



2024:DHC:4994



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **ARB.P. 750/2023****MOTHER BOON FOODS PVT. LTD.**PetitionerThrough: **Mr. Lalit Bhardwaj, Mr. Jatin
Anand Dwivedi and Mr. Chaan
Alam Kazi, Advocates.**

versus

READY ROTI INDIA PVT. LTD.RespondentThrough: **Mr. Shrey Chathly, Advocate.****CORAM:****HON'BLE MR. JUSTICE C. HARI SHANKAR****JUDGMENT (ORAL)**

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03.07.2024

1. The factual matrix of this case is somewhat convoluted.
2. This petition has been preferred by the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996¹, seeking appointment of an arbitrator as the earlier arbitrator who was in seisin of the disputes between the parties has, by letter dated 12 May 2023, withdrawn from the arbitral proceedings.
3. Once an arbitrator withdraws from the arbitral proceedings, the mandate of the arbitrator stands terminated under Section 15(1)(a)² of the 1996 Act. The remedy with either party who desires to continue

¹ The 1996 Act.

² 15. **Termination of mandate and substitution of arbitrator.—**

(1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate—

(a) where he withdraws from office for any reason;



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the arbitral proceedings is under Section 15(2)³. Section 15(2) of the 1996 Act requires the party who seeks to reignite the arbitral proceedings to do so in accordance with the rules applicable at the time of appointment of the earlier arbitrator. The reference to “rules” in Section 15(2) has been interpreted by the Supreme Court in *Yashwith Constructions P Ltd. v. Simplex Concrete Piles India Ltd. & Anr.*⁴, as referring to the arbitration agreement between the parties. This position also stands noted by a coordinate Bench of this Court in a recent decision in *Raj Chawla and Co. Stock and Share Brokers v. Nine Media and Information Services Ltd*⁵.

4. The Manufacturing Agreement dated 25 July 2012, between the parties, provides for arbitration as a method of resolution of disputes in Clause 17.2 thereof, which reads thus:

“17.2 **Arbitration**

17.2.1 Any and all claims, disputes, questions or controversies involving the Parties and arising out of or in connection with or relating to this Agreement, or the execution, interpretation, validity, performance, breach or termination hereof, including, without limitation, the provisions of this Clause (individually, a Dispute) that is not settled to the satisfaction of the Parties under Article 17.1 above shall be finally resolved by arbitration in accordance with the rules of Indian Arbitration and Conciliation Act, 1996 and any amendment of the same effected and enacted from time to time

17.2.2 For the purpose of such arbitration, the Company shall appoint the Sole Arbitrator.

17.2.3 The place of arbitration shall be Delhi.

17.2.4 All arbitration proceedings shall be conducted in the

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

⁴ 2006 (6) SCC 204

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English language.”

5. Though Clause 17.2.2. of the Agreement empowers the respondent to appoint the arbitrator, that clause cannot be enforced in view of the judgment of the Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Limited***⁶. The Supreme Court has held that, in such cases, both parties would have to be granted the opportunity to decide on the arbitrator who has to arbitrate on the dispute. This would, however, require the party who seeks to continue the arbitral proceedings to address a communication to the other party, suggesting the name of an arbitrator to arbitrate. That, admittedly, has not been done in the present case after the existing arbitrator refused to continue with the proceedings by his letter dated 12 May 2023.

6. The occasion for this Court to step in and appoint an arbitrator under Section 11 (6) of the 1996 Act arises only where the parties are unable to agree on the arbitrator who has to deal with the matter. Absent such failure of the parties to arrive at an agreement, this Court cannot assume jurisdiction and appoint an arbitrator on its own.

7. This petition, therefore, is premature, as the petitioner has directly approached the Court without in the first instance communicating with the respondent with respect to an arbitrator to arbitrate on the disputes.

8. While the petition would, therefore, have to be rejected on this ground, I do not deem it appropriate to end the discussion at this point,



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as a serious question of law has been raised by the respondent which requires to be dealt with, so that it is not raised at a later stage.

9. Before approaching the said issue, certain facts are required to be noted.

10. On 12 April 2014, the respondent, apparently, in exercise of the authority conferred by Clause 17.2.2 of the agreement, unilaterally constituted an Arbitral Tribunal. The said Arbitral Tribunal went on to render an *ex parte* award against the petitioner on 15 July 2014. The petitioner challenged the said award before this Court by means of OMP (Comm) 136/2017, which was allowed by this Court *vide* judgment dated 27 August 2018, setting aside the award dated 15 July 2014.

11. The petitioner, thereafter, moved a petition under Section 11 (6) of the 1996 Act for appointment of an Arbitrator. However, during the pendency of the said petition, the respondent, *vide* the following letter dated 3 December 2018, addressed to one Mr. A. K. Raghava, a retired Additional District Judge (who would be referred to hereinafter as “Mr. Raghava”) appointed him as an arbitrator:

“3 December, 2018

Mr. A. K. Raghava, ADJ (Retd.)
1-A, Civil Lines
Gurgaon - 122 001

Sub: Appointment of arbitrator in the disputes / controversies
arising from Manufacturing Agreement with M/s Mother Boon
Foods Pvt Ltd

Dear Sir,

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By: AJIT KUMAR
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Date: 07.07.2024 23:51

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AN HARI SHANKAR
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We have entered into Manufacturing Agreement with M/s Mother Boon Foods Pvt Ltd on 25 July, 2012. Certain disputes /controversies have arisen in connection with the said agreement between the parties. The parties have mutually agreed under Article 17 of the said agreement that sole arbitrator shall be appointed by us to adjudicate the disputes/controversies arising from the said agreement. Copy of agreement is attached for your reference.

In accordance with foregoing, we wish to appoint you as Sole Arbitrator to adjudicate the disputes/controversies/issues arising from or with reference to the aforesaid agreement between the parties including their claims and counter claims.

You are requested to accord your consent to act as Sole Arbitrator in the matter and initiate arbitral proceedings at the earliest.

Thanking you.

Yours sincerely,

For Ready Roti India Pvt Ltd
(Erstwhile, Mindscape One Marketing Pvt Ltd)

Sd/-
(S. C. Agrawal)
Director”

12. As is apparent from the reading of the aforesaid letter, it purports to state that the appointment of Mr. Raghava was by mutual agreement between the parties.

13. Mr. Bhardwaj, learned counsel for the petitioner, however, disputes this contention and submits that the appointment of Mr. Raghava by the respondent was unilateral without obtaining any consent from the petitioner. As a result, apparently no Statement of Claim was ever filed by the petitioner before Mr. Raghava.

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14. On 21 October 2021, the petitioner withdrew the Section 11 petition filed by it before the learned District Court, as the jurisdiction to pass orders under Section 11(6) vests with the High Court, specifically with the Chief Justice or his designate.

15. Having thus withdrawn the Section 11 petition filed before the learned District Court, the petitioner filed Arb.P. 176/2023 under Section 11(6) of the 1996 Act before this Court seeking appointment of an arbitrator to arbitrate on the disputes between the parties.

16. In the meanwhile, however, the petitioner had addressed the following communication to Mr. Raghava on 16 July 2022:

“Dated 16-07-2022

To,

Shri A.K.Raghva
A.D.J. (Retd)
1A Civil Lines
Gurugaon (HR)

Sir,

Kindly refer letter dated 02-07-2022 of M/s Ready Roti India Pvt.Ltd.RZ-167(1) A Block , Road No. 4,Mahipalpur Extn. New Delhi, in this connection it is to informed that since both the parties have agreed to appoint you as sole arbitrator, and both the parties are Company registered under the Company Act.

M/s Ready Roti India Pvt. Ltd. has accepted in their para-3 of the above letter that we had requested to appoint you as sole arbitrator vide your letter dated 03-12-2018 and 04-12-2018, as per the agreement executed.

In the above circumstances you are kindly requested to proceed ex-parte proceeding and decide the matter for which we will be thankful to you.

Thanking you.

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Sd/-
(Mohd. Khursheed Chaudhary)
Director
Mother Boon Foods (P) Ltd.
Khasra No.219, Vilage- Bhailjuri”

17. In view of the specific acknowledgment, in the letter dated 16 July 2022 (*supra*) addressed by the petitioner to Mr. Raghava, to the effect that his appointment as sole arbitrator was by agreement of both parties, it cannot lie in the mouth of the petitioner today to contend that the appointment of Mr. Raghava by the respondent on 3 December 2018 was unilateral. The petitioner has, in his communication dated 16 July 2022 to Mr. Raghava, clearly accepted the factual position, reflected in the letter dated 3 December 2018 that the appointment of Mr. Raghava was bilateral and not unilateral.

18. A Coordinate Bench of this Court, on 14 February 2023 disposed of Arb.P. 176/2023 as premature, as, in the opinion of the Coordinate Bench, the mandate of Mr. Raghava was still continuing. Till the said mandate was terminated, the Coordinate Bench held that the petitioner could not invoke Section 11 (6) of the 1996 Act and seek appointment of any other arbitrator.

19. It is at this juncture that it becomes necessary to note the submissions of Mr. Shrey, learned counsel for the respondent, to which I have alluded in para 7 *supra*. Mr. Shrey’s contention is that the mandate of Mr. Raghava stands terminated by operation of Section 29A(4)⁷ of the 1996 Act, as he failed to make an award within the

⁷ 29-A. Time limit for arbitral award-

(4) If the award is not made within the period specified in sub-section (1) or the extended



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period envisaged under Section 29A(1)⁸. Mr. Shrey further submits that in this context, Section 29A(1) has to be read with Section 23(4)⁹ of the 1996 Act. He submits that pleadings before Mr. Raghava ought to have been completed within six months of 3 December 2018 and Mr. Raghava was empowered to pass an award within one year thereof. On the expiry of this period, Mr. Shrey's contention is that mandate of Mr. Raghava stands terminated by operation of law, specifically by Section 29A(4) of the 1996 Act.

20. He relies, in this context, on the judgment of the Coordinate Bench in *Raj Chawla*. The occasion to enter into this dispute does not arise in the present case for the simple reason that the order dated 14 February 2023, by which a Coordinate Bench of this Court disposed of Arb. P. 176/2023, specifically notes that the mandate of Mr. Raghava was continuing as on that date. That order is binding *inter parties*, unless it is set aside by any hierarchically superior judicial forum. Though Mr. Shrey submits that the order was passed *ex parte*, he admits that the respondent came to know of this order when the present petition came to be filed by the petitioner.

21. The present petition was filed by the petitioner in May 2023.

period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the court has, either prior to or after the expiry of the period so specified, extended the period:

⁸ 29-A. Time limit for arbitral award.—

(1) The award in matters other than international commercial arbitration shall be made by the arbitral tribunal within a period of twelve months from the date of completion of pleadings under sub-section (4) of Section 23:

Provided that the award in the matter of international commercial arbitration may be made as expeditiously as possible and endeavour may be made to dispose of the matter within a period of twelve months from the date of completion of pleadings under sub-section (4) of Section 23.

⁹ 23. Statements of claim and defence.—

(4) The statement of claim and defence under this section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of their appointment.

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We are today in July 2024 and, till date, the respondent has not chosen to challenge the order dated 14 February 2023.

22. It is a well settled principle of law that an order is binding *inter parties* even if it is erroneous, whether on facts or in law. The sanctity of an order passed inter parties is well settled. It can be over turned only in a manner known to law and, unless that is done, neither of the parties can seek to escape the order by stating that it is contrary to the legal position which exists. One may rely, for this purpose, on the judgment of the Supreme Court in ***Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman***¹⁰.

23. Inasmuch as the order dated 14 February 2023 passed by the coordinate Bench of this Court in Arb. P. 176/2023 has not been challenged by the respondent, it is binding on both parties. By operation of the said order, therefore, Mr. Raghava's mandate has to be treated as continuing as on 14 February 2023.

24. After 14 February 2023, Mr. Raghava has himself stated that he is not continuing with the proceedings any further by communication dated 12 May 2023. The withdrawal of Mr. Raghava from the proceedings by the said communication, results in termination of his mandate within the meaning of Section 15(1)(a) of the 1996 Act.

25. Mr. Shrey submits that the withdrawal of the learned arbitrator from the proceedings by the letter dated 12 May 2023 was only as a



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response to the respondent's communication dated 14 May 2022 by which the learned arbitrator was informed that his mandate stood terminated under Section 29A(4).

26. Be that as it may, the fact of the matter is that, as on date, Mr. Raghava has withdrawn from the proceedings and a fresh arbitrator has necessarily to be appointed.

27. As already noted towards the commencement of this judgment, the remedy with the petitioner is to seek appointment of an arbitrator in accordance with the protocol envisaged in the arbitration agreement read with the judgment of the Supreme Court in *Perkins Eastman Architects DPC and Bharat Broadband Network Ltd v. United Telecoms Ltd*¹¹.

28. Mr. Bhardwaj candidly acknowledges that no notice, suggesting appointment of alternate arbitrator has been issued by him to the respondent after the withdrawal of Mr. Raghava by the communication dated 12 May 2023.

29. The petitioner could not have approached this court under Section 11(6) without in the first instance, communicating with the respondents for appointing an arbitrator.

30. In these circumstances, this petition is disposed of reserving liberty with the petitioner to address a communication to the



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respondent, suggesting the appointment of alternate arbitrator. In the event that the parties are unable to arrive at a consensus regarding the arbitrator, the remedies with the petitioner as are available in law shall stand reserved.

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

C. HARI SHANKAR, J.

JULY 3, 2024

P/dsn

Click here to check corrigendum, if any

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