IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
ARBITRATION APPLICATION NO.287 OF 2018

Rehana Praveen Chaudhary .. Applicant
vs
1. Poonam Drums and Containers Pvt.Ltd
2. Izaz Ahemad M.Chaudhary
3. Akram Khan .. Respondents

……..

Mr.Rajnish Kumar Banyal for Applicant
None for Respondents.

Coram : G.S.KULKARNI, J
Date : 27th NOVEMBER 2018

P.C

1. By this application under section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as said 'Act') the applicant seeks appointment of an arbitral tribunal for adjudication of the disputes which have arisen between the parties, under the share purchase agreement dated 2 November 2015 entered between the parties.

2. The case of the applicant is that respondent no.1-Poonam Drums and Containers Pvt.Ltd was dealing in manufacturing, producing, processing, making, fabricating, dealing and distributing all types of drums, barrels, containers of different sizes made from steel and has

factories at Khopoli Maharashtra and Dera Bassi Punjab and a plot of land in Panoli, Gujarat. The applicant and her family members were holding 50.95% shares in the said company (for short the said company). The percentage of holding of the applicant was 35.85% corresponding to 1,80,406 equity shares of the company. The applicant was the director of the company from 19.1.2012 to 25.5.2015. The applicant was also a guarantor of the loan taken by the company from the banks.

3 The applicant states that the applicant was not aware of an earlier agreement dated 6.5.2015 which was disclosed for the first time by respondent no.2 Izaz Ahemed M.Choudhary, Managing Director of the company. The agreement pertains to sale of the plot of land at Panoli belonging to the company. The agreement does not indicate that the plot of land was being sold by the company by showing any involvement of the company as there was no stamp or seal of the company. There was no notice ever issued to the applicant nor applicant was on the board of directors to discuss or resolve to sell the said land. Further the applicant did not receive any financial statement from the company and no annual general meeting was held after 29.9.2014.

4 It was also revealed that respondent no.2 had filed a reference with BIFR on 27.7.2015 under section 15 (1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) on behalf of the company claiming that the net worth of the company had been eroded due to accumulated losses and the applicant was not informed although the applicant was major share holder of the company. The BIFR passed an order on 14.10.2015 restraining the company from alienating, or transferring or disposing of its immovable property without the prior approval of the BIFR board. All this information was produced by respondent no.2 for the first time in the National Company Law Tribunal (NCLT) proceedings. The applicant thereafter, resigned as a director of the company. The daily affairs of the company were not being revealed by respondent No.2.

5 In August 2015, respondent no.2 approached the applicant and requested her to sell her shares held by her family members in the company. Considering the conduct of respondent no.2 and losses suffered by the company at his behest the applicant was constrained to execute a share purchase agreement dated 2.11.2015 wherein the applicant agreed to transfer all her shares held by her and her family members at a

purchase price mentioned in the said agreement. The sale of shares under the share purchase agreement was conditional upon the respondent no.2 absolving the company from the liability of company towards the bank. It was provided that the applicant shall have exited from the respondent no.1 company and shall have no right,title interest and/or claim against the company. A termination clause was also provided whereby the applicant could terminate the SPA in the event of occurrence of a material adverse effect after the first closing date or default by the company and/or the purchaser in performance of any of its obligation under the SPA.

6. The applicant has stated that respondent no.2 had no authority to execute a deed of assignment cum conveyance dated 29.2.2016 wherein the plot of land at Panoli belonging to the company was transferred to M/s Brindavan Phospates Private Ltd for a meagre sale consideration of Rs.1,86,000/-. This transfer was made in contravention of the order of the BIFR dated 14.10.2015. The applicant was surprised to receive a notice dated 16.3.2016 from the Bank of India recalling the dues of company amounting to Rs.37,41,75,,836/- and making the applicant liable for the said notice as a director/guarantors albeit the applicant

being assured by respondent no.2 that the company will not be liable for anything arising out of invocation of any bank guarantee furnished by the applicant to any bank for providing loans to the company. This according to the applicant, was a clear violation of the share purchase agreement.

7. The applicant therefore, addressed e-mails dated 15.3.2016, 30.3.2016, 6.4.2016, 25.6.2016 requesting respondent no.2 to furnish information about the company with regard to change of address of the head office of company and also how the change of the head office was obtained by respondent no.2. There was no reply from the respondent no.2 to these e-mails. The applicant also did not receive any financial statement of the company from the respondent no.2 and no AGM was held. The applicant also called upon the board of directors to convene an extraordinary general body meeting to resolve various issues. The applicant thereafter by letter of her advocate dated 16.8.2016 reiterated the breaches committed by the respondent no.1 and again called for holding of extra ordinary general meeting. This letter was replied by respondent no.2 making frivolous allegations. The applicant therefore terminated the share purchase agreement by advocate's letter dated 4.10.2016 which was received by the respondent no.2 without any

objections. The applicant furnished the share purchase agreement for the breach of the conditions by the respondent.

8. The applicant being aggrieved by the oppression and mismanagement also filed petition No.37/241-242/NCLT/MAH/2016 before the National Company Law Tribunal (NCLT) praying for bringing an end to the act of oppression and mismanagement perpetrated by respondent nos.2 and 3. Respondent no.2 filed a Misc.Application under section 8 of the Arbitration and Conciliation Act,1996 contending that the applicant was not entitled to file the said company petition before the NCLT as there was an arbitration agreement between the parties under the share purchase agreement. The NCLT passed an order dated 21.12.2016 wherein it was held that the disputes between the parties are required to be referred to arbitration and cannot to be decided by the NCLT.

9. An appeal was preferred by the applicant before the National Company Law Appellate Tribunal (NCLAT) against the said order passed by the NCLT. By an order dated 21.03.2017, the NCLAT dismissed the said appeal and held that the findings of the NCLT as

made in the order dated 21.12.2016 would not influence the proceedings before the arbitral tribunal and restrained respondent no.2 from relying on the order of the NCLT dated 20.12.2016. After the order was passed by NCLT, there was correspondence between the applicant and respondent no.2 and further offer was made by respondent No.2 vide letter dated 18.4.2017, however, the same came to be rejected by the applicant.

10. In the above circumstances, it is the applicant's case that disputes have arisen between the parties under the share purchase agreement in which the parties had agreed for referring the disputes under the said agreement for adjudication as agreed in clause 10.12 of the share purchase agreement. Clause 10.12 reads thus :

> **Clause 10.12 Dispute Resolution**
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> "**10.12.1**. Any dispute claim or controversy arising under or relating to the agreement, including without limitation any dispute concerning the existence or enforceability hereto, shall be resolved by arbitration in accordance with the arbitration and Conciliation Act, 1996."
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> "**10.12.2**. Notwithstanding anything contained in the agreement contained in the agreement to the contrary, the parties to the agreement hereby agree that they intend to discharge their obligation in utmost good faith. The parties therefore agree that they will at all times, act in good faith and make all attempts to resolve the differences (Amicable Settlement) in case the amicable settlement does not resolve the dispute within 30 (thirty) calendar days it shall be referred to arbitration in accordance with this clause 10.12."

> "**10.12.3**. All dispute and differences arising out of or connection with any of the matters set out in the agreement if not resolve by amicably settlement, shall be settled by sole arbitration to be appointed by the parties to the dispute. If the parties to the dispute are unable to appoint a sole arbitrator by way of mutual consent the seller shall together appoint 1 arbitrator the purchaser and the company shall appoint 1 arbitrator and the 2 arbitrators so appointed shall be entitled to appoint the third who will act as umpire of the arbitral tribunal."

11. The applicant by a letter dated 30.11.2017 and the respondent by a letter dated 22.11.2017 invoked the arbitration clause and appointed an Arbitrator to adjudicate all issues in terms of clause 10.12.1 of the said share purchase agreement. The applicant has stated that in pursuant to invocation of the arbitration clause, the applicant appointed Mr.Dharam Vir Gautam to act as an arbitrator as also the respondent appointed Mr.Anoop Khetan, Advocate. It was expected that the arbitrator would appoint a third arbitrator by mutual consent of both the arbitrators.

12. Accordingly, Mr.Dharm.Vir Gautam as appointed by the applicant, addressed a letter dated 23.12.2017 to Mr.Anoop Khetan the arbitrator appointed by the respondent on 30.1.2018 to hold a meeting at the venue as indicated in the said letter. However, no one attended the meeting as there was no response to the telephone calls made to the

respondent's arbitrators. In the above circumstances, the applicant has filed a petition praying for the following prayers :

13. On behalf of the applicant, affidavit of service is placed on record, inter alia stating that notice of the present application along with copy of the arbitration application and annexures was served on the respondents on 31.8.2018. The company has acknowledged receipt of the same by entering the company's stamp and signing the acknowledgement on original copy of the advocate's notice. However despite service, the respondent has chosen not to appear. The notice was acknowledged with appropriate stamp of the company. Despite service of notice, the respondents have chosen not to appear and/or to oppose the present application.

14. It will therefore, have to be taken that the facts as narrated in the application in regard to the disputes and differences arising between the parties are uncontroverted. In the present case, the invocation of arbitration as stated by the applicant is on 30.11.2017 and on the part of the respondent, the invocation is by a letter dated 22.11.2017. As per the amended provisions of section 11 incorporating sub-section (6-A) of the

Act (w.e.f. 23.10.2015) the endeavour of the Court would be only to examine the existence of the arbitration agreement. It is clear that there is an arbitration agreement between the parties as also disputes and differences have arisen between the parties under the share purchase agreement dated 02.11.2015 under which the parties have agreed to invoke the arbitration clause.

15. In the above circumstances and there is no contest to the present application, the application is required to be allowed. Hence the following order.

: O R D E R :

(i) Mr. Dharam Vir Gautam, is appointed as the nominee arbitrator of the applicant. Mr. Anoop Khaitan, Advocate, is appointed as the nominee arbitrator of the Respondents. Both the prospective arbitrators shall appoint a Presiding Arbitrator;

(ii) The learned members of the arbitral tribunal fifteen days before entering the reference, shall forward to the Prothonotary and Senior

Master a disclosure as per requirement of Section 11 (8) read with Section 12(1) of the Act and also furnish copies of the same to the parties ;

(iii) The prospective arbitrators shall hold the first meeting on 15 January 2019 at a time mutually convenient to the prospective arbitrators;

(iv) All contentions of the parties on merits of the application are expressly kept open;

16 The arbitration application is disposed of in above terms. No costs.

17. Learned Counsel for the Applicant to communicate this order to the Prospective Arbitrators.

(G.S. KULKARNI, J.)