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

Reserved on: 16th August, 2018
Date of Decision 27th August, 2018

+ **O.M.P. (COMM) 136/2017**

MOTHER BOON FOODS PVT LTD Petitioner

Through: Mr. S.P. Saxena, Advocate (M-9650561714).

versus

MINDSCAPE ONE MARKETING PVT LTD Respondent

Through: Mr. Shrey Chathly, Advocate (M-9910211045).

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The proverb, “*better safe than sorry*”, cannot be of universal application as the facts in the present case would show. The safe procedure for parties to an arbitration agreement is to actually adhere to the stipulation in the arbitration clause and not attempt anything which the parties may perceive to be safer.

2. The Petitioner, Mother Boon Foods Pvt Ltd (*hereinafter*, ‘*Petitioner*’) has filed the present petition under Section 34 (2) of the Arbitration and Conciliation Act, 1996 (*hereinafter*, ‘*the Act*’) challenging the arbitral award dated 15th July 2014, passed by a three member tribunal. The Respondent, Mindscape One Marketing Pvt Ltd (*hereinafter*, ‘*Respondent*’) is a leading company engaged in manufacturing and marketing the bread. A

manufacturing agreement was entered into between the parties dated 25th July, 2012 under which the Petitioner was appointed as a contract manufacturer to manufacture and package breads as per requirements and specifications of the Respondent. Commercial production was commenced in July, 2013. Quality control measures were to be put in place by the Respondent. However, disputes arose between the parties leading to termination of the agreement vide letter dated 14th March, 2014. The Petitioner requested for a meeting to explore settlement of the disputes vide letter dated 19th March, 2014. However, no settlement could be arrived at despite the meeting held on 1st April, 2014. The Petitioner then sent a letter dated 2nd April, 2014 setting out its various financial claims against the Respondent which were not accepted by the Respondent.

3. The agreement contained an arbitration clause which reads as under:

“

17.2 Arbitration'

17.2.1 Any and all claims, disputes, questions or controversies-involving the Parties and arising out of or in connection with or relating to this-Agreement, or the execution, interpretation, validity, performance, breach or termination hereof, including, without limitation, the provisions of this Clause (individually, a Dispute) that is not settled to the satisfaction of the Parties under Article 17.1 above shall be finally resolved by arbitration in accordance with the rules of Indian Arbitration and Conciliation Act, 1996 and any amendment of the same effected and enacted from time to time.

17.2.2 For the purpose of such arbitration, the Company shall appoint the Sole Arbitrator.

17.2.3 The place of arbitration shall be Delhi.

17.2.4 All arbitration proceedings shall be conducted in the English language.

17.2.5 On request of any Party, a transcript of the hearings shall be prepared and made available to the Parties.

17.2.6 Judgment upon any arbitral award rendered hereunder may be entered in any court having jurisdiction, or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be.

17.2.7 The Parties agree to facilitate the arbitration by:

17.2.7.1 cooperating in good faith to expedite (to the maximum extent practicable) the conduct of the arbitration;

17.2.7.2 making available to one another and to the arbitrator for inspection and extraction all documents, books, records, and personnel under their control or under the control of a person controlling or controlled by such Party if determined by the arbitrator to be relevant to the dispute;

17.2.7.3 conducting arbitration hearings to the greater extent possible on successive business days; and

17.2.7.4 using their best efforts to observe the time periods established by the rules of the arbitrator for the submission of evidence and briefs

.....”

4. The clause above contemplated appointment of a sole arbitrator by the Respondent which, however, constituted a three member tribunal, which issued notices to the parties on 16th April, 2014. The Respondent submitted its claims on 7th May, 2014, however, prior to that the Petitioner sent a letter

dated 16th June, 2014 challenging the constitution of tribunal. The extract of the said letter reads as under:

“Dated 16-6-2014

*To,
The Registrar
Office of the Arbitral Tribunal
Mahipalpur Extension,
NEW DELHI*

Sir,

Kindly refer to your notice dated 6-6-2014 for the proceedings of the tribunal on dated 16th June, 2014. In this connection I would like to draw your kind attention to para 1.2.11 of the agreement executed on 25.07/2012 between the parties stipulate that the matter be referred to the arbitration tribunal under the statute or statutory provision.

Since I have not been given opportunity to appoint my arbitrator and not informed by the Company and not received my consent to appoint the present arbitration tribunal and on the contrary constituted the arbitration tribunal by Shri Arun Sharma vide letter dated 12-04-2014 was totally illegal and vitiated section 11 which stipulate appointment of arbitrators that each party shall appoint the third arbitrator who shall act as the Presiding Arbitrator. Since the requirement of section 7 of the new Act has been fulfilled hence the further proceedings in the matter will be null and void and having no force of law. Section 11 (3) requires the two arbitrators to appoint the third arbitrator or umpire which has not been followed the prescribed as laid down under the statutory rules and law.

In the light of the above you are kindly requested to withdraw the said notice and advice the party to follow the law under the said Act. In such case only Chief Justice of High Court has full authority to appoint a retired justice for the fair proceedings.

Authorised Signatory

Mother Boon Foods P. Ltd.”

5. Subsequent to the issuance of this letter, the Petitioner did not participate in the arbitration proceedings. The tribunal adjourned the matter and issued notices to the Petitioner. Despite the same, the Petitioner did not appear. Arbitration proceedings were, accordingly, closed and the impugned award was passed. As per the impugned award, the tribunal has ruled as under:

“.....

This Tribunal in light of the above awards & directs that the various matters as relating to this dispute will be settled as under:

- (a) The various equipment / goods / material as detailed under para 9, 10 & 12 above will be returned by the CMU to the Company at New Delhi. If the CMU fails to deliver any of these items within a period of 30 days of this award, the Company shall set-off the amount of the cost of such missing items against the final amount due to the CMU.*
- (b) The CMU shall deliver the equipment as detailed under para 13 above to the Company along with the sales invoice for such equipment.*
- (c) The CMU will deliver all equipment/material at New Delhi premises of the Company and in the presence of authorised representatives of the both the Company and CMU. The expired materials as detailed in para 4 & 5 above will be destroyed in the manner which is in accordance with environmental and pollution control laws in force.*
- (d) After satisfactory completion of the above items (a), (b) & (c), the Company will deliver through the office of this Tribunal to the CMU the final amount worked out considering dues of Rs. 15,32,420/- (Rupees Fifteen lacs thirty two*

thousand four hundred twenty only) by the Company to the CMU as per para 2, 7, 8, 11 & 15 above after setting off / deducting the dues by the CMU to the Company on account of not returning the equipment / goods / material as mentioned in para 9, 10, & 12 above and/or not furnishing the sales tax declaration forms as mentioned in para 7 & 15 above as the full and final settlement of all dues which pertain to this dispute. The Company shall also pay to the CMU the cost of equipment (as per the invoice furnished by the CMU to the company) returned vide para 16(c) above.

17. The tribunal awards and directs the payment of Rs.10,000/- (Rupees Ten Thousand Only) each to be made by both the parties towards the costs of the arbitrators and incidental expenses of this award. The amount is to be paid within 30 days of the announcement of this award.

.....”

6. The present objection petition under Section 34 of the Act has been filed challenging the constitution of the tribunal. Submission of the learned counsel for Petitioner is that as per the clause in the agreement, the Respondent was to appoint a Sole Arbitrator. A three member tribunal, fully chosen by the Respondent is, therefore, contrary to the agreement between the parties and the provisions of the Act. Hence the tribunal's constitution being contrary to the agreement, the award passed is not sustainable.

7. Learned counsel for Respondent, on the other hand, submits that a three member tribunal was constituted at the instance of the Petitioner, who during the settlement meeting demanded for a three member tribunal. According to learned counsel for Respondent, the Petitioner itself had repeatedly demanded that it would be fair if a three member tribunal is

constituted. According to the Ld. Counsel for the Respondent, the Company decided to appoint three arbitrators *`to be on the safer side`*. Since a sole arbitrator was to be appointed by the Company, instead of a sole arbitrator, it decided to appoint three arbitrators. Thus, according to Ld. Counsel the constitution of a three member tribunal was done to give a fairer adjudication process for the Petitioner.

8. A perusal of the arbitration clause reveals that the same contemplated the appointment, only of a Sole Arbitrator, by the Respondent. It is indeed strange as to how a three member tribunal came to be constituted by the Respondent. The Respondent appears to have *“played safe”* in the words of the learned counsel for the Respondent. There is, however, nothing on record to show that the Petitioner indeed demanded for constitution of a three member tribunal. It is nigh possible that the Respondent decided to adopt a fair attitude by appointing a three member tribunal, however, if a three member tribunal had to be appointed, then the same ought to have been done with the consent of the Petitioner and in accordance with the provisions of the Act. The arbitration agreement, as per the 1996 Act, has to be in writing and since the arbitration clause, which is a part of the contract, was in writing, the same could not have been superseded by any oral demand or agreement. The Petitioner may have been clever in orally demanding a three member tribunal but it is clear that the procedure adopted by the Respondent is impermissible. The Petitioner having raised its objection at the initial stage itself to the constitution of the tribunal but the tribunal having proceeded further with the matter, the Petitioner is entitled to challenge the said constitution at this stage by raising its objections under Section 34. If, as per the clause, a Sole Arbitrator was to be appointed, then

only a Sole Arbitrator could have been appointed. It appears that the so called safe approach has, in fact, proved to be dangerous for the Respondent as the appointment of three arbitrators by the Respondent was not contemplated in the agreement. The Petitioner has rightly relied upon ***Prime Industries Ltd. v. SEIL Ltd., 2010 LawSuit (Del) 996*** which holds that the will of the parties, as reflected in the agreement, has to prevail. Relevant portion of the judgment is quoted below:

“.....

[10] *We are unable to persuade ourselves to agree with the view taken by the learned Single Judge. It is trite to say that the will of the parties as reflected in the agreement must prevail in case of constitution of an Arbitration Tribunal. Thus each arbitration clause would have to be given a meaning as per its phraseology. If the arbitration clause 18 of the MOU is examined in that context, we are of the considered view, that there are three parts to the arbitration clause. The first part deals with reference of disputes between the parties to the agreement to be referred to “an arbitrator” appointed by ICA, New Delhi. The second part stipulates that the provisions of the said Act would be applicable to such a reference. The third part provides that a reference would be decided as per rules of ICA. We find that the expression “an arbitrator” must be given its full effect and the said phrase would not have been used but for the intent to appoint a sole arbitrator. The parties are limited companies and are duly advised by legal counsels who would have taken care to use the appropriate word/phraseology. The first part does not say that the disputes should be referred to the arbitration of arbitrators appointed in accordance with Rules of ICA. If such a phraseology would have been used then only the question of rules 21(b) of the ICA mandating a panel of three arbitrators would apply in the present*

case. The view taken by the learned arbitrator in deciding the application 06.12.2000 is thus correct. We also note that the petitioner had approached the Court by filing an application under Section 11 (6) of the said Act for the appointment of an arbitrator. The order passed on that application on 02.07.1999 also shows the same intent. The order reads as under:

“Learned counsel for the parties agree for appointment in terms of article 18 of the Memorandum of Agreement dated 10.06.1994. All disputes between the parties may be referred for arbitration and the rules of Indian Council of Arbitration by the Arbitrator appointed by Indian Council of Arbitration. It is agreed to by the learned counsel for the parties that Arbitrator shall be entitled to decide the question of existence of the arbitration agreement of otherwise in terms of Section 16 of the Act as well as all other objections, claims and counter claim which may be raised by the parties. The matter of accordingly referred to the Indian Council of Arbitration for appointment of Arbitrator.”

[11]. The aforesaid shows the use of the expression “the arbitrator” and the expression “arbitrator”. This order was passed by consent of parties. Thus, the intent even at that stage was to have the appointment of a single arbitrator.

.....”

9. The Respondent has relied upon ***Indian Oil Corporation Ltd. & Ors. v. Raja Transport (P) Ltd. (2009) 8 SCC 520*** to argue that just because the appointment of the Arbitrator was by the Respondent, it does not mean that same can be interfered with. The said judgment has no application in the facts of the present case.
10. The arbitral tribunal being not in accordance with the arbitration

agreement between the parties, the award rendered by the said tribunal is liable to be set aside. Accordingly, the impugned award is set aside.

11. Petition is allowed in the above terms.

PRATHIBA M. SINGH
JUDGE

AUGUST 27, 2018/dk

