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

Date of Decision: 22.04.2021

\+ **CM(M) 71/2021 & CMs 3098/2021, 10016/2021**

SAGAR RATNA RESTAURANTS PVT. LTD. ..... Petitioner
Through Mr.Ajay Gulati, Adv.

versus

D S FOODS & ORS. ..... Respondents
Through Mr.S.K.Jain, Ms.Stuti Jain, Mr.Akshu Jain, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This hearing has been held by video conferencing.

2. This petition has been filed by the petitioner challenging the order dated 27.02.2020 passed by the learned District Judge, (Commercial Court-02), South District, allowing the application of the respondents herein filed under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act'); accepting the plea of the respondents that the parties be referred to arbitration; and dismissing the suit filed by the petitioner as not maintainable.

3. It is the case of the petitioner that it is the registered owner of the trade mark “SAGAR”, “RATNA” and “SAGAR RATNA” which has been duly renewed by the petitioner from time to time. The

petitioner contends that it entered into a Franchise Agreement dated 06.06.2013 and a Supplementary Agreement dated 08.10.2014 with the respondents wherein the respondents were appointed as Franchisees and granted licence to use said trade mark.

4. As certain disputes arose, the petitioner claims to have sent a cease and desist notice dated 31.10.2018 to the respondents to terminate the Franchise Agreement.

5. The petitioner thereafter filed a petition under Section 9 of the Act, being ARBP No. 269/2018, wherein, vide order 27.12.2018, the respondents were restrained from using the trademark of the petitioner.

6. The respondents challenged the above order before this Court in form of an appeal, being FAO No. 36/2019. The same was dismissed vide order dated 29.01.2019.

7. The petitioner thereafter, vide notice dated 27.02.2019, invoked the Arbitration Agreement contained in the Franchise Agreement, and on failure of the respondents to agree to the appointment of an arbitrator, filed a petition under Section 11 of the Act, being ARB.P. 239/2019. The said petition was allowed by this Court vide its order dated 07.05.2019, appointing an arbitrator.

8. The petitioner thereafter filed an application under Section 17 of the Act before the Arbitrator. The learned Arbitrator was pleased to dismiss the said application vide his order dated 13.08.2019. In the said order, the learned Arbitrator recorded the objection of the respondents to the maintainability of the arbitration proceedings as under:

"8. On the other hand, Ld. Counsel for the respondents submits that the franchisee agreement does not stand terminated for want of legal notice in terms of the Franchisee Agreement because 45 days' notice has not been served by the claimant. Secondly, that as per the ratio laid down by the Hon'ble Apex Court in A.Ayyasamy Vs. A. Paramasivam & Ors. (2016) 10 SCC 386 the disputes in relation to trademarks and patents are not arbitrable. Thirdly, that the relief against alleged infringement does not fall within the jurisdiction of the arbitrator as it does not arise out of the contract between the parties containing the arbitration agreement. Ld. Counsel has also relied upon Emaar MGF Land Ltd. Vs. Aftab Singh 2018 SCC online SC 2771 and Steel Authority of India Ltd. Vs. SKS Ispat & Ltd. 2014 SCC online Bom. 4875."

9. The petitioner herein filed an appeal under Section 37(2)(b) of the Act challenging the above order of the learned Arbitrator, being ARB No.41/2019. In the said appeal, the respondents again contended as under:

"10(4). The matter is not arbitrable, in as much as, the Trademark Act provides a mechanism and machinery for determination of such rights, and any such determination would be a judgment in rem, having far reaching consequences and as such, the arbitration cannot be a remedy for such determination."

10. The learned Additional District Judge-02, vide order dated 14.10.2019, was pleased to dismiss the appeal of the petitioner, observing as under:

"18. So far as the question No.1 is concerned, it is settled law that no injunction can be granted in case the contract is determinable. It has been consistently held by the Superior Courts that even if the termination is illegal, the remedy would be damages. This Court is, prima facie, of the view that having admitted the factum of termination, as stands recorded in the order dated 29.01.2019 passed by the Hon'ble High Court in FAO No.36/2019 and atleast having acknowledged that the email dated 20.08.2018 of the appellant, which clearly contemplated termination, the respondents cannot have continued to use the trademark/trade-name belonging to the appellant. As per the law of land the remedy at best would be damages even if the respondents succeeds in proving that the termination was unjust or unlawful.

19. The question No.2, however, alters the orientation of the proceedings. The contention of the appellant side is that the very agreement fundamentally is an agreement granting permission to use the Intellectual Property Rights, and the dispute would be a "dispute" within the four corners of the arbitration clause seems to be impressive arguments. One might feel tempted to accept it as the sole determinative factor. The fact, however, remains that such disputes have been decisively left out of the scope or purview of the arbitration law. No doubt the fact situation strongly leans in favour of the appellant, the significant question which emerges in the present proceedings, is one of the remedy and not the merit alone.

20. The facts involved, quite predicatively, leads towards the grant of injunction but the present lis itself is besieged by inherent lack of jurisdiction. The contention of the learned counsel for the appellant that the case laws cited by the respondent side at best can be treated as obiter as none of the case directly involves the determination of the question in relation with IPR, and further that since the agreement is fundamentally an agreement involving the Intellectual Property Rights itself the respondent cannot question arbitrability of the dispute, cannot be accepted. However, anomalous, dispiriting or unjust it may appear to the appellant, the jurisdiction would

remain major determinative, and factors in too significantly in the present proceedings.

21. The jurisdiction of a Court/Tribunal/Forum, to try a given specie of matter, is a rigid concept, and cannot be over sighted. It assumes centre stage, whenever challenged. The factual upright involved in this case, in the opinion of this Court, would neither subsume, nor trivialize nor even observe the lack of jurisdiction, which is clearly precepted by law, as has been observed by the Hon'ble Supreme Court in A.Ayyasamy v. A. Paramsivam & Ors., 2016 SCC OnLine SC 1110; and Emaar MGF Land Ltd. v. Aftab Singh 2018 SCC OnLine 2771, as also the other case laws cited by the respondent side.

22. Jurisdiction appears to be a vantage point for the respondent in the present matter and any grant of injunction in ignorance thereof would lead to crisis of a different dimension.

23. In so far as the impugned order is concerned, even if this Court is of the view that another view could have possibly been taken in regard with the notice of termination, or that the Learned Arbitrator could also have reflected upon the termination more emphatically, the fact remains what would still weigh more heavily, is the lack of jurisdiction. This Court would not hesitate in accepting the contention of the Learned counsel for the respondents that the question of jurisdiction could be raised subsequently, even if it was not raised at the time of appointment of arbitrator."

11. Faced with the above order, which had refused to grant interim protection to the petitioner, accepting the objection of the respondents and observing *prima facie* doubt on the maintainability of the arbitration, the petitioner filed an application before the learned Arbitrator, praying for leave to withdraw the arbitration claim to

institute a civil suit. In the application, the petitioner pleaded and prayed as under:

> *"5. That it is relevant to mention here that the Ld. ADJ, while dismissing the appeal, held that on the termination of the franchisee agreement, the licensor i.e. the respondents herein do not have any right to use the trademark of the claimant however it was decided that the arbitral tribunal lacks jurisdiction to adjudicate upon the trademark matters as the disputes relating to trademark are non-arbitrable.*
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> *xxxxxx*
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> *It is therefore most respectfully prayed that this Hon'ble Tribunal may be pleased to allow the claimant to withdraw its claim in order to raise the same before the appropriate court of law or pass any other order or relief which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case."*

12. The learned Arbitrator by its order dated 11.12.2019 allowed the said application.

13. The petitioner thereafter filed the Suit wherein the present Impugned Order has been passed.

14. The respondents now filed an application contending that the dispute between the parties is arbitrable in nature. The said plea has been accepted by the learned Trial Court and the suit has been dismissed.

15. The learned counsel for the petitioner submits that the respondents cannot be allowed to approbate and reprobate and must not be allowed to take inconsistent pleas in different proceedings. He

submits that the respondent having succeeded in their plea on lack of arbitrability of the dispute, cannot now challenge the maintainability of the suit as well.

16. On the other hand, the learned counsel for the respondents submits that the dispute between the parties is arbitrable in nature. He submits that therefore, the Impugned Order has rightly allowed the application under Section 8 of the Act and referred the parties to arbitration. He submits that there was no final adjudication by the learned Arbitrator holding the dispute to be not arbitrable in nature. The petitioner, therefore, cannot rely upon the observation made by the learned Additional District Judge in appeal, and the remedy of the petitioner should have been to challenge the said order.

17. He further submits that in any case, this Court should not interfere in an arbitration matter in exercise of powers under Article 227 of the Constitution of India. In this regard, he places reliance on the judgment of the Supreme Court in ***Bhaven Construction vs. Executive Engineer & Anr.***, 2021 SCC OnLine SC 8.

18. I have considered the submissions made by the learned counsels for the parties.

19. As noted hereinabove, there is no dispute on the existence of an Arbitration Agreement between the parties as contained in the Franchise Agreement dated 06.06.2013 executed between the parties. Disputes having arisen between the parties, the petitioner invoked the Arbitration Agreement and the parties were referred to arbitration on a petition filed under Section 11 of the Act before the High Court. It was however, the respondents who raised objection to the arbitrability

of the claim of the petitioner, both before the learned Arbitrator as also before the learned Additional District Judge in the appeal. The learned Additional District Judge, in his order dated 14.10.2019, though on merit found the petitioner to be entitled to an injunction, refused to grant relief to the petitioner, *prima facie* accepting the plea of non-arbitrability of the dispute raised by the respondents. The petitioner accepted the above order and withdrew its claim before the learned Arbitrator to file the suit.

20. A bare perusal of the above sequence of events would show that the respondents have been taking inconsistent stands at different stages, as per their convenience. On the petitioner invoking the Arbitration Agreement, the respondents took a plea that the dispute raised is not arbitrable in nature. This submission found favour with the learned Appellate Court while dismissing the appeal of the petitioner filed under Section 37 of the Act. Faced with this situation, the petitioner instead of challenging the said order, accepted the objection of the respondents and withdrew its claim before the learned Arbitrator to file the suit in question. The petitioner, therefore, not only suffered an order but also changed its position to its detriment based on the submission made by the respondents.

21. In ***Kiran Devi v. Bihar State Sunni Wakf Board & Ors.,*** 2021 SCC OnLine SC 280, on inconsistent pleas being taken by a litigant, the Supreme Court has held as under:-

> ***"13.*** *We have heard learned counsel for the parties and find that it is not open to the appellant at this stage to*

dispute the question that the suit filed before the learned Munsif could not have been transferred to the Wakf Tribunal. The plaintiff had invoked the jurisdiction of the Civil Court in the year 1996. It is the Wakf Board and the appellant who then filed an application for transfer of the suit to the Wakf Tribunal. Though, in terms of Ramesh Gobindram, the Wakf Tribunal could not grant declaration as claimed by the plaintiff, but such objection cannot be permitted to be raised either by the Wakf Board or by the appellant as the order was passed by the Civil Court at their instance and was also upheld by the High Court. Such order has thus attained finality inter-parties. The parties cannot be permitted to approbate and reprobate in the same breath. The order that the Wakf Tribunal has the jurisdiction cannot be permitted to be disputed as the parties had accepted the order of the civil court and went to trial before the Tribunal. It is not a situation where plaintiff has invoked the jurisdiction of the Wakf Tribunal.

14. *The argument raised by the learned counsel for the appellant that there was no estoppel against the statute as consent could not confer jurisdiction upon the Authority which did not originally have jurisdiction. Hence, it was submitted that the decision of the Tribunal was without jurisdiction. It is to be noted that the plaintiff had filed proceedings before the Civil Court itself but the same was objected to by the appellant as well as by the Waqf Board. Thus, it is not conferment of jurisdiction by the plaintiff*

voluntarily but by virtue of a judicial order which has now attained finality between parties. The suit was accordingly decided by the Waqf Tribunal. We do not find that it is open to the appellant to raise the objection that the Waqf Tribunal had no jurisdiction to entertain the suit in the facts of the present case. Therefore, we do not find any merit in the first argument raised by the learned counsel for the appellant."

22. In ***Suzuki Parasrampuria Suitings Pvt. Ltd. v. Official Liquidator of Mahendra Petrochemicals Ltd. (In Liquidation) & Ors.,*** (2018) 10 SCC 707, the Supreme Court deprecated this practice of taking inconsistent pleas by a litigant to merely prolong the litigation, in the following words:

> *"12.A litigant can take different stands at different times but cannot take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands. The untenability of an inconsistent stand in the same case was considered in Amar Singh vs. Union of India, (2011) 7 SCC 69, observing as follows:*
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> > *"50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions."*

13.A similar view was taken in Joint Action Committee of Air Line Pilots' Assn. of India vs. DG of Civil Aviation, (2011) 5 SCC 435, observing:

> *"12. The doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity..... Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily."*

23. This Court in its judgment dated 27.05.2020 passed in CS(OS) 2454/2009 titled ***Parmod Kumar Jain & Anr. vs. Ram Kali Jain & Ors.***, has also held as under:-

> "29. *The question which arises for consideration is, whether the Courts today can permit litigants coming before it to take a stand before the Court different from that they have been taking for long period of time before taxation and other authorities. In my view, the Courts, if permit the litigants to, for the purposes of litigation take a different stand from what they have been taking while complying with various laws, would be aiding and abetting such litigants to violate the laws, particularly fiscal laws and would be permitting the litigants to change their face from time to time to their advantage and to the detriment of public exchequer and the public at large. The same cannot be permitted. Reference in this regard can be made to Dr.Mukesh Sharma Vs. Dr. Maheshwar Nath Sharma 2017 SCC OnLine Del 7237, M/s New Era Impex (India) Pvt. Ltd. Vs. M/s Oriole Exports Pvt. Ltd. (2016) 234 DLT 615 and M/s*

Moolchand Khairati Ram Trust Vs. Union of India 2016 SCC OnLine Del 2840."

24. In ***Telefonaktiebolaget Lm Ericsson (Publ) vs. Intex Technologies (India) Ltd***., 2015(62) PTC 90 (Del), this Court reiterated as under:-

*"**144**. It is equally well-settled that the party cannot be allowed to approbate or reprobate at the same time so as to take one position, when the matter is going to his advantage and another when it is operating to his detriment and more so, when there is a same matter either at the same level or at the appellate stage.*

***145**. In the case of Dwijendra Narain Roy vs. Joges Chandra De, MANU/WB/0151/1923: AIR 1924 Cal 600, The Division Bench of the Calcutta High Court has succinctly held:*

It is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. This wholesome doctrine, the learned Judge held, applies not only to successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided the second suit grows out of the judgment in the first.

(Emphasis Supplied)

Applying the said principles of law to the present case, it is apparent that if the defendant is allowed to re-agitate, it would also lead to allowing the party to approbate and reprobate at the same time which is clearly impermissible. The plea is thus barred by way of principle of approbate or reprobate which is a facet of estoppels as the defendant had accepted the findings of the Division Bench and Single Judge. There are no subsequent events which have changed warranting re-adjudication of the matter."

25. It is also to be seen that arbitration is an Alternate Dispute Resolution mechanism which is resorted to by the parties with their consent. The parties have to be *ad idem* for the same. The respondents have, in the earlier instance, clearly envisaged an intent not to be bound by the Arbitration Agreement so far as the claim of the petitioner to the trademark is concerned. The petitioner has now accepted that opposition and has invoked the ordinary jurisdiction of a Civil Court seeking enforcement of its rights in the trademark. Where both the parties have become *ad idem* that the dispute raised by the petitioner is not arbitrable in nature, the parties could not have been referred to arbitration.

26. In this regard, reference may be made to ***JMC Projects (India) Ltd. vs. Rites Ltd***., (order dated 20.04.2007 passed in CS(OS) 1632/2006), wherein this Court, while dismissing an application under Section 8 of the Act, observed as under:-

> *"Since the parties are ad idem that the subject matter of dispute is not capable of being adjudicated by the arbitrators, the suit must proceed. The defendant by his stand before the arbitrators has shown its unwillingness to have the dispute settled by arbitration and, thus, the present application is not maintainable."*

27. As far as the objection of the learned counsel for the respondents on the maintainability of the present petition is concerned, in the present case, the order in challenge is not one passed by the

learned Arbitrator but by a Civil Court. Though it is correct that in an order passed by the learned Arbitrator, the jurisdiction of the Court is highly circumscribed and limited and can be invoked in only the most rare and exceptional cases, in the present case, the Impugned Order having been passed by a Civil Court and without taking into account the inconsistent stand taken by the respondents itself, in my opinion, the present petition warrants an interference by this Court with the Impugned Order.

28. Accordingly, the Impugned Order cannot be sustained and is set aside.

29. The application filed by the respondents under Section 8 of the Act shall be treated as dismissed. The suit, being CS(Comm) No. 40/2020, is restored back to its original number.

30. The parties shall appear before the learned Trial Court on 11th May, 2021 (subject to the general orders/directions regarding the functioning of the Court) through VC or physically through counsels.

31. The interim order dated 29.01.2021 passed by this Court shall continue to operate till the further continuation/vacation/modification of the said order is considered by the learned Trial Court, in accordance with law and upon hearing the parties.

32. The petition is allowed in the above terms. There shall be no order as to costs.

NAVIN CHAWLA, J

APRIL 22, 2021
RN/A.