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

Date of decision: 26th November, 2018

+ **O.M.P.(COMM.) 72/2016**

INTERNATIONAL BREWERIES PVT. LTD. Petitioner
Through: Mr.Debashish Moitra, Ms.Suruchi
Mittal, Mr.Abhishek Gautam, Mr.Harsh
Singhal, Mr.Kirti Mewar, Ms.Deeksha Gaur,
Advs.

versus

KALPANA INTERNATIONAL BREWERIES LTD
..... Respondent
Through: Mr.S.N.Gupta, Mr.Abhishek
Vashisht, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenges the Arbitral Award dated 17.11.2015 passed by the Sole Arbitrator adjudicating the disputes that had arisen between the parties in relation to the Amending Agreement dated 07.06.2005 entered into between the parties.

2. By the said Amending Agreement, the respondent took over all the rights and responsibilities of one *M/s Shakuntalam Investment & Leasing Ltd. (SILL)* under the Agreement dated 22.08.2003 executed between the petitioner and SILL.

3. The respondent claimed that though the term of the Agreement was for a period of five years commencing from 08.06.2005 till August, 2010, the petitioner made supplies only between the period from 19.10.2005 to 28.11.2006. The respondent further asserted that at the time of entering into the said Amending Agreement, the respondent had given a Franchise Fee of Rs.85 lacs to the petitioner, which in terms of Clause 15 of the Amending Agreement was to be adjusted equally over the period of five years that is, the term of the Amending Agreement. As the petitioner failed to make supplies beyond 28.11.2006 and was therefore, in breach of the Amending Agreement, the respondent was entitled to refund of the Franchise Fee. The respondent further asserted that the petitioner owed a sum of Rs.20,33,090/- to the respondent on the reconciliation of the Statement of Account and a further sum of Rs.20 lacs, which it had agreed to pay against the poor quality of beer supplied to the respondent.

4. The claims of the respondent were denied by the petitioner.

5. The Arbitrator by his Impugned Award has directed a refund of Rs.65 lacs out of the amount of Rs.85 lacs deposited by the respondent as Franchise Fee with the petitioner. The Arbitrator has further allowed the claim of the respondent to the sum of Rs.20,33,090/-, while rejecting the claim of the respondent for a sum of Rs.20 lacs towards alleged supply of poor quality of beer. The Arbitrator has directed payment of *pendente lite* interest @ 12% per annum and further post Award interest @18% per annum.

The Arbitrator has further rejected the counter claims of the petitioner.

6. Counsel for the petitioner submits that there was no Arbitration Agreement between the parties to the present petition. The Arbitration Agreement was contained in the Agreement dated 22.08.2003, which was executed between the petitioner and SILL. The said Agreement was only for the Union Territory of Delhi and was for a period up till 31.03.2009. The Amending Agreement dated 07.06.2005 signed between the parties to the present petition did not contain an Arbitration Agreement between the parties. He further submits that though the respondent claimed itself to be a nominee of SILL, no document in this regard was filed by the respondent.

7. I have considered the submission made by the counsel for the petitioner, however, find no merit in the same.

8. The agreement dated 07.06.2005 records as under:

*“AMENDING AGREEMENT
(AMENDMENT TO AGREEMENT BETWEEN THE
PARTIES
DATED 22nd AUGUST, 2003)*

*This Agreement is made at New Delhi on, this 7th day of
June, 2005 between International Breweries Pvt Ltd., xxxxxx*

And

*Shakuntalam Investment & Leasing Limited, xxxxx who
hereby nominate a group company "Shakuntlam Credits &*

Holdings Ltd." as the operating company to take on the rights and responsibilities under this Agreement (hereinafter called the "Sales Promoter")

AS AND BY WAY of amendment and modification of the original agreement entered into on the 22nd August, 2003 (hereinafter called the "Agreement") by and between the parties referred to above, namely IBPL and the Sales Promoter.

Whereas the two aforesaid parties have entered into an agreement on 22nd August, 2003 to launch IBPL's brands, Australian Max Strong beer and Australian Lager Premium beer in the Union Territory of Delhi.

And whereas both parties have agreed to amend the terms of the said Agreement to facilitate the manufacture and sale of Australian Max Strong beer and Australian Lager Premium beer (hereinafter called the "Brands") in the State of Rajasthan, and to replace all references to "The Union Territory of Delhi" in the Agreement with "the State of Rajasthan" defined henceforth as "the Territory".

(Emphasis Supplied)

9. The Amending Agreement further, in Clause 17 records as under:

"17. AMENDMENT TO SUPERCEDE : That it has been agreed to by and between the parties hereto, that the original agreement dated the 22nd August, 2003 stands modified to the extent as aforesaid and the provisions of this agreement shall form an integral part of the original agreement dated the 22nd August, 2003. Where there is a conflict between clauses & interpretation or meaning in the original Agreement and those in this Amendment, this Amendment shall apply and supercede."

(Emphasis Supplied)

10. A reading of the above Clause would clearly show that while making amendments in the contract and substituting the respondent for SILL, the parties had agreed that the Amending Agreement shall form an integral part of the Agreement dated 22.08.2003. Therefore, clearly the Arbitration Agreement between the parties subsisted with SILL having been substituted by the respondent herein.

11. In any case, the Arbitrator has relied upon the correspondence exchanged between the parties and observed as under:

“At para 2 it was noted that Shakuntlam Credits & Holding Ltd. was the operating company which took over the rights and responsibilities. There was a change in nomenclature and Claimants' name got incorporated as evident from CW 1/4 of the documents. Several correspondences after June, 2006 from the Respondent establish that it was aware of the changed scenario. Particular reference is drawn to pages 66, 72, 77 and 87 of the documents filed by the Claimant. These letters are dated 28.10.2006, 16.12.2006, 23.12.2006 and 12.01.2007 respectively.

There are several other undisputed documents where the Respondent has acknowledged the Claimant's position. Virtually all the correspondences of Rajasthan State Beverage Corporation Ltd. and Mohan Meakins Ltd. are addressed to the Claimant.”

12. The above finding of the Arbitrator, therefore, cannot be faulted.

13. Counsel for the petitioner has further contended that in terms of Clause 15 of the Amending Agreement, the Franchisee fee

deposited by the respondent with the petitioner was non-refundable. He submits that the Arbitrator has therefore erred in directing refund of the same in favour of the respondent. Relying upon the judgments of the Supreme Court in ***Food Corporation of India vs. Chandu Construction & Anr.*** (2007) 4 SCC 697, he submits that the Arbitrator being a creature of the Agreement between the parties, has to operate within the four corners of the Agreement and if he ignores the specific terms of the Agreement, the Award would be liable to be set aside. Further, placing reliance on the judgment of the Supreme Court in ***The Central Bank of India, Ltd., Amritsar vs. Hartford Fire Insurance Co., Ltd.*** AIR 1965 SC 1288, he submits that the plain and categorical language of the Agreement cannot be changed by relying upon the surrounding circumstances.

14. I have considered the submissions made by the counsel for the petitioner and do not find any force in the same.

15. The Arbitrator has accepted the claim of the respondent that the last supply was made by the petitioner to the respondent on 28.11.2006. Thereafter, the petitioner was in no position to make the supplies to the respondent. For this purpose, the reliance of the respondent on the objections filed by the petitioner challenging an Arbitral Award passed against the petitioner in its dispute and its Agreement with Mohan Meakins Ltd. was relied upon by the Arbitrator. In the Statement of Defence filed by the petitioner, a categorical stand had been taken by the petitioner that the

petitioner was making the supplies and was in a position to make such supplies through Mohan Meakins Ltd. Once this assertion was found to be incorrect, the petitioner was found to be in breach of the Agreement. The Arbitrator further held that Clause 15 of the Agreement provides for the adjustment of the Franchise Fee on a monthly basis. Due to such breach, as the Franchise Fee could not be adjusted any longer, the respondent was entitled to a refund of the same.

16. No fault can be found in such finding of the Arbitrator. A reading of the Award would show that the Arbitrator has duly considered Clause 15 of the Agreement between the parties and thereafter reached at the above conclusion. The Arbitrator having interpreted the Agreement in a particular manner, which has been found to be just and proper, the Award cannot be set aside.

17. Counsel for the petitioner has further submitted that the claim filed by the respondent was barred by law of limitation. For this, he places reliance on the finding of the Arbitrator that the last supply was made on 28.11.2006 and therefore, the counter claim of the petitioner was dismissed as being barred by limitation. He submits that similarly, the respondent having invoked the Arbitration Agreement between the parties only by its notice dated 02.03.2010, the claim of the respondent was also barred by limitation.

18. Counsel for the petitioner, however, fairly concedes that this issue was not raised before the Arbitrator. He, however, places

reliance on the judgment of the Supreme Court in *State of Gujarat vs. Kothari and Associates* (2016) 14 SCC 761 to contend that even where such a plea is not raised before the Trial Court, it is incumbent on the trial Court to consider the same on its own initiative.

19. On the other hand, counsel for the respondent has placed reliance on various communications exchanged between the parties between the period 2006-2009. Particularly, he has placed reliance on the e-mails dated 14.12.2007 and 20.03.2009 addressed by the petitioner to the respondent whereby the petitioner was calling upon the respondent to produce supporting documents for its claim. He submits that as the parties were in negotiation and the claim of the respondent had never been denied by the petitioner, the claim of the respondent was within the period of limitation. He submits that on the other hand, the petitioner had never raised any claim against the respondent in this period and, therefore, its counter claim was rightly held to be barred by limitation.

20. In my view, in the present case the question of limitation would be a mixed question of fact and law. The facts asserted by the respondent, if correct, would certainly make the claim of the respondent to be within the period of limitation as the e-mails dated 14.12.2007 and 20.03.2009 would act as an acknowledgment of liability by the petitioner leading to extension of period of limitation in terms of Section 18 of the Limitation Act, 1963.

21. It is lastly contended by the counsel for the petitioner that the claim of the respondent for a sum of Rs.20,33,090/- has been allowed by the Arbitrator without there being any evidence in proof of such a claim. The Arbitrator has considered this issue and has held as under:

“As regards Claimant's claim of Rs.20,33,090/- is concerned the Claimant at Para 10 of the claim petition has averred on two aspects:

(a) Agreement of Respondent to pay Rs.20 lakhs in respect of poor quality of Beer supplied.

(b) As per statement of account of the Respondent a sum of Rs.20,33,090/- was due to the Claimant.

The Claimant has claimed Rs.20,33,090/- stated to be admitted to be due by the Respondent. So far as, this claim is concerned the Claimant has referred para 14 of the evidence by way of affidavit of CW-1 Shri Amitabh Agarwal, it is stated that as per the statement of account a sum of Rs.20,33,090 was due towards transaction amount to the Claimant and Respondent was liable to pay same.

In its Statement of Defence/Reply, the Respondent has dealt with aforesaid pleadings at Para 7 of the "Reply on Merits". Such Reply is in addition to preliminary objections. In Para 7, the Respondent has categorically denied to have agreed to pay anything to the Claimant. This obviously is in relation to the aforesaid aspect (a). There is no specific denial except in general terms regarding the claim being false, vexatious and concocted. The correctness of the Statement of Accounts as per document at page 36 has not been disputed. Reference can also be made to Claimants' letter dated 22.05.2007 (at page 40 of the documents).

Though not stated in the pleadings, in the written submissions the Respondent has stated that the figure has

not been certified by any Chartered Accountant and in another proceeding Mohan Meakins Ltd. has stated about liability of Claimant to Respondent. Both these stands do not find place in the pleadings in the Statement of Defence /Counter Claim filed by the Respondent. Even during evidence stage no credible evidence has been led. It has also not been explained as to how a certificate by the Chartered Accountant would have changed the position.

Above being the position the Claimant is entitled to this amount which is awarded.”

22. It is further asserted by the counsel for the respondent that the Statement of Account relied upon by the Arbitrator was, in fact, one sent by the petitioner itself and therefore, was an admitted figure of liability. This is disputed by the petitioner.

23. This being a matter of appreciation of evidence led by the parties, this Court cannot sit as a Court of appeal to re-appreciate the same to arrive at its own conclusion. The Arbitrator being the final Judge of the evidence led by the parties before him, the opinion of the Arbitrator has to be respected.

24. In view of the above, I find no merit in the present petition and the same is dismissed with cost quantified at Rs.25,000/-.

NAVIN CHAWLA, J

NOVEMBER 26, 2018
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