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

% *Date of Judgment: 08th January, 2021*

\+ **O.M.P. (T) (COMM.) 88/2020**

MEDISPROUTS INDIA PVT LIMITED CIN U93020KL2012PTC030297 A COMPANY REGISTERED UNDER THE COMPANIES ACT & ORS. ..... Petitioners

Through Mr Shinu J. Pillai, Advocate.

versus

M/S SILVER MAPLE HEALTHCARE SERVICES (P) LTD CIN U85100DL2010PTC200694 A COMPANY INCORPORATED UNDER COMPANIES ACT ..... Respondent

Through

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through videoconferencing]

VIBHU BAKHRU, J. ***(ORAL)***

1. The petitioners have filed the present petition under Section 32(2)(c) of the Arbitration and Conciliation Act, 1996 (hereinafter 'the Act'), *inter alia*, impugning an order dated 27.11.2020, whereby an application filed by the petitioners seeking termination of arbitral proceedings in terms of Section 32(2)(c) of the Act was rejected along with costs of ₹20,000/-. The petitioners also pray that orders be passed

terminating the arbitral proceedings.

2. The disputes between the parties arose in connection with a Sub-Franchise Agreement dated 24.01.2012 entered into between petitioner no. 1 and the respondent. In terms of the said agreement, the respondent had granted petitioner no. 1 non-transferable and non-assignable license to use the trademarks (DHI trademarks) for specified products and for hair transplantation services, in the State of Kerala.

3. Petitioner no. 1 is a company and petitioner nos. 2 and 3 are its directors.

4. The petitioners claim that petitioner no. 1 terminated the said Sub-Franchise Agreement vide a letter dated 06.03.2019. The respondent claims that it terminated the Sub-Franchise Agreement by a letter dated 16.05.2019, citing various reasons including lapses in health and safety standards.

5. By a letter dated 04.06.2019, the respondent invoked the Arbitration Agreement contained in the said Sub-Franchise Agreement for adjudicating the disputes that had arisen between the parties. The respondent also suggested names of two former judges of this Court to be appointed as Arbitrators. The said proposal was declined by the petitioners but subsequently, the parties constituted the Arbitral Tribunal by the petitioner no.1 nominating Mr. MKS Menon, Advocate and the respondent nominating Mr. Amit Bansal, Advocate as arbitrators. Justice Indermeet Kochhar was appointed as the

presiding arbitrator.

6. The respondent filed a Statement of Claim claiming a sum aggregating ₹6,31,81,795/- along with interest from the petitioners. The petitioners filed their response and petitioner nos. 1 and 2 made a counter-claim aggregating ₹19,97,75,452.72 along with interest.

7. The petitioners state that the respondent filed a criminal complaint before the Safdarjung Police Station resulting in registration of FIR No. 340/19. The petitioners have challenged the registration of the said FIR in ***Crl. MC No. 516 of 2020***, which is pending before this Court. The petitioners also filed a criminal complaint which led to the registration of FIR No. 107/2020 with the Ernakulam Town South Police Station, Kerala.

8. Thereafter, on 06.11.2020, the petitioners filed an application before the Arbitral Tribunal praying that the arbitral proceedings be terminated under Section 32(2)(c) of the Act. The said application was dismissed by an impugned order dated 27.11.2020.

9. The petitioners claim that the respondent had entered into the Sub-Franchise Agreement by falsely representing to it that the respondent was a franchise of DHI trademarks under the Master Franchise Agreement dated 26.05.2010. The petitioners claim that the CEO of the respondent company had falsely represented that the respondent had sufficient authority to deal with the brand 'DHI', which was owned by entities based in Cyprus. The petitioners further claim that the disputes have become un-arbitrable in view of

subsequent developments including registration of FIRs and consequent investigations. The petitioners claim that disputes relating to Intellectual Property Rights are not arbitrable.

10. It is further stated that both the parties – petitioner no.1 as well as the respondent – had also filed criminal complaints against each other and consequentially, FIRs have also been registered on the basis of the said complaints.

11. The learned counsel appearing for the petitioner submits that since the respondent did not have any right to sub-license or deal with the brand 'DHI', the Sub-Franchise Agreement was a consequence of fraud perpetuated on it. He submits that in view of the above, the disputes raised by the respondents are not arbitrable and therefore, the Arbitral Tribunal has no mandate to deal with the said disputes. He submits that in the given circumstances, the Arbitral Tribunal was obliged to terminate the arbitral proceedings under Section 32(2)(c) of the Act. He referred to the recent decision of the Supreme Court in ***Vidya Drolia v. Durga Trading Corporation: C.A. No. 2402 of 2019 decided on 14.12.2020***. He also referred to the decision of the Supreme Court in ***Lalitkumar V. Sanghavi Thr LRs & Anr. v. Dharamdas V. Sanghavi & Ors.: (2014) 7 SCC 255***, in support of his contention that the disputes regarding termination of arbitral proceedings under Section 32(2)(c) of the Act could be agitated by filing a petition under Section 14 of the Act.

12. It is not necessary for this Court to examine the contention whether the disputes raised before the Arbitral Tribunal are arbitrable

or not. The question whether the disputes are arbitrable relate to the jurisdiction of the Arbitral Tribunal. The doctrine of *Kompetenz-Kompetenz* is applicable to arbitral proceedings and the arbitral tribunal has the jurisdiction to rule as to the extent of its own competence on the issues before it.

13. It is relevant to refer to Section 16 of the Act, which is set out below:

> "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."

14. It is apparent from the above that any challenge to the jurisdiction of an Arbitral Tribunal necessarily has to be decided by the Arbitral Tribunal itself in the first instance. Thus, the question whether the disputes are arbitrable or not cannot be made the subject matter of proceedings under Section 14 of the Act.

15. Plainly, if the Arbitral Tribunal agrees with the contention that the disputes are not arbitrable, arbitral proceedings would require to be terminated and the aggrieved party would have its remedies against the said order/decision. However, if the Arbitral Tribunal rejects the contention that it does not have jurisdiction to decide the claims, the Arbitral Tribunal would proceed to render an award. In the given circumstances, the Arbitral Tribunal may adjudicate the dispute regarding the question of jurisdiction and such decision may be construed as an award (See: ***Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products: (2018) 2 SCC 534***). In such circumstances, the aggrieved party would have a right to apply for setting aside of the said award provided that the grounds as set out under Section 34 of the Act are made out. In either event, recourse to Section 14 of the Act is not available to challenge the decision of the Arbitral Tribunal regarding any question of arbitrability/jurisdiction,

unless the issue relates to the ineligibility of an arbitrator to act, such as in terms of Section 12(5) of the Act.

16. The decision in the case of ***Vidya Drolia*** (*supra*) is of little assistance to the petitioner. In that case, the Supreme Court has authoritatively held as under:

> "69. Issue of non-arbitrability can be raised at three stages. *First*, before the court on an application for reference under Section 11 or for stay of pending judicial proceedings and reference under Section 8 of the Arbitration Act; *secondly*, before the arbitral tribunal during the course of the arbitration proceedings; or *thirdly*, before the court at the stage of the challenge to the award or its enforcement."

17. It is, thus, clear that the question whether the disputes are arbitrable is to be examined by the Arbitral Tribunal in the first instance and by the court while examining the award at the stage of challenge under Section 34 of the Act.

18. In ***Vidya Drolia*** (*supra*), the Supreme Court also explained that the issue of non-arbitrability is a facet of the jurisdiction of the Arbitral Tribunal and can be examined by the Arbitral Tribunal under Section 16(1) of the Act. And, the remedy of the unsuccessful party raising the objection to the issue of arbitrability is the recourse under Section 34 of the Act. The relevant extract of the said decision is set out below:

"119. Section 16(1) of the Arbitration Act accepts and empowers the arbitral tribunal to rule on its own jurisdiction including a ruling on the objections, with respect to all aspects of non-arbitrability including validity of the arbitration agreement. A party opposing arbitration, as per sub-section (2), should raise the objection to jurisdiction of the tribunal before the arbitral tribunal, not later than the submission of statement of defence. However, participation in the appointment procedure or appointing an arbitrator would not preclude and prejudice any party from raising an objection to the jurisdiction. Obviously, the intent is to curtail delay and expedite appointment of the arbitral tribunal. The clause also indirectly accepts that appointment of an arbitrator is different from the issue and question of jurisdiction and non-arbitrability. As per sub-section (3), any objection that the arbitral tribunal is exceeding the scope of its authority should be raised as soon as the matter arises. However, the arbitral tribunal, as per sub-section (4), is empowered to admit a plea regarding lack of jurisdiction beyond the periods specified in sub-section (2) and (3) if it considers that the delay is justified. As per the mandate of sub-section (5) when objections to the jurisdiction under sub-sections (2) and (3) are rejected, the arbitral tribunal can continue with the proceedings and pass the arbitration award. A party aggrieved is at liberty to file an application for setting aside such arbitral award under Section 34 of the Arbitration Act. Sub-section (3) to Section 8 in specific terms permits an arbitral tribunal to continue with the arbitration

proceeding and make an award, even when an application under sub-section (1) to Section 8 is pending consideration of the court/forum. Therefore, pendency of the judicial proceedings even before the court is not by itself a bar for the arbitral tribunal to proceed and make an award. Whether the court should stay arbitral proceedings or appropriate deference by the arbitral tribunal are distinctly different aspects and not for us to elaborate in the present reference.

120. Section 34 of the Act is applicable at the third stage post the award when an application is filed for setting aside the award. Under Section 34, an award can be set aside - (i) if the arbitration agreement is not valid as per law to which the party is subject; (ii) if the award deals with the disputes not contemplated by or not falling within the submission to arbitration, or contains a decision on the matter beyond the scope of submission to arbitration; and (iii) when the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. Thus, the competence - competence principle, in its negative effect, leaves the door open for the parties to challenge the findings of the arbitral tribunal on the three issues. The negative effect does not provide absolute authority, but only a priority to the arbitral tribunal to rule the jurisdiction on the three issues. The courts have a 'second look' on the three aspects under Section 34 of the Arbitration Act."

19. At this stage, it is also relevant to refer to Section 14 of the Act and the same is set out below:

> "14. Failure or impossibility to act.—(1) 29[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."

20. A plain reading of Section 14 of the Act indicates that it applies only in cases where the Arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without delay. In terms of Clause (b) of Section 14(1) of the Act, it also applies where the Arbitrator withdraws from his office or his mandate is terminated by the parties. It is obvious from the plain language of Section 14(1) of the Act that it has no application in cases where the Arbitral Tribunal is proceeding with the reference and the mandate of the Arbitrators is not terminated by the parties.

21. Reliance on the case of ***Lalitkumar*** (*supra*) is also misplaced. In the said case, the Arbitral Tribunal had terminated the arbitral

proceedings as the concerned party had failed to pay the arbitration fees. The Supreme Court held that such termination would fall within the ambit of Section 32(2)(c) of the Act, that is, on the Arbitral Tribunal's finding that continuation of arbitral proceedings has become unnecessary or impossible. It is in that context that the Supreme Court held that "*the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court as provided under Section 14(2)*". This decision would have little relevance in cases where the arbitral proceedings have not been terminated; the arbitrators are able to perform their function; and they have neither withdrawn their mandate nor has the same been terminated by the parties.

22. As noticed above, the question whether the disputes are arbitrable or not is a matter effecting the jurisdiction of the Arbitral Tribunal and the same is not a subject matter of Section 32(2)(c) of the Act.

23. The present petition is, thus, misconceived. The same is, accordingly, dismissed.

VIBHU BAKHRU, J

JANUARY 8, 2021
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