

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

% Judgment delivered on: 18.07.2011

ARBITRATION PETITION NO. 188/2010

TRINATH KHERA & ANR. Petitioners
Through: Petitioner No.1 in person.

versus

MS/ ADITYA BIRLA NUVO LTD. & ORS. Respondents
Through: Mr Harish V. Shanker, Adv.

CORAM:-

HON'BLE MR JUSTICE MANMOHAN SINGH

1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in Digest ?

MANMOHAN SINGH, J

1. This petition has been preferred under Section 11 of the Arbitration and Conciliation Act, 1996 to seek the appointment of any former judge of this Court as the sole arbitrator to adjudicate the disputes and differences which have arisen between the parties. The facts of the case are that the petitioner a sole proprietorship concern has been in the business of clothing accessories specializing in cuff links and neck ties since the year 1982. The respondents are a well known Public Limited

company having their offices at many places in India including Delhi and are engaged in the retail sale of garments and wearing accessories.

2. It is averred in the petition, that in the year 2004, the respondents proposed to the petitioner to work together as licensor and licensee in respect of “cuff links” for the respondent’s brand known as “Peter England” and the trade mark licensed user agreement dated 03.01.2005 was executed between the parties. However, the “Peter England” project turned out to be a failure as some of the distributors of the respondents did not make payments against the goods supplied. Thus, the petitioner decided to terminate the said agreement by completing requirements on each side.

3. As per the petitioner, in the meantime, the respondents made a fresh proposal to the petitioner, that in future, the petitioner shall work with the respondents directly and not through their distributors. The respondents convinced the petitioner that he will be able to recover “Peter England” losses through their premium brands like “Louis Phillippe”, “Van Heusen” and “Allen Solly”. Therefore, the petitioner agreed to work afresh. The respondents on 10.08.2005 gave the final shape to the proposal by modifying the earlier “Peter England” agreement on the lines discussed and agreed by the parties. The respondents gave a printed copy to the petitioner and took an identical copy of the same to

Bangalore for getting it reproduced on the requisite stamp paper which was available only in Bangalore.

4. Further it is stated, that the petitioner was told by the respondents that their legal cell at Bangalore may change the settings of sentences and paragraphs, but the terms of agreement shall remain the same. But, the respondents never sent the formal agreement papers to the petitioners. The petitioner, apart from following the matter over telephone sent letter dated 29.08.2005 and emails on 06.09.2005 and 09.09.2005 to the respondents asking them to send the agreement. On 09.09.2005 the respondent, sent an email to the petitioner, stating that for the moment they will make said agreement valid till March 2008, and since the agreement is not ready, the petitioner may use the said letter dated 09.09.2005 of the respondent for the purpose of import. Thereafter, the petitioner sent a detailed letter dated 05.11.2005 to the respondents requesting them to expedite the execution of the agreement.

5. It is submitted by the petitioners that though the formality of signing the agreement dated 10.08.2005 did not take place, yet it has been acted upon by the respondents in its spirits till December 2008 and clause 8 of the said agreement is the arbitration clause.

6. According to the petitioner, during the course of business, various disputes arose between the parties and a substantial amount of money is owed to the petitioner by the respondents. Therefore, the

petitioner served the notice dated 25.05.2010 to the respondents for appointment of the sole arbitrator for settlement of disputes and claims.

7. In the reply filed by the respondents, it is stated, that the agreement dated 03.01.2005 could not work due to various reasons and the business under the same was discontinued. The respondent on being requested by the petitioner permitted the petitioner to supply cuff links and other accessories under their brands “Louis Phillippe”, “Van Heusen”. However, despite both the parties negotiating over a draft, the agreement could not be executed. Thereafter the transactions that took place between the parties were based on the terms and conditions of the unsigned agreement between the parties and the respondents have been regularly making payments to the petitioners since 2005 which includes payments towards direct purchases and also for license sales since 2005.

8. The main objections of the respondents for grant of relief in the present petition are as under:

- i. This Court has no jurisdiction to entertain the present petition.
- ii. There is no written arbitration agreement between the parties and the Arbitration Act does not permit a petition before this Court on the basis of oral agreement.

iii. Several claims made by the petitioners are admittedly time barred.

9. As far as the first objection of the respondents is concerned, there is a specific averment made by the petitioners, that the business proposal and acceptance of orders between the parties were concluded in Delhi. The terms of agreement dated 10.08.2005 were agreed upon, concluded, accepted and written at Delhi. From the material produced by the petitioners, it also appears that various payments including bank e-transfer in favour of the petitioners were released in Delhi. Some of the payments have also been released in favour of the petitioners from the respondents' office located in Delhi. The petitioners are also residing and carrying on business in Delhi. The supplies made by the petitioners to the respondents' retail outlets were accepted by the respondents in Delhi. One of the instances relied upon by the petitioners is Annexure P-7, the letter dated 14.11.2006 issued by the respondents, wherein the suggestion was made to the petitioners to collect the payment cheque from Birla Corporate office at 4th floor, UCO Bank Building, Parliament Street, New Delhi-110001. There is no denial about Annexure P-7 by the respondents. Therefore, the objection raised by the respondents is without any substance and cannot be accepted.

10. As regard the second objection raised by the respondents that in case of signed written agreement between the parties, the law does

permit the petitioner to file the present petition before this Court seeking relief for appointment of arbitrator on the basis of oral agreement between the parties.

11. The petitioners submit that earlier agreement dated 03.01.2005 executed between the parties in respect of respondents' brand "Peter England" was not clicked on account of main reason that some of the distributors appointed by the respondents did not pay any amount to the petitioners against the goods supplied or made less payment and at that time the petitioners expressed their intention to terminate the agreement but before the agreement could be terminated, the respondents came out with a fresh proposal that in future the petitioners shall work with the respondents directly in the same fashion under Louis Phillippe, Van Heusen and Allen Solly and the petitioners agreed for the same.

12. According to the petitioners, on 10.08.2005 while sitting in their office the respondents corrected the earlier format for "Peter England" and modified the same on the lines discussed and accepted by the parties and also gave printed copy of the same to the petitioners. The petitioners have placed the agreement dated 10.08.2005 as Annexure P-2. The contention of the petitioners is that the fact of existence of agreement and its enforcement has been acknowledged by the respondents in series of correspondences, although a formal agreement was executed between the parties. The contention of the petitioners is that from the

correspondence exchanged between the parties, one can infer about the existence of the agreement. The petitioner No.1 appearing in person has referred to the copy of the Annexure P-2 which was given to the petitioners on 10.08.2005 and several documents and from correspondence exchanged between the parties by way of letters, fax messages and e-mails. Some of the documents have been filed by the petitioners as Annexure P-3 and P-4 in support of their submissions. Annexure P-3 is a copy of the respondents' e-mail dated 09.09.2005 and attachment authorizing the petitioners as respondents authorized licenced vendor. The copies of petitioners' couriered letter dated 29.08.2005, e-mails dated 04/06.09.2005 and 09.09.2005 and registered letter dated 05.11.2005 are annexed as Annexure P-4. The extract of the said letters read as under:

“Letter dated 29.08.2005

It is our privilege to have had your visit at our office on 10th instant and the discussion held. We request you to please look into the following:

01. The single piece 024 cuff-link samples sent by us to you on 02.08.05 through DTDC have not been received so far. Mr. Sandeep Saxena was reminded over the telephone as well.

02. The cuff-link pairs 06 sets sent on 20-07-05 for purpose of photography of P.E. have not been received.

03. We are waiting for the agreements in respect of V.H. and L.P.

E-mail dated 04/06.09.2005

Dear Mr Balan,

During your visit at our office on 10-08-05, you had made a note for your record that Agreements in respect of Van Heusen and Luis Phillipe have to be sent to us. The brass tools in place of aluminium tools for better accuracy are likely to be ready by 08th instant. We are very much after getting VH boxes ready by the 15th. But deliveries can be possible only after we send the box manufacturers certified copy of our arrangement between you and us. Hence, it is very important to send us the agreements. In case agreements are likely to take some more time, you may send us letters confirming the arrangement.

E-mail dated 09.09.2005

The licensing agreement with VH and LP for a period of only one and a half years is not acceptable. It has to be for a minimum period of three years as discussed at the start of the development stage. One and a half years would take only to establish the product range. In case of PE, nine months have already passed, huge investments made by us, the sale and the recovery of the payment is hardly any during the last six months since the time the goods have been supplied.

Letter dated 05.11.2005

It is our privilege to have had your visit at our office on 10-08-2005. You were very kind to have modified PE format and framed an Agreement on the terms discussed and accepted. A typed copy was given to me for my record and the other one taken along by you for formal execution on the stamp papers which were to be purchased at Bangalore. I have drawn your valued attention a number of times. I also requested you through my

letter dated 29.08.2005 and through exchange of mails from both of us. It is very kind of you to have sent me letter dated 09 September 2005 on our business association but it does not speak of detailed terms of business as were accepted on 10.08.2005. I may also point out that Allen Solly name is missing in your letter of 09.09.05. I shall be grateful if you could spare some time and send me the agreements on stamp papers duly typed for my signatures as was done in case of Peter England. Thereafter you may send a copy of it to me duly signed by competent authority of your office for my record.

I would also like to invite your attention to the discussion we had on the subject of License Fee. Since I am not using your Brand Names on my products, hence there is no reasoning of your charging Royalty Fee from me. Your Brand Names are Showrooms. I am not using your Brand Name through my channels. Even otherwise, Royalty Fee does not form a part of terms of Agreement accepted by both of us. Please rectify and inform your accounts department.”

13. The relevant portion of the admission made by the respondents in Annexure P-9, i.e., e-mail dated 07.07.2010 reads as under:

“As far as the appointment of arbitrator is concerned, it is you who has to name the “arbitrator” and not us as the dispute has arisen in your view and you have chosen to intaiate to issue a notice under Section 11(5) of the Arbitration and Conciliation Act, 1996.”

14. In view of the above said admission, although the proposed agreement dated 10.08.2005 was not signed by the respondents and merely signed by the petitioners, but, due to correspondence exchanged

between the parties and admission on behalf of the respondents, I am of the view that the agreement exists between the parties for adjudication of the dispute between the parties.

15. As regards the objection raised by the respondents that the claims of the petitioners are time barred, the said objection also has no force in the presence of the respondents' letter dated 07.07.2010. In any case, the said objection of the respondents about the claim being barred by time can be raised before the arbitrator and the same would have to be determined in accordance with law.

16. Under these circumstances, the present petition is allowed. Instead of nomination of the arbitrator referred to by the petitioners, I find it appropriate that the matter be referred to the arbitration, to be conducted under the aegis of Delhi High Court Arbitration Centre and its rules. Parties shall appear before the Delhi High Court Arbitration Centre on 05.07.2011. The Arbitrator appointed by the Delhi High Court Arbitration Centre shall give prior notice to the parties before commencing the proceedings. The petition stands disposed of. A copy of the order be sent to Delhi High Court Arbitration Centre. Dasti.

MANMOHAN SINGH, J

JULY 18, 2011

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