IN **HIGH COURT FOR THE STATE OF TELANGANA AT HYDERABAD**

TUESDAY ,THE EIGHTH DAY OF DECEMBER
TWO THOUSAND AND TWENTY

PRESENT

THE HONOURABLE SRI JUSTICE A.RAJASHEKER REDDY

ARBITRATION APPLICATION NO: 131 OF 2019

Between:

M/S. URBAN ASIA RESTAURANTS & HOTELS PRIVATE LIMITED, A company registered under the provisions of Companies Act, 2013, having its Registered Office at Plot No.1259/A/1, Road No.36, Jubilee Hills, Hyderabad-500036, represented by its Authorized Representative Ms. Sujatha Kanthan, Daughter of Mr. RL Kantan, Aged about 45 years, Resident of Plot No.29, Indrapuri Railway Colony, West Maredpally, Secunderabad- 500026

...APPLICANT

AND

M/S. L & T METRO RAIL (HYDERABAD) LIMITED, a company registered under the provisions of Companies Act, 2013, having its Registered office at Hyderabad Metro Rail Administrative Building, Uppal Main Road, Nagole, Hyderabad 500039, Represented by its Managing Director and Chief Executive Officer.

...RESPONDENT

Application under Section 11 (5 & 6) of the Arbitration and Conciliation Act, 1996 and Scheme of Appointment of Arbitrator praying that for the reasons stated in the affidavit filed therewith, the High Court may be pleased to

i) to appoint Sole Arbitrator to adjudicate the Claims

ii) to award the costs and Disputes between the Applicant and Respondent and

iii) and pass such other order orders as this Hon'ble Court deem fit and proper in the Interest of Justice.

The application coming on for hearing, upon perusing the Application and affidavit filed in support thereof and upon hearing the arguments of Sri. V. Ramachander Goud, Advocate for the Applicant and of Sri. M.S. Srinivas Iyengar, Advocate for Respondent.

The Court made the following:

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

Arbitration Application No.131 of 2019

ORDER:

This application is filed under Section 11(5) & (6) of the Arbitration and Conciliation Act, 1996, seeking to appoint a sole arbitrator for adjudication of the claims and disputes between the applicant and the respondent.

2. The brief facts of the case are that the applicant and the respondent had entered into sub-licence agreement dated 13.12.2018, for setting up a food court and that as disputes arose, the applicant filed O.P.No.54 of 2019 on the file of the III Additional Chief Judge, City Civil Court, Hyderabad, wherein urgent notice was ordered to the respondent on 02.05.2019 and thereafter, an interim order was also passed on 03.05.2019 restraining the respondent, its representatives, men, henchmen etc., from interfering with the licensed premises of the applicant, and the said order was communicated to respondent on 04.05.2019. It is further stated that after filing of said O.P., the representatives of the respondent removed the workers of the applicant from out of the premises on the pretext of inspection and that they also restrained the workers to enter into the licensed premises and hence, the applicant filed a complaint before Madhapur Police Station, Cyberabad, and thereafter, it also filed W.P.No.10198 of 2019 against the respondent. It is further stated that the respondent filed C.M.A.No.528 of 2019 against the interim order dated 03.05.2019 passed in O.P.No.54 of 2019 and the same was dismissed as infructuous on 10.06.2019. Thereafter, the applicant filed C.M.A.No.688 of 2019 against the order dated 04.07.2019 passed in O.P.No.54 of 2019 and this Court referred the parties for mediation, but as

the said mediation failed, the applicant issued arbitration notice dated 05.07.2019 to the respondent, who in turn has filed a reply on 03.08.2019 rejecting the proposal. Hence, the present application is filed.

3. The respondent filed counter affidavit disputing the claim on merits, but admitted that mediation failed. It is further stated that as per the arbitration clause, respondent alone is entitled to appoint an arbitrator. Since the arbitration application is limited to the finding of existence of arbitration clause and invocation of the same, details given in the counter affidavit need not be reproduced.

4. Heard learned counsel for the applicant and learned counsel for the respondent.

5. Learned counsel for the applicant submits that the agreement dated 13.12.2018 contains arbitration clause-38 and the same was invoked by issuing notice to the respondent and the same was replied by the respondent, but as the respondent has not disputed the arbitration clause, the arbitration application needs to be allowed. He further submits that the power to appoint arbitrator conferred on the respondent by virtue of Clause 38 of the agreement is no longer available to the respondent in view of introduction of Section 12(5) of the Amendment Act, 2015, and as such, the respondent cannot contend that it alone can appoint the arbitrator. He further submits that except the power to appoint the arbitrator, the other terms in clause 38 are intact and the present application is filed within time. In support of his contentions, he relied on the judgment of the Supreme Court in **TRF Limited V. Energo Engineering Projects Limited**[1]; and **Perkins Eastman Architects DPC and another v. HSCC (India) Limited**[2].

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[1] (2017) 8 SCC 377
[2] 2019 SCC OnLine SC 1517

6. On the other hand, Sri M.S.Srinivas Iyengar, learned counsel for the respondent, submits that in view of introduction of Section 12(5) of the Amendment Act, 2015, the existence of arbitration clause is wiped out and as such, the arbitration application is not maintainable. He relied on the judgment of the Supreme Court in **Newton Engineering and Chemicals Limited v. Indian Oil Corporation Limited and others**[3].

7. The sub-license agreement dated 13.12.2018 contains arbitration clause-38.1, which reads as under;

> "Any dispute arising out of or in connection with this contract in the interpretation, application or performance of this agreement and/or the document in relation thereto in respect of the premises shall be submitted for resolution or adjudication for final and binding arbitration to a sole arbitrator who shall be nominated and appointed by the Sub-Licensor only. The Arbitration will be conducted by a sole Arbitrator. The arbitration will be governed by the Arbitration and Conciliation Act, 1996, including any statutory amendments or re-enactments thereof for the time being in force and rules made thereunder. The seat of the Arbitration shall be in Hyderabad, India and it shall be conducted in the English language".

8. The applicant has invoked the arbitration clause by issuing notice dated 05.07.2019 and the respondent gave reply to the same on 03.08.2019 stating that appointment of arbitrator has to be done by the respondent only in accordance with the arbitration clause and as such, the proposal for appointment of arbitrator by the applicant is not accepted. By virtue of introduction of Section 12(5) of the Amendment Act, 2015, the power conferred on one of the parties to the agreement to appoint arbitrator is no longer available and to that extent, the power given to the respondent to appoint arbitrator is no longer available. However, the contention of the learned counsel for the respondent that entire arbitration clause gets superseded for the same reason cannot be accepted as there

[3] (2013) 4 SCC 44

is no such stipulation in the arbitration clause. In **Newton Engineering's** case (3 supra) relied on by the learned counsel for the respondent, the Apex Court was interpreting the arbitration clause, which is not in paramateria with the present arbitration clause. In the said judgment, the relevant clause, which was interpreted by the Apex Court, contains in paragraph No.2 of the judgment, which reads as under:

> "Leave granted. It is not necessary to refer to the facts of the case. Suffice it to say that the arbitration clause in the agreement between the parties provides that all disputes and differences between them shall be referred by any aggrieved party to the contract to the sole arbitration of ED(NR) of respondent 1, Indian Oil Corporation (for short 'the Corporation"). The arbitration clause further provides that if such ED(NR) is unable or unwilling to act as the sole arbitrator, the matter shall be referred to the sole arbitration of some other person designated by such ED(NR) in his place who is willing to act as sole arbitrator. The arbitration clause also provides that no person other than ED(NR) or the person designated by the ED(NR) should act as arbitrator".

In the aforesaid case, the arbitration clause is very specific and states that no person other than ED(NR) or the person designated by the ED(NR) should act as arbitrator. But, in the present case, there is no such provision and as such, the said judgment cannot come to the rescue of the respondent.

9. In **TRF Limited's** case(1 supra), the Apex Court held in paragraph Nos.44 and 45 as under;

> " We are required to sit in a time machine and analyse the judgments in this regard. In Datar Switchgears (supra), it has been held that the appointment made by the respondent was invalid inasmuch as there was no proper notice by the appellant to appoint an arbitrator and before an application under Section 11(6) of the Act was filed, the arbitrator was appointed. Relevant part of clause 20.9 of the agreement in the said case postulates thus:
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> "20.9. It is agreed by and between the parties that in case of any dispute under this lease the same shall be referred to an arbitrator to be nominated

by the lessor and the award of the arbitrator shall be final and binding on all the parties concerned.'

The aforesaid clause lays down that the lesser shall nominate the arbitrator.

In Newton Engineering (supra), though the agreement has not been produced in the judgment, the Court has analysed in detail the purport of the arbitration clause in the agreement and ruled that the matter shall be referred to the sole arbitration of ED (NR) of the respondent Corporation and if the said authority is unable and unwilling to act, the matter shall be referred to the sole arbitration of some other person designated by ED (NR) in his place who is willing to act as a sole arbitrator. The said post had ceased to exist and as the parties intended the matter to go to arbitration, the respondent substituted the arbitrator with the Director (Marketing) in the arbitration clause subject to the written confirmation giving the consent by the contractor. The contractor informed the Corporation that it would like to have the arbitrator appointed under the Act whereby each of the parties would be appointing one arbitrator each to which the Corporation did not accede. At that juncture the contractor moved an application under Section 11(6C) of the Act and the High Court appointed a retired Judge. Taking exception to the view of the High Court, the two-Judge Bench held, as stated earlier, that the arbitration clause postulated sole arbitrator would be ED (NR) or his nominee and no one else and, therefore, Section 11(6C) was not applicable. The Court ruled that as the parties had not been able to reach the agreed decision, the arbitration clause did not survive.

10. The arbitration clause which was interpreted by the Apex Court in the aforesaid judgment is almost similar to the present arbitration clause. In view of the same, this Court is of the view that the arbitration clause exists, but only got superseded to the extent of power of the respondent to appoint arbitrator just because the applicant has nominated the names of some of the arbitrators, but that does not in any way effect the invocation of arbitration clause and more so, after the amendment, an independent arbitrator has to be appointed only under Section 11 of the Act and as such, the arbitration application needs to be allowed.

11. In view of above facts and circumstances, the Arbitration Application is allowed, nominating Sri Justice P. Swaroop Reddy,

Former Judge, High Court of Andhra Pradesh, Hyderabad, as Arbitrator, to arbitrate on the disputes between the applicant and the respondent.

12. As a sequel thereto, miscellaneous applications, if any, pending in the Arbitration Application shall stand closed.

Sd/- K. GANGADHARA RAO
JOINT REGISTRAR

//TRUE COPY//

SECTION OFFICER

To,

1. Sri Justice P. Swaroop Reddy, Former Judge, Plot No. 91, Ambience Fort, Attapur Ring Road, Rajendranagar, Hyderabad-48.
   (with a copy of affidavit petition and material papers) (By Spl. Messenger)
2. One CC to Sri. V. Ramachander Goud, Advocate (OPUC)
3. One CC to Sri.M.S. Srinivasa Iyengar, Advocate (OPUC)
4. Two CD Copies.

PM

HIGH COURT

DATED:08/12/2020



ORDER

A.A.No.131 of 2019

Allowing the Arbitration Application
Without costs.

29/12/2020.