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

+ ARB.P. 150/2021 & I.A.1255/2021, I.A.5900/2021

M/S. PAWAN BROTHERS PVT. LTD Petitioner

Through: Mr. Amarjeet Sahni, Advocate

versus

M/S. SKYLARK FASHIONS PVT. LTD. & ANR.

..... Respondents

Through: Ms. Savita Aggarwal, Adv. for
R-1

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

ORDER (O R A L)

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05.05.2021

(Video-Conferencing)

1. By an agreement dated 9th March, 2016, the petitioner leased out the premises at D-1, Sector 10, Noida, admeasuring 30000 sq. feet to Respondent No.1, in order to enable Respondent No.1 to conduct its business from the said premises. Clause 11 of the said agreement provided for resolution of disputes between the parties, if any, by arbitration and reads as under:

"11. That in case any dispute arises between the parties hereto that shall be referred to the penal (sic) of the Arbitrator which consists three person, each party can appoint their arbitrator and then they can appoint single arbitrator appointed under the Arbitration Act whose decision will be final and will be binding on both the parties hereto. Further the jurisdiction of Delhi Courts shall be final."

2. The grievance of the petitioner as voiced by Mr. Amarjeet Sahni, learned Counsel, appears to be that Respondent No.1 did not pay, to the petitioner, 25% of the sales effected by it using the premises granted by the petitioner on lease, as required by the agreement dated 9th March, 2016. The petition alleges that Respondent No.1 was seeking to contend that it was not running any business from the premises and that, therefore, no amount was payable to the petitioner, but disputes this contention by alleging that the petitioner was running its business through Respondent No.2 merely in order to avoid paying the petitioner its legitimate dues. As such, the petition asserts that an arbitrable dispute had arisen between the parties and, as the notice invoking arbitration, issued by the petitioner to the respondents, did not result in any arbitrator being appointed, the petitioner has approached this Court for appointment of an arbitrator.

3. Ms. Aggarwal, learned Counsel for the Respondent No. 1 submits that Respondent No. 2 is not a party to the agreement and that, therefore, the petition was not maintainable against Respondent No. 2. *Prima facie*, as the arbitration agreement is between the petitioner and Respondent No. 1, it may not be necessary to implead Respondent No. 2 in these proceedings. Mr. Sahni agrees to delete Respondent No. 2 from these proceedings, with liberty to move the arbitral tribunal for impleading Respondent No. 2 as a party, upon the petitioner convincing the arbitral tribunal regarding the necessity therefor.

4. Ms. Aggarwal further contends that the agreement dated 9th March, 2016 was obtained by fraud and that the petitioner had concealed from the respondents, the fact that it was carrying on similar business from the said premises. In my view, this cannot a ground to contest the prayer of the petitioner for appointment of an arbitrator. It shall always be open to for the respondents to plead the said fact before the arbitral tribunal and for the arbitral tribunal to take a view thereon, given the nature of the controversy before it.

5. No other substantial ground having been advanced by Ms. Aggarwal to contest the prayer of the petitioner for appointment of an arbitrator, I am of the opinion that this petition deserves to be allowed.

6. In view thereof, I appoint Mr G. Tushar Rao, Senior Advocate (Cell: 9810708121 and Email ID: gtusharrao@yahoo.com) as the Arbitrator to arbitrate on the disputes between the parties. The Arbitrator would be entitled to charge fees in accordance with the Fourth Schedule to the Arbitration & Conciliation Act, 1996. The arbitrator would also furnish the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on reference.

7. All issues of fact and law are left open. The respondent shall be entitled to raise all grounds before the Arbitrator including the question of arbitrability of the dispute, the plea that the agreement between the parties was executed by fraud as well as any other grounds of fact or law which may be available to be canvassed by the respondent. Similar liberty would be available to the petitioner. This

Court does not express any opinion on the merits of the disputes between the parties.

8. The respondent shall also be entitled to raise, before the Arbitrator any counter-claim that it may deem appropriate in accordance with law.

9. Respondent No. 2 stands deleted from the array of parties in this case. However, the petitioner shall be at liberty to seek impleadment of Respondent No. 2 in the arbitral proceedings as a non-signatory third party, by moving an appropriate application to that effect and it would be for the Arbitral Tribunal to take a decision thereon. This Court does not express any opinion in that regard.

10. This petition alongwith pending applications stand disposed of in the aforesaid terms with no orders as to costs.

C.HARI SHANKAR, J

MAY 5, 2021/kr