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ETOILE CREATIONS

v.

SARL DANSET DECO

(Arbitration Application (Civil) No. 4 of 2015)

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JULY 25, 2016

**[T.S. THAKUR, CJI, R. BANUMATHI AND UDAY UMESH
LALIT, JJ.]**

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*Arbitration and Conciliation Act, 1996: s.11(5) r/w s.11(9) –
Petition for appointment of sole arbitrator – In the instant case, it is
evident from the petition that the disputes arose between the parties
and in view of arbitration agreement, disputes could be resolved
only by way of arbitration – Thus, petition is allowed – A Former
Judge of Delhi High Court appointed as a sole arbitrator for
adjudication of disputes.*

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Allowing the petition, the Court

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HELD: 1. As is evident from the averments in the petition, disputes have actually arisen between the parties in relation to the agreement and in view of Clause 14 such disputes could be resolved only by way of arbitration. Whether the respondent is bound to pay Euro 393916.95 alongwith interest at the rate of 24% per annum; whether the respondent has committed breach of Clause 2.2 of the agreement in cancelling the orders; whether the respondent is liable to compensate for cancelling the orders and reimburse the cost and damages incurred by the petitioner; whether the respondent acted in violation of Clause 4.1 of 'Buyers Agreement' dated 18.10.2012 by diverting the orders to another agency and, if so, whether the respondent is liable to compensate the petitioner and such other incidental questions can be examined only by the arbitrator. When an arbitration agreement exists between the parties, the present petition under Section 11 (5) read with Section 11 (9) of the Arbitration and Conciliation Act, 1996, shall have to be allowed with appropriate directions. A Former Judge, Delhi High Court is appointed as a Sole Arbitrator for adjudication of the disputes that have arisen between the parties in relation to the 'Buyers Agreement' dated

18.10.2012 executed between them. [Paras 8, 9] [482-E-H; 483-A-B] A

CIVIL ORIGINAL JURISDICTION : Arbitration Application
(Civil) No. 4 of 2015

Vivek Gupta, Adv. for the Petitioner.

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The Judgment of the Court was delivered by

R. BANUMATHI, J. 1. In this petition under Section 11(5) read with Section 11(9) of the Arbitration and Conciliation Act, 1996, the petitioner prays for the appointment of a sole arbitrator for adjudication of disputes that have arisen between the parties in relation to 'Buyers Agreement' dated 18.10.2012 executed between them. C

2. Briefly stated case of the petitioner is as under:- Petitioner is a proprietorship firm having its registered office at C-291, Suraj Mal Vihar, Delhi. The petitioner is engaged in the business of manufacturing of products relating to home furnishing and upholstery etc., exclusively for the respondent since 2000. The respondent-SARL DANSET DECO is a concern having its office at 240 Rue De La Lys 59250, Halluin, France which is engaged in the business of purchase and sale of the product relating to home furnishing and upholstery and is the buyer of the products manufactured by the petitioner. Accordingly, a 'Buyers Agreement' was executed on 18.10.2012 at New Delhi between the petitioner and the respondent. As per the aforesaid agreement, the petitioner has been selling/supplying its aforesaid products and the respondent has been buying/purchasing the products for resale/sale in the territory of France. There was a long business relationship since 2000, even prior to execution of the agreement and the petitioner was regularly supplying the products to the respondent. At the time of execution of the aforesaid agreement, it was acknowledged that the respondent owes a total amount of Euro 367814.80 as the outstanding amount. The details of the outstanding dues have been mentioned in Schedule-I of the 'Buyers Agreement'. The petitioner has alleged that as per the terms and conditions of the 'Buyers Agreement' dated 18.10.2012, the respondent did not release the said outstanding amount within seven days of the agreement. Despite numerous reminders for the payment of dues through e-mails, SMS messages exchanged between the parties during November 2012 to April 2013 and subsequent legal notices sent to the respondent, the respondent failed to pay the admitted dues of the petitioner. H

A 3. Clause 2.2 of the 'Buyers Agreement' imposed a restriction
upon the petitioner from supplying its product to any other person/firm
or company, in the territory of France. On the other hand, the respondent
B agreed and assured that the products ordered during each year of the
term shall not fall short of the target provided in Schedule-II of the said
agreement. In the event of the failure to meet such target, the agreement
stipulated termination of restriction so imposed upon the petitioner.
Petitioner supplied various materials to the respondent at different points
of time against various orders. The respondent cancelled a few orders
C to the tune of Euro 272368.25. The respondent committed breach of the
terms and conditions of the 'Buyers Agreement' because cancelled orders
were not restored. Thus, the respondent is liable to compensate the
petitioner for cancelling orders and reimburse for cost and damages
incurred in procuring material worth Euro 272368.25, just prior to the
date of shipment and also for preparing samples as per the request of
the respondent dated 25.05.2012 and 26.07.2012. As per Clause 4.1 of
D the 'Buyers Agreement', the respondent shall not purchase/obtain/ deal
with the products or any goods that compete with them, for sale from
any person, firm or company in India other than the petitioner. The
respondent not only cancelled the orders, but also in violation of Clause
4.1 of the 'Buyers Agreement' dated 18.10.2012, purchased the same
products worth approximately Euro 700000 from M/s. Chahat Exports,
E 148-A, Basement, Deep Complex, Near Maharani Bagh, New Delhi
and Dhruv Overseas, 4502, Dau Bazar, Cloth Market, Fateh Puri, Delhi.
Placing such orders with other firms, according to petitioner, is a violation
of terms and conditions of the terms of the 'Buyers Agreement' which
stipulates commitment between the parties for five years to maintain the
business relations; but the respondent by diverting those orders to another
F agency has clearly breached the terms and conditions of the agreement.
Petitioner sent legal notices dated 08.05.2013, 04.07.2013 and 06.07.2013
calling upon the respondent to pay unpaid invoices to the tune of Euro
393916.95 and also unpaid invoices to the tune of Euro 209580.63 of M/
s Creative International (another partnership firm of the petitioner)
G alongwith interest at the rate of 24% per annum.

4. As the respondent did not make the payment of the invoices,
the petitioner invoked arbitration clause agreed in Clause 14 of the 'Buyers
Agreement' for the appointment of three arbitrators, one to be nominated
by each party and the third to be appointed by the two appointed
H arbitrators. As per Clause 14 of the 'Buyers Agreement', the petitioner

sent a statutory notice dated 14.08.2013, nominating on his behalf Mr. Subhash Chandra, LLM, Higher Judicial Services (V.R.S.), Member Judicial, Railway Claims Tribunal (Retd.) as an arbitrator. Petitioner requested the respondent to nominate its arbitrator so as to enable these arbitrators nominated by the parties to further nominate the presiding arbitrator and constitute an arbitral tribunal.

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5. The petitioner filed a petition before the Commercial Court in Lille to seize all the bank accounts of the respondent with the banks Caisse d' Epargne, GCE Trade and HSBC bank alongwith all money, values and/or bonds held by these banks on behalf of the respondent. The court's bailiffs seized a total amount of Euro 48000 in HSBC bank on 11.10.2013 and Caisse d' Epargne on 14.10.2013 in compliance to order of Appellate Court, Douai, France dated 25.09.2014. The petitioner filed a claim before the Tribunal-DE-COMMERCIAL DE LILLE METROPOLIS, France for recovery of debt amounting to Euro 393916.95, the Tribunal however dismissed the claim of the petitioner vide its order dated 30.01.2014. Petitioner then filed an Appeal No. Minute:14/389/RG 14/01147 before the Appellate Court, Douai, France against the order dated 30.01.2014 passed by the President of the Commercial Court of LILLE, which also came to be dismissed by its judgment dated 25.09.2014. The appellate court declared the appeal inadmissible on the issue of jurisdiction in view of the arbitration agreement and also held that there was no emergency to approach the court instead of seeking remedy under the Arbitration Agreement. According to the petitioner, the aforesaid disputes and differences have arisen in India, are covered by the terms and conditions of the 'Buyers Agreement' and are to be resolved by the arbitrator in view of the arbitration clause 14 of the 'Buyers Agreement'. Hence, the petitioner has filed this petition invoking the arbitration clause 14 of the 'Buyers Agreement' for appointment of a sole arbitrator in terms of 'Buyers Agreement' dated 18.10.2012 qua recovery of Euro 393916.95 payable to the petitioner alongwith interest at the rate of 24% per annum.

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6. As per the Office Report dated 06.04.2016, counsel for the petitioner has on 23.02.2016 filed an affidavit of dasti service alongwith proof of service on respondent and proposed respondents and the service of notice is complete.

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7. We have heard the learned counsel for the petitioner at some length. Despite service of notice, respondent has chosen not to appear. The material facts are not in dispute that 'Buyers Agreement' was

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- A executed between the parties on 18.10.2012. Clause 14 of the said agreement provides for settlement of dispute in relation to the agreement by way of arbitration. Clause 14 reads as under:-

“14. Arbitration

- B 14.1 Any dispute, difference, controversy or claim
C (“Dispute”) arising between the Parties out of or in relation
to or in connection with this Agreement, or the breach,
termination, effect, validity, interpretation or application of
this Agreement or as to their rights, duties or liabilities
hereunder, shall be settled by the Parties by mutual
D negotiations and agreement. If, for any reason, such Dispute
cannot be resolved amicably by the parties, the same shall
be referred to and settled by way of arbitration proceedings
by three arbitrators, one to be nominated by each Party
and the third to be appointed by the two appointed arbitrators.
The arbitration proceedings shall be held in accordance with
the Arbitration and Conciliation Act, 1996, or any subsequent
enactment or amendment thereto (the “Arbitration Act”) by a sole arbitrator appointed by the First Party. The decision
of the arbitrator shall be final and binding upon the Parties.
The venue of arbitration proceedings shall be Delhi. The
E language of the arbitration and the award shall be English.”

8. As is evident from the averments in the petition, disputes have actually arisen between the parties in relation to the agreement and in view of clause 14 such disputes could be resolved only by way of arbitration. Whether the respondent is bound to pay Euro 393916.95
F alongwith interest at the rate of 24% per annum; whether the respondent has committed breach of Clause 2.2 of the agreement in cancelling the orders; whether the respondent is liable to compensate for cancelling the orders and reimburse the cost and damages incurred by the petitioner; whether the respondent acted in violation of Clause 4.1 of ‘Buyers Agreement’ dated 18.10.2012 by diverting the orders to another agency
G and, if so, whether the respondent is liable to compensate the petitioner and such other incidental questions can be examined only by the arbitrator. When an arbitration agreement exists between the parties, the present petition under Section 11 (5) read with Section 11 (9) of the Arbitration and Conciliation Act, 1996, shall have to be allowed with appropriate
H directions.

9. In the result, we allow this petition and appoint Mr. Justice Kailash Gambhir, a Former Judge, Delhi High Court as a Sole Arbitrator for adjudication of the disputes that have arisen between the parties in relation to the 'Buyers Agreement' dated 18.10.2012 executed between them. We leave it open for the parties to make their claims and counter claims in relation to the agreement aforementioned before the Arbitrator. All contentions otherwise open to the parties on facts and in law shall be open to be urged before the arbitrator. The arbitrator shall fix his own fee. The petition, is accordingly, allowed with the above directions leaving the parties to bear their own costs. Parties are directed to appear before the arbitrator on 14.09.2016.

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Devika Gujral

Petition allowed.