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

+ O.M.P. (T) (COMM.) 18/2020, CAV 220/2020 & I.As. 3259/2020,
3260/2020

PRIME INTERGLOBE PVT. LTD.

..... Petitioner

Through: Mr.Sameer Jain, Ms.Suvigya
Awasthy and Ms.Jayashree Parihar,
Advvs.

versus

SUPER MILK PRODUCTS PVT. LTD.

..... Respondent

Through: Mr.Arvind Nayar, Sr. Adv. with
Mr.Ajay Bhargava, Mr.Aseem
Chaturvedi, Mr.Shivank Diddi,
Ms.Pragati Banka and Mr.Arjun Kant,
Advvs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

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11.03.2020

CAV 220/2020

Learned counsel for the caveator has put in appearance.

Caveat stands discharged.

I.A. 3259/2020

Exemption allowed subject to all just exceptions.

Application stands disposed of.

O.M.P. (T) (COMM.) 18/2020

1. This petition has been filed by the petitioner under Section 14 read with Section 15 of the Arbitration & Conciliation Act, 1996 ('Act', for

short) seeking termination of the mandate of the learned Sole Arbitrator due to de-jure inability of the learned Sole Arbitrator and seeking appointment of an independent and neutral Sole Arbitrator.

2. The prayers made in the petition are as under:-

“In light of the aforementioned circumstances and in the interest of justice the Petitioner humbly prays before this Hon'ble Court that it may be graciously pleased to:

(a) Allow the present petition and terminate the mandate of the Sole Arbitrator - Mr. Sudhanshu Batra, Senior Advocate on account of the Arbitrator becoming de jure incapable of adjudication the disputes between the Parties;

(b) Appoint a neutral and impartial sole arbitrator and refer the disputes arising out of the Master Franchise Agreement to the said neutral arbitrator

if this Hon'ble Court thinks that the disputes may be arbitrated; and/ or

(c) Pass any other order(s) as this Hon'ble Court may deem fit in facts and circumstances of the present case.”

3. Some of the facts noted from the petition are that the parties have entered into a Master Franchise Agreement ('MFA', for short) on October 03, 2016. Disputes arose between the parties. Subsequently, on May 20, 2019, the petitioner invoked Clause 28 of the MFA, whereby the petitioner appointed an Advocate as the Sole Arbitrator to adjudicate the dispute(s) between the parties. It appears that the respondent vide reply dated May 27, 2019, while refusing to accept the appointment made by the petitioner,

proposed a panel of three Arbitrators namely (i) Hon'ble Ms. Justice (Retd.) Pratibha Rani, (ii) Sudhanshu Batra (Senior Advocate), and (iii) Arvind Varma (Senior Advocate); for the petitioner to choose a Sole Arbitrator from the said panel. Clause 28 of the MFA reads as under:

“ARBITRATION

28.1 Any and all disputes ("Disputes"] arising out of or in relation to this Agreement between the Parties hereto or arising out of or relating to or in connection with this Agreement or the performance or non-performance of the rights and obligations set forth herein or the breach, termination, invalidity or interpretation thereof, shall be referred for arbitration in accordance to the provisions of the Arbitration and Conciliation Act, 1996 or any amendments thereof

28.2 The place of arbitration shall be New Delhi and the language used in the arbitral proceedings shall be English. Arbitration shall be conducted by a sole arbitrator to be appointed by the Master Franchisee out of panel of three people suggested by the Franchisor herein.

28.3 In the event of the Arbitrator to whom the matter is referred to, does not accept the appointment, or is unable or unwilling to act or resigns or vacates his/ her office for any reasons whatsoever, the Franchisor aforesaid shall nominate another person to act as the Sole Arbitrator.

28.4 The Award of the Sole Arbitrator shall be final and binding on the parties to the Agreement."

4. Since the panel as suggested by the respondent was not agreeable to the petitioner, a petition under Section 11 of the Act was filed by the respondent herein for appointment of an Arbitrator. The said petition was disposed of on July 26, 2019 whereby this Court had appointed Mr. Sudhanshu Batra, Sr. Advocate, as a Sole Arbitrator to adjudicate the disputes arisen between the parties.

5. During the arbitral proceedings, the petitioner herein filed an application under Section 12 read with Section 16 of the Act before the learned Arbitrator with the following prayers:-

“In light of the submissions made hereinabove and the legal provisions, it is most respectfully prayed that the Learned Arbitral Tribunal may be pleased to grant the following reliefs:

(i) Allow the present Application and dismiss the Claim filed by the Claimant as being non-arbitrable and beyond the scope of reference;

(ii) Pass an order declaring that the Arbitral Tribunal lacks jurisdiction to adjudicate the present dispute;

(iii) Pass an order declaring that the mandate of this Arbitral Tribunal is terminated on the ground of de jure ineligibility in terms of Section 12(5) of the Act; and

(iv) Without prejudice to the above reliefs sought, Respondent seeks liberty to reserve its right to file its Statement of Defence and Counter-Claim, if required after disposal of the present application; and

(v) Pass any other orders(s) as this Arbitral Tribunal may deem fit in facts and circumstances of the present case.

6. Reply and rejoinder was filed by the respondent and the petitioner to the said application and the same was dismissed by the learned Arbitrator vide order dated February 25, 2020. The primary contention of the petitioner before the learned Arbitrator was that the Tribunal is *de-jure* and ineligible to adjudicate the disputes between the parties. It was also averred before the learned Arbitrator that the Trade Mark Registered User Agreement dated August 18, 2018 ('User Agreement', for short) defined Sole User in Clause 2, which states that the respondent was given the right to be the sole and exclusive user of the Trademark for the business in India and for exports to any countries in future. According to the petitioner, Clause 16 stipulated that the User Agreement would be registered with the Trademark Authorities under the Trademark Act, 1999 but the same was not registered. It was contended by the petitioner that as per clause 2 of the User Agreement, the respondent did not have the right to permit use of the Trademark to any other person and even otherwise as the said agreement was not registered, the respondent had no authority to enter into the MFA. It was further the case of the petitioner before the Arbitrator that the MFA refers to the trademark KEVENTERS (without apostrophe) which is owned by another entity called Edward Keventer Private Ltd, which is distinct and separate from the entity by the name of Edward Keventer (Successor) Private Ltd, which owned the trademark KEVENTER'S (with apostrophe) and through whom the respondent derives title. It was also the case of the petitioner that the dispute requires adjudication of the ownership of the

Trademark and being an adjudication *in rem*, the same is not arbitrable. Further, fraud was also pleaded by the petitioner to allege that the same is of serious nature and goes to the root of the original agreement being the MFA, as such the same is null and void and consequently the arbitration agreement does not survive.

7. The learned Arbitrator had posed two questions for adjudication of the application, which were:-

1. Whether the Tribunal is *de jure* and is illegible to adjudicate the present dispute.

2(i) Whether the dispute requires determination of KEVENTERS trade mark which effects rights *in rem* as well as determination of rights of third parties;

2(ii) Whether the serious fraud has been played by the respondent on the petitioner;

2(iii) Whether the serious fraud allegedly played goes to the root of the agreement between the parties resulting in MFA being null and void and therefore the arbitration agreement does not survive.

8. It was contended on behalf of the petitioner that the arbitration clause was invoked by the respondent wherein three names including the name of the learned Arbitrator was proposed for appointment, inviting the petitioner to select one out of the three proposed names in accordance with Clause 28.2 of the MFA. Clause 28.3 also mandates that the respondent shall have exclusive and unilateral right to appoint another person as the Sole Arbitrator in the event the Arbitrator to whom the matter was initially referred does not accept the appointment or resign or vacates his / her office for any reasons whatsoever. The petitioner objected to the part of the

Arbitration Clause whereby the respondent has an exclusive right to propose (Clause 28.1) as well as unilaterally appoint a Sole Arbitrator (Clause 28.3), in view of the judgment of the Supreme Court in ***Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd. reported as (2019) SCC Online SC 1517***; wherein it was held that a procedure of appointment of arbitrator granting exclusive and unilateral power of appointment to one party is in contravention of provision contained in section 12(5) of the Act. Thus, it is contended on behalf of the petitioner that in view of the judgment, the appointment of the learned Sole Arbitrator by the Court, being one from the panel proposed by the respondent, is automatically illegal.

9. Reliance was also placed on the judgment of the Supreme Court in ***Central Organization for Railway Electrification Vs. M/s ECI-SPIC-SMO-MCML (JV) reported as (2019) SCC Online SC 1635***.

10. The aforesaid submissions were contested by the learned counsel for the respondent by relying upon the order passed by this court on July 26, 2019. In other words, it was his contention that the judgment in the case of ***Perkins Eastman Architects DPC & Anr. (supra)***, shall not be applicable when an order has been passed by this Court on an application under Section 11 of the Act filed by the respondent herein, more so, when ‘no objection’ was given on the appointment of the learned sole Arbitrator. On this issue, the learned Arbitrator was of the following view:-

“In Perkins’ case (supra) the Hon’ble Apex Court was adjudicating upon the procedure for appointment of an arbitrator, which power was exclusively vested in one of the parties to the dispute. The procedure envisaged under Clause 28 of the MFA is different from the procedure of appointment

referred to in Perkin's Judgment(supra) and therefore the same would not be applicable in the present case. In any event the order is a consent order passed under section 11 of the A&C Act by the Hon'ble High court and the order nowhere mentions that the procedure under Clause 28 of the MFA was followed. Reading something into the order of the High court would be wrong. Reliance placed by the Claimant/Non-applicant in State of West Bengal Vs. Sarkar and Sarkar reported as (2018) 12 sec 736 would squarely cover the present case.

Looking at it from another perspective, admittedly the Respondent did not agree to the names suggested by the Claimant vide notice dated 28th May 2019 and the procedure for appointment could not be given effect to. The claimant had no other option but to approach the competent Court under section 11 of the A&C Act for appointment of the Arbitrator. Moreover, the Hon'ble High Court has appointed the Arbitrator with the consent of the parties. The Respondent has chosen not to challenge the said order.

In view of the above, the contention raised by the applicant/Respondent is hereby rejected.”

11. On issue No.2, with regard to Section 16 of the Act, learned Arbitrator was of the following view:-

“Considering the factual matrix and the legal propositions laid down by the courts, I am of the view that dispute is merely

contractual in nature. The Respondent has not even set up a case of dispute over the ownership of the Trade Mark as it has not filed its statement of defense or counter claim. The dispute in the SOC merely pertains to contractual disagreement between the parties and non-payment of monies by the Respondent to the Claimant. Even if the Respondent claims that the Claimant did not have a valid license, an adjudication of the said issue shall pertain to the inter-se rights of the parties arising out of the MFA. Therefore, the disputes in hand do not involve any adjudication of the rights in rem. A cogent reading of Clauses 1.1 (c), 7.10, 7.13 and clause 12.2 and 12.9 of the MFA does not lead to any inference of misrepresentation or Fraud committed by the Claimant. In fact the Brand name/Trade Mark is defined in the MFA to mean brand name KEVENTER'S (with apostrophe) and/or such other adaptations of these concepts owned. In any event for the purpose of adjudication of the claims of the Claimant, if the question arises that the Claimant had no right to enter into MFA on account of not having a valid assignment either because of non-registration of the Registered User agreement dated 18th August 2015 or otherwise the Claimant did not have a right to license it to the Respondent, the necessary consequences shall follow while finally adjudicating the matter in dispute. The fraud alleged by the Respondent does not fall in any of the categories of cases of fraud which are not aribtrable as laid down in the various judgments of the

Hon'ble Apex court.

Consequently, the application filed by the Respondent is dismissed. However, the views expressed in this order are prima facie and nothing stated or observed herein shall affect the merits of the case at the time of final adjudication.

12. Today, the learned counsel for the petitioner has, in fact, reiterated the submissions as made by the petitioner before the learned Arbitrator.

13. His submissions being, in view of the judgment in ***Perkins Eastman Architects DPC & Anr. (supra)***, the learned Arbitrator could not have been appointed by this Court. Suffice it would be to state that the judgment in the case of ***Perkins Eastman Architects DPC & Anr. (supra)*** has no applicability in the facts of this case, in view of the order passed by this Court on July 26, 2019 in arbitration petition filed by the respondent herein. The said order clearly records, the petitioner having given consent to the appointment of the learned Arbitrator. For all purposes, the order dated July 26, 2019 is an order of the Court, under Section 11 of the Act and not an appointment made by the respondent herein. In fact, it is a conceded case that the petitioner had accepted the order passed by this Court on July 26, 2019 and had not challenged the same before a higher Court.

14. The judgment of the Supreme Court in ***Central Organization for Railway Electrification (supra)*** has no bearing on the case setup by the petitioner, more so in view of the order passed by this Court on July 26, 2019, which has remained unchallenged, as the appointment of the learned Arbitrator must be construed to be an appointment of an impartial person.

15. As this is the only submission made by the learned counsel for the

petitioner, this Court is of the view that the present petition is devoid of merit and the same is dismissed. No costs.

I.A. 3260/2020

Dismissed as infructuous.

V. KAMESWAR RAO, J

MARCH 11, 2020/ak

Signature Not Verified

Digitally Signed By ASHEESH
KUMAR YADA
Signing Date: 11.03.2020
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