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

Decided on 9th November, 2020

\+ ARB.P. 562/2020 and I.A. 10265/2020

JAYNEER INFRAPOWER AND MULTIVENTURES PVT LIMITED & ORS. ..... Petitioners

Through: Mr. Joy Basu, Sr. Advocate with Ms. Ritwika Nanda, Ms. Petal Chandhok, Mr. Saurav Baveja and Mr. Kanak Bose, Advs.

versus

HERO FINCORP LTD ..... Respondent

Through: Mr. Raunak Dhillon, Ms. Ananya Choudhury and Mr. Shubhankar Jain, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGEMENT (ORAL)

% **09.11.2020**

(Video-Conferencing)

C. HARI SHANKAR, J.

I.A. 10265/2020

1. Allowed, subject to all just exceptions.

2. The application stands disposed of.

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ARB.P. 562/2020

1. This is a petition under Section 11(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "1996 Act"), for appointment of an arbitrator to arbitrate on the disputes between the parties.

2. A brief conspectus of the dispute, as set out in the petition, may be presented thus:

(i) On 21st August, 2018, two Facility Agreements were executed between M/s. Arrow Media & Broadband Pvt. Ltd. (hereinafter referred to as "Arrow Media") and the petitioners, whereunder Arrow Media availed term loan facilities of ₹ 75 crores and ₹ 25 crores, respectively, working out to a total of ₹ 100 crores. Following the said agreements, on 21st August, 2018, various pledgors pledged shares with the respondent, as security against the aforesaid loan of ₹ 75 crores, availed by Arrow Media. Insofar as the petitioners are concerned, the details of the pledged shares, may be reflected in a tabular form thus:

	Name of Listed Security	**Demat Account/Client ID**	**DP ID**	**Number of shares pledged**
Petitioner No. 1	Zee Learn Limited	16538173	IN301127	28,00,000
Petitioner No. 2	Zee Media Corporation	14044455	IN300450	5,30,000

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	Limited			
Petitioner No. 3	Zee Learn Limited	20849014	IN301330	21,00,000

(ii) On 25th January, 2019, the respondent wrote to Arrow Media, stating that the security cover which, according to the Facility Agreement, was required to be maintained, had reduced below the minimum cover contemplated by the agreement and called upon Arrow Media, therefore, to infuse a further amount of ₹ 19.36 crores, to avoid any event of default.

(iii) The petition further avers that, on 30th January, 2019, consequent on the invocation of certain shares by the respondent, the loan of ₹ 100 crores, covered by the aforesaid two Facility Agreements dated 21st August, 2018, was repaid in full, resulting in settlement and discharge of the said Facility Agreements.

(iv) The "Final Settlement Date" was defined, in Clause 2.4.1 of the Pledge Agreement, as 30th January, 2019. As the entire loan stood liquidated by the said date, the petition avers that the Pledge Agreement stood extinguished, in terms of Clause 10 thereof, thereby entitling the petitioners to release of the pledged shares. It is further averred that there is no dispute regarding the full and final discharge of the Facility Agreement, dated 21st August, 2018. Reliance is placed, for the said purpose, on an email, dated 8th March, 2019, from the respondent, as well as the statements of accounts, relating to the

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Facility Agreement, stated to be attached therewith. As a consequence to liquidation of the loans covered by the aforesaid two Facility Agreements, the petition avers that the obligations of the petitioners, as pledgors, against the said loan stood extinguished as on the Final Settlement Date, i.e. 30th January, 2019.

(v) Despite this fact, the petitioners complain that the respondent has illegally failed to release the pledged shares to the petitioners.

(vi) The petition also refers to other loans availed by Arrow Media, as well as securities pledged thereagainst, under various other pledged agreements, but asserts in para 41, that these loan facilities were distinct from the Facility Agreements, dated 21st August, 2018 and that the present dispute is not concerned with the Pledge Agreements whereunder the said securities were pledged. In this regard, it is further averred that, though Petitioner Nos. 1 and 2 were not parties to the said loans availed by Arrow Media, and Petitioner No. 3 was a party to one of the said Pledge Agreements, dated 3rd February, 2017 and another unattested Pledge Agreement, dated 27th December, 2018, the shares pledged, *vide* the said Pledge Agreements, were distinct and different from the shares pledged under the Pledge Agreement dated 21st August, 2018, constituting subject matter of the present proceedings.

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(vii) It appears that, according to the respondent, there were various defaults by Arrow Media, in respect of the loans availed by it, in connection with which, on 22nd June, 2020, the respondent addressed an e-mail, expressing its intent to dispose of the shares pledged by the petitioners under the Pledge Agreement dated 21st August, 2018.

(viii) Aggrieved thereby, the petitioners moved this Court under Section 9 of the 1996 Act, *vide* OMP (I) (COMM) 151/2020 (***Jayneer Infrapower & Multiventures Pvt. Ltd. & Ors. v. Hero Fincorp Ltd.***), praying for a restraint against the respondent from alienating or otherwise creating any third party interest in respect of the shares pledged by the petitioners under the Pledge Agreement dated 21st August, 2018. This petition was disposed of, by this Court, *vide* judgment dated 2nd July, 2020, restraining the respondent from selling, invoking or creating any third party rights in respect of the shares pledged by the petitioners under the Pledge Agreement dated 21st August, 2018. The directions were, however, made subject to the petitioners invoking arbitration within 30 days.

3. It is in pursuance thereof, that the present petition has been filed by the petitioners, seeking reference of the disputes between the petitioners and the respondent to arbitration, in terms of Clause 12 of the Pledge Agreement dated 21st August, 2018, which reads as under:

"**12. Governing Law and Jurisdiction**

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> This unattested Memorandum of Pledge shall be governed by and construed in accordance with Indian law. All parties irrevocably agree that the courts/tribunals of competent jurisdiction in New Delhi shall have non-exclusive jurisdiction to settle any dispute which may arise out of or in connection with this Unattested Memorandum of Pledge and that, accordingly, any legal action, suit or proceedings arising out of or in connection with this Unattested Memorandum of Pledge may be brought in those courts/tribunals of competent jurisdiction and the Borrower/Pledgors irrevocably submits to and accepts the jurisdiction of those courts/tribunals.
>
> Nothing contained in this section, shall limit any right of the HFCL to take proceedings in any other court or tribunal of competent jurisdiction, nor shall the taking of proceedings in one or more jurisdiction preclude the taking of proceedings in any other jurisdiction whether concurrently or not and the Borrower irrevocably submits to and accepts for itself and in respect of its property, generally and unconditionally, the jurisdiction of such court and tribunal, and the Borrower irrevocably waives any objection it may have now or in the future to the laying of the venue of any proceedings and any claim that any such proceedings have been brought in an inconvenient forum.
>
> Any dispute arising out of this Unattested Memorandum of Pledge shall resolved by way of Arbitration under Arbitration and Conciliation Act, 1996 as per the mechanism laid down in Clause 14.11 of the Facility Agreement. Pledgors, hereby agrees and acknowledge that they have read and understood their obligation and shall be bound by the terms of the Facility agreement."

4. Clause 12 of the Pledge Agreement dated 21st August, 2018, therefore, contemplates the disputes arising thereunder to be resolved by way of arbitration under the 1996 Act, as per the mechanism, contained in Clause 14.11 of the Facility Agreement. The reference to

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Clause 14.11 appears to be inadvertent, as the correct Clause in the Facility Agreement is Clause 13.11, which reads thus:

> "**13.11 Dispute Resolution**
>
> Any dispute, controversy or difference between the Parties arising out of or relating to the Facility Documents (including a dispute relating to the validity or existence of any Transaction Document) shall be referred to arbitration by a sole arbitrator appointed by HFCL. The arbitration proceedings shall be conducted in accordance with the Arbitration and Conciliation Act, 1996. The venue, place and the seat of arbitration shall be Delhi and the language of the arbitration shall be English. The award including interim awards(s) of the arbitral tribunal shall be final, conclusive and binding on all the parties concerned. The arbitral tribunal may, from time to time, lay down the procedure to be followed in conducting the arbitration proceedings and shall conduct the arbitration proceedings in such manner as it considers appropriate. Nothing contained herein shall be construed as extinguishing, limiting or ousting HFCL's rights under the DRT Act, Insolvency and Bankruptcy Code, 2016 and/or SARFESI, if any in connection with recovery of amounts due under the Facility Documents."

5. Though Clause 13.11 of the Facility Agreement contemplates arbitration by a sole arbitrator appointed by the respondent, the learned counsel are *ad idem* that, in view of Section 12(5) of the 1996 Act, as well as the judgments of the Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd***[1] and ***Bharat Broadband Network Ltd v. United Telecoms Ltd***[2], the sole arbitrator would have to be appointed by this Court.

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[1] **2019 SCC OnLine SC 1517**

[2] **(2019) 5 SCC 755**

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6. The respondent does not contest the fact that arbitrable disputes exist. The necessity of moving this Court has arisen because of the fact that, between the petitioners and the respondent, there was no consensus, *ad idem*, regarding the arbitrator/arbitrators, who would arbitrate on the aforesaid disputes.

7. Today, during the course of proceedings, Mr. Joy Basu, learned Senior Counsel for the petitioners, has, on instructions, consented to the disputes between the parties being referred to the arbitration of Hon'ble Mr. Justice Madan B. Lokur, a learned retired Judge of the Supreme Court, being one of the learned arbitrators whose names were suggested by the respondent.

8. In view thereof, the aforesaid disputes, raised by the petitioner, stands referred to Hon'ble Mr. Justice Madan B. Lokur (whose cellphone number is 09868219007) for resolution by arbitration.

9. The parties are directed, therefore, to contact the learned sole arbitrator within a period of three days from the receipt, by email from the Court, of a copy of this judgment, to work out the modalities of arbitration.

10. It is also clarified that, in case the respondent has any counter-claims, it is at liberty to urge the counter-claims before the learned sole arbitrator, in accordance with law.

11. The learned sole arbitrator would file the requisite disclosure, in

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terms of Section 12 of the 1996 Act, within a week from entering on reference.

12. The learned Sole Arbitrator would be entitled to fees in terms of the Fourth Schedule to the 1996 Act.

13. With the aforesaid directions, this petition stands disposed of.

C. HARI SHANKAR, J.

NOVEMBER 9, 2020
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