

rajshree

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL ARBITRATION APPLICATION NO.115 OF 2020

Skechers South Asia Private Limited] .. Applicant

vs.

Gajrup Retails Private Limited] .. Respondent

Mr.Darshit Jain i/b Divya Jain and Dileep Satale for the Applicant.

CORAM : BHARATI DANGRE, J

DATE : 24th NOVEMBER, 2022.

P.C.

1] The present Arbitration Application being filed under Section 11 of the Arbitration and Conciliation Act, in respect of the Franchise Agreement executed with the Respondent, seek following relief :

(a) this Hon'ble Court be pleased to appoint an arbitral tribunal of 3 (three) members or such other members as this Hon'ble Court may deem fit;

(b) Costs of this Application and the order to be made thereon be provided for.

2] The Applicant is a Company engaged in the business of footwear under the trade name "Skechers" and is involved in wholesale trading business of various types of footwear for men, women and children. The Applicant claims that it has acquired exclusive right to use the trade mark "Skechers" and for development and operation of retail stores and establishments throughout India.

In this background, with substantial demand being persistent in the market for its products and services, the Applicant was approached by the Respondent with the claim of possessing expertise in the retail business of acquiring licenses from brands and operating stores under the licenses.

3] On due deliberations and agreeing on certain commercial terms for carrying out business operations at distinct locations, the Franchise Agreement was entered with Respondent on 19.01.2017 for opening of Exclusive Business Outlets (EBO) as stipulated in Article 2 of Schedule 3 of the said Agreement. The Applicant, described as “Franchiser” agreed to appoint the Respondent as “Franchise”, by granting license for managing the EBO business on the terms and conditions stipulated in the Agreement, with the license being valid till such period on sole discretion of the Franchiser and to be terminated immediately, in case of deficiency of services. The Franchise granted a non-exclusive, non-transferable and non-assignable license to use the trade mark “Skechers” for a limited purpose of establishing and operating EBO to sell and market various produces described in the Agreement.

4] Addendum Agreement was also prepared for operation of additional EBO at Bhubaneshwar and parties exchanged draft Agreement. The Respondent requested the Applicant to transfer 5 out of 11 EBOs to Gajrup Retail South Private Limited and the Applicant responded by stating that some EBOs were showing degrowth. The Applicant informed the Respondent that he has failed to invest requisite amount for the EBO at Jaipur and Haldwani. A meeting took place between the parties, where grievance was raised about the Respondent’s failure to maintain payment sanctity, re-invest of various

EBOs and slow growth of EBOs, due to inefficient operation of the same.

5] According to the Applicant, the Respondent confirmed outstanding amount due and the Applicant provided Respondent with a calculation of outstanding account receivables. On 01.04.2019, the Applicant issued termination notice upon the Respondent, thereby terminating the Franchise Agreement and calling upon to pay the outstanding dues. The EBOs were taken back from the Respondent on 26.09.2019. Similarly, the Applicant collected the unsold stocks, fixtures and furniture lying at the EBO at Haldwani.

It is, in this background, the dispute arose between the parties.

6] The Applicant by relying upon the arbitration clause contained in the Franchise Agreement invoked it, on 16.12.2019. Despite the period described in the notice having expired and since the Respondent has failed to respond for appointment of Arbitrator, the Applicant has approached this Court.

7] The Franchise Agreement between the parties comprise of dispute resolution clause at Para 22 which reads thus :

22.1 Any dispute, controversy or claim arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred in writing ("Dispute Notice") to and finally resolved by arbitration under the Arbitration and Conciliation Act 1996 or any other statutory re-enactment or modification thereto for the time being in force, which are deemed to be incorporated by reference into this Clause 22.

22.2 The number of arbitrators shall be 3 (three) ("Arbitration Board") within 7 (seven) days after one party has served a Dispute Notice, the Franchisor on the one hand and the Franchisee on the other shall each appoint 1 (one) arbitrator. The 2 (two) arbitrators so

appointed shall appoint a 3rd (third) arbitrator within 7 (seven) days of the appointment of the last of the 2 (two) arbitrators, failing which the 3rd (third) arbitrator shall be chosen in accordance with the Rules. The 3rd (third) arbitrator shall act as chairman of the Arbitration Board.

22.3 The seat, or legal place, of arbitration shall be Mumbai, India. The language to be used in the arbitral proceedings shall be English. The arbitration award shall be final and binding on all of the parties. Judgment upon the award rendered may be entered in any court having jurisdiction, or application may be made to such court for a judicial recognition of the award or an order of enforcement thereof, as the case may be, and to the extent permissible by law, the Parties unconditionally waive their rights to challenge, set aside or appeal against the award rendered by the Arbitration Board. The Parties would be entitled to seek interim relief from the courts of India.

22.4 The costs and expenses of the arbitration, including, without limitation, the fees of the arbitration and the Arbitration Board, shall be borne equally by each Party to the dispute or and each Party shall pay its own fees, disbursements and other charges of its counsel, except as may be determined by the Arbitration Board. The Arbitration Board would have the power to award interest on any sum awarded pursuant to the arbitration proceedings and such sum would carry interest, if awarded, until the actual payment of such amounts.

22.5 Subject to Applicable Law, any award made by the Arbitration Board shall be final and binding on each of the Parties that were parties to the dispute.

8] The invocation of notice dated 16.12.2019 clearly contemplate arbitration, in terms of Clause 22 of the Franchise Agreement, with the following contention, in specific, which reads thus :

“24. In the aforesaid circumstances, Skechers is constrained to invoke and commence arbitration proceedings under Clause 22 of the Franchise Agreement, to refer the dispute that has arisen thereunder in order to recover the amounts due and payable to it by Gajrup as on date. While clause 22 of the Franchise Agreement stipulates that the number of arbitrators shall be three, in the interest of both the parties, Skechers proposes to appoint a sole arbitrator and hereby recommends Mr. Anurag Gokhale to be the sole arbitrator. Gajrup is called upon to indicate its agreement to Skechers' proposal and recommendation within 10 (ten) days from the receipt of this notice of invocation of arbitration or make an alternative recommendation.”

9] On 08.06.2022 notice was issued to the Respondent and in addition a private notice was also permitted to be served by all the permissible modes. It was made clear that if the Respondent despite service is not represented on the adjourned date of hearing, the court shall proceed to hear the Applicant and pass appropriate orders.

On 14.10.2022, once again, opportunity was given by noticing the fact that the Respondent No.1 has been served through email. Despite this, Respondent did not put appearance.

The Applicant has placed on record Affidavit of service.

10] I have heard the learned counsel for the applicant. The Respondent remain unrepresented, despite service, being effected.

The Arbitration clause has set out the mode of the dispute resolution and contemplate appointment of Arbitrators, one to be appointed by the Franchiser, the other to be appointed by the Franchise and two Arbitrators so appointed shall appoint the third Arbitrator, failing which the third Arbitrator shall be chosen in accordance with the rules. The Third Arbitrator is contemplated as Chairman of the Arbitral Board.

Since the Respondent has chosen not to appear, the learned counsel for the Applicant would submit that in an identical dispute between the Applicant and Respondent, the parties were referred to the Sole Arbitrator, Manjari Shah, Advocate, Bombay High Court by order dated 03.09.2019 in Commercial Arbitration Petition (L) No.672/2019, where the claim of the Applicant came to be granted and an Award is passed on 12.01.2021. It is, therefore, requested that the same Arbitrator shall be appointed in terms of the invocation of Arbitration, against the Respondent in the present dispute.

11] I have perused the Application and also the Award.

The Applicant seek appointment of an Arbitrator since the Party-Respondent has failed to act as required under the procedure contemplated under the Arbitration Clause contemplating arbitration by Arbitral Board, as stipulated in the Franchise Agreement. Since the existence of the arbitration agreement cannot be disputed, and since the parties have agreed to submit to arbitration, all disputes which have arisen between them in respect of legal relationship defined by the Franchise Agreement, I deem it appropriate to appoint the Sole Arbitrator in terms of invocation of the arbitration by the Applicant and I justify this appointment for the reason enumerated below.

12] The learned counsel for the applicant is perfectly justified in submitting that in the fitness of things, by considering the nature of dispute involved, for raising claims before the Arbitrator, it would be appropriate to effect the appointment of Sole Arbitrator instead of appointing Board of Arbitrators as contemplated under the Arbitration clause contained in the Agreement, since this Court is empowered to take necessary measures as contemplated under sub-section 7 of Section 11 of the Arbitration and Conciliation Act.

13] The power under sub-section(6) can be exercised by this Court in the contingency stipulated in the said Section, which read thus :

11. Appointment of arbitrators

(6) Where, under an appointment procedure agreed upon by the parties -

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any

function entrusted to him or it under that procedure, [the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

Section 11(6) of the Act deals with appointment of Arbitrator when the appointment procedure agreed upon by the parties fails.

14] There is thin distinction between the exercise of power under sub-section 4, 5 and 6 of Section 11. The requirement of request for appointment of an Arbitrator to be made by one of the parties to the other is provided in sub clause (a) of sub-section (4) and in sub-section (5) of Section 11. While sub-section (4) provides for situation where arbitration agreement itself prescribe the procedure for appointment of an Arbitrator, sub-section (5) applies where arbitration agreement does not so transcribe. It is only where parties to the arbitration agreement do not mutually agree or are unable to agree on the Arbitrator, would the question arise of one of the parties requesting the arbitral institution to appoint the Arbitrator. While sub-section (5) of Section 11 enables a party to the Arbitration Agreement to request the Court designate to appoint an Arbitrator, sub-section (6) enables the parties to request that “necessary measure” be taken.

The term “necessary measure” is circumscribed by the words “unless the agreement on the appointment procedure provided other means for securing the appointment.”

15] True it is, that it is the duty of the Court to preserve sanctity of the autonomy of the parties and adhere to the appointing procedure agreed to between the parties, but at times, an appropriate necessary measure may contemplate deviation from the intention expressed by the parties in the Agreement and particularly in a situation, like this where one of the party has failed to respond to the invocation notice and even has failed to appear before this Court, pursuant to the notice issued. In such scenario, the Court cannot refrain from exercising the discretion to appoint such an Arbitrator including a solo one, as it may deem fit to meet the ends of justice.

16] In the case of ***Siddhi Real Estate Developers vs. Metro Cash and Carry India Pvt. Ltd. in 2014(4) Mh.L.J. 283***, the learned Special Judge of this Court (S.C. Gupte, J) has worked out the modality in the following manner :

“8. These authorities suggest a balanced approach in the matter. The courts should as far as possible preserve the sanctity of party autonomy and defer to the appointment procedure agreed to between the parties, whilst at the same time retaining a discretion to appoint such arbitrator/s as may be deemed fit to meet the ends of justice. It may be that in a given case, a party requiring to nominate an arbitrator may be taking benefit of its own wrong by not naming an arbitrator or frequently changing the arbitrator. It may also be that an order to follow the appointment procedure is likely to result in a statement or otherwise interests of justice may require that the appointment procedure ought not to be followed. In all such cases, the courts are not powerless to ignore the appointment procedure and appoint an independent tribunal outside the appointment procedure. After all, the principle of party autonomy is not so sacrosanct as to require adherence even in the face of a clear injustice.”

17] Apart from this, it is to be noted that the Respondent has failed to seek enforcement of the terms of Agreement by constituting the

Arbitration Board as prescribed in the clause and I am persuaded to accept the proposition suggested by the learned counsel for the Applicant. for appointment of Sole Arbitrator in the wake of fact that similar dispute arising between the parties has been referred to the Sole Arbitrator and even an Award has been passed. Further considering the claim involved, the appointment shall reduce the cost and hence in case, by appointing sole Arbitration.

18] In the wake of aforesaid, I deem it appropriate to grant the application filed by the Applicant, by the following order :

TERMS OF APPOINTMENT

(a) Appointment of Arbitrator :

Advocate Ms.Manjiri Shah, is hereby appointed as a Sole Arbitrator to decide the disputes and differences between the parties under the documents referred to above.

(b) Communication to Arbitrator of this order :-

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the applicant/petitioner within one week from the date this order is uploaded.

(c) Disclosure : The learned Arbitrator, within a period of 15 days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this application, with a copy to be forwarded to both the parties.

(d) Appearance before the Arbitrator : The parties shall appear before the Sole Arbitrator within a period of two weeks from today and the learned Arbitrator shall fix up a first date of

hearing in the week commencing from 12/12/2022. The Arbitral Tribunal shall give all further directions with reference to the arbitration and also as to how it is to proceed.

(e) Contact and communication information of the parties : Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator. This information shall include a valid and functional E-mail address as well as mobile numbers of the parties, participating in the process as well as of the Advocates.

(f) Section 16 application : The respondent is at liberty to raise all questions of jurisdiction within the meaning of Section 16 of the Arbitration Act. All contentions are left open.

(g) Fees : Parties agree that the arbitral costs and fees of the Arbitrator shall be borne by them in equal portion and shall be subject to the final Award that may be passed by the Tribunal.

(h) Venue and seat of Arbitration : Parties agree that the venue and seat of the arbitration will be in Mumbai.

(i) Procedure : These directions are not in derogation of the powers of the learned Sole Arbitrator to decide and frame all matters of procedure in arbitration.

Application is disposed off in the aforesaid terms.

[BHARATI DANGRE, J]