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

+ **ARB.P. 538/2020**

KUNWAR NARAYAN

..... Petitioner

Through: **Mr. Ruchin Midha, Adv.**

versus

MS OZONE OVERSEAS PVT LTD AND ANR

..... Respondents

Through: **Ms. Gunita Pahwa, Adv.**

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

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10.02.2021

(Video-Conferencing)

1. This petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") invokes the provision for arbitration as contained in Clause 12 of a Share Buyback Agreement, dated 27th March, 2018, executed between the petitioner and the respondents.

2. Insofar as the dispute between the parties is concerned, it would be most appropriate to reproduce paras a to s of the petition, thus:

"a. That by way of a Employment Contract dated 01.04.2013 (hereinafter referred to as "**Employment Contract**"), Respondent No.1 Company i.e. M/s Ozone Overseas Pvt. Ltd. (hereinafter referred to as "**Respondent No. 1 Company**") employed the Petitioner as Director (Sales) in Respondent No.1 Company on certain terms and conditions.

b. That in accordance with the mutual arrangement and understanding between the Parties at the time of joining the Respondent No. 1 Company, an allotment of 42,707 equity shares of the Respondent No.1 Company was made in favour of the Petitioner @ 0.5% of the outstanding shares of Respondent No. 1 Company, for each year of service. In furtherance of the aforesaid, an allotment of 31,871 equity shares of Respondent No. 1 Company was made in the form of sweat equity shares on 06.05.2016 for service from 01.04.2013 to 31.03.2016 and an allotment 10,836 equity shares was made in form of sweat equity shares on 24.11.2016 for service in financial year 2016-20 17.

c. It is stated that the aforementioned sweat equity shares were issued with a lock-in period of 3 years from date of issue. Lock-in period with respect to the above mentioned 31,871 number of equity shares expired on 05.05.2019 whereas the lock-in period with respect to the 10,836 number of equity shares expired on 23.11.2019. Thus, as on date, the Petitioner is the beneficial owner of and is holding the aforesaid 42,707 number of equity shares bearing folio no. 24 and share distinctive nos. 2124735 to 2156605 and 2167224 to 2178059 (hereinafter referred to as the "**Said Shares**") in Respondent No. 1 Company.

d. That as per a verbal mutual understanding between the Petitioner and the Respondent No.2, who was acting on behalf of the Respondent No. 1 Company, at the time of the Petitioner's joining, the terms of employment of the Petitioner were to be renewed and a fresh employment contract had to be executed between the Petitioner and Respondent No. 1. Based on the Petitioner's outstanding performance and firm commitment shown by the Petitioner during the course of his employment, the Respondent No.1 Company promoted the Petitioner as CEO of Respondent No.1 Company, and offered additional sweat equity shares employee stock options, and fresh terms and conditions for employment were discussed between the Parties. The draft of the said terms were in fact duly agreed between the Parties and the final draft agreement was also exchanged between the Parties, however, on one pretext or the other, Respondent No. 1 Company and its

management avoided the execution/signing of the revised employment agreement.

e. That during the course of Petitioner's employment, the aforementioned Share Buyback Agreement was executed amongst the Petitioner, Respondent No. 1 Company's Promoter Group represented by its Managing Director namely Shri Alok Aggarwal (Respondent No.2), and Respondent No. I Company. It is stated that in addition to the general terms and conditions the Share Buyback Agreement *inter alia* specifies valuation methodology, as well as dispute resolution mechanisms for the purchase of the Said Shares by the Promoter Group and/or Respondent No. 1 Company as the case may be.

f. That in terms of Para C of the preamble of the Share Buyback Agreement, after the expiry of the lock-in period, Petitioner became entitled to sell the Said Shares by offering it first to the Promoter Group duly represented by Respondent No. 2 or its nominees; and in the event the Promoter Group or its nominee refuses to buy the Said Shares within a period of 45 days from the date of offer, the Petitioner was entitled to and Respondent No. 1 Company was obligated to buyback the Said Shares from the Petitioner.

g. That as per Clause 1.2 of the Share Buyback Agreement the Promoter Group represented by Respondent No.2 was obligated to either agree to purchase or intimate refusal thereof to the Petitioner within 30 days of receipt of the written offer made by the Petitioner. It was further agreed between the Parties that in case Respondent No.2 refuses to buy the Said Shares or fails to respond within 30 days of sale offer, the Petitioner was entitled to offer the sale of Said Shares to Respondent No. 1 Company and the Respondent No. 1 Company was required to buyback the Said Shares and make the payment to the Petitioner within a period of 30 days from the receipt of the sale offer. In addition to the aforesaid a perusal of Clause 1.2 read with Clause 7.3 of the Share Buyback Agreement substantiates that in case Respondent No. 2 purchases only limited number of shares out of the Said Shares then it shall be purchased by Respondent No.1

Company within 30 days of the expiry of the offer made by the Petitioner.

h. That Clause 3 of the Share Buyback Agreement *inter alia* provides the method of calculating the 'Purchase Price' of the Said Shares at the time of offer to sell made by the Petitioner.

i. Sometime during the month of August 2019, the Petitioner raised the issue of encashment of his Said Shares, subsequent to expiry of their respective agreed lock-in periods and in this regard, several discussions were held between the Petitioner and Respondent No.2, wherein the Petitioner insisted on starting the process of valuation and *inter alia* requested Respondent No.2 to provide the audited accounts for the financial year 2018-2019.

j. That while the aforesaid discussions were still taking place, the Respondents placed the Petitioner on forced leave for an indefinite period without giving any explanation, with effect from 12.11.2019. Thereafter, several meetings had taken place between the Petitioner and the Respondents to amicably resolve the differences and encash the Said Shares as per the Terms of the said Share BuyBack Agreement. However, abruptly, Respondent No. 1 Company through Respondent No.2 arbitrarily and with *mala fide* intent terminated the Petitioner's employment *vide* its e-mail dated 21.11.2019. A copy of the e-mail dated 21.11.2019 issued by Respondent No.2 is appended along-with the present Petition at page 24 of Documents.

k. Thereafter, the Petitioner made several attempts to amicably settle the matter and also shared settlement proposal with the Respondents. However, the Respondents and management of Respondent No.1 was not forthcoming for any amicable resolution/ settlement and subsequently, in terms of the Share Buyback Agreement, the Petitioner issued an Share Sale Notice dated 23.01.2020 to Respondent No.2 (hereinafter referred to as “**First Sale Offer**”) *inter alia* offering to sell the Said Shares at a Purchase Price of INR 4,682.14/- per equity share, totalling to INR 19,99,60,133/-

(hereinafter referred to as “**Buyback Consideration**”). It is stated that a detailed calculation for arriving at the Purchase Price was also provided along--with the aforementioned letter dated 23.01.2020. A copy of the First Sale Offer dated 23.01.2020 is appended along-with the present Petition at page 25-27 of Documents.

l. That *vide* its letter dated 21.02.2020 Respondent No.2 on behalf of the Promoter Group, rejected the offer of the Petitioner on arbitrary and frivolous ground *inter alia* stating that the offer made by the Petitioner was not in accordance with the terms of the Share Buyback Agreement. A copy of the Letter dated 21.02.2020 issued by Respondent No. 2 is appended along-with the present Petition at page 28 of Documents.

m. It is pertinent to state here that a perusal of the Share Buyback Agreement substantiates that the Petitioner is not under any obligation to discuss the refusal by Respondent No. 2 however, since the Petitioner has always been willing to comply with the terms of the Share Buyback Agreement and *inter alia* settle any misunderstanding and/or dispute amicably, the Petitioner *vide* its letter dated 26.02.2020 reiterated its offer to sell and buyback and *inter alia* requested Respondent No. 2 to communicate the following - (i) whether the Promoter Group was at all willing to purchase the Said Shares; and (ii) if the Promoter Group is desirous of purchasing the Said Shares then the Petitioner requested Respondent No. 2 to provide the purchase price of the Said Shares along--with detailed computation and methodology for the purpose of Buyback Consideration in accordance with the Share Buyback Agreement. However, *vide* his reply dated 07.03.2020, the Respondent No.2 again rejected the Petitioner's offer on frivolous grounds. A copy of the Letter dated 26.02.2020 and reply letter dated 07.03.2020 is appended alongwith the present Petition at page 29-30 of the Documents.

n. That in response to the aforesaid letter, Respondent No. 2 *vide* its Letter dated 07.03.2020 provided an evasive reply and neither expressed its willingness to buyback the

Said Shares nor provided a computation and methodology for calculating the purchase price of the Said Shares as per its own understanding of the terms of the Share Buyback Agreement.

o. That since Respondent No. 2 *inter alia* refused to buyback the Said Shares and since despite repeated opportunities the Promoter Group headed and represented by Respondent No. 2 rejected the sale offer made by the Petitioner and refused to purchase the Said Shares thus, in terms of Clause 1.2 read with Clause 7.3 and other relevant provisions of the Share Buyback Agreement, the Petitioner *vide* its share buy-back notice dated 13.03.2020 (hereinafter referred to as "**Buy Back Notice**") to the Respondents and called upon Respondent No.1 to buyback the Said Shares@ INR 4,682.14/- per equity share, amounting to Rs. 19,99,60,133/- (Rupees Nineteen Crores Ninety Nine Lacs Sixty Thousand One Hundred Thirty Three Only). A copy of the said Buy Back Notice dated 13.03.2020 sent by the Petitioner to the Respondents is appended along-with the present Petition at page 32-38 of Documents.

p. It is humbly submitted that in terms of Clause 1.2 read with Clause 7.3 of the Share Buyback Agreement the Promoter Group represented by Respondent No.2 was obligated to either agree to purchase or intimate refusal thereof to the Petitioner within 30 days of receipt of the written offer made by the Petitioner. It was further agreed between the Parties that in case Respondent No.2 refuses to buy the Said Shares or fails to respond within 30 days of sale offer, the Petitioner was entitled to offer the sale of Said Shares to Respondent No. 1 Company and the Respondent No.1 Company was under obligation to buyback the Said Shares and make the payment to the Petitioner within a period of 30 days from the receipt of the sale offer.

q. That in complete breach of the terms of the Share Buyback Agreement, Respondent No.1 *Company vide* its letter dated 10.04.2020 refused to buyback the Said Shares. It is stated that the only reason provided by Respondent No. 1 Company, in its aforesaid letter. for its refusal to buyback the

Said Shares was that since the First Sale Offer made by the Petitioner to Respondent No.2 was invalid and *inter alia* since Respondent No. 2 never refused to purchase the Said Shares thus, the provisions pertaining to issuance of the Buy Back Notice was never triggered and accordingly even the said Buy Back Notice was invalid. A copy of the aforesaid letter dated 10.04.2020 issued by Respondent No. 1 Company is appended along-with the present Petition at page 39 of Documents.

r. In response to the aforesaid letter, the Petitioner, in his letter dated 14.05.2020 sent to the Respondent No. 1 Company, had reiterated that in yet another attempt to amicably resolve all issues with the Respondents and in order to avoid any litigation with the Respondent No.2, the Petitioner had offered to settle the disputes amicably and since the Respondents were not forthcoming to resolve the disputes amicably, the Petitioner was constrained to pursue the remedies available to him in law. A copy of the aforesaid letter dated 14.05.2020 sent by the Petitioner to Respondent No. 1 Company is appended along-with the present Petition at page 40 of Documents.

s. That the aforesaid response from the Respondents demonstrates that right from the outset; the Respondents had no intentions to perform their obligations under the said Share Buyback Agreement and to perform their obligations therein. Despite various attempts of the Petitioner, the Respondents failed to resolve/settle the matter amicably. The Respondents have, "with *malafide* intent, neither accepted the BuyBack Consideration calculated by the Petitioner as per the terms of the said Share Buyback Agreement nor have the Respondents provided their own calculations in order to wriggle out of their obligations."

3. Needless to say, this Court, while reproducing the aforesaid sub-paragraphs from the petition is not intending to express any opinion, on merits, regarding the claims of the petitioner, and it would always remain open to the respondents to contest the said claims in

accordance with law before the learned Arbitrator appointed by this Court in the present order.

4. The petitioner submits that, as efforts at an amicable resolution of the disputes did not fructify, the petitioner, *vide* notice dated 22nd July, 2020 to the respondent, invoked the provision for arbitration contained in Clause 12 of the Share Buyback Agreement and suggested the name of a former Chief Justice of India, as the arbitrator to arbitrate on the disputes. The respondents, in their response dated 22nd February, 2020, did not agree to the appointment of the arbitrator as suggested by the petitioner. The petitioner has, therefore, approached this Court by means of the present petition.

5. Ms. Pahwa, learned Counsel for the respondents submitted that her only objection, to the petition, was that the petitioner has not exhausted the avenue of amicable resolution, contemplated by Clause 12 of the Share Buyback Agreement. I am not inclined to agree with this submission. The recital of facts, as set out in the petition, indicate that efforts at trying to resolve the disputes, amicably were made, but did not succeed. Even otherwise, the Supreme Court in *Demarara Distilleries Pvt. Ltd. v Demerara Distilleries Ltd.*¹ and this Court, in its judgment in *Ravindra Kumar Verma v. BPTP Ltd.*², opined that relegation of the parties to the avenue of amicable resolution, when the Court is moved under Section 11(6) of the 1996 Act, would be unjustified, where such relegation would merely be in the nature of an empty formality. The arbitration clause in the present case does not

¹ (2015) 13 SCC 610

² MANU/DE/3028/2014

envisage any formal regimen or protocol for amicable resolution, such as issuance of a notice in that regard and completion of any stipulated time period thereafter, before which arbitral proceedings could be invoked. In the absence of any such stipulation, I am of the opinion, following the law laid down in *Demarara Distilleries Pvt. Ltd.*¹ and *Ravindra Kumar Verma v. BPTP Ltd*² nothing worthwhile would be achieved, by relegating the parties to explore any avenue of amicable resolution. Besides, the appointment of an arbitrator by this Court would not act as an impediment in the parties resolving their disputes amicably, should it be possible at any point of time.

6. Ms. Pahwa requests that the arbitrator should be appointed by this Court, under Section 11(6).

7. In view thereof, in exercise of the jurisdiction vested in me by Section 11(6) of the 1996 Act, I appoint Justice R.V. Raveendran, former Supreme Court Judge as the Arbitrator to arbitrate on the disputes between the parties. The contact details of the learned arbitrator are as under:

8/2, Krishna Road, Basavangudi,
Bangalore-560004.

Phone No.080-26601279
+91-7760599770

Email ID: justiceraveendran@gmail.com

8. As jointly requested by the parties, the fees of the learned arbitrator would be fixed in accordance with the Fourth Schedule to the 1996 Act.

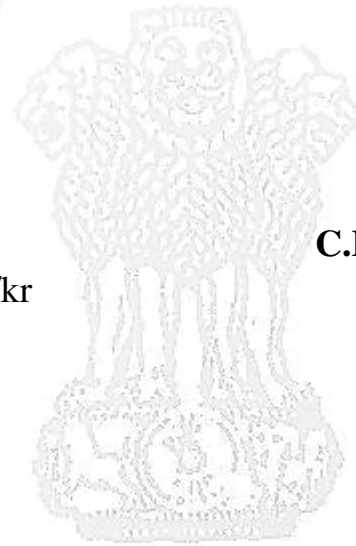
9. The learned arbitrator would furnish the requisite disclosure under Section 12(2) of the 1996 Act within one week of entering on the reference.

10. Learned counsel for the parties are directed to contact the learned arbitrator, within one week of being communicated a copy of this judgment to them by the Registry of this Court by e-mail.

11. The present petition stands disposed of accordingly with no orders as to costs.

C.HARI SHANKAR, J

FEBRUARY 10, 2021/kr



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