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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMM. ARBITRATION PETITION NO. 791 OF 2024

Wonderchef Home Appliances Pvt. Ltd.
A company incorporated under the
Provision of Companies Act, 1956
Through its Authorized Person
Mr. Aditya Agrawal
Adult Indian inhabitant aged 32 years
Occupation: - Service
Having its registered office at Unit No. 303,
3rd Floor, B Wing, Supreme Business Park,
Supreme City, Hiranandani Gardens, Powai,
Mumbai - 400076

...Petitioner

Versus

Shree Swaminarayanan Pty Ltd.
A company incorporated under the
Provisions of Corporations Act 2001 (Cth),
Australia (ACN:133 497097)
Through its Authorized Person
Mr. Biren Janardanbhai Desai
Adult Indian inhabitant aged about 47 years
Occupation: - Distributor
Having its registered office at
ABN 82 133497097, 8, Manto Street,
Bungarribee, NSW 2767, Australia.

...Respondent

Mr. Malhar Zatakia a/w Mr. Kaushal Ameta i/b Legal Prism, for the
Petitioner.

CORAM : SOMASEKHAR SUNDARESAN, J.

DATE : JANUARY 27, 2025

ORAL JUDGMENT : (Per. Somasekhar Sundaresan J.)

Factual Context:

1. This is a Petition under Section 9 of the *Arbitration and Conciliation Act, 1996* ("**the Act**") in connection with disputes and differences between the parties relating to a Distribution Agreement dated December 26, 2017 ("**Agreement**") which contains an arbitration agreement

between the parties. The Respondent is a distributor of the Petitioner in Australia.

2. The sole prayer in this Petition is to injunct the Respondent from making any disparaging statements or taking any actions that may harm or damage, malign or disparage the Petitioner's reputation and its brand name "Wonderchef". The basis of this prayer is the fact that the Respondent has been sending out e-mails complaining about Petitioner's products having demonstrated defects and the poor treatment of the Respondent by the Petitioner, and the manner in which the relationship is being handled.

3. Therefore, in short, the Petitioner primarily seeks a gag order against the Respondent under Section 9 of the Act, before invocation of arbitration.

Scope of Consideration under Section 9:

4. The scope of powers of this Court under Section 9 of the Act are essentially to make interim measures of protection with respect to the preservation of the subject matter of the agreement between the parties, which is subject to resolution by arbitration. Such measures could be taken to preserve or inspect property, secure amounts involved or to inspect property which is the subject matter of the dispute. To be able to seek a gag order, the Petitioner would need to show that remarks of the Respondent

are proscribed by the agreement that contains the arbitration agreement, and that pending resolution of disputes, such remarks cannot be made.

5. The Petitioner has filed number of e-mails exchanged between the parties as also e-mails sent out by the Respondent to multiple recipients, and also e-mails sent to recipients blind-copied (marked 'bcc'), and states that the Petitioner is likely to suffer serious damage to his reputation. The Petitioner seeks to demonstrate his contention that the communications being sent out by the Respondent constitute disparagement and harm the reputation of the Petitioner.

6. On the last occasion, since none appeared for the Respondent, the matter was stood over to today, directing the Petitioner to intimate the Respondent that it would be taken up today. It is seen from the service affidavit filed by the Petitioner that notice was issued to the very same e-mail ID of the Respondent from which correspondence and complaints have been sent by the Respondent. Consequently, the matter was taken up today, despite the absence of the Respondent.

7. Learned Counsel for the Petitioner has pitched his case on the premise that the communications sent out by the Respondent to various parties (these include other distributors of the Petitioner in other jurisdictions, one in Fiji, and various other statutory addressees such as Government Officers and to potential financial investors) constitutes

disparagement and erosion of the Petitioner's reputation. According to him, the sending of such email constitutes communication of "confidential information" which is defined in the Agreement as information about the products of the Petitioner. The Learned Counsel alludes to potential commercially sensitive information also being shared, by pointing to the existence of attachments to the emails that have been brought on record, and the file-names of the attachments. While he concedes that the attachments are not part of the record, and he cannot conclusively show what the contents of the attachments are, he would submit that the file-names would point to the content being potentially confidential information.

8. Learned Counsel would submit that such conduct of the Respondent is in direct conflict with Article XIII, and in particular Clause 13.3 of the Agreement, which requires distributors to keep the information in connection with the products dealt with by the distributors and manufactured by the Petitioner, confidential, since such information is proprietary information.

9. Having given my anxious consideration to the multiple issues posed by the fact situation, it would be necessary for me to record that commercial speech is eminently part of free speech. It is not easy for a Court to prohibit a party from expressing itself about its grievances about a product acquired in the course of commerce, since the factors to be borne in

mind when considering a request for a gag order, is to see if such expression is truthful and warranted. Merely because speech is made in a commercial context, it would not cease to have the ingredients of free expression. I must hasten to add that at this stage, it is not necessary to get into the constitutional right to free speech guaranteed by Article 19(1)(g) of the Constitution of India – the constitutional protection may not be relevant since the Respondent is an Australian company, and its representatives' citizenship is not clear from the record, although they appear to be individuals of Indian ethnicity.

10. Learned Counsel for the Petitioner has pitched the Petitioner's case on the premise of "confidential information" being shared by the Respondent, in violation of the Agreement. However, to my mind, such an inference would be too sweeping. To consider any and every comment on the Petitioner's products as being "confidential information" would also be counter-intuitive – a distributor who is expected to publicly extol the virtues of the products, would, in terms of the interpretation canvassed by the Petitioner, violation of confidential information since the distributor would be sharing information about the products.

11. However, there is one provision in the Agreement, which could be regarded as obliging the Respondent in respect of his manner of communication about the Petitioner and its products. Disputes and differences over such obligation would be subject matter of disputes

relating to the Agreement, and therefore, arbitrable, warranting an examination of protection pending initiation of arbitration. Clause 12.2(c) of the Agreement provides that the Respondent shall conduct business in a manner that “reflects favourably at all times” on the products of the Petitioner and the reputation of the Petitioner. The Respondent is contractually obliged to conduct business in the aforesaid manner in order to develop, promote and maintain such reputation and favourable reflection, with customers and to protect and preserve the goodwill and image of the Petitioner and the products. It is in this context that reliefs under this Petition are capable of being granted within the contours of the jurisdiction of Section 9 of the Act. Since the subject matter over which disputes and differences exists between the parties is the Agreement and Clause 12.2(c) is an integral part of the Agreement, pending resolution of disputes and differences between the parties, there would be a basis for the Section 9 Court to afford some protection.

12. It is also seen from the record that the Respondent, right from way back in 2023, had sought arbitration proceedings to be initiated but evidently there is nothing on record to show that the Petitioner responded favourably to have the offer of arbitration accepted. However, it is also evident from the record that the parties engaged in discussions and the Petitioner sent a draft Settlement Agreement to the Respondent, which was unacceptable to the Respondent, who dismissed the draft as being one-sided. The discussions between the parties then took a shabby turn, after

which the aforesaid e-mails have been sent by the Respondent to the various parties as alleged by the Petitioner.

13. Against this backdrop, one would need to consider how to balance equities and examine if any protective directions can be issued, taking into account the interests of both parties, pending arbitration.

14. I am mindful that the Petitioner, being promoted by a celebrity Indian chef, enjoys a strong reputation. Even from what is brought on record, it would be hard to conclude that the Respondent's e-mails are able to cause any perceptible dent to the Petitioner's reputation. Higher the stature of the celebrity, thicker the skin, is a reasonable expectation. If comments made in the course of a commercial dispute cannot dent the reputation and cause harm lightly, one has to be even more careful when considering whether and how to deal with a prayer for gagging free commercial speech. If the nature of the expression would lead to a reasonable person of commerce to conclude that the publicly-aired complaints constitute ranting by a disgruntled commercial counter-party, the likelihood of damage would not be easy to infer. In fact, in the factors of the case at hand, such a reaction is actually seen from the response from a distributor of the Petitioner who is based in Fiji – he has responded to the Respondent that he is quite happy with the Petitioner's products and has advised the Respondent to engage with the Petitioner to resolve disputes.

15. Equally, since the jurisdiction under Section 9 is available to preserve and protect the subject matter of the dispute and since Clause 12.2(c) of the Agreement contains a right of the Petitioner against the Respondent, requiring the Respondent to maintain the Petitioner in good light and to protect the Petitioner's reputation, there is an element of the Respondent having consciously and autonomously bound himself not to harm the Petitioner's reputation.

16. Taking all the aforesaid considerations into account, to balance equities and make an interim arrangement, this Petition is ***finally disposed of*** with an injunction against the Respondent that would last for 90 days, bearing in mind that free speech cannot be lightly proscribed, by directing the Respondent to ensure that he is in full compliance with Clause 12.2(c) of the Agreement, i.e., to conduct business in manner that reflects favourably at all times on the products and reputation of the Petitioner, and to refrain from indulging in any action that would violate Clause 12.2(c) of the Agreement. Put differently, during the aforesaid period, the Respondent shall not vitiate the atmosphere for the arbitration by sending out e-mails attacking the Petitioner's reputation. During such 90-day period, it is expected that the Petitioner shall actually invoke arbitration or take forward, the earlier proposal of the Respondent to go to arbitration. Considering that the Respondent had proposed arbitration way back in 2023, it is possible that an application under Section 11 may not be necessary, but should intentions have changed, it may become necessary to

invoke Section 11 of the Act. The Petitioner would be expected to take all such steps with due dispatch within the next 90 days.

17. Consequently, taking into account that free speech, and that too in the commercial context, should not be lightly interfered with, and not having material to arrive at a strong *prima facie* conclusion about whether the Respondent's statements are factually true or untrue (the Respondent has faced regulatory action in relation to the products in Australia, which triggered the current dispute), but with a view to ensure an framework in which the parties could actively get a dispute resolution process underway, the aforesaid direction has been formulated. In my opinion, the aforesaid formulation would address the factors of preventing further perceived harm, and would also be convenient to the parties, without any unreasonable stipulation being put in place.

18. Typically, case law relating to disparagement in the commercial context is set in the context of disputes between competitors in the marketplace. This is a unique case of a manufacturer accusing a distributor (who is meant to be aligned and not in conflict) of disparagement on being upset about the relationship. Whether the e-mails sent by the Respondent are accurate and their contents bear out the truth, are matters of evidence that the arbitral tribunal can decide on merits, immediately upon being constituted. Balancing these competing considerations, the intervention made in this manner is considered to be appropriate, letting the protection

run the entire statutory course envisaged under Section 9 of the Act.

19. It is also noted that Respondent has chosen not to appear before this Court. However, to ensure that the Court is not unjust to the Respondent, the material on record has been examined in minute detail, and that forms the basis of the intervention made in this order.

20. It is hoped that in this spirit, the parties are able to move to arbitration within the next 90 days to ensure that the disputes are presented for resolution by way of arbitration. Needless to add, the arbitral tribunal shall have the fullest powers to pass such further directions as may be considered necessary under Section 17 of the Act, and also factor in such costs and damages that may arise out of violation of any directions that the arbitral tribunal may make, or indeed of the provisions of the Agreement, since it would be the arbitral tribunal that would examine evidence and arrive at a view on the relative merits of each party's case.

21. Accordingly, this Petition is ***finally disposed of*** in the aforesaid terms. In these circumstances, there shall be no order as to costs.

22. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]