

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

% Order delivered on : 5th September, 2016

+ **ARB.P. 154/2016**

JUVALIA MARKETING PRIVATE LIMITED Petitioner
Through Mr.Naresh K. Daksh, Adv.

versus

SANTA CLAUS COURIERS PVT. LTD. & ORS. Respondents
Through Mr.Dinesh Agnani, Sr. Adv. with
Mr.Mukul Singh, Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the present petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 read with the Arbitration and Conciliation (Amendment) Ordinance, 2015 for appointment of an Arbitrator for adjudicating the disputes between the parties in terms of the Agreement dated 14th November, 2012.
2. Existence of the disputes and execution of the Agreement which contains the Arbitration Clause has not been disputed by the respondents.
3. The only plea taken by the respondents is that the final notice of recovery was issued by the petitioner on 23rd February, 2016 and as per Clause 34 of the Agreement dated 14th November, 2012, the respondent had appointed a sole Arbitrator by way of reply dated 21st March, 2016, within the period of thirty days. Therefore, the present petition is not maintainable.

4. The petitioner-Company is engaged in the business of sale and marketing of different jewellery items including earrings, costumes jewellery, jewellery case, cufflinks, medallions, necklaces, ornamental pins, ornaments, pearls, trinkets, bags and other women accessories through e-commerce platform, business to business transactions and other modes of sale under brand name "Juvalia" and has goodwill and reputation in the market.

5. The respondent No.1 is engaged in the business of Courier and Logistics and also providing related services. The respondent Nos.2 and 3 are Directors of respondent No.1-Company and are managing and looking after all the affairs.

6. For discharge of their liabilities, the respondent Nos.2 and 3 had also issued various cheques which stood dishonoured. Even the demand notices were not replied. Therefore, the respondent Nos. 2 and 3 are being impleaded as the necessary parties.

7. The Directors of the respondent No.1-Company had represented that they are reputed Courier and Cargo Company and had offered to provide the services for delivery of goods to the customers at different places and also to collect the payments against the shipments sent under Cash on Delivery (COD) transaction and also to provide the related services for Delhi / NCR region.

8. Considering the representations and assurances made by the respondents, the petitioner had agreed to avail the services of the respondent No.1-Company. Upon the settlement of terms and conditions, an Agreement dated 14th November, 2012 was executed by the respondent No.1-Company. As per the Agreement, since the

petitioner had been selling and marketing products through online mode and other modes, against some of the orders, the payments were to be collected at the time of delivery of the product to the concerned customer. As per the terms of the Agreement, respondent No.1-Company was required to remit the collected amount to the petitioner within the stipulated time period. Further in consideration of the said services and in order to discharge its obligations including remittance of payments collected by the respondents, the petitioner-Company was required to make the payment to the respondent No. 1 as per the agreement, on submission of the bills by the respondent No.1-Company.

9. The petitioner had been sending its goods through the respondent No.1 for delivery to the customers and the said respondent had been collecting the payments against the shipments from the customers. The respondents have been remitting the payments but such payments were short against the shipments given for delivery. Time and again, the petitioner requested the respondents for payment of such overdue amounts and remittance of amounts regularly. The respondent No.2 assured and had promised to clear the overdue amounts and also to remit the payments on time against the shipments.

10. The respondents had issued a cheque dated 6th December, 2013 amounting to Rs. 2 lacs but the said cheque was dishonoured. After issuance of statutory notice dated 26th December, 2013 to the respondents, the petitioner had filed a Complaint Case under Section 138 of the Negotiable Instruments Act, 1881 and thereafter, the respondents made the payment of Rs. 2 lacs. While admitting its liabilities in part, the respondents had also issued a cheque bearing

No. 001775 dated 11th June, 2014 amounting to Rs. 19,68,027/- to the petitioner and had assured that the said cheque would be honoured. When the petitioner presented the cheques for encashment on the due dates, the cheques issued by the respondents were dishonoured. Thereafter, the petitioner issued a statutory Notice dated 8th July, 2014 to the respondents but even after the receipt of the notice, the respondents failed to discharge its liabilities. The petitioner was also constrained to file a Complaint Case under Section 138 of the Negotiable Instruments Act, 1881 against the respondents and the same is pending for adjudication. The respondents are avoiding the proceedings in the said case.

11. The petitioner has further submitted that it is maintaining an account with regard to all the shipments and transactions which were given to the respondents and after adjusting all the payments remitted by the respondents, an amount of Rs.66,66,678/- is still outstanding and payable by the respondents to the petitioner. The transaction being a commercial transaction, the petitioner claims that it is entitled for an interest @ 24% per annum. It is also submitted that the petitioner had also made efforts to resolve the matter by negotiations but the respondents are avoiding the resolution of the matter amicably. The respondents are also avoiding discharge of their outstanding liabilities.

12. The Arbitration Clause as per the Agreement dated 14th November, 2012 has been reproduced herein below:

"34. All the disputes arising out of this Agreement shall be amicably settled. However, in the event of any such disputes are not settled amicably between the parties, the same shall be referred to a sole arbitrator to be appointed by Chhotu.in in accordance with the

Arbitration and Conciliation Act, 1996 and the venue of such arbitration shall be at New Delhi. However, the same shall be without prejudice to the other legal rights available to the parties under this Agreement.

35. Any dispute between the parties arising out of this agreement, which have not been resolved through the process of arbitration, shall be resolved within the exclusive jurisdiction of any competent courts situated at Deihi."

13. Since the disputes have not been resolved between the petitioner and respondents amicably by mutual negotiations and the respondents have failed to appoint any Arbitrator, the claim of the petitioner deserves to be resolved and adjudicated through Arbitration as agreed by the respondents.

14. The petitioner issued a legal notice dated 6th November, 2015 to the respondents invoking the Arbitration Clause and asking the respondents to give consent to any of the three names proposed therein to be appointed as an Arbitrator for the resolution of the disputes. In spite of the receipt of the said notice, the respondents failed to appoint an Arbitrator and even failed to give their consent to any of the names proposed by the petitioner.

15. It is further stated by the petitioner that since there was some error regarding the outstanding amount in the notice dated 6th November, 2015, the petitioner issued Corrigendum Notice dated 23rd February, 2016 thereby correcting the outstanding amount as Rs. 66,66,678/-. In spite of the service of the said notice, the respondents failed to give any response.

16. It is rightly alleged by the petitioner that the Sole Arbitrator is to be appointed through this Court as provided under Section 11

of the Act. Pursuant to the invocation of arbitration clause by the petitioner, vide notice dated 6th November, 2015, admittedly the respondents failed to take steps for the appointment and/or to give its consent to any of the proposed names to be appointed as an Arbitrator within the period of thirty days. The appointment made by the respondent after filing of the present petition has no consequences. There is also no force in the submissions of the respondents that since the final notice/corrected notice was issued only on 23rd February, 2016, the appointment of sole Arbitrator within thirty days is a valid appointment and the petition is not maintainable as the same has been filed before the expiry of thirty days of final notice. The relevant date of issuance of arbitration notice as required under the law is 6th November, 2015. The respondents did not take any steps to appoint the sole Arbitrator. As per the scope of the Act, unless the appointment is made before the filing of the petition, the appointment of an Arbitrator after the expiry of thirty days or after filing of the petition is not maintainable.

17. Thus, the prayer of the present petition is allowed.

18. Accordingly, Justice Lokeshwar Prasad, retired Judge of this Court (Mobile No.9810962592/9818000170) is appointed as the sole Arbitrator to adjudicate the disputes arising out of the Agreement between the parties. The parties are also allowed to file their respective claims and counter-claims before the Arbitrator. Liberty is granted to the respondent to raise all the grounds as mentioned in the reply to the petition.

19. The learned Arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The fees of the learned

Arbitrator shall be in terms of the schedule of the amended Act. The parties to appear before the learned Arbitrator on 3rd October, 2016 for directions.

20. The petition is accordingly disposed of.

21. Copy of this order be given *dasti* to the learned counsel for the parties and a copy thereof be delivered to the learned Arbitrator as well as Additional Coordinator, DAC forthwith.

(MANMOHAN SINGH)
JUDGE

SEPTEMBER 05, 2016

