

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

% **Date of order : 13th December, 2022**

+ **O.M.P.(I)(COMM.) 245/2019**

BIBA APPARELS PRIVATE LIMITED Petitioner

Through: Mr. Archit Upadhayay, Mr. Samarth
Mohanty and Ms. Charu Sharma,
Advocate

Versus

SHABNAM ENTERPRISES Respondent

Through: Mr. Piyush Jain, Advocate

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The Petitioner has filed the instant petition under Section 9 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act, 1996') read with Section 2(1)(c) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Court Ordinance, 2015, praying for the following reliefs:

"a) Pass an ex-parte ad-interim injunction in favor of the Petitioner and against the Respondent thereby directing that the Respondent should not create any third party rights or sell or transfer the copyrighted raw material of the Petitioner to any third party; or

b) Pass an ex-parte ad-interim order in favor of the Petitioner, directing the Respondent to return all the finished products as has been contemplated in the Agreement dated 08.12.2016; or

c) Pass an Order directing the Respondent to furnish a sum of Rs.2,93,01,418/- as per the terms of the Agreement dated 08.12.2015, in the event that the Respondent fails to provide the finished goods to the Petitioner; and
d) Pass any other order(s) that this Hon'ble Court may deem fit and proper under the facts and circumstances of the present case."

2. The petitioner, M/s Biba Apparels Private Limited is a company registered under the provisions of the Companies Act, 1956 (hereinafter referred to as 'the Companies Act'), having its registered office at 13th Floor, Capital Cyberscape, Ullahwas, Sector 59, Golf Course Extension Road, Gurugram.

3. The respondent is a proprietorship firm, M/s. Shabnam Enterprises having its registered office at RZ-172A, Main Dabri Nasirpur Road, Durga Park, New Delhi and its factory at RZ-87, Gali No.2, Dabri Extension, New Delhi- 45.

4. Allegedly, the respondent firm had previously contacted the petitioner company in an effort to become its registered vendor. Agreement dated 8th December, 2016 (hereinafter referred to as the "Agreement") effective for a period of 3 years from the date of commencement, was executed between the parties in pursuance of numerous rounds of negotiations between the petitioner company and the respondent firm.

5. Learned counsel appearing for the petitioner has referred to the relevant provisions of the Agreement during the course of his submissions. Following is the reproduction of the relevant clauses from the agreement dated December 8th, 2016: Clause 2(i), 2(j), 3(i), 3(r), and Section 11 (Dispute Resolution Clause):

"2(i)THE PROCESSOR undertakes that he shall not hold any fabric/ materials, goods, articles, received from BIBA or any dresses, outfits and costumes which belongs to BIBA prepared or to be prepared by THE PROCESSOR, for the non-payment against any previous delivery. In the event of THE PROCESSOR resorts to any such means, BIBA shall have the right to terminate this Agreement and take civil and criminal action against THE PROCESSOR.

2(j) The Debit notes (other than aforesaid invoices), if any, will be cleared by either Party immediately.

3(j)THE PROCESSOR shall be responsible for all the material and goods entrusted to THE PROCESSOR by BIBA till the finished dresses, outfits and costumes are handed over to BIBA. THE PROCESSOR will check all the fabrics, materials, dress, outfits and costumes as the case may be on a daily basis to ensure consistent quality. THE PROCESSOR being only a job work contractor, all fabrics/ materials, goods and other articles including design supplied by BIBA shall be the sole property of BIBA and THE PROCESSOR shall always be the trustee or custodian of the fabrics/ material lying with him. THE PROCESSOR shall therefore insure and take all reasonable care as well as ensure proper and safe custody of the same.

3(r) THE PROCESSOR shall be bound to give the finished dresses, outfits and costumes and return unused fabric/ material to BIBA within 7 (seven) days from a demand for the return of such articles being made. In the event of any delay or failure by THE PROCESSOR in returning the finished/ stitched dresses, outfits and costumes and unused fabrics/ materials, goods and other articles including designs, THE PROCESSOR shall be bound to pay a penalty equivalent to two times the then market value of the Fabrics/ material, goods and/or articles or designs.

11. DISPUTE RESOLUTION AND ARBITRATION

In the event of any dispute arising between the parties hereto BIBA shall be obliged to first clear all undisputed: outstanding dues payable to THE PROCESSOR and THE PROCESSOR shall be obliged to return all fabric/ material and other articles to BIBA before proceeding further with the dispute and the dispute shall thereafter be resolved through arbitration by referring such dispute of the sole arbitrator to be jointly appointed by both the parties. The arbitration shall be conducted as per the provisions of the Arbitration and Conciliation Act, 1996 or any other statutory modification or enactment in force at the relevant time. The Venue of arbitration shall be New Delhi and Arbitrator shall be conducted in English. The award of the arbitrator shall be final and binding on the parties."

6. Pursuant to respondent firm being registered as a vendor and consequently, entering into the agreement dated 8th December, 2016, the petitioner company started issuing the production orders called the POs & PRDOs, to the respondent. Resultantly, the respondent started lifting the raw materials to complete the said work orders.

7. It is submitted by the learned counsel for the Petitioner that initially, the Petitioner issued PRDOs for relatively minor orders, which the respondent carried out, some with delay and some to the Petitioner's satisfaction. Thereafter, the petitioner company started issuing larger orders to the respondent company and against the said orders the respondent company completed several works for the petitioner company.

8. According to learned counsel appearing on behalf of the petitioner, the petitioner company issued seven work orders to the respondent following which, despite lifting the raw materials for the purpose of

completing the said work orders, the respondent company failed to complete the aforementioned work orders.

9. Learned counsel for the petitioner stated that the petitioner company has provided the respondent company multiple reminders and notifications to finish the job in compliance with the work orders granted to the respondent.

10. It is further claimed that the respondent was obligated by the provisions of the agreement dated 8th December, 2016. Learned counsel for the Petitioner relied on Clause 2(i) of the agreement to argue that the respondent has no authority to withhold materials lifted by it or completed items processed by the respondent following the execution of a work order.

11. Learned counsel appearing for the petitioner has also referred to Clause 3(j) of the above said agreement and submitted that the materials were the sole property of the petitioner company, and the respondent was the trustee/custodian of the fabrics/materials lying with it and could not have withheld the same once the demand for returning the materials was made by the petitioner. The petitioner corporation experienced significant commercial losses as a result of the respondent's behaviour, and the respondent now owns the petitioner's copyright materials.

12. Learned counsel for the petitioner also contended that the petitioner company has a legitimate apprehension that the respondent may sell the petitioner's copyright items to a rival or another store, causing the petitioner company significant loss and injury.

13. Learned counsel for the petitioner said that, notwithstanding the notifications, the respondent has refused to invoke the agreement's

arbitration clause and is also unwilling to settle disagreements with the petitioner company, leaving the petitioner with no choice but to bring the current petition.

14. *Per Contra*, the learned counsel appearing for the respondent has vehemently opposed the current petition and asserted that, in accordance with Clause 3(r) of the agreement, the petitioner company has never demanded the goods from the respondent. As a result, it is incorrect to claim that the respondent has not supplied the finished goods and raw materials that are currently in its possession.

15. The respondent adamantly asserts that because the conflicts between the parties do not have the characteristics of arbitration disputes, this Court lacks the jurisdiction to pass any orders for temporary protection under Section 9 of the Act, 1996.

16. Furthermore, it is submitted that the petitioner has never attempted to invoke the arbitration clause of the contract, which calls for the appointment of an arbitrator to settle disagreements, if any, between the parties, or filed a petition with the court in accordance with Section 11 of the Act, 1996 seeking appointment of the Arbitrator.

17. Learned counsel for the respondent submits that the petitioner company filed the present petition in 2019, and since then, the petitioner company has not even attempted to invoke the arbitration i.e., Clause 11, of the agreement, nor has it pursued a resolution with the respondent to resolve the alleged dispute. Moreover, this Court has not yet issued an interim order pertaining to the current petition.

18. Learned counsel for the Respondent asserts that the present petition is without any merit and should be dismissed in light of the aforementioned position.

19. Heard the learned counsel for the parties and perused the records.

20. The present petition has been filed in accordance with Section 9 of the Act, 1996. The petitioner via the present petition is requesting that the respondent should not create any third-party rights, sell or transfer the copyrighted raw materials of the petitioner to any third party, and is further seeking directions to the respondent to return all finished products to the petitioner company as has been contemplated in the agreement. The petitioner company has also claimed an amount from the respondent company.

21. On the other hand, the learned counsel appearing for the respondent voiced fierce opposition to the present petition and submitted that that the present petition cannot be maintained. This application should be denied because it lacks the merit, thus, it should be rejected for the following reasons:

- Firstly, there are no arbitral disputes between the parties;
- Secondly, the petitioner company has failed to invoke the arbitral clause as per the agreement or as well as no notice has been given for appointment of the Arbitrator for settlement of the alleged disputes between the parties and;
- Thirdly, the petition is pending since the year 2019 and after lapse of more than two years, the petitioner has not tried once for appointment

of the arbitrator or filed any appropriate petition before this Court seeking a direction for appointment of the Arbitrator.

22. According to the preceding paragraphs, the court has the authority to issue interim orders under Section 9 of the Act, 1996. In accordance with Section 21 of the Act, 1996; the procedures before an arbitrator do not get underway until the respondent is in possession of the request to refer the dispute.

23. Sections 2(d), 9, 17, and 21 of the Act, 1996 are some of the relevant provisions pertinent to adjudicate upon the current case. An Arbitral Tribunal is defined in Section 2(d) as a single arbitrator or a panel of arbitrators. Section 9 of the Act, 1996 which empowers the Court to issue interim orders and is interpreted by this Court in the current instance, reads as follows:

“9. Interim measures, etc. by Court.—A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or

experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
(d) interim injunction or the appointment of a receiver;
(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

As this Section refers to “Arbitral Tribunal’ the same has to be read along with Section 21, which relates to the commencement of the arbitral proceedings and reads as follows:

“21. Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.”

The Arbitral Tribunal has also been given jurisdiction to pass interim orders under Section 17 of the said Act which reads as follows:

“17. Interim measures ordered by arbitral tribunal.—
(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.
(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1).”

24. The terms "before or during the arbitral procedures" are the key phrases that appear in Section 9 of the Act, 1996. This clearly contemplates two stages when the Court can pass interim order i.e., during the arbitral proceedings or prior to arbitral proceedings. There is no reason as to why Section 9 of the Act, 1996 should not be literally construed. Meaning has to

be given to the word “before” occurring in the said Section. The only interpretation that can be given is that the Court can pass interim orders before the commencement of arbitral proceedings. The Courts have jurisdiction to entertain an application under Section 9 of the Act, 1996 either before arbitral proceedings or during arbitral proceedings or after making of the arbitral award but before it is in force in accordance with Section 36 of the Act, 1996.

25. When a party files a petition under Section 9 of the Act, 1996 it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is preferable to the Arbitration Tribunal. When an application under Section 9 of the Act, 1996 is filed before the commencement of the arbitral proceedings, there has to be ‘manifest intention’ on the part of the applicant to take recourse to the arbitral proceedings if, at the time when the application under Section 9 of the Act is filed, the proceedings have not commenced under Section 21 of the Act, 1996.

26. In order to give full effect to the words “before or during the arbitral proceedings” occurring in Section 9 of the Act, it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application under Section 9 of the Act can be filed. The issuance of notice may, in a given case is sufficient to establish the manifest intention to have the dispute referred to an Arbitral Tribunal.

27. The instant petition under Section 9 of the Act, 1996 was filed in 2019 and despite lapse of more than 3 years, the petitioner has failed to establish its intent to invoke the arbitration clause. Therefore, perusal of the

materials on the record and the averments made in the petition, this Court has reached the conclusion that the petitioner company has failed to satisfy this Court with respect to its intent, to invoke the arbitration clause, i.e., clause 11 of the agreement and in consequently initiate the arbitration proceedings, in accordance with law.

28. In view of the foregoing discussions, this Court does not find any cogent reason to entertain the instant petition.

29. The instant petition, being devoid of merits, is accordingly dismissed along with pending applications, if any.

30. The order be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

DECEMBER 13, 2022
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