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

Judgement decided on: 28.08.2018

+ ARB.P. 489/2018

RATTAN POLYCHEM PVT. LTD. & ANR. Petitioners

Through: Mr. Rakesh Kumar and Mr. Hetish
Raj Singh, Advs.

versus

RELIABLE INSUPACKS PRIVATE LIMITED & ORS. Respondents

Through: None for R-2
Mr. Vinay Shukla, Adv. for R-3 to 6

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

1. This is a petition filed under Section 11 of the Arbitration and Conciliation Act, 1996.
2. The petitioners pray for appointment of an Arbitrator.
3. Notice in this petition was issued on 13.7.2018, when on behalf of respondent no.2, Ms. Parul Agrawal accepted notice. While on behalf of respondent nos. 3 to 6, Mr. Shukla accepted notice.
4. An opportunity was given to the aforementioned counsel to file their replies in the matter.
5. Unfortunately, respondent no.2 is not represented today.
6. Insofar as respondents no.2 to 6 are concerned, no reply has been filed, though Mr. Shukla is present in Court.
7. Given this situation, there is, in fact, on record, no rebuttal to the

assertions made in the petition.

8. Broadly, the case of the petitioners appears to be that in and about 16.11.2016 money was advanced to respondent no.1 company. Against the money advanced, a pledge was created qua plant and machinery, and receivables as also stocks were hypothecated.

9. It is the petitioners' stand that respondent no.1 company owed a sum of Rs.2,13,12,822/- to the petitioners; a claim which was made subject matter of a Memorandum of Understanding dated 3.2.2018 (hereafter referred to as the 1st MOU).

10. Concededly, the 1st MOU did not fructify and that, according to the petitioners, was overridden by the MOU dated 15.2.2018 (hereafter referred to as the 2nd MOU).

11. Broadly, under the 2nd MOU, respondents no.2 to 6, according to the petitioners, had agreed to transfer 100% equity stake held by them in the 1st respondent company in favour of the petitioners.

12. Resultantly, according to the petitioners transfer forms were executed and valuation of the shares was got done in pursuance of the 2nd MOU.

13. The valuer, so appointed, rendered his report, which is dated 30.3.2018. As per the valuer, the subject shares were worth Rs.15,25,000/-.

14. Respondent no.2 to 6 appear to dispute the valuation. Respondent no.2 to 6 are also aggrieved by the fact that the petitioners have not defrayed unsecured loans. These grievances have been communicated to the petitioners via an email dated 4.4.2018.

15. Besides the aforesaid, it appears that respondent No. 2 to 6 have also filed a criminal complaint against the petitioners. The complaint was evidently filed in and about 11.4.2018. The burden of the criminal complaint is that the petitioners have illegally acquired control of the 1st

respondent company.

16. A cross-criminal complaint has been filed by the petitioners, perhaps, as a reaction to the complaint lodged by respondent No. 2 to 6.

17. This apart, respondent no.3 to 6, I am told by Mr. Shukla, have approached the NCLT. The petition preferred by respondent no.3 to 6 is an oppression and mismanagement action.

18. I may also indicate that this Court, in a petition preferred under Section 9 of the 1996 Act, has passed an order dated 22.5.2018. The relevant part of that order is extracted hereafter:

“.....It is the case of the petitioners that the respondent no. L owed a sum of approximately Rs.2.35 crores on account of supply of raw material made by the petitioner to the respondent no. L. As the respondent no. L was not in a position to pay the said amount, a Memorandum of Understanding (MOU) dated 3rd February, 2018 was executed between the petitioner and respondent no. 1. Respondent no. L was being represented by the respondent no.2 who was its Director. In terms of the said MOU, 55% of the shareholding of the respondent no. L was to be bought by the petitioner at a value of Rs.35 per share. The money received from the petitioners was to be ploughed back in the company to re-pay the dues of the petitioners. It was a term of the Agreement that the respondent no. L shall pay interest @ 1% in monthly instalments of Rs.11 lacs each till the entire outstanding of the petitioner is settled.

Another MOU was executed between the petitioner and the respondent no.1 on 15th February, 2018 in terms whereof the petitioners agreed to acquire 100% shareholding of the respondent no.1 company. It was a term of the Agreement that the respondent no.2 shall be appointed as the Chief Operating Officer of the respondent no. L and shall be paid a monthly Cost to Company (CTC) of Rs. 1 lac per month. It was a term of this MOU that 100% shareholding of the respondent no. L shall be bought by the petitioner on a value arrived at on the basis of a valuation done by a Chartered Accountant firm.

It is the case of the petitioner that in terms of this MOU, not only did the shareholders, that is, respondent nos.2 to 4

execute the Share Purchase Agreement, Indemnity Bond as also receipts, the respondent no.1 also appointed respondent nos. 7 and 8 as Additional Directors of the respondent no.1 company. Counsel for the petitioners further submits that the transfer of the shareholding of the respondent no.1 has also been effected even before the Registrar of Companies. It is further asserted that Explico Consulting Pvt. Ltd. was appointed as a valuer and the valuer has since given his report valuing the shares of the respondent no. 1 company at Rs.15.25 per share, which the petitioner is ready and willing to pay to the respondent nos.2 to 6. It has further been asserted that certain disputes arose between the parties when the petitioner sought to enforce its rights under the MOU. The respondents created hurdles leading to cross complaints being filed by the parties against each other with the police.

My attention has also been drawn to an e-mail dated 4th April, 2018, wherein respondent no.2 has denied the enforceability of the MOU on the ground that the petitioner has failed to make certain payments for effecting the share transfer.

Counsel for the petitioners relying upon the above documents submits that the petitioner was in control of the respondent no.1 company and that the respondent nos.2 to 6 are now trying to create hurdles in the working of the respondent no.1 company and are liable to be restrained.

On the other hand, counsel for the respondent nos.2 to 6 submits that the share transfer forms and other documents sought to be relied upon by the petitioner are blank and undated documents and admittedly no consideration has been paid by the petitioner for the said transfer. He submits that these documents were executed and kept in safe custody of Mr.Rajesh Arora, the Chartered Accountant of the respondent no.1 company, who may have unauthorizedly handed over the same to the petitioner.

As far as the managerial control of the respondent no.1 company is concerned, it is submitted that the Additional Directors appointed pursuant to the MOU dated 3rd February, 2018 have been removed in a General Meeting held on 25th April, 2018.

Counsel for the respondents further submits that the respondent is ready and willing to deposit a sum of Rs.2.35

crores which was outstanding from the respondent no.1 company to the petitioner as credit, before this Court within four weeks.

Having considered the submissions made by the counsels for the parties, at this stage, it is not possible to conclusively hold that the shares held by respondent nos.2 to 6 were indeed transferred in favour of the petitioner. The share transfer forms etc. relied upon by the petitioner are indeed blank, including with respect to material particulars. At the same time, it cannot be denied by the respondents that respondent nos.7 and 8 were indeed appointed as Additional Directors based on the MOU dated 3rd February, 2018.

At the present stage, while the parties would have to get their disputes adjudicated through arbitration or through any other appropriate remedy that they have and seek to enforce, the balance of equity can be achieved by directing respondent nos.2 to 6 to deposit a sum of Rs.2.35 crores with the registry of this Court within four weeks from today. Respondent nos.2 to 6 shall not transfer their share to any third party for a period of 12 weeks from today within which time the parties would initiate arbitration or any other proceedings in accordance with law. In case any such proceedings are initiated by party, the continuation of this order, or modification/vacation thereof shall be considered by the competent authority on an application being moved by either party. The present order shall not prejudice the rights of either party in such proceedings and all submissions of either party shall remain open.

Respondent nos.2 to 6 shall file an undertaking within two days from today giving an unconditional undertaking to make the deposit or money as directed by this order.

The amount on deposit shall be invested by the Registry of this Court in an interest bearing fixed deposit, initially for a period of one year with automatic renewal. The amount deposited and interest accrued thereon shall abide by directions given by competent authority finally resolving and adjudicating the disputes between the parties in relation to the above mentioned Memorandum of Understanding(s).

The petition is disposed of in the above direction with no order as to costs.

Dasti.”

(emphasis is mine)

19. As would be evident, as per order dated 22.5.2018, passed by this Court, respondent no.2 and 6 were required to do the following:

(i) to deposit a sum of Rs.2.35 crores with the Registry of this Court within a period of four weeks;

(ii) to file an undertaking that they would deposit the aforementioned amount. This undertaking was required to be filed within two days of the order; and

(iii) not to transfer their shares for a period of 12 weeks from that date, with a caveat, that parties would trigger arbitration proceedings or other proceedings, *albeit*, in accordance with law.

20. Concededly, respondent no.2 to 6 have not deposited the sum of Rs.2.35 crores with the Registry of this Court, though, an undertaking, as required, has already been filed.

20.1 This aspect is not disputed by Mr. Shukla. Mr. Shukla, though, tells me that he has filed an application seeking modification of this part of the order dated 22.05.2018; an application which is pending adjudication.

21. The petitioners, on their part have triggered the arbitration clause contained in the 2nd MOU. In this behalf, notice dated 28.5.2018 was served on respondent no.2 to 6.

22. This notice has been replied to by respondent No. 3 vide reply dated 2.6.2018.

23. Given the aforesaid background, what has clearly emerged, is that, a dispute obtains interse the parties.

24. Mr. Shukla, however, resists appointment on the ground that the oppression and mismanagement action is pending adjudication in the NCLT.

25. It is also the contention of Mr. Shukla that since fraud had been

committed by the petitioners in obtaining the signatures of respondent no.2 to 6 in obtaining share transfer forms, this matter cannot proceed to arbitration.

26. According to me, both contentions are untenable. Remedies that are available to the respondents in the action filed before the NCLT would perhaps be different from the ones that are available, if the parties were to trigger the arbitral mechanism.

26.1 There is no dispute that an arbitration agreement obtains between the parties. The petitioners at this juncture seek appointment of an Arbitrator; that relief cannot be denied to the petitioners only on account of the fact that an oppression and mismanagement action is pending before the NCLT.

27 Insofar as the contention raised with regard to fraud being employed by the petitioners is concerned, it is well settled that the party against whom the fraud is alleged can choose a private forum, such as that of an Arbitrator, for adjudication of a dispute. In this regard reference is made to the following observations made in *Punjab National Bank vs. Kohinoor Foods Limited*, 2015 SCC OnLine Del 7351

“D.1 To my mind, ordinarily the leeway as to the forum, where adjudication should take place, is available to the party which is charged with fraud, as against one which makes the allegation. This proposition, however, is hemmed in by a caveat, which is that, ultimately the discretion in that behalf is vested in the court. If, the one who levels the charge makes out a tenable case, that is, a prima facie case, in the very least, the court, could in the given facts of the case refuse to send the parties to arbitration. The reason, to my mind, is simple: parties could not have agreed to have the charge of “cheating” or “serious fraud” involving complicated questions of law referred to an arbitral tribunal. The rationale though, for grant of a leeway by courts, to a party charged with fraud, is that, he could desire a public vindication of allegation made against him and, therefore, may convey to the court that he does not want such an allegation to be tried by a

private forum. Therefore, ordinarily, the court would sustain the plea of a person charged with fraud that his case should be tried by a public fora such as a court.

D.1.1 The same, however, is not true of a person leveling a charge, save and except where the court comes to a conclusion that the matter requires adjudication by a court of law as it involves serious allegations of fraud. The person making the allegation of fraud qua another may want a trial qua an allegation of fraud before a public forum, to which the accused could respond, and quite reasonably, if I may say so, that he desires to have the matter tried by a private forum, such as an arbitral tribunal, without a (sic: the) public glare as it is easy to filing (sic: file) trumped-up charges of fraud, which could irreversibly damage his character by the time trial by a public fora gets concluded.

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D.1.3 The Supreme Court in the case of Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, adopted the Russell v. Russell principle. The relevant observations made in the said judgment of the Supreme Court, which support this principle, are extracted hereinbelow:

“There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference. But it is not every allegation imputing some kind of dishonesty, particularly in matters of accounts, which would be enough to dispose a court to take the matter out of the forum which the parties themselves have chosen. This to our mind is clear even from the decision in Russel’s case (1880) 14 Ch. D. 471.”

We are clearly of the opinion that merely because some allegations have been made that accounts are not correct or that certain items are exaggerated

and so on that is not enough to induce the court to refuse to make a reference to arbitration. It is only in cases of allegations of fraud of a serious nature that the court will refuse as decided in Russel's case (1880) 14 Ch. D. 471 to order an arbitration agreement to be filed and will not make a reference.

It is only when serious allegations of fraud are made which it is desirable should be tried in open court that a court would be justified in refusing to order the arbitration agreement to be filed and in refusing to make a reference....”

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8.3 In my view, the ratio of the judgment is that the decision of the court whether or not parties should be relegated to a public forum is not wholly dependent on who takes the plea but is governed by the assessment of the court as to whether a serious case of fraud is made out which requires a public trial.”

(emphasis is mine)

27.1 Therefore, this contention is also unsustainable.

28. The respondents, in this case, were given an opportunity to file a reply. However, as noticed hereinabove, they failed to file a reply in the matter.

29. Further opportunity cannot be given to the respondents to file a reply as it would lead to unnecessary delay in adjudication of the main dispute obtaining between the parties. As noticed above, the defence which the respondents seek to take in resisting the petition is already evident from the record, which is placed before me. Mr. Shukla, has pressed those issues at the hearing held today.

30. In these circumstances, I am inclined to allow the prayer sought for in

the instant petition.

31. Accordingly, Mr. Manmohan Sarin, Former Chief Justice, Jammu and Kashmir, (Mobile no.9818000210) is appointed as an Arbitrator.

32. The learned Arbitrator, on entering upon a reference, will issue written notice to the parties concerned.

33. I may also indicate that the petitioners have, in the instant proceedings, given up the relief sought in the instant petition, insofar as respondent no. 5 and 6 are concerned, on account of the stand taken by Mr. Shukla that they are not parties to the arbitration agreement.

34. Counsel for the petitioners says that, if necessary, a requisite application will be filed before the learned Arbitrator to demonstrate that they ought to be arrayed as parties before him.

35. Therefore, for the present, in view of the stand taken by the counsel for the petitioners, this order is confined to respondent no.1 to 4 and, thus, will bind, only, the petitioners and respondent no.1 to 4.

36. The petition is disposed of in the aforesaid terms.

RAJIV SHAKDHER
(JUDGE)

AUGUST 28, 2018

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