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

\+ ARB.P. 290/2024

MOGLI LABS (INDIA) PVT. LTD. THROUGH ITS AUTHORIZED SIGNATORY MR. SANIDHYA JAIN

.....Petitioner

Through: Mr Harsh Vardhan, Adv.

versus

M/S SHUBAN PRINTS THROUGH ITS PARTNERS & ORS.

.....Respondents

Through: Mr Dhruv Gupta, Adv. (through VC)

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

% **28.08.2024**

1. This is a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator for adjudication of disputes between the parties.

2. The petitioner is engaged in Business-to-Business ('B2B') procurement and supply of essential industrial supplies. The respondents approached the petitioner for buying/procuring of packaging material and various other products and to formalize the transaction, a Distributor Agreement dated 20.10.2022 was entered into.

3. The agreement contains an arbitration clause being Clause 9(d.) which reads as under:

> *"d.* ***Dispute Resolution:*** *If any dispute arises between the Parties in connection with this Agreement, the same shall be settled by a Sole Arbitrator appointed with mutual consent of the Parties. The*

arbitration proceedings shall be governed by the Indian Arbitration and Conciliation Act, 1996 or any statutory modification there on. All arbitration proceedings shall be conducted in English Language and the place of arbitration shall be at New Delhi."

4. The dispute is regarding a Purchase Order bearing No. PO-20221129-7113 for supply of 15,00,000 units of Lahori Zeera Cartoon 160ml Tray. Since there were disputes with regard to this Purchase Order, the petitioner invoked arbitration *vide* legal notice dated 02.05.2023. Thereafter, the present petition is filed.

5. Mr Gupta, learned counsel for the respondents primarily states that the dispute raised by the petitioner is not contemplated in the arbitration agreement.

6. Clause 1 of the Distributor Agreement dated 20.10.2022 reads as under:

*"1. **Appointment of Distributor**: Upon the terms and conditions of this Agreement, the Company hereby appoints the Distributor as an authorized Distributor of the Company for selling and marketing only to specified prospects/customers as mentioned in Schedule B as confirmed by the Company in writing for the products under the brand (s) (the "Products") as listed in Schedule A attached hereto and incorporated herein, and the Distributor hereby accepts such appointment.*

In such capacity, the Distributor will purchase the Products from the Company and sell the same to Customers in Indian & International markets."

7. He states that hence the dispute could only be with regard to customers mentioned in Schedule B. He draws my attention to Schedule B which reads as under:

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Schedule B

Customer Name:

1. Lupin Ltd

2. SWG Foods Pvt Ltd (Dukes Brand)

3. Sunshine Foods Pvt. Ltd (Chaayos Brand)

4. Deepak Fastners Pvt. Ltd

5. Archian Food (Brand: Lahori Zeera)

6. Bhikaji Food

7. Godrej"

8. Mr Gupta, learned counsel for the respondents states that the first four entries were agreed and entry number 5, 6 and 7 were unilaterally added by the petitioner to bring the dispute as raised within the domain of the Distributor Agreement. He draws my attention to Clause 9(g.) of the Distributor Agreement which reads as under:

*"g. **Modification**: Any amendment or modification of this Agreement shall be in writing signed by the Parties."*

9. Mr Gupta, learned counsel for the respondents states that modification could only be valid if it was in writing signed by the parties. The entries in Schedule B of entry Nos. 5, 6 and 7 are in handwriting, unilaterally and malafidely incorporated by the petitioner and never agreed by the respondents. Had the same been agreed by the respondents, the same would have been counter-signed by the respondents.

10. Mr Gupta also draws my attention to para 7 of the reply to the Section 21 notice of the respondents dated 16.05.2023, which reads as under:

> *"7. That vis-a-vis your invocation of Arbitration in terms of Clause 9(d) of the Distributorship Agreement dated 20.10.2022, the same is highly misplaced and preposterous. It is pertinent to mention that by way of Distributorship Agreement dated 20.10.2022, our client was appointed as an authorized Distributor of your client for selling and marketing only to specified customers as mentioned in Schedule B of the said agreement. The Purchase order bearing no.PO-20221129-7113 is completely an independent and separate order and being so, the said transaction is totally beyond purview of the said distributorship agreement. Therefore, the present dispute being non-arbitrable cannot be refer to Arbitrator."*

11. Hence, he states that the dispute as sought to be referred to arbitration is not covered within the Agreement and should not be referred.

12. In response, Mr Harsh Vardhan, learned counsel for the petitioner states that the same is incorrect and the Agreement was duly annexed to the e-mail sent to the respondents which shows consensus ad idem.

13. I have heard learned counsel for the parties.

14. The fact whether the three entries were handwritten unilaterally, malafidely and without the consent of the respondents cannot be adjudicated by a referral Court.

15. The Hon'ble Supreme Court in ***SBI General Insurance Co. Ltd. v. Krish Spinning,*** 2024 SCC OnLine SC 1754 has observed as under:

"113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in In Re: Interplay (supra) that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a prima facie arbitration agreement and not any other issues. The relevant observations are extracted hereinbelow:

> *"209. The above extract indicates that* ***the Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a prima facie arbitration agreement and not other issues". These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings.*** *Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a timebound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. [...]"*
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> *(Emphasis supplied)*

114. In view of the observations made by this Court in In Re : Interplay (supra), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie *existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in Vidya Drolia (supra) and adopted in NTPC v. SPML (supra) that the jurisdiction of the referral court when dealing with the issue of "accord and satisfaction" under Section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in In Re : Interplay (supra).*

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118. Tests like the "eye of the needle" and "ex-facie meritless", although try to minimise the extent of judicial interference, yet they require the referral court to examine contested facts and appreciate prima facie evidence (however limited the scope of enquiry may be) and thus are not in conformity with the principles of modern arbitration which place arbitral autonomy and judicial non-interference on the highest pedestal."

16. The judgment of ***SBI General Insurance Co. Ltd. (supra)*** clearly holds that the referral Court is only to see the existence of the arbitration agreement and in case the dispute as alleged by one of the parties is covered within the arbitration clause, the parties must be referred to arbitration. The issues raised by Mr Gupta as captured above are touching the merits of the controversy and will require trial/evidence which only an Arbitrator can decide.

17. For the said reasons, the petition is allowed. Since the parties are still having disputes between them, the following directions are issued:-

i) Ms. Wamika Trehan, Advocate (Mob. No. 9818978088) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.

ii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi (hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of the DIAC (Administrative Cost and Arbitrators' Fees) Rules, 2018.

iii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.

iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, claims/counter-claims and merits of the dispute of either of the parties, as well as the objection of the respondents as to the three entries being handwritten and beyond the purview of the Agreement are left open for adjudication by the learned arbitrator.

v) The parties shall approach the learned Arbitrator within two weeks from today.

18. The petition is disposed of in the aforesaid terms.

JASMEET SINGH, J

AUGUST 28, 2024/sr

Click here to check corrigendum, if any