

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

ARBITRATION PETITION NO. 218 OF 2022

M/s. Malu Sales Corporation through
its Sole Proprietor Mr. Santosh
Manikchand Malu ...Petitioner

Vs.

Nayra Energy Limited through
Officer-in-charge. ...Respondent

Mr. Yuvraj Narvankar, for the Petitioner.
Ms. Pooja Kshirsagar, Ms. Nikita Lad i/b. Ashok Purohit and Co.,
for the Respondent.

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**CORAM : MANISH PITALE, J.
DATE : 30 MARCH 2023**

P.C.

. Heard learned counsel for the parties. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996, for appointment of the sole arbitrator, for resolution of disputes between the parties. In the present case, the petitioner has placed reliance on franchisee agreement dated 2/6/2005, whereby the petitioner was appointed as a franchisee of the respondent (formerly known as Essar Oil Ltd) for a retail outlet of petroleum products. The said franchisee agreement consisted an arbitration clause, which reads as follows:

“Arbitration :

(a) All disputes and differences of any nature whatsoever or any claim, cross claim, counter claim or any dispute arising under or out of this Agreement or any breach or alleged breach of any of the covenants thereof or as to the interpretation of any clause / provision of this Agreement or any of the provisions contained herein shall be referred to a sole arbitrator to be appointed by the COMPANY and the Franchisee hereby consents to the same and the proceedings shall be governed by the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof, from time to time in force.”

2. It appears that disputes arose between the parties when the respondent intended to take action against the petitioner on the basis that the quality of products being sold by the petitioner were not as per expected standards. The documents on record show that supply of petroleum products to the retail outlet of the petitioner was suspended. Since the supply remained suspended, the petitioner issued notice dated 19/10/2022, invoking the arbitration clause and proposing the appointment of an Advocate as a sole arbitrator.

3. On 4/11/2022, the respondent refuted the claim made by

the petitioner and asserted that as per the arbitration clause, the respondent alone was authorized to appoint the sole arbitrator and therefore, there was no question of agreeing with the name proposed by the petitioner. Since the agreed procedure of appointment of arbitrator between the parties failed, the present petition under Section 11 of the said Act came to be filed.

4. The learned counsel for the respondent has appeared through counsel.

5. The learned counsel for the petitioner referred to the arbitration clause and submitted that since it provides for appointment of a sole arbitrator unilaterally by the respondent, it is hit by Section 12(5) of the said Act read with Seventh Schedule thereof.

6. The learned counsel for the petitioner further relied upon communications exchanged between the parties and the invocation notice alongwith its reply to contend that this Court may appoint a neutral sole arbitration for resolution of disputes.

7. Learned counsel for the respondent submitted that proposal of the petitioner for appointment of the arbitrator could not be accepted because the respondent has power to unilaterally appoint the arbitrator under the concerned clause and even as on today, the respondent is prepared to consider the explanations that may be given by the petitioner to the proposed action on the

part of the respondent. It is submitted that as on today, the franchisee agreement has not been terminated and that therefore, invocation of arbitration clause is premature. It is further submitted that in the invocation notice the petitioner has sought to raise disputes beyond the scope of the franchisee agreement in question. Reliance is placed on judgment of this Court in the case 1 of *Appasaheb Nabhiraj Rukade Vs. Deputy General Manager, Indian Oil Corporation Ltd. (in Arbitration Appeal No.28/2018)* alongwith connected appeals. It is submitted that in similar factual situation, this Court had already held that Section 11 of the said Act could not have been invoked for appointment of an arbitrator. On this basis, it was submitted that present petition may be dismissed.

8. This Court has considered the rival contentions. There can be no dispute about the fact that post amendment of the aforesaid Act in the year 2015 and the stipulation in Section 12(5) of the said Act, the respondent would not be entitled to unilaterally appoint the sole arbitrator.

9. This is particularly so because Section 12(5) of the amended Act specifically stipulates that notwithstanding any agreement to the contrary, unilateral appointment of the arbitrator cannot be permitted.

10. Therefore, the stand taken on behalf of the respondent in

the reply to the invocation notice, is wholly unsustainable. It was sought to be justified before this Court on the part of the respondent that there are no disputes as such, that can be referred to the arbitrator for the reason that the respondent is yet to take decision as to whether the franchisee agreement is to be terminated or not. This Court is of the opinion that the said contention cannot be accepted and the reliance placed on the case of *Appasaheb Nabhiraj Rukade* is misplaced. This Court is convinced that undisputedly the respondent has suspended supply of petroleum products to the retail outlet of the petitioner. It is the case of the petitioner that such suspension is unjustified and dispute in that regard is raised in the invocation notice. There is a reference to the specific clause of the franchisee agreement, in respect of which, the dispute is sought to be raised, thereby indicating that the contention of the respondent that invocation of the power under Section 11 of the said Act may not be justified, is not correct.

11. Since the disputes have arisen, in the face of the arbitration clause between the parties, such disputes need to be referred to the arbitrator. In the light of the fact that the arbitration clause is hit by Section 12(5) of the said Act read with Seventh Schedule thereof, this Court is inclined to appoint a neutral arbitrator for resolution of disputes between the parties. In so far as contention raised on behalf of the respondent is concerned that the controversy between the parties ought to be restricted to the

franchisee agreement and the relevant arbitration clause, this Court is of the opinion that the arbitrator deriving jurisdiction from the arbitration clause which specifies the nature of disputes that can be decided through arbitration can decide whether the dispute falls within the scope of the concerned agreement. It is a matter that the arbitrator can decide and the contentions in that regard raised on behalf of the respondent are kept open for determination by the arbitrator.

8. In view of the above, Mr. Vishal Kanade, practicing Advocate in this Court is appointed as the sole Arbitrator, for resolving the disputes between the parties. The details of the learned Arbitrator are as follows.

Mr. Vishal Kanade

Addres : Office No.103, 1st Floor,
Gundecha Chambers, N. M. Road,
Fort, Mumbai – 400 001.

Mobile No. 9819668711

9. The petitioner to inform the learned arbitrator immediately about the order passed today.

10. The learned arbitrator is requested to communicate his consent and disclosure statement as per Section 11(8) and 12(1) of the aforesaid Act, within four weeks to the Registrar (Judicial) of this Court. The fees of the learned arbitrator shall be as per

schedule IV to the said Act.

11. All contentions of the parties are kept open.
12. The petition stands disposed of, in aforesaid terms.

MANISH PITALE, J.