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

Date of decision: 16th January, 2023

+ **ARB.P. 1106/2022**

BIKANERVALA FOODS PRIVATE LIMITED Petitioner

Through: Mr.Ankit Jain, Mr.Raman Mishra,
Ms.Neha Jain, Mr.Abhay Pratap
Singh, Mr.Aditya Chauhan, Advs.

versus

M/S SAATVIK FOODS & ORS. Respondents

Through: Mr.Anurag Bisaria, Mr.Madhur
Mahajan, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Franchise Agreement dated 21.05.2019 executed between the parties. The Arbitration Agreement is contained in Clause 29 of the Franchise Agreement and is reproduced herein below:

***"29. DISPUTE RESOLUTION, ARBITRATION
& COURTS JURISDICTION***

*a. If a dispute arises in relation to, touching,
arising out of, or in connection with this
Agreement shall be resolved amicably at the first*

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ARB.P.1106/2022

*instance whereby referring the same to Managing Directors/Directors of both the parties. The final outcome of the same whether resolved or unresolved, as the case may be, shall be recorded in writing. Unresolved disputes, controversies, contests, disputes, if any, shall be submitted to arbitration within 30 days from the date of failure to resolve the dispute or difference. The Arbitration shall be conducted in accordance with the Provisions of the Arbitration and Conciliation Act, 1996 along with the rules framed there under and any amendments thereto by a sole arbitrator, duly appointed by the **FRANCHISER**. The **Ld.** Arbitrator appointed shall be either a Retired Judge of the Hon'ble Delhi High or a Senior Advocate with a standing of at-least 20 years before the Bar. The arbitration shall be conducted in English. The decision/award of the arbitrator shall be final/ conclusive and binding on the parties. The seat of arbitration shall be at New Delhi. The Arbitrator's fee shall be borne by the all the parties equally.*

b. Notwithstanding anything contained in clause 29 (a) mentioned herein above, this agreement shall not preclude either party from seeking temporary, provisional, or injunctive relief from courts having jurisdiction over this agreement.”

2. The dispute having arisen between the parties, the petitioner addressed a Demand Notice dated 28.03.2022 to the respondents. Having received no response, the petitioner terminated the Franchise Agreement vide notice dated 29.07.2022, and called upon the respondents to undertake various steps pursuant thereto. Again, as no response was received from the respondents, the petitioner invoked the Arbitration Agreement vide notice dated 29.08.2022. As the respondents did not reply to the said notice as well, the present petition was filed.

3. The learned counsel for the respondents submits that the pre-

condition for invoking the Arbitration Agreement has not been complied with by the petitioner. He submits that the Arbitration Agreement will come into play only where the attempt to amicably resolve the disputes by referring the same to the Managing Directors/Directors of both the parties has failed, and such failure is recorded in writing. In the present case, the petitioner never sought the reference of the disputes to the Managing Directors/Directors of the parties. He submits that, in fact, the respondents made attempts to meet the Managing Director of the plaintiff company, however, the same failed. He submits that without following the pre-condition mandated in Clause 29, the petitioner cannot invoke the Arbitration Agreement. In support, he places reliance on the judgment dated 10.10.2022 passed in FAO(OS)(COMM) 9/2019, titled *M/s Welspun Enterprises Ltd. v. M/s NCC Ltd.* He further submits that even otherwise, the claims raised by the petitioner are frivolous and are liable to be rejected. These are a clear case of deadwood.

4. On the other hand, the learned counsel for the petitioner submits that the petitioner, prior to invoking the Arbitration Agreement, had addressed the Demand Notice dated 28.03.2022 as also the Termination Notice dated 29.07.2022 to the respondents. The respondents did not even respond to the said notices. He submits that, therefore, the occasion of referring the dispute to the Managing Directors/Directors of the parties did not and could not have arisen. He submits that the petitioner, therefore, was left with no option but to invoke the Arbitration Agreement. He submits that even otherwise, as held by this Court in its judgment dated 18.11.2014 in CM(M) 1021/2014, titled *Ravindra Kumar Verma v. M/s BPTP Ltd. & Anr.*, the condition of the parties

attempting conciliation prior to invoking arbitration, is only directory in nature.

5. I have considered the submissions made by the learned counsels for the parties. It cannot be disputed that in the present Arbitration Agreement contained in the Franchise Agreement between the parties, the parties have agreed to first attempt to resolve their disputes amicably by referring the same to the Managing Directors/Directors of both the parties. The final outcome of the said conciliation proceedings has been directed to be recorded in writing. However, reference to conciliation process has to be mutual and cannot be unilateral in nature. The petitioner before invoking the Arbitration Agreement had given demand notice dated 28.03.2022 and the Termination Notice dated 28.07.2022 to the respondents. Admittedly, the respondents did not give any response to the said notices. The respondents did not also seek reference of these disputes to the Managing Directors/Directors of the parties. The onus of such reference cannot be cast on the petitioner alone; it is mutually on the parties. The failure of such conciliation process, therefore, resulted in its non-initiation itself for the inaction of the respondents. The petitioner, therefore, cannot be faulted for invoking the Arbitration Agreement as in spite of issuance of the above notices, it had failed to elicit any response from the respondents, leave alone a request for a conciliated settlement. The respondent cannot benefit out of its own inaction. The submission of the learned counsel for the respondents that the respondents had requested the petitioner for a meeting with the Managing Director of the petitioner, which request was acceded to, cannot also be accepted in absence of any written request for the same in spite of written notices

from the petitioner.

6. In *M/s Welspun Enterprises Ltd* (supra), the Division Bench of this Court was considering the question of limitation and held that if the Arbitration Agreement requires the parties to exhaust the dispute resolution process as a pre-condition for invoking arbitration, the right to refer the dispute to arbitration would arise only after the parties have exhausted the said procedure. If the parties have agreed that they would first endeavour to resolve the disputes amicably in a particular manner, it is necessary for them to first exhaust that procedure before exercising any right to refer the disputes to arbitration. In the present case, however, as noted hereinabove, the petitioner has not invoked the Arbitration Agreement without first raising the disputes with the respondents. It could not, therefore, be complained of having not tried the resolution process.

7. As far as the other objections of the learned counsel for the respondents on the claims of the petitioner are concerned, these are necessarily to be adjudicated by the Arbitrator alone. They cannot be considered by this Court while appointing an Arbitrator.

8. In view of the above, I appoint Justice G.S. Sistani, Former Judge of this Court, Bungalow no. M-23, Jangpura Extension, New Delhi-110014, as the Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the above-mentioned Agreement.

9. The learned Sole Arbitrator shall give disclosure in terms of Section 12 of the Act before proceeding with the reference. The fee of the learned Sole Arbitrator shall be governed by Schedule IV of the Act.

10. The parties shall appear before the learned Sole Arbitrator on

31.01.2023 at the time and place to be communicated by the learned Sole Arbitrator.

11. The petition is allowed in the above terms.

NAVIN CHAWLA, J

JANUARY 16, 2023/Arya



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ARB.P.1106/2022