



2024:DHC:5455



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

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Decided on: 22nd July, 2024+ **ARB.P. 1381/2022 & I.A. 15345/2023**

PACIFIC FOODS

.....Petitioner

Versus

KREST ENTERPRISES

.....Respondent

+ **ARB.P. 1382/2022 & I.A. 15423/2023**

PACIFIC FOODS

.....Petitioner

versus

MAROON HOSPITALITY

.....Respondent

Appearance:-Mr. Lalitaksh Joshi & Ms. Ananya Saraogi, Advocates
for Petitioner-Pacific Foods in Item Nos. 4 & 5.Mr. Saurabh Sharma & Mr. Ashutosh Ranjan,
Advocates for Respondent-Krest Enterprises &
Maroon Hospitality in Item Nos. 4 & 5**CORAM:****HON'BLE MR. JUSTICE PRATEEK JALAN****PRATEEK JALAN, J. (ORAL)**

1. By way of these two petitions under Section 11 of the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner seeks appointment of arbitrators to adjudicate disputes between the parties under contracts dated 18.05.2022 and 07.05.2022.

2. The petitioner is common in both cases. The respondents are also sister concerns; the nature of the transactions and the arguments raised on

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behalf of the parties are virtually identical. The petitions have, therefore, been taken up together for hearing.

3. The respondents are in the business of running restaurants. The transactions between the parties are for the sale and purchase of ingredients used by them. The petitioner was the seller of the goods. The transactions were conducted on an online platform known as Red Basil.

4. The petitioner relies upon a document entitled “CONTRACTUAL TERMS BETWEEN BUYER AND SELLER” [Document 2 of the Petitioner’s List of Documents], which contains an arbitration clause in the following terms:-

*“10. In the case of any controversy, claim, disagreement or dispute (**Dispute**) the parties shall first attempt to reach an amicable settlement through mutual consultations and negotiations. If the parties are unable to resolve a Dispute amicably within a period of 30 (thirty) days from the date of arising of the Dispute, either party may choose to refer the Dispute for arbitration and the seat of the arbitration shall be New Delhi, India. The arbitration proceedings shall be conducted by a sole arbitrator appointed by the consensus of the parties.”*

5. According to the petitioner, the petitioner and the respondents are subscribers to the Red Basil platform. The respondents submitted inquiries to the petitioner for supply of goods, for which the petitioner sent quotations to the respondent. The respondents then accepted the quotations, pursuant to which the goods were dispatched by the petitioner and accepted by the respondents. The petitioner has placed on record invoices bearing the logo of Red Basil, and noting that the goods were sold by the petitioner. The shipping and billing addresses are those of the respondents.

6. The petitioner claims that the respondents failed to make payment



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for the goods, as a result of which it invoked arbitration by separate communications dated 19.09.2022. The communications were sent to the respondents by e-mail from the petitioner directly.

7. As there was no consensus on appointment of the arbitrators, the petitioner has approached this Court under Section 11 of the Act.

8. I have heard Mr. Lalitaksh Joshi, learned counsel for the petitioner and Mr. Saurabh Sharma, learned counsel for the respondents.

9. The only contention taken by the respondents in these proceedings is with regard to the existence of an arbitration agreement. It is the contention of the respondents that they did not consent to resolution of disputes by arbitration, and that the respondents were party only to “Terms and Conditions” for the use of the Red Basil platform, which did not incorporate an arbitration clause. In fact, Mr. Sharma points out that Clause 13.6 in the document placed on record by the respondents [Document R1 in the Respondents’ List of Documents] provides that the terms and conditions would be subject to the exclusive jurisdiction of the courts in Gurugram.

10. The question of existence of an arbitration clause requires reference to Section 7 of the Act. Section 7 requires an arbitration agreement to be in writing, which is elaborated in Section 7(4) as follows:-

- “(4) An arbitration agreement is in writing if it is contained in -
- (a) a document signed by the parties;
 - (b) an exchange of letters, telex, telegrams, or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or
 - (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not



denied by the other.”

11. In the present case, it is the admitted position that there is no single document signed by both the parties which contains the arbitration agreement. However, the point to be considered is whether the facts of this case establish an exchange of communications through electronic means, which provide a record of the agreement. At this stage, this scrutiny is a limited one. The Court's jurisdiction at the pre-reference stage is circumscribed by the doctrine of *Kompetenz- Kompetenz*, which empowers the arbitral tribunal to rule on its own jurisdiction. While the question of the existence of an arbitration agreement requires the *prima facie* satisfaction of the Court, the final adjudication of this question is best left to the arbitral tribunal.

12. A seven Judge Bench of the Supreme Court in *Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re*,¹ has clarified the scope of examination under Section 11 of the Act as follows:

*“166. The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence-competence, only prima facie proof of the existence of an arbitration agreement must be adduced before the Referral Court. **The Referral Court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the Arbitral Tribunal. This position of law can also be gauged from the plain language of the statute.***

167. Section 11(6-A) uses the expression “examination of the existence of an arbitration agreement”. The purport of using the

¹ (2024) 6 SCC 1.



word “examination” connotes that the legislature intends that the Referral Court has to inspect or scrutinise the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression “examination” does not connote or imply a laborious or contested inquiry. [P. Ramanatha Aiyar, *The Law Lexicon* (2nd Edn., 1997) 666.] On the other hand, Section 16 provides that the Arbitral Tribunal can “rule” on its jurisdiction, including the existence and validity of an arbitration agreement. A “ruling” connotes adjudication of disputes after admitting evidence from the parties. **Therefore, it is evident that the Referral Court is only required to examine the existence of arbitration agreements, whereas the Arbitral Tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement.** A similar view was adopted by this Court in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.* [*Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*, (2005) 7 SCC 234]

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169. When the Referral Court renders a *prima facie* opinion, neither the Arbitral Tribunal, nor the Court enforcing the arbitral award will be bound by such a *prima facie* view. If a *prima facie* view as to the existence of an arbitration agreement is taken by the Referral Court, it still allows the Arbitral Tribunal to examine the issue in depth. Such a legal approach will help the Referral Court in weeding out *prima facie* non-existent arbitration agreements. It will also protect the jurisdictional competence of the Arbitral Tribunals to decide on issues pertaining to the existence and validity of an arbitration agreement.”²

13. The decision in *In Re: Interplay Between Arbitration Agreements*,³ has been followed in a very recent judgment of the Supreme Court in *SBI General Insurance Co. Ltd. v. Krish Spinning*.⁴ The Court has reiterated that the enquiry under Section 11 of the Act does not include a contested or laborious enquiry, which is to be left to the arbitral tribunal.

14. The question then arises as to whether, in the facts and circumstances of the present case, the petitioner has made out a *prima*

² Emphasis supplied.

³ *Supra* note 1.



facie case as to the parties' subscription to an online platform, which renders the disputes amenable to arbitration. Although, in the replies filed by them, the respondents have disputed the terms of the agreement, they have not denied the substantive transactions between the parties and the fact that these transactions were conducted on the Red Basil platform.

15. From the documents placed on record by the respondents themselves, it appears that the substantive transaction of sale and purchase was between the petitioner and the respondents. The terms and conditions filed by the respondents, appear to be the terms and conditions which applied to the relationship between the Red Basil platform and its subscribers. It contains three sections:-

“A. Terms applicable to all Users on the Platform;

*B. Terms applicable to Buyers (“**Buyer Terms**”); and*

*C. Terms applicable to Sellers (“**Seller Terms**”). “*

Clause 8 of these terms, which is in Section A, *inter alia*, provides as follows:-

“8.1 When a product is listed for sale on the Platform by a Seller, products sold to Buyer by the Seller will be governed by the contractual arrangement entered into directly between the Buyer and the Seller. Buyer agrees that Red Basil cannot and does not confirm each Seller’s purported identity. Red Basil advises and encourages Buyers to exercise discretion and caution while dealing with various Sellers and vice versa.”⁵

It thus contemplates a contractual arrangement between the buyers and the seller. This understanding is supported and supplemented by other terms and conditions of the Red Basil platform. It provides in Clause 2.3

⁴ Civil Appeal Nos. 7821-82/2024, decided on 18.07.2024.

⁵ Emphasis supplied.



as follows:-

“2.3 Red Basil merely provides an online venue however, Red Basil is not manufacturing/producing/designing the products and/or services sold or purchased by the User(s) via the Platform or neither does give any warranty and representation about the authenticity and quality of the product/service. All transactions shall be the responsibility of the members only. These Terms shall not be deemed to create any partnership, joint venture, or other joint business relationship between Red Basil and other party.”

The same position is reflected in Clause 8.1 quoted above, read with clauses 8.3, 8.4 and 8.6. Clause 3.2 and 3.3 of Section B relating to the Buyer Terms, also make it clear that there is a substantive contract between the petitioner and the respondents, under which the goods were supplied.

16. The argument of the respondents, that there was no such privity of contract, is thus inconsistent with the terms and conditions of the Red Basil platform, which are relied upon by the respondents themselves. Those terms and conditions make it clear that the transaction is between the buyer and the seller, for which Red Basil is merely acting as the intermediary. They specifically contemplate contractual terms between the buyer and the seller. It is not the case of the respondents that they agreed to contractual terms which were different from those relied upon by the petitioner, but that they undertook the transaction on the very same platform without consenting to any contractual terms between themselves and the petitioner. Such an argument is *prima facie* unacceptable. The petitioner's assertion in the invocation notices dated 19.09.2022 also did not elicit a denial from the respondent.

17. Document 2 of the petitioner's list of documents contains, according to the petitioner, the very terms and conditions which govern



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the transaction, including the arbitration clause. In the rejoinder filed by the petitioner, it has described and annexed screenshots of the application architecture, including the modalities by which the parties entered into the substantive transactions through the intermediary platform. This description is supported by a certificate from the Red Basil platform also. It *prima facie* appears therefrom that the petitioner [herein the seller] accepted the terms and conditions while sending its quotations, and the buyers [herein the respondents] accepted the terms and conditions while placing their order. Those terms and conditions contain an arbitration clause, which is adequate for the purposes of a *prima facie* consideration, as required in the present petition.

18. I am, therefore, of the view that there *prima facie* exists an arbitration agreement, to which both parties have assented by exchange of electronic communications, and that the arbitration clause has been invoked in accordance with law.

19. For the aforesaid reasons, the petitions are allowed and the disputes between the parties are referred to arbitration under the aegis of Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi [“DIAC”]. DIAC is requested to nominate an Arbitrator from its panel. The learned Arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.

20. The arbitration proceedings will be governed by the Rules of DIAC, including as to remuneration of the learned Arbitrator.

21. The arbitrations will be treated as two separate arbitrations for all purposes, but it is for the learned Arbitrator to decide whether the hearings are required to be held together or separately.



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22. All rights and contentions of the parties are left open for consideration by the learned Arbitrator, in accordance with law.

23. The petitions, alongwith pending applications, stand disposed of.

PRATEEK JALAN, J

JULY 22, 2024

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