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

Date of decision: 18th April, 2023

+ O.M.P.(I) (COMM.) 119/2023

COLVYN JAMES HARRIS

..... Petitioner

Through: Mr.Tishampati Sen, Ms.Riddhi
Sanchet, Mr.Anurag Anand,
Ms.Tasmiya Teleha, Advs.

versus

FLEXING IT SERVICES PRIVATE LIMITED & ORS.

..... Respondents

Through: Mr.Nakul Dewan, Sr. Adv. with
Mr.Esenese Obhan,
Mr.Ashimam Obhan,
Ms.Ayesha Ghuthakurtha,
Ms.Tansi Fatedar, Mr.Seerat
Bhutan, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

I.A.7211/2023 (exemption)

1. Allowed, subject to all just exceptions.

O.M.P.(I) (COMM.) 119/2023

2. This petition has been filed by the petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') praying for the following reliefs:

"a. Direct the Respondents to maintain status quo with respect to the shares, shareholding, other securities, as well as its assets and properties during the pendency of arbitration proceedings between the parties;

b. Direct the Respondents to maintain status quo on the conversion of the CCDs of the Petitioners as well as other CCD holders;

c. Direct the Respondents to provide the financial reports, term sheet of the international investor, details of other CCD holders, notes of meetings with other CCD investors and other relevant information as

being sought by the Petitioner."

3. It is the case of the petitioner that the petitioner had invested 50,000 USD in the respondent no.1 company pursuant to the Debenture Subscription Agreement dated 16.07.2015 executed between the parties. Clause 6.1 of the said Agreement provided for automatic conversion of the Compulsorily Convertible Debenture (CCDs), and reads as under:

"6.1 Automatic Conversion.

Each Investor CCD shall stand mandatorily converted into fully paid-up Equity Shares on the occurrence of the earlier of:

- (i) Upon the occurrence of the Qualified Financing (defined hereinafter); or*
 - (ii) At the expiry of 1.5 (One and a half) years from the date of issuance of the Investor CCD, in the manner set forth below*
- whichever is earlier."*

4. Clause 6.2.1 to 6.2.4 of the Agreement provided for the conversion rate in an eventuality where prior to the expiry of one and a half years from the closing date, the respondent no.1 consummates the financing and issues equity or quasi-equity securities to a third party. Clause 6.2.5 is the default clause in case the respondent no.1 is not able to obtain the qualified financing. Clause 6.2 reads as under:

"6.2 Conversion Rate

*6.2.1 In the event the Company consummates, prior to the expiry of 1.5 (One and a half) years from the Closing Date, a financing pursuant to which it issues equity or quasi-equity securities to a third party ("**Qualified Financing Securities**") amounting to a minimum of USD 1,000,000/- (United States Dollars One Million only) with the principal purpose of raising capital (a "**Qualified Financing**"), then the Investor CCDs will convert in accordance with Sections 6.2.2, 6.2.3, 6.2.4 and 6.2.5.*

6.2.2 If the pre-money valuation in the

Qualified Financing is less than or equal to USD 15,000,000 (US Dollar Fifteen Million only), the Investor CCDs shall automatically convert into a number of Equity Shares determined by dividing the total principal outstanding under the Investor CCDs by the conversion price equal to the Applicable Discount (defined hereinafter) applied to the lowest per Equity Share purchase price paid for the Securities issued in the Qualified Financing, with such quotient rounded off to the nearest whole number.

6.2.3 If the pre-money valuation in the Qualified Financing is more than USD 15,000,000 (US Dollar Fifteen Million only) the Investor CCDs shall automatically convert at a conversion price determined as if the pre-money valuation in such Qualified Financing is USD 15,000,000 (US Dollar Fifteen Million only).

6.2.4 For the purpose of this Section, Applicable Discount shall be determined with reference to the Investment Subscription Amount, in accordance with the table below:

<i>Investment (USD)</i>	<i>Applicable Discount</i>
<i>Equal to or greater than \$50,000</i>	<i>25%</i>
<i>From \$20,000 to \$49,999</i>	<i>20%</i>
<i>Equal to or Less than \$19,999</i>	<i>15%</i>

6.2.5 In the event of non-occurrence of a Qualified Financing (amounting to a minimum of USD Million) within a period of 1.5 (one and a half) years from the date of issuance of the Investor CCDs, the Investor CCDs will convert to such number of Equity Shares that collectively amount to 20% (twenty percent) of the Shareholding of the Company on a fully diluted basis.”

5. The petitioner claims that in between 2016 and 2023 the petitioner repeatedly sought updates from the respondents on the status of conversion of the CCDs as per the terms and conditions of

the Agreement, however, did not receive any response. The relevant averments in the petition in this regard are reproduced as under:

“g. That upon not receiving any information about the status of Qualified Financing or conversion of CCDs into equity shares, the Petitioner, sought various updates from Respondent no. 2 on the status of conversion of his CCDs into equity shares. However, the Respondents, time and again took the position that they were in the stage of finalising several investments and unilaterally extended the time for the conversion, thus delaying the conversion on the Investor CCDs to equity shares.

h. That ever since the Petitioner has time and again requested the Respondents to convert the Investor CCDs on the basis of the terms and conditions laid down in the Agreement. Respondent No. 2, additionally kept on delaying any discussion on conversion of CCDs to equity on one ground or the other.”

6. The petitioner claims that it is only by an e-mail dated 20.02.2023 that the respondent no.2 informed the petitioner that they were planning to convert the CCDs of the early investors based on a certain valuation. The respondent no.2 offered a discount of 45% on the valuation to the petitioner and stated that the petitioner would thereby be entitled to 822 shares, that is, 0.38 % of shareholding in the respondent no.1. The petitioner by emails dated 27.02.2023 and 15.03.2023 sought various information from the respondents, including the basis on which the offer of only 0.38% shareholding has been made to the petitioner.

7. The petitioner claims that though the respondents replied vide e-mails dated 17.03.2023 and 20.03.2023 stating that the petitioner must exercise its option within a day of such communication, they failed to disclose the basis of their offer.

8. The petitioner claims that left with no option, the petitioner has

already invoked the Arbitration Agreement and appointed its Arbitrator. The respondents have also appointed their Arbitrator, however, the Arbitral Tribunal is not yet constituted.

9. The learned counsel for the petitioner submits that in terms of Clause 6.2.5 of the Agreement, which is the default clause, the petitioner, after a period of one and a half years from the date of the issuance of the investors CCDs, was entitled to convert the same to Equity Shares, which in terms of the investment of the petitioner would be 2% of the respondent no.1 shareholding. He submits that there was no concept of any discount being applied to the valuation of the company at a later date. He submits that the respondent no.1 cannot unilaterally impose upon the petitioner a particular valuation of the company and thereafter proceed to apply a discounting rate, thereby offering lesser number of shares to the petitioner in the respondent no.1 company.

10. The learned counsel for the petitioner, placing reliance on Clause 15.6 of the Agreement, submits that any amendment to the Agreement could only be by way of writing and duly executed by or on behalf of all the parties, and therefore, the respondents cannot unilaterally seek amendments of the contract.

11. On the other hand, the learned senior counsel for the respondents, who appears on advance notice, submits that the present petition is liable to be dismissed on the ground of concealment of vital and material facts. He submits that though the petitioner has built up its case on a premise as if the petitioner was entitled to the allotment of 2% of the shareholding in the respondent no.1 company without any reference to the valuation of the respondent no. 1 company after the expiry of one and a half years of the appointed date, the petitioner

correspondences exchanged between the parties right from 2016 which shows that the parties had agreed that the conversion shall be on the basis of the valuation of the company as on the date of conversion, with the petitioner being entitled to certain discounts because of its initial investment. In this regard, he has drawn my attention to the emails dated 10.11.2016, 21.11.2016, 22.12.2016, 14.02.2017, 21.02.2017, 09.10.2018 and 23.10.2018 exchanged between the parties.

12. He further submits that 16 of the 19 CCD holders of the respondent no.1 have already consented to the conversion of their CCDs on the valuation and the formula offered by the respondents. The investment of 14 such CCD holders has already been converted to Equity Shares, while for the remaining 2, the process is ongoing for want of certain documents from them.

13. He further submits that the petitioner having agreed to the formula of conversion, cannot now place reliance on Clause 6.2.5 which, in any case, due to the passage of time cannot now be worked out between the parties and would not be applicable.

14. I have considered the submissions made by the learned counsels for the parties.

15. At the outset, I must note and re-emphasize that the parties are very close to the appointment of the Arbitral Tribunal. It was put to the learned counsels for the parties that the learned Arbitrators appointed by the parties can be requested to expedite the constitution of the Arbitral Tribunal and leave the petitioner with liberty to approach the Arbitral Tribunal for seeking an appropriate relief in form of an application under Section 17 of the Act. The learned counsel for the petitioner, however, insisted on this Court passing

passed considering the request made by the learned counsel for the petitioner. It is made clear that any observation made in this order would not prejudice either party before the Arbitral Tribunal.

16. At the outset, it is to be noticed that the petitioner has made a very vague and ambiguous statement with respect to the entire period from 2016 to 20.02.2023 in the petition. The relevant averments in the petition for this period have already been reproduced herein above. The petitioner has not disclosed in the petition the various correspondences which have been exchanged between the parties during this period and which the learned senior counsel for the respondents has now placed on record and has referred to during the course of his submissions. The same *prima facie* indicates that the parties had not insisted upon the strict working of Clause 6.2.5 of the Agreement, which has been reproduced hereinabove and which provided that on expiry of one and a half years from the date of issuance of the investors CCDs, the investors CCDs will convert to such number of Equity Shares that collectively amount to 20% of the shareholding of the Company on a fully diluted basis. The said correspondence further shows that the parties were negotiating on the conversion of the CCDs based on the valuation of the respondent no.1 company and a particular rate of discount being extended to the petitioner for the conversion on such valuation. Though it also shows that the parties could not arrive at a consensus on the valuation and the rate of discount, however, the fact remains that the insistence of the petitioner that he shall be entitled to 2% of the shareholding of the respondent no.1 stands belied by the correspondences that were exchanged between the parties between 2016 and 2023.

17. As noted hereinabove, the petitioner has concealed such correspondence from this Court thereby making him disentitled to any

interim relief in exercise of the discretionary power of this Court under Section 9 of the Act. It needs no emphasis that a party which approaches the Court for discretionary relief, must do so with clean hands and with full and correct disclosure. Any concealment or misstatement of facts itself shall be a ground to disentitle the person approaching the court to the relief prayed.

18. In any case, Clause 6.5 of the Agreement provided that on expiry of one and a half years of the issuance of the investor CCDs and non-occurrence of a 'Qualified Financing' within this period, the CCDs shall stand converted to Equity Shares. It is admitted that the CCDs did not get converted on the expiry of the stipulated period and, in fact, even till now though many years have passed. It would therefore, have to be considered by the learned Arbitral Tribunal if the petitioner can still place reliance on Clause 6.2.5 of the Agreement for staking his claim. *Prima facie*, the subsequent correspondence exchanged between the parties does not support such claim. Reliance of the learned counsel for the petitioner on Clause 15.6 of the Agreement cannot be of much assistance to the petitioner as it is not a case of amendment to the terms of the contract but, a case of seeking strict enforcement thereof after a lapse of a long period of time.

19. The petitioner has also not been able to show a position of irreparable harm in case the *ad interim* injunction, as prayed for, is not granted in favour of the petitioner.

20. For the reasons stated hereinabove, I find no merit in the present petition. The same is dismissed, leaving it open to the petitioner to avail of its remedy before the Arbitral Tribunal in accordance with the law.

21. The learned Arbitrators nominated by the parties are, however, requested to expedite the constitution of the Arbitral Tribunal.

22. It is reiterated that any observation made in this order is only *prima facie* in nature and will not prejudice either party in their case before the Arbitral Tribunal so constituted.

23. There shall be no order as to cost.

NAVIN CHAWLA, J

APRIL 18, 2023/Arya



Signature Not Verified

Digitally Signed By: SUNIL

Signing Date: 21.04.2023

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O.M.P.(I) (COMM.) 119/2023