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

Pronounced on: 20.12.2023

+ **ARB.P. 1201/2022**

M/S S.K AGENCIES

..... Petitioner

Through: Mr. Sushil Kr. Pandey, Adv

versus

M/S DFM FOODS

..... Respondent

Through: Mr. Sidhant Kumar, Mr. Gurpreet Singh Bagga, Ms. Manyaa Chandok. Mr Shivankar Rao, Ms. Muskaan Gopal and Ms. Harleen, Advs.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the 'A&C Act') has been filed seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.

2. Briefly stated, the factual background is that the parties had entered into an agreement dated 24.07.2015. In terms of the said agreement, the petitioner was given right to operate distribution outlet/ sale depot of the respondent situated in Kanpur, Uttar Pradesh. The said agreement was intended to continue for a period of three years. However, the said agreement was extended by the parties. The said agreement contains an arbitration clause in the following terms:

"All disputes and differences arising hereof under this agreement shall be endeavored to be settled through friendly discussion and negotiation, which the parties undertake to conduct for at least a period of 10 days from the date of receipt of notice of such disputes from the aggrieved



Party, and if that fails, then through arbitration by the sole arbitration of the Managing Director of the First Party.

The language of the arbitration proceedings shall be English and the proceedings shall be conducted in Delhi only.”

3. The case of the petitioner is that the agreement dated 24.07.2015 continued to govern the relationship and dealings between the parties beyond the initial period covered by the said agreement. It is submitted that as per previous practice the petitioner continued to run the outlet of the respondent in continuation of and under the terms of the original agreement dated 24.07.2015; the said agreement continued to remain the fulcrum of contractual relationship between the parties. It is further submitted that even the respondent had continued to dispatch the material to its outlet in Kanpur in the name of the petitioner till the end of July 2019. Thereafter, the respondent is stated to have stopped sending the material to the outlet.

4. The petitioner is stated to have sent certain communications to the respondent highlighting the loss suffered by it, and seeking a copy of the extension agreement beyond 23.07.2019. The respondent vide letter dated 20.09.2019 denied the claims raised by the petitioner and *inter alia* stated as under:

“3. The agreement between the parties expired on 23.07.2019. Before expiry, so many times the matter was discussed over the phone and personal meeting but it never concluded from your side for the reason best known to you. Finally on 31st July, 2019, it was mailed to you that your agreement has expired and you were called to Delhi so that the fresh terms of the new agreement could be renegotiated to suit the requirements of the business. It is surprising that, there was no response from your side and it seemed quite obvious that you were not interested in renewing the agreement after 23.07.2019.

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7.Now since the company has decided not to continue the business



with you and has accordingly transferred the security deposit of Rs. 37,00,000/- (Thirty Seven Lakh only) in your account of 19th August, 2019, you are hereby called upon to return the stocks of the company lying with you and accordingly file your claim for the month of July, 2019 so that your account can be closed and settled....”

5. In reply to the said letter, the petitioner vide letter dated 24.10.2019 again highlighted the fact that the copy of the new extended contract/agreement was not provided to the petitioner. It was further stated that the parties continue to work even after purported termination on 23.07.2019 and thus the previous agreement was automatically renewed after 23.7.2019. Further, the Managing Director of the respondent was requested to “conclude the arbitration proceedings and passing necessary order for resolving the issues”. Vide letter dated 16.12.2019, the petitioner again requested that the arbitration proceedings be initiated at the earliest. In reply to the said letter, the respondent vide letter dated 31.12.2019 *inter alia* stated as under:

“Sir,

This has reference to your letter dated 3rd December, 2019 via email and letter dated 16th December, 2019 wherein you have desired to know about “orders passed by the Hon’ble Managing Director in Arbitration proceedings” presumably referring to your letter dated 24th October, 2019 addressed to our Managing Director requesting for resumption of business between us post termination of the contract dated 22.12.2018 which expired on 23.07.2019.

As you are aware, the contract expired on 23.07.2019 pursuant to which you were called upon to return the stocks of the Company with you immediately but the same has not been complied with by you till date despite our repeated reminders you have not responded so we have presumed that the said stocks have been disposed of by you in the market. Further, we reiterate the contents of our letter dated 20.09.2019 which has been duly received by you.

Please further note that you are only entitled for payment in respect of the Contract dated 23rd July, 2019 till the date of expiry thereof and for which we have been requesting you time and again to submit your claim



for the month of July, 2019 so that the accounts could be finalized. In the event you are ready to settle your account, you are required to contact our accounts department for doing the needful.

There is no question of any kind of arbitration to be initiated amongst us after the illegal and unprincipled action taken by you by withholding 5 trucks dispatched to our new CFA i.e. Sheetal Agencies, Kanpur and as a result it caused total disruption of the supply network of the Company in Kanpur.

Further your above mentioned request in respect thereof is totally absurd and unfounded and does not merit our attention.

Please further note that we do not propose to enter into any further business terms with you and accordingly your request for the renewal of the expired Contract cannot be entertained and the matter stands closed at our end. Please note that any further letter, email or other communication in this regard from your side, shall not be responded by us and shall be treated as redundant.

*Your faithfully,
For DFM Foods Ltd.”*

6. It may be noted that the agreement dated 22.12.2018, relied upon by the respondent in aforesaid communications, also contains an identical arbitration agreement between the parties.

7. Ultimately, vide legal notice dated 01.03.2022 the petitioner again invoked the arbitration clause seeking appointment of an arbitrator. The said request was rejected by the respondent claiming that no live dispute subsists between the parties. Thereafter, the present petition has come to be filed by the petitioner.

8. Learned counsel for the respondent has raised the following contentions to oppose the present petition:

a. It is submitted that the present petition being instituted by a sole proprietorship firm is not maintainable since the sole



proprietorship/ petitioner, in law, does not have the right to sue. To support this contention reliance has been placed on a decision of this court in ***Svapn Constructions v. IDPL Employees Co-Operative Group Housing Society***, (2006) 127 DLT 80.

b. It is submitted that the letter dated 01.03.2022 does not constitute a valid invocation of arbitration in terms of Section 21 of the A&C Act since vide the said letter, the petitioner has invoked the 2015 agreement, which agreement was superseded by the 2018 agreement. Therefore, the applicable arbitration agreement has not been invoked. It is also submitted that the petitioner has not set out the dispute/s and head/s of claim/s in the said letter which is a basic requirement of such notice. To support this contention reliance has been place on a judgment of this court in ***Rahul Jain &Ors. v. Atul Jain &Ors.***, 2022 SCC OnLine Del 3860.

c. Lastly, it is submitted that the disputes sought to raise by the petitioner are not covered within the scope of arbitration agreement. It is submitted that the agreement dated 22.12.2018 has expired by efflux of time on 23.07.2019 and thus the arbitration agreement has extinguished. It is submitted that any claim/s raised thereafter are not referable to arbitration. It is submitted that all the claims raised by the petitioner are after the said date, hence not within the scope of arbitration agreement. It is submitted that claim of damages and idling for period after the



expiry of the agreement cannot be made subject matter of arbitration agreement.

9. Having heard learned counsel for the parties, no merit is found in the objections raised by the respondent.

10. At the outset, it is noted that in terms of the settled legal position, an arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability and unless the dispute is manifestly and/or ex facie non-arbitrable, the rule is to refer the dispute to arbitration. “When in doubt, do refer” says *Vidya Drolia v. Durga Trading Corpn.*¹. I have also gone through the judgements² cited by the respondent, the same does not derogate from this position.

11. In the present case, the factual background as narrated above clearly bring out that the parties are at loggerhead over the interpretation of clause 3³ of the aforesaid agreements which provides for the operating term of the agreements. The petitioner’s case is that as per contractual provision and as per the conduct of the parties there was no automatic termination of the agreements between the parties, and that the claims for damages and idling is justified. The respondent’s case is that the agreement dated 22.12.2018 automatically expired on 24.07.2019 by virtue of clause 3 of the said

¹(2021) 2 SCC 1

²Magic Eye Developers Pvt. Ltd. v. Green Edge Infrastructure Pvt. Ltd. 2023 SCC Online SC 620; DLF Home Developers Limited v. Rajapura Homes(P) Ltd., 2021 SCC OnLine SC 78

³ “3. OPERATING TERM:

The parties intend to continue with this arrangement for a period of 3 years subject to Clause 9 and subject to renegotiation of the commercial terms every 12 months from the date of signing of this Agreement relating to the amount of security, deduction of monthly rent of the leased premises of the sales depot and Professional Fees. However, if the commercial terms are not successfully renegotiated, then this Agreement will automatically come to an end forthwith. The renegotiated terms would always be reduced to writing.”



agreement, and thus the claims raised by the petitioner for the subsequent period are outside the scope of the arbitration agreement.

12. The above controversy is liable to be adjudicated upon by a duly constituted arbitral tribunal. In these proceedings, it is beyond the province of this Court to interpret contractual provision/s and/or deal with aspects having a bearing on the merits of the respective case of the parties.

13. Also, the conduct of the parties would be a relevant factor in determining whether the agreements were extended. In **Reva Electric Car Co. (P) Ltd. v. Green Mobil**⁴, the initial period under a MoU was expiring by 31.12.2007, the Supreme Court relied upon the correspondence between the parties and found that the MoU was extended by the petitioner till terminated on 25.09.2009, and referred the parties to arbitration even in respect of disputes arising after 31.12.2007. This aspect shall be considered by a duly constituted Arbitral Tribunal.

14. In any event, it is well settled that an arbitration agreement survives the termination of the main contract. In **Reva Electric** (supra), it has been held as under:

“51. Section 16(1)(a) of the Arbitration and Conciliation Act, 1996 provides that an arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract. The plain meaning of the aforesaid clause would tend to show that even on the termination of the agreement/contract, the arbitration agreement would still survive. It also seems to be the view taken by this Court in Everest Holding Ltd. Accepting the submission of Ms Ahmadi that the arbitration clause came to an end as the MoU came to an end by efflux of time on 31-12-2007 would lead to a very uncertain state of affairs, destroying the very efficacy of Section 16(1).

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54. Under Section 16(1), the legislature makes it clear that while considering any objection with respect to the existence or validity of the

⁴(2012) 2 SCC 93



arbitration agreement, the arbitration clause which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract. To ensure that there is no misunderstanding, Section 16(1)(b) further provides that even if the Arbitral Tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. Section 16(1)(a) presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being null and void. In view of the provisions contained in Section 16(1) of the Arbitration and Conciliation Act, 1996, it would not be possible to accept the submission of Ms Ahmadi that with the termination of the MoU on 31-12-2007, the arbitration clause would also cease to exist.”

15. The judgement of **A.N. Traders (P) Ltd. v. Shriram Distribution Services (P) Ltd.**⁵, relied upon by the respondent is clearly distinguishable inasmuch as firstly, the said judgment was rendered in a petition under Section 34 of the A&C Act; secondly, the relevant clause of the agreement in that case is materially different from the present case. The relevant clause in that case provided for ‘commencing’ and ‘ending’ of agreement, and specifically provided that ‘extension’ of agreement has to be in writing.

16. There is also no merit in the contention of respondent that the invocation of the arbitration vide notice dated 01.03.2022 is invalid. It is not in dispute that the petitioner has sent a notice invoking arbitration. The said notice admittedly has been received and replied to by the respondent. The said notice clearly mentions that the petitioner is invoking clause 11 of the agreement dated 22.12.2018. Vide the said notice, the petitioner has requested the respondent to appoint an arbitrator. Non-classification of disputes or non-quantification of the claims in the said notice, cannot be

⁵2018 SCC OnLine Del 12416



construed to deny arbitration, when intent to refer the disputes to arbitration is manifest from the said notice.

17. In **Rahul Jain** (supra), relied upon by the respondent, this court has held that in absence of invocation of arbitration agreement, the arbitration proceedings, in terms of Section 21 of the A&C Act, cannot commence. The said decision is of no application in the facts of the present case since, the petitioner herein has invoked the arbitration agreement.

18. There is again no merit in the contention of the respondent that the present petition is liable to be dismissed since the petitioner is a sole proprietorship firm. In **Svapn Constructions**, relied upon by the respondent, it has been held that a sole proprietorship firm does not have any legal status and in case sole proprietorship firm wants to file a suit, it has to be in the name of the proprietor on behalf of the sole proprietorship firm and not in the name of sole proprietorship firm. The said decision is distinguishable inasmuch as in the present case, it has been averred in the petition that Mr. Satyendra Kumar Dixit is the proprietor of the M/s S.K Agencies. The affidavit in support of the petition and statement of truth has been filed by Mr. Satyendra Kumar Dixit. Therefore, the present petition is instituted by Mr. Satyendra Kumar Dixit as the proprietor of M/s. S. K. Agencies.

19. In the circumstances, there is no impediment in appointing an independent sole arbitrator to adjudicate the disputes between the parties, as contemplated in **Perkins Eastman Architects DPC v. HSCC (India) Ltd.**, (2020) 20 SCC 760.

20. Accordingly, Mr. Justice (Retd.) R. B. Misra, Former Judge, Himachal Pradesh High Court, (Mob. No.: 9816066600) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.



21. The respondent shall be entitled to raise preliminary objections as regards jurisdiction and/or arbitrability/maintainability of the claims which shall be decided by the arbitrator, in accordance with law.
22. 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 A&C Act.
23. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule of the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.
24. Parties shall share the arbitrator's fee and arbitral costs, equally.
25. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.
26. Needless to say, nothing in this order shall be construed as an expression of this court on the merits of the disputes between the parties.
27. The present petition stands disposed of in the above terms.

SACHIN DATTA, J

DECEMBER 20, 2023/hg