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

+ **ARB.P. 485/2018**

Date of decision : 29th November, 2018

OSA VENDITA PVT. LTD.

.... Petitioner

Through: Ms.Karuna Nundy, Mr.Anivesh
Bhardwaj, Ms.Krishna
Parkhani, Mr.Ishaan Kakri,
Advs.

versus

BAUSCH & LOMB INDIA PVT. LTD. Respondent

Through: Ms.Mukti Chaudhary,
Ms.Tejaswini, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner seeking the appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Distributorship Agreement dated 24.09.2003 executed between the Bausch & Lomb Eyecare (India) Private Limited, which is now the respondent herein, and Mr. Arvindam Mukherjee and Mr. Ravi Kant Thakkar, who jointly formed a partnership under the name and style of M/s Om Sai Agencies.

2. The Distributorship Agreement contains an Arbitration Agreement in form of Clause 11.9 thereof, which is reproduced hereinbelow:-

“11.9 Distributor hereby expressly agrees that unless the Parties agree otherwise, any and all disputes or claims relating to this Agreement shall be resolved by arbitration of a sole arbitrator appointed by the Managing Director, of BLEIPL in accordance with the provisions of the Arbitration and Conciliation Act and the arbitration proceedings shall be conducted in the city of New Delhi /Delhi,”

3. Disputes having arisen between the parties, the petitioner invoked the Arbitration Agreement vide its notice dated 17.09.2007. As the Arbitrator was not appointed, the petitioner filed an application under Section 11 of the Act before the High Court of Calcutta, being AP No. 346/2008. In the said petition, the High Court of Calcutta vide its order dated 03.02.2010 appointed a Sole Arbitrator.

4. The respondent being aggrieved of the above order, challenged the same before the Supreme Court by way of SLP (C) 14869/2010. One of the contentions raised before the Supreme Court was that the said Agreement could not have been assigned by the partnership firm in favour of the petitioner. The Supreme Court, vide its order dated 15.01.2016 observed that the answer to this objection of the respondent could be provided only after the proper evidence is led by the parties and therefore, upheld the order of the Calcutta High Court, leaving it open to the respondent to raise all defenses available to it before the Arbitrator.

5. Thereafter, as the Arbitrator appointed by the Court tendered his resignation, the petitioner filed another application under Section 11 of the Act before the Calcutta High Court. The Calcutta High Court vide its order dated 18.04.2016 appointed the same Arbitrator to adjudicate the disputes between the parties.

6. Before the Arbitrator, the respondent filed an application under Section 16 of the Act *inter alia* contending that the Arbitrator cannot proceed with arbitration in Calcutta inasmuch as the arbitration proceedings have to be conducted at New Delhi. The respondent relied upon the judgment of the Supreme Court in ***Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and Others***, (2017) 7 SCC 678.

7. The Arbitrator vide his order dated 14.11.2017 accepted the submission of the respondent and held that the arbitration proceedings cannot take place at Calcutta and recused himself from the proceedings.

8. The petitioner, vide its notice dated 08.02.2018, while accepting the decision of the Arbitrator, suggested the name of the substitute Arbitrator to be appointed and the proceedings to be convened at New Delhi.

9. The respondent, however, vide its reply dated 02.04.2018 while denying the existence of the Arbitration Agreement between the parties, refused to give its consent to the proposed Arbitrator. The petitioner, therefore, filed the present petition before this Court.

10. The learned counsel for the respondent reiterated that there is no Arbitration Agreement between the parties. She submits that the Distributorship Agreement was between the respondent and the partnership firm and therefore, only the partnership firm could have invoked the arbitration.

11. In my view, the said issue has to be determined by the Arbitrator as held by the Supreme Court in its order dated 15.01.2016 passed in SLP (C) No. 14869/2010 and cannot be considered by this Court in the present petition.

12. The learned counsel for the respondent further submits that the earlier Arbitrator having been appointed by the Calcutta High Court, it is only the Calcutta High Court that would have jurisdiction to entertain a petition seeking appointment of a substitute Arbitrator in his place. Even otherwise, the petition under Section 11 of the Act would not be maintainable and the remedy, if any, of the petitioner would be in form of an application under Section 15 of the Act. In support of her submission she places reliance on the judgment of the Supreme Court in *Antrix Corporation Limited v. Devas Multimedia Private Limited*, (2014) 11 SCC 560.

13. I find no merit in the objection raised by the learned counsel for the respondent. Admittedly, it was the respondent who placed reliance on the judgment of the Supreme Court in *Indus Mobile Distribution Private Limited* (Supra) to contend that the arbitration proceedings cannot take place in Calcutta. The said judgment further holds that where the seat of arbitration has been prescribed in the Agreement, the

same would amount to vesting exclusive jurisdiction in the Court where the seat of arbitration is situated. Therefore, the Calcutta High Court, at the first instance, lacked territorial jurisdiction to entertain the application filed by the petitioner under Section 11 of the Act and the exclusive jurisdiction vested with this Court alone.

14. As far as the objection of the respondent that the present petition under Section 11 would not be maintainable, as the appointment of the Arbitrator itself has been held to be void due to the objection taken by the respondent on lack of jurisdiction, the present petition would be maintainable under Section 11 of the Act. In any case, the petitioner, pursuant to the order dated 14.11.2017 passed by the Sole Arbitrator, had requested the respondent to agree to the appointment of the Arbitrator vide its notice dated 08.02.2018. The respondent by its reply dated 02.04.2018 had refused to give its consent to the appointment and reiterated its objection on the non-existence of the Arbitration Agreement between the parties. Therefore, even otherwise, the petition under Section 11 of the Act would be maintainable as the parties had failed to agree on a Sole Arbitrator to be appointed.

15. The learned counsel for the respondent has further submitted that the notice dated 08.02.2018 cannot be considered as a notice required under Section 21 of the Act. She submits that the notice was not addressed to the respondent but to its counsels. Further, the notice did not spell out the disputes between the parties which required adjudication.

16. On the other hand, the counsel for the petitioner submits that notice under Section 21 had been issued to the respondent on 17.09.2007 and the letter dated 08.02.2018 was merely a request to agree on the appointment of an Arbitrator.

17. I find merit in the contention raised by the learned counsel for the petitioner. In the present case, the petitioner had invoked the arbitration proceedings vide its notice dated 17.09.2007, and thereafter it has also filed a petition under Section 11 of the Act before the Calcutta High Court. I have already referred to various proceedings that took place thereafter before the Calcutta High Court, before the Supreme Court and before the Arbitrator. All these proceedings eventually turned out to be fruitless on the objection raised by the respondent on the lack of jurisdiction of the Calcutta High Court. However, the fact remains that the petitioner had invoked arbitration way back on 17.09.2007 itself.

18. The notice dated 08.02.2018 was pursuant to the order passed by the Arbitrator recusing himself from the proceedings. By that stage, the petitioner had already filed its Statement of Claim before the Arbitrator and the respondent was well aware of the disputes between the parties. The notice, therefore, merely sought concurrence of the respondent on the name of the Arbitrator. The fact that the notice was not addressed to the respondent but to its counsel is also irrelevant, as the respondent admittedly replied to the said notice not raising such objection.

19. In my view, the petitioner would also be entitled to claim the exclusion of time spent in the earlier proceedings before the Calcutta High Court, before the Supreme Court and before the Arbitrator, in terms of the Section 14 of the Limitation Act, 1963. I draw support from the judgment of the Supreme Court in ***HBM Print Limited v. Scantrans India Private Limited***, (2009) 17 SCC 338, wherein the Supreme Court had granted the benefit of Section 14 of the Limitation Act to the petitioner who had earlier filed a petition under Section 11 of the Act before the High Court of Madras and on realizing that the said Court would have no jurisdiction as the dispute was under an International Commercial Agreement, withdrew the same to file it before the Supreme Court. The Supreme Court held as under:-

“9. Section 14 of the Limitation Act has wider amplitude and provides that the time spent in prior proceedings is liable to be excluded provided the proceedings relating to the same matter were in issue and prosecuted in good faith in the Court which from the definition of the jurisdiction either because of like nature was unable to entertain it. I find no reason to hold that the earlier proceedings before the Chief Justice of the High Court of Madras were not filed in good faith. The petitioner might have realized later that the application is to be filed under Section 11 of the Act before the Chief Justice of India. The respondent has not pointed anything to show that there was willful negligence or lack of good faith on the part of the petitioner in having filed the application before the Chief Justice of the Madras High Court. Therefore, the contention raised by the respondent as to limitation is only to be rejected.”

20. In view of the above, I find no impediment in appointing the Sole Arbitrator for adjudicating the disputes that have arisen between

the parties in relation to the abovementioned Distributorship Agreement.

21. I appoint **Mr.Pramod B Agarwal**, Advocate (R/o C-34, Niti Bagh, South Extension, Near Kamla Nehru College, South Extension, New Delhi, Delhi 110049, Mobile: 9999105066) as a Sole Arbitrator for adjudicating the disputes that have arisen between the parties.

22. The Arbitrator shall give disclosure under Section 12 of the Act before proceeding with the reference.

23. All contentions of the respondent, including the one relating to non existence of the Arbitration Agreement and that of Limitation, would remain open to be taken before the Arbitrator.

24. The petition is allowed in the above terms, with no order as to cost.

NAVIN CHAWLA, J

NOVEMBER 29, 2018/rv