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

% *Date of decision:* 15.09.2017

+ O.M.P. (T) (COMM.) 12/2017

AARADHYA INTERNATIONAL PVT. LTD. Petitioner
Through Mr.Bhuvanesh Sehgal and
Mr.Anubhav Bhasin, Advs.

versus

VISAGE BEAUTY & HEALTH CARE PVT. LTD..... Respondent
Through Mr.Tarun Kumar, Adv.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. ORAL)

1. This petition is filed under Section 14(2) and 15 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking termination of the mandate of the Arbitrator and appointment of a new arbitrator to adjudicate the disputes between the parties.
2. The case of the petitioner is that it is a company engaged in the business of wholesale and retail sale of cosmetics and other similar products in the entire region of Nepal. It is stated that the respondent approached the petitioner and represented that they are engaged in manufacturing and sale of cosmetics and beauty products. Pursuant to negotiations, the parties entered into an agreement/MOU for sale of the products of the respondent by the petitioner. The respondent issued a letter dated 22.11.2012 appointing the petitioner as its super distributor. An MOU dated 23.11.2012 was also executed. The agreement was entered for a period of 5 years.

3. Disputes having arisen between the parties, on 09.12.2014 the petitioner is said to have invoked the arbitration clause. As per the agreement between the parties, there is a named arbitrator who is to act as the sole Arbitrator, namely, Mr. Shanmuga Patro, Advocate. The relevant clause reads as follows:

“(A) In the case of dispute arising between the parties with regard to interpretation of any of the clauses of this agreement, the transaction and dealings made thereunder with respect to settlement of accounts and other matters the same shall be referred to the sole arbitration of SHANMUGA PATRO & ASSOCIATES whose decision shall be binding on both the parties and for purpose of adjudication, the provisions of Arbitration Act shall apply.

(B) In case of any dispute arising out of this agreement, the parties shall be bound by the exclusive jurisdiction of the Courts of New Delhi, India.”

4. The petitioner submits that on 02.02.2015, they had requested the named learned Arbitrator to proceed with the matter. The learned Arbitrator on 12.09.2015, after a gap of 7 months, is said to have replied to the communication of the petitioner and consented to be the Arbitrator. The first hearing took place between the parties on 10.10.2015. The record of the proceedings shows that it fixed the time schedule. The claimant was to file its claim statement by 15.11.2015 and the respondent was to file its reply/counter-claim within three weeks thereafter. The matter was adjourned to 10.12.2015. The record of proceedings also notes the submission of the learned counsel for the parties that they would try and explore the possibilities of settlement.

5. The case of the petitioner is that on account of certain disturbances in

Nepal, the claim petition was filed by the petitioner on 28.01.2016 and the fees of the learned Arbitrator of Rs.30,000/- was paid on 29.02.2016. Thereafter, time has been given on several occasions to the respondent to file their reply. Till date reply has not been filed. No proceedings thereafter have taken place. Hence, the present petition is filed seeking termination of the mandate of the Arbitrator and appointment of a fresh Arbitrator to adjudicate the disputes between the parties.

6. Learned counsel for the respondent however has opposed the present petition. He submits that the parties were trying to negotiate a settlement and hence, the proceedings have not progressed. He reiterates that on 18.07.2016, the petitioner has itself written to the learned Arbitrator asking him not to proceed with the matter and hence, thereafter no proceedings have taken place. He submits that appropriate directions can be issued to the learned Arbitrator to proceed with the matter in a time bound manner.

7. Section 14(1) of the Act reads as follows:-

“14. Failure or impossibility to act.—

(1) The mandate of an arbitrator shall terminate if—

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.”

8. Hence, where the learned arbitrator fails to act without undue delay, the mandate of an arbitrator is liable to be terminated.

9. Delay in the facts of the present case is manifest from a perusal of the record. The first hearing took place on 13.10.2015 when the next date was fixed for 10.12.2015. The petitioner was not able to file his statement of

claim as per the dates fixed by the learned Arbitrator, namely, 15.11.2015. They accordingly on 13.11.2015 wrote an e-mail to the learned Arbitrator seeking three weeks' further time to file their statement of claims. The learned Arbitrator by an e-mail of the same date, namely, 13.11.2015 agreed to the request of the petitioner and they were permitted to file statement of claims before the next date 10.12.2015. There is nothing to show as to whether a hearing took place on 10.12.2015. It appears that the petitioner has filed the claim petition on 28.01.2016. The learned Arbitrator on 03.02.2016 has sent an e-mail to the parties confirming receipt of the claim statement. However, he states that in the absence of deposit of the fees by the parties, the statement of claim is not taken on record and the parties were requested to deposit the fees. It is the case of the petitioner that they have paid their share of the fees to the learned Arbitrator on 29.02.2016. This is confirmed by the learned Arbitrator by his e-mail dated 12.03.2016 where he directs the respondent to file their reply/counter-claim before 31.03.2016 and to deposit their share of the fees. Learned Arbitrator fixed the next hearing on 12.04.2016 for directions. Thereafter it appears no proceedings have taken place. No hearing took place on 12.04.2016 as is reflected from the e-mail of the petitioner dated 17.05.2016 where the Arbitrator was requested to inform the next date of hearing and to expedite the proceedings. A reminder was sent to the learned Arbitrator by the petitioner on 23.05.2016.

10. The learned Arbitrator on 23.05.2016 has sent a communication to the parties pointing out that the reply/counter-claim of the respondent has not been received and the respondent has not deposited the fees. In the interest of justice, time was given to the respondent to file its statement of defence

by 10.06.2016 with an advance copy. The petitioner was asked to file rejoinder. The communication also stated that the learned Arbitrator was out of town during June 2016. Thereafter, Communications/reminders have been sent by the petitioner on 04.07.2016 and 12.07.2016. A notice has been sent to the learned Arbitrator on 18.07.2016 whereby the petitioner has pointed out to the learned Arbitrator that he is not conducting the proceedings in an independent and impartial manner and is unable to perform his functions as per law. The present petition has been filed on 16.02.2017.

11. A perusal of the above narration of the proceedings before the learned Arbitrator shows that for nearly 2 years, no proper proceedings have taken place. Other than a single hearing held on 13.10.2015 where certain directions were passed to the parties to complete the pleadings, no other steps have been taken by the learned Arbitrator. The respondent have not filed their reply since 28.01.2016 when the claim petition was filed by the petitioner. The learned Arbitrator has taken no steps to close their right or to deal with this situation. It is manifest from the above that there is unnecessary delay on the part of the learned Arbitrator in completing the proceedings. The learned Arbitrator has failed to act with expedition in completing the proceedings and the matter is unnecessarily lingering on.

12. The mandate of an Arbitrator has to be terminated if he fails to act without undue delay. Reference may be had to the judgment of the Supreme Court in ***Union of India (UOI) vs. U.P.State Bridge Corporation Ltd., (2015)2 SCC 52/MANU/SC/0837/2014*** on termination of the mandate of an Arbitrator on account of delay held as follows:-

“13. As is clear from the reading of Section 14, when there is a failure on the part of the Arbitral Tribunal to act and it is unable to perform its function either de jure or de facto, it is open to a party to the arbitration proceedings to approach the Court to decide on the termination of the mandate. Section 15 provides some more contingencies when mandate of an arbitrator can get terminated. In the present case, the High Court has come to a categorical finding that the Arbitral Tribunal failed to perform its function, and rightly so. It is a clear case of inability on the part of the members of the Tribunal to proceed in the matter as the matter lingered on for almost four years, without any rhyme or justifiable reasons. The members did not mend their ways even when another life was given by granting three months to them. Virtually a pre-emptory order was passed by the High Court, but the Arbitral Tribunal remained unaffected and took the directions of the High Court in a cavalier manner. Therefore, the order of the High Court terminating the mandate of the arbitral tribunal is flawless. This aspect of the impugned order is not even questioned by the Appellant at the time of hearing of the present appeal.”

13. In view of the above legal position and the facts stated above which show that the arbitration proceedings have been meandering along since last two years with no progress, I terminate the mandate of the Arbitrator.

14. As per the arbitration clause noted above, the matter had to be referred to the sole arbitration of Shanmuga Patro & Associates. As the mandate of the named arbitrator has been terminated, the vacancy has to be filled up by this court by an independent arbitrator to adjudicate the disputes between the parties. Accordingly, I appoint Mr. Shasank Garg, Advocate (Mobile 9811526671) as the sole Arbitrator to adjudicate the disputes between the parties. The arbitration shall take place under the aegis of the Delhi International Arbitration Centre (DIAC). A copy of the order be sent to

DIAC and the learned Arbitrator.

15. The former Arbitrator is requested to transmit the record pending before him to the DIAC. In the eventuality there is any delay in transmitting the record, the petitioner is free to file a copy of the settlement of claim filed before the previous arbitrator before the DIAC/newly nominated arbitrator.

16. The petition stands disposed of.

JAYANT NATH, J.

SEPTEMBER 15, 2017/rb

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