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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 24.02.2020

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Pronounced on: 12.05.2020

+ **ARB.P. 798/2018 and IA 12977/2019**

CARDIO FITNESS INDIA PVT. LTD.

..... Petitioner

Through: Ms. Simran Brar, Ms. Apporva
Neral and Ms. Anjali Dwivedi,
Advocates

versus

SPORTSFIT WORLD PVT. LTD.

..... Respondent

Through: Mr Jagdeep Singh Lamba, Ms.
Chhavi Gupta Narula and Mr.
Pravir Singh, Advocates

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. Present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') for appointment of a Sole Arbitrator.
2. The brief facts as narrated by the Petitioner are that the Petitioner is engaged in the business of supplying fitness and spa products and accessories including cardiovascular, strength and spa equipment and other accessories to various Gymnasium chains and Fitness Centres. Owing to the desire of the Respondent of setting up Fitness Centres at

different locations within the country, Respondent approached the Petitioner for purchase of health and fitness equipments. Accordingly, an Agreement dated 10.01.2013 was executed between the Petitioner and the Respondent for sale and purchase of these equipments. There was an express representation made by the Respondent that Petitioner will be the preferred supplier of equipment for the purposes of the Agreement.

3. Thereafter on 18.02.13, two Purchase Orders were issued by the Respondent for health and fitness equipment for its Gurgaon and Chandigarh Centres. Consequently, Petitioner imported the equipment required under the said Orders and issued Invoices for the said purchase as per the terms of the Agreement. However, Respondent failed to perform its obligations of taking delivery of the equipment and also failed to make payments towards the Invoices raised.

4. It is the case of the Petitioner that numerous requests were made for payment and reminders were also sent to the Respondent, from time to time. Despite repeated assurances given by the Respondent, no payment was remitted against the invoices and the debit notes raised by the Petitioner. Since the Respondent failed to fulfill its obligations under the Agreement, Petitioner sent an email dated 03.02.2016 to the Respondent bringing to its notice its outstanding liability, as on 31.12.2015 and requested to pay an amount of Rs. 1,70,00,000/-. A meeting was held on 05.04.2016 between the representatives of the Respondent and the Petitioner to discuss the modalities of the outstanding payments.

5. Subsequent to the meeting, a Settlement was arrived at between the parties, whereby Respondent was to remit an amount of Rs.1,20,00,000/-

to the Petitioner. Although the total outstanding amount was Rs. 1,87,00,000/-, however, on an assurance from Mr. Arun Pandey on behalf of the Respondent that there would be regular business between the parties on an exclusive basis, as also to end the disputes, Petitioner agreed to a figure of Rs.1,20,00,000/-. It is the case of the Petitioner that a Schedule was also agreed between the parties for the payment, as per which Rs.90 lakhs was to be paid on or before 30.06.2016, with further extension up to 31.07.2016, if any, and the balance of Rs. 30 lakhs was to be paid in instalments of Rs. 5 lakhs each, all of which were to be paid before 31.12.2016.

6. Petitioner avers that despite the said Settlement and the Schedule having been worked out, Respondent failed to pay. Hence, the parties were back to the original position where the Respondent owed an amount of Rs. 1,91,50,287/-. Instead of clearing the liability, Respondent sent a demand notice dated 14.09.2017, raising a frivolous claim of Rs.25,44,953/- on the Petitioner. Petitioner duly replied to the said notice on 10.10.2017, denying any liability to pay.

7. Since all attempts to resolve the disputes amicably failed, Petitioner sent a notice invoking Arbitration under Clause 5.2 of the Agreement on 28.08.2018 and suggested the name of a Senior Advocate as a Sole Arbitrator. Respondent vide its reply dated 19.09.2018 denied the execution of the Agreement dated 10.01.2013 and asked the Petitioner to withdraw the notice invoking Arbitration. Left with no other remedy, present petition was filed.

8. Respondent filed a reply to the petition and contested its maintainability on the ground that Agreement dated 10.01.2013 was

never executed between the parties, as per the record of the Respondent Company. Leaned counsel for the Respondent argued that Petitioner entered into a covert understanding in the year 2013 with Mr. Pankaj Guliani, Ms. Gursimrat Guliani and Mr. Sajid Shamim (hereinafter referred to as 'Ex-Management') for purported supply of Gym equipment/machines to the Respondent. Various fraudulent bills totalling to Rs. 1,19,37,019/- were raised for the alleged supplies and Petitioner in collusion with Ex-Management, managed to receive Rs.84,81,872/- through an account payment, till February, 2015, which was even otherwise in excess of the actual price of the machines received by the Respondent, till that date and Petitioner owes Rs. 25,44,953/- to the Respondent.

9. It is submitted that in mid 2016, Petitioner approached the Respondent representing that some unused equipment was lying in its premises and Respondent owed some money to the Petitioner. Respondent was launching its franchisee in Jaipur, Rajasthan and required gym equipment. Believing the representations made by the Petitioner to be true, it agreed to take some equipment and also agreed to pay a further sum of Rs. 60 lakhs to the Petitioner, subject to scrutiny of accounts and inventory. Respondent paid Rs.60 lakhs in three instalments, ending 10.01.2017.

10. Respondent argued that once the current Management took over and the records were scrutinized, fraud was unearthed and financial irregularities and mismanagement of accounts was discovered. Agreement is a forged and fabricated document and a product of fraud and manipulation. There is no Authorization or any Board Resolution by

the Respondent in favour of the three officials to enter into any Agreement, much less the alleged Agreement dated 10.01.2013 and hence, in the absence of any valid and existing Arbitration Agreement, Petitioner has no right to invoke Arbitration against the Respondent. It is also argued that Respondent has already lodged a criminal complaint with the Economic Offences Wing, Delhi and another complaint being CC no. 12593/2017 filed in Patiala House Court, for cheating and misappropriation of funds, is pending.

11. Learned counsel further argued that the alleged Purchase Orders and Invoices produced by the Petitioner do not have any reference to the Agreement dated 10.01.2013 and this proves that no such Agreement was ever executed or signed between the parties. He submits that in the additional documents filed by the Petitioner, certain draft settlement Agreements have been placed on record but a perusal of the documents shows that while in the draft shared at page 191 along with email dated 29.04.2016, there is a reference to the Agreement, but on the objection of the Respondent that the Agreement is a fraud, in the final draft at page 213, reference to the Agreement was dropped, and thus no Agreement exists between the parties.

12. Respondent admits that a meeting did take place for settlement of issues in April 2016 but submits that even thereafter no final Agreement was entered into between the parties. It is also denied that any schedule for payment to the Petitioner was worked out between the parties, as alleged by the Petitioner.

13. Counsel for the Petitioner in rejoinder reiterates that Agreement dated 10.01.13 was executed and signed and there is a valid and existing

Arbitration Agreement between the parties. Clause 10.9 of the Agreement is a Severability Clause and provides that if any provision of the Agreement is adjudged void or unenforceable by a Court, it shall not affect the other provisions of the Agreement.

14. It is further submitted that invoices raised were for genuine claims and only with respect to part equipment received by the Respondent. No invoice was raised for the equipment which is lying with the Petitioner, for which the Petitioner has incurred losses, including huge costs on account of rentals of the warehouse, where the balance equipment has been stored.

15. Learned counsel for the Petitioner contends that Respondent has not filed any document to show fraud and collusion, as alleged, despite the onus of proof being on the Respondent and only vague allegations have been made in reply to the petition. While Respondent has pleaded that a Forensic Audit Report is available and a criminal complaint has been lodged, but again none of the documents have been filed on record. Without prejudice to the above arguments, learned counsel relies on the judgment of the Supreme Court in *A. Ayyasamy v. A. Paramasivam*, (2016) 10 SCC 386, to contend that mere allegations of fraud simplicitor would not take away the arbitrability of the dispute.

16. Learned counsel reiterates that an inter se dispute between the Management of the Respondent is of no concern to the Petitioner and in any case even after the alleged change of the Directors, Respondent collected the equipment ordered pursuant to the Purchase Orders, for the Gurgaon and Chandigarh centres and documents in support are on record. She further submits that the Petitioner has also placed on record the

Invoice raised by the Petitioner for one of the items of the first Purchase Order, as also Bond to Bond Sale Agreement dated 19.02.2013 entered into between the parties, to make payment and collect the life fitness 95T Treadmill Base from the Custom Warehouse. As per Clause 11 of the said Sale Agreement, Respondent was obliged to arrange clearance of equipment from the Customs by paying Custom Duty directly to the Customs Authority and the Petitioner has placed on record the Bill of Entry for Ex-Bond clearance, which shows that the equipment has been collected by the Respondent. Similarly, even for the other equipment, the same procedure was followed by the parties.

17. Learned Counsel submits that Respondent alleges change of Management in mid-2016, but even thereafter it acted upon the Agreement and collected some more equipment for their Jaipur franchisee and the Purchase Orders are on record. Mr. Arun Pandey has been actively involved in the business of the Respondent, both before and after the alleged change in the Management. Petitioner has placed on record WhatsApp chat of Mr. Arun Pandey with Mr. Deepak Dewan as well as the emails exchanged between them.

18. It is important to note at this stage that while throughout the Respondent was contesting the present petition, but towards the end of the argument, it was submitted that the petition may be allowed, subject to the plea of fraud and collusion raised by the Respondent being left open for the Arbitrator to decide. This argument, significantly, is also incorporated in para 9 of the written submissions filed by the Respondent. Counsel for the Respondent relied upon the judgment of the Supreme

Court in *Ameet Lalchand Shah v. Rishabh Enterprises*, (2018) 15 SCC 678, in support of the said proposition.

19. I have heard the learned counsels for the parties and examined the rival contentions.

20. Apart from the signed Agreement, Petitioner has also placed on record Purchase Orders that were placed upon the Petitioner, pursuant to which part of the contracted equipment was supplied and was, admittedly, received by the Respondent. Respondent also admits that some payments were made to the Petitioner, although they are stated to be in excess of what was actually due, for which a Demand Notice was sent. Petitioner has also placed on record certain emails and WhatsApp chats between the parties which have not been denied by the Respondent.

21. A perusal of documents shows that after the current Management took over, there were settlement talks between the parties, which are not denied even today. Admittedly, the current Management also received some equipments for their Jaipur franchisee and collected the equipments. Petitioner has filed documents indicating payment made towards the said equipments on 25.07.2016 and on 04.01.2017 for Rs. 10 lakhs and Rs. 20 lakhs, respectively. Emails and WhatsApp chats placed on record by the petitioner, *prima facie* belies the stand of the Respondent, on affidavit, that Mr. Pandey was not involved with the transactions. It is thus apparent that there were transactions between the parties with respect to the Purchase Orders in question. Whether or not the transactions and the Purchase Orders are a result of fraud, as alleged by the Respondent, as

rightly submitted by the counsel for the Respondent, are issues which are in the domain of the Arbitrator.

22. Prior to the Amendment of the Act on 23.10.2015, it was open to the Court, while examining a petition under Section 11(6) of the Act, to decide issues such as limitation, accord and satisfaction, time barred claims etc. as was held by the Supreme Court in the case of ***SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618***. However, Sub-Section (6A) was inserted in Section 11 by the Arbitration and Conciliation (Amendment) Act, 3 of 2016. Post Amendment, Court while examining a petition under Section 11 of the Act can only examine the existence of the Arbitration Agreement and no more and no less. Section 11 (6A) reads:

“(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.”

23. Supreme Court in the case of ***Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729*** and ***Mayavati Trading (P) Ltd. v. Pradyut Deb Burman, (2019) 8 SCC 714*** has clearly held that the scope of examination under Section 11 of the Act can only be restricted to examining the existence of an Arbitration Agreement. Relevant part of the judgment in ***Duro Felguera, (supra)*** reads as under:

“48. Section 11(6-A) added by the 2015 Amendment, reads as follows:

“11. (6-A) The Supreme Court or, as the case may be, the High Court, while considering any application

under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.”

(emphasis supplied)

From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and BogharaPolyfab [National Insurance Co. Ltd. v. BogharaPolyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] . This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.”

24. Relevant part of the judgment in **Mayavati (supra)** reads as under:

“10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment [United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd.,

(2019) 5 SCC 362 : (2019) 2 SCC (Civ) 785] , as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in Duro Felguera, SA — see paras 48 & 59.”

25. Thus the only question that arises is whether there is an Arbitration Agreement between the parties. In the case of ***Duro Felguera*** (*supra*), Supreme Court has laid down a simple mechanism/test to ascertain whether there exists an Arbitration Agreement between the parties or not. Relevant part has been extracted above.

26. Applying the said test to the present case, it is evident that the Agreement dated 10.01.2013 contains an arbitration clause being Clause No.5.2, which is as under:

“5.2 Arbitration

(a) The Parties shall attempt in good faith to resolve any disputes, differences or claims arising out of or relating to this Agreement ("Dispute") promptly by negotiating among them. If the matter has not been resolved amicably within 30 (thirty) days after written notice of the dispute or claim has been furnished by the complaining Party to the other Party, the dispute shall be referred to arbitration in terms of Clause (b) specified below.

(b) If the Dispute cannot be resolved pursuant to the above to the above clause, the Dispute shall be referred to a sole arbitrator to be appointed by mutual consent of the Parties and the arbitration shall be conducted in accordance with the provisions of Arbitration and Conciliation Act, 1996 as amended from time to time. The decision of award of the arbitrator so appointed shall be binding on the Parties.

(c) The Arbitrator shall have the authority to order specific performance of this Agreement.

(d) All proceedings shall be conducted in English and a daily transcription English shall be prepared. The venue of arbitration shall be Delhi. The order of such arbitral tribunal shall be final and binding on the Parties. Each Party hereby consents to single, consolidated arbitration proceedings of multiple claim, or claims.”

27. It is clear that while entering into the Agreement, the parties intended to resolve their disputes, if any, arising in future, through the mode and mechanism of Arbitration and provided for a Sole Arbitrator to adjudicate the disputes. Thus, there is an Arbitration Agreement in existence between the parties and there is no impediment in the present petition being allowed and the Arbitrator being appointed.

28. The question that next arises is with respect to allegations of fraud leveled by Respondent against the Petitioner. In view of the stand of the Respondent, the said question is left open to be decided by the learned Arbitrator. In any case, as per the settled law, this question can only be decided by the Arbitrator for the reasons hereinafter.

29. Very recently, the Supreme Court in the case of *A. Ayyasamy (supra)* had the occasion to consider the said issue. After examining the seriousness of the allegations of fraud made by one party against the other, Court was of the view that the allegations of purported fraud were not so serious that could not be taken care of by the Arbitrator. Court held that mere allegations of fraud simplicitor may not be a ground to nullify the effect of Arbitration Agreement between the parties. Only where the allegations are very serious or where they are so complicated

that it would be essential that only a Civil Court or a *public fora* decides the issue, that the Court would refuse to refer the parties to Arbitration. Court also held that when a case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of the Arbitration Agreement, strict and meticulous enquiry into the allegations of fraud is needed and only when the Court is satisfied that allegations are extremely serious and of the complicated nature, it would be more appropriate that the parties do not resort to Arbitration. Relevant para of the judgment reads as under:

“25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simplicitor may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by civil court on the appreciation of the voluminous evidence that needs to be produced, the Court can sidetrack the agreement by dismissing application Under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration Clause or the validity of the arbitration Clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration Clause need not be avoided and the parties can be relegated to arbitration.

While dealing with such an issue in an application Under Section 8 of the Act, the focus of the Court has to be on the question as to whether jurisdiction of the Court has been ousted instead of focusing on the issue as to whether the Court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of non-arbitrable subjects are carved out by the Courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, Courts, i.e. public fora, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application Under Section 8 of the Act, should be on the aforesaid aspect, viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject matter rather than relegating the parties to arbitration, then alone such an application Under Section 8 should be rejected.”

30. Examined from the touchstone of the said observations of the Supreme Court, when the allegations made by the Respondent in the reply filed to the petition are looked at, it is obvious that the allegations are not so serious or complex that the Court should refuse to appoint an Arbitrator. In the present case, looking at the nature of allegations, this Court is of the opinion that they can be decided by the Arbitrator and petition cannot be dismissed on this ground. It is open to the Respondent

to raise the plea of fraud before the Arbitrator and as and when raised the Tribunal would consider the same based on the evidence led and the law on the subject. In fact as noticed above, counsel for the Respondent has stated that matter be referred to Arbitration leaving the question of fraud to be decided by the Arbitrator in view of the judgement in ***Ameet Lalchand Shah (supra)***.

31. Additionally, Section 16 of the Act empowers the Tribunal to rule upon its own jurisdiction. Section 16(1)(b) stipulates that a decision by the Tribunal that a contract is null and void shall not entail *ipso facto* the invalidity of the Arbitration Clause. It is well settled that the main contract is severable from the Arbitration Clause and even if, on the plea of fraud the contract is declared null and void, the Arbitration Agreement would survive. Para 27 of the judgment in ***A. Ayyasamy (supra)*** is relevant in this regard and reads as under:

“27. Section 16 empowers the arbitral tribunal to Rule upon its own jurisdiction, including ruling on any objection with respect to the existence or validity of an arbitration agreement. Section 16(1)(b) stipulates that a decision by the arbitral tribunal that a contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Hence, the invalidity of the contract between the parties does not render the arbitration agreement invalid as a consequence of law. This recognises as inhering in the arbitrator the jurisdiction to consider whether the main contract (other than the arbitration clause) is null and void. The arbitration agreement survives for determining whether the contract in which the arbitration Clause is embodied is null and void, which would include voidability on the ground of fraud. The severability of the arbitration agreement is a doctrinal development of crucial significance. For, it leaves the adjudicatory power of the arbitral tribunal unaffected,

over any objection that the main contract between the parties is affected by fraud or undue influence.”

32. Supreme Court in the same judgment has also held that the basic principle which must guide judicial decision making is that Arbitration is a voluntary act of parties, contracting with each other to resolve the disputes through a private Forum and this is expressed in the Arbitration Agreement. Commercial understanding is reflected in the terms of the Agreement between the parties and it is the duty of the Court to impart to that commercial understanding a sense of business efficacy.

33. I accordingly appoint Ms. Justice Pratibha Rani, former Judge of this Court as a Sole Arbitrator to adjudicate the disputes between the parties. The address and mobile number of the learned Arbitrator is as under :-

Ms. Justice Pratibha Rani (Retd.),
Address: Tower No. 23, Flat No. 603,
Parsvnath La-Tropicana,
Khyber Pass, Delhi.
Mobile No.: 9910384626

34. The learned Arbitrator shall give disclosure under Section 12 of the Act before entering upon reference.

35. Fee of the Arbitrator shall be fixed as per Fourth Schedule of the Act.

36. A copy of this order be sent to the learned Arbitrator for information.

37. Petition is allowed in above terms. Pending application also stands disposed of.

JYOTI SINGH, J

MAY 12th, 2020

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