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

+ O.M.P.(I) (COMM.) 216/2016 & IA No.11093/2016

SRS PRIVATE INVESTMENT POWAI LTD Petitioner

Through: Mr Arun Kathpalia, Senior Advocate
with Ms Shyel Trehan, Ms Himanie
Katoch and Mr Samaksh Goyal,
Advocates.

versus

SUPREME HOUSING AND HOSPITALITY

PVT LTD & ORS. Respondents

Through: Mr Sandeep Sethi, Senior Advocate
with Mr Karan Luthra and Ms Niyati
Kohli, Advocates for R-1, 3 & 4.
Mr Abhimanyu Mahajan, Mr Milan
Deep Singh and Ms Anubha Goel,
Advocates for R-2.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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03.10.2016

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996, *inter alia*, praying for certain interim measures of protection including directing the respondents to deposit a sum of ₹1,88,60,96,559/- in this Court for securing the petitioner's claim.

2. The petitioner states that certain disputes have arisen in respect of an agreement dated 19.03.2015 captioned as "Share Purchase Agreement". In

terms of which the petitioner claims that it is entitled for consideration of a sum of ₹1,62,00,00,000/- for sale of part of the “Investor Securities”. It is the petitioner’s case that the respondents have failed and neglected to perform the said agreement.

3. The petitioner has also alleged that its affirmative rights in respect of the management and affairs of the company have also been violated. In the aforesaid context, this Court had passed an order dated, 27.05.2016, *inter alia*, directing as under:-

“9. Till the next date of hearing, the respondents, its officers, subordinates, agents, servants and any other person(s) acting through or under the respondents are restrained from alienating, encumbering or creating any third party rights in respect of assets of the respondent no.1 including not limited to, supreme business park and the respondents shall not act upon any matters set out in clause 12.10 of the investment agreement including but not limited to matters referred to in clause 12.10 (i), (v), (xii) and (xxvi) of the Investment Agreement without prior written approval of the petitioner.”

4. The petitioner had, thereafter, alleged that the aforesaid order had been violated inasmuch as after the order dated 27.05.2016, certain payments had been made to related parties and which payments were covered under subject matters falling within 12.10(i), (v),(xii) & (xxvi) of the Investment Agreement.

5. Respondent No. 1 has filed a short reply, *inter alia*, objecting to the maintainability of the present petition as it is claimed that this Court would have no jurisdiction to consider the disputes.

6. In view of the objections, it is relevant to refer to the arbitration clause under the aforementioned Share Purchase Agreement, which reads as under:-

“18. Governing Laws and Dispute Resolution

- 18.1 This Agreement shall be governed by, and construed in accordance with, the laws of India. Subject to Clauses 18.2 and 18.3, the Parties shall submit all disputes, controversies or differences arising out of or in connection with this Agreement to the exclusive jurisdiction of the Courts at Delhi.
- 18.2 All disputes or differences arising out of or in connection with this Agreement, including any dispute relating to its interpretation, validity or termination ("**Dispute**") shall, in the first instance, be settled through good faith negotiations amongst the Parties, the Investor on the one hand and the Promoters and the Company (acting collectively) on the other hand, to such Dispute (the "**Disputing Parties**") for a period of 15 (*fifteen*) days after any Party sends a written notice to the other Parties regarding such Dispute ("**Dispute Notice**").
- 18.3 In the event that a Dispute cannot be resolved in accordance with Clause 18.2 above, such Dispute shall be finally settled in terms of the (Indian) Arbitration and Conciliation Act, 1996 by a panel of 3 (*three*) arbitrators appointed as follows:
- 18.3.1 within a period of 30 (*thirty*) days from the date of the Dispute Notice, the Promoters and the Company shall jointly appoint 1 (*one*) arbitrator and the Investor shall jointly appoint another arbitrator;
- 18.3.2 within a period of 15 (*fifteen*) days after the above mentioned arbitrators have both been appointed, the arbitrators shall appoint the third arbitrator.

18.4 The place of arbitration shall be Delhi.

18.5 The arbitral proceedings shall be conducted in English language.

18.6 Any award rendered pursuant to such arbitration shall be final and conclusive and binding on the Parties.

18.7 The costs of arbitration shall be borne by each of the Disputing parties equally, unless otherwise awarded by the arbitral panel.”

7. Mr Kathpalia, the learned senior counsel appearing on behalf of the petitioner has also pointed out that the said agreement was entered into at Delhi and, therefore, part of the cause of action has also arisen in Delhi.

8. It is seen that the seat of arbitration under the agreement is Delhi. The question whether the court where the seat of arbitration is situated would have jurisdiction under the Arbitration and Conciliation Act, 1996 is no longer *res integra*. The Supreme Court in the case of **Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Services, Inc. and Ors.**: 2012 (9) SCC 552, had held as under:-

"96. **Section 2(1)(e) of the Arbitration Act, 1996** reads as under:-

2. Definitions.-(1) In this Part, unless the context otherwise requires-

(a)-(d)

(e) 'Court' means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

We are of the opinion, the term "subject matter of the arbitration" cannot be confused with "subject matter of the suit". The term "subject matter" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the learned counsel for the appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act,

1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution, i.e., arbitration is located."

9. The aforementioned decision in ***Bharat Aluminium*** (*supra*) has also been followed by a Division Bench of this Court in ***Ion Exchange (India) Ltd.v. Panasonic Electric Works Co. Ltd.***: 208(2014) DLT 597 (DB).

10. In the circumstances, the objections raised by the respondents as to the maintainability of the present petition is bereft of any merit.

11. As far as the interim directions are concerned, the parties are agreeable that the present petition may be disposed of directing that the orders passed on 27.05.2016 and 08.09.2016 be made absolute till the pendency of the arbitral proceedings. However, Mr Kathpalia further requests that respondent no. 1 be directed to provide a periodical statement of its accounts.

12. Mr Sethi also prays that although the orders dated 27.05.2016 and 08.09.2016 be confirmed, the reference to Investment Agreement in the order dated 27.05.2016 be rectified to read the Share Purchase Agreement. It is contended by Mr Sethi that the rights of the petitioner as provided under

the Investment Agreement stood altered and modified by the agreement dated 19.03.2015. In support of his contention, he referred to Clause 9.1 of the said Share Purchase Agreement, which reads as under:-

“9.1. In terms of the Investment Agreements, in addition to the other rights of the Investor as contained therein, the Investor has an affirmative vote on certain matters as enumerated in the Investment Agreements, whether such matters are tabled at a meeting of the Board of Directors or general body meetings. In view of the Investor having agreed to sell all its Investor Securities to the Promoter and/or its nominees, all the affirmative voting rights of the Investor under the Investment Agreements shall stand withdrawn and revoked, save and except as provided below, upon the successful Closing of SBP Consideration Amount, and thereafter the Investor shall have limited affirmative voting rights only on the matters stipulated hereinafter including those actions that may have any relation to the development of the R Zone (or PTC).”

13. In addition, he also referred to Clause 10.5.2 which reads as under:-

“10.5.2. The affirmative voting rights reserved for the Investors under the Investment Agreement as modified by this Agreement and recorded under Clause 9 herein shall stand withdrawn and revoked.”

14. He submits that in view of the aforesaid clauses, the petitioner's right under the Investment Agreement would no longer hold good. In my view, the aforesaid contention is also bereft of any merit. A plain reading of Clause 9.1 of the Agreement would indicate that the petitioner's right under the Investment Agreement would stand withdrawn and revoked upon the successful closing of the “SBP consideration amount” which in this case,

admittedly, had not been paid. In absence of the payment of SBP consideration, the rights of the petitioner under the Investment Agreement would continue to be exercisable. The reference to Clause 10.5.2 of the Share Purchase Agreement is also wholly misplaced. It is seen that the said Clause relates to the consequence of investor's default in performing its obligations. In other words, the said clause would be applicable where there is default on the part of the petitioner. It is nobody's case that the petitioner had defaulted in its obligations. Thus, the question of any rights of the petitioner being abrogated, withdrawn or revoked in terms of Clause 10.5.2 does not arise.

15. The parties have appointed their respective Arbitrators and the said Arbitrators are expected to conclude the appointment of a third Arbitrator shortly.

16. In the circumstances, the orders passed on 27.05.2016 and 08.09.2016 are made absolute till the conclusion of the Arbitral Proceedings.

17. Since it is not disputed that the petitioner has made a substantial investment in the respondent company and considering the serious allegations of siphoning of funds, I deem it appropriate that the respondent no.1 be also directed to provide weekly statement of all receipts and payments as well as fortnightly statements of all its bank accounts to the petitioner.

18. This order would also be subject to any further orders that may be passed by the Arbitral Tribunal. It is further clarified that the petitioner would be at liberty to approach the Arbitral Tribunal for any relief that the

petitioner may seek to press. Needless to mention that all contentions of the parties are open.

19. The petition and the pending application are disposed of.

CCP(O) No.61/2016

20. The learned counsel for the petitioner states that although the respondents have violated the order but in view of the fact that the Arbitral Tribunal is likely to be constituted shortly, the petitioner does not press the said petition at this stage.

21. The same is disposed of.

OCTOBER 03, 2016
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VIBHU BAKHRU, J

