Karnataka High Court
Force Fitness (India) Private ... vs Bengaluru Fitness Centre Private ... on 31 July, 2015
Author: Ashok B.Hinchigeri

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 31ST DAY OF JULY 2015

BEFORE

THE HON'BLE MR. JUSTICE ASHOK B. HINCHIGERI

CIVIL MISCELLANEOUS PETITION No.92/2012

BETWEEN:

Force Fitness (India) Private Limited,
No.41/A, 1st Floor,
BDA Complex, HSR Layout,
Bangalore - 560 102.
Rep. by its Director. ...Petitioner

(By Sri Bharath Babu, Advocate)

AND:

Bengaluru Fitness Centre Private Limited,
No.101, Avalon, Rahath Bagh Enclave,
Nagavarapalya,
Old Madras Road,
Bangalore - 560 093. ... Respondent

(By Sri James P.Arun Kumar, Advocate)

This civil miscellaneous petition is filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 praying for the reasons stated therein that this Hon'ble Court may be pleased to appoint a sole arbitrator for resolution of the disputes between the petitioner and the respondent arising out of and consequent to the agreements dated 27.4.2009 (Annexure-A), 11.1.2010 (Annexure-B),

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16.3.2012 (Annexure-C) and 17.3.2012 (Annexure-D) in the interest of justice and equity.

This civil miscellaneous petition having been heard and reserved for orders on 14.7.2015, coming on for pronouncement of orders this day, the Court made the following:

ORDER

This petition is filed seeking the appointment of the arbitrator under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 ('the said Act' for short). The petitioner's case in brief is that Snap Fitness (India) Private Limited ('Snap Fitness' for short) is in the business of establishing/franchising fitness centers. The said Company appointed the respondent, earlier known as Live Fit India Private Limited as a franchisee to establish and maintain a Snap Fitness Center. In that regard, a copy of the Snap FitnessTM Franchise Agreement, dated 27.4.2009 is produced as Annexure-A. The name of the franchisee was changed to Bengaluru Fitness Center Private Limited, the respondent herein. M/s. Snap Fitness and the respondent amended the franchise agreement on 11.1.2010. A copy of the Amended Franchise Agreement is produced as Annexure-B.

2. On 16.3.2012, M/s. Snap Fitness entered into a Master Franchise Agreement with the petitioner whereby the petitioner became the sole and master franchisee of M/s. Snap Fitness. Further, M/s. Snap Fitness transferred all its business interests to the petitioner by the Business Transfer Agreement, dated 17.3.2012. The copies of the said agreements, dated 16.3.2012 and 17.3.2012 are at Annexures - C and D respectively. On finding that the respondent was due to the petitioner in a sum of over `22 lakhs towards royalty, over `41 lakhs towards the equipment loan, the petitioner issued the notice, dated 26.3.2012 (Annexures - F and G) to the two Directors of the respondent. In the said notice, it was made clear that M/s.Snap Fitness has assigned all the franchise agreement to the petitioner quantifying the outstanding amounts from the respondent at `64,06,983.32/- and demanding interest at 18%. The petitioner conveyed its decision to appoint the sole arbitrator in order to resolve the dispute and sought the consent of the respondent. It is also stated in the notice that if the respondent fails to give his consent, it has to take steps to nominate any other person as an arbitrator of its choice. The respondent issued the reply, dated 24.4.2012 (Annexure-H) questioning the locus standi of the petitioner. The petitioner sent the rejoinder, dated 4.6.2012 (Annexure-J) tracing its right to Master Franchise Agreement and the Business Transfer Agreement. M/s. Snap Fitness also wrote to the respondent informing that it has licensed the petitioner as its master franchisee for the territory of India, that all the receivables are transferred to the petitioner and advising the respondent to execute the assignment deed with the petitioner to clear the outstanding dues without any delay. A copy of the said letter, dated 13.6.2012 is at Annexure-K.

3. The respondent's resistance to this petition is on the ground that there is no agreement between the petitioner and the respondent. For resolving the dispute between the respondent and the franchiser Company, namely, M/s. Snap Fitness, an arbitrator cannot be appointed. As the respondent is also claiming the damages for causing the loss and defamation to the respondent, the dispute cannot be arbitrated upon.

4. Sri Bharath Babu, the learned counsel for the petitioner submits that M/s. Live Fit India Private Limited was only an intended name. On the incorporation of the franchisee Company as Bengaluru Fitness Center Private Limited on 28.5.2009, M/s. Snap Fitness and the said newly incorporated respondent Company entered into the Amended Franchise Agreement, dated 11.1.2010 confirming each of their obligations under the franchise agreement, dated 27.4.2009. The learned counsel brings to my notice Clause 4 of the Amendment to Franchise Agreement, which reads as follows:

> "4. Ownership and Management. Franchisee signed the Franchise Agreement under the name "Livefit India Private Limited", but has since changed this entity to "Bengaluru Fitness Center Private Limited." Franchisee hereby confirms and agrees that all references to "Livefit India Private Limited" shall be replaced by "Bengaluru Fitness Center Private Limited" which entity shall be bound in all respects by the terms of the Franchise Agreement (including as amended herein). Further, Franchisee represented and warrants that its ownership, management and information regarding Bengaluru Fitness Center Private Limited as of the date of this Amendment are accurately reflected on Exhibit 1 attached to and incorporated into this Amendment."

5. The learned counsel relies on the Apex Court's judgment in the case of CHLORO CONTROLS (I) P. LTD. v. SEVERN TRENT WATER PURIFICATION INC. AND OTHERS reported in 2012 STPL (Arbitration) 17 SC. Paragraph Nos.68, 71, 92 and 100 read out by him are as follows:

> "68. A non-signatory or third party could be subjected to arbitration without their prior consent, 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 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.

71. The Court will have to examine such pleas with greater caution and by definite reference to the language of the contract and intention of the parties. In the case of composite transactions and multiple agreements, it may again be possible to invoke such principle in accepting the pleas of non-signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically inter-mingled or inter-dependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of 'composite performance' would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other.

92. Now, we should examine the scope of concept of 'legal relationship' as incorporated in Article II(1) of the New York Convention vis-à-vis the expression 'any person claiming through or under him' appearing in Section 45 of the 1996 Act. Article II(1) and (3) have to be read in conjunction with Section 45 of the Act. Both these expressions have to be read in harmony with each other. Once

they are so read, it will be evident that the expression "legal relationship" connotes the relationship of the party with the person claiming through or under him. A person may not be signatory to an arbitration agreement, but his cause of action may be directly relatable to that contract and thus, he may be claiming through or under one of those parties. It is also stated in the Law and Practice of International Commercial Arbitration, Alan Redfern and Martin Hunter (supra), that for the purposes of both the New York Convention and the UNCITRAL Model Law, it is sufficient that there should be a defined "legal relationship" between the parties, whether contractual or not. Plainly there has to be some contractual relationship between the parties, since there must be some arbitration agreement to form the basis of the arbitral proceedings. Given the existence of such an agreement, the dispute submitted to arbitration may be governed by the principles of delictual or tortuous liability rather than by the law of contract.

100. Various legal basis may be applied to bind a non- signatory to an arbitration agreement. The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities. The second theory includes the legal doctrines of agent- principal relations, apparent authority, piercing of veil (also called the "alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law."

6. He also brings to my notice Clause F in the agreement, dated 27.4.2009 (Annexure-A). It reads as follows:

> "F. Transfer by Us. We have the right to sell or assign, in whole or in part, our interest in this Agreement. Further, you acknowledge and agree that we may delegate any or all of our rights and obligations to third parties, including that we may appoint an area developer to provide services to you."

7. He relies on the Apex Court's judgment in the case of M.R.ENGINEERS AND CONTRACTORS PVT. LTD. v.

SOM DATT BUILDERS LTD. reported in (2009) 7 SCC 696 wherein it is held that the arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by specific reference to arbitration clause.

8. Per contra, Sri James P.Arun Kumar, the learned counsel for the respondent submits that there is no agreement between the petitioner and the respondent; the agreement may be only between M/s. Snap Fitness and the respondent. He also submits that the agreement does not bear the signatures of M/s. Snap Fitness and the respondent. The signatures of the respondent was obtained on some blank papers and that one such paper appears to have been used as the last page of the agreement in question.

9. The learned counsel submits that the respondent has already filed the criminal case in which proceedings the respondent's protest application is pending consideration before the criminal court

and that therefore the petition for the appointment of the arbitrator is not entertainable at this juncture.

10. He submits that the Apex Court's judgment in the case of Chloro Controls (supra) has no application for the facts of the case on hand.

11. He submits that when the respondent was not at all in existence at the material point of time of the executing the agreement, dated 27.4.2009 and as it has got incorporated subsequently, there is no arbitration agreement as far as the respondent is concerned. The agreement entered into by M/s. Snap Fitness with a non-existent imaginary party does not bind the respondent in any way. In support of his submissions, he relies on the Apex Court's judgment in the case of ANDHRA PRADESH TOURISM DEVELOPMENT CORPORATION AND ANOTHER v. M/S. PAMPA HOTELS LTD. reported in AIR 2010 SC 1806.

12. In the course of rejoinder, Sri Bharath Babu takes exception to the submissions made on behalf of the respondent and demands that the respondent should clarify under what agreement the respondent is using the brand name of M/s. Snap Fitness.

13. The submissions of the learned counsel have received my thoughtful consideration. The question that falls for my consideration is whether the petitioner's request for the appointment of the arbitrator can be turned down on the ground that the petitioner is not a signatory to any agreement with the respondent. Admittedly, M/s. Snap Fitness and M/s. Live Fit India Private Limited entered into franchise agreement, dated 27.4.2009 (Annexure-A). Under Clause-11 F of the agreement extracted supra, M/s. Live Fit India Private Limited is under an obligation to recognize M/s. Snap Fitness's right to sell or assign its interest to any third parties. The name of M/s. Live Fit India Private Limited came to be changed to Bengaluru Fitness Center Private Limited (the respondent herein). Thereafter, M/s.Snap Fitness and the respondent have executed on 11.1.2010 the Amendment to Franchise Agreement. There is a clear mentioning of the change of name of the franchisee in Clause 4 of the Amendment to Franchise Agreement. Recital 'B' of the said Agreement states that M/s. Snap Fitness and the respondent desired, inter alia, to confirm each of the obligations under the Franchise Agreement. What follows from these recitals in the subsequent agreement is that the respondent entity's earlier name was Live Fit India Private Limited. Subsequently, M/s. Snap fitness and the respondent desired to confirm each of their obligations under the earlier Agreement. Neither the identity of the respondent is in dispute nor there is any ambiguity about the intention of the parties.

14. Subsequently, M/s.Snap Fitness transferred all its business interest to the petitioner by appointing the petitioner as the master franchisee. The same is evident from the Master Franchise Agreement, dated 16.3.2012 and Business Transfer Agreement, dated 17.3.2012 (Annexures - C and D respectively). On the respondent raising the question of the petitioner's locus standi in response to the petitioner's notices for the payment of dues, it is clarified by M/s. Snap Fitness itself that all the franchise agreements are transferred to the petitioner. The agreements and the correspondence do not leave anybody in doubt that the petitioner has stepped into the shoes of M/s. Snap Fitness vis-à-vis the respondent.

15. It is also worthwhile to notice that the respondent had filed O.S.No.7162/2012 against M/s. Snap Fitness and its Directors. The same came to be dismissed by the civil court, by its order, dated 30.10.2012 referring the parties to arbitration holding that the reliefs claimed in the suit are the subject-matter of the agreement providing for arbitration. Aggrieved by the said order, the respondent filed Civil Revision Petition No.506/2012 in this Court. By its order, dated 20.6.2013, this Court dismissed the said civil revision petition. Further, the respondent took up the matter to the Hon'ble Supreme Court by filing SLP (C) No.36158/2013. The Hon'ble Supreme Court dismissed the SLP by its order, dated 9.12.2013. If the respondent has any claim or counter claim, the same is also to be raised only in the proceedings before the arbitrator. In view of the said orders, I cannot hold that the respondent has not entered into any agreements or that the agreements do not provide for the arbitral clause.

16. I am also not persuaded to dismiss this petition on the ground that a protest application in a criminal case is pending consideration. It is only in a case of allegation of fraud of serious nature that the Court will refuse to refer the matter to the arbitrator. In saying so, I am fortified by the Apex Court's judgment in the case of ABDUL KADIR SHAMSUDDIN BUBERE v.

MADHAV PRABHAKAR OAK AND ANOTHER reported in AIR 1962 SC 406. Paragraph No.17 of the said decision is extracted hereinbelow:

> "17. There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference. But it is not every allegation imputing some kind of dishonesty, particularly in matters of accounts, which would be enough to dispose a court to take the matter out of the forum which the parties themselves have chosen. This to our mind is clear even from the decision in Russell's case (1880) 14 Ch D 471. In that case there were allegations of constructive and actual fraud by one brother against the other and it was in those circumstances that the court made the observations to which we have referred above."

17. On the ground that M/s. Snap Fitness is not a party to this petition or on the ground that the petitioner is not a party to the Franchise Agreement, the appointment of the arbitration cannot be resisted by the respondent. The arbitrator himself can take a call on the issue of joinder/striking off of parties to the arbitration proceedings.

18. On the ground that all the pages of the first agreement do not bear the signature of the respondent, the respondent cannot resist this petition. If any document is obtained by fraud, that would also be the question which the arbitrator has to decide under Section 16 of the said Act.

19. The respondent is in no position to clarify as to under what agreement the respondent is using the brand name of M/s. Snap Fitness.

20. For all the aforesaid reasons, I hold that the objections to the CMP are not tenable. As M/s. Snap Fitness and M/s. Live Fit India Private Limited, the forerunner of the respondent Company and also the respondent Company itself have entered into the agreements which provide for arbitration and as the petitioner has stepped into the shoes of M/s. Snap Fitness vis-à-vis the respondent and as the disputes have arisen in relation to the agreements, I allow this petition. I appoint Justice N.Anand, Former Judge, High Court of Karnataka as the sole arbitrator. He shall enter upon the arbitration, arbitrate the dispute and conduct the arbitration proceedings at Bengaluru Arbitration Centre as per the Arbitration Centre - Karnataka (Domestic and International) Rules, 2012.

21. The Registry is directed to send a copy of this order to the Arbitration Centre, Bengaluru.

Sd/-

JUDGE MD