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

Date of decision: 22nd November, 2018

+ **O.M.P. 384/2012**

UDAIPUR CEMENT WORKS LTD

..... Petitioner

Through: Mr. T.K. Ganju, Senior Advocate
with Mr. Sushant Pushkar & Mr.
Anchit Oswal, Advocates (M-
8527607062).

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Anuj Aggarwal, ASC with Mr.
Himanshu Sharma, Advocates for R-1
(M-9891363718).
Mr. Arvind Minocha & Mr. Sanjeev
Kumar Singh, Advocates for R-3 (M-
9811048012).

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present Section 34 petition has been filed challenging the award dated 4th January, 2012 passed by the Learned Arbitrator. The operative portion of the award reads as under:

“8. Keeping in view of the relevant provision(s) in the Arbitration & Conciliation Act, 1996 & arguments advanced by Respondent Nos.1,2,3 & the Govt. Counsel appearing for Claimant/IOI, I have come to the conclusion and pass the Order on the reply filed by the Respondent NO.3 to the Statement of Claim (filed by the Claimant/IOI) whereby stating that all the prayer(s) of Respondent No.3, as at para 2 above are, ‘rejected’, on the reason(s) as given below:-

(i) that, there is no bar in continuing the arbitration proceedings by the arbitrator during the pendency of proceedings while the case is pending before BIFR u/s

22 of SICA, however, the award passed in such cases shall not come into operation, till the final outcome of the case by BIFR.

(ii) that as per the provisions in agreement of sale dated 10.06.93, made between Bajaj Hindustan Ltd. the Respondent No.2 (hereinafter referred to as 'the vendor') and JK Udaipur Cement Udyog Ltd. the Respondent No.3 (hereinafter referred to as , 'the purchaser'), **the Respondent No.2 shall not escape from the liabilities as assigned to and which arising out of above agreement of sale.**

(iii) that, this arbitral tribunal has very well, the jurisdiction, over the dispute/matter referred to.

(iv) that, the claim of the Claimant/UOI cannot be 'rejected' at this stage but will be determined by the arbitrator in accordance with provision(s) as made in 'contract agreement' after giving due hearings to the parties to the dispute."

2. The brief background is that a tender was floated for supply of cement by the DGS&D. The tender was awarded on 25th August 1980, to M/s Udaipur Cement Works (a division of Bajaj Hindustan Ltd.) P.O. Bajaj Nagar, Udaipur. It is not disputed that Bajaj Hindustan Ltd. was the legal entity which was awarded this tender. M/s. Udaipur Cement Works was a wholly owned unit/division of Bajaj Hindustan Ltd. which had bid for the said tender.

3. An agreement was entered into on 10th June, 1993 between M/s Bajaj Hindustan Ltd. and J.K. Udaipur, Udyog Ltd. This was an agreement for sale of the Udaipur Cement Works unit (hereinafter 'Udaipur') to M/s J.K. Udaipur Udyog Ltd. (hereinafter 'J.K. '). Disputes arose under the award of tender dated 25th August, 1990 between the DGS&D and Bajaj Hindustan Ltd. On 29th June, 1998, arbitration was invoked by DGS&D. In the

arbitration proceedings, DGS&D impleaded both Bajaj Hindustan Ltd and J.K.

4. Initially, award dated 29th October, 1999 (*award no.1*) was passed awarding the claims of DGS&D. However, in OMP 26/2000, the said award was challenged and vide order dated 14th November, 2006, a Learned Single Judge of this Court set aside award no.1. A fresh Arbitrator was directed to be appointed who would decide the issues afresh. The operative portion of the said order is set out herein below:

“19. Even in respect of other issues, I find the award very cryptic, in that, has not shown that the learned Arbitrator has come to grips with the contentions urged by the Petitioner.

20. Any observations while dealing with the contentions of the petitioner would prejudice the stand of the parties at the fresh arbitration.

21. I accordingly allow the petition and set aside the award dated 29.10.1999 published by Shri B.L. Nishad.

22. I direct the competent authority to nominate a fresh arbitrator other than Shri B.L. Nishad who would re-decide the issue and would give a reasoned decision. Reasons would show that the learned Arbitrator has come to grips with the respective stands taken by the 2 parties.”

5. In the second round of arbitration, Sh. B.L. Chaudhary was appointed as the Sole Arbitrator. Before the said Arbitrator, J.K. filed an application under Section 16 of Arbitration and Conciliation Act, 1940 challenging the jurisdiction of the Arbitrator on the ground that there was no arbitration agreement between the J.K. and DGS&D. The said application came to be dismissed and the arbitration proceedings continued against J.K.

6. In the final award, however, the Arbitrator held that the defenses raised by J.K. are rejected. However, the Arbitrator observed that Bajaj Hindustan Ltd. cannot escape from its liabilities under the sale agreement.

7. The Petitioner herein is aggrieved by the said award inasmuch as all the defenses raised by J.K. were rejected by the Arbitrator and it is being saddled with the arbitration proceedings when it is actually not a party to the arbitration proceedings. The present petition has thus been preferred challenging the award.

8. During the pendency of proceedings, the name of J.K. has been changed to Udaipur Cement Works Ltd. The submission of Mr. T.K. Ganju, Learned Senior Counsel for the Petitioner is that as per the agreement to sell, all the liabilities are of Bajaj. The unit was bought as a going concern and all legal claims, liabilities, etc. were to be responsibility of Bajaj Hindustan Ltd. He relies upon various clauses of the agreement to sell.

9. Ld. Counsel for DGS&D Mr. Anuj Agrawal, submits that as long as the arbitration proceedings can continue against Bajaj Hindustan Ltd., it would not have any say insofar as the internal dispute between Bajaj and J.K. is concerned. Ld. Counsel for Bajaj Hindustan Ltd., Mr. Minocha also submits that Bajaj is not in any manner attempting to escape from the arbitration proceedings and is willing to defend itself.

10. After hearing counsel for the parties, it is clear that the dispute is on a very short issue. A perusal of the clauses of the sale agreement shows very clearly that when J.K. took over the Udaipur Cement Works unit from Bajaj, the “undisclosed or undisputed or contingent liabilities” whether or not identified on the date of transfer i.e. 10th June, 1993 would be that of Bajaj. The relevant clauses are set out below:

“8(E) Liabilities in respect of all statutory levies including sales tax, excise, customs, octroi, mineral rights tax, land tax, Cement Regulation Account and Jute Packaging Materials (Compulsory Use in Packaging Commodities) Act, 1987 upto and including the Transfer date and liabilities pertaining to pending legal cases upto and including the Transfer Date shall be and remain the liabilities of the Vendor whether or not the same accrue or arise before or after the Transfer Date and shall not be transferred by the Vendor to the purchaser under or pursuant to sub-clause (C) above. Any benefits or credits relating to the aforesaid statutory levies which accrue or arise after the Transfer Date and which relate to the period upto and including the Transfer Date shall likewise belong exclusively to the Vendor and shall not be transferred to the Purchaser under or pursuant to this Agreement. All income tax liabilities upto and including the Transfer Date shall be and remain the liabilities of the Vendor and the Vendor agrees to furnish to the Purchaser such Undertaking or declaration as may be required pursuant to the provisions of Section 281 of the Income Tax Act, 1961.

(F) Save as provided in this Agreement, any undisclosed or disputed or contingent liabilities relating to the operations and activities of the UCW of the Vendor hereby agreed, to be sold and' transferred under or pursuant to this Agreement upto and including the Transfer Date, whether or not the same has been identified on or before or after the Transfer Date, shall be that of the Vendor alone, and the Vendor shall indemnify the Purchaser against the same provided that the Purchaser shall not be entitled to claim from the Vendor any such contingent liability after the expiry of 15 (Fifteen) months from the Transfer Date.

...

11. The Vendor shall bear, pay and discharge all

liabilities, obligations , assessments, , rents, rates, taxes, outgoings and impositions of whatsoever nature including those referred, to in clause 8 above relating or pertaining to the operations and activities of the UCW of the Vendor upto and including the Transfer Date and if any, such payments relate to the period after the Transfer Date, the same shall be apportioned between the Vendor and the Purchaser. The Vendor shall be liable and responsible for all obligations or liabilities arising from or in respect of the operations and activities of the UCW of the Vendor upto and including the Transfer Date. The Vendor, shall indemnify the Purchaser and at all times keep the purchaser fully indemnified from and against all claims, demands, actions, proceedings, costs, charges, expenses or other liabilities made or brought against, suffered or incurred by the Purchaser by or as a consequence of the failure, refusal or neglect on the part of the Vendor to comply with its obligations under this Clause.”

11. The above clauses leave no doubt that as on the date of transfer Bajaj was not only responsible for all the liabilities of the unit which was sold but also fully indemnified the purchaser i.e., J.K. in respect of any actions, proceedings, claims brought against in respect of the said unit.

12. Thus, this issue ought to have been decided by the Arbitrator which was not decided. The Ld. Arbitrator simply rejected the stand of J.K., without any reasoning. The Petitioner cannot obviously be asked to defend proceedings where it does not even have any responsibility towards the DGS&D. The arbitration clause is applicable between the company Bajaj Hindustan Ltd. and the DGS&D and not the unit separately which was sold to J.K. M/s.Udaipur Cement Works which was a division of Bajaj Hindustan Ltd. And does not have any independent legal existence of its own. It is only

the company Bajaj Hindustan Ltd. which was awarded the tender, though through its unit, which it later sold.

13. Under these circumstances, it is held that the Petitioner is not a party to the arbitration agreement applicable to the award of tender dated 25th August, 1990. The Petitioner need not to participate in the arbitration proceedings as Bajaj Hindustan Ltd. is duly defending itself.

14. It is also submitted that the DGS&D is a division of the Government of India which is not functional now. Since, DGS&D itself is not functional and there are no Personnel managing the division, this Court deems it appropriate to refer the matter to an independent Arbitrator who is requested to dispose of the claims of DGS&D within a period of six months from the date when the records are handed over and the first hearing is held by the new Arbitrator.

15. Mr. Anuj Aggarwal, Ld. Counsel for the Respondent submits that he would contact the Arbitrator and obtain the record from him and transmit the same to the newly appointed Arbitrator by this Court.

16. Justice Pratibha Rani (Retd.) is appointed as an Arbitrator in this matter to adjudicate the disputes between the Respondent No.1 – DGS&D and Bajaj Hindustan Ltd. The fee of the Arbitrator is fixed at a lump sum Rs.2 lakhs to be paid by DGS&D and Bajaj Hindustan Ltd. equally.

17. Petitioner need not to participate in the arbitration proceedings.

18. OMP is disposed of.

PRATHIBA M. SINGH
JUDGE

NOVEMBER 22, 2018/Rahul