

IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 244/2014

FUTURE LIFESTYLE FASHIONS LIMITED Petitioner

Through: Mr. Dayan Krishnan, Senior
Advocate with Mr. Rishi Agrawala and
Ms. Malavika Lal, Advocates.

versus

ADIDAS INDIA MARKETING PRIVATE LIMITED

.... Respondent

Through: Mr. Joy Basu, Senior Advocate with
Mr. Niraj Singh, Mr. Alok Kumar Srivastav and
Mr. Aranya Maullick, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
19.01.2015

1. The Petitioner, Future Lifestyle Fashions Limited ('FLFL') earlier known as Pantaloon Retail India Limited ('PRIL') seeks the appointment of an Arbitrator to adjudicate the disputes between it and the Respondent, Adidas India Marketing Private Limited ('Adidas').
2. Adidas had entered into a Memorandum of Understanding ('MoU') dated 1st January 2006 with Planet Sports Private Limited ('PSPL') whereby Adidas had permitted PSPL to open and operate franchisee 'ADIDAS' stores at different places in India. Clause 39 of the said MoU was the arbitration clause under Clause 43, the parties agreed to submit to the jurisdiction of this Court since the place of business from where the goods was to be supplied and was situated in Delhi. Subsequently, the name of PSPL was changed to M/s. Planet Retail Holding Private Limited ('PRHPL'). By a Slump Sale Agreement dated 30th November 2008

PRHPL transferred its sports business to M/s. Winner Sports Private Limited ('WSPL'). PRHPL, Adidas and WSPL entered into a tripartite assignment agreement dated 2nd June 2009. One of the clauses in the preamble relevant for the purposes of the present petition reads as under:

“Whereas pursuant to the transfer of the running business, PRHPL desires to sign an assignment agreement to the MoU in the name of the WSPL on the same terms and conditions as was there in the MoU dated 1st January 2006.”

3. Clause I of the assignment agreement dated 2nd June 2009 defines expression 'Agreement' or 'this Agreement' to mean 'this Assignment Agreement', the word 'MoU' was to mean MoU dated 1st January 2006 attached with the Agreement as Schedule I. The relevant clauses under the assignment agreement are contained in Clause II:

“a. PRHPL hereby assigns the whole of its right, title and benefit in, to and under the MoU with PSPL to WSPL as of 1st day of December 2008, hereof (hereinafter referred to as the “Effective Date”). The MOU shall henceforth be construed and treated in all respects as if WSPL was named as Party in the MOU in place of PSPL.

b. WSPL agrees and undertakes to be bound by the terms and conditions of the MOU and hereby covenants to assume all rights, benefits, duties, obligations and discharge all abilities of PSPL thereunder, from the Effective Date.

c. WSPL hereby covenants that it shall duly perform all its obligations and discharge all liabilities whatsoever to be performed or discharged under the MOU and shall be liable for breach of any of the terms and conditions, from the Effective Date.

d. a-India hereby recognizes WSPL as a Party to the MOU and discharges PSPL from its obligations under the MOU, the Effective Date. a-India hereby agrees to perform its continuing obligations under the MOU and deal with WSPL hereinafter. Adidas agrees that any rights accruing to PSPL under the MOU shall now accrue to WSPL.

e. a-India and/or PSPL and PRHPL confirm that the terms and conditions of the MOU permit PRHPL to assign its rights and obligations under the same to a third party, subject to prior approval of a-India. By executing this agreement, a-India expressly grants its approval to PRHPL for assigning its rights and obligations under the MOU to WSPL on the terms and conditions contained herein. The Parties confirm no consent of any third parties is required for such assignment.”

4. In Clause III (5) it was agreed that “any dispute arising out of this Agreement shall be made to the Courts at New Delhi.”

5. According to the Petitioner, on 31st March 2010 WSPL transferred its business to its 100% holding company PRIL which had subsequently merged with FLFL, the Petitioner herein, through a slump sale agreement. The Petitioner states that another tripartite agreement was entered into between WSPL, PRIL and Adidas on 23rd December 2010. The MoU dated 1st January 2006 was also annexed to the said agreement dated 23rd December 2010 as Schedule I. The Petitioner contends that with the signing of the agreement dated 23rd December 2010, FLFL obtained the right to operate ‘ADIDAS stores’ including the right to use the store operating from Shop No. S-114, First Floor South City Mall, 375, Prince Anwar Shah Road, Kolkata.

6. The Petitioner states that although it had been operating the franchise without any complaint for the last 8 years after 1st June 2006, it received a notice dated 6th February 2014 from the Respondent requesting the Petitioner to handover the vacant possession of the premises at Kolkata including the stock lying at the premises to the Respondent by the end of business hours on 6th February 2014. This was followed by a legal notice

dated 18th February 2014 whereby the Respondent alleged that the Petitioner had defaulted in making an overdue payment of Rs. 17,26,06,128. The Respondent called upon the Petitioner to pay the said amount along with interest @ 24% per annum within a period of seven days from the date of the notice. The Respondent reiterated that it had exercised its option to terminate the business arrangement with the Petitioner.

7. The Petitioner sent a letter dated 1st March 2014 to the Respondent, protesting against the termination for being allegedly wrongful and unilateral. The Petitioner quantified its losses at Rs. 18,86,83,956. The Petitioner by the same letter dated 1st March 2014 invoked the Clause 39 of the MoU and sought reference of the disputes to arbitration. The Petitioner by the same letter also nominated the sole Arbitrator.

8. On 3rd March 2014 the Petitioner filed OMP No. 280 of 2014 under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act'). In the said petition, after hearing both the parties, this Court passed an order dated 5th March 2014 appointing the Local Commissioners ('LCs') to take over the goods of the Respondent lying in the stocks of the Petitioner. The said order dated 5th March 2014 left open the question, raised by the Respondent, that there was in fact no arbitration clause between the parties. The Court noted that "while exercising jurisdiction under Section 9 does not lose its power as a civil Court." It was made clear that "the passing of this order shall not be construed as acceptance of the Petitioners plea with regard to existence of an arbitration agreement."

9. With the Respondent not consenting to the appointment of the Arbitrator nominated by the Petitioner, the present petition has been filed.

10. In response to the notice issued in the present petition on 19th May 2014, the Respondent filed its reply reiterating its objection to the maintainability of the petition on the ground that no arbitration agreement existed between the parties. According to the Respondent, the MoU stood superseded by the assignment agreement dated 2nd June 2009 which governed the rights and obligation of the parties. It was specifically pleaded that “the assignment agreement dated 23rd December 2010 being an unsigned document cannot be construed as concluded contract between the parties and therefore, cannot govern rights and obligation between the parties. Without prejudice to the aforesaid it is submitted that even the assignment agreement dated 23rd December 2010, nowhere provides for adjudication of the dispute between the parties by way of arbitration. The said agreement empowers Courts at New Delhi to adjudicate the dispute between the parties.”

11. Mr. Dayan Krishnan, learned Senior counsel appearing for the Petitioner, did not dispute that the agreement dated 23rd December 2010 was in fact not signed by the parties. However, he contended that a specific arbitration agreement was not required in view of the valid and binding arbitration clause in the MoU dated 1st January 2006. He referred to the averments in the notice dated 18th February 2014 of the Respondent terminating “business agreement/arrangement/ understanding/business relationship both verbal and/or written” which, according to him, removed any doubt about the existence of an agreement between the parties. He submitted that it is inconceivable that without any written agreement between the parties the franchise could have continued. He relied upon the decision of the Supreme Court in ***Govind Rubber Limited v. Louids Dreyfus Commodities Asia Private Limited*** (decision dated 16th December 2014 in Civil Appeal No. 11438 of 2014) and in particular para

16 where it is held that the mere fact of one of the parties had not signed the agreement would not absolve him from the liability under the agreement. He also placed reliance upon the decision of the Supreme Court in *H.R. Basavaraj (dead) by his LRs v. Canara Bank (2010) 2 SCC 458* to urge that the plea of the Respondent that the MoU had been superseded by the tripartite agreement dated 2nd June 2009 was misplaced since the rights under the MoU had never been extinguished.

12. In reply to the above submissions, Mr. Joy Basu, learned Senior counsel for the Respondent, relied on the decisions in *Union of India v. Kishorilal Gupta & Bros. AIR 1959 SC 1362* and *Young Achievers v. IMS Learning Resources Private Limited 2013 (3) Arb LR 299 (SC)*. He submitted that there was clearly no signed arbitration agreement between the parties and therefore, the question of appointing an Arbitrator did not arise.

13. The above submissions have been considered. Section 7 of the Act, which sets out the requirement of a written arbitration agreement, reads as under:

“ 7. **Arbitration agreement-** (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

14. It is plain from a reading of the Section 7 (3) that an arbitration agreement has to be in writing. The written arbitration agreement can also be inferred from other documents as specified in Section 7 (4) (a), (b), (c). Further, Section 7 (5) states that a reference in a contract “to a document containing an arbitration clause” would by itself constitute an arbitration agreement “if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”

15. Going by the above requirement spelt out in Section 7 of the Act, there can be no doubt after the tripartite agreement dated 2nd June 2009, the MoU dated 1st January 2006 which contained the arbitration clause definitely remained operational as far as the parties to the agreement dated 2nd June 2009 were concerned. The Court is of the view that although the MoU itself is for a period of five years and would have expired on 1st January 2011, had it in fact been made part of the agreement dated 23rd December 2010, it could still have continued.

16. However the agreement dated 23rd December 2010 was not signed by any of the parties. In a rejoinder to para 7 of the reply it is stated by the

Petitioner that the said agreement " being unsigned does not take away from the fact that the parties have been acting in furtherance of the MOU with each other since the past more than 8 years.”

17. The fact remains that for the purposes of Section 7 of the Act, there has to be an arbitration agreement in writing. There are no contemporaneous documents, in the form of correspondence exchanged between the parties, from which an arbitration agreement can be inferred. Therefore, it is futile to look to Section 7 (4) of the Act to find out whether apart from the document dated 23rd December 2010, there is any other document from which existence of arbitration agreement can be inferred. Section 7 (5) of the Act also does not help since the agreement dated 23rd December 2010 is unsigned. The facts in **Govind Rubber Limited** (supra) are distinguishable inasmuch as it was not a case where what was relied upon was the document not signed by any of the parties. Without the signature of even one of the parties it is not possible to conclude on the basis of the unsigned document dated 23rd December 2010 that there was an arbitration agreement between the parties.

18. For the purpose of Section 62 of the Indian Contract Act, 1872 it would have to be shown that the parties to the MoU kept it alive even beyond agreement dated 2nd June 2009. That could have, if at all, been possible only if the document dated 23rd December 2010 was shown to have been signed by the parties. Since that is not the position, it is not possible for the Court to agree with the Petitioner that the arbitration clause in the MoU dated 1st January 2006 continued to bind the parties.

19. Consequently, the petition is accordingly dismissed. However, it is

open to the Petitioner to avail out other remedies as may be available to it in accordance with law.

S. MURALIDHAR, J.

JANUARY 19, 2015

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