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

Date of Decision: 9th December, 2021

+ **ARB.P. 839/2021**

SHIVAKRITI AGRO (P) LTD.

..... Petitioner

Through: Mr. Sandeep Sethi and Mr. Jayant Mehta, Senior Advocates with Mr. Lalit Gupta, Mr. Siddharth Arora, Advocates.

versus

UMAIZA INFRACON LLP & ORS.

..... Respondents

Through: Mr. O.P. Gaggar, Advocate for R-1 and 3.

Mr. Arun Aggarwal and Mr. Abhishek K. Singh, Advocates for R-4.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA HYBRID MODE]

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 [*hereinafter "the Act"*] seeks appointment of a Sole Arbitrator for adjudication of disputes pertaining to the Facility Agreement dated 30th September, 2019 which contains an arbitration clause, produced hereunder:

"Article 6 – Dispute Resolution and Jurisdiction

6.1 This Agreement shall, in all respects be governed by and construed in accordance with the laws of India.

6.2 The Parties hereto undertake to use their best efforts to resolve any dispute arising out of or in connection with this Agreement through consultation in

good faith and mutual understanding, provided that such consultation shall not prejudice the exercise of any right or remedy of either Party hereto by any such Party in respect of any such dispute.

*6.3 If any dispute of difference that may arise between the Parties (other than any inter se dispute among the Requesting Parties, which shall be outside the scope of this Agreement), and the same is not resolved in mutual good faith discussion, it shall be decided by way of final and binding arbitration to be held in accordance with the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) to be conducted by a sole Arbitrator to be nominated by Shivakirti.*

6.4 The seat and venue of arbitral proceedings shall be at Delhi, India and the language of the proceedings shall be the English language.

6.5 Subject to the above provisions contained in Article 6, the Parties submit to exclusive jurisdiction of Courts at Delhi, India for any interim or such other emergency relief.”

Factual Background:

2. The facts relevant for decision on the instant application are as follows:

- (i) Respondent No. 1 (*viz.* Umaiza Infracon LLP) is an LLP wherein Respondent No. 2 (*viz.* Mr. Ajay Yadav) and Respondent No. 3 (*viz.* Ms. Lata Yadav) are partners.
- (ii) Earlier, Corporate Insolvency Resolution Proceedings [**“CIRP”**] pertaining to Respondent No. 4 (*viz.* M/s. Sunstar Overseas Limited) were pending before the National Company Law Tribunal. Respondent No. 1 filed a Resolution Plan in the said proceedings, which was approved by NCLT on 12th September, 2020. In order to discharge their obligations under the Resolution Plan, Respondents No. 1 to 3 approached the Petitioner seeking financial assistance. A Facility Agreement dated 30th September, 2019, was executed, whereunder, financial assistance to the tune of Rs. 130 crores was extended by the Petitioner to Respondent No. 1, which was then utilized for making payments to the creditors of Respondent No. 4.
- (iii) Later in February 2020, additional facility amount of 16 crores was

disbursed, and thus a total amount of Rs. 146 crores presently stand paid to Respondent No. 1.

- (iv) Now, the IBC proceedings against the Respondent No. 4 stand concluded and the entire shareholding of Respondent No. 4 stands transferred to Respondent No. 1.
- (v) The Petitioner came to know that Respondents had breached their obligations under the Facility Agreement by attempting to create charge/ encumbrances over their assets in violation of several clauses of the Facility Agreement. In these circumstances, they approached this court under section 9 of the Act [in OMP (I) (COMM.) No. 180/2021], wherein an interim order was passed in favour of the Petitioner which is continuing till date.
- (vi) Since disputes had arisen due to non-payment of dues and breaches of the Facility Agreement, Petitioner *vide* notice dated 12th June, 2021 requested Respondents to agree for arbitration. The request was declined.
- (vii) In the above background, Petitioner seeks reference of disputes between itself and Respondents No. 1 to 4 to arbitration.

OBJECTIONS OF RESPONDENTS NO. 1 AND 3:

3. Mr. O.P. Gaggar, counsel for Respondents No. 1 and 3 makes the following objections: -

- (i) Respondent No. 3 [*viz.* Mrs. Lata Yadav], who held 99% shares of Respondent No. 1 [*viz.* Umaiza Infracon LLP] at the relevant time, is not a signatory to the agreement in spite of her name being mentioned

as a party to the Facility Agreement, and therefore, the same is not binding on her either.

- (ii) Respondent No. 1 is governed by the document of incorporation, which as per the Limited Liability Partnership Act, 2008 [*hereinafter “LLP Act”*] is the sole source of authority for the LLP. It is governed by the terms of its Incorporation Agreement dated 21st February, 2019 (as amended on 21st June 2019). Mrs. Lata Yadav, on the date of alleged execution of the remaining Facility Agreement, had 99% share, whereas Mr. Ajay Yadav had the remaining 1% share in the said firm. Clause 22 of the said incorporation document mandates that all matters related to Respondent No. 1 shall be decided by a resolution passed by a majority (in number) of the partners and for this purpose each partner shall have a vote according to the profit-sharing ratio. Clause 36 of the incorporation document expressly provided that the firm is not bound by anything done by a partner if: (a) the partner in fact has no authority to act for the LLP in doing a particular act, or (b) the person knows that he has no authority or does not know or believe him to be a partner of the Umaiza Infracon LLP.
- (iii) Thus M/s. Umaiza Infracon LLP does not permit or authorise a single designated partner to sign or enter into any agreement without concurrence of the other partners. The signing of the alleged Facility Agreement was never authorised by Respondent No. 3, who was the majority holder designated partner.
- (iv) The resolution (dated 28th September, 2019) mentioned in the Facility Agreement was never passed by M/s Umaiza Infracon LLP. Thus, a

reference thereof in the alleged agreement is totally wrong as no resolution was ever passed or is in existence.

- (v) Mr. Ajay Yadav had no authority to sign the Facility Agreement for and on behalf of M/s Umaiza Infracon LLP.
- (vi) The LLP and the non-signatory partners cannot be bound by any act done by a partner without proper authority in terms of the Incorporation Document and the LLP Act.
- (vii) The signatures of Mr. Ajay Yadav on the alleged Facility Agreement were obtained by fraud and material concealment. Petitioner's representative who obtained his signatures told him that it was a rough draft agreement, not as per the consensus arrived between them, and that later the same shall be torn and replaced with a properly executed contract incorporating the actual deal arrived at with him.
- (viii) The rubber stamp embossed on the alleged Facility Agreement is not the one that is used by Umaiza Infracon LLP. Petitioner on its own has procured the stamp and affixed it, only to give it a semblance of originality.
- (ix) The alleged Facility Agreement is for an unlawful consideration and is therefore, void *ab-initio*. The beneficial owners of the Petitioners are none other than the original promoters / directors of Respondent No. 4 i.e., M/s Sunstar Overseas Ltd. Section 29A of the Insolvency and Bankruptcy Code, 2016 [hereinafter "**IBC**"] bars the promoters and directors of a company, which is in CIRP, from participating in its resolution process, either directly or indirectly.
- (x) The Court must look into the question of existence of an Arbitration Agreement, while entertaining a request for reference of disputes to

Arbitration. Since the arbitration agreement is shrouded in doubts, the Court should not refer the parties to arbitration. Reliance in this regard is placed upon *Vidya Drolia and Ors. v. Durga Trading Corporation*.¹

OBJECTION OF RESPONDENT NO. 2

4. Respondent No. 2's stand is quite similar to that of the Respondent No. 1 and therefore, for brevity, the same need not be elaborated. It would suffice to note that Respondent No. 2 does not deny his signatures, but contends that the signatures were obtained by misrepresenting the document to be a draft agreement which was to be destroyed later and followed by a final agreement as per agreed terms. He also contends that neither copy of the said agreement was provided, nor any opportunity was afforded to go through the same, to understand its contents, or to modify the same. The Facility Agreement is thus *void ab initio* as it was obtained without free consent.

OBJECTION OF RESPONDENT NO. 4

5. Mr. Arun Aggarwal, counsel for Respondent No. 4 makes the following averments: -

- (i) Respondent No. 1 is neither a signatory nor a party to the Facility Agreement and therefore, not bound by any of the terms and conditions contained therein. Under the Companies Act, 2013 [hereinafter "***Companies Act***"], Respondent No. 4, has its own

¹ (2021) 2 SCC 1.

separate legal identity, distinct from its promoters, directors, or shareholders.

- (ii) At the time of execution of the Facility Agreement, the Respondent No. 4 was under insolvency proceedings, and a Resolution Professional had been appointed by the NCLT. For execution of the Facility Agreement, Respondent No. 4 was not involved or consulted at any stage.
- (iii) On the date of signing of this alleged agreement, the Respondent No. 4 was under insolvency resolution process and no person other than the Resolution Professional appointed by the NCLT could have signed any agreement on its behalf. The petition as such is not maintainable against Respondent No .4.
- (iv) No term of the Facility Agreement which are contrary to the Resolution Plan approved by NCLT could bind the affairs of the replying respondent, the answering respondent cannot act contrary to the Resolution Plan.
- (v) To refer a non-confirming party to Arbitration, the Court must consider whether there are any rights and obligations which are required to be adjudicated *qua* such party. Under the Facility Agreement, *ex-facie* no obligations bind Respondent No. 4 and therefore, it need not be directed to join the Arbitration.

CASE OF THE PETITIONER:

6. On the other hand, Mr. Sandeep Sethi and Mr. Jayant Mehta, Senior Counsels for the Petitioner make the following submissions seeking reference *qua* all the Respondents: -

- (i) On account of Respondent No. 1, being an LLP, the Facility Agreement would equally bind its partners (viz. Respondents No. 2 and 3) as well, notwithstanding the fact that the same is signed by only one of the partners [viz Respondent No. 2].
- (ii) Reliance was placed on Section 26 of the LLP Act, to argue that the absence of signatures of Respondent No. 3 would not invalidate the Agreement.
- (iii) In any event, all Respondents are necessary and proper parties to the Arbitration proceedings. *Qua* Respondent No. 4, reference is sought by contending that Respondent No. 4 is an alter ego of Respondent No. 1 and further having regard to the terms and conditions of the Facility Agreement, a referral *qua* Respondent No. 4 is necessary having regard to the principle enunciated in ***Ameet Lalchand Shah & Ors. v. Rishabh Enterprises & Anr.***² and ***Shapoorji Pallonji & Co. Pvt. Ltd. v. Rattan India Power Ltd. & Anr.***³

ANALYSIS

7. This Court has considered the submissions of the parties.

8. *Qua* Respondents No. 1 to 3, the answer is simple and straightforward. Respondent No. 1, which an LLP, has signed the Facility Agreement through its partner Mr. Ajay Yadav. The constitution of Respondent as a limited liability partnership is not in dispute. Mr. Ajay Yadav also does not deny his signatures or the fact that he is a partner of

² (2018) 15 SCC 678

³ (2021) 281 DLT 246 at Paras 23 to 26.

Respondent No. 1. Thus, the execution of the Facility Agreement, his authority being implied, would *prima facie* bind Respondent No. 1. Respondent No. 1 and 3 cannot wriggle out of the arbitration agreement contained in the Facility Agreement by merely claiming that her partner Mr. Ajay Yadav has acted without consent or concurrence, particularly when the receipt of the sum of Rs. 1,46,00,00,000/- (Rupees One Hundred and Forty-Six crores Only) by Respondent No. 1 has not been denied by any of the Respondents.

9. Further, mere absence of signature of Respondent No. 3 cannot render the agreement *ex-facie* invalid, since Respondent No. 1 is a limited liability partnership. Reference against her is based on her being a partner of Respondent No. 1 firm, which is not denied. The contention of the Respondents that the LLP's incorporation documents do not give Mr. Ajay Yadav the final authority in respect of all major decisions in light of his shareholding, or that the Facility Agreement was only a rough draft; or that there is no resolution backing the execution; or that rubber stamp is not genuine, etc., are aspects that would have to be agitated before the Arbitral Tribunal and cannot be examined in the present proceedings having regard to the limited scope of jurisdiction envisaged under Section 11 of the Act. Therefore, the controversy regarding invalidity of the agreement, as raised by the Respondents can, at the highest, only cast a doubt in the mind of the Court. It is only in rare circumstances, where, the Court is of the opinion that an agreement is *ex-facie* invalid or *non-est*, should the Court decline referring the parties to the arbitration. This is certainly not such a case. *Prima facie* test regarding the existence of the arbitration agreement is met

in the instant case. Thus, in terms of the judgment of the Supreme Court in ***Vidya Drolia*** (*supra*), as relied upon by the Petitioner, calls for reference to Arbitration.

10. This brings the Court to the question of referring Respondent No. 4 who is undoubtedly a non-signatory to the Facility Agreement. There is no dispute on the proposition that the scope of an arbitration agreement is limited to the parties who entered into it and that those claiming under or through them. However, under exceptional circumstances, a non-signatory or third party can also be subjected to arbitration. Thus, the short question is whether the Petitioner is able to discharge this heavy onus for seeking reference against Respondent No. 4.

11. The law in this respect is no longer *res integra*. Mr. Sethi has taken the court through the judgment in ***Shapoorji Pallonji*** (*supra*), which captures all the theories in this respect. According to him, the theories of the non-signatory being the ‘subject matter’, ‘beneficiary’ and ‘alter ego’ of the parties to the agreement – are applicable in the instant case. The court now proceeds to examine if there is indeed any *prima facie* merit in this argument.

12. Here, it must be first noted that affairs of Respondent No. 4 company, are being managed as per the provisions envisaged under the Resolution Plan, filed by Respondent No. 1. Further, Respondents No. 2 and 3 are the directors as well as shareholders of Respondent No. 1. The corporate

structure of Respondent No. 4 demonstrates that, if the corporate veil is pierced, it is indeed an alter ego of Respondent No. 1.

13. Next, the facility extended by the Petitioner was for the direct benefit of Respondent No. 4, which was in CIRP. The payment made by the Petitioner was utilised for discharging liabilities of Respondent No. 4. But for the payment so made, the resolution plan would not have been implemented, which could perhaps have resulted in the winding up of Respondent No. 4. Thus, undisputedly, Respondent No. 4 is a direct beneficiary of the facility extended by the Petitioner to Respondent No. 1.

14. That apart, in lieu of extending the Facility Amount to Respondent Nos. 1 to 3, certain assets as identified in the Facility Agreement, were agreed to be dealt with, as provided for in Facility Agreement. On this aspect, the Petitioner has drawn the attention of this Court to the terms and conditions of the Facility Agreement, and in particular clauses 3 and 4, which read as under:-

“3.4. The Requesting Parties represent, warrant, agree and undertake that they will and shall take all necessary measures to ensure that they may able to transfer all the Sunstar Securities to Shivakriti and/ or their nominee on or before the Sunstar Securities Transfer Date, including without limitation, the following:

(i) The Requesting Parties agree and undertake that Umaiza shall subscribe to and be the absolute and sole owner of all the Sunstar Securities at all times till the Agreed Date; or till the repayment of the entire Agreed Amounts, along with interest; or the existence of the Purchase Right by Shivakriti and the consequent transfer of all the Sunstar Securities to Shivakriti and/or their nominee – whichever is later.

(ii) The Requesting Parties shall not sell or transfer in any manner whatsoever, any of the Sunstar Securities or any part thereof or any right, title or interest therein, without the prior written consent of Shivakriti;

(iii) The Requesting Parties shall not appoint/change the directors/Management in Sunstar without the prior written consent of Shivakriti; and

(iv) The Requesting Parties shall not create any encumbrance, in any manner whatsoever, over any of the Sunstar Securities, or any part thereof or any right, title

or interest therein, without the prior written consent of Shivakriti. Without prejudice to the foregoing any such encumbrance shall be subject to and clearly recognize Shivakriti's Purchase Right.

4.1. Each of the Requesting Parties hereby represent and warrant, and covenants and undertake that:

(vi) within 30 days from the Effective Date, they will procure and ensure that all security interest and other encumbrances over any and all of the assets of Sunstar are released in full other than charge created over any and all of the assets in favor of Kalpatru and first charge on all the assets of Sunstar (second charge in the case of assets over which Kalpatru has first charge) will be extended to Shivakriti and a confirmation to this effect authorized by the Board of Directors of Sunstar and each of the Requesting Parties is handed over to Shivakriti.

(vii) within 30 days from the Effective Date, they will procure and ensure that all the security interest and other encumbrances over any and all the shares, debentures, bonds and such other securities (including the Specified Securities) issued by Sunstar to Umaiza are pledged with Shivakriti as security for a loan of availed by Umaiza – and a confirmation to this effect authorized by the Board of Directors of Sunstar and each of the Requesting Parties is handed over to Shivakriti.

4.2. Each of the Requesting Parties hereby covenant and undertake that, until such time Shivakriti NOC is issued to the Requesting Parties:

(iii) they will execute any definite agreement (as envisaged in the Resolution Plan with Sunstar and any other stakeholders), without in any manner diluting any of the rights available to Shivakriti hereunder, and only with prior consent of Shivakriti (which consent will not in any manner dilute the obligations of Requesting Parties hereunder).

(iv) they will ensure that no security interest and other encumbrances over any of the assets of Sunstar are created except as mentioned in Article 4.1(vi) and no security interest and other encumbrances over any of the shares, debentures, bonds and other securities (including Specified Securities) are created in any manner.

(v) They will procure Sunstar to ensure and comply with each and all of the above covenants and undertakings.”

15. These clearly indicate that obligations under this Agreement also pertain to Respondent No. 4 and to the operation of its business and contractual commitments. The terms of the Facility Agreement, the conduct of the parties, the background leading to execution of the Facility Agreement – all spell out the true intention of the parties, i.e., the successful implementation of the resolution plan which resulted in Respondent No. 1 acquiring Respondent No. 4. Undoubtedly, the performance of Facility Agreement is intrinsically interlinked with the assets of Respondent No. 4 and may not be feasible without its direct involvement. Pertinently, any

order/ proceedings relating to the execution of the Facility Agreement would surely and directly impact Respondent No. 4, and therefore the adjudication of any disputes arising thereunder would necessarily require its presence.

16. This Court is also guided by the ‘group of companies doctrine’ as expounded in the case of *MTNL v. Canara Bank*,⁴ where the group company of Canara Bank, being a non-signatory to the arbitration agreement, was also referred to arbitration after considering the composite nature of transaction, the commonality of subject matter, and the fact that final resolution of the disputes would not be feasible without joining of such party. It goes on to say that:

“The Group of Companies Doctrine has also been invoked in cases where there is a tight group structure with strong organizational and financial links, so as to constitute a single economic unit, or a single economic reality. In such a situation, signatory and non-signatories have been bound together under the arbitration agreement. This will apply in particular when the funds of one company are used to financially support or re-structure other members of the group.”

17. In view of the foregoing, although Respondent No. 4 is a non-signatory to the Facility Agreement, yet, having regard to: (a) Respondent No. 4 being an alter ego of Respondents No. 1 to 3; (b) the fact that the subject matter of the Facility Agreement pertains to Respondent No. 4; (c) there is a direct commonality of the subject matter viz the assets of Respondent No. 4; and (d) composite nature of the transaction between the parties which is inter-linked in nature and the performance thereof, the reference of disputes would not be feasible without the aid of Respondent No. 4, and thus, the Court is of the opinion that reference should be a composite one *qua* all the Respondents.

18. Before proceeding further, it is clarified that the observations made hereinabove are only for the purpose of referring Respondent No. 4 to arbitration. Whether Respondent No. 4 has any liability arising out of this agreement has neither been considered nor commented upon, and the same, if any has to be adjudicated in the arbitration proceedings.

19. In view of the above, there is no impediment for this Court to allow the petition *qua* all the Respondents, and accordingly, the same is allowed.

20. Accordingly, Hon'ble Mr. Justice D. K. Jain (Retd.), (former Judge of Supreme Court) (Contact No.: +91 9999922288) is appointed as a Sole Arbitrator to adjudicate the disputes that have arisen between the parties under the Facility Agreement dated 30th September, 2019.

21. The parties are directed to appear before the learned Arbitrator as and when notified. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

22. The learned Arbitrator will be paid his fees in terms of the Schedule IV of the Act.

23. Needless to say, the Respondent shall be at liberty to raise all objections as per law, including the plea of non-existence of arbitration

⁴ 2020 12 SCC 767.

agreement *qua* them, before the learned Arbitrator. Furthermore, it is clarified that the observations made in the present order are only for the purpose of deciding the present petition and they shall not come in the way of the learned Arbitrator to independently adjudicate upon the objections raised by the Respondents.

24. The petition is allowed in the above terms.

SANJEEV NARULA, J

DECEMBER 9, 2021

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(corrected and released on 21st December, 2021)