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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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+ **O.M.P. 575/2010 & IA No. 4953/2016**

KONKA GROUP COMPANY LTD ..... Petitioner
Through: Mr. Arvind Nayar with Mr. Sushant Kumar and Mr. Ashwini Kumar, Advocates.

versus

A2VP DISTRIBUTORS PVT LTD (FORMERLY KNOWN AS SPATAK DISTRIBUTORS PVT. LTD.) & ANR ..... Respondents
Through: Mr. Arun Kathpalia, Senior Advocate with Ms. Deepali Chandhoke and Mr. Nimanniyu Sharma, and Mr. Anant Garg, Advocates.

CORAM: JUSTICE S.MURALIDHAR

O R D E R
% **10.11.2016**

1. The challenge in this petition by the Petitioner, Konka Group Company Limited ('Konka'), under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an impugned Award dated 29^{th} May 2010 passed by the learned sole Arbitrator allowing the claims of the Respondents i.e., A2VP Distributors Private Limited ('ADPL', Respondent No. 1) and M/s Suyog Sales and Marketing (Respondent No. 2) and rejecting the counter-claims of Konka.

2. The background to the present petition is that Konka is a company incorporated and located in China engaged in the business of manufacture and sales of electronic goods under the trade mark/trade name 'KONKA'.

3. A Memorandum of Understanding ('MoU') dated Nil was entered into

between Konka and M/s. Suyog Group to market and distribute products under the trade mark 'KONKA". In terms of the said agreement, Konka Electronics (India) ('KEIL') which is a Konka Group company, was to transfer its entire shareholding in M/s. Konka Electronics Marketing (India) Limited ('KEMIL') to the Suyog Group. The Konka Group was to allow use of the brand name 'KONKA' to KEMIL together with the goodwill for a consideration of Rs. 101. It was agreed that all 'KONKA' range of products shall be marketed in India through KEMIL for a period of three years. The said arrangement could be renewed thereafter by mutual consent. The MoU also provided that the Suyog Group would pay value of the stocks to KEIL and that there would be no liability of KEIL towards sale of the stock after it was taken control of by M/s. Suyog Group. It contains exclusive jurisdiction clause stating that the dispute between the parties shall be settled under the Indian Laws subject to the exclusive jurisdiction of the Courts at Delhi. The said MoU was signed by representatives of KEIL, Konka and the Suyog Group.

4. On 9th November 2011 a Frame Agreement was executed between Konka, KEIL and Suyog Distributors Pvt. Ltd. (SDPL). The Frame Agreement is stated to have been executed at Shenzhen in China. In terms of the Frame Agreement, KEIL was to transfer its entire shareholding in KEMIL to SDPL for a consideration of Rs. 101. Clause 7.1 of the Frame Agreement, recorded that Konka had delivered and disclosed to SDPL, the true and complete copies of the audited financial statement of KEML as on 31st March 2001 and the list of shareholders of KEMIL as of that date. Clause 7.2 reads as under:

> "7.2 These statements represent the accurate and complete financial position of the company and is free from all material errors and omission and give a true and fair view of the state of affairs of the company. The terms of the transaction being entered

into are on this basis. KEIL and Konka have undertaken that in case of any liability other than those mentioned in the above stated balance sheets shall be in the account of KONKA Group and KONKA Group hereby indemnify SDPL and/or its nominees from any damages, claims etc. that may be raised against them from any person, company or authorities."

5. Clause 15.1 of the Frame Agreement which is also relevant for the purposes of the present case, reads as under:

"**15.1 Survival of Representations and Warranties.**

The representations and warranties respectively made by the parties to this agreement, pursuant to this agreement, will survive the closing, and will remain in full force and effect thereafter until the expiration of all applicable statutes of limitation (including all periods of extension, whether automatic or permissive)."

6. The Frame Agreement contained an arbitration clause which provided that the seat of the arbitration would be at New Delhi and the Courts in New Delhi shall have exclusive jurisdiction. The Frame Agreement was signed by Mr. Tandon on behalf of SDPL and a representative of KEIL. There was a third signature in Chinese language which according to the learned Arbitrator was not clear. Considering that there were three parties to the Frame Agreement viz., SDPL, KEIL and Konka, the third signature in Chinese ought to be that of a representative of Konka.

7. Following the Frame Agreement, on 10th November 2001 entered into a Share Purchase Agreement (SPA) was executed. The parties to the SPA were SDPL and Suyog Group on the one side and KEIL and Konka on the other. The SPA stated that it was made and entered into at Konka Group Co. Ltd. Shenzhen, China. In terms of the SPA, KEIL agreed to sell and transfer to SDPL its shares in KEMIL free and clear of all lien. Clause 12.3 of the said agreement is relevant and reads as under:

"12.3 Notices

Any notice or other communication given pursuant to this Agreement must be in writing and (a) delivered personally, (b) sent by telefacsimile or other similar facsimile transmission, (c) or sent by registered or certified mail, postage prepaid, as follows:

(a) If given to Konka Grop/KEIL

To the Attn of Mr. Zeng Rui

Al notices and other communications required or permitted under this Agreement that are addressed as provided in this Section 16.3 will (a) if delivered personally or by overnight courier, be deemed given upon delivery; (b) if delivered by telefacsimile or similar facsimile transmission, be deemed given when electronically confirmed; and(c) if sent by registered or certified mail, be deemed given when received. Any party from time to time may change its address for the purposes of notices to that party by giving a similar notice specifying a new address, but not such notice will be deemed to have been given until it is actually received by the party sought to be charged with the contents thereof."

8. The SPA also contained an arbitration clause.

9. On 5th February 2002 a meeting took place between the representatives of the Suyog Group, KEIL, KEMIL, a Chartered Accountant, an Advocate and Mr. R.B. Tandon. The meeting was to decide the procedure for takeover of KEMIL by the Suyog Group. In terms of the Minutes of the Meeting held on 5th February 2002, it was decided *inter alia* that each of the parties would work towards fulfilling the deficiencies to finalize the transactions of transfer of shares.

10. It appears that the dispute arose between the parties out of the SPA. A notice was issued by counsel for SDPL in which it was alleged that the management of Konka failed to hand over the management of KEMIL to SDPL; that in fact Konka had abandoned India without taking SDPL or their distributors into confidence. Meanwhile, SDPL had incurred

expenses in taking over the stocks apart from additional expenses. It was alleged that the total loss of Rs. 8,62,75,560 had been suffered by SDPL as a result of KEIL's failure to transfer its stocks. Further it was stated that SDPL liable to claim the amount to the tune of Rs. 60,34,319 against the debit notes issued to Konka Group towards interest, loss of profit on account of non-supply of materials, damages and costs. Konka Group was called upon to pay SDPL a sum of Rs. 9,23,09,879 within 30 days from the date of receipt of the notice. The name of the Arbitrator was also suggested.

11. This was followed by SDPL filing against the Konka Group an OMP No. 428 of 2004, under Section 9 of the Act, in which an order was passed on 25th November 2004 restraining Konka Group from selling, marketing or distribute any of its products covered under the Frame Agreement dated 9th November 20011 except through the SDPL until the next date of hearing.

12. On 24th November 2005 a common order was passed by this Court by disposing of Arbitration Petition No. 67 of 2004 filed under Section 11 (4) of the Act and OMP No. 428 of 2004. The said order noted that the existence of an arbitration clause was not in dispute. The order dated 25th November 2004 was directed to continue till such time the learned sole Arbitrator appointed by the Court considered the mater. A former Chief Justice of India was appointed as the sole Arbitrator. An order was passed by the learned Arbitrator on 23rd January 2007 continuing the interim injunction granted b the Court during the pendency of the arbitral proceeding.

13. It may be noted at this stage that two Claimants in the arbitral proceedings were Saptak Distributors Pvt. Ltd. (formerly known as

‘Suyog Distributors Pvt. Ltd.’, ‘Claimant No. 1’) and M/s. Suyog Sales and Marketing (Claimant No. 2). The Respondent in that proceeding was Konka Group. The monetary claims of Claimant No. 1 were:

(a) payment against three debit notes dated 2nd February 2002 to the tune of Rs. 60,34,319;

(b) price difference of Rs. 85,07,689;

(c) interest on the above amounts;

(d) loss of profit amounting to Rs. 8,62,75,560; and

(e) damages on account of loss of credibility amongst dealers and distributors amounting to Rs. 1 crore.

14. The monetary claims of Claimant No. 2 against Konka Group were as follows:

(a) excess amount paid by Claimant No. 2 for delivery of goods for which the goods were not supplied amounting to Rs. 65,19,546;

(b) the amount paid on behalf of the Konka Group to dealers of KEIL and KEMIL given under the Konka Group’s instructions amounting to Rs. 44,86,844;

(c) amount due against defective goods in the sum of Rs. 2,52,500;

(d) amount due and payable on account of cash discount by Konka to claimant No. 2 amounting to Rs. 13,08,217;

(e) interest on the above amount due and payable to Claimant No. 2;

(f) damages on account of loss of credibility amongst dealers and distributors amounting to Rs. 1 crore.

15. The Claimants made also joint claims against the Respondent for:

(a) specific performance of Konka Group's obligations under the Frame Agreement, i.e., (i) transfer of KEMIL at zero liability in favour of Claimants and (ii) all Konka range of products present and future be marketed in India through Claiimants exclusively for a period of three years and

(b) legal costs incurred by the Claimants.

16. Konka group while contesting the above claims also preferred counter-claims. *Inter alia* it was contended that the Frame Agreement remained operative for a period of three years does not renew after its expiry i.e., 9th November 2004. Secondly, KEIL and KEMIL both were into liquidation and therefore, Clause 3 of the Frame Agreement could not and might never be fulfilled. Konka had not committed any breach of any of the agreements. The Frame Agreement could not have a perpetual validity. The Claimants had neither placed an order for purchase of Konka's goods nor even sent a trade inquiry. The Frame Agreement authorized the exclusive manufacture and sale of Konka products in India by the Claimants. It was only use of the said trade mark which was permitted. The said trademark was never assigned to the Claimants. The counter-claims preferred by Konka against Calimants 1 and 2 were as under:

(i) Damages on account of loss of credibility and goodwill in the market: Rs. 10 crores

(ii) Legal costs: Rs. 3.50 lakhs

17. The following issues were framed by the learned Arbitrator on 10th January 2007:

> "(1) (a) What is the period for which Frame Agreement (FA) dated 9th November 2011 shall bind the parties? (OPP)
>
> (b) Whether the life of the FA comes to an end on expiry of three years calculated from 9th November 2011? (OPR)
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> (2) (a) Whether the MoU and FA relate to all products manufactured by Konka? (OPP)
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> (b) Whether the MoU and FA are confined to products bearing the trade mark Konka only? (OPR)
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> (3) Whether the MoU and FA bind KEIL and KEMIL also? (OPP)
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> (4) Whether the Respondents can be said to have committed breach of MoU and FA? (OPP)
>
> (5) Whether the MoU and FA can be said to have become void as frustrated on account of KEIL and KEMIL having gone in liquidation? (OPR)
>
> (6) Whether the Claimants are entitled to reliefs such as specific performance, injunction and damages as prayed for? (OPP)
>
> (7) Any other relief and costs? (OPP)"

18. On behalf of the Claimant No.1, Mr. Vinay Palel, Director filed a affidavit and was cross-examined. On behalf of the Respondent, one Mr. Rui Wu filed an affidavit and was cross-examined.

19. The findings of the learned Arbitrator were as under:

(i) As regards Issue Nos. 1 (a) and 1 (b), it was held that there was nothing on record to show that the entire equity shareholding of

KEML has been transferred in favour of SDPL and/or its nominees. It was also not proved that all directors of KEMIL resigned and that the statutory forms were submitted to the Registrar of Companies ('RoC'). Consequently, the learned Arbitrator concluded that the Frame Agreement which became effective on 9th November 2001, the date on which it was entered into, continued to be effective and binding on the parties till date and for future also it shall continue to remain so until the five conditions (a) to (e) of Clause 3 thereof have been fulfilled.

(ii) As far as Issue No. 1 (b) is concerned, while the term expired with effect from 9th November 2004, the Frame Agreement continued to remain in operation for all practical purposes. However Clause 5.1 which related to sale of KONKA range of products marketed in India came to an end with the expiry of three years could have been renewed only by mutual consent.

(iii) The obligation of the claimants to make trade enquiries and to sell minimum number of TV sets is not binding unless the shares in KEMIL stood transferred to the Claimants. The period of three years as specifically stated in Clause 5 of the Frame Agreement does not extend to for an indefinite length of time. The extension granted by virtue of injunction in the arbitral proceedings shall come to an end with the pronouncement of the Award.

(iv) As regards Issue Nos. 2(a) and 2(b), the learned Arbitrator held that the MoU and Frame Agreement relates to all products manufactured by Konka and that that it applied to all products bearing the trade mark 'KONKA'. The products manufactured on the date of the Frame Agreement were to be marketed in India only under the trademark ‘KONKA’ but subject to the settlement of the price by mutual consent between the parties.

(v) As far as the Issue No. 3 is concerned, the learned Arbitrator adopted the doctrine of 'Lifting the corporate veil' and held that “all the transactions entered into between the parties and the overall deal which is the subject matter of adjudication in these proceedings binds KONKA, KEIL and KEMIL all the three.”

(vi) On Issue No. 4 the learned Arbitrator held that Konka Group has been in breach of the obligations undertaken by it under Clause 5 of the Frame Agreement.

(vii) Issue No. 5 was decided by the learned Arbitrator by holding that doctrine of frustration cannot be invoked by Konka as it could not take advantage of its own wrong. Nothing was brought on record to point out as to how, in what circumstances and at whose instance the winding up proceedings were initiated against KEIL and KEML. It was observed that Konka which was controlling KEIL by holding 70% shares and also controlling KEMIL by holding 100% shares through KEIL, could have managed for payment of the debts of KEIL and KEMIL and to restore their business, there was nothing to show that Claimants defaulted in performing their any such obligations as would disentitle them to specific performance of the agreement. The MoU and the frame Agreement cannot be said to have become impossible of performance and rendered void and frustrated on account of KEIL and KEMIL having gone into liquidation.

(viii) Alternatively, if KEIL and KEMIL were co-promisors, anyone of them could be directed to perform obligations and discharge the liabilities incurred by them. Reference was made to Section 43 of the Indian Contract Act. It was held that Konka alone could be held liable to meet the claims of the Claimants even in the absence of KEMIL and KEIL. Over and above the relief of specific performance in terms of the Frame Agreement the claimant was awarded a sum of Rs. 25 lakhs.

(ix) As regards Issues 6 and 7, the learned Arbitrator held that the Respondent shall pay to the Claimant No. 1 an amount of Rs. 1,45,42,008 with interest calculated at the rate of 9% per annum, with effect from 2nd February 2002 on the amount of Rs. 60,34,319 till payment, and on the amount of Rs. 85,07,689 with effect from 5th April 2006 the till the date of payment.

(x) The Respondent shall pay Claimant no. 2 an amount of Rs. 93,14,607 with interest calculated at the rate of 9% per annum from 5th April 2006 till payment.

(xi) The Claimants' claim for specific performance of the Respondent's obligations under the Frame Agreement was decreed and allowed to the extent of directing the Respondents to transfer KEMIL to the claimants at zero liability by completing all such formalities as may be requited within a period of six months from the date of the Award.

(xii) In addition to the claim for Specific Performance being allowed, the Claimants were also held entitlement to the recovery of Rs. 25,00,000 by way of compensation for the delay and breach of obligation committed by the Respondent.

(xiii) The operation of order of injunction passed by the High Court of Delhi on 25th November 2004 and confirmed by the order of the High Court on 24th November 2005 and continued by the order of the Arbitral Tribunal dated 23rd January 2007 shall cease to operate with effect from the date of the Award;

(xiv) The counter claims of the Respondent were rejected as devoid of any merit;

(xv) The Claimants were held to be entitled to the costs of the proceedings which are quantified at Rs. 10 lakhs which figure is inclusive of the fees of the sole Arbitrator, fees of counsel and costs incurred on venue of the arbitral hearings. The claimants were also held to be entitled to recover the amount of stamp duty paid by them on the Award over and above the amount of Rs. 10 lakhs as above.

20. It was submitted by Mr. Arvind Nayar, learned counsel appearing for Konka as under:

(a) The learned sole Arbitrator has erroneously applied the principle of 'lifting of corporate veil' to make Konka liable along with KEIL and KEMIL. The fact that all of the shares of KEMIL are owned by the parent company has nothing to do with its separate legal existence. If the owned company is wound up, the Liquidator and not its parent company, would have to step in. Reliance was placed on the decisions in ***Vodafone International Holdings B.V. v. Union of India (2012) 6 SCC 613*** and ***Life Insurance Corporation of India v. Escorts Limited (1986) 1 SCC***

264 as well as other decisions.

(b) The learned sole Arbitrator erred in holding that Konka was in breach of the Frame Agreement

(c) The claim for specific performance of the Frame Agreement was erroneously granted despite the said contract having been frustrated. The burden under the Frame Agreement upon KEIL could not have been transferred to Konka. Reliance was placed on the decisions in ***Satyabrata Ghose v. Mugneeram Bangur 1954 SCR 310*** and ***Naihati Jute Mills Limited v. Khyaliram Jagannath 1968 1 SCR 821.***

(d) The learned Arbitrator exceeded the scope of the arbitration.

21. Mr. Arun Kathpalia, learned Senior counsel appearing on behalf of Respondents supported the impugned Award. He submitted that no ground has been made out for interference with the impugned Award under Section 34 of the Act. He submitted that the learned Arbitrator correctly interpreted the Frame Agreement and concluded that Konka was in breach of its obligations thereunder.

22. Although it was pointed out by Mr. Arvind Nayar that the learned Arbitrator was in doubt as to the third signature on the Frame Agreement, the fact that Konka was a party thereto was never in doubt. No specific plea to the contrary appears to have been urged by Konka before the learned Arbitrator. Further, the burden under the Frame Agreement was not exclusively that of KEIL. It has been rightly held by the learned Arbitrator that the obligations under Clause 3 of the Frame Agreement continued beyond the term of the said agreement.

23. As rightly pointed out, the MoU had to be read along with the Frame

Agreement and Konka was a party to both. The independent liability of Konka to indemnify the Suyog Group is clearly established under both documents. Therefore, even if the doctrine of lifting the corporate veil is held not to apply, the independent liability of Konka as a co-promisor certainly subsists. The decisions in ***Vodafone International Holdings B.V. v. Union of India*** (supra) and ***Life Insurance Corporation of India v. Escorts Limited*** (supra) are therefore not helpful to the Petitioner in the facts and circumstances of the case.

24. The Court is unable to find any error having been committed by the learned Arbitrator in the interpretation of the MoU, Frame Agreement and the SPA or the reasoning and conclusions reached in the Award.

25. The Court is satisfied that none of the grounds under Section 34 of the Act are attracted in the present case.

26. Consequently, the petition is dismissed but, in the facts and circumstances of the case, with no orders as to costs.

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27. This application does not survive and is disposed of as such.

S.MURALIDHAR, J

NOVEMBER 10, 2016
Rm