case of the petitioner that the petitioner has paid the same amounting to approximately Rs.30 crores. Besides the said initial franchise fee, the petitioner under the agreement is also to pay continuing service fee to the respondent and on the dates mentioned therein. The senior counsel for the petitioner has drawn attention to Clause 4 D (v) of the agreement

whereunder upon the said fee being late by more than 10 days, the petitioner has agreed to pay to the respondent additional sums towards late charge plus interest at 10% per annum besides exchange rate loss, if any etc.

3. The senior counsel for the petitioner has also drawn attention to Clause 13 A of the agreement whereunder the respondent is entitled to terminate the agreement upon any breach by the petitioner of a material provision of the agreement, only after notifying the petitioner and upon the failure of the petitioner to cure the breach within 30 calendar days of the notice. The said agreement also provides for arbitration.

4. The jurisdiction of this court is invoked on the averment in the petition that since part of cause of action including payment of initial franchise fee, part performance under the agreement and termination of the agreement has arisen within the territorial jurisdiction of this court, this court would have jurisdiction.

5. The respondent being a body corporate incorporated in a country other than India, the arbitration between the parties would be International Commercial Arbitration within the meaning of 2 (f) of the Act. Though the Supreme Court in ***Bhatia International Vs. Bulk Trading S.A.*** 2002 4 SCC 105 on which reliance is placed in the OMP itself, has held the Provisions of Part-I of the Act (including Section 9) applicable to the International Commercial Arbitrations also but since ***Bhatia International*** (Supra) itself lays down that the same is subject to the parties, by agreement express or implied not excluding the said law or any of the provisions of the said Part-I

of the Act, query from the senior counsel for the petitioner was made in this regard.

6. The senior counsel contended that in the arbitration clause, though providing for submission for arbitration to the New York office of the American Arbitration Association under its Commercial Arbitration Rules, with the arbitration proceedings to be conducted in the English language in New York, USA, there was nothing therein to indicate that the parties had agreed to exclude the applicability of Part-I of the Act. The senior counsel for the petitioner also drew attention to sub clauses iii & iv of the arbitration clause in the agreement where the reference has been made to “a court of competent jurisdiction” and it was urged that the parties had not agreed to the jurisdiction of any court and since the agreement in the present case was to be implemented in India, including within the territorial jurisdiction of this court, it was contended, that this court was the court of competent jurisdiction.

7. Attention of the senior counsel for the petitioner was invited to clause 21 of the agreement providing for “the agreement to be construed under and governed by the laws of the State of New Jersey, USA” and providing for exclusion of certain legislations in force there. Attention of the senior counsel was also invited to the recent dicta of this court in ***Max India Ltd. Vs. General Binding Corporation*** MANU/DE/1212/2009 where on an interpretation of the agreement in that case, the parties were held to have excluded the application of Part-I of the Act.

8. From reading of the judgment in ***Bhatia International*** it cannot be made out whether there was any clause in the agreement under consideration in that case providing for any governing law as in this case. The senior counsel for the petitioner faced with this, invited attention to ***INDTEL Technical Services Pvt. Ltd. Vs. W.S. Atkins PLC*** (2008) 10 SCC 308, ***Venture Global Engineering Vs. Satyam Computer Services Ltd.*** 2008 4 SCC 190 and lastly to ***Citation Infowares Ltd. Vs. Equinox Corporation*** (2009) 7 SCC 220.

9. In ***INDTEL Services Pvt. Ltd.*** (Supra) the agreement provided for its construction, validity and performance to be governed and construed in accordance with the laws of England & Wales. The agreement further provided for disputes not amicably settled to be referred to the adjudicator or the courts as the case may be, appointed to decide the disputes or difference under the agreement. **The agreement did not provide the venue for such adjudication.** The Supreme Court held the said clause in the agreement to be an arbitration clause. It was inter-alia the contention of the respondent foreign party therein that since the parties had expressly agreed to the law of England & Wales to be the proper law, it showed that the arbitration proceedings should also be subject to the jurisdiction of the courts of England & Wales. The application filed by the petitioner in that case under Section 11 (9) of the Act before the Supreme Court was thus contended to be not maintainable. The Supreme Court in para 24 of the judgment while accepting the proposition that when the arbitration agreement is silent as to the law and procedure to be followed in implementing the arbitration agreement, the law governing the said agreement would

ordinarily be the same as the law governing the contract itself as well settled, however in view of the ***Bhatia International***, held the petition under Section 11 (9) of the Act to be maintainable and appointed the arbitrator.

10. ***Venture Global Engineering*** (Supra) was concerned with the maintainability of a petition/challenge under Section 34, also falling in Part-I of the Act, qua a foreign award. The agreement in that case also provided for being construed in accordance with and governed by the laws of the State of Michigan, USA and provided for arbitration of the London court of arbitration. The Supreme Court held the petition under Section 34 to be maintainable in the courts in India.

11. Notwithstanding the aforesaid state of law, the single judge of this court and the Division Bench in appeal in ***Max India Ltd.*** (Supra) held the petition in this court under Section 9 of the Act to be not maintainable. While applying the test laid down in ***Bhatia International***, this court found that the parties had in the agreement in that case manifested the intention to have their disputes adjudicated by arbitration of a neutral Arbitral Tribunal at Singapore in accordance with the laws of Singapore and had also made clear that the arbitration proceedings would be conducted as per the rules of the Singapore Tribunal and specifically vested jurisdiction in Singapore courts. The Division Bench thus held that not only the proper law of contract but the proper law of arbitration agreement, procedural as well as substantive, was that of Singapore and it showed an unmistakable intention of the parties to exclude the jurisdiction of this court and the applicability of Part-I of the Act.

12. The senior counsel for the petitioner contended that the agreement between the parties in **Max India Ltd.** of choosing the exclusive jurisdiction of the Singapore courts and also choosing the law governing the arbitration to be that of Singapore is what distinguishes **Max India Ltd.** from the facts of this case. It is argued that in the present case there is no agreement that the procedural law applicable to arbitration would be the law of New Jersey, USA and the parties had not agreed to the jurisdiction of the courts at New Jersey, USA.

13. To buttress the said argument, reliance was placed on **Citation Infowares Ltd.** (Supra). In that case, being an application under Section 11 (9) of the Act for appointment of the arbitrator in an agreement of International Commercial Arbitration, the parties had agreed to the governing law being of California, USA. The senior counsel contended that notwithstanding the agreement as to the governing law, the Supreme Court held on the basis of **Bhatia International** that Part-I of the Act would be applicable and appointed the arbitrator. However, in my opinion **Citation Infowares Ltd.** does not help the petitioner. The Supreme Court in this case also in para 25 of the judgment reiterated that the law of arbitration is normally the same as the proper law of the contract and it is only in exceptional cases that it is not so, even where the proper law of contract is expressly chosen by the parties; it was further held that there is a presumption that the law of the country where the arbitration is agreed to be held is the proper law of arbitration (**NTPC Vs. Singer Company** (1992) 3 SCC 551). However, in spite of reiterating the said proposition, the Supreme Court in this case held the application under Section 11 (9) of the Act

to be maintainable because the parties had in that case not agreed to the venue of arbitration. On this ground, the ***NTPC*** case (Supra) was distinguished and the arbitrator appointed, though to decide in accordance with the Californian law.

14. Once the aforesaid distinction is highlighted, in my view the dicta of this court in ***Max India Ltd.*** would be squarely applicable. The parties in the present case have not only agreed to the governing law being that of New Jersey, USA but also to the place of arbitration being New York. It being the settled proposition that the governing law is presumed to be the law of arbitration also, it necessarily follows that the parties had expressly or impliedly agreed to the exclusion of Part-I of the Act. The parties having found to have so agreed, this court would not have jurisdiction under Section 9 of the Act.

15. There is yet another relevant factor as noticed in para 14 (d) of the judgment in ***Bhatia International***. One of the reasons which prevailed upon the court for holding the courts in India to have jurisdiction to entertain the petition under Section 9 was that the properties and assets, with respect where to interim measures were sought, were lying in India and it was felt that without Section 9 being held to be applicable, the party seeking the interim measure would be remediless. Similarly, in ***Venture Global Engineering*** also one of the reasons which prevailed with the court was that the agreement, besides providing for governing law of Michigan, USA, also provided that the shareholders of company shall act in accordance with Company's Act and other laws in force in India; it was felt that the implementation of the award in that case was required

to be in accordance with the Indian law and that unless petition under Section 34 with respect to the award was held to be maintainable in Indian courts, the question of the award being opposed to public policy of India or not had to be decided by Indian court. The other two judgments as aforesaid were not with respect to Section 9 of the Act. The nature of the interim measures sought by the petitioner in the present case is not such which can be enforced in this court alone. The respondent is a company incorporated outside this country and if interim measures against the respondent are necessary, the same can be sought also in the territorial jurisdiction of the court, to applicability of whose law, the parties have agreed to, and the relief is not found to be such which can be granted by this court only.

16. I have also examined the Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association. Rule 48 (c) thereof provides that the parties to an arbitration under those rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereon. The said rule shows that the parties by agreeing to the arbitration of the American Arbitration Association in accordance with its Commercial Arbitration Rules inter-alia agreed to the jurisdiction of the federal or state court of USA. Similarly, the said rules also contain optional rules for emergency measures of protection whereunder a party in need of emergent relief is entitled to apply to the Arbitral Tribunal constituted under the said rules. Thus, I also find that the parties by opting for the arbitration of the American Arbitration Association inter-alia excluded the applicability of Part-I of the Act.

17. I find that the Bombay High Court also in *Frontier Drilling A.S. Vs. Jagson Internatural Ltd.* (2003) 3 Arb. LR 548 held that where substantive law was English Law and the place of arbitration was London, the curial law, in the absence of any other specific provision would be the curial law as applicable to arbitration in London. The application under Section 9 of the Act was thus held no maintainable on this ground, though held maintainable for the reason of respondent having itself invoked jurisdiction of Indian courts.

18. I had on 31st August, 2009 itself also enquired from the senior counsel for the petitioner as to how the interim measure of injunction claimed could be granted since the agreement appeared not capable of specific performance. There cannot be an injunction restraining termination of an agreement which cannot be specifically enforced. The senior counsel for the petitioner has today urged that the agreement in clause 6 D thereof contains a negative covenant; reliance is placed on ***Rajasthan Breweries Ltd. Vs. The Stroh Brewery Company*** AIR 2000 Delhi 450 to contend that even if the agreement is not specifically enforceable, if contains a negative covenant, the court is not precluded from granting an injunction to perform the negative covenant.

19. The agreement as aforesaid was of sub-franchise by the respondent to the petitioner of the trademark "CENTURY 21" and the right to use the "CENTURY 21 System" in the territory of India. Clause 4 G of the said agreement inter-alia provides that the respondent shall not grant a license as granted to the petitioner to any other person or entity within the same territory, without first offering the petitioner a right of first refusal and modality whereof is

laid down in the agreement. This shows that the license given to the petitioner was not intended to be an exclusive license, for the petitioner to claim the interim measure from this court of restraining the respondent from entering into contract with any other person. Not only so, the petitioner has in the clause aforesaid also acknowledged that the respondent and the owner of "CENTURY 21" trademark and system could within the same territory establish the same business themselves or through their subsidiaries. This again shows that there was never intended to be any exclusivity in favour of the petitioner. Clause No.6 D relied upon by the petitioner in support of enforcement of negative covenant has been expressly made subject to clause 4 G aforesaid. All that, clause 6 D provides is that so long as the agreement remains in effect, the petitioner shall have exclusive right to sub license "CENTURY 21 System" and marks in accordance with the terms of the agreement. The said clause does not restrain the respondent from terminating the agreement during the term thereof. Thus the argument of the petitioner being entitled to interim measure in enforcement of negative covenant also does not survive.

20. Also, even for a negative covenant to be enforced, the same can be done only when the petitioner is not in breach. In the present case, it is the admitted position that the petitioner is in breach/default of its obligations of making payments to the respondent. In fact the statement of the petitioner offering to deposit the payments in this court or to pay the same to the respondent, without prejudice to its rights and contentions, was recorded in the order dated 31st August, 2009. The petitioner has itself filed its letters dated 9th April, 2009 & 20th April, 2009 to the respondent seeking waiver of payments due. The respondent by its

letter dated 23rd April, 2009 to the petitioner reminded the petitioner to clear the payments already due by 15th May, 2009. The petitioner again vide its letter dated 27th April, 2009 expressed its inability to make the payments, citing the general economic slowdown. The respondent on 29th April, 2009 gave notice of intent to terminate the agreement in accordance with the agreement, giving more than 30 days time i.e. till 1st June, 2009 to the petitioner to cure the default by making the payment. The petitioner, though vide its letter dated 6th May, 2008 represented that it was attempting to make arrangements for the monies, did not make the payment. The respondent finally vide its letter dated 9th June, 2009 while confirming termination to have come into effect upon non-payment by the petitioner within the period of 30 days, called upon the petitioner to stop using the trademark "CENTURY 21" and do other acts which it was required to do post termination. The petitioner corresponded with the respondent thereafter also calling upon the respondent to review its decision, again generally citing the slowdown in the realty sector throughout the world. However, it appears that the respondent did not oblige the petitioner. The present petition came to be filed only on 28th August, 2009.

21. The aforesaid would also show that the petitioner is guilty of laches. As aforesaid the agreement stood terminated on 1st June, 2009; the notice of termination was given on 29th April, 2009. The present petition has been preferred after nearly three months. The petitioner has in the interregnum not disputed the ground or modality of termination and the pleas taken in this petition appear to be an afterthought.

22. The senior counsel for the petitioner has laid emphasis on the petitioner having not only paid a huge sum of Rs.30 crores to the respondent as initial license fee but also having incurred other expenses in developing the business in India. It is also contended that the default alleged is of payment of approximately Rs.50 lacs only and that it is insignificant in comparison to the investments already incurred and payments already made to the respondent. The senior counsel for the petitioner has also urged that the respondent has in its e-mail dated 2nd September, 2009 (Supra) not claimed to have already entered into an agreement with any third party and thus the rights of the petitioner be protected. However the same cannot be a ground for granting interim relief, if otherwise the petitioner as aforesaid is not found entitled thereto. The petitioner has the agreed remedy of arbitration available to it for redressal of its grievances, if any.

23. Thus neither is the petition under Section 9 found to be maintainable nor is the petitioner found entitled to the interim measure.

The petition is dismissed.

No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**September 3rd, 2009
PP**