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

\+ ARB.P. 376/2019

NCML FINANCE PRIVATE LTD ..... Petitioner

Through: Mr. Amit Bajaj, Adv.

versus

S.R CASHEWS & ORS. ..... Respondents

Through: None.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

% **17.10.2019**

1. The present petition has been filed by the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 *inter alia* for appointment of an Arbitrator.

2. The facts as noted from the petition are that the petitioner is a company registered under the Companies Act, 1956 with its registered Office at Gurugram, Haryana. It is a non-banking finance company registered under the Reserve Bank of India Act, 1934. It is the case of the petitioner that the respondent Nos.2 and 3 had approached it on behalf of the respondent No.1 for Warehouse Receipt finance facility. The respondent Nos.2 and 3 are partners of respondent No.1 Firm. The parties had entered into a Master Facility Agreement dated July 31, 2017 at Delhi for a loan facility of Rs.10 Crores. That in terms of the agreement a total amount of Rs.1,85,75,432/- was disbursed to the respondent No.1. The said facility carried an interest @ 13%.

3. It is also the case of the petitioner that the respondents further entered

into a Pledge Agreement dated July 31, 2017 which specifically provided that, in the event of default, on the part of respondents in making payment of any amounts in relation to the facility and / or any other part of the Pledgor's Obligations or there is an event of default under Master Facility Agreement or any breach of terms and conditions, then the petitioner company shall be entitled to sell or otherwise dispose of, in any manner all or any of the Pledged Goods in any manner whatsoever and / or upon such terms and / or subject to such conditions as the Pledgee may think fit, without the consent of the Pledgor.

4. It is also the case of the petitioner that further the respondent Nos.2 and 3 are also guarantors of respondent No.1 and a separate deed of guarantee was executed by the respondent Nos.2 and 3 jointly and severely in favour of petitioner company, guaranteeing repayment of the said loan and other amounts due and payable under the said loan account in the event of default in repayment by respondent No.1. It is the case of the petitioner that the respondents were very irregular in maintaining financial discipline, inasmuch as in terms of clause 8 of the *'Schedule of Specific Terms-Warehouse Receipt Finance'* they were bound to adhere to maintenance of margin call and despite notice for demand of margin call dated April 30, 2018, they failed to regularise the loan account.

5. Accordingly, the loan recall notice dated June 12, 2018 was issued by the petitioner which was duly served / deemed to be served upon the respondents on June 18, 2018. Through loan recall notice, the respondents were called upon to repay an amount of Rs.15,76,920/-. In fact, pre-auction notice dated July 05, 2018 was issued by the petitioner to the respondents thereby calling upon to deposit a sum of Rs.15,76,920/- within a period of

three days of the receipt of notice, failing which pledged goods will be auctioned. The said notice was delivered upon the respondents on July 18, 2018.

6. Thereafter, the notice of invocation of arbitration was issued on April 05, 2019. Attention of the respondents was drawn to clause 30 of the Master Facility Agreement and clause 25 of the deed of guarantee which provides for resolution of dispute through arbitration. The petitioner suggested name of Shri Amit Jagga, Advocate to act as Sole Arbitrator for resolution of the disputes and differences. The learned Arbitrator accepted the reference and letter dated May 03, 2019 was issued by the learned Arbitrator for hearing on May 22, 2019.

7. It appears that the respondents through their e-mail dated May 06, 2019 and letter dated May 07, 2019, objected to the appointment of Arbitrator. They have raised an objection about the right of the petitioner to appoint a Sole Arbitrator in terms of clause 30 of the Master Facility Agreement. In other words, the respondents had objected to the appointment of a Sole Arbitrator unilaterally by the petitioner and stated that the deed of guarantee dated July 31, 2017 provided for appointment of Sole Arbitrator by parties.

8. When the arbitration proceedings were listed for hearing on May 22, 2019, the learned Arbitrator noting the receipt of the e-mail / letter from the respondents had resiled himself from the arbitration proceedings and discontinued the same. It is under these circumstances, the present petition has been filed.

9. Despite service there is no appearance for the respondents.

10. It is noted from the above and perusal of the notice of invocation

dated April 05, 2019, the petitioner has invoked the arbitration clause under clause 30 of the Master Facility Agreement dated July 31, 2017 and clause 25 of the deed of guarantee dated July 31, 2017, the same are reproduced as under:

> ***"30. ARBITRATION***
>
> *30.1 Any dispute or difference in connection with the interpretation, performance, termination of this Agreement, or otherwise in connection with this Agreement / Facility shall be referred to arbitration under the Arbitration and Conciliation Act, 1996 to a Sole arbitrator to be appointed by the Lender.*
>
> *30.2 The Arbitration proceedings shall be conducted in the English language and the venue of arbitration shall be at a suitable location identified by the Lender in Delhi (National Capital Region) or at such other location in India as the Lender may determine.*
>
> *30.3 The Arbitral award shall be final and binding on the parties, and enforceable in accordance with its terms. The arbitrator shall state reasons for his/her findings in writing. The parties agree to be bound thereby and to act accordingly.*
>
> ***25. Arbitration***
>
> *25.1 Any dispute in connection with the interpretation, performance, termination of this Guarantee, or otherwise in connection with this Guarantee and/ or any of the Facility(ies)* ***("Dispute")****, shall be submitted to arbitration by a sole*

arbitrator nominated by the Parties.

The arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory re-enactment thereof, as may be in force then.

25.2 The arbitration proceedings shall be conducted in the English language and the venue of arbitration shall be at a suitable location identified by the Lender in Delhi (National Capital Region) or at such other location in India as the Lender may determine.

25.3 The arbitral award shall be final and binding on the Parties, and enforceable in accordance with its terms. The arbitrator shall state reasons for his/her findings in writing. The Parties agree to be bound thereby and to act accordingly."

11. The question that would arise is, whether the petitioner can invoke the arbitration clause in both the agreements and seek an appointment of one common Arbitrator.

12. It is a matter of record that Master Facility Agreement was executed between the respondent No.1 and the petitioner. The respondent No.1 was represented through its Managing Partner. Through the Master Facility Agreement, the respondent No.1 was granted loan facility whereas vide deed of guarantee at pages 103-119, the respondent Nos.2 and 3 stood as guarantors for the loan secured by the respondent No.1 through Master

Facility Agreement. It can be said that both the agreements are interconnected, inasmuch as vide both the agreements, the loan facility was advanced to the respondent No.1 which is partnership firm comprising of two partners being the respondent Nos.2 and 3, who stood as guarantors in terms of the deed of guarantee.

13. In that way, the deed of guarantee becomes an integral part of the facility agreement. In any case both the agreements contain arbitration clause which I have already reproduced above.

14. No doubt, an Arbitrator was appointed but he had recused himself on an objection taken by the respondents on the ground that an Arbitrator has been appointed unilaterally. Be that as it may, now a petition has been filed by the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator as both the parties could not agree jointly for appointment of an Arbitrator.

15. Despite notice there is no one for the respondents to oppose the prayer in the petition. In that eventuality, this Court is of the view that there is no impediment in appointing an Arbitrator. The aforesaid view has been taken in view of the opinion of the Supreme Court in the case of ***Ameet Lalchand Shah and Others. v. Rishabh Enterprises and Another, AIR 2018 SC 3041,*** wherein in paras 22 and 23 had held as under:

> *"22. Parties to the agreements namely Rishabh and Juwi India:- (i) Equipment and Material Supply Agreement; and (ii) Engineering, Installation and Commissioning Contract and the parties to Sale and Purchase Agreement between Rishabh and Astonfield are one and the same as that of the parties in the main agreement namely Equipment Lease*

> *Agreement (14.03.2012). All the four agreements are inter-connected. This is a case where several parties are involved in a single commercial project (Solar Plant at Dongri) executed through several agreements/contracts. In such a case, all the parties can be covered by the arbitration clause in the main agreement i.e. Equipment Lease Agreement (14.03.2012).*
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> *23. Since all the three agreements of Rishabh with Juwi India and Astonfield had the purpose of commissioning the Photovoltaic Solar Plant project at Dongri, Raksa, District Jhansi, Uttar Pradesh, the High Court was not right in saying that the Sale and Purchase Agreement (05.03.2012) is the main agreement. The High Court, in our view, erred in not keeping in view the various clauses in all the three agreements which make them as an integral part of the principal agreement namely Equipment Lease Agreement (14.03.2012) and the impugned order of the High Court cannot be sustained."*

16. Accordingly, the parties are relegated to the Delhi International Arbitration Centre, which shall appoint an Arbitrator from its panel for adjudication of *inter se* dispute between the parties. The terms of the appointment of the learned Arbitrator shall be governed by the DIAC Rules. The parties herein shall appear before Coordinator of DIAC, New Delhi on November 13, 2019 for a preliminary hearing.

17. Let a copy of this order be sent to the respondents as well as to the

Coordinator of DIAC, New Delhi for information.

18. The petition is disposed of.

V. KAMESWAR RAO, J

OCTOBER 17, 2019/*aky*