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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 5th April, 2024.
+ **ARB.P. 501/2023**

ARJUN MEHTA

..... Petitioner

Through: Ms. Aakanksha Kaul, Mr. Aman
Sahanai, Ms. Satya Sabharwal &
Mr. Akash Saxena, Advs. (M:
9711870725)

versus

SAURAV GUPTA & ORS.

..... Respondents

Through: Mr. Ratnesh Sharma & Mr. Abhinav
Nagar, Advs. for R-1 & 2 (M:
8448722439)
Mr. Arif Ansari, Adv. for R-3. (M:
8826562027)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. This hearing has been done through hybrid mode.

Background Facts:

2. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeks appointment of an Arbitrator in terms of the Memorandum of Understanding ('MoU') which does not bear a date. The same was entered into between- Plaintiff -Mr. Arjun Mehta and Respondent No. 3- Mr. Suraj Partap Malik on the one hand and Respondent No. 1- Mr. Saurav Gupta and Respondent No. 2-Mr. Palash Ghosh on the other hand.
3. As per the said MoU, the parties together, were intending to incorporate a company for the purpose of manufacturing and marketing of



cheese. They entered into an MoU, to this effect, which had various clauses.

4. As per the said MoU the type of cheese that was agreed for manufacture was “*Bandel*” cheese. The Petitioner and Respondent No.3 were to jointly have 70% of the shareholding of the company which was to be incorporated and Respondent No.3 was to own 30% shareholding. The detailed terms were also contained in the MoU. The clause relating to intellectual property and the arbitration clause was also specified. The said MoU was signed in original by Mr. Palash Ghosh and Mr. Saurav Gupta. Two witnesses had also witness witnessed the said MoU being Mr. Bulti Ghosh and Mr. Prasenjit Bhattacharjee.

5. However, the Respondents 1 and 2 after signing the same couriered the MOU to the Petitioner on 22nd July, 2022. This is, therefore, considered as the date of the MoU. The MoU which is annexed with the petition, however, does not have the signatures of the Petitioner and the Respondent No.3.

6. The original MoU which bears the signatures of the Respondents and the two witnesses has been produced before the Court.

Submissions

7. The submission on behalf of the Petitioner is that the Respondent Nos.1 and 2 have signed the MoU. The Petitioner is agreeable to be bound by the arbitration clause and, thus, even if the Petitioner has not signed the MoU the same would be binding on the Petitioner as also Respondent Nos. 1 and 2.

8. Ld. Counsel- Ms. Aakanksha Kaul, relies upon the decision of the Id. Single Judge of this Court in *Buildmyinfra Pvt. Ltd. v. Gyan Prakash*



Mishra (2022 SCC OnLine Del 2196). It is, further, submitted by her that various covenants of the MOU are being breached by Respondent Nos.1 and 2. They are also imitating the label which was created for the purposes of the cheese products which was to be manufactured and marketed by the company to be incorporated.

9. The company-Bandel Cheese Pvt. Ltd. was incorporated on 3rd August, 2022. Ld. Counsel for the Petitioner submits that the Respondent Nos. 1 and 2 are now carrying on their independent business in violation of the terms of the MoU. Hence, an Arbitrator ought to be appointed.

10. On the other hand, Mr. Ratnesh Sharma appearing for Respondent Nos. 1 and 2 raises the following objections;

- i. He submits that the MoU is not a binding document as the same was recalled and revoked as on 28th July, 2022 i.e., within a few days after the original MOU was sent by courier to the Petitioner.
- ii. The question as to whether *Bandel* cheese can be used as a trade mark is pending both before the Trade Marks Registry and also before Geographical Indication ('GI') Registry. *Bandel* cheese is a geographical indication over which no monopoly can be claimed by any party. Ld. Counsel for Respondent Nos. 1 and 2, further, submits that the trade marks which were applied by the Petitioner have been abandoned.
- iii. The existence of the arbitration agreement has to be gone into by the referral Court.
- iv. The arbitrability of the dispute is in question inasmuch as the



monopoly in respect of *Bandel* cheese mark would be an issue which arises in public law and cannot be decided in arbitral proceedings.

- v. There is no consensus *ad idem* in respect of the terms of the MoU.
 - vi. The MoU has not been executed as per clauses contained in MoU i.e., clauses 2.3 and 6.5. The Petitioner has not signed the said MoU and the third witness has also not signed the MoU.
 - vii. In terms of *Vidya Drolia and Ors. v. Durga Trading Corporation ((2021) 2 SCC)*, the Arbitrator cannot go into issues which are in *rem* and since the dispute is not arbitrable, the petition is not liable to be allowed.
 - viii. Respondent Nos. 1 and 2 has always been in the cheese business even prior to the MoU, thus, there cannot be any violation of the said MoU.
 - viii. The company *Bandel Cheese Pvt. Ltd.* has been registered by misusing the digital signatures of Respondent Nos. 1 and 2 and the disputes are also pending before the Registrar of Companies ('ROC'). The matter in respect of using of the name *Bandel Cheese* as part of the company is also pending before the ROC.
11. Ld. Counsel for the Respondents Nos. 1 and 2 also relies upon the following decisions:
- i. *Magic Eye Developers Pvt. Ltd. v. Green Edge Infrastructure Pvt. Ltd. & Ors. (2023 SCC OnLine SC 620).*
 - ii. *S.S. Con-Build Pvt. Ltd. v. Delhi Development Authority*



(2023:DHC:3092)

- iii. ***Alsorg Interiors India Pvt. Ltd. v. Kunal Suri & Anr.***
(2023:DHC:2263)
- iv. ***Sequoia Fitness and Sports Technology Pvt. Ltd. v. GD Goenka Pvt. Ltd. & Ors.*** (2022 SCC OnLine Del 3554).
- v. ***Vidya Drolia and Ors. v. Durga Trading Corporation*** ((2021) 2 SCC)
- vi. ***MX Media & Entertain Pte. Ltd. v. Contagious Online Media Networks Pvt. Ltd.*** (2021 SCC OnLine Del 1490)

Analysis

12. The Court has considered the matter and heard counsel for the parties. The first and foremost question is whether there is an arbitration agreement between the parties. The original MoU has been perused and the signatures of Respondent Nos. 1 and 2 on the same are not disputed. The arbitration clause in the agreement reads as under:

“7. GOVERNING LAW AND DISPUTE RESOLUTION

7.1. This MoU is governed by and shall be construed in accordance with Indian law. The courts of New Delhi shall have exclusive jurisdiction.

7.2. In case of any disputes or differences arising between the Parties out of or in relation to this MoU, including any issue regarding construction, meaning, scope, operation or effect of this MoU or breach of this MoU, Parties shall make efforts in good faith to amicably resolve such dispute.

7.3. If the Parties fail to reach a settlement through amicable discussion within a period of ninety days, or such longer time as mutually agreed, the dispute or difference shall be finally settled by arbitration under



the provisions of the Arbitration & Conciliation Act 1996 by reference to a sole Arbitrator. The arbitration shall be conducted as per the Rules of Delhi International Arbitration Centre (Delhi High Court) at New Delhi. The place and seat of arbitration shall be New Delhi and the Court of New Delhi shall have exclusive jurisdiction.

7.4. It is hereby agreed between the Parties that they will continue to perform their respective obligations under this MoU during the pendency of any dispute or difference and the functioning of the New LLP shall not be stalled. The Arbitrator shall have the power to order specific performance of the MoU.”

13. A perusal of the MoU would show that the clause itself is wide to include disputes or differences arising between the parties out of or in relation to this MoU including the construction, meaning, scope, operation effect or breach. Such a clause is a widely construable clause. Further, in terms of the judgement of ***Buildmyinfra Private Limited (supra)***, since the MoU itself was signed by the parties in question, it was held the clauses would be applicable to the parties. Relevant paragraph of the said decision is set out below:

*“10. In the present case, the original of the Agreement has also been produced in Court. It prima facie bears the signature of the respondent at the foot of every page and also on the last page, although he has signed on the last page at the place where the petitioner's representative was required to sign. Mr. Rana endeavours to submit that the Agreement was invalid as it does not contain the signature of the petitioner's representative. However, on this point, the judgment of the Supreme Court in *Govind Rubber Limited v. Louis Dreyfus Commodities Asia Private Limited*, (2015) 13 SCC 477 [paragraphs 15 and 16] cited by Ms.*



Majumdar, makes it clear that it is not necessary for the written document to be signed by all the parties, so long as the existence of an arbitration agreement can be culled out from the exchange of letters, telex, telegrams or other means of communication which provide a record thereof. So long as it can prima facie be shown that the parties are ad idem, the liability of a party cannot be negated only because the agreement has not been signed by him or her.”

The Respondent nos 1 and 2 clearly signed the MOU. They have couriered the same to the Petitioner, expressing their acceptance of the terms of the MOU. The Petitioner does not challenge the existence of the MOU. Thus, the mere communication a few days later resiling from the MOU or cancelling it does not cancel the arbitration clause or give an escape to the Respondent nos 1 and 2 from the obligations stipulated in the MOU.

14. In the recital to the MoU there are various negative covenants that Respondent Nos.1 and 2 have agreed. It is not in dispute that the said Respondents have signed the agreement. The Petitioner who may not have affixed the signatures is not disputing the said MoU. Thus, once the Respondent Nos. 1 and 2 have signed and couriered the agreement in original to the Petitioner, the agreement takes effect. The arbitration clause, therefore, cannot be stated to be non-existent.

15. The question as to what is the length and breadth of the scope of the arbitration clause would be an issue which would have to be considered by the Id. Arbitrator or at the stage of reference by this Court which the Court is dealing with in the present order.

16. The Petitioner seeks to raise the following disputes in the arbitration



proceedings as stated in the notice invoking arbitration dated 20th October, 2022:

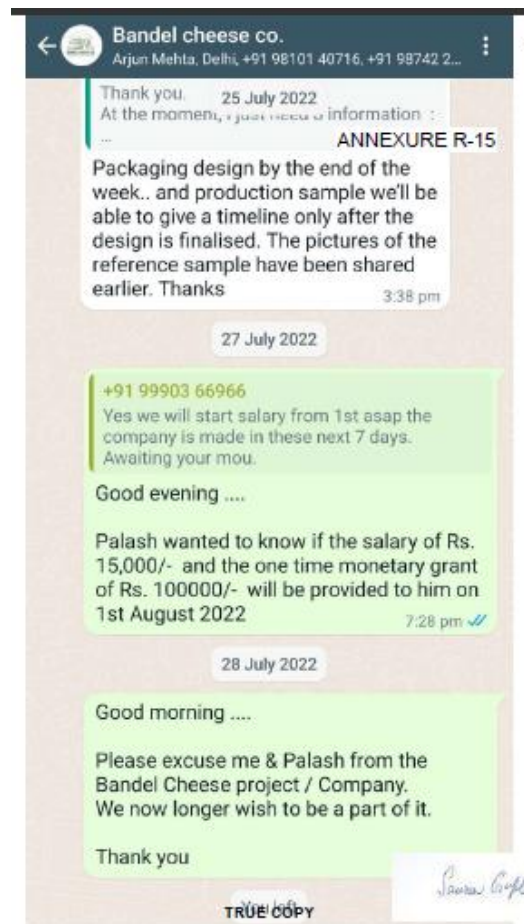
“A. Claim for outstanding subscription money along with interest @ 10% p.a.

B. Claim for loss of business opportunities

C. Damages for infringement of the Company’s intellectual property”

17. A perusal of the above claims would show that insofar as claim A is concerned, the Petitioner no longer presses the said claim. Insofar as Claim B is concerned, this is a loss of business opportunity claim which squarely arises out of the agreement.

18. The WhatsApp chat dated 28th July, 2022 which has been issued by the Respondent No.1 would show that after having couriered the agreement, on 28th July, 2022, the Respondent stated as under:



19. After sending this message on a group called Bandel Cheese Company which was stated to have been created by the parties, the Respondent No.1 left the group.

20. Insofar as Respondent No. 2 is concerned, there is nothing on record as to how he exited from the agreement.

21. This situation has arisen immediately within a week after the agreement was couriered. It is not in dispute that Respondent No.2 is manufacturing cheese/ products and Respondent No.1 is marketing the products in association with the Biswas Bangla Marketing Corporation. A



sample packaging has also been placed on record by Id. Counsel for the said Respondents, reproduced hereinunder:



22. The Respondent No.1 is running an entity by the name ‘The Whole Hog Deli’ which manufactures *Bandel* cheese. The question as to whether the Respondent Nos. 1 and 2 can continue doing their business as they are currently doing and whether the same would be violative of the terms of the MoU would be an arbitrable dispute between the parties. The MoU itself consists of the following clauses which would have a bearing on the conduct of parties.

“3.4 The Second Party shall ensure that without the consent of the First Party no sale or manufacture is done

5.5 The Parties agrees and undertakes that they shall not, for itself or on behalf of any other person or business enterprise, engage in any business activity which competes with the New LLP within India till the time it is a partner in the New LLP unless otherwise agreed in writing between the parties”

23. The MOU having been executed by Respondent Nos.1 and 2, it cannot be said that the loss of business opportunity claim would not be a claim arising out of the MoU. In fact, the question whether the Respondent Nos. 1 and 2 can conduct cheese business outside of the Company



incorporated by the parties, is also an arbitrable dispute. The said Respondents may be entitled to claim that the clause is in restraint of trade, but even this issue would have to be adjudicated by the Ld. Arbitrator. The enforceability of negative covenants in the MOU would be within the realm of the arbitrator's jurisdiction.

24. Insofar as the third claim i.e., claim C for intellectual property is concerned, certain labels are stated to have been created during the negotiation period around the time when the MoU was executed. The sample of the label of the Petitioner is extracted hereinunder:



25. There can be no doubt that insofar as the *Bandel* cheese mark itself is concerned, whether it is a Geographical Indication ('GI') or a mark which is owned by any particular community or region, cannot be subject matter of arbitration. The question whether the said mark can be registered also cannot be gone into arbitration. Registration of marks have to be exclusively decided by the office of the Registrar of Trade Marks. However, if the disputes relating to the intellectual property surrounding a label and other material created for marketing and promotion, would not be excluded from the scope of arbitration. The definition of the intellectual property under the MoU reads as under:



“4. INTELLECTUAL PROPERTY

4.1. All intellectual property rights in relation to the production/ manufacture and any recipes created and to be created in relation to the Cheese shall vest with the First Party till the incorporation of the Company.

4.2. The Company/First Party shall apply for trademark/copyright and patent, etc as applicable, before the concerned authorities and the same shall vest with the First Party at all times and continue to be the sole property of the First Party, which shall be assigned to the Company upon incorporation.

4.3. The Second Party may not use the word/ trademark Bandel or any variations thereof with prefixes or suffixes without the permission of the First Party.

4.4. The company shall apply for PAN, GST with the appropriate authorities and the same shall vest with the first party.”

26. The above clause includes within its fold, not merely the mark *Bandel* cheese, but also copyrights in the label, any recipes which may have been created, etc. All this would constitute intellectual property over which arbitration can take place in terms of the MoU.

27. The question raised by the Respondent Nos. 1 and 2 in respect of there being no consensus *ad idem*, is therefore, decided against the Respondent Nos. 1 and 2. The MoU was signed, and at the time when it was signed there was consensus *ad idem*. However, thereafter for whatever reason, Respondent Nos. 1 and 2 may have reneged on or termination or revoked the agreement.

28. The arbitration clause in the MoU is broad enough to cover all the disputes which arise between the parties. Under such circumstances, this



Court is of the opinion that the Arbitrator would be liable to be appointed to adjudicate the disputes between the parties. Needless to add that the observations made in this order would not be binding on the Arbitrator at the time of final adjudication.

29. The matter is, accordingly, referred to arbitration to **Justice Manmohan Singh (Retd) [M:9811079753/ 9717495001]** who shall act as the sole Arbitrator. The arbitral proceedings shall take place under the aegis of the Delhi International Arbitration Centre ('DIAC'). The fee of the Arbitrator shall be paid in terms of the Fourth Schedule of the Act as amended by DIAC Rules, 2023.

30. Insofar as the disputes relating to incorporation of the company and the trade mark *Bandel* cheese is concerned, those shall be liable to be adjudicated by the appropriate forum/fora which are already seized of the matter.

31. Parties to appear before the DIAC on 24th April, 2024.

32. List before the DIAC on 24th April, 2024.

33. Let a copy of the present order be emailed to Secretary, DIAC on email id- delhiarbitrationcentre@gmail.com.

34. The petition is disposed of, in the above terms. All pending applications are also disposed of.

PRATHIBA M. SINGH
JUDGE

APRIL 5, 2024

dj/bh

(corrected & released 9th April, 2024)