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

+ **FAO (OS) (COMM) 16/2021, CM APPLs. 3307-09/2021 & 3987/2021**

AIRGATE HOLDINGS LIMITEDAppellant

Through: Mr. Siddharth Bhatnagar, Senior Advocate with Mr. Saket Shukla, Mr. Vasanth Rajasekaran, Mr. Saurabh Babulkar, Ms. Reshma Ravipati, Ms. Maryam Quadri, Advocates.

Versus

SUMIT MOHAN SINGH GANDHI AND ORS.Respondents

Through: Mr. Parag P Tripathi, Senior, Advocate, Mr. Rishab Gupta, Ms. Meghna Rajadhyaksha, Mr. Gauhar Mirza, Mr. Arjun Doshi, Mr. Nishant Doshi, Ms. Meera Menon, Advocates for R-1. Mr. Rajshekhar Rao with Mr. Rishab Gupta, Ms. Meghna Rajadhyaksha, Mr. Gauhar Mirza, Mr. Arjun Doshi, Mr. Nishant Doshi, Mr. Raghav Kacker, Advocates for R-2.

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Date of Decision: 08th February, 2021

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

MANMOHAN, J (Oral):

1. The appeal has been heard by way of video conferencing.
2. Present appeal has been filed challenging the order dated 22nd

January, 2021 passed by the learned Single Judge in a Section 9 petition being OMP(I) COMM 374/2020 filed under Arbitration and Conciliation Act, 1996.

3. The learned Single Judge by the impugned order has stayed the operation of the Put Option Notices dated 15th November, 2020 issued by respondents No. 1 and 2 in respect of 19.98% shares of the respondent No. 3 company subject to the petitioner depositing an amount of Rupees Sixty Seven Crores Sixty Seven Lakhs Fifty Eight Thousand and Thirty Seven (Rs. 67,67,58,037/-) with this Court within two weeks. Upon deposit of the said amount, the respondents No. 1 and 2 were directed to maintain status-quo as regards 19.98% of the shares of the respondent No. 3 company. The deposit was also to abide by further orders to be passed either in the arbitration or by the National Company Law Tribunal as the case may be.

4. Learned senior counsel for the appellant submits that the learned Single Judge had ignored the fact that the shareholders agreement does not expressly state that the Post Majority Put Option share consideration to be calculated as per the Floor Price formula set out in Clauses 7.3 and 7.6 of the said agreement, especially after the year 2015. In fact, according to him, the shareholders agreement is crystal clear that share price in relation to Post Majority Put Option shares under the shareholders agreement can only be ascertained either by (i) calculating the relevant year EBITDA price or (ii) by calculating the Fair Market Value (FMV). He emphasises that the applicability of the Floor Price mechanism was limited by the agreement between the parties only till 30th September, 2015 and once such period expired, the right of a party to take benefit of the Floor Price mechanism for the purpose of ascertaining the share price also expired/lapsed.

5. He submits that had the intention of the parties been to make the Floor Price mechanism applicable for subsequent years i.e. after the year 2015, the parties would have expressly provided for the same in writing and as contemplated in other provisions of the shareholders agreement. He points out that the parties had, with open eyes, voluntarily consented and agreed to placing a time limit on calculation of share price through Floor Price mechanism under the shareholders agreement and without any specific written terms agreed between the parties waiving such requirements. He reiterates that the learned Single Judge erred in proceeding to interpret the shareholders agreement in a manner which gives an affect the parties never intended or desired.

6. *Per contra*, learned senior counsel for the respondent No. 1 submits that the arguments advanced by the appellant have been duly considered and rejected by the learned Single Judge. He extensively relies upon the impugned order. The relevant portion of the impugned order relied upon by the learned senior counsel for respondent no. 1 is reproduced hereinbelow:-

“38. In the light of this legal position and the polar opposite stances adopted by them, it is apparent that the parties” dispute with respect to the allegations of financial irregularities requires a much more comprehensive examination, of a kind that this Court certainly cannot undertake while exercising its powers under Section 9 of the Act. However, for the purpose of meting out justice in the present petition, I have carefully considered the extent of influence wielded by the petitioner in the financial dealings of respondent no.3. The petitioner chose and appointed several key personnel in the company and the finance team thereof was not only directly under the supervision of a Finance Director appointed by the petitioner but the entire department itself reported to the petitioner’s nominee Director. It appears that the petitioner was never denied an audit into the accounts

and finances of the respondent no.3 company through external auditors and that even the statutory auditor of the company was appointed under the recommendation of the petitioner. In fact, as noted above, the Board resolution dated 21.09.2018 shows that Mr. Thomas Whelan, a nominee director of the petitioner, was authorised to review and write off all uncollected debts of respondent no. 3 company up to 31.03.2017; who then proceeded to authorise writing off of significant sums of debts, despite the hesitation of respondent nos.1 and 2. Thus, the petitioner's nominee Directors wrote off and, in some cases, insisted upon the writing off of the debts that it complains of today. The record shows a tacit acceptance on the petitioner's part of the financial dealings of respondent no.3 company. Throughout the period of its shareholding in the company, the petitioner has accumulated an enormous margin of dividends which it has received from respondent no.3 company over the years, which includes the period that it seeks to cast suspicion on. Not to mention, no annual statements of the company for any financial year have been flagged by its statutory auditors, rather each has been approved by the petitioner's own nominee Directors which signifies their acceptance of the financial dealings of the company for those years. Even the allegations of default under the Clauses 15.5 and Schedule 2 of the SHA amended on 28.10.2015, by the respondent nos. 1 and 2 cannot be determined without leading evidence. Therefore, prima facie, I find no merit in the petitioner's submission that the respondent nos.1 and 2 orchestrated financial transactions which would bring harm to the company, without the knowledge of the petitioner. At the cost of repetition, I emphasise that this is a purely interim finding since drawing any sort of final conclusion on this aspect, at this stage, would be premature and invariably cause prejudice to the arbitration proceedings and those pending before the learned National Company Law Tribunal.

39. Now coming to the second grievance of the petitioner which concerns the valuation made by respondent nos.1 and 2, in the impugned notices, of the shares they seek to sell today. The respondent nos. 1 and 2 appear to have relied upon Clause 7.6 of

the SHA to invoke the floor price formula set down in Clause 7.3 for the purpose of calculating the amount payable to them on the premise that the other two methods of calculating share price in Clause 7.3 could not be applied since the audited financial statements for the relevant year, FY 2019-20, are not available. On the other hand, the petitioner contended that Clause 7.6 was meant to apply only for FY 2014-15 as it makes a specific reference to a situation where the audited financial statements were not delivered to the petitioner/Investor on or before 30.09.2015. Thus, according to the petitioner, the use of the floor price formula through Clause 7.6 was only intended to calculate the value of shares in the event of exercise of call/put option by any shareholder in the year 2015 and no other year. It was submitted that Clause 7.6 of the SHA automatically stopped operating after 2015. The petitioner, therefore, contended that the SHA provided only two methods for determining share values for the purpose of a call/put option right exercise after 2015 which was contained in Clause 8.1; (i) by taking the EBIDTA price of the shares for the relevant year and calculating the value based on that, or (ii) on the basis of the fair market value of the shares determined by a chartered accountant. However, since these methods depend entirely on the audited financial statements of respondent no.3 company for the relevant year and the petitioner is in staunch opposition of the statements released thus far, the petitioner contended that no valuation could be made as on date without arbitrating the issue of financial irregularities. Here, it may be apposite to extract the clauses which form the crux of this issue, namely Clause 7.3 of the SHA.....

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40. Reading these extracted provisions along with Clause 8.1 already noticed hereinabove, it is not difficult to gauge as to why the petitioner urged that this formula was applicable only for FY 2015. Undoubtedly, the plain language of Clauses 7.6 as also 8.1 makes a specific reference to the year 2015 for application of the floor price formula. However, that being said, it is undisputed that the SHA underwent an amendment in 2019, i.e., much after September, 2015, yet the clause for determining the value of the

shares on the basis of the floor price formula was never removed and continued to remain intact in the contract. If the intention of the parties was to truly limit the applicability of Clause 7.6 to a single year of 2015, nothing prevented them from removing the clause entirely. The fact that they did not, has to be read along with the settled principles governing construction of a contract in that, contents of the SHA have to be read in a manner which does not render the terms thereof absurd. Prima facie, I am of the opinion that the interpretation sought to be advanced by the petitioner would lead to a preposterous situation wherein the put option right of respondent nos.1 and 2, a contractually vested right under the SHA, can never be exercised after FY 2015 in case the audited financial statements of the company are not available. That would mean that once the petitioner achieved majority shareholding of respondent no.3 company in 2015 and FY 2015 ended, respondent nos.1 and 2 could never exercise their put option rights in case any of the shareholders raised a dispute on the finances of the company preventing the finalisation of the audited financial statements for the relevant year. Certainly, the agreement did not intend to bear such a complicated operation of the call/put option rights or make these rights inaccessible to its shareholders. Thus, I am of the prima facie view that at this stage, when the audited financial statements for the FY 2019-20 are not available, the only legitimate method to determine the price of the shares under the SHA is as per the floor price formula set out in Clauses 7.3 and 7.6. Therefore, at this stage, it cannot be prima facie stated that the valuation of the shares, as carried out in the impugned notices, is excessive in any manner.”

7. Having heard learned counsel for the parties, this Court is of the view that the arguments advanced by learned senior counsel for the appellant really involve the interpretation of Clauses 7.3 and 7.6 of the shareholders agreement. The said Clauses are reproduced hereinbelow:-

“7.3. Subject to Clause 7.6 and applicable Law, the Call Price shall be the higher of: (i) the Floor Price; (ii) the Relevant Year

EBITDA Price; or {iii} the fair market value computed by a chartered accountant (eligible to practice in India as per applicable Law) appointed solely by the Investor. For the purposes of this Agreement:

“Floor Price” means the amount in INR equal to the value of "FP" determined in accordance with the formulae set out below:

$FP = \frac{CS}{ESC} \times \text{Closing Date Enterprise Value-Net Debt on Relevant Year Closing Date}$
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For the purposes of the above mentioned formulae:

- (i) "CS" means the number of call Shares proposed to be specified in the Call Option Notice,*
- (ii) "ESC" means aggregate number of Equity Securities comprising the Share Capital; and*
- (iii) “Closing Date Enterprise Value” means INR 3000 million.*
- (iv) “Net Debt on Relevant Year Closing Date”= long term and short term borrowings of the Company- Cash & cash equivalents- Non-core real estate assets. Net Debt should be estimated as of year of completion date of the Call Option.*

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7.6 If the company fails to deliver audited financial statements of the Company for the Relevant Year to investor on or prior to the expiry of September 30, 2015 on account of any reason other than a mandatory requirement under applicable Laws, then the Call Price shall be deemed to be the Floor Price.”

8. The aforesaid clauses were incorporated by the parties even when the shareholders agreement was amended for the second and third time on 28th October, 2015 and 14th November, 2019 respectively.

9. Consequently, this Court is in agreement with the view of the learned Single Judge that if the intention of the parties was to limit the applicability

of Clauses 7.6 to a single year of 2015, nothing prevented them from removing the said clauses entirely when the shareholders agreement was amended in 2015 and 2019.

10. Upon a conjoint reading of Clauses 7.3 and 7.6 of the shareholders agreement, this Court is of the view that for years other than 2015 and even for 2015, if audited accounts were available, then the Call price/option price had to be the higher price of the three prices determined by three different formulas, namely, Floor Price, Relevant Year EBITDA and Fair Market Value Price computed by a Chartered Accountant.

11. This Court is of the opinion that Clause 7.6 stipulates that the call price/put option price shall be deemed to be the floor price (i.e. sole methodology to determine the price) in the year 2015, if the audited accounts were not available for the said year on account of any reason other than a mandatory requirement under applicable laws.

12. This Court is also of the opinion that in accordance with Clause 7.3 of the shareholders agreement, the call price/ put option price for all years other than 2015 was to be higher of the three prices calculated by three different formulas, namely, Floor Price, Relevant Year EBITDA Price and Fair Market Value price computed by a Chartered Accountant.

13. In any event, this Court is of the opinion that the learned Single Judge by way of the impugned order has only balanced the equities and put in place an ad-interim arrangement which shall abide by orders to be passed in either the arbitration proceedings or the learned National Company Law Tribunal. It is pertinent to mention that the amount of Rs. 67,67,85,037/- has to be deposited with the Registry of this Court and it is not to be released to the respondents.

14. In *Wander Ltd. and another v. Antox India P. Ltd., 1990 (Supp) SCC 727* the Supreme Court has delineated the principles on which a Division Bench may interfere with discretion exercised by the learned Single Judge. The relevant portion of the said judgment is reproduced herein below:-

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.”

15. Consequently, this Court is of the view that the impugned order passed by the learned Single Judge calls for no interference.

16. In fact, on the last date of hearing, the learned senior counsel for the appellant had sought time to obtain instructions as to whether the appellant would like extension of time to deposit the amount in accordance with the impugned order. However, today, learned senior counsel for the appellant states that the appellant does not want extension of time to comply with the

impugned order. Accordingly, the appeal along with pending applications, being bereft of merits, is dismissed.

17. The order be uploaded on the website forthwith. Copy of the order be also forwarded to the learned counsel through e-mail.

MANMOHAN, J

ASHA MENON, J

FEBRUARY 08, 2021
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