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

\+ ARB.P. 245/2024

HERO FINCORP LIMITED ..... Petitioner

Through: Mr. Arun Aggarwal, Mr. Shivam Saini, Mr. Praful Rawat, Ms. Aditi Gupta, Advs.

versus

GUPTA POWER INFRASTRUCTURE LIMITED AND ORS

..... Respondents

Through: Mr. Krishnaraj Thakker, Mr. Sandip Agarwal, Mr. A. Kumar, Mr. Nishant Kumar, Mr. Tanay Agarwal, Dr. Sumit Kumar, Mrs. Aprajita, Mr. Ayesh Kumar, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

<u>O R D E R</u>

% **10.04.2024**

1. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter, "the Act") seeking appointment of an Arbitrator to adjudicate the disputes between the parties.

2. The facts are that the respondent No. 1 approached the petitioner seeking financial assistance and the petitioner granted financial facility of Rs. 5 crores in the nature of purchase invoice discounting of dealers *vide* sanction letter dated 16.02.2023.

3. Since the respondent failed to adhere to the terms and conditions of

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the financial facility and defaulted in payment, the petitioner on 23.10.2023 recalled the entire loan amount, terminated the Facility Agreement dated 16.02.2023 and all other documents executed in this regard and called upon the respondent to pay a sum of ₹ 5,17,42,056.70/-.

4. Since the respondent did not pay the amount, the petitioner filed a petition under Section 9 of the Act being O.M.P.(I)(COMM.) 25/2024 seeking interim orders.

5. Thereafter, on 19.02.2024, the petitioner filed the present Section 11 petition seeking appointment of an Arbitrator.

6. Mr. Thakker, learned counsel for the respondent has opposed the petition primarily on the ground that there is no notice invoking arbitration under Section 21 of the Act, which is a mandatory requirement.

7. Mr. Aggarwal, learned counsel for the petitioner has drawn my attention to the legal notice dated 23.10.2023 to state that this is the notice under Section 21 of the Act. The notice reads as under:

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23.10.2023

'o,

1. **M/s Gupta Power Infrastructure Limited (Borrower / Addressee No. 1)**
   Through its Directors,
   Having its Registered Office at:
   Gupta Cable Compound, Gupta Niwas,
   Cuttack Road,Bhubaneshwar, Khordha, Odisha-751006
   Email: Pankaj.sureka@guptapower.com, agupta@guptapower.com
   Ph. No.: 9937064000
   Also At:7 mangoe langer no 302& 303
   3rd floor, Kolkata west Bengal -700001

2. **Mr. Mahendra Kumar Gupta(Guarantor /Addresee No. 2)**
   Managing Director,
   Residing at: Gupta Niwas, Cuttack Road
   Budheswari, Bhubaneshwar M.C,budeshwar Khordha, Odisha-751006
   Email: MD@guptapower.com Ph. No.: 9937089002, 9437089000

3. **Mr. Jitendra Mohan Gupta(Guarantor /Addresee No. 3)**
   Director,
   Residing at: Gupta Niwas, Cuttack Road
   Budheswari, Bhubaneshwar M.C,Khordha, Odisha-751006
   Email: jmgupta@guptapower.com Ph. No.: 9937064000

4. **Mr. Abhishek Gupta(Guarantor /Addresee No. 4)**
   Director,
   Residing at: Gupta Niwas, Cuttack Road
   Budheswari, Bhubaneshwar M.C,Khordha, Odisha-751006
   Email: agupta@guptapower.com Ph. No.: 9937064000

5. **Mrs. Kiran DaviGupta(Guarantor /Addresee No. 5)**
   Director,
   Residing at: Gupta Niwas, Cuttack Road
   Budheswari, Bhubaneshwar M.C,Khordha, Odisha-751006
   Email: pankaj.surekha@guptapower.com Ph. No.: 9937064000

REFERENCE: **FACILITY AGREEMENT DATED 16.02.2023, EXECUTED BETWEEN YOU, THE ADDRESSEE(S) AND M/S HERO FINCORP LIMITED.**

SUBJECT: **LOAN RECALL NOTICE**

That our Company, Hero FinCorp Limited (hereinafter referred to as **"HFCL"**) is a Non-Banking Financial Company duly incorporated and registered under the Companies Act, 1956, having its registered office at 34, Community Centre, Basant Lok, Vasant Vihar, New Delhi - 110057. HFCL is also duly registered with the Reserve Bank of India and is engaged in the business of providing financial assistance to meet the needs of over millions of its customers all over India. We hereby serve you, Addressee(s) as under:

1. That you, the Addressee(s) desirous of taking financial assistance had approached HFCL and sought financial assistance in the form of Bill Discounting. It was represented that you, the Addressee(s) have sufficient means to repay the proposed financial facility. It was further

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represented that you, the Addressee(s) will stand as Guarantors for the aforesaid financial facility.

2. Based on the representations given by you, the Addressee(s) to be true and correct, HFCL had agreed to grant financial facility for Rs.5,00,00,000/- (Rupees Five Crore Only) in the nature of Purchase Invoice Discounting of Dealers/ Distributors buying products from Hindalco vide Sanction Letter bearing Reference No. 38783277 dated 16.02.2023.

3. That Pursuant to the sanction of the aforesaid financial facility, *inter alia*, Facility Agreement dated 16.02.2023, was executed between you, the Addressee(s) and HFCL.

4. It was agreed by you, the Addressee(s) that discounting tenure shall be for a period of sixty (60) days from the date of disbursement. The rate of interest was decided at 11.00% per annum. It was further agreed that a penal interest charge of 12.00% per annum shall be levied in case of delayed payment on the overdue amount.

5. In order to secure the financial facility, you the Addressee No. 2,3,4&5 guaranteed to repay the financial facility along with all applicable interest and charges vide Deed of Guarantee dated 16.02.2023 in favor of HFCL.

6. That you, the Addressee(s), however, miserably failed to adhere to the terms and conditions of the aforesaid financial facility and have defaulted in the payment of the discounted invoice. Upon enquiries, you, the Addressee(s) kept on delaying the payment on one or the other pretext. Thus, you, the Addressee(s) have caused substantial loss to HFCL.

7. From the above iterated chronology of events, it is clear that you, the Addressee(s) are deliberately not adhering to the terms and conditions contained in the aforesaid Sanction Letter and Facility Agreement and other documents executed under the financial facility. Such deplorable conduct on the part of each of you, the Addressee(s) constitutes fundamental breach of contract. Aghast by your conduct, HFCL is constrained to recall the entire loan amount advanced to you, the Addressee(s) under the financial facility and thus, HFCL hereby terminates the Facility Agreement dated 16.02.2023 and all the other documents executed in this regard with immediate effect. As on **20.10.2023**, you, the Addressee(s) are jointly and severally liable to pay a sum of **Rs. 5,17,42,056.70/- (Rupees Five Crores Seventeen Lakhs Forty Two Thousand Fifty Six and Seventy Paise Only).** Details of the outstanding amount due as on **20.10.2023** are given in **"Schedule – A"** to this Notice.

8. Thus, you, the Addressee(s) are hereby called upon to pay a sum of **Rs. 5,17,42,056.70/- (Rupees Five Crores Seventeen Lakhs Forty Two Thousand Fifty Six and Seventy Paise Only)** due as on **20.10.2023** along with the applicable interest and other charges, till the actual date of payment within Seven (7) days from the receipt of this notice.

9. If you, the Addressee(s) fail to pay the amount as mentioned in paragraph (08) of the present notice, HFCL shall be constrained to initiate appropriate legal action, both civil and criminal, at your risk, cost and consequences.

The present notice is being issued without prejudice to any rights, contentions or remedies which may have accrued or may in future, accrue to HFCL.

Soham Kumar/Abhay Nair
D/3557/2023
Advocates
For Hero FinCorp Limited

8. I have heard learned counsel for the parties.

9. It is an admitted case that notice under Section 21 of the Act is a mandatory requirement before filing of a Section 11 petition.

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10. The issue for consideration is whether this notice dated 23.10.2023 can be construed as a notice under Section 21 invoking arbitration.

11. The reliance on ***Bharat Chugh v. MC Agrawal***, 2021 SCC OnLine Del 5373 is well placed and the relevant paragraphs read as under:

> "*27. To my mind, the issue is elementary. Section 21 of the 1996 Act is a provision which specifically deals with commencement of arbitral proceedings. That which does not commence, obviously, cannot continue. When the statutory scheme envisages commencement of proceedings in a particular fashion, they have to commenced in that fashion or not at all. One may rely, for this purpose, on the line of authorities starting with Taylor v. Taylor and proceeding through Nazir Ahmed v. King Emperor to State of Uttar Pradesh v. Singhara Singh and Municipal Corporation of Greater Mumbai v. Abhilash Lal.*
>
> *28. Section 21 clearly states that arbitral proceedings, in respect of a dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the opposite party. Admittedly, there is no such communication, from the respondent to the petitioner, envisaging reference of the disputes between them to arbitration. Mr. Agarwal has drawn my attention to a communication dated 17th June, 2020, addressed by him to the petitioner. The communication set outs, in graphic detail, the specifics of the dispute between the petitioner and the respondent. Thereafter, the communication concludes with the following passages:*
>
> > *"We therefore, hereby call upon you to return back all the shares given by our client vide agreement dated 25.01.2020 except 1750 shares of Cipla Ltd. and 260 Shares of Ultra Tech Cement Ltd. (the shares returnable on Feb 20 and March 2020) and also make the payment of interest and dividend payable by you on the said shares and also give/transfer the right shares as per agreement dated 25.01.2020, within a period of 7 clays of the receipt of this notice. Kindly note that in case you fail to do so, our client shall take appropriate action both under the criminal, and*

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also the civil law, by filing an FIR against you and also by taking appropriate steps under civil law for recovery of equity shares and amount of interest at your cost risk and liability."

29. Mr. Agarwal submits that, even if the aforesaid communication dated 17th June, 2020 did not specifically envisage reference of the dispute to arbitration, it, nonetheless, put the petitioner on notice that the respondent, in the event of default on the part of the petitioner in complying with the demands of the respondent, intended "to take appropriate action both under the criminal, and also the civil law …. by taking appropriate steps under civil law for recovery of equity shares and amount of interest." This, according to Mr. Agarwal, would suffice as a notice invoking arbitration, as arbitration is also a civil law remedy. For this purpose, Mr. Agarwal also placed reliance on certain passages from the judgment of a Coordinate Bench of this Court in De Lage.

30. As against this, Mr. Singh points out that the notice dated 17th June, 2020 was prior to the supplementary agreement dated 26th June, 2020, whereunder the arbitral proceedings have been initiated. Accordingly, he submits that it cannot be treated as a notice invoking arbitration.

31. A notice invoking arbitration, to my mind, must necessarily do that. It has to invoke arbitration. At the very least, it has to refer to the clause in the contract which envisages reference of the dispute to arbitration. Merely sending a notice, setting out the disputes between the parties and informing the addressee that civil and criminal legal remedies would be availed in the event of failure, cannot, in my view, constitute a notice invoking arbitration."

12. This Court in its order dated 18.03.2024 in ARB.P. 558/2023 titled ***"The Prasar Bharati vs. Visual Technologies India Pvt. Ltd."*** has held that in the notice invoking arbitration, the ingredients of Section 21 of the Act must be fulfilled:

"9. There is no fixed format of notice invoking arbitration. The requirement in law is that the party invoking arbitration must highlight the disputes between the parties and make a request that in case the disputes are not resolved, arbitration proceedings shall be commenced. The intention to invoke the redressal of disputes through the arbitral process must clearly spelt out in the notice. Hence in my view, the notice under Section 21 of 1996 Act must clearly state as follows:-

a. The dispute between the parties.
b. The demand to resolve the disputes as per the envisaged arbitration clause.
c. In case, the disputes are not resolved the intention to resort to the arbitral process.
d. The notice must be sent to the respondent."

13. The judgment of the Coordinate Bench in ***De Lage Landen Financial Services India (P) Ltd. v. Parhit Diagnostic (P) Limited***, 2021 SCC OnLine Del 4160 is also relevant, of which paragraphs 11 and 15 read as under:

"11. In the instant petition as well, although the notices dated 13th May, 2019 for "facility cancellation/acceleration" did not specifically mention that the Petitioner is resorting to arbitration, but it was clearly stated that the Petitioner would take recourse to legal proceedings under the agreement. The relevant paragraphs of the said notice is extracted as under:-

"Please settle the aforementioned Sum Total Amount Due forthwith failing which DLL will commence legal proceedings to enforce all DLL's rights under the Agreement including but not limited to recovery of all amounts due under the Agreement."

….

15. Subsequently, Guarantee Invocation Notices were sent by Petitioner on 17th July, 2019, however, no response was received from the Respondents to either the Notices dated 17th July, 2019 or 13th May, 2019, thereafter, the Petitioner appointed an Arbitrator vide notice of invocation dated 29th August, 2019. This notice,

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coupled with the fact that the Respondents joined and participated in the ensuing arbitration proceedings, clearly shows that Respondents became aware of the Petitioner's intent to arbitrate, choice of Arbitrator, and identification of claims; and thus, could have formed an opinion as to whether the disputes were time barred. Hence, for all intents and purposes, the rationale for giving notice, stood fulfilled. In the opinion of the Court, the entire argument of the Respondents is hinged on a hyper-technical plea. No prejudice whatsoever has been pleaded nor shown to have occurred on any of the above counts. Mr. Savla, however, states that the thirty-days notice is mandatory for the parties to come to an agreement on the name of the Arbitrator. The present petition has been pending since May, 2019. The parties, till date, have not been able to agree on any name. Therefore, this objection of Mr. Savla is also completely implausible. Dismissing the petition on the ground of non-compliance of Section 21 of the Act is not warranted."

14. Applying the principles of the aforesaid judgments to the present case, it is clear that the legal notice dated 23.10.2023 even though in reference mentions the Facility Agreement, but in the concluding paragraphs states that in case the amounts are not paid, the petitioner would be constrained to initiate appropriate legal action, both civil and criminal.

15. Both, in ***The Prasar Bharati*** (supra) as well as in ***De Lage Landen*** (supra), it had been clearly mentioned in the notices therein that in the event of default, proceedings under the respective agreements would take place.

16. The same is missing in the notice of 23.10.2023.

17. Another important argument brought forth by the learned counsel for the respondent is that in the Section 9 petition filed by the petitioner on 05.01.2024 (i.e. after notice of 23.10.2023), the petitioner itself states as under:

"15. That the Petitioner humble submits that it fully intends to follow

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the appropriate and initiate arbitration for the subject matter of the dispute. The Petitioner does not have any alternative efficacious remedy for redressal of its grievances and for redressal of its grievances and for securing its claims against the Respondents, and hence the Petitioner is constrained to approach this Hon'ble Court."

18. A perusal of the aforesaid paragraph clearly shows that the petitioner itself did not consider the notice of 23.10.2023 as a notice under Section 21 of the Act, and showcased intent to invoke arbitration in terms of the Facility Agreement.

19. For the said reasons, I am of the view that the petition is premature and it has been filed without giving notice under Section 21 of the Act.

20. The petitioner is at liberty to give appropriate notice under Section 21 of the Arbitration and Conciliation Act, 1996, and thereupon proceed in accordance with law.

21. With these observations, the petition is dismissed.

JASMEET SINGH, J

APRIL 10, 2024/DM

Click here to check corrigendum, if any

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