

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Jurisdiction

ORIGINAL SIDE
(COMMERCIAL DIVISION)

AP-COM/577/2024

SRMB SRIJAN PVT. LTD.
VS.
AGGARWAL STEEL INDUSTRIES PVT. LTD. AND ANR.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR

For the petitioners ...

Mr. Arnab Das, Adv.
Ms. Syeda Romana Sultan, Adv.
Mr. Vaibhav Sharma, Adv.

For the respondents ...

Mr. S.N.Mitra, Sr. Adv.
Mr. Avra Mazumder, Adv.
Ms. Alisha Das, Adv.
Mr. Suman Bhowmik, Adv.
Mr. Samrat Das, Adv.
Ms. Elina Dey, Adv.
Mr. Sourendra Nath Banerjee, Adv.

Hearing concluded on: 02.01.2025
Judgment on: 14.01.2025

Shampa Sarkar, J.:-

1. This is an application under Section 11 (5) and (6) of the Arbitration and Conciliation Act 1996, for appointment of an Arbitrator. The case of the petitioner was that the respondent No.1 entered into a Unit Franchise Agreement with the petitioner on January 1, 2022, which was valid for two years from the effective date of the agreement, that is, January 1, 2022 or

from the day of commencement of business. The terms and conditions were mutually agreed between the parties.

2. The said agreement was executed in the office of the petitioner within the jurisdiction of this court. It was agreed that the respondent No.1 would act as the franchisee of the petitioner in the States of Jammu and Kashmir, Himachal Pradesh and Punjab and for the same purpose, it would make a payment of royalty of Rs.300 per metric tonne along with applicable taxes for the first four months and thereafter, would pay an amount of Rs.400 per metric tonne on a monthly basis along with taxes.

3. On the request of the respondent No.1, the petitioner deployed its own sales team in the States of Jammu and Kashmir, Himachal Pradesh and Punjab and it was agreed between the parties that the cost for deployment of the sales team would be borne by the respondent No.1. According to the petitioner, it was obligatory on the part of the respondent No.1 to provide proper report of the sales statement periodically. It was contended by the petitioner that various discrepancies were detected by the petitioner with regard to sale of the products. The respondent No.1 did not take any consent or approval for relocating the manufacturing operations and the unit was given on lease to a third party, which started that manufacturing activity for the products at Bardi, Himachal Pradesh. This was in violation of the terms and conditions of the agreement.

4. Accordingly, it is alleged that the manufacturing of the materials abruptly stopped and the brand value and the reputation of the petitioner suffered. According to the petitioner, it had incurred huge loss and damages to the tune of 40 lakhs. When the petitioner confronted the respondent No.1

about the illegal activities, the respondent No.1 allegedly accepted the breaches and requested the petitioner to permit the respondent No. 2, a group company of the respondent No.1, having a common promoter to discharge the obligations of the said agreement. By an email dated March 14, 2022, the respondent No.2 requested the petitioner to amend the agreement and to incorporate the name of the respondent No.2 therein, and also requested the petitioner to allow the operation of the manufacturing unit at Bardi, Himachal Pradesh. The respondent No.2 assured to abide by the terms and conditions and also proposed to execute a supplementary agreement. It was proposed that the production of the materials would commence immediately after the renewal of the said agreement.

5. Having no other alternative, the petitioner contended to have accepted such proposition and a supplementary agreement was executed on April 25, 2022, between the parties, for a further period of two years on similar terms and conditions. The supplementary agreement was made a part of the original franchise agreement. According to the petitioner, the respondent No.2 failed to perform its obligations and the entire production was stopped till May 2022. This jeopardized the entire business cycle of the petitioner in the said States. Due to non-performance on the part of the respondent No.2 as well, the petitioner suffered loss and damages, which led to loss of distributors, dealers and customers.

6. The petitioner sent various emails, asking the respondents to release the wages and salary of the sales team deployed by the petitioner, but the respondents deliberately paid no heed to such request. Lastly, the petitioner had no other alternative, but to terminate and revoke the franchise

agreement dated January 1, 2022, as well as the supplementary agreement dated April 25, 2022.

7. By a letter dated December 5, 2022, the petitioner raised a demand of Rs.3,11,29,747/- towards outstanding damages and losses suffered. According to the petitioner, Article 26 of the Franchise Agreement dealt with the law applicable and settlement of disputes. The Article provided that the parties would attempt in good faith to resolve any dispute, difference or claim arising out of or in relation to the agreement. The dispute must be notified to the other party in writing and both parties would then try to resolve the same through mutual discussion. In case the dispute was not resolved within 30 days from receipt of the written communication by the other party, the complaining party could issue a notice of reference, invoking settlement of such dispute through arbitration. All disputes between the parties would be subject to the exclusive jurisdiction of the courts of Calcutta.

8. Article 26 of the Franchise Agreement was placed by the petitioner, in support of such contentions. It was urged that once the parties failed to resolve the dispute by negotiation and mutual discussion, the only other mechanism for settlement of such unresolved disputes raised by the petitioner, was arbitration by a sole arbitrator to be appointed by this court.

9. The supplementary agreement was referred to in support of the contention that the said agreement was made a part of the original agreement and the dispute resolution clause in the supplementary agreement also provided that parties should attempt to settle the dispute by negotiation and in the event the dispute could not be resolved by the parties

within 30 days, it would be referred to arbitration. The arbitration would be held in Kolkata, in accordance with Arbitration and Conciliation Act, 1996.

10. According to the petitioner, although several requests and representations were made to the respondents to release the amount claimed, the respondents neglected to adhere to the terms and conditions of the agreement. The petitioner invoked the arbitration clause under Section 21 of the Arbitration and Conciliation Act, 1996 and by the letter dated July 10, 2023, the petitioner nominated its own arbitrator, a former Judge of the High Court at Calcutta.

11. According to the petitioner, upon receipt of the notice invoking arbitration, the respondent No.2 by a letter dated August 2, 2023, refused to settle the dispute through arbitration and proposed to settle the dispute by negotiation. The respondent No.2 also rejected the claim with regard to outstanding dues, losses suffered, damages, etc. By a letter dated August 11, 2023, the petitioner accepted the proposal for negotiation and proposed to conduct a virtual meeting from its registered office, as mentioned in the cause title of this application. The respondent No.2 refused to join the virtual meeting and by a letter dated August 21, 2023, made certain baseless and unfounded allegations against the petitioner.

12. The petitioner was for the first time informed that the respondents had approached the High Court at Himachal Pradesh challenging the notice invoking arbitration. The petitioner, thereafter, preferred an application under Section 11 (5) and (6) of Arbitration and Conciliation Act, 1996, before the High Court at Calcutta, which was registered as AP No.683 of 2023. The respondents appeared in the proceeding and informed the court that an

application under Section 9 of the said Act had been filed before the High Court at Himachal Pradesh and an order staying any proceeding on the basis of the notice invoking arbitration had been passed. Accordingly, by an order dated October 4, 2023, a learned Coordinate Bench disposed of AP No.683 of 2023, by observing that, when the notice invoking arbitration had been stayed by another High Court, the High Court at Calcutta could not entertain the application and granted liberty to the petitioner to raise the questions before the High Court at Himachal Pradesh, including the question of lack of jurisdiction of the said court, in view of the seat chosen by the parties as Kolkata. On the basis of the said order, the petitioner appeared before the High Court at Himachal Pradesh and made submissions.

13. It was contended by the learned Advocate for the petitioner that the objection as to the jurisdiction of the High Court of Himachal Pradesh was also urged and at that juncture, the parties decided to resolve the dispute mutually, by negotiation. On the basis of such submission of the parties, the application was disposed of and the question of jurisdiction was not decided.

14. It is the specific case of the petitioner that after the application filed before the High Court of Himachal Pradesh, being Arb. Case No. 633 of 2023 was disposed of on March 1, 2024, the petitioner informed the respondents about a virtual meeting to be held on March 8, 2024, at 5.30 pm. The meeting link was also provided by the petitioner. The meeting was attended by the respondents, but no fruitful result matured out of the meeting, thereby, leaving the petitioner with no other alternative, but to invoke the arbitration clause as per Article 26 of the Franchise Agreement dated

January 1, 2022 and Article V(v) of the supplementary agreement dated April 25, 2022.

15. Accordingly, by a letter dated March 19, 2024, the petitioner again invoked the arbitration clause proposing the name of a retired Judge of this court to arbitrate upon the dispute between the parties. In reply to the said notice, the respondent No.2 by a letter dated 19 April 2024, rejected the proposal made by the petitioner and instead, suggested a few names of learned Judges of Himachal Pradesh to be nominated as an arbitrator. The petitioner refused to accept any of those names and thus this application has been filed before the court seeking appointment of the sole arbitrator in the facts and circumstances of the case.

16. Mr. Surojit Nath Mitra, learned Senior Advocate, submitted that the address of the respondents as per the cause title would indicate that the respondents were outside the Ordinary Original Civil Jurisdiction of the High Court at Calcutta. The work was to be executed outside West Bengal. The respondent No.1 was to act as the franchisee of the petitioner in the States of Jammu and Kashmir, Himachal Pradesh and Punjab. Thus, the State of West Bengal was in no way connected with the said agreement, out of which the present dispute arose. This Court lacked the jurisdiction to take up the matter.

17. Mr. Mitra further submitted that this was the second application for appointment of the arbitrator and the application was not maintainable as it was hit by the principles of res judicata. The first application for appointment of an arbitrator being AP/683/2023, was rejected by a Coordinate Bench by order dated October 4, 2023. The Coordinate Bench

directed that once the High Court of Himachal Pradesh had stayed the notice invoking arbitration, the court was not inclined to appoint an arbitrator on the basis of the said notice. Any order on the said application would be in conflict with the decision of the said High Court. The petitioner was granted liberty to take appropriate steps before the Himachal Pradesh High Court, including the point of jurisdiction. According to Mr Mitra, such liberty would mean that the petitioner should have approached the Himachal Pradesh High Court for appointment of the sole arbitrator, once the negotiations failed.

18. It was further submitted that the petitioner entered appearance in Arb. Case No. 633 of 2023, by submitting to the jurisdiction of the High Court of Himachal Pradesh and agreed before the said court to resolve the dispute through negotiation. Reflection of such conduct of the petitioner was available from the order dated March 1, 2024, passed in Arb. Case No. 633 of 2023 and the petitioner could not have come to this court after the negotiations had failed.

19. Having heard the learned advocates for the respective parties, this court finds that there is existence of an arbitration clause which provides for settlement of disputes by arbitration, upon failure to resolve the dispute amicably. Both the Franchise Agreement and the Supplementary Agreement clearly indicate that the parties had agreed that the courts of Kolkata would have exclusive jurisdiction. Article 26 further provided that the arbitral award would be in writing and would be final and binding on each party and would be enforceable in any competent court in respect of the applications made. The supplementary agreement provided that all the clauses of the

principal agreement would remain the same and be in full force and effect between the parties. The said agreement further provided that in the event, the dispute was not resolved within 30 days, it would be referred to and settled by arbitration. The arbitration would be held at Kolkata in accordance with the Arbitration and Conciliation Act, 1996.

20. The parties thus agreed that the arbitration shall be held at Kolkata and only the courts at Kolkata would have the jurisdiction to entertain any application under the Arbitration and Conciliation Act. The order of the Coordinate Bench dated October 4, 2024, recorded that it was arguable whether the respondents could have filed any application before the Himachal Pradesh High Court in view of the designated venue in the arbitration agreement. The order dated August 4, 2023, passed in Arb. Case No. 633 of 2023, records that the dispute resolution clause indicated that the arbitral proceedings were contemplated to be held at Kolkata. However, the *ex parte* order of stay was granted on the understanding of the court that prior to resorting to the arbitration proceeding, the parties had agreed to settle the dispute by negotiation and only if the negotiation failed, the same could be referred to and settled by an arbitrator in arbitration proceedings.

21. The court found that the petitioner, unilaterally and without resorting to a negotiation to settle the dispute, had nominated an arbitrator. On this ground, the interim order of stay was passed *ex parte*, restraining the petitioner from acting in furtherance of the first notice invoking arbitration dated July 10, 2023. When the petitioner approached this court for appointment of an arbitrator, a Coordinate Bench observed that it was

arguable as to how the respondents could approach the Himachal Pradesh High Court, when the designated venue as agreed between the parties was Kolkata and the courts of Kolkata were to have exclusive jurisdiction in respect of any application filed under the said Act. Her Lordship refrained from passing any order for appointment of arbitrator on the basis of the said notice under Section 21 of the said Act issued by the petitioner, as the said notice had been stayed by another High Court.

22. Instead of appointing an arbitrator, Her Lordship directed the petitioner to approach the Himachal Pradesh High Court and take all points available, including the point of jurisdiction. Such direction does not indicate that Her Lordship had rejected the application on the ground of lack of jurisdiction, as the High Court at Himachal Pradesh had entertained an application under Section 9 of the said Act. The relevant portion of the order dated October 4, 2023 is quoted below:-

“Even though the dispute between the parties is evidence from the letters exchanged and appears also to have been admitted by the respondent (petitioner before the Himachal Pradesh High Court) in its affidavit-in-opposition, this Court is however not inclined to appoint an Arbitrator in terms of the very same notice which has been stayed by the Himachal Pradesh High Court. This would result in a conflict in the decisions of two High Courts.

The petitioner shall be at liberty of taking appropriate steps before the Himachal Pradesh High Court including the point of jurisdiction. It is also arguable whether the respondent could have filed any proceeding before the Himachal Pradesh High Court in view of the designated venue in the arbitration agreements.”

23. The petitioner appeared before the Himachal Pradesh High Court. Although, it is urged by the petitioner that the arguments on the point of jurisdiction were advanced at length, it appears that the application was disposed of when the parties agreed to once again try to mutually settle the matter through negotiation. The jurisdiction of the said court was neither

decided nor discussed. In any event, appointment of Arbitrator will be in accordance with the agreement. The Himachal Pradesh High Court would not assume jurisdiction to exercise powers under Section 11 of the said Act, on the ground that the application under Section 9 of the said Act was filed before the said court. The seat of arbitration as agreed between the parties was Kolkata.

24. While disposing of the said application, the High Court at Himachal Pradesh recorded that the parties had mutually agreed that they would initially hold one negotiation on March 8, 2024, and try to resolve the dispute. Thereafter, unless the parties agreed to have further negotiations, the parties were to proceed in accordance with the agreement entered into between the parties. Accordingly, in view of such mutual agreement, the arbitration case was disposed of along with all connected applications.

25. The agreement provides for an arbitration clause with the jurisdiction of the courts at Kolkata in respect of all applications filed by the parties under the said Act. The designated seat of arbitration as Kolkata has been mentioned in the supplementary agreement, which was made a part of the franchise agreement. The relevant clauses are quoted below for convenience.

26. Article 26 of the Franchise Agreement is quoted below:-

ARTICLE 26

APPLICABLE LAW AND SETTLEMENT OF DISPUTES

- i. This agreement and the rights and obligations of the parties hereunder shall be governed by and construed in accordance with the applicable laws of India.
- ii. The Parties shall attempt in good faith to resolve any dispute, difference or claim arising out of or in relation to this Agreement: Any dispute is to be notified to, the other party in writing setting out the dispute or claim which both the parties will then try to resolve through mutual discussions. In case it is not resolved within thirty (30) days from receipt of the written communication

- by the other party, the complaining party may issue a notice of reference, invoking settlement of such dispute through Arbitration.
- iii. All disputes between parties shall be subject to exclusive jurisdiction of the courts of Kolkata only.
 - iv. Any and all disputes ("Disputes") arising out of or in relation to or in connection with this Agreement between the Parties or relating to the performance or non-performance of the rights and obligations set forth herein or the breach, termination, invalidity or interpretation thereof shall be referred for arbitration at Kolkata, India in accordance with the terms of Indian Arbitration and Conciliation Act, 1996 or any amendments thereof. The language used in the arbitral proceedings shall be English. The arbitral award shall be in writing and shall be final and binding on each party and shall be enforceable in any court of competent jurisdiction. In respect of application/s made under the Arbitration and Conciliation Act, 1996, the Courts at Kolkata, alone shall have the jurisdiction to entertain such application.

27. The dispute resolution clause from the supplementary agreement is quoted below :-

V) Dispute Resolution –

Unless stated to the contrary in this Supplementary. Agreement, any dispute between the Parses at any time in regard to any matter arising from the Supplementary Agreement or its interpretation or rectification shall be submitted for settlement by negotiation by the each party. In the event that the dispute cannot be resolved by the Parties within thirty (30) days it shall be referred to and settled by arbitration proceeding.

The arbitration shall be held at Kolkata in accordance with the Arbitration and Conciliation Act, 1996 and any, subsequent amendment thereon.

28. Thus, the submissions of Mr. Mitra cannot be accepted. The order in Arb. Case No. 633 of 2023, dated March 1, 2024, clearly records that the parties had agreed before the said court to negotiate once and unless they wanted further negotiations, they would proceed in respect of the dispute as per the terms of the agreement and the terms of agreement have been quoted hereinabove. The relevant portion of the order is quoted below:-

“Learned counsel for the parties mutually agree that in terms of Article V Clause (v) of the supplementary agreement, they will initially hold

only one negotiation on 08.03.2024 and try to resolve the dispute and thereafter unless mutually agreed to have further negotiations, the parties shall proceed in accordance with the agreement entered into between them.

In view of the agreement entered into between the parties, the instant petition is disposed of, so also all the pending applications.

29. Reference is made to the decision of Hon'ble Apex Court in the matter of **Arif Azim Co. Ltd. vs Micromax Informatics FZE** reported in **2024 SCC Online SC 3212**, The relevant paragraphs is quoted below :-

71 (iv) The moment 'seat' is determined, it would be akin to an exclusive jurisdiction clause whereby only the jurisdictional courts of that seat alone will have the jurisdiction to regulate the arbitral proceedings. The notional doctrine of concurrent jurisdiction has been expressly rejected and overruled by this Court in its subsequent decisions.

30. Thus, the High Court at Calcutta has the jurisdiction to decide and entertain this application and accordingly, this court allows the said application by appointing Hon'ble Justice Siddhartha Roy Chowdhury (retired), a former Judge of this court to arbitrate upon the disputes between the parties. This appointment is subject to compliance of Section 12 of the Arbitration Conciliation Act 1996.

31. The learned Arbitrator shall fix his own remuneration as per the schedule of the said Act.

32. AP-COM 577 of 2024 is, accordingly, disposed of.

33. There will be no order as to cost.

34. Parties are directed to act on the server copy of this judgment.

(Shampa Sarkar, J.)