



2024:DHC:7325



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **ARB.P. 121/2024**
DELHIVERY LIMITED Petitioner

Through: Mr. Jaskaran S. Narula, Adv.

versus

KARE ENTERPRISE PRIVATE LIMITED Respondent
Through: Mr. Varun Nathani, Ms.
Suchitra Valjee and Mr. Rajvi Shah, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT (ORAL)

% **19.09.2024**

1. This is a petition filed under Section 11(5) of the Arbitration and Conciliation Act, 1996¹, seeking reference of the disputes between the parties to arbitration.

2. I have heard Mr. Jaskaran Narula and Mr. Varun Nathani, learned counsel for the petitioner and the respondent respectively.

3. Mr. Narula submits that the petitioner provides logistic services to the respondent. In connection with the provision of the said services, two Delivery Services Agreements² were executed between the petitioner and the respondent; the first on 9 December 2021 and the second on 5 February 2022. The execution of the second DSA was necessitated, according to Mr. Narula, as there was a revision of fees

¹ "the 1996 Act", hereinafter

² "DSAs", hereinafter

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for the services provided by the petitioner. For all other intents and purposes, Mr. Narula submits that the two DSAs are identical.

4. Undisputedly, both the DSAs envisage resolution of disputes by arbitration and contain identical dispute resolution clauses which read as under :

“18. DISPUTE RESOLUTION:

All disputes arising out of or in relation to this Agreement, including any question regarding its existence, validity or termination, which cannot be amicably resolved by the Parties within 15 days of being brought to their attention, such 15 (fifteen) day period is referred to as the "Consultation Period"), and if such dispute is still not resolved, the dispute shall be settled by arbitration governed by the provisions of Arbitration and Conciliation Act, 1996. The Parties mutually agree to appoint a sole arbitrator. The venue/seat of Arbitration shall be New Delhi and the language of arbitration shall be English.”

5. Pursuant to initial communications, raising demands on the respondent, the petitioner issued a notice to the respondent under Section 21 of the 1996 Act, seeking reference of the disputes to arbitration on 11 April 2023. The notice invokes the arbitration clause in both the DSAs.

6. When this matter was listed yesterday, Mr. Nathani, learned counsel for the respondent advanced a preliminary objection to the maintainability of the petition on the ground that the petitioner had not exhausted the pre-arbitral protocol envisaged by Clause 18 of the DSAs. He submits that prior to invocation of arbitration, the party was required to attempt an amicable resolution of dispute within 15 days, which is referred in Clause 18 as the “consultation period”. The



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invocation of arbitration was permissible only if the dispute was not resolved within the said period.

7. In response to this submission of Mr. Nathani, Mr. Narula has drawn my attention to the following trail of e-mails exchanged between the parties:

From: Nidhi Rastogi nidhi.rastogi@delhivery.com
To: Sharad Taparia sharad.taparia@kareenterprise.com
Cc: Prateek Dixit prateek.dixit@delhivery.com
Nikhil Mehta nikhil.mehta@delhivery.com
"fin.recon" fin.recon@delhivery.com
Anand Biswas <anand.biswas@delhivery.com>, Darayus

Hi Sharad,

Please confirm your availability. We will schedule a GMEET with respective SPOCs for closing this.

~~~~~  
Pls note:

1-Kindly share the dispute within the 7 days of submission else we will not accept any dispute.

2-Payment Method :

By cheque/DD : Kindly address in favour of 'Delhivery Ltd.'  
Address to send cheque - Delhivery Pvt Ltd, Plot no - 5, Sector - 44, Gurgaon – 122002

For RTGS/ NEFT Transfer, kindly use the following details:

Account Name: Delhivery Ltd.  
Bank: HDFC Bank Ltd  
Account number: 12022320000801  
IFSC Code: HDFC0001202  
Branch: Shop # 25,26,27&28, ground Floor,Cross Point Mall,Opp Galleria Market,DLF Phase-4,Gurgaon 122009,Haryana

**Yours sincerely**

Nidhi Rastogi  
Accounting & Collections – Postpaid



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From: Sharad Taparia <sharad.taparia@kareenterprise.com>  
At: 11:57 AM, On: Fri, Oct 14, 2022

### Issues with Delivery

Approx 50 Lost Shipments across all accounts

70% of shipments were Delayed in Delivery specially Heavy Account

Almost 300 shipments Delhivery CS Changed Delivery address wrong due to which we had to ship it again via other log partner by air.

Approx 85 complaints of Damaged Shipments recd at consignees place already shared with photos to Delhivery CS

Two shipments recd at our corporate office whereof the address was not at all mentioned anywhere while manifesting.

Approx 100 shipments which were lying in Delhivery whs at bangalore, we have to go at delhivery whs and had to reship again. Approx 50 shipments, material like notebooks and stationery were missing.

We had been sharing all this with the immediate CS on whats app and mail.

From: Sharad Taparia [sharad.taparia@kareenterprise.com](mailto:sharad.taparia@kareenterprise.com)  
To: Prateek Dixit [prateek.dixit@delhivery.com](mailto:prateek.dixit@delhivery.com)  
At: 2:51 PM On: Fri, Oct 14, 2022

Dear Prateek,

Not today please.

Thanks  
Sharad

From: Prateek Dixit [prateek.dixit@delhivery.com](mailto:prateek.dixit@delhivery.com)  
To: Nidhi Rastogi [nidhi.rastogi@delhivery.com](mailto:nidhi.rastogi@delhivery.com)  
Cc: Sharad Taparia [sharad.taparia@kareenterprise.com](mailto:sharad.taparia@kareenterprise.com)  
Nikhil Mehta [nikhil.mehta@delhivery.com](mailto:nikhil.mehta@delhivery.com)  
fin.recon [fin.recon@delhivery.com](mailto:fin.recon@delhivery.com)  
Anand Biswas [anand.biswas@delhivery.com](mailto:anand.biswas@delhivery.com)



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At: 14 October 2022, On:12:41

**Subject: Re:**

Hi Sharad,

Can we have a call today at 3:30PM for discussion and closure of the points

Regards  
Prateek Dixit

From: Nidhi Rastogi [nidhi.rastogi@delhivery.com](mailto:nidhi.rastogi@delhivery.com)  
At: 12:00 PM, On: Fri, Oct 14, 2022  
+Prateek Dixit +Nikhil Mehta - Please look into this.

Thanks & Regards,  
Nidhi Rastogi  
Finance AR  
Delhivery Limited  
Website: [www.delhivery.com](http://www.delhivery.com)  
Plot No. 05, Sector 44, Gurugram, Haryana – 122002

From: Nidhi Rastogi <[nidhi.rastogi@delhivery.com](mailto:nidhi.rastogi@delhivery.com)>  
To: Sharad Taparia [sharad.taparia@kareenterprise.com](mailto:sharad.taparia@kareenterprise.com)  
At: 6:24 PM, On: Tue, Oct 18, 2022

Hi Sharad,

Please confirm your availability to discuss.

Thanks & Regards,  
Nidhi Rastogi  
Finance AR  
Delhivery Limited  
Website: [www.delhivery.com](http://www.delhivery.com)  
Plot No. 05, Sector 44, Gurugram, Haryana – 122002

From: Prateek Dixit [prateek.dixit@delhivery.com](mailto:prateek.dixit@delhivery.com)  
To: Sharad Taparia [sharad.taparia@kareenterprise.com](mailto:sharad.taparia@kareenterprise.com)  
At: 11:05 AM, On: Thu, Oct 20, 2022

Hi Sharad,  
Please help in discussion to close this pending issue for better business relationship



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Regards  
Prateek Dixit

From: Sharad Taparia [sharad.taparia@kareenterprise.com](mailto:sharad.taparia@kareenterprise.com)  
To: Nidhi Rastogi [nidhi.rastogi@delhivery.com](mailto:nidhi.rastogi@delhivery.com)  
At: 3:36 PM, On: Mon, Oct 31, 2022

Dear Nidhi,

Pls. provide me invoices with details for the month of August and September 2022

As discd July payment of around 6.80 Lacs will be cleared by end of this week, Possibly.

Thanks  
Sharad

From: Prateek Dixit [prateek.dixit@delhivery.com](mailto:prateek.dixit@delhivery.com)  
To: Sharad Taparia <[sharad.taparia@kareenterprise.com](mailto:sharad.taparia@kareenterprise.com)>  
Cc: Nikhil Mehta [nikhil.mehta@delhivery.com](mailto:nikhil.mehta@delhivery.com)  
[fin.recon@delhivery.com](mailto:fin.recon@delhivery.com)  
Anand Biswas [anand.biswas@delhivery.com](mailto:anand.biswas@delhivery.com)  
Nidhi Rastogi [nidhi.rastogi@delhivery.com](mailto:nidhi.rastogi@delhivery.com)  
At: 1:35 PM, On: Saturday, November 5, 2022

Subject: Re:

Good Afternoon Sharad !! Hope you are doing well !!  
PFB inputs on the issues you had highlighted :

Issues with Delivery

1) Approx 50 Lost Shipments across all accounts - Please share the AWB data so we can reconcile and process for CN as per agreement.

This is in Delivery Report itself

2) 70% of shipments were Delayed in Delivery specially Heavy Account - We agree that there were delays in our network due to our integration, but TAT delays cannot be used as a le

3) Almost 300 shipments Delivery CS Changed Delivery address wrong due to which we had to ship it again via other log partner by



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air - Please elaborate what is needed at De

I would request Delivery team to give us solution for this financial loss beared by us.

4) Approx 85 complaints of Damaged Shipments recd at consignees place already shared with photos to Delivery CS - Kindly share the consolidated AWB data to Reconcile

Have already share so many photos and AWBs , pls. ask your team the CS at theat time to make a consolidated report. will check if they missed anything.

5) Two shipments recd at our corporate office whereof the address was not at all mentioned anywhere while manifesting - Please confirm what is required at Delivery 's end  
Delivery team to decide on this as its our financial loss

6) Approx 100 shipments which were lying in Delhivery whs at bangalore, we have to go at delhivery whs and had to reship again - Please confirm what is required at Delhivery 's  
The delay happened we lost goodwill and our customers got irritated, how can delhivery help now?

7) Approx 50 shipments, material like notebooks and stationery were missing - Kindly share the consolidated AWB data to Reconcile  
Point 4 reply

8) We had been sharing all this with the immediate CS on whats app and mail - Kindly loop us in such Emails.  
Now to search mails and whats app details will be difficult but yes possible at your CS level.

@Sharad Taparia - We would always require consolidated AWB data in case there is any sort of discrepancy to close the reconciliation. Kindly confirm what is actually required at our end  
@Nikhil Mehta @Nidhi Rastogi - FYI

Regards  
Prateek Dixit

From: Sharad Taparia [sharad.taparia@kareenterprise.com](mailto:sharad.taparia@kareenterprise.com)  
To: Prateek Dixit [prateek.dixit@delhivery.com](mailto:prateek.dixit@delhivery.com)  
Cc: Nikhil Mehta [nikhil.mehta@delhivery.com](mailto:nikhil.mehta@delhivery.com)  
fin.recon [fin.recon@delhivery.com](mailto:fin.recon@delhivery.com)  
Anand Biswas [anand.biswas@delhivery.com](mailto:anand.biswas@delhivery.com)  
Nidhi Rastogi [nidhi.rastogi@delhivery.com](mailto:nidhi.rastogi@delhivery.com)

Signature Not Verified

Digitally Signed By: ARB. P. 121/2024  
KUMAR  
Signing Date: 23.09.2024  
15:56:37

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Signature Not Verified

Digitally Signed  
By: CHANDRASHEKHARAN  
HARI SHANKAR  
Signing Date: 23.09.2024  
15:55:21



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At: 1:50 PM, On: Saturday, November 5, 2022

Subject: Re: Re:

Dear Prateek,  
PFB replies in red.

Thanks  
Sharad

From: Nidhi Rastogi <nidhi.rastogi@delhivery.com>  
To: Sharad Taparia [sharad.taparia@kareenterprise.com](mailto:sharad.taparia@kareenterprise.com)  
At: 10:38 AM, On: Wed, Nov 2, 2022

Hi Sharad,

Please find the attached invoice copy of Aug & Sep.

Thanks & Regards,  
Nidhi Rastogi  
Finance AR  
Delhivery Limited  
Website: [www.delhivery.com](http://www.delhivery.com)  
Plot No. 05, Sector 44, Gurugram, Haryana – 122002

From: Nidhi Rastogi [nidhi.rastogi@delhivery.com](mailto:nidhi.rastogi@delhivery.com)  
To: Sharad Taparia [sharad.taparia@kareenterprise.com](mailto:sharad.taparia@kareenterprise.com)  
At: 9:41 AM, On: Fri, Nov 4, 2022

Hi Sharad,

Any update on the payments?

Thanks & Regards,  
Nidhi Rastogi  
Finance AR  
Delhivery Limited  
Website: [www.delhivery.com](http://www.delhivery.com)  
Plot No. 05, Sector 44, Gurugram, Haryana – 122002

From: Prateek Dixit [prateek.dixit@delhivery.com](mailto:prateek.dixit@delhivery.com)  
To: Sharad Taparia [sharad.taparia@kareenterprise.com](mailto:sharad.taparia@kareenterprise.com)  
At: 9:51 AM On: Fri, Nov 4, 2022

Hi Sharad,



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As discussed on the call, can we have a call today to clear the doubts and get the resolution mutually.

Regards  
Prateek Dixit

From: Nidhi Rastogi [nidhi.rastogi@delhivery.com](mailto:nidhi.rastogi@delhivery.com)  
To: Sharad Taparia [sharad.taparia@kareenterprise.com](mailto:sharad.taparia@kareenterprise.com)  
At: 10:43 AM, On: Wed, Nov 9, 2022

Hi Sharad,

We still have not received any payment from your end. Can you please confirm the status immediately?

@Nikhil Mehta @Prateek Dixit - Please look into this.

Thanks & Regards,  
Nidhi Rastogi  
Finance AR  
Delhivery Limited  
Website: [www.delhivery.com](http://www.delhivery.com)  
Plot No. 05, Sector 44, Gurugram, Haryana – 122002

From: Nidhi Rastogi <[nidhi.rastogi@delhivery.com](mailto:nidhi.rastogi@delhivery.com)>  
To: Sharad Taparia [sharad.taparia@kareenterprise.com](mailto:sharad.taparia@kareenterprise.com)  
At: 11:09 AM, On: Mon, Nov 7, 2022

Hi Sharad,

As discussed, please process payment ASAP.

Thanks & Regards,  
Nidhi Rastogi  
Finance AR  
Delhivery Limited  
Website: [www.delhivery.com](http://www.delhivery.com)  
Plot No. 05, Sector 44, Gurugram, Haryana – 122002

From: Nidhi Rastogi [nidhi.rastogi@delhivery.com](mailto:nidhi.rastogi@delhivery.com)  
To: Sharad Taparia [sharad.taparia@kareenterprise.com](mailto:sharad.taparia@kareenterprise.com)  
Prateek Dixit [prateek.dixit@delhivery.com](mailto:prateek.dixit@delhivery.com)  
Nikhil Mehta [nikhil.mehta@delhivery.com](mailto:nikhil.mehta@delhivery.com)  
Cc: Sumit Tokas [sumit.tokas@delhivery.com](mailto:sumit.tokas@delhivery.com)



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Anand Biswas [anand.biswas@delhivery.com](mailto:anand.biswas@delhivery.com)  
At: 4:50 PM, On: Thu, Nov 10, 2022

Hi Sharad,

As discussed, please ensure to process the payment by tomorrow itself.  
in case of no payment received. Will move your account to LEGAL & Security Team.

Thanks & Regards,  
Nidhi Rastogi  
Finance AR  
Delhivery Limited  
Website: [www.delhivery.com](http://www.delhivery.com)  
Plot No. 05, Sector 44, Gurugram, Haryana – 122002

From: Sharad Taparia [sharad.taparia@kareenterprise.com](mailto:sharad.taparia@kareenterprise.com)  
At: 11:32 AM, On: Mon, Dec 19, 2022

Dear All,

Still we are waiting for an appropriate solution.  
Lets find a solution and proceed further.

Thanks

Sharad”

8. Mr. Narula submits, and I am inclined to agree with him, that the aforesaid e-mail trail indicates that the parties had attempted a resolution of the disputes but that it did not fructify. In such circumstances, the Supreme Court has held, in *Visa International Ltd v. Continental Resources USA Ltd*<sup>3</sup> and *Demerara Distilleries Pvt Ltd v Demerara Distillers Ltd*<sup>4</sup>, that it would be futile to relegate the parties to any attempt at conciliation or an amicable resolution, and that reference of the disputes to the arbitration would be apposite. The relevant passages from the said decisions are reproduced thus :

<sup>3</sup> (2009) 2 SCC 55  
<sup>4</sup> (2015) 13 SCC 610



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### Visa International

“38. It was contended that the pre-condition for amicable settlement of the dispute between the parties has not been exhausted and therefore the application seeking appointment of arbitrator is premature. *From the correspondence exchanged between the parties at pp. 54-77 of the paper book, it is clear that there was no scope for amicable settlement, for both the parties have taken rigid stand making allegations against each other.* In this regard a reference may be made to the letter dated 15-9-2006 from the respondent herein in which it is inter alia stated “... since February 2005 after the execution of the agreements, various meetings/discussions have taken place between both the parties for furtherance of the objective and purpose with which the agreement and the MoU were signed between the parties. Several correspondences have been made by CRL to VISA to help and support its endeavour for achieving the goal for which the abovementioned agreements were executed”. In the same letter it is alleged that in spite of repeated requests the petitioner has not provided any funding schedules for their portion of equity along with supporting documents to help in convincing OMC of financial capabilities of the parties and ultimately to obtain financial closure of the project. The exchange of letters between the parties undoubtedly discloses that attempts were made for an amicable settlement but without any result leaving no option but to invoke the arbitration clause.”

(Emphasis supplied)

### Demerara Distilleries

5. Of the various contentions advanced by the respondent Company to resist the prayer for appointment of an arbitrator under Section 11(6) of the Act, the objections with regard the application being premature; the disputes not being arbitrable, and the proceedings pending before the Company Law Board, would not merit any serious consideration. *The elaborate correspondence by and between the parties, as brought on record of the present proceeding, would indicate that any attempt, at this stage, to resolve the disputes by mutual discussions and mediation would be an empty formality. The proceedings before the Company Law Board at the instance of the present respondent and the prayer of the petitioners therein for reference to arbitration cannot logically and reasonably be construed to be a bar to the entertainment of the present application.* Admittedly, a dispute has occurred with regard to the commitments of the respondent Company as regards equity participation and dissemination of technology as visualised under the Agreement. It

Signature Not Verified

Digitally Signed By: ARI  
KUMAR  
Signing Date: 23.09.2024  
15:56:37

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Signature Not Verified

Digitally Signed  
By: CHANDRASHEKHARAN  
HARI SHANKAR  
Signing Date: 23.09.2024  
15:55:21



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would, therefore, be difficult to hold that the same would not be arbitrable, if otherwise, the arbitration clause can be legitimately invoked. Therefore, it is the objection of the respondent Company that the present petition is not maintainable at the instance of the petitioners which alone would require an in-depth consideration.”

(Emphasis supplied)

9. As such, the preliminary objection of Mr. Nathani to the effect that the petitioner had not exhausted the pre-arbitral protocol is rejected.

10. Today, Mr. Nathani advances another submission. He submits that, prior to the Section 21 notice, the petitioner had issued a demand notice to the respondent on 1 December 2022. Mr. Nathani submits that, in the notice dated 1 December 2022, the petitioner’s claim was ₹ 21,29,255/- and that the surviving claim in the Section 21 notice is of ₹ 12,31,603/-. In as much as the surviving claim of ₹ 12,31,603/- is part of the claim which forms subject matter of the notice dated 1 December 2022, Mr. Nathani submits that the Section 21 notice issued by the petitioner is defective as it invokes both the DSAs, whereas the demand notice dated 1 December 2022 is restricted to the DSA dated 9 December 2021.

11. This, however, is not a matter which can engage the attention of this Court while exercising jurisdiction under Section 11(6) of the 1996 Act in view of the recent enunciation of law in ***SBI General Insurance Co Ltd v Krish Spinning***<sup>5</sup>. The said decision makes it clear that a Court exercising jurisdiction under Section 11 of the 1996 Act is



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only to examine whether there exists an arbitration agreement between the parties. Para 114 of the report specifically says that the *court is to see nothing else*. The only other aspect which the court has to bear in mind is whether the Section 11(6) petition has been filed within three years of the Section 21 notice initiating the arbitral proceedings. Both these conditions stand satisfied in the present case.

**12.** It shall, therefore, be open to the respondent to raise the contention which Mr. Nathani has raised before this Court today in opposition to the petitioner's claim. This Court is expressing no view thereon. Any such contention, if raised, shall be examined by the learned Arbitrator in accordance with law.

**13.** As the parties have not been able to arrive at a consensus regarding arbitration, this dispute is referred to the Delhi International Arbitration Centre<sup>6</sup>, which shall appoint a suitable Arbitrator to arbitrate on the disputes.

**14.** The arbitration shall take place under the aegis of the DIAC and would abide by its rules and regulations.

**15.** The learned arbitrator shall be entitled to charge fees as per the schedule of fees maintained by the DIAC.

**16.** The learned arbitrator is also requested to file the requisite disclosure under Section 12(2) of the 1996 Act, prior to entering on

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<sup>6</sup> "the DIAC", hereinafter



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reference.

17. The petition stands allowed in the aforesaid terms.

**C. HARI SHANKAR, J.**

**SEPTEMBER 19, 2024/yg**

*Click here to check corrigendum, if any*