



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

% *Reserved on : 05th July, 2022*
Decided on : 28th July, 2022

+ **ARB.P. 672/2019**

TCG MEDIA LIMITED Petitioner

Through: Mr. Karan Jain, Advocate.

versus

MAXPOSURE MEDIA GROUP INDIA PVT.LTD.Respondent

Through: Mr. Anurag Ahluwalia, Mr. Abhigyan
Siddhant & Mr. Danish Faraz Khan,
Advocates.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G E M E N T

1. The present petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 has been filed on behalf of the petitioner seeking appointment of an Arbitrator for adjudication of disputes which have arisen between the parties in relation to the Business Transfer Agreement.

2. It is submitted in the petition that the petitioner entered into a Business Transfer Agreement (BTA) with the respondent Company on 31st January, 2015 for transferring the "Transfer Rights and Assumed Liabilities" to the petitioner in respect of license agreements with the licensors. The BTA was amended by way of amended agreement dated 04th February, 2015 whereby the respondent agreed to transfer certain number of employees to the petitioner Company. BTA was further amended vide amendment agreement dated 20th February, 2015 wherein certain provisions in respect of Escrow account were amended. In terms of Clause 4.1.2 of BTA, the



petitioner was entitled to conduct a limited legal, financial and physical due diligence exercise in connection rights and assumed liabilities. However, it has now come to the knowledge of the petitioner that at the time of conducting due diligence the respondent deliberately concealed and misrepresented relevant and material information. The respondent is also in breach of Clause 9.8 of BTA primarily for the reason of false commitment and promises made by the respondent to several clients/ celebrity etc. which was concealed from the petitioner. Furthermore, during the period of transfer of the magazine respondent with a malafide intention unilaterally reduced the print and circulation of the magazine which dented the brand image, goodwill of the magazine which ultimately caused financial as well goodwill loss to the petitioner. In addition material breach of Clause 16 of BTA which provides for non-hire and non-solicitation of employees has been committed by the respondent. The respondent even mis-represented to the petitioner about service terms and conditions of employees who were transferred to the petitioner in terms of BTA. The petitioner has claimed a sum of Rs.5 crores which is the loss suffered due to concealment of vital facts and material breaches of the several clauses of BTA. Clause 12 of the BTA provides for adjudication of disputes arising from the Agreement by the Sole Arbitrator. The present petition is, therefore, been filed for appointment of the Arbitrator under Section 11(6) of the Arbitration & Conciliation Act, 1996.

3. The respondent in his reply took a preliminary objection that two arbitration proceedings titled Maxposure Media Group (India Private Limited versus TCG Media Limited (*hereinafter referred to as "Maxposure Arbitration"*) and TCG Media Limited versus HDFC Bank Limited and



Another' (*hereinafter referred to as the "TCG Arbitration"*) arising out of BTA signed between the parties are already ongoing before the are already ongoing before the Arbitral Tribunal consisting of the Hon'ble Ms. Justice (Retd.) Rekha Sharma, Sole Arbitrator since 21.01.2016. It is claimed that the issues sought to be raised in the present petition could have well been raised by the petitioner during the filing of TCG arbitration. This petition is merely an attempt to disrupt and delay the two arbitrations which are ongoing for almost four years. Moreover, ample opportunity has already been granted to the petitioner to bring forth any issues while filing TCG arbitration, but it has chosen not to do so. Moreover, in Maxposure arbitration, issue No.2 has been framed as under :

"(ii) Whether the parties fulfilled all their conditions and obligations of facilitating due diligence to the satisfaction of the respondent No. 1 under cause 4.1.2 of the BTA? OPC"

4. The petitioner by way of the present petition is only seeking to re-agitate this issue which is only a subject matter of the arbitration between the parties which is ongoing. It is further submitted that on 26th February, 2015 the petitioner and respondent along with HDFC Bank Limited acting as the Escrow agent entered into a tripartite escrow agreement to secure payments to be made by the petitioner to the respondent in terms of BTA. On 08th September, 2015 the respondent served the Notice of arbitration to the petitioner as it failed to complete its obligations under BTA in accordance with Clause 12 of the BTA. Hon'ble Ms. Justice (Retd.) Rekha Sharma, has been appointed as the Sole Arbitrator. It is further submitted that in TCG arbitration, Hon'ble Ms. Justice (Retd.) Rekha Sharma, Sole Arbitrator has been appointed as Sole Arbitrator. The issue sought to be



raised by way of present petition are already under consideration in the two arbitration proceedings. The cross-examination of the witnesses has been completed in Maxposure arbitration and is now listed for final arguments. The claimant's witnesses have been partly cross-examined in TCG arbitration and it is claimed that present petition is nothing but an attempt to disrupt and delay the conclusion of the two pending arbitrations. It is further asserted that the present petition is barred by limitation since the BTA was entered into between the parties in the year 2015. It is, therefore, submitted that petition is tenable and is liable to be dismissed.

5. Written submissions have been filed on behalf of the petitioner as well as the respondent.

6. Submissions heard.

7. It is not in dispute that the BTA was executed between the parties on 31st January, 2015 and the Amended Agreement dated 04th February, 2015 and 20th February, 2015 were executed thereafter. It is also not in dispute that Clause 12 of the BTA provides for arbitration Agreement.

8. The petitioner has raised specific claims for Rs.5 crores on the assertion of material breach of Clause 16 which provided for non-hire and non-solicitation of employees. It is asserted that the petitioner has come to know about the concealment by the respondent, when one Sh. Lokesh Mishra applied for employment on 03rd December, 2018 disclosing that he was earlier appointed with the respondent. These facts were not within the knowledge of the petitioner at the time of filing of the earlier arbitration petitions. The petitioner has thus claimed that there is prima facie breach of Clause 12 of the BTA. It is further submitted that the disputes now been



agitated by the petitioner are not the subject matter of the earlier arbitration proceedings pending between the parties.

9. Learned counsel on behalf of the respondent on the other hand has asserted that the disputes now been raised are duly covered in the earlier two arbitration proceedings and he is barred from re-agitating them by way of the present arbitration proceedings.

10. The disputes have been raised by the petitioner in respect of BTA. Considering the existence of the arbitration clause, the other issues raised by the respondent in regard to the claim being barred as there are already arbitration proceedings pending or that the claim is barred by limitation, may be agitated before the Arbitrator.

11. In the wake of a valid Arbitration Agreement, Hon'ble Ms. Justice Rekha Sharma (Retired) (Mobile No.9871300025) is appointed as the Sole Arbitrator to conduct the arbitration under the aegis of Delhi International Arbitration Centre. The parties are at liberty to raise their claims objections including limitation before the learned Arbitrator.

12. This is subject to the learned Arbitrator making the necessary disclosure as required under Section 12(1) of the A&C Act, 1996 and not being ineligible under Section 12(5) of the Arbitration & Conciliation Act, 1996.

13. Accordingly, the petition is allowed in the above terms.

NEENA BANSAL KRISHNA, J

JULY 28, 2022

va