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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **O.M.P. (COMM) 501/2016**

GLOBAL FRAGRANCES PVT. LTD. & ANR. Petitioners

Through: Mr S. S. Ray and Mr Vaibhav Gulia,
Advocates.

versus

REEBOK INDIA COMPANY

..... Respondent

Through: Mr Abhinav Vashisht, Senior
Advocate with Mr Nijraj Singh and
Mr Akshay, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

21.11.2016

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VIBHU BAKHRU, J

IA No.14338/2016

1. Allowed, subject to all just exceptions.
2. The application stands disposed of.

O.M.P. (COMM) 501/2016

3. The petitioners have filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, impugning an Award dated 06.08.2016 passed by Justice M. L. Mehta (Retired), a former Judge of this Court.
4. The main objection urged by the learned counsel for the petitioners is that the disputes adjudicated by the Arbitrator are not arbitrable. He pointed out that certain disputes had arisen between the parties in respect of a

Manufacturing Agreement dated 02.07.2011 (Ex.CW/1/3 before the Arbitrator); and, these disputes were resolved in terms of Memorandum of Understanding dated 03.12.2012 (Ex.CW/1/5 before the Arbitrator and hereafter referred to as 'the MoU'). He submits that in terms of the MoU, the parties had agreed that it superseded all prior discussions and agreements between the parties with respect to the subject matter of the MoU.

5. It was further recorded in the MoU recorded that all disputes that arise out of the MoU would be submitted to the jurisdiction of the Courts at Delhi alone to the exclusion of the other Courts. He contends that in view of this, the arbitration clause included in the Agreement dated 02.07.2011 also perished and, therefore, the Arbitrator had no jurisdiction to adjudicate the disputes.

6. In my view, the aforesaid contentions cannot be entertained principally for the reason that the Sole Arbitrator was appointed by an order dated 18.03.2014 passed by this Court in Arb. P. No.93/2014. The said order clearly records that the petitioners have no objection for such appointment. Plainly, no objection as to the existence or the validity of the arbitration agreement was urged by the petitioners at the material time and the petitioners had consented to the appointment of the Sole Arbitrator.

7. It is also important to note that no such objection was taken by the petitioners even in their Statement of Defence; at any rate, none has been pointed out by the learned counsel for the petitioners. The learned counsel for the respondent on the other hand has pointed out that in the Statement of Defence, the petitioners had specifically pleaded that the petitioners also intended to refer disputes to the arbitration. It is also a matter of record that the petitioners had also preferred counter-claims before the Arbitrator and

thus cannot be now heard to state that the parties had not agreed to resolution of the disputes by arbitration.

8. Insofar as other disputes are concerned, the same relate to the merits of rival claims, which have been adjudicated by the Arbitrator. The Arbitrator has examined the terms of the MoU as well as other evidence and had concluded that the sums of ₹89,20,379/- and ₹50 lacs had been given as advances to the petitioners which were duly acknowledged by the petitioners. However, the petitioners had not supplied the goods against the aforesaid advances in terms of the MoU. It was the petitioners' case that although they had received the aforesaid sums, the same were not given as advances but against goods manufactured and the respondent had failed to receive such goods on account of paucity of space. The petitioners further claimed that in addition to the above, they had also manufactured goods worth ₹82 lacs.

9. The Arbitrator noted that the Managing Director of the petitioner no. 1 (RW1) had, *inter alia*, deposed that the petitioners had called upon the respondent to pay the outstanding and take the delivery of goods from the petitioners' factory, but the respondent had not paid the outstanding and therefore the goods could not be supplied. RW1 had further also admitted that the entire goods had not even been manufactured; that in terms of the MoU the goods had to be delivered by the petitioners at the respondent's warehouse; and the respondent was to make the final payment by the seventh day of such delivery. The Arbitrator also found several inconsistencies in the evidence of RW1. After evaluating and appreciating the entire evidence, the Arbitrator concluded that neither sufficient raw material was procured by the petitioners nor any goods were taken to the

respondent's warehouse for delivery. He, thus, held that the petitioners had failed to deliver the goods to the respondent as per the MoU.

10. The learned counsel for the petitioners states that the aforesaid finding are erroneous as the Arbitrator had not taken into account the petitioners' e-mail dated 14.12.2012 since it was not proved as per law under Section 65B of the Evidence Act, 1872. He further submits that the audit report of M/s Ernst & Young placed before the Arbitrator also indicated that the goods were lying in the premises as on 09.10.2012 but had not been considered as the witness had not produced the original e-mail. He submits that such hyper-technical view is opposed to the ethos of arbitration as strict rules of evidence do not apply to arbitral proceedings.

11. In my view, the aforesaid contention is also wholly bereft of any merit. First of all, the Arbitrator had examined the contents of the e-mail dated 14.12.2012 and further noted that the said e-mail was also not put to the respondent's witnesses in their cross-examination. The said e-mail was evaluated in the context of the testimony of witnesses. After examining the evidentiary value of the said e-mail, the Arbitrator had concluded that the same did not indicate that the goods had, in fact, been supplied to the respondent.

12. Similarly, the Arbitrator had also examined the report of M/s Ernst & Young. It was the petitioners' case that the said report was an inspection audit report of the goods lying in the premises of the petitioners. The said report was disputed by the respondent as being fabricated, the report also did not bear the seal or the stamp of any official of Ernst & Young. The petitioners, on the other hand, claimed to have received the same by e-mail, however, the petitioners' witness did not place that e-mail on record. Thus

there was no evidence indicating the authenticity of the said report. Further, the petitioner's witness (RW1) had in his cross-examination deposed that he did not remember whether the goods highlighted in the said report were ever supplied to the respondent. In view of the aforesaid, the Arbitrator had rejected the said report as not proved but had also observed that the said report did not advance the case of the petitioners.

13. In my view, none of the findings can be said to be perverse or unsubstantiated. It is trite law that the scope of interference in an arbitral award is only limited to the grounds as specified under Section 34(2) of the Act. The petitioners have sought to place their case within the scope of Section 34(2)(b)(ii) of the Act; that is, the arbitral award is in conflict with the public policy of India. In my view, no such ground has been made out. The Arbitrator's findings that the petitioners had received advances from the respondent and had not supplied the goods against such advances are findings of fact that are based on appreciation of evidence. No interference with those findings are warranted in these proceedings.

14. In **Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49**, the Supreme Court has explained the above principle in the following manner:

“It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this

score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

15. In the aforesaid view, the present petition is without any merit and is accordingly, dismissed.

VIBHU BAKHRU, J

NOVEMBER 21, 2016/MK

