

IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 25/2015

AKARI ENTERPRISES LLC Petitioner
Through: Ms. Karnika Seth, Advocate.

versus

GENESIS LUXURY FASHION PVT LTD. Respondent
Through: Ms. Vibha D. Makhija, Senior
Advocate with
Mr. Kush Chaturvedi and
Ms. Disha Vaish, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
16.01.2015

Caveat No. 49 of 2015

1. Mr. Kush Chaturvedi, learned counsel appears for the Respondent.

2. The caveat stands discharged and disposed of as such.

IA No. 901 of 2015 (for exemption)

3. Exemption allowed subject to all just exceptions.

4. The application is disposed of.

Arb.P. No. 25 of 2015 & IA No. 902 of 2015 (u/O XIII Rule 1 CPC)

5. This is a petition under Section 11 (5) of the Arbitration and Conciliation Act, 1996 ('Act') seeking the appointment of an

Arbitrator to adjudicate the disputes between the parties arising out of the Consulting Agreement (‘Agreement’) dated 4th August 2011 entered into between the Petitioner and the Respondent.

6. The Agreement itself notes that the Petitioner is a limited liability company, having a business address of 1520 Cerro Gordo Road, Santa Fe, NM 87501. The relevant clause in the agreement about reference of disputes to the arbitration reads as under:

“Dispute Settlement Mechanism: That in case any dispute or difference between the Company and the Consultant in respect of this agreement the same shall be referred for arbitration to be conducted by sole arbitrator who shall be appointed by the Courts at Delhi in accordance with the Arbitration and Conciliation Act, 1996. The seat of the arbitral proceedings shall be New Delhi.”

7. Ms. Karnika Seth, learned counsel appearing for the Petitioner submits that since both the parties have expressly agreed that the Arbitrator will be appointed by the Courts in Delhi the present petition is maintainable. On the other hand, Ms. Vibha D. Makhija, learned Senior counsel appearing for the Respondent, draws the attention to the Court of the fact that the proposed arbitration would be in the nature of an ‘international commercial arbitration’ within the meaning of Section 2 (1) (f) of the Act and therefore, in terms

of Section 11 (12) (a) of the Act, the appointment of the Arbitrator will have to be made by the Chief Justice of India and not by this Court. Ms. Makhija, also placed reliance on the decision of this Court in ***HRD Corporation v. Gail (India) Limited*** 184 (2011) ***DLT 390***.

8. The definition of international commercial arbitration as contained in Section 2 (1) (f) of the Act, reads as under:

“(f) “international commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) a company or all association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country.

9. There can be no doubt in the present case that the Petitioner is a limited liability company incorporated and having its business outside India. An arbitration of the dispute involving the said company would fall within the definition of ‘international

commercial arbitration’. In ***HRD Corporation v. Gail (India) Limited*** (supra) the question arose in the context of substitution of an Arbitrator. The Court held in paras 26 and 28, as under:

“26. A conjoint reading of the aforementioned provisions especially the interplay between Section 2(f) read with Section 11 (6) and Section 11 (12) makes it abundantly clear that the legislature has intentionally carved out a fine distinction between the matters relating to the “any other arbitration” and “international commercial arbitration” when it comes to the process of the appointment of the arbitrator.

28. This leaves no room for doubt that Section 11 (6) is the enabling provision which empowers the High Court, in the present case this Court as well as Supreme Court for appointment of the arbitrator. However, the designated court changes depending upon the nature of arbitration. IN the case of international commercial arbitration, the Supreme Court will exercise powers vested under Section 11 (6) by virtue of the clear terms of the case of any other arbitration, the same powers vested in it shall be exercised by the “High Court” in view of the operation of Section 11 (6) read with Section 11 (12) of the Act.”

10. In that view of the matter, this Court is not inclined to accede the prayer made in the present petition seeking appointment of the Arbitrator. It is open the Petitioner to approach the learned Chief

Justice of India for relief. The petition and the pending application are dismissed in the above terms.

S. MURALIDHAR, J.

JANUARY 16, 2015

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