



2023 : DHC : 7333



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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 25th September, 2023**Pronounced on: 09th October, 2023**

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ARB.P. 110/2023, I.A. 18166/2023**DALMIA CEMENT (BHARAT) LIMITED**

..... Petitioner

Through: Mr.Rajiv Nayar, Senior Advocate and
Mr.Ashish Dholakia, Sr.Advocate
with Mr.Rishi Agarwala, Ms.Niyati
Kohli, Ms.Pratham Agarwala,
Mr.Arpit, Advocates.

versus

BINOD KUMAR BAWRI & ORS.

..... Respondent

Through: Mr.Aman Sinha, Senior Advocate
with Mr.Pravesh Thakur and
Ms.Ishita Sinha, Advocates for R-1 to
13.
Ms.Shipra Choudhary, Advocate for
R-14.

CORAM:**HON'BLE MR. JUSTICE YOGESH KHANNA****YOGESH KHANNA, J.****I.A. 18166/2023**

1. Applicant / respondent No.14 seeks to bring on record the change in its name as *Dalmia Cement (North East) Limited*. In view of formal nature of the application, same stands allowed.
2. The application stands disposed of.
3. The amended memo of parties be placed on record by the applicant within a week from today.

**ARB.P. 110/2023**

4. This petition is filed under Section 11(6) of Arbitration and Conciliation Act for appointment of an arbitrator to adjudicate the disputes between the parties.

5. In the year 2004 Calcom was incorporated by Bawri Group along with the AIDC for setting up a cement manufacturing unit in the State of Assam. In April, 2011 despite investments from foreign companies and loans by financial institutions, Calcom came under severe financial distress and the construction of the cement plant came to a grinding halt. It was also on the verge of being declared a non-performing asset by its lenders as it had defaulted on its payments. In October, 2011, the respondents, looking for a financial investor, were introduced to the petitioners.

6. On 02.12.2011 the petitioner and the respondents signed a Term Sheet outlining the terms and conditions to effectuate the transaction. On 16.01.2012 the petitioner and the respondents entered several definitive agreements highlighting different aspects of the commercial deal. On 30.11.2012 and 01.12.2012 the agreements were amended by amendment agreements and a further set of agreements were entered into which include the following: (i) Shareholders Agreement dated 16.01.2012, which was amended by the Amendment to SHA dated 30.11.2012("SHA"); (ii) Share Purchase Agreement dated 30.11.2012 ("New SPA"); (iii) Amendment to New SPA dated 01.12.2012; and (iv) Escrow Agreement - 2 dated 30.11.2012 ("Escrow Agreement").

7. On 15.07.2015 certain disputes arose between the parties, inter alia, in connection with completion of project conditions by Bawri Group and its consequences thereto, which were referred to arbitration. The said



arbitration proceedings commenced on 15.07.2015. The arbitral tribunal comprising of Hon'ble Mr. Justice (Retd.) T.S. Thakur, Hon'ble Mr. Justice (Retd.) V.N. Khare and Hon'ble Mr. Justice (Retd.) Deepak Verma was constituted and the learned arbitral tribunal passed the award on 20.03.2021.

8. On 21.07.2020 during the pendency of the arbitration, the petitioner invoked the Call Option clause in respect of Call Option shares, in terms of clause 6.7 and Article 40 of the Articles of Association ("AOA") of Calcom. On 09.10.2020 the petitioner, in accordance with Clause 6.10.4 of the SHA and Clause 2.5.2(b) of the Escrow Agreement, issued release instructions to the escrow agent Mr. Haigreve Khaitan, instructing him to transfer the 2,05,33,729 equity shares of Calcom deposited with the escrow agent, to the petitioner.

9. On 12.10.2020 the respondents raised a disagreement with respect to the call option price and the method of calculation of the additional consideration. On 14.10.2020 the petitioner invoked Clause 7.2 of the SHA and clause 11.2 of the new SPA and requested Mr.Y.H. Dalmia and Mr.Binod Kumar Bawri to *constitute a committee* for the resolution of the deadlock event/disagreement pertaining to the call option price and the method of calculation for the same. Mr. Y.H. Dalmia issued a letter to Mr.Binod Kumar Bawri initiating the resolution process and outlining a procedure for the same. On 16.10.2020 the petitioner provided to the respondents the primary documents required to verify certain figures in order to determine the call option price, the additional consideration and the net amount payable for the call option shares. Thereby, Mr.Y.H. Dalmia issued a notice to the respondents directing them to file their written



submissions before the resolution Committee. The respondents were expected to file their written submissions by 19.10.2020.

10. Mr.Binod Kumar Bawri issued a letter dated 20.10.2020 to Mr.Y.H. Dalmia stating the Email Id to which the previous emails were addressed was not working and that he would apply his mind to the matter and respond. On 21.10.2020 a reminder letter was sent by Mr.Y.H. Dalmia to Bawri Group informing that no response has been received to the letter dated 16.10.2020 addressed by him.

11. On 09.11.2020 the petitioner sent a letter to Bawri Group sharing a zoom link and stated that Mr.Y.H. Dalmia had offered to meet Bawri Group to discuss the disagreement which has arisen between the parties and to move forward as per the terms of the SHA. On 16.11.2020 the petitioner wrote to the respondents, informing them that the mediation period had come to an end due to the lack of communication from the respondents. Pursuant to this, the petitioner, under clause 7.3 of the SHA and clause 11.3 of the new SPA, referred the deadlock event/disagreement to a three-member committee comprising of Mr.S. Gurumoorthy, Mr.Y. H. Dalmia and Mr.Binod Kumar Bawri. Bawri Group on 18.11.2020 sent a letter to the petitioner refusing to participate in such proceedings, on the ground that, inter alia, all disputes are under adjudication before the Arbitral Tribunal. The petitioner submits that Bawri Group maintained its stand *despite the Tribunal refusing to entertain any dispute relating to the call option*. Bawri Group also objected to Mr. Gurumoorthy being a member of the committee and Mr. S. Gurumoorthy, in view of the objection raised by Bawri Group, recused from the three-member committee as the third member and addressed an email to the parties informing the same.



12. On 23.11.2020 the petitioner wrote to Mr.Y.H. Dalmia and Mr.Binod Kumar Bawri to appoint a replacement for Mr.S. Gurumoorthy, in order to resolve the disagreement between the parties. On 24.11.2020 Mr. Y.H. Dalmia wrote to Mr. Binod Kumar Bawri suggesting the name of Mr. Vinod Rai as a replacement for Mr. M.S. Gurumoorthy in the three member committee. Mr. Bawri once again sent an email dated 27.11.2020 to Mr.Y.H. Dalmia refusing to participate in such proceedings, on the ground that, inter alia, all disputes are under adjudication before the Arbitral Tribunal.

13. The Arbitral Tribunal passed the arbitral award on 20.03.2021 wherein it was specifically mentioned that the present dispute pertaining to the exercise of the call option had not been adjudicated. The petitioner submits that Bawri Group has also expressed its unwillingness to submit to the three member committee in terms of clause 7 of the SHA and clause 11 of the new SPA in order to seek resolution and determination of the call option price and/ or the quantum or manner of calculation of the additional consideration.

14. On 09.08.2021 the petitioner was accordingly constrained to file a petition under Section 11 (6) of the Arbitration and Conciliation Act being Arbitration Petition No. 758 of 2021. The said petition was allowed to be withdrawn on 01.04.2022 by the Coordinate Bench.

15. The petitioner addressed a notice dated 28.11.2022 to Bawri Group under Section 21 of the Arbitration and Conciliation Act invoking arbitration under clause 17 of the SHA. On 10.12.2022 Bawri Group sent a reply to the notice dated 28.11.2022 stating that the notice issued by the petitioner is not legally sustainable.



16. On 19.12.2022 due to Bawri Group's failure to give consent to one of the three names suggested by the petitioner to act as the Sole Arbitrator, the petitioner addressed another notice to Bawri Group appointing Mr. Justice (Retd.) Kurian Joseph, Former Judge of Supreme Court of India as the Nominee Arbitrator of the petitioner. By way of the notice dated 19.12.2022, the Petitioner, in terms of SHA and other agreements, called upon Bawri Group to appoint their nominee arbitrator to adjudicate the disputes, which was to be done within 30 days in accordance with Section 11 of Arbitration and Conciliation Act, 1996.

17. The notice dated 19.12.2022 was received by Bawri Group on 27.12.2022. Bawri Group has failed to appoint their nominee arbitrator in accordance with Section 11 of Arbitration and Conciliation Act, 1996, hence this petition.

18. The learned senior counsel for the petitioner refers to the terms of the agreement as under:

“6.7 Call Option of the Dalmia Group

6.7.1 At any time after July 31, 2017 and for a period upto July 31, 2020 (the "Call Option Period"), the Dalmia Group shall have the right to but not the obligation to issue a notice ("Call Notice") to the Promoter Group, to sell to the Dalmia Group or any nominee or Affiliate of the Dalmia Group ("Call Option Purchaser"), at its sole discretion, either (i) all, and not less than all, of the Equity Shares held by the Promoter Group in the Company; or (ii) the entire Shareholding of the Promoter Group in the Company on a Fully Diluted Basis less 5% (five percent) of the Shareholding of the Promoter Group in the Company (such that the Promoter Group shall retain 5% (five percent) of the Share Capital of the Company on a Fully Diluted Basis post the exercise of the Dalmia Group Call Option ("Call Option Shares") at the Call Option Price, on the terms and conditions contained in this Agreement (the "Dalmia Group Call Option"). Such Call Notice shall only be issued by the Dalmia Group after the accounts for the previous Financial Year has been approved by the Board. Such Call Notice shall specify the date on which such Transfer shall take place ("Call Date"), which shall not be less than 30 (thirty) days and not more than 90 (ninety) days from the issuance of the Call Notice, the identity of the Call



Option Purchaser, the Call Option Price and the number of Call Option Shares.

9 PROJECT CONDITIONS

9.1 The Bawri Group undertakes to complete or ensure the completion of the following conditions ("Project Conditions") to the reasonable satisfaction of the Dalmia Group on or before June 30, 2013:

(a) to (h) xxx xxx

In case of unforeseen delays to the completion of the Project Conditions, the time period to ensure completion of the Project Conditions to the satisfaction of the Dalmia Group shall stand extended to March 31, 2014 ("Project CP Satisfaction Date"). However, if the clinker unit is ready to commence production during the period July 1, 2013 and March 31, 2014 but unable to commence production because of non-availability of lime stone, then the last date for the completion of the Project Conditions i.e. the Project CP Satisfaction Date shall be the date on which the clinker unit is unable to operate because of non-availability of lime stone.

On or before the Project CP Satisfaction Date, the Bawri Group shall issue a notice to the Dalmia Group stating that the Project Conditions have been completed. Within 10 (ten) days, the Dalmia Group shall issue a notice ("Project CP Satisfaction Notice") to the Bawri Group, indicating that (i) all the Project Conditions have been completed to its satisfaction; or (ii) the Project Condition which have not been completed to the reasonable satisfaction of the Dalmia Group and giving the Bawri Group a time period of 10 (ten) Business Days to complete such Project Condition. If within the aforesaid period of 10 (ten) Business Days, Bawri Group are unable to complete such Project Conditions to the reasonable satisfaction of the Dalmia Group, the Dalmia Group shall have the right, at its sole discretion, to exercise the rights set out in Clause 9.2.

9.2 The Parties agree that upon the happening of any of the following events:

(a) to (b) xxxx

Then notwithstanding the provisions of clause 6, the Dalmia Group shall have the right, at its sole discretion to either:

(i) Purchase, by itself or through any nominee, Affiliate or Third Person nominated by the Dalmia Group, at its sole discretion, all and not less than all of the Shareholding of the Promoter Group in the Company for an aggregate consideration of Re.1 (Rupee One Only) and upon exercise of such right by the Dalmia Group, the Promoter Group shall be obliged to sell, and the Bawri Group shall cause Hold Co-1 to sell, all and not less than all of its Shareholding in the Company to Dalmia Group for an aggregate consideration of Re.1 (Rupee One Only); or xxxxx"

19. It is alleged by the learned counsel for the respondent the earlier arbitration, disposed of vide arbitral award dated 20.03.2021, also pertain to



the same set of shares wherein petitioner exercised its right under clause 9.2 (supra) and rather the petitioner had made a submission in the said arbitration proceedings viz. *in view of the fact it had exercised an option under clause 9.2 of the SHA, the petitioner has no right to exercise the call option under clause 6.7 (supra)* as had waived its right to exercise the option under clause 6.7 (supra). Moreso, even after the arbitral award dated 20.03.2021 the petitioner had filed another Arbitration Petition 758/2021 under Section 11 of Arbitration and Conciliation Act but it was withdrawn, hence now the petitioner is barred to file this petition.

20. I have heard the arguments advanced by both the learned senior counsels. Admittedly, the shares are common in both the arbitrations. However the agreements executed between the parties provided for *two* mechanisms for the petitioner to acquire the remaining 20.5% shares in the respondent company. The first mechanism available was under clause 9.1 (supra) which has a valuation adjustment mechanism under which the Dalmia Group could exercise the right to purchase the remaining shareholding of respondent No.1/ Bawri Group at *Re.1* for non-fulfillment of project conditions as defined under clause 9.1. As Bawri Group had to ultimately *exit from respondent no.2 company*, the second mechanism available to the Dalmia Group is under clause 6.7 of the SHA (as amended) under which the Dalmia Group could purchase the remaining shareholding of the Bawri Group at a call option price.

21. The call option price or adjudication and determination of the call option price was admittedly not a subject matter of adjudication before arbitral tribunal in the previous arbitration proceedings and the said fact is duly recorded in the award dated 20.03.2021. In the previous arbitration



proceedings, Dalmia Group sought transfer of remaining shares held by respondent no.1 in respondent no.2 company ("Calcom") due to non-fulfillment of project conditions by Bawri Group under clause 9.1 and its consequences thereto as provided under clause 9.2 and the same is reflected in the issues framed as well. Issues no. 13 and 14(i) therein are as under:

"13. Whether the Bawri group refused failed or neglected to complete the project condition within the time frame prescribed in the share holder's agreement dated 16.01.2012? If so to what extent and to what effect? OP Counter-Claimants Dalmia

14. In case issue no.13 is proved in the affirmative.

i) Whether Dalmia is entitled to 73642742 equity shares of Calcom referred to in para 17(I)(a)(b)&(c) of the statement of Counter Claim of Re.1/- and whether a direction can be issued to the holders of the said shares to execute all such deeds and documents as are necessary for transfer of the said shares from Bawri to Dalmia?

22. The Dalmia Group thus had an alleged independent right under the agreements to invoke "Call Option" provided in clause 6.7 of SHA (as amended). The said right could be exercised by the Dalmia Group after 31.07.2017 and at any time before 31.07.2020. Accordingly, on 21.07.2020, the Dalmia Group issued the call option notice to Bawri Group invoking clause 6.7 during the pendency of the other arbitration proceedings as the limitation for invoking the same would have expired. The Bawri Group raised a dispute by writing to the Escrow Agent calling upon the Escrow Agent not to release the shares till the dispute is resolved. Pertinently the previous arbitration was invoked much prior to exercise of call option i.e., in May 2015. It was alleged the Arbitration Petition No. 109/2023 arose out of the previous round of arbitration proceedings and hence was not pressed as the Bawri Group's Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 was pending before this Court. However, the present



petition i.e., Arbitration Petition No.110/2023 arose out of the completely separate issue i.e., call option which was never a subject matter of adjudication before the learned Arbitral Tribunal. The observations of the learned Arbitral Tribunal in its award dated 20.03.2021 are as under:

“Having said that we must for the sake of completeness also mention that on 28th October 2020 i.e., around the time the final arguments in the case were being concluded by learned counsel for the parties Mr. Virmani filed before us a memo with a copy of a call option notice dated 21.7.2020 and certain other documents for what the memo said was "only for purposes of information of the Tribunal". The memo stated that the exercise of call option was not the subject matter of the present Arbitration proceedings and that the notice and connected documents are being filed simply to keep the Tribunal informed company.

*The Claimants have also filed a copy of their reply to the call option notice and inter alia asserted that the notice is malafide and that Dalmias have no right to issue the same. **Be that as it may, all questions relevant to the call option notice and its validity as also matters relating thereto do not form the subject matter of the statement of claims or the counter claims before us nor has the said subsequent development been introduced in the pleadings by a suitable amendment thereof.** Even the parties have not expressed their willingness to let the Tribunal to go into the questions of their rights and entitlements in relation to the said notice. **We therefore leave the parties free to take resort to such proceedings for such relief as they may be advised to seek.**”*

23. Qua second submission viz. waiver of right it was submitted by the learned senior counsel for the petitioner there is no waiver in the pleadings by the petitioner on the exercise of its rights to invoke call option under clause 6.7 as invoking of call option of Dalmia Group to acquire the remaining shares of Bawri Group held in Calcom is an *independent mechanism* available to Dalmia Group under the agreements and has been allegedly exercised in accordance with the SHA. Admittedly, there is no clause in the agreement to the effect if the right under clause 9.2 of the SHA is exercised then the call option cannot be exercised. The arbitral tribunal *admittedly* never entertained the issue related to call option in its award.



Thus, the dispute/disagreement pertaining to the call option price is/was completely outside the scope of the previous arbitration proceedings that culminated into an Arbitral Award dated 20.03.2021 and as such the present petition would not be barred by Order II Rule 2 of the Code of Civil Procedure, 1908.

24. Though it was alleged by respondent no.1 the petitioner has made a statement waiving its right to exercise the call option but the petitioner had submitted *no such statement was ever recorded*. Even otherwise clause 22.1 of SHA executed between the parties provides *waiver of a right* under the agreement could *only be in writing and signed by both the parties*, hence the argument of the respondent has no force.

25. Qua plea of *res-judicata*, the claim of Dalmia Group for determination of call option price admittedly remained un-adjudicated, as call option was exercised only after commencement of earlier arbitration proceedings. The adjudication of call option was *admittedly* neither a subject-matter of earlier adjudication *nor* has the same been decided on merits in earlier arbitration petition vide Arbitral Award dated 20.03.2021.

26. Lastly, *qua res-judicata* on the ground the Arbitration Petition No. 758 of 2021 was withdrawn without any liberty to file it afresh, I may say its withdrawal *prima-facie* has no effect on the maintainability of the present petition as this petition is filed invoking clause 17 now clause 6.7 of the SHA which admittedly was never invoked by the Dalmia Group in Arbitration Petition No. 758 of 2021. The Arbitration Petition No. 758/2021 was withdrawn having wrongly invoked clause 7 of the SHA and clause 11 of SPA which provide for formation of two members committee; could not be maintainable under Section 11 of Arbitration and Conciliation Act and



hence was withdrawn. The order dated 14.03.2022 itself called upon the petitioner to examine and address the Court on the issue whether the petition was maintainable under clause 7.3 of SHA and clause 11.3 of SPA. Thus the earlier petition was under different clauses and hence cannot operate as res-judicata.

27. At this stage, there is no doubt that there exist an arbitration agreement and the parties have a debatable, dispute and arguable case. The issue whether the dispute ought to be raised are overlapping with the claims in earlier arbitration clearly fall within the domain of learned Arbitral Tribunal and it be decided by the learned Arbitrator. However, considering the fact the rights accrued under clause 9.1 and 9.2 are different than accrued under clause 6.7, there is no bar to invoke arbitration *per* clause 6.7.

28. In the circumstances, Mr. Justice Pradeep Nandrajog (Retd.) (Mob.No.9818000130) is hereby appointed as an arbitrator to adjudicate the disputes between the parties. The rights and contentions of the parties are left open, including the plea of overlapping and its effect. The observations made above shall not be considered as an opinion on merits.

29. The petition stand disposed of along with pending application(s).

YOGESH KHANNA, J.

OCTOBER 09, 2023

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