

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.12.2020

CORAM :

THE HONOURABLE MR.JUSTICE P.T. ASHA

Original Petition No.22 of 2020

M/s.Fipola Retail (India) Private Limited
rep. by its Director Mr.SushilKanugolu
No.2B, Door No.AC 5, II Floor,
II Avenue, Anna Nagar,
Chennai – 600 040.

... Petitioner

versus

M/s.AlphaEdge Consumer Private Limited
rep. by its Director Mr.TirthaBrata Panda,
1424, Fern Block, Embassy Residency,
Behind Gleneagles Global Health City,
Cheran Nagar, Perumbakkam,
Chennai – 600 100.

... Respondent

Prayer: Original Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint a sole Arbitrator on behalf of the parties to resolve the disputes in terms of Clause 21.9 of the Franchise Agreement dated 31.05.2018 entered into between the petitioner and the respondent.

For Petitioners
For Respondent

: Mr.N.V. Prakash
: M/s.R. Prem Raja Kumari

ORDER

The above application is filed for appointing an Arbitrator to resolve the disputes between the parties.

2.The petitioner would submit that they have entered into a Franchise Agreement dated 31.05.2018 with the respondent. The said Agreement contains an Arbitration Clause 21.9 which reads as follows.

“21.9 – Dispute Resolution and jurisdiction

Any dispute, controversy or claims arising out of or relating to this Agreement or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996.

The parties agree that in case of any arbitrate dispute arising in respect of this Lease, the matter shall be referred to arbitration in consonance with the provisions of the Indian Arbitration and Conciliation Act, 1996, as may be

amended from time to time. The parties shall mutually appoint a sole Arbitrator, in the event the parties fails to agree on the sole Arbitrator, same shall be appointed as per the provisions of the Arbitration and Conciliation Act, 1996, by the Competent Court. The decision of the Arbitrator so appointed shall be binding upon both parties. The place of arbitration shall be at Chennai and any Award whether interim or final, shall be made, and shall be deemed for all purposes between the parties to be made in Chennai.”

3.The petitioner would submit that alleging a breach of the Franchise Agreement, the respondent had made claims against the petitioner towards outstanding Return On Investment payable, franchisee Fee, security deposit, investment made in store, refund of excess amount paid to vendors, guaranteed ROI for delay in compensation of store business, future loss of guaranteed ROI, projected loss of promised ROI, outstanding vendor payment, negligence and deficiency and mental agony. These claims are stoutly denied by the petitioner.

4.The respondent had issued a legal notice dated 18.03.2019 calling upon the petitioner to remedy the alleged breach of the terms of the Franchise Agreement within 7 days from the date of receipt of the notice, contrary to the terms of the Agreement which prescribed a notice period of 30 days. The respondent did not stop with this notice but had also initiated Corporate Insolvency Resolution Process against the respondent before the NCLT, Chennai. All these caused a great deal of hardship to the petitioner and had also defamed them. Therefore, they are entitled to damages and also to costs on frivolous and pre-mature litigation.

5.In view of the above, issues between the parties the petitioner had invoked an arbitration clause and issued a notice dated 28.11.2019. The respondent refused to consent for the invocation of the arbitration stating that the matter was *sub judice* by NCLT, Chennai. Therefore, the petitioner has moved this application.

6.The learned counsel for the petitioner had made his submissions on the lines of the petition.

7.A counter has been filed by the respondent *inter alia* contending that the Franchise Agreement between the petitioner and the respondent dated 31.05.2018 was for a period of 12 years with a minimum guaranteed monthly return on investment for a lock in period of three years and that the petitioner failed to pay the sum and had only paid a sum of Rs.1,74,440/-.

8.From a reading of the counter, apart from narrating the various proceedings initiated by the respondent against the petitioner, the respondent would contend that originally, the petitioner had allowed the petition to be dismissed for default on 11.02.2020 and the same had been restored only thereafter. The respondent would further submit that the petitioner having submitted to the jurisdiction of the NCLT, Chennai, Section 283 of the Insolvency and Bankruptcy Code, 2016 gives an overriding effect and therefore, the arbitration clause cannot be invoked. The learned counsel who appeared on behalf of the respondent vehemently

argued that as per the Franchise Agreement, the respondent had undertaken to pay the Return On Investment every month without any demand being made made by the respondent. She would further submit that it was the respondent who had invoked the Insolvency and Bankruptcy Code, 2016 and initiated proceedings. She would further submit that as early as on 26.07.2019 the respondent had objected to the arbitration clause. It is also her case that the respondent has filed a Form-3 under the Insolvency and Bankruptcy Code. Further, the learned counsel would argue that in response to the Form-3, the petitioner has issued a notice of dispute to which a reply had been sent. She would further submit that the petitioner had allowed this petition to be dismissed for default on 11.02.2020 and therefore, the invocation of Arbitration Clause pending the IBC proceedings is without jurisdiction.

9. Heard the learned counsels appearing on either side and perused the papers.

10. The fulcrum of the argument of the respondent is that since the proceedings are pending under the Insolvency and Bankruptcy Code the

Arbitration proceedings cannot be invoked simultaneously. However, a perusal of the Order dated 13.02.2020 in IBA.No.737 of 2019 would indicate that the Bench of the NCLT has held that the claim of the respondent cannot be treated as a financial debt and the respondent cannot be treated as a financial creditor and therefore dismissed the application.

11. In fact, the Bench had observed that the Franchise Agreement has to be read as a whole and that the petition filed by the respondent was not supported with the Return financial Contract specifying the tenure of the financial debt, interest or compensation, which if any payable and had clearly held that the Franchise Agreement could not be treated as a financial document. As on date, there is no proceedings pending before the NCLT which was the ground on which the respondent had objected to the invocation of the arbitration clause. Be that as it may, the parties have signed the Franchise Agreement in which they had agreed to resolve their disputes through arbitration. It is admitted that the disputes have arisen between the parties.

12.In these circumstances, taking into account Clause 21.9 of the Franchise Agreement, it is ordered as follows:

(i) Ms.Chitra Sampath, learned Senior Advocate, is residing at No 12/1, Kamatchipuram 1st Street, West Mambalam, near Ayothiya Mandabam, Chennai – 600 033, Contact No.044-24895233, is appointed as the Arbitrator to enter upon reference and adjudicate the disputes *inter se* the parties.

(ii) The learned Arbitrator may, after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. It is open to the respondent to raise all legal objections as to the validity of contract.

(iii) The learned Arbitrator is at liberty to fix his remuneration and other incidental expenses as per law.

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(iv) The proceedings may be conducted under the aegis of the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules.

The Original Petition is, accordingly, allowed, leaving the parties to bear their own costs.

09.12.2020

Speaking Order / Non-speaking Order

Index : Yes / No

Internet : Yes

mps

To

Ms.Chitra Sampath,
Senior Advocate,
No 12/1, Kamatchipuram 1st Street,
West Mambalam,
near Ayothiya Mandabam,
Chennai – 600 033,
Contact No.044-24895233.

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P.T. ASHA, J.

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