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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.743 OF 2013

Asset International
(A Division of Aptech Ltd. Co.)
having its registered office at
Aptech House, A-65, MIDC,
Marol, Andheri (East),
Mumbai – 400 093 (Maharashtra).

...Petitioner

...Versus...

M/s.Universal Computer,
Sou.Kalpana Uttam Kunutkar
(Proprietor) through Shri
Uttam P. Gangadhar Kunutkar,
(POA), Govardhan Ghat Road,
Nanded, Maharashtra

...Respondent

Mr.N. Engineer with Mr.Jayesh Mistry i/b RMG Law Associates for the
Petitioner.

None for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 21ST JULY, 2015.

ORAL JUDGMENT :-

1. Learned counsel appearing for the petitioner states that the respondent has been served. None appeared for the respondent.
2. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996 (for short “the Arbitration Act”), the petitioner has impugned the arbitral award dated 31st March,2008. Some of the

relevant facts for the purpose of deciding this petition are as under :

3. The respondent was appointed by the petitioner by the franchise agreement dated 30th October, 2002 as franchisee for the period of two years on the terms and conditions recorded in the said agreement. It is the case of the petitioner that with effect from 21st July, 2007, the petitioner changed its old address to new address and accordingly filed Form No.18 with the Registrar of Companies.

4. The dispute arose between the parties. The respondent through its advocate issued a notice on 24th October, 2005 to the petitioner and suggested the name of three persons with a request to select one out of them to act as the sole arbitrator within 30 days from the date of the said notice.

5. The petitioner by its reply dated 10th October, 2005 informed the respondent that the petitioner was not agreeable to the names proposed by the respondent.

6. The respondent vide its advocate's letter dated 22nd December, 2005, suggested the name of Mr.Suresh Kamble as arbitrator and requested the petitioner to accept his name as a sole arbitrator. In the said letter, the respondent informed the petitioner that the respondent had separately informed the said Mr.Suresh Kamble about his selection as the sole arbitrator. In response to the said letter, the petitioner vide its letter dated 27th December, 2005,

protested against the appointment of Mr.Suresh Kamble as the sole arbitrator and contended that his appointment was not binding upon the petitioner.

7. The petitioner thereafter filed Arbitration Application (No.70 of 2006) under section 11 of the Arbitration & Conciliation Act, 1996 *inter-alia* praying for an appointment of an arbitrator. The said arbitration application appeared before this Court on 6th October, 2006. This Court was of the opinion that since the respondent had already appointed an arbitrator, the remedy of the petitioner was not under section 11 of the Arbitration Act and it would be some where else.

8. It is the case of the petitioner that since the office of the petitioner was shifted to new address, the petitioner did not receive any notice from the said arbitrator illegally appointed by the respondent nor any papers and proceedings had been served upon the petitioner.

9. The petitioner came to know about the declaration of the impugned award only on 12th April, 2013 when a bailiff from the office of the Sheriff visited the premises of the petitioner for delivering the warrant of attachment of the property. The petitioner, without prejudice issued a cheque of Rs.10.00 lakhs and immediately filed an application before this Court *inter-alia* praying for staying of the

execution proceedings. On 15th April, 2013, this Court granted *ad-interim* order and recorded the statement made by the respondent that the said cheque of Rs.10.00 lakhs issued by the petitioner would not be encashed. The petitioner also called upon the learned advocate representing the respondent to furnish copy of the papers and proceedings of the arbitration and also copy of the award. After getting copy of the award from the learned advocate representing the respondent, the petitioner filed this petition.

10. Learned counsel for the petitioner invited my attention to the correspondence exchanged between the parties and also other annexures to the petition. He also invited my attention to the arbitration clause recorded in clause 28(1) of the franchise agreement and submits that under the said clause, the power of appointing the arbitrator did not vest in the respondent exclusively. He submits that since the petitioner did not agree to the name suggested by the respondent, the only remedy of the respondent to seek appointment of an arbitrator was under section 11(6) of the Arbitration Act. It is submitted that the respondent could not have unilaterally appointed the learned arbitrator. Learned counsel submits that the entire proceedings was thus without jurisdiction and the award rendered by the learned arbitrator is nullity. In support of this submission, learned counsel invited my attention to the judgment delivered by this Court in

the case of **Reliance Webstore Pvt. Ltd. vs. Pushpam Communications, 2013 (3) Mh.L.J. 206,** and in particular paragraphs 4 to 7. He submits that the said judgment squarely applies to the facts of this case.

11. None appeared for the respondent though served. No affidavit in reply has been filed. I have perused the arbitration application recorded in clause 28(1) of the franchise agreement. A perusal of the said agreement clearly indicates that the power to appoint an arbitrator did not vest in any of the parties exclusively. A perusal of the correspondence indicates that the petitioner did not agree to the names suggested by the respondent. In my view, the respondent thus could not have unilaterally appointed the learned arbitrator. The only remedy of the respondent was to file an application under section 11(6) of the Arbitration Act for appointment of the sole arbitrator. It is not the case of the respondent that any such application under section 11(6) of the Arbitration Act was filed by the respondent for appointment of the sole arbitrator. A perusal of the letter dated 22nd December, 2012 addressed by the learned advocate representing the respondent indicates that the respondent had appointed Mr.Suresh Kamble as the sole arbitrator and has proceeded with the arbitration unilaterally.

12. This Court in case of **Reliance Webstore Pvt. Ltd. vs.**

Pushpam Communications, (supra) has held that since the petitioner therein had not given any consent to the names suggested by the respondent, the learned arbitrator could not have acted as an arbitrator and the only remedy for the respondent is to file an appropriate application under section 11(6) of the Arbitration Act before the Hon'ble Chief Justice for appointing an arbitrator. It has been held that the appointment of the learned arbitrator unilaterally by the respondent and the act of the learned arbitrator acting as an arbitrator without the consent of both the parties is illegal and without jurisdiction. It is held that the entire award is thus vitiated and is liable to be set-aside.

13. In my view, the said judgment squarely applies to this case and is binding on this Court. I respectfully bound by the said judgment. The respondent could not have appointed the learned arbitrator unilaterally. The learned arbitrator could not have acted as the sole arbitrator without consent of both the parties since the arbitration agreement did not permit any of the party exclusively to appoint arbitrator. The entire arbitral proceedings were thus without jurisdiction and nullity. The impugned award also is thus without jurisdiction and nullity.

14. I therefore pass the following order :-

a). The impugned award dated 31st March, 2008 is declared

as null and void and is set-aside.

b). The arbitration petition is accordingly disposed of in the aforesaid terms. No order as to costs.

15. Since the impugned award rendered by the learned arbitrator is set aside, the petitioner would be at liberty to apply for withdrawal of the deposit made in this Court by the petitioner in the chamber summons filed by the petitioner.

(R.D. DHANUKA, J.)