

\$~28

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

+ **ARB.P. 239/2019**

M/S SAGAR RATNA RESTAURANTS PRIVATE LIMITED

..... Petitioner

Through: Mr. Puneet Singh and Mr. Ajay
Gulati, Advocates.

versus

M/S D.S. FOODS & ORS.

..... Respondents

Through: Mr. Ruchir Mishra, Mr. Sanjiv Kr.
Saxena, Mr. Mukesh Kr. Tiwari,
Mr. Ramneek Mishra and
Mr. Abhishek Rana, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

%

07.05.2019

1. The present petition under Section 11 (5) of the Arbitration and Conciliation Act, 1996 seeks the appointment of an Arbitrator for the adjudication of the dispute that is stated to have arisen between the parties. The arbitration clause is contained in the General Conditions of Contract (GCC) of the franchise agreement, in Article VIII which reads as under:

“All dispute and differences relating to payment of any nature shall be settled through mutual amicable discussions and negotiation, which the Parties undertake to conduct for at least a period of 10 days from the date of receipt of such notice of such dispute from the aggrieved Party. If efforts at conciliation fail then any dispute arising out of or in connection with this Agreement shall be referred to and finally resolved by the

arbitrator mutually appointed as per the Arbitration & Conciliation Act. The provisions of the Arbitration & Conciliation Act, 1996 shall govern the arbitration proceedings. The venue for arbitration will be Delhi. All arbitration proceedings shall be conducted in English. The arbitration award shall be final and binding on the Parties, without recourse to further appeals and shall be entered in the Court of competent jurisdiction for enforcement against the Parties and their respective successors in business and/or permitted assigns as applicable. Each Party shall be responsible for its own legal costs and other costs such as travel and stay during the course of arbitration. Only the common costs such as arbitrator's fees and venue expenses shall be shared equally between the two Parties.

Provided however that during the pendency of the arbitration proceedings both Parties shall continue to fulfill their obligations under this Agreement save and except such obligations that may be the subject matter of the arbitration. Any breach of this undertaking by a Party shall be deemed to be a material breach of this Agreement and the non breaching Party shall be entitled to all remedies available to it, whether under this Agreement, contract, law or equity and each such remedy shall be independent.”

2. The Respondents have not filed reply to the present petition. However, learned counsel for the Respondents on instructions states that the existence of the Arbitration Agreement is not disputed. The invocation of the Arbitration Clause is also a matter of record, and has been replied by the Respondents.

3. Petitioner is in the business of running and operating a chain of vegetarian restaurants under the name of “Sagar Ratna”. It executed the franchise agreement dated 6th June 2018 with the Respondents whereby the Respondent was appointed as a franchisee. As per the terms of the franchise agreement, the Respondents were *inter-alia* liable to pay franchise commission. It is the case of the Petitioner

that the Respondents defaulted in making the payments on regular basis and the Petitioner has to recover the franchise fee from the Respondents towards the franchise fee. The Respondents, however disputes the liability. It is thus clear that the disputes and differences have arisen between the parties that now require to be adjudicated.

4. Learned counsel for the Repsondents is raising another objection that the Petitioner could not resort to the Arbitration Clause, having not first exhausted the remedy of conciliation as provided in the Arbitration Clause. The Respondent in its reply to the invocation notice from the Petitioner did not express a desire to amicably settle the disputes. The reply to the notice reads as under:

“My client Ms D.S.Foods through its Partner Mr.Anjum Goyal and Tarsem Kumar having Registered office at SCO no.489, Sector 35-C, Chandigarh, has placed before me your notice dated 27.2.2019 issued under the instructions of Sh.Anjum Goyal and Tarsem Kumar partners of- Ms. D. S.Foods having, Registered office at SCO no.489, Sector 35-C, Chandigarh and accordingly under the instructions of my client, I hereby reply to your notice.

1. That contents of para No.1 of your notice is a matter of record.
2. That contents of para No.2 of your notice is also a matter of record. However it is correct that franchisee agreement was entered into and supplementary agreement was also executed. The contents of the agreement are denied at this stage.
3. That contents of para No.3 of your notice are not correct. The Franchisee agreement was granted to my client but the address where the Franchisee was to run was at premises known as SCO No. 488 which was later on changed and the intimation of which was given to your client by my client vide e-mail dated 9.5.2018 and since then the Franchisee is being run in SCO No.489, Sector 35-C, Chandigarh.
4. That contents of para No.4 of your notice are specifically and pointedly denied. It is pointed out that my clients have not failed to perform the obligations under the franchisee agreement and

your client illegally terminated the franchisee agreement, and termination of the franchisee agreement was illegal and unlawful. Since my clients had not done anything against the terms and conditions of the franchisee agreement, therefore the termination of franchisee is illegal.

5. That contents of para No.5 of your notice is wrong and denied. My clients have not received any letter dated 31.10.2018, therefore direction of termination of agreement was not communicated to my clients.

6. That contents of para No.6 of your notice is a matter of record.

7. That contents of para No.7 of your notice is a matter of record.

8. That contents of para No.8 of your notice are wrong and denied. No dispute has arisen which is referable to the Arbitrator and the Arbitration clause, in accordance to which the matter was referred to Learned Additional District Judge, New Delhi has come to an end and now no independent arbitrator is to be appointed. The notice in question sent by you is thus not sustainable in the eyes of law and no arbitrator can be appointed. It is denied that now the arbitrator can be appointed through mutual consent.

9. That in reply to para No.9 of your notice, no other arbitrator even Mr. Balvinder Singh Mauji, Advocate is not acceptable to my clients nor he is required to be appointed as Arbitrator, as there is no dispute referable to the Arbitrator as mentioned in the Franchisee Agreement. That my clients do not consent for the appointment of Mr. Balvinder Singh Mauji, Advocate to appoint as Arbitrator and no dispute is referable to the Arbitrator, therefore my clients do not consent for the appointment of Arbitrator for the reasons given in the reply in hand.

10. That in view of the circumstances explained above my client do not give any consent for the appointment of such Arbitrator as mentioned in this notice.

We, therefore again request you to advise your client to withdraw the termination notice and not to go ahead for the appointment of Mr. Balvinder Singh Mauji.”

5. In fact, it is also noteworthy that the Petitioner had earlier filed a petition under

Section 9 of the Arbitration and Conciliation Act before the District Court wherein an interim order has been passed in favour of the Petitioner. Therefore directing the parties to first undergo mutual amicable discussions and negotiation at this stage would be of no consequence. Accordingly, Mr. Gurdeep Kumar, learned District Judge, Retired (Mob. 9910384622), is appointed as the sole Arbitrator to adjudicate the disputes and differences that have arisen between the parties.

6. The parties are directed to appear before the Arbitrator as and when notified. Learned Arbitrator will issue a declaration under Section 12 read with the attendant provisions of the 1996 Act before entering upon reference.

7. The learned Arbitrator will be paid his fee in terms of the provisions of the Fourth Schedule appended to the Arbitration and Conciliation Act, 1996.

8. The Petition is allowed in the above terms. No order as to costs. The Registry will despatch a copy of this order to the learned Arbitrator.

SANJEEV NARULA, J

MAY 07, 2019

nk