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

Judgment reserved on: 28.03.2023
Judgment pronounced on: 03.07.2023

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+ **ARB.P. 1141/2022**

INDUS BIRRA BEVERAGES

..... Petitioner

Through: Mr. Arun K. Srivastava (Through
 VC) and Mr. Mimansak Bhardwaj
 and Mr. Sunny Chhonkar, Advs.

versus

ARUN KUMAR DWIVEDI

..... Respondent

Through: Dr. Amit George, Mr. Alex Joseph,
 Mr. Rayadurgam Bharat, Ms. Merin
 Thampan, Mr. Piyo Heridd and Ms.
 Sonali. S.S., Advs.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

SACHIN DATTA, J.

Factual Background

1. The present petition filed under Section 11(2), (5) & (6) of the Arbitration & Conciliation Act, 1996¹ seeks appointment of an independent sole arbitrator to adjudicate the disputes stated to have arisen between the parties.

¹ "the Act"



2. The disputes between the parties have arisen in the context of a “Sub-Dealership Agreement” dated 18.03.2021 between the following parties:

- (i) M/s Mahakaal Alcobrew (MA) (*referred to in the aforesaid agreement as the ‘Distributor’*);
- (ii) M/s RCR Filling Station, represented by Mr. Arun Kumar Dwivedi (*the respondent herein and referred to in the aforesaid Agreement as the ‘Sub-Dealer’*);
- (iii) M/s Indus Birra Beverages (IBB) (*the petitioner herein and referred to in the aforesaid Agreement as the ‘Importer’*).

3. The Arbitration Clause in the said Agreement is in the following terms:

“19. Arbitration

“That any dispute/difference or claims arising out of or relating to the agreement or interpretation of any provision here of or the breadth here of, shall be referred to INDUS BIRRA BEVERAGES for resolution of the dispute however if the dispute remains unsolved, a sole arbitrator shall be appointed by either of the parties and the arbitration shall be governed by the Arbitrator and Conciliation Act 1996 at jurisdiction of Bhopal (MP) and Delhi.”

4. Neither of the parties has disputed the territorial jurisdiction of this Court to entertain the present petition, inasmuch as the aforesaid clause, inter-alia, confers jurisdiction on Delhi. There is also no controversy about stamping of the said agreement.

5. A reading of the Agreement reveals that the broad framework/purport thereof is as under:

- (i) The “Sub-Dealer”, of which the respondent is the sole



proprietor, would place a purchase order alongwith advance payment upon the distributor for relevant product in question mentioned in the Agreement i.e. Tensberg beer (the product);

(ii) The distributor i.e. M/s Mahakaal Alcobrew (MA) would transmit this amount to the importer i.e. M/s Indus Birra Beverages (the petitioner herein);

(iii) The rebate and remuneration shall be disbursed directly by the petitioner (importer) to the retailer;

(iv) The distributor, being the official FL-10 B licence holder would be responsible for payment collection;

(v) Upon realization of the amount by the distributor, the investment of the sub-dealer would be returned along with an additional remuneration of Rs.160/- per case.

6. Importantly, the aforesaid Agreement makes it incumbent on the “Sub-Dealer” (the respondent), to place a purchase order at the outset, and to deposit advance amount to the extent mentioned in Annexure-I of the Agreement, to the tune of Rs.3,09,76,400/-. The agreement further makes it incumbent on the “Sub-Dealer” (the respondent) to provide a quarterly purchase schedule, to the distributor (M/s Mahakaal Alcobrew) for timely service and supply commitment. It is further contemplated that the Sub-Dealer would draw up a quarterly purchase schedule, ensure timely deposit of amount to avoid delay and hampering sales in the market due to non-availability of stock. In this regard, reference may be made to Clauses 1, 6 and 12 of the Agreement which read as under:

“1. Sub-Dealer shall provide a quarterly purchase schedule of



Tensberg beer, product wise/SKU wise to the Distributor M/s Mahakaal Alcobrew for timely service and supply commitment.

xxx

xxx

xxx

6. *That the Sub dealer ensures that as per the demand from the market the sub dealer will ensure timely deposition of amount to avoid delay and hampering sales in the market because of non-availability of stock.*

xxx

xxx

xxx

12. *Sub Dealer along with the representatives of company shall have to plan out the time line for width of distribution and provide timely reports on the initial market penetration and subsequently a monthly report to be submitted on the status brand wise and SKU wise."*

7. It is also relevant to note that the Agreement in question contemplates that the "Sub Dealer" (the respondent) would handle the entire area of Indore, Bhopal and Ujjain.

8. Admittedly, the initial purchase order placed by the "Sub Dealer" (the respondent) was not to the extent contemplated in terms of Annexure-I of the Agreement dated 18.03.2021 and there was a shortfall in the amount remitted by the said sub-dealer.

9. A meeting is stated to have taken place between the parties on 09.06.2021 to seek resolution of disputes on account of shortfall in the initial purchase order amount. The same eventually resulted in "Cancellation and Settlement Agreement dated 09.07.2021" (*hereinafter referred to the 'Cancellation Agreement'*). The said Cancellation Agreement provides for reimbursement of the investment made by the respondent along with some additional margin in respect of a total of 9715 cases of the product in question.

10. Significantly, Clause 4 & 5 of the said Cancellation Agreement provides as under:



“4) The terms and conditions only and only limited to the liquidation and payment of 9715 cases of this cancellation Agreement amongst the parties shall remain effective up till final settlement rest other association as a sub dealer for Indore and Bhopal shall remain disqualified and terminated.

5) Either parties commits, breaches and violates any terms and conditions of this agreement as mentioned above, the aggrieved party has each and every rights to avail the remedy available to them in law before the competent court against the violating party.”

11. In this background, the petitioner issued an arbitration notice dated 22.08.2022 to the respondent seeking to invoke the arbitration clause contained in the Agreement dated 18.03.2021. The disputes which were sought to be referred to Arbitration were stated to be as under in the said notice :

“23. That my client has suffered and still suffering due to the sudden withdrawal of you the Noticee from the system creating turbulence in first dealing of business only. Further loss of order for 20,000 cases which was required in a season but due to default in payment at your end, the stock reached Madhya Pradesh after the season which caused Loss of estimated return, Loss of goodwill amongst channel partners and retailers. First impression is last impression as the Image of my client got hampered in the market on the very first dealing hence, the channel partners lost confidence in the brand which made the stock to expire with a heavy loss of Rs.3.5 crores in the system which indirectly hampering the business of my client in other states as well till today. Due to these, overheads expenses amounting to the tune of Rupees Seventy Lakhs have been suffered which ultimately resulted in the mental harassment to my client.”

12. Vide the said Notice dated 22.08.2022, the petitioner also suggested the name of a person who could be appointed as Sole Arbitrator to adjudicate upon the disputes between the parties.

13. In response, the respondent sent a communication dated 12.09.2022 wherein it was contended that the arbitration clause in the Sub-Dealership



Agreement stood discharged as a result of the Cancellation Agreement dated 09.07.2021. Consequently, the present petition came to be filed.

Submissions on Behalf of the Petitioner

14. It has been contended by learned counsel for the petitioner that the existence of the arbitration agreement in the Sub Dealership Agreement dated 18.03.2021 is not disputed. As such an arbitral tribunal is required to be constituted to adjudicate the disputes between the parties. It is further contended that the cancellation agreement has no bearing on the right of the petitioner to raise the disputes in question, and the same are not precluded on account of the cancellation agreement. Learned counsel further contends that even the issue as to whether the cancellation agreement results in discharging the obligations of the parties under the Sub-Dealership Agreement is an aspect that is required to be gone into and pronounced upon by a duly constituted arbitral tribunal.

15. In support of his contentions, learned counsel for the petitioner relies upon the following judgments:

- (i) *M/s Everest Holding Ltd vs. Shyam Kumar Shrivastva & Ors.*²
- (ii) *Reva Electric Car Company P. Ltd. vs. Green Mobil*³
- (iii) *PVR Limited vs. Imperia Wishfield Pvt. Ltd.*⁴
- (iv) *Sirajuddin Kasim and Another vs. Paramount Investment Limited.*⁵
- (v) *Sanjeev Prakash vs. Seems Kukreja and Other*⁶
- (vi) *Vidya Drolia vs. Durga Trading Corpn.*⁷

Submissions on behalf of the Respondent

² (2008) 16 SCC 774

³ (2012) 2 SCC 93

⁴ 2022 SCC Online Del 3947

⁵ (201) 8 SCC 557

⁶ (2021) 9 SCC 732

⁷ (2021) 2 SCC



16. Learned counsel for the respondent has painstakingly gone through the contents of the said Sub Dealership Agreement, Minutes of Meeting dated 09.06.2021 and the Cancellation Agreement, and has contended that the purport of the Cancellation Agreement was to resolve all the outstanding disputes between the parties. It is strenuously urged that all the outstanding disputes stood resolved/settled in terms of the Cancellation Agreement. It is further submitted that the Cancellation Agreement results in complete substitution and effacement of the rights and obligations under the Sub Dealership Agreement. Further, the cancellation agreement has also been acted upon by the parties.

17. It is contended that given the sequence of events, leading upto the execution of cancellation agreement, there cannot be said to be any surviving dispute under the Sub-Dealership Agreement dated 18.03.2021 which can be referred to arbitration and that the remedy, if any, of the petitioner, could only be qua the cancellation agreement which does not contain an arbitration clause. Therefore, only a civil court has jurisdiction with regard to any such disputes.

18. In support of his contentions, the learned counsel for the respondent has relied upon on the following judgments:

- (i) *Young Achievers vs. IMS Learning Pvt. Ltd.*⁸
- (ii) *Zenith Drugs & Allied Agencies Pvt. Ltd. vs. Nicholas Piramal India*⁹
- (iii) *Jasmine Buildmart Pvt. Ltd. vs. Ahluwalia Contracts.*¹⁰
- (iv) *C.E. Constructions Ltd vs. Intertoll ICS Cecons O&M Compny (P)*

⁸ (2013) 10 SCC 535

⁹ (2020) 17 SCC 419

¹⁰ [MANU/DE/5257/2022]



- Ltd. & Ors.*¹¹
- (v) *Indian Oil Corporation Ltd. vs. NCC Ltd.*¹²
- (vi) *New Age Insurance Company Ltd. vs. Genus Power Infrastructure Ltd.*¹³
- (vii) *Agastya Agro Ltd. vs. United India Insurance Company Ltd.*¹⁴

Analysis And Conclusion

19. Having heard contentions of the parties and having given my consideration to the matter and on prima facie conspectus, I am unable to agree that the arbitration agreement contained in the “Sub Dealership Agreement” dated 18.03.2021 has been discharged/substituted by virtue of the cancellation agreement. The reasons are enumerated hereunder.

20. As noticed hereinabove, the Sub Dealership Agreement dated 18.03.2021 prescribes the respective roles and obligation of the parties thereto. The respondent was specifically entrusted with the responsibility “to handle entire area of Indore, Bhopal and Ujjain area/division (as per excise department)” and to “provide all required inputs to enable proper distribution and sales of company products in these areas.”

21. As is evident from the various provisions of the Sub-Dealership Agreement, in essence, the obligation undertaken by the “Sub Dealer” (the respondent) was to place timely purchase orders and to provide funds to ensure that adequate quantity of the concerned product are imported by the petitioner and thereafter distributed in the market. In consideration thereof, the respondent was entitled to restitution of its payment/investment along

¹¹ [2017 SCC OnLine Del 6401]

¹² [2022 SCC OnLine SC 896]

¹³ [2015 (2) SCC 424]

¹⁴ [2022 SCC OnLine TS 1323]



with further remuneration of Rs.160/- per case. It was specifically made incumbent upon the respondent/the sub-dealer to “plan out the time line for the width of distribution and provide timely reports on the initial market penetration and subsequently a monthly report to be submitted on the status brand wise and SKU wise.” This obligation of the respondent was to subsist for the entire duration of the agreement i.e. till 31.03.2022.

22. Apart from and in addition to the aforesaid, it was also contemplated in the Sub-Dealership Agreement that an initial purchase order worth Rs.3,09,76,400/- would be placed by the respondent. Admittedly, the initial purchase order/amount paid by the respondent was not to the said extent, and only an amount of Rs. 2,00,000,000/- (Rupees Two Crores Only/-) was paid by the Respondent. The scope and purport of the cancellation agreement was evidently to resolve the dispute pertaining to this shortfall.

23. A bare reading of the cancellation agreement makes it clear that it does not contain any express provision stating that all the obligations imposed on sub-dealer (the respondent) under the said Sub Dealership Agreement dated 18.03.2021 stands extinguished or effaced. All that the cancellation agreement purports to do is to set out the frame work for resolution of the dispute in respect of initial amount of Rs.2,00,000,000/- (Rupees Two Crores Only/-), paid by the sub-dealer (respondent) to the distributor/importer.

24. The Cancellation Agreement does not even contain a provision to the effect that it is in supersession of the Sub-Dealership Agreement dated 18.03.2021.

25. As such, *prima facie*, it is untenable for the respondent to contend that



the Cancellation Agreement has the effect of extinguishing or effacing all respective rights and obligations of the parties to the Sub Dealership Agreement or that it results in a full and final discharge.

26. While the cancellation agreement was confined to the disputes in respect of the initial amount of Rs.2,00,000,000/- (Rupees Two Crores only/-), the dispute/s sought to be referred to arbitration are in a wider compass. As noticed hereinabove, the disputes/claims set out in the arbitration notice are on account of loss of business as a result of deficiency in payment/investment by the petitioner and the consequent loss of estimated return, loss of goodwill amongst channel partners. The cancellation agreement does not contain any express stipulation with regard to these aspects. Whether or not the intent of the parties was to preclude such claims, is an aspect that would require a detailed examination by a duly constituted Arbitral Tribunal.

27. There can be no quarrel with the proposition, as canvassed by learned counsel for the respondent, that an Agreement which brings about a full and final settlement, results in discharge of the arbitration agreement. However, in the facts of the present case, it cannot be concluded at this stage, that the arbitration agreement stands discharged on account of the cancellation agreement.

28. It is made clear that the petitioner is not precluded from making further submissions and/or adduce evidence in arbitration proceedings to substantiate its contention/s regarding non-maintainability/non-arbitrability of the claim/s sought to be raised. In this regard, reference may be apposite to the judgment of a coordinate bench of this Court in *PVR Limited vs.*



Imperia Wishfield Private Limited¹⁵, wherein it has been held as under:

“27. It is settled position in law that the issue whether the rights of the parties under an agreement are being superseded by subsequent agreement or not, is itself an arbitrable issue which can be examined by the Arbitrator. Supreme Court in the case of Sirajuddin Kasim and Another Vs. Paramount Investment Limited., (2010) 8 SCC 557 has held as follows:

26. In the instant case the petitioners have alleged that there was economic duress in the matter of execution of the settlement agreement. Therefore, following the ratio of this Court in National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. [(2009) 1 SCC 267] this Court is of the opinion whether rights of the parties under SHA have been superseded by the subsequent settlement agreement may be an arbitrable issue and that issue can be examined by the arbitrator.”

[Emphasis Supplied]

29. Reference may also be made to the judgment in the case of ***Sanjiv Prakash vs Seema Kukreja and others¹⁶***, in which it has been held as under:

“19. when it appears that prima facie review would be inconclusive, or on consideration inadequate as it requires detailed examination, the matter should be left for final determination by the Arbitral Tribunal selected by the parties by consent. The underlying rationale being not to delay or defer and to discourage parties from using referral proceedings as a ruse to delay and obstruct. In such cases a full review of the Courts at this stage would encroach on the jurisdiction of the Arbitral Tribunal and violate the legislative scheme allocating jurisdiction between the courts and the Arbitral Tribunal. Centralisation of litigation with the Arbitral Tribunal as the primary and first adjudicator is beneficent as it helps in quicker and efficient resolution of disputes.”

[Emphasis Supplied]

30. It has been held by the Supreme Court in ***Bharat Sanchar Nigam Limited vs. Nortel Networks India Pvt. Ltd.¹⁷*** that it is only in those cases

¹⁵ 2022/DHC/005052

¹⁶ (2021) 9 SCC 732

¹⁷ (2021) 5 SCC 738



that there is not even a vestige of doubt that the dispute is not arbitrable, that the court may decline to make the reference; even if there is slightest doubt, the rule is to refer to arbitration, otherwise it would encroach upon essentially what is the matter to be determined by the Arbitral Tribunal. The relevant observation of the Supreme Court in the said case are as under:

“47 It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time barred, or that the dispute is not arbitrable that the Court may decline to make the reference. However, if there is even slightest of doubt, the rule is to refer the dispute to arbitration, otherwise it would encroach upon essentially what is essentially a matter to be determined by tribunal.”

31. In the circumstances, there is no impediment in constituting an arbitral tribunal to adjudicate the disputes between the parties.

32. The arbitration clause contained in the Sub Dealership Agreement dated 18.03.2021 contemplates a Sole Arbitrator to be appointed by either of the parties. Since the parties have been unable to agree upon appointment of a sole arbitrator, it is incumbent on this Court to appoint an independent sole arbitrator to adjudicate the disputes between the parties.

33. In the circumstances, Mr. Justice (Retired) R. K. Gauba (Mobile No.9650411919) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

34. It is made clear that it shall be open for the respondent to raise objection/s as to jurisdiction and/or arbitrability/maintainability of the claims before the learned Sole Arbitrator which shall be adjudicated by the learned Sole Arbitrator, in accordance with law.

35. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as



required under Section 12 of the Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.

36. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

37. All rights and contentions of the parties in relation to the claims/counter-claims and as to jurisdictional objections are kept open, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.

38. Needless to say, nothing in this order shall be construed as an expression of opinion of this court on the merits of the case.

39. The present petition stands disposed of in the above terms.

JULY 03, 2023/ssc

SACHIN DATTA, J

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