

M/S Pernod Ricard India Pvt Ltd vs M/S Indo Spirits & Ors on 9 August, 2024

Author: Jasmeet Singh

Bench: Jasmeet Singh

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IN THE HIGH COURT OF DELHI AT NEW DELHI
ARB.P. 399/2024, I.A. 35164/2024, I.A. 3
M/S PERNOD RICARD INDIA PVT LTD

Through: Mr Suhail Dutt, Sr. Adv. w
Rajat Kamal, Mr Sankalp Go
Khanuja, Ms Aprajita Tygi,
and Mr Aseem Atwal, Advs.

versus

M/S INDO SPIRITS & ORS.

Through: Mr Nakul Dewan, Sr. Adv. w
Mr Himanshu Chaubey, Mr S
Nishesh Gupta, Mr Srajan
Dubey, Advs. for R-1.
Mr Srijan Sinha, Mr Himan
Siddharth Garg, Mr Nishes
Yadav and Mr Gourang Dube
Mr Dhruv Gupta, Mr Anubha
Indhirajith, Advs. for R-
Mr Nitesh Rana, Ms Soumya
Kohli and Mr Deepak Nagar
Mr Nithin Chowdary Pavulu
Saurabh, Advs. for R-5.
Mr Aditya Ganju, Ms Shamb
Honeyshya Raj and Ms Pall
6 and I.A. 35170/2024.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH
ORDER

% 09.08.2024

1. This is a petition under Sections 11(5) and 11(12)(b) of the Arbitration and Conciliation Act, 1996 ("the Act") seeking, inter alia, This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 24/08/2024 at 00:01:10 appointment of an Arbitrator for adjudicating the disputes between the parties arising out of their business arrangement under the Surety Bond dated 21.12.2021 and Letter dated 05.01.2022

containing arbitration agreements.

2. The brief facts of the case are that the petitioner, M/s. Pernod Ricard India Pvt. Ltd., is a subsidiary of the French alcoholic beverages company Pernod Ricard SA and a company incorporated under the laws of India.

3. Respondent Nos. 3, 4 and 5 entered into a Joint Venture Agreement dated 29.10.2021 for running the business of beverages in the name and style of Indo Spirits (Respondent No.1) which is a partnership firm.

4. Respondent No.1 obtained a license for wholesale distribution of alcoholic beverages in its name and approached the petitioner for sale of petitioner's products on a credit basis. Accordingly, the respondent No.1 issued the Surety Bond dated 21.12.2021, guaranteeing payment to the petitioner up to a sum of INR 200 crores towards unpaid amount. Vide Letter dated 05.01.2022, respondent No. 1 acting through respondent Nos. 2, 3, 4, 5 & 6 (being its guarantors and partners) entered into an agreement with the petitioner for supply of goods/products of the petitioner on credit basis. The petitioner supplied its products to respondent No.1 granting a credit period of 66 days against each supply of goods.

5. The Letter dated 05.01.2022 and the Surety Bond dated 21.12.2021 both contained arbitration clauses at Clause 9 and Clause 4 respectively.

6. Since there were disputes between the parties, the petitioner invoked arbitration vide Legal Notice dated 20.10.2023. Thereafter, the petitioner filed the present petition.

7. Replies have been filed by respondent Nos. 1 and 4.

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8. The primary argument of respondent Nos. 1 and 4 is that the subject matter of the present petition is non-arbitrable.

9. It is stated by Mr Dewan, learned senior counsel for respondent No.1 and Mr Rana, learned counsel for respondent No.4, that the question of non- arbitrability of the subject matter has not been interdicted by the judgment of the Hon'ble Supreme Court in SBI General Insurance Co. Ltd. v. Krish Spinning, 2024 SCC OnLine SC 1754. It is stated that the entire subject matter of the agreements which is sought to be referred to arbitration is subject matter of investigation both by the Enforcement Directorate as well as the CBI and a charge-sheet has already been filed and even cognizance has been taken. Hence, for the said reasons, this Court should not entertain the present petition.

10. Reliance is also placed upon the judgment of *Rashid Raza v. Sadaf Akhtar* (2019) 8 SCC 710 and more particularly paragraphs 3, 4, 5 which read as under:

"3. Having heard the learned counsel for both the sides, it is clear that the law laid down in *A. Ayyasamy case* [*A. Ayyasamy v. A. Paramasivam*, (2016) 10 SCC 386 : (2017) 1 SCC (Civ) 79] is in para 25 and not in para 26. Para 25 of the said judgment states as follows:

(SCC pp. 406-407) "25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simpliciter may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 24/08/2024 at 00:01:10 offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the court has to be on the question as to whether jurisdiction of the court has been ousted instead of focusing on the issue as to whether the court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of non-arbitrable subjects are carved out by the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 24/08/2024 at 00:01:10 courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, courts i.e. public fora, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied

that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject-matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected."

4. The principles of law laid down in this appeal make a distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to "simple allegations". Two working tests laid down in para 25 are: (1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain.

5. Judged by these two tests, it is clear that this is a case which falls This is a digitally signed order.

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11. Reliance is also placed upon *Avitel Post Studioz Limited & Ors. v. HSBC PI Holdings (Mauritius) Limited* (2021) 4 SCC 713, and more particularly paragraph 35 which reads as under:

"35. After these judgments, it is clear that "serious allegations of fraud" arise only if either of the two tests laid down are satisfied, and not otherwise. The first test is satisfied only when it can be said that the arbitration clause or agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. The second test can be said to have been met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or mala fide conduct, thus necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain."

12. I have heard learned counsels for the parties.

13. The arbitration clause is Clause 9 in the Letter dated 05.01.2022 and reads as under:

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on the other hand arising out of or in connection with this letter of request/agreement, the same shall be referred for adjudication by way of an arbitration of a Sole Arbitrator to be mutually agreed by the parties. The Award of the Arbitrator shall be final and binding on the parties. The Arbitration shall be governed by the provisions of Arbitration and Conciliation Act, 1996 (as amended) or any further amendments thereto, modifications or reenactment thereof. The Juridical Seat and venue of Arbitration shall be at New Delhi. The Courts at New Delhi shall have exclusive jurisdiction in the matter."

14. The arbitration clause is Clause 4 in the Surety Bond dated 21.12.2021 and reads as under:

"4. Without Prejudice to the remedies available to you under Negotiable Instruments Act, 1881, in the event of any civil dispute, or difference between the licensee and guarantor, jointly or severally, on the one hand and the supplier on the other hand arising out of or in connection with this agreement, the same shall be referred for adjudication by way of an arbitration of a Sole Arbitrator to be mutually agreed by the parties. The Award of the Arbitrator shall be final and binding on the parties. The Arbitration shall be governed by the provisions of Arbitration and Conciliation Act, 1996 (as amended) or any further amendments thereto, modifications or re-enactment thereof. The Judicial Seat and venue of Arbitration shall be at New Delhi. The Courts at New Delhi shall have exclusive jurisdiction in the This is a digitally signed order.

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15. The Hon ble Supreme Court in SBI General Insurance Co. Ltd. v. Krish Spinning, 2024 SCC OnLine SC 1754 has observed as under:

"113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in In Re: Interplay (supra) that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a prima facie arbitration agreement and not any other issues. The relevant observations are extracted hereinbelow:

"209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a prima facie arbitration agreement and not other issues". These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument

under the Stamp Act is not a timebound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. [...]"

(Emphasis supplied) This is a digitally signed order.

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114. In view of the observations made by this Court in In Re :

Interplay (supra), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in Vidya Drolia (supra) and adopted in NTPC v. SPML (supra) that the jurisdiction of the referral court when dealing with the issue of "accord and satisfaction" under Section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in In Re : Interplay (supra).

118. Tests like the "eye of the needle" and "ex-facie meritless", although try to minimise the extent of judicial interference, yet they require the referral court to examine contested facts and appreciate prima facie evidence (however limited the scope of enquiry may be) and thus are not in conformity with the principles of modern arbitration which place arbitral autonomy and judicial non- interference on the highest pedestal."

16. Hence, the scope of inquiry at the stage of appointment of Arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement and nothing else. The arbitration agreement in the present case is contained in Clause 9 of the Letter dated 05.01.2022 and Clause 4 of the Surety Bond dated 21.12.2021. The Letter is signed by respondent Nos. 2, 4, 5 and 6. The Surety Bond is signed by respondent Nos. 2 and 6 for and on behalf of respondent No. 1. Respondent No. 1 is the partnership of respondent Nos. 3, 4 and 5.

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17. The judgment of Rashid Raza (supra) has been considered by a Coordinate Bench of this Court in Avantha Holdings Limited v. CG Power and Industrial Solutions Limited 2021 SCC OnLine Del 5202 wherein the Court has held that even allegations of fraud can be adjudicated by an Arbitral Tribunal. Paragraph 90 of the said judgment reads as under:

"90. Prima facie, this Court finds no reason why an Arbitral Tribunal cannot decide the said disputes. It has been held by the Supreme Court in a number of occasions that an Arbitral Tribunal can decide, what the trial court can adjudicate. In this view, this Court is unable to accept that the present petition is liable to be rejected only on the ground that it involves allegations of fraud."

18. Mr Pavuluri, learned counsel appears for respondent No. 5 and has handed over an application under Order I Rule 10(2) of CPC seeking deletion from array of parties. The same is taken on record. Let the Registry number the application.

19. At page No. 13 of the application, Mr Pavuluri has drawn my attention to a letter dated 08.04.2022 addressed by respondent No. 1 to the Commissioner of Excise showing respondent No. 5 to have exited from the partnership firm. However, this letter is dated 08.04.2022 and the arbitration clause is contained in the Letter dated 05.01.2022. Hence, at this stage, respondent No. 5 cannot be deleted from the array of parties as he was a partner on the date of issuance of the Letter dated 05.01.2022. The respondent No. 5 is at liberty to raise this issue before the learned Arbitrator in accordance with law.

20. Another application has been handed over by Mr Srijan Sinha, learned counsel stating that respondent No. 2 should also be deleted from the array This is a digitally signed order.

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21. The respondent No. 2 is a signatory to the Surety Bond dated 21.12.2021 (as the controlling person) as well as to the Letter dated 05.01.2022. For the said reasons, the respondent No. 2 cannot be deleted from the arbitration proceedings as of today. However, respondent No. 2 is also at liberty to raise all these issues before the Arbitral Tribunal which shall decide the same in accordance with law.

22. I.A. 35170/2024 has been filed seeking deletion of respondent No. 6 from the array of parties.

23. Admittedly, respondent No. 6 is a Director of respondent No. 3 which is a partner in respondent No. 1.

24. A perusal of the Surety Bond dated 21.12.2021 shows that the respondent No. 6 has signed as a Director of respondent No. 3. Similarly, even though the Letter dated 05.01.2022 has been signed by respondent No. 6, the arbitration clause shows that disputes between the licensee and guarantor and the supplier are to be referred to arbitration and respondent No. 6 is neither the licensee nor the guarantor but has signed as the authorized representative of the licensee only. The licensee can only be a party to the arbitration proceedings.

25. For the said reasons, the application is allowed and the respondent No. 6 is deleted from the array of parties.

26. In view of my findings above, the petition is allowed. Since the parties are still having disputes between them, the following directions are issued:-

i) Mr. Justice Rajiv Sahai Endlaw (Retd.) (Mob. No. 9717495002) This is a digitally signed order.

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ii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi (hereinafter, referred to as the „DIAC). The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.

iii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.

iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims/counter-claims and merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.

v) The parties shall approach the learned Arbitrator within two weeks from today.

27. The petition is allowed and disposed of in the aforesaid terms.

28. The observations are only for the purpose of deciding Section 11 petition and the Arbitrator will be free to decide the same in accordance with law uninfluenced by the order passed today.

JASMEET SINGH, J AUGUST 9, 2024 sr Click here to check corrigendum, if any This is a digitally signed order.

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