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

Reserved on:29 August 2024
Pronounced on:18 September 2024

\+ O.M.P. (T) (COMM.) 29/2023

YVES SAINT LAURENT .....Petitioner

Through: Mr. Akhil Sibal, Sr. Adv. with Mr. Aseem Chaturvedi, Mr. Nirupam Lodha, Ms. Rashika Bajpai, Mr. Kingshuk Banerjee, Mr. Shivank Diddi, Mr. Arsh Alok, and Mr. Gautam Wadhwa.

versus

BROMPTON LIFESTYLE BRANDS PRIVATE LIMITED & ANR. .....Respondents

Through: Mr. Gaurav Gupta, Mr. Nikhil Kohli, and Ms. Akshaya Ganpath, Advs. for R-I.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT

% 18.09.2024

Facts

1. The petitioner Yves Saint Laurent[1] is a leading fashion designer house headquartered in Paris. The petitioner entered into a Franchise Agreement[2] dated 19 April 2019 with Respondent 2 Beverly Luxury Brands Ltd[3] to open a boutique in Delhi. The FA did not contain any arbitration clause, and conferred exclusive jurisdiction on the

[1] "YSL", hereinafter
[2] "FA", hereinafter
[3] "Beverly", hereinafter

Commercial Court at Paris to decide any dispute arising under. Brompton Lifestyle Brands Pvt Ltd[4] entered into a Sub-Franchise Agreement with Beverly on 2 July 2019. The SFA was executed, admittedly without the consent of the petitioner and the petitioner was not a signatory to it.

2. The petitioner terminated the FA on 8 August 2021. Subsequently, Beverly also terminated the SFA.

3. On 22 February 2022, Brompton addressed a notice to Beverly and the petitioner under Section 21[5] of the Arbitration and Conciliation Act 1996[6], invoking an arbitration clause contained in the SFA and proposing to refer disputes, stated to have arisen between Brompton on the one hand and the petitioner and Beverly on the other, to arbitration. The petitioner was Addressee 2, and Beverly was Addressee 1 in the notice, whereas Brompton was referred to as "our client". The substance of the notice was contained in the following paragraphs:

> 1. Our Client had entered into a Sub-Franchise Agreement dated 02.07.2019 (hereinafter referred to as 'Agreement') with you that the Addressee No. 1 whereby you the Addressee No. 1 had agreed to supply the designer clothes and apparels designed by the Addressee No. 2, which is a French luxury fashion brand (hereinafter referred to as "goods").
>
> 2. It would be imperative mention here that the addressee no. 1 and addressee no. 2 had entered into a Franchise Agreement dated 19.04.2019, whereby, the Addressee No. 2 had agreed to supply the goods to the Addressee No. 1 for the purpose of sale in

[4] "Brompton", hereinafter

[5] **21. Commencement of arbitral proceedings**. – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

[6] "the 1996 Act", hereinafter

global market. Pursuant to the said agreement, the Addressee No. 1 executed the agreement with our client to supply the goods of Addressee No. 2 to sale in the Indian market.

3. That in terms of the agreement, you the Addressee No. 1 had undertook to supply the goods to our client after receipt of the purchase order raised by our client. It was agreed in terms of the agreement that you the Addressee No. 1 shall supply the goods within 15 days from the date of receipt of the purchase order raised by our Client.

4. Please note that you the Addressee No. 1 since, the inception of the agreement was negligent in performance of your contractual obligations in time bound manner. That you the Addressee No. 1 on most of the occassions had delayed in time bound delivery of the goods as demanded by our Client, which has caused immense financial loss to our Client.

5. That you the Addressee No. 1 used to supply the goods in delayed manner as and when demanded to our Client. However, you the Addressee No. 1, since 2021 had stopped to the supply the goods demanded by our Client for the reason best known to you. The aforesaid actions/ inactions of you the addressee no. 1 is in sheer contravention of terms of the agreement. It is noteworthy to mention here that you the Addressee No. 1 had failed to perform his contractual obligation with no rhymes or reasons by not supplying the goods to our Client, which was essence of the agreement. It is further stated that you the Addressee No. 1 had never gave any plausible explanation for not supplying the goods to our Client, which demonstrates the breach committed by you the Addressee No. 1.

6. Our Client had time and again made representations to you the Addressee No. 1 with respect to the said breach and requested to regularize the supply of goods with immediate effect. Our Client had also sought explanations for the action of non-delivery of goods to our Client and requested to perform his contractual obligations. However, despite acknowledging and being aware of the said breach committed by you, you the Addressee No. 1 made no efforts to regularize the supply of goods or provided any explanation for discontinuing the supply of goods to our Client.

7. Now, in view of the aforesaid dispute, Our Client is constrained to invoke the arbitration clause as stipulated in clause 9.2 of the Agreement, which is, inter alia, be reproduced herein below for ease of reference:

"**9. Governing Laws and Dispute Resolution**

9.1.. ……..

9.2 "If any claim, dispute or differences of any kind whatsoever shall arise between the Parties in connection with or arising out of this Agreement ("Dispute"), the parties shall seek to resolve any such dispute shall be settled by binding arbitration under the (Indian) Arbitration and Conciliation Act, 1996. The seats and venue of such arbitration shall be in New Delhi. All proceedings of such arbitration shall be in the English language. A sole arbitrator shall be mutually appointed by the parties in accordance with (Indian) Arbitration and Conciliation Act, 1996. The award pronounced by the arbitrator shall be final, conclusive and binding upon the parties."

8. In terms of the aforesaid Clause, the Arbitral Tribunal shall comprise of Sole Arbitrator, which shall be mutually nominated by the parties. The sole arbitrator shall have the power to settle and adjudicate upon the aforementioned disputes arising from and in connection with the Agreement.

9. Further, since the seat of Arbitration will be in India and the governing law, as per clause 9 of the Agreement will be laws of Republic of India, Our Client, in accordance with the terms of the relevant clauses of the Agreement and Section 21 of the Arbitration Conciliation Act, 1996 (as amended up to date) hereby nominates the following person as its nominee on the Arbitral Tribunal comprising of 3 arbitrators:

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10. In view of the aforesaid facts and circumstances, by means of the present Notice, our Client hereby invokes the arbitration clause and notifies you about invocation of arbitration against you for adjudication of the claims of Our Client and you are hereby requested to accordingly nominate an arbitrator within 30 days of receipt of this notice."

According to the petitioner, it came to know of the execution of the SFA, for the first time, through the above notice invoking arbitration.

4. *Vide* order dated 23 July 2022, the learned Arbitrator communicated, to both parties, the fact that he had entered on reference.

5. On receiving the said order, the petitioner wrote to Beverly on 28 September 2022, stating that, prior to receiving the notice of invocation of arbitration dated 22 February 2022, the petitioner was unaware of the existence of the SFA, purportedly executed between Brompton and Beverly. It was also pointed out that the petitioner was not a party to the SFA, and that the SFA had been executed in breach of the terms of the FA. The petitioner asserted that it had been wrongly joined in the arbitral proceedings. Further, the documents on record indicated that the Arbitral Tribunal was also unilaterally constituted by Beverly. The petitioner had, in any case, not consented to the constitution of the Arbitral Tribunal. In the circumstances, the letter called upon Beverly to terminate, forthwith, the arbitral proceedings and/or delete the petitioner from the said proceedings.

6. The above letter was followed by a reminder on 18 October 2022.

7. On 28 October 2022, the petitioner addressed an email to the learned Arbitrator. The email reiterated the contentions contained in the letter dated 28 September 2022 *supra* addressed by the petitioner to Beverly. Pointing out*, inter alia*, that the petitioner was not a party to the SFA and had no privity of contract with Brompton and that the appointment of the learned Arbitrator was unilateral by Brompton, without any consent by the petitioner, the learned Arbitrator was requested to delete the petitioner as a party in the arbitral proceedings.

8. A copy of the communication was also marked to Beverly and to Brompton's solicitors.

9. Brompton, through its solicitors DSNR Legal responded to the above communication dated 28 October 2022 by e-mail dated 29 October 2022, addressed to the learned Arbitrator and to the petitioner. Brompton contended that the petitioner was always aware and conscious of the SFA executed between Beverly and Brompton. Besides, all correspondences relating to the arbitration had been marked to the petitioner. As the petitioner had willingly chosen to remain absent in the arbitral proceedings, the learned Arbitrator was requested to dismiss the petitioner's request and continue with the arbitral proceedings.

10. The petitioner responded by communication dated 8 November 2022, addressed to the learned Arbitrator, with copies marked to Beverly and Brompton's solicitors. The assertion of Brompton that the petitioner had been marked in all the correspondence relating to the arbitration was emphatically denied. In fact, pointed out the petitioner, it had not been served with any pleadings, including the Statement of Claims[7] or any other documents filed by Brompton before the learned Arbitrator. Reiterating that the learned Arbitral Tribunal had been unilaterally constituted, as the petitioner had not consented to its constitution, the learned Arbitrator was again requested to delete the petitioner from the arbitral proceedings.

[7] "SoC", hereinafter

11. This was followed by a further communication dated 21 November 2022 from the petitioner to the learned Arbitrator, in which the attention of the learned Arbitrator was invited to paras 20 and 21 of the judgment of the Supreme Court in ***Perkins Eastman Architects DPC v HSCC (India) Ltd.***[8] and para 9 of the judgment of this Court in ***Omcon Infrastructure Pvt. Ltd. v Indiabulls Investment Advisors Ltd.***[9]. Of the documents relating to the arbitration, the petitioner submitted that it was in receipt only of orders dated 23 July 2022, 14 October 2022 and 12 November 2022 passed by the learned Arbitrator. The learned Arbitrator was, therefore requested to call upon Brompton to provide the petitioner all pleadings and documents relating to the arbitral proceedings.

12. On 22 November 2022, the petitioner again wrote to Brompton, requesting that the documents relating to the arbitral proceedings be forwarded to it. On 12 November 2022, the learned Arbitrator passed an order recording the request of Brompton to remit the arbitral fee, administrative expenses and secretarial expenses. Further time was granted to Brompton to remit the said amount till 17 November 2022. Paras 4 to 8 of the order proceed to record thus:

> "4. Notwithstanding order dated 29.10.2022 qua e-mail dated 28.10.2022 from Khaitan and Co., no application for setting aside Ex-parte proceedings has been received.
>
> 5. Now power of Attorney has been furnished by Mr. Chunchreek Singhvi, Attorney of respondent No. 2 in favour of M/s Khaitan and Co., Advocates.

[8] **(2020) 20 SCC 760**
[9] **2020 SCC OnLine Del 2793**

> 6. As is clear from order dated 29.10.2022, Respondent No. 2 was proceeded against Ex-parte vide order of 02.05.2022 which order was further confirmed on 29.10.2022.
>
> 7. No e-mail would be entertained in this behalf. No proper representation is being made for setting aside the order whereby Respondent No. 2 has been proceeded against Ex-parte.
>
> 8. To come up on 21.11.2022 for further proceedings. Compliance be made as assured by the Claimant."

According to the petitioner, it had never received the order dated 2 May 2022 or 29 October 2022, whereby it was purportedly proceeded *ex parte*.

Petitioner's Section 16 application before the learned Arbitrator, and reply and rejoinder therein

13. On 26 November 2022, the petitioner filed an application before the learned Arbitrator under Section 16[10] of the 1996 Act. It was submitted, in the said application that, *vis-à-vis* the petitioner, the learned Arbitrator was *coram non judice*, as the petitioner was not a signatory to any arbitration agreement with Brompton and had not

[10] **16. Competence of arbitral tribunal to rule on its jurisdiction**. –
(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—
(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.
(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.
(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.
(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

consented to arbitration or to the appointment of the learned Arbitrator. It was submitted that the learned Arbitrator cold not proceed against a non-signatory to the SFA. The learned Arbitrator was, therefore, requested to set aside the orders proceeding against the petitioner *ex parte,* relinquish jurisdiction over the petitioner and terminate his mandate under Section 32[11] of the 1996 Act.

14. In CS (Comm) 789/2022, which had been instituted in the interregnum by the petitioner against Brompton alleging infringement of the petitioner's registered trademarks, a learned Single Judge of this Court decided IA 20643/2022 filed by Brompton under Section 8(1)[12] of the 1996 Act, seeking reference of the disputes in the suit to the arbitral proceedings then pending before the learned Arbitrator. Paras 13 to 16 of the judgment, which deal with the said application, may be reproduced:

> "13. By way of present application, Applicant/ Defendant No. 1-Brompton seeks reference of disputes arising in the present suit to pending arbitration initiated by Applicant against Plaintiff and Beverly. Applicant's case is that the Suit seeks remedies against infringement and passing off solely on the ground that the right to

[11] **32. Termination of proceedings**. –
(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).
(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—
(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;
(b) the parties agree on the termination of the proceedings; or
(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
(3) Subject to Section 33 and sub-section (4) of Section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

[12] **8. Power to refer parties to arbitration where there is an arbitration agreement**. –
(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

use YSL marks is not founded under terms of Franchise Agreement and Supply Agreement; and it is not for deceptively using similar trademarks. Therefore, it is contended that Plaintiff's asserted rights emanate from the afore-said agreements, and not under the provisions of Trade Marks Act. Disputes raised predominantly in respect of the rights and obligations under a contract – including those of arbitrability of disputes and use/license of trademarks are required to be addressed by the arbitral tribunal keeping in view the doctrine of 'kompetenz-kompetenz'. It is also contended that agent-principal relationship is established between Beverly and Plaintiff; and Beverly, as agent, acted under authority of Plaintiff to enter into Supply Agreement with Brompton. Reliance is placed on ***Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power Ltd. and Anr***[13]*,* to argue that in such circumstances, even a party which is non-signatory to Supply Agreement can be referred to arbitration; and Plaintiff having secured benefits from the operation of store and acted in terms of Supply Agreement, is amenable to arbitration in terms of the Supply Agreement in view of its conduct.

14. In the opinion of the Court, the present application is entirely misconceived. Despite expressly acknowledging that there is no privity of contract with the Plaintiff, Brompton has initiated arbitration proceedings under the Supply Agreement, to which Plaintiff is not a party. The instant suit is for infringement of YSL marks and passing off based on statutory rights under Trade Marks Act. Plaintiff had granted rights of use of YSL marks to Beverly alone under afore-said Franchise Agreement, wherein Brompton is not party. This agreement also prohibited transfer of rights without prior consent. Further, Plaintiff is admittedly neither a party nor has it consented to the Supply Agreement cited by Brompton for use of YSL marks. The claim of use of the marks by Brompton as an authorised user falls under Section 29(1) of the Trade Marks Act. Thus, scope of the present suit is entirely different, based on statutory rights under the Trade Marks Act as well as the Franchise Agreement to which Brompton is not privy. These disputes are founded on a different cause of action and Brompton not being privy to the Franchise Agreement cannot seek reference of disputes arising therefrom to arbitration. The judgments relied upon are entirely inapplicable.

15. In light of the above, Brompton's request under Section 8 of the A&C Act by relying on an arbitration clause contained in Supply Agreement is clearly misconceived and cannot be granted.

[13] **2021 SCC OnLine Del 3688, see paragraphs 23 to 27**

> 16. For the above reason, the application is not maintainable and is accordingly dismissed."

15. On 17 December 2022, Brompton submitted its reply, before the learned Arbitrator, to the Section 16 application of the petitioner. It was submitted that the application deserved to be rejected even on the ground of delay, under Section 16(2) of the 1996 Act. Inasmuch as the petitioner had admittedly received the notice invoking arbitration dated 22 February 2022, Brompton contended that the petitioner could not plead ignorance of the arbitral proceedings. Besides, notice regarding the proceedings was also sent to the petitioner by the learned Arbitrator *vide* e-mail dated 25 April 2022, which also notified the next date of hearing as 2 May 2022. It was only when the petitioner did not appear on 2 May 2022 that the learned Arbitrator proceeded against it *ex parte*. Brompton categorically denied the petitioner's assertion that it had not received the orders passed by the learned Arbitrator. As, therefore, the delay in filing the Section 16 application was unjustified and unexplained, Brompton requested the learned Arbitrator to dismiss the application.

16. The reply further relied upon the order dated 21 November 2022, passed by the learned Arbitrator, in which it was observed that no proper application had been preferred by the petitioner for setting aside the orders by which the learned Arbitrator had proceeded against the petitioner *ex parte*. Apropos the petitioner's contention that it was a stranger to the proceedings and, as it had no privity of contract with Brompton, could not be included in the arbitral proceedings, the reply pointed out that

(i) on 23 October 2019, the petitioner had written to Brompton seeking confirmation regarding the VAT/invoicing details of Brompton,

(ii) invoice dated 30 October 2019 had been issued by the petitioner to Brompton, relating to supplies directly provided by the Beverly to Brompton for opening the petitioner's boutique,

(iii) Brompton had, with the knowledge of the petitioner, executed a Lease Deed with Riveria Commercial Developers[14] to lease out the boutique premises,

(iv) the petitioner directly delivered the products and merchandise to Brompton and also directly issued invoices to Brompton in that regard, which were annexed,

(v) the approved vendors of the petitioner were also directly supplying material to Brompton and raising invoices, which were also annexed,

(vi) on 21 January 2021, Ms. Sarah Berkaoui, a representative of the petitioner addressed an email to Brompton, communicating the decision of the petitioner that payments against invoices would be made by Brompton to Beverly, who would in turn pay the petitioner, and

(vii) on 13 February 2020, Sarah Berkaoui addressed an email to Brompton, requesting for an invite to the boutique.

These facts, it was submitted, clearly indicated that Brompton always had the implied consent of the petitioner to run the boutique.

[14] "Riveria", hereinafter

17. All these facts, it was submitted, had been suppressed by the petitioner. They indicated that, in the transactions between the petitioner, Brompton, and Beverly, Beverly was only acting as an agent of the petitioner. Brompton contended that the law permitted inclusion, in arbitral proceedings between an agent and sub-contractor, of the principal, provided it was established that the agent had acted under the authority of the principal. The submission of the petitioner that a non-signatory could not be included in arbitral proceedings was also refuted, relying, for the purposes, on the judgment of the Supreme Court in ***Chloro Controls India Pvt Ltd v Severn Trent Water Purification Inc.***[15].

18. For all these reasons, Brompton prayed that the petitioner's application be dismissed.

19. On 4 January 2023, the petitioner filed a rejoinder before the learned Arbitrator, to the above reply of Brompton to the petitioner's Section 16 application. It was submitted that many of the grounds raised by Brompton in its reply stood decided against Brompton by the order dated 13 December 2022 passed by this Court in IA 20643/2022. It was further pointed out that Brompton had not provided any reply to the petitioner's submission that the appointment of the learned Arbitrator was illegal as it was unilateral. Nor was there any material, in Brompton's reply, to indicate that the petitioner had ever consented to, or was even aware of the SFA. Prior to the receipt of the notice invoking arbitration dated 22 February 2022, it was

[15] **(2013) 1 SCC 641**

submitted that the petitioner knew Brompton only to be an entity handling the logistics for Beverly. Apropos the various documents to which, Brompton had drawn attention, it was submitted that

(i) the email dated 23 October 2019 was a sequel to earlier communications in which Beverly had provided the VAT details of Brompton for inclusion in the invoices to be raised by the packaging suppliers and, in fact, in its reply dated 24 October 2022, to the said email, Beverly clarified that invoicing was to be done in the name of Beverly while delivery of goods was to be made to Brompton, thereby indicating that Brompton was merely an entity handling the logistics for Beverly,

(ii) the invoices relied upon by Brompton themselves indicated Beverly to be the importer and Brompton to be the consignee, thereby disclosing that the petitioner was always supplying goods to Beverly, and Brompton was only the logistics partner of Beverly,

(iii) in any event, these communications did not indicate knowledge, on the petitioner's part of the SFA,

(iv) until termination of the FA in August 2021, the petitioner had been regularly raising invoices for royalty and other payments, under the FA, on Beverly, thereby indicating that the petitioner had never been informed of the SFA executed between Beverly and Brompton during the subsistence of the FA,

(v) there was nothing to indicate that the Lease Deed between Brompton and Riveria was executed with the knowledge or approval of the petitioner,

(vi) the e-mail dated 21 January 2021 from Sarah Berkaoui also did not impute knowledge to the petitioner, of the SFA, and

(vii) the e-mail dated 13 February 2022 sought an invite from Brompton only because assistance for Visa approval could only be provided by the Indian Logistics Partner of Beverly, i.e., Brompton, and not by Beverly itself.

Reiterating the contentions contained in its Section 16 application, the petitioner once again sought termination of the mandate of the learned Arbitrator and the petitioner's deletion from the arbitral proceedings.

Written submissions filed before the learned Arbitrator

20. Written submissions were filed, before the learned Arbitrator, by the petitioner and Brompton.

21. The petitioner, in its written submissions, once again asserted that there was no privity of contract, or any arbitration agreement, between the petitioner and Brompton. This position, it was submitted, already stood confirmed by the judgment dated 13 December 2022 passed by the Coordinate Bench of this Court in CS (Comm) 789/2022. It was further reiterated that the learned Arbitral Tribunal had been unilaterally constituted without the consent of the petitioner and was, therefore, incompetent to arbitrate. The assertions of Brompton that the petitioner had impliedly consented to the SFA and that Beverly was an agent of the petitioner and had executed the SFA in its capacity as such agent, were both denied as false. It was pointed

out that Clauses 3.1 and 39.1 of FA contained express proscriptions against sub-franchising without the consent of the petitioner.

22. The petitioner once again drew attention to the fact that Brompton's Section 8 application was rejected by this Court in its judgment dated 13 December 2022 in CS (Comm) 789/2022. In its pleadings, in the said suit, it was submitted that Brompton had admitted the lack of any privity of contract between the petitioner and Brompton. The dismissal of Brompton's Section 8 application was specifically on the ground that there was no privity of contract between the petitioner and Brompton. Admissions made in judicial proceedings, it was submitted, were of greater value than admissions made elsewhere, for which purpose reliance was placed on para 27 of the judgment of the Supreme Court in ***Nagindas Ramdas v Dalpatram Iccharam***[16].

23. The documents relied upon by Brompton in its reply to the petitioner's Section 16 application, it was submitted, did not indicate any privity of contract between the petitioner and Brompton. It was further submitted that, where the contract envisaged arbitration by consent of parties, appointment of the Arbitrator by one party, without the consent of the other was impermissible, as such appointment would be unilateral in nature. It was pointed out, in this context, that no Section 11 petition had been filed by Brompton.

[16] **(1974) 1 SCC 242**

24. Insofar as the aspect of delay was concerned, the petitioner further submitted that a challenge to the jurisdiction of the learned Arbitrator could be raised at any stage, for which purpose reliance was placed on paras 4 to 6 of ***Lion Engineering Consultants v State of Madhya Pradesh***[17]**,** and paras 16 to 18 of ***Hindustan Zinc v Ajmer Vidyut Vitran Nigam***[18].

25. It was further submitted, relying on ***Sangram Singh v Election Tribunal***[19]**,** that a decision to proceed against a party *ex parte* did not result in denial in divesting the party of its right to further participate in the proceedings.

26. For all these reasons, the petitioner reiterated its prayers in its Section 16 application.

27. Brompton also filed written submissions before the learned Arbitral Tribunal on 20 January 2023. It was contended by Brompton, *inter alia*, that the judgment dated 13 December 2022, passed by this Court in CS (Comm) 789/2022, was irrelevant, as it related to trademark infringement whereas the arbitral proceedings claimed damages on account of termination of the FA and the SFA. Brompton reiterated that the documents relied upon by it in its reply to the petitioner's Section 16 application indicated the existence of a direct relationship between the petitioner and Brompton in the course of

[17] **(2018) 16 SCC 758**
[18] **(2019) 17 SCC 82**
[19] **AIR 1955 SC 425**

running the boutique. The legal position that a non-signatory could also be included in arbitral proceedings was also reiterated.

Order dated 8 April 2023 of the learned Arbitrator

28. By order dated 8 April 2023, the learned Arbitrator proceeded to dismiss the petitioner's Section 16 application. Reliance was placed, by the learned Arbitrator, on his earlier orders dated 29 October 2022, 5 November 2022, 12 November 2022 and 21 November 2022. It was further noted that the petitioner had not denied receipt of the Section 21 notice dated 22 February 2022 issued by Brompton and had also not issued any reply thereto. Copies of all orders passed by the learned Arbitrator, it was noted, had been provided to the petitioner *vide* e-mail dated 25 April 2022, which also contained a link to enable the petitioner to participate in further proceedings. Despite this, the petitioner chose to remain away from the proceedings. The learned Arbitrator further held that Section 16 of the 1996 Act did not empower the Arbitrator to set aside orders passed by him proceeding against a party *ex parte*. Inasmuch as the petitioner had been proceeded *ex parte*, it was observed that the petitioner could not seek termination of the mandate of the learned Arbitrator without first getting the orders proceeding against the petitioner *ex parte* set aside, as Section 16 was available only to a party to the proceedings.

The present petition

29. By the present petition, preferred under Section 14[20] read with Section 12(5)[21] of the 1996 Act, the petitioner seeks termination of the mandate of the learned Arbitrator. *There is no other prayer*.

30. Reply and rejoinder stand filed.

31. I have heard Mr. Akhil Sibal, learned Senior Counsel for the petitioner, and Mr. Gaurav Gupta, learned Counsel for the respondents, at length.

Rival Submissions

Opening submissions of Mr. Sibal

32. In his opening submissions, Mr. Sibal contends that, inasmuch as the consent of the petitioner to arbitration by the learned Arbitrator had not been obtained, the learned Arbitrator was not competent, as his appointment, *vis-à-vis* the petitioner, was unilateral. While conceding that non-signatories to the arbitration agreement can also,

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[20] **14. Failure or impossibility to act**—
(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if —
(*a*) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and
(*b*) he withdraws from his office or the parties agree to the termination of his mandate.
(2) If a controversy remains concerning any of the grounds referred to in clause (*a*) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.
(3) If, under this section or sub-section (3) of Section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of Section 12.

[21] Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:
Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

in appropriate cases, be co-opted in the proceedings, Mr. Sibal submits that none of the five definitive tests which are envisaged, in the judgment of the Supreme Court in ***ONGC Ltd v Discovery Enterprises Pvt Ltd***[22], as requiring satisfaction for such impleadment to be permissible, is satisfied in the present case. The learned Arbitrator was not, therefore, he submits, justified in rejecting the petitioner's Section 16 application and continuing to proceed with the arbitration.

Mr. Gaurav Gupta's submissions in reply

33. Mr. Gaurav Gupta raises a preliminary objection to the maintainability of the present petition. He submits that, once the petitioner had applied to the learned Arbitrator under Section 16, and the petitioner's application was dismissed, the only option with the petitioner is to wait for the final award to be passed by the learned Arbitrator and assail it under Section 34 of the 1996 Act. He cites, in this context,

(i) para 7 of ***SBP & Co v Patel Engineering Ltd***[23],

(ii) paras 16 and 23 of ***Bhaven Construction v Executive Engineer, Sardar Sarovar Narmada Nigam Ltd***[24],

(iii) paras 23, 24 and 30 of ***Cadre Estate Pvt Ltd v Salochana Goyal***[25], and

(iv) paras 18 and 19 of ***NTPC Ltd v Siemens Atkeingesellschaft***[26].

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[22] **(2022) 8 SCC 42**
[23] **(2005) 8 SCC 618**
[24] **(2022) 1 SCC 75**
[25] **2010 (119) DRJ 457**

34. Mr. Gupta further cites paras 37 and 42 of the judgment of a learned Single Judge of this Court in ***Purvanchal Vidyut Vitran Nigam Ltd v SRV Techno Engineering Pvt Ltd***[27] to contend that a challenge to the jurisdiction of the learned Arbitrator cannot be raised at a belated stage.

35. Finally, Mr. Gupta submits that a petition seeking termination of the mandate of the learned Arbitrator, with no consequential prayer for appointment of a substitute Arbitrator, is not maintainable. He cites, for the purpose, para 9 of ***Extramarks Education India Pvt Ltd v Saraswati Shishu Mandir***[28] and ***Religare Finvest Ltd v Widescreen Holdings Pvt Ltd***[29].

Mr. Sibal's submissions in rejoinder

36. Arguing in rejoinder, Mr. Sibal submits that, in the present case, no notice under Section 21 of the 1996 Act was issued by Brompton to the petitioner. He further submits that, in the event that parties could not mutually agree on arbitration, or on the arbitrator, either party, which nonetheless desired the disputes to be referred to arbitration, had to approach the Court under Section 11(5)[30] or 11(6)[31],

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[26] **(2007) 4 SCC 451**
[27] **2022 SCC OnLine Del 4713**
[28] **2024 SCC OnLine Del 3710**
[29] **2024 SCC OnLine Del 2769**
[30] (5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made on an application of the party in accordance with the provisions contained in sub-section (4).
[31] (6) Where, under an appointment procedure agreed upon by the parties,—
(a) a party fails to act as required under that procedure; or

as would be applicable. Unilateral appointment of an arbitrator is completely impermissible. Even on the sole ground that the learned Arbitrator had been unilaterally appointed, he was rendered *de jure* incapable of functioning as an Arbitrator. His mandate was, therefore, liable to be terminated under Section 14 of the 1996 Act.

37. Mr. Sibal submits that there is no inflexible principle that a party cannot merely seek termination of the mandate of the Arbitrator. Section 14(2), he points out, entitles either party to apply to a Court only for termination of the mandate of the arbitrator, in the event of any controversy regarding the applicability of one or the other of the grounds envisaged in Section 14(1) which would result in termination of the arbitrator's mandate. He submits that if, for example, the arbitrator were to withdraw from the proceedings, no occasion for either party to apply to the Court under Section 14(2) may arise.

38. Section 15(2)[32], submits Mr. Sibal, envisions the procedure to be followed in the event of a substitute arbitrator having to be appointed, consequent on termination of the mandate of the existing arbitrator. In that event, the substitute arbitrator, by virtue of Section

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(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

[the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

[32] **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; or

(b) by or pursuant to agreement of the parties.

(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.

15(2), would have to be appointed according to the rules applicable to the appointment of the earlier arbitrator. For that purpose, an application would have to be moved under Section 11(5). Such a situation would not arise in the present case, as the petitioner's contention is that there is, in fact, no arbitration agreement between Brompton and the petitioner. Without prejudice, Mr. Sibal submits that this Court would not be empowered to appoint a substitute arbitrator as, under Section 11(6), the substituted arbitrator would have to be appointed by the Supreme Court, as the petitioner is located abroad, and the arbitration would be in the nature of International Commercial Arbitration. To support his submissions, Mr. Sibal places reliance on

(i) para-12 of ***HRD Corporation v GAIL***[33], and

(ii) Paris 15, 17 and 19 of ***Bharat Broadband Networks Ltd v United Telecoms Ltd***[34].

39. Adverting to the order dated 8 April 2023, whereby the learned Arbitrator dismissed the petitioner's Section 16 application, Mr. Sibal submits that the merits of the application have not even been considered, and the application has been rejected solely on the ground that a combined application for setting aside the earlier orders passed by the learned Arbitrator proceeding against the petitioner *ex parte* and questioning the authority of the learned Arbitrator to arbitrate on the dispute, could not be maintained. As there is no decision on the merits of the application, the petitioner, he submits, has no option but to invoke Section 14 of the 1996 Act. He submits that the present

[33] **(2018) 12 SCC 471**
[34] **(2019) 5 SCC 755**

petition under Section 14 is maintainable and relies, for the purpose, on ***ACC Ltd v Global Cements Ltd***[35] and paras 9, 18, 20 to 22 and 34 of ***Swadesh Kumar Agarwal v Dinesh Kumar Agarwal***[36]. He also submits, in this regard, that Section 14(2) uses the expression "the Court". The "Court" which would exercise jurisdiction under Section 14(2) would, therefore, be the "Court" as defined in Section 2(1)(e)[37]. As against this, appointment of a substitute Arbitrator can only be by the High Court. This also goes to indicate that substitution of the Arbitrator is not the inevitable sequitur to termination of the mandate of the existing Arbitrator.

Analysis

Re. Preliminary Objection of Mr. Gaurav Gupta re. maintainability of the present petition

40. I am not in agreement with Mr. Gaurav Gupta in his preliminary submission that the present petition is not maintainable as the learned arbitrator has passed the order under Section 16 of the 1996 Act, and the petitioner has not chosen to challenge it. To my mind, the right of the petitioner to seek termination of the mandate of an arbitrator, where the circumstances justify such termination, as envisaged by

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[35] **(2012) 7 SCC 71**

[36] **(2022) 10 SCC 235**

[37] (e) "Court" means—

(i) in the case of an arbitration other than international commercial arbitration, the principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal civil court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;

Section 14 of the 1996 Act apply, is absolute and untrammeled by any other considerations.

41. There is nothing in the 1996 Act which divests a party to the arbitral proceedings from its right to seek termination of the mandate of learned arbitrator under Section 14 merely because it has already petitioned the arbitrator in that regard under Section 16 and has lost.

42. Mr. Gaurav Gupta relies, for this purpose, on the following sentences in para 7 of ***SBP***:

> "A person aggrieved by the rejection of his objection by the Tribunal on its jurisdiction or the other matters referred to in that section, has to wait until the award is made to challenge that decision in an appeal against the arbitral award itself in accordance with Section 34 of the Act."

43. In my opinion, Mr. Gupta is reading more into the afore-extracted observations of the Supreme Court than can legitimately be read into it. All that the Supreme Court says is that, if a party has applied to the Arbitral Tribunal under Section 16, questioning the jurisdiction of the Arbitral Tribunal to arbitrate on the dispute, and the Section 16 application has been dismissed, then, *if the party desires to challenge that dismissal*, it can do so only when the final award is passed, in a Section 34 challenge to the final award. This is made apparent from the next sentence in the paragraph, which contradistinguishes this with a situation in which the objection relating to jurisdiction under Section 16 is *accepted* by the Arbitral Tribunal. In such an event, the decision of the Arbitral Tribunal can straight away be challenged under Section 37. This is because Section

37(2)(a)[38] permits an appeal against an order *accepting* a plea under Section 16(2) or Section 16(3), but not an appeal against the order *rejecting* such a plea. What the Supreme Court has emphasized in para 7 of ***SBP*** is, therefore, that if a party applies to the Arbitral Tribunal under Section 16(2) or 16(3), and the application is *accepted*, the opposite party has a right of appeal against the decision under Section 37(2)(a), but if the application is *rejected*, the applying party does not have a right of appeal under Section 37, and has to wait until the final award is rendered and challenge the final award under Section 34. The Supreme Court has not, in para 7 of ***SBP***, in any manner, pronounced on the right of a party to seek termination of the mandate of the Arbitral Tribunal under Section 14.

On merits

44. It is necessary to take stock of the exact prayer in the present petition. The petitioner seeks termination of the mandate of the learned arbitrator seized of the dispute between Brompton and Beverly.

45. There are only three provisions in the 1996 Act which envisage termination of the mandate of an arbitrator. They are Sections 14(1), 15(1) and 29A. Of these, Section 29A envisages termination of the mandate by efflux of time, and does not, therefore, concern us.

[38] (2) An appeal shall also lie to a court from an order of the arbitral tribunal—
(a) accepting the plea referred to in sub-section (2) or sub-section (3) of Section 16; or
(b) granting or refusing to grant an interim measure under Section 17.

Between themselves, Sections 14(1) and 15(1) contemplate termination of the mandate of an arbitrator in five circumstances, *viz.*

(i) if he becomes *de jure* unable to perform his functions,

(ii) if he becomes *de facto* unable to perform his functions,

(iii) if he fails to act without undue delay,

(iv) if he withdraws from his office and

(v) if the parties agree to the termination of his mandate.

46. Of these, the last three circumstances (iii) to (v) do not apply. Indeed, the petitioner, too, does not seek to invoke any of these circumstances.

47. The petitioner's contention is that, as his appointment was unilateral, the learned Arbitrator was rendered *de jure* incapable of performing his functions as an arbitrator.

48. But was it, and was he?

49. It cannot be disputed that the 1996 Act does not permit unilateral appointment of an arbitrator. The Supreme Court has held in ***Dharma Prathishthanam v Madhok Construction Pvt Ltd***[39] and ***Perkins Eastman Architects***, among others, that the unilateral appointment of an arbitrator is impermissible. The corollary, however, is that there must be consensus between the parties not only to arbitration of the dispute, but to the appointment of the arbitrator. In the event of any want of consensus in that regard, either party, who

[39] **(2005) 9 SCC 686**

desires the dispute to be resolved by arbitration, has to approach the Court under Section 11(5) or 11(6), as the case may be, whereupon the arbitrator would be appointed by the Court.

50. This is clear even from the language of Section 21, which envisages agreement, between "the parties", to the appointment of the arbitrator. "Party" is defined, in Section 2(1)(h) as "a party to an arbitration agreement". Ergo, the requirement of consensus regarding appointment of the arbitrator, as envisaged under Section 21, applies only to the parties to the arbitration agreement, and not to a non-signatory who is sought to be included in the proceedings.

51. The petitioner is, therefore, clearly in error in treating the appointment of the learned arbitrator to be unilateral *because the petitioner had not consented to it*. The petitioner, admittedly, was not a party to the arbitration agreement, which was contained in the SFA between Brompton and Beverly. The principle of consensus *ad idem*, in reference of the dispute to arbitration and in the appointment of the arbitrator, applies to the parties to the arbitration agreement. It does not apply to a non-signatory, who is sought to be made a party in the arbitration proceedings. No consent of a non-signatory, who is sought to be impleaded in the arbitral proceedings, is required. This position was stated, in para 73 of ***Chloro Controls***, thus:

> "73. *A non-signatory or third party could be subjected to arbitration* <u>*without their prior consent*</u>, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite

> transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed."
>
> (Emphasis supplied)

52. The petitioner is, therefore, not correct in his submission that as the petitioner's consent was not taken while appointing the learned arbitrator, the appointment was bad in law. Expressed otherwise, the appointment of the learned arbitrator does not become unilateral because the petitioner's consent was not taken. If the petitioner could legitimately have been co-opted in the arbitration, despite being a non-signatory, its consent was not required prior thereto. If, on the other hand, the petitioner was illegally or irregularly made a party in the arbitration, the sequitur would be that the petitioner would be entitled to deletion from the proceedings, and not that the Arbitrator was rendered *de jure* incapable of arbitrating on the dispute.

53. This petition does not, however, incorporate any prayer for deletion of the petitioner from the arbitral proceedings.

54. If the consent of Brompton and Beverly, who were parties to the arbitration agreement, was not available, and the learned arbitrator had entered on reference without consensus *ad idem* between Brompton and Beverly regarding his appointment, then his appointment might possibly have been liable to be characterized as unilateral. Whether

Beverly's consent to the appointment of the learned arbitrator was, or was not, granted is, however, not forthcoming from the record. To reiterate, it is not the petitioner's case that Beverly's consent was not taken before the learned arbitrator entered on reference.

55. Indeed, in the order dated 8 April 2023, the learned arbitrator has specifically observed as under:

> "16. When the proceedings started under the aegis of this Sole-Tribunal, *whereas Respondent No.1 gave its consent to the constitution of this Tribunal*, Applicant/Respondent No.2 preferred to remain absent for no explainable reasons. Vide e-mail dated 25.04.2022, the Applicant/ Respondent No.2 was provided all previous procedural orders passed by this Tribunal. Meeting link etc. to appear before this Tribunal on 02.05.2022 (Annexure R-1) was sent. Despite receiving e-mail dated 25.04.2022, Respondent No.2 neither reverted to the said e-mail nor made appearance on the said date to participate in the proceedings."
>
> (Emphasis supplied)

56. The petitioner has also acknowledged to the said effect in para 19 of the petition.

57. It appears, therefore, that Beverly did consent to the arbitration of the dispute by the learned arbitrator. In that view of the matter, the appointment of the learned arbitrator cannot be treated as unilateral and, therefore, void on that ground.

58. That being so, the learned arbitrator cannot be treated as being *de jure* incapable of functioning as an arbitrator, so as to justify termination of his mandate under Section 14(2) read with Section 14(1)(a).

59. The petitioner has also sought to contend that the relevant tests to be applied while impleading a non-signatory in arbitral proceedings, as laid down by the Supreme Court in its decision in ***Discovery Enterprises Pvt Ltd***, were not satisfied in the present case and that, therefore, the petitioner could not have been made a party.

60. This issue is not relevant as the petitioner has not included, in the present petition, any prayer to delete the petitioner from the array of parties before the learned arbitrator.

61. Even otherwise, even if it were to be presumed that the petitioner was not a necessary or proper party in the arbitration, that would not render the arbitrator *de jure* or *de facto* incapable of arbitrating on the dispute, so as to justify termination of his mandate. The plea that the petitioner was entitled to be deleted from the array of parties in the arbitration is obviously entirely distinct from a plea that the learned Arbitrator was *de jure* incapable of functioning as an arbitrator. The inclusion, or exclusion, of parties in an arbitral proceeding does not impinge on the capability, or capacity, of the arbitrator to arbitrate on the dispute.

62. This judgment does not, therefore, pronounce on the petitioner's entitlement to be deleted from the arbitral proceedings.

Conclusion

63. The petitioner has not, therefore, been able to make out any case for termination of the mandate of the learned Arbitrator.

64. The petition is devoid of merit and is accordingly dismissed.

C. HARI SHANKAR, J

SEPTEMBER 18, 2024
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