

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

% **Date of Order : 14th February, 2023**

+ **ARB.P. 176/2023 & I.A. 2890/2023**

MOTHER BOON FOODS PVT LTD Petitioner

Through: Mr. Utsav Jain, Advocate

versus

READY ROTI INDIA PVT LTD Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter "**the Act**") has been filed on behalf of the petitioner seeking the following reliefs:

"a) Allow the present petition. and appoint an independent and impartial sole Arbitrator on DIAC, Delhi High Court panel with a direction to adjudicate upon the disputes having arisen between the parties to the present petition;

b) Pass such other order and further orders as this Hon'ble Court may deem fit and proper."

2. Learned counsel for the petitioner submits that the petitioner is a company incorporated under the Companies Act, 2013. Learned counsel for the petitioner submits that the petitioner entered into a Manufacturing agreement dated 25th July 2012 with Mindscape one marketing Pvt. Ltd., which has been amalgamated with the respondent *vide* order dated 4th

October 2016 passed by the High Court of Rajasthan.

3. Learned counsel for the petitioner further submits that as per the manufacturing Agreement, the petitioner agreed to manufacture specified breads in accordance with the specifications and standards provided by the respondent from time to time. He further submitted that the said Agreement was for an initial term of seven years unless renewed by the parties and could be terminated by giving a prior notice of ninety days by any of the parties. The said agreement also provided an arbitration clause as reproduced below:

"17.2 Arbitration

17.2.1 Any and all claims, disputes or controversies involving the parties and arising out of or in connection with or relating to this agreement, or the execution, interpretation, validity, performance, breach or termination hereof, including, without limitation, the provisions of this clause (individually, a dispute) that is not settled to the satisfaction of the parties under Article 17.1 above shall be finally resolved by arbitration in accordance with the rules of Indian Arbitration and Conciliation Act, 1996 and any amendment of the same effected and enacted from time to time.

17.2.2 For the purpose of such arbitration, the Company shall appoint the Sole Arbitrator.

17.2.3 The place of arbitration shall be Delhi."

4. Learned counsel for the petitioner submits that the petitioner started functioning after setting up the plant within time frame provided in the agreement. However, within few months, the respondent started acting in violation of the terms agreed between the parties. He further submits that the respondent was not placing the purchase orders in accordance with the promises made in relation to its quantitative

demands, acting on which the petitioner invested in huge amount of time and money on the capacity of the plant and machinery.

5. It is submitted that the respondent kept holding the payments of the invoices issued by the petitioner, while on the other side, the petitioner was incurring costs to keep running the plant including the interest which it was paying for the loans taken from the banks. He further submits that when the petitioner started complaining about the same, the respondent illegally, arbitrarily and suddenly terminated the agreement between the parties *vide* letter dated 14th March 2014 by alleging *inter alia* that petitioner failed to provide the congenial and conducive atmosphere to the supervisory team deputed by it in the factory premises.

6. Learned counsel for the petitioner submits that several Emails were sent by the petitioner to the respondent to release the payments but the respondent was unresponsive. It is further submitted that the respondent without replying to any Emails, letters and legal notice sent by the petitioner and in violation of the arbitration clause as provided under the Agreement, constituted an arbitral tribunal unilaterally on 12th April 2014 and appointed three members to it on its own. The petitioner objected to the unilateral constitution of the Arbitral Tribunal by the respondent and further wrote an Email dated 16th June 2014 to the Arbitral Tribunal to not proceed with the arbitration.

7. Learned counsel for the petitioner further submits that the said Arbitral Tribunal passed an *ex-parte* award dated 15th July 2014. The petitioner filed a petition under Section 11 of the Act bearing number Arb. P 414/2014 on 19th August 2014 before this Court for appointment of a Sole Arbitrator. The petitioner sought permission to withdraw the

said petition in view of the award being already passed. The said petition got "*Dismissed as withdrawn*" vide Order dated 22nd August 2014 by this Court.

8. It is submitted that the petitioner challenged the award dated 15.07.2014 passed by the said Arbitral Tribunal before this Hon'ble Court vide OMP No.1195/2014 which was later renumbered as OMP (Comm.) 136/2017. It is further submitted that vide Judgment dated 27th August 2018 in OMP (Comm.) 136/2017, this Court set aside the said award dated 15th July 2014 *inter alia* holding that arbitral tribunal was not constituted in accordance with the agreement.

9. Learned counsel for the petitioner submits that the petitioner had filed a Section 11 petition before District Court, South-west, Delhi bearing number OMP (Comm) 47/2019 for appointment of arbitrator. However, the said petition was withdrawn to file a petition at this Court. It is submitted that meanwhile, the respondent appointed Mr. A.K Raghva, ADJ(Retd.), Gurugram as Sole Arbitrator on 12th April, 2019 itself to adjudicate the claims of the petitioner, sans the petitioner's consent.

10. That post the withdrawal of the aforementioned petition, the petitioner consented to proceed with the Arbitral proceedings before Mr. A.K Raghava, learned ADJ to avoid any further delay and made several requests to the respondent to mutually start proceedings, but there was no response from the respondent side and the proceedings stayed numb.

11. Learned counsel for the petitioner submits that since the respondent is no more interested in the adjudication of the claims of the petitioner and deliberately avoiding the appointment of the Sole Arbitrator with

mutual consent, the petitioner is filing the present petition before this Court to appoint the Sole Arbitrator in view of the deadlock between the parties. It is submitted that the petitioner has certain claims worth Rs.1,21,54,665/- (Rupees One Crore Twenty-One Lakh Six Hundred Sixty-Five only) along with interest at the rate 18 percent per annum against the respondent, which have been awaiting independent adjudication.

12. In view of the present circumstances, learned counsel for the petitioner prays for the appointment of a Sole Arbitrator by this Court.

13. Heard learned counsel for the petitioner and perused the record.

14. The Court has observed that a Sole Arbitrator has already been appointed to conduct the arbitral proceedings. The appointment of another Arbitrator in such a situation would be irregular and contrary to the Law laid down in the Act.

15. The Chhattisgarh High Court in the matter ***J.B. Construction Company v. South Eastern Central Railway, 2020 SCC OnLine Chh 1704***, dealt with a similar matter pertaining to the appointment of an Arbitrator when there exists a previous mandate of appointment. The relevant paragraph is reproduced below:

*“17. Relying upon the aforesaid two judgments of the Supreme Court, this High Court also on a similar issue in Arbitration Appeal No. 80 of 2016 in case of **Rahul Somani v. Ramgopal Somani**, wherein this court in its judgment dated 06.01.2017 has reached to the conclusion that so far as the termination of mandate is concerned, it would lie only before the Principal Civil Court of original jurisdiction and with only those High Courts which exercise ordinary original civil jurisdiction. In the said case, in paragraphs 12 and 17 to 20 held as under:*

12. *A conjoint reading of the provisions contained in Section 14(2) and Section 2(1)(e)(i) of the Act, 1996, would manifest that a prayer for termination of mandate would lie before the Principal Civil Court of original jurisdiction or with the High Court where the High Court is exercising ordinary original civil jurisdiction.”*

XXX XXX XXX

17. *In the present case, learned counsel for the applicant has raised another ground to press his application before this Court on submission that the present is a joint application for termination of mandate as well as for appointment of new Arbitrator, therefore, for the remaining part of the prayer, the application is maintainable.*

18. *I am not impressed with the arguments advanced by learned counsel for the applicant, because, as long as an Arbitrator is functioning under the deed of joint consent for appointment of Arbitrator and is seized of the matter, a second application for appointment of fresh Arbitrator is not maintainable unless the mandate of the earlier appointed Arbitrator is terminated in accordance with Section 14 of the Act, 1996.*

19. *I am not commenting on the jurisdiction of this Court under Section 11(6) of the Act, 1996, once the mandate is terminated, but for the present, this Court has no jurisdiction to entertain an application for appointment of fresh Arbitrator.*

20. *For the foregoing, the application is dismissed, as not maintainable. However, the applicant would be at liberty to approach the principal Civil Court of original jurisdiction*

seeking prayer to terminate the mandate of the Arbitrator.”

16. The appointed Sole Arbitrator has to be discharged from his position in the Tribunal, in order to approach the Court for the appointment of a new arbitrator to conduct the Arbitral proceedings.

17. The court is of the opinion that mere unresponsiveness of the current Arbitrator is not a valid ground to approach the Court with a petition under Section 11 of the Act.

18. The appointment of the present Arbitrator has to be vacated first and only then a petition under Section 11 of the Act be maintainable.

19. In view of the foregoing discussions, this Court finds this instant petition to be premature and is hereby accordingly dismissed.

20. Pending applications, if any, also stand dismissed.

21. The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

FEBRUARY 14, 2023

gs/as

[Click here to check corrigendum, if any](#)