



2024:DHC:6430



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

+ **ARB.P. 539/2024**

SAMEER BANSAL & ORS.Petitioners

Through: **Mr. Deshpande, Adv**

versus

VIPIN GUPTA & ANR.Respondents

Through: **Mr. Arun Srivastava, Mr. Akhil Srivastava, Advs.**

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT (ORAL)

22.08.2024

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1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996¹ for reference of dispute to arbitration.

2. The petitioners are shareholders of M/s NSP Associates (India) Pvt Ltd, currently undergoing Corporate Insolvency Resolution Process², which is pending before the learned National Company Law Tribunal³.

3. The petitioners entered into a Memorandum of Understanding ("MoU") dated 9 March 2023, according to which both parties agreed to approach the Canara Bank⁴ for the purpose of a One Time Settlement ("OTS") for which the respondents were to deposit 10% of

¹ "the 1996 Act" hereinafter

² "CIRP"

³ "the Ld. NCLAT" hereinafter

⁴ "the bank hereinafter"

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the OTS value upfront for consideration and approval of the Bank.

4. Thereafter several proposals were sent to the Bank, but were rejected on account of non-payment by the respondents.

5. By virtue of clause (g) of the MoU, the Respondents had further undertaken to pay a sum of ₹1,50,00,000/-. However, the amounts undertaken were never paid.

6. As disputes had arisen among the parties, the petitioners, by letter dated 23 April 2024 invoked clause (n) of the MoU and sought reference of the disputes to arbitration. Clause (n) of the MoU provides for appointment of an Arbitrator by this Court.

7. Mr. Arun Srivastava, learned Counsel for the respondent, has opposed this petition. His contention is that there is no arbitration agreement in existence between the parties.

8. This contention is further predicated on Clause (c) of the MoU, which reads thus:

“(c) That the full terms of this MOU/agreement shall come into force only after the Bank and CoC accepts the OTS proposal made by the FIRST PARTY and SECOND PARTY, in pursuant to the present MOV. The total cost of IRP/RP, including any other legal expenses, shall be borne by the FIRST PARTY till the date of termination of CIRP. In case the proposal for OTS is not accepted by the Bank and CoC, the 10% amount so deposited by the SECOND PARTY at the time of making the OTS proposal along with interest accrued thereon (if any) shall be refunded to the SECOND PARTY and on refund of 10% amount so deposited, this MOD shall stand ceased without any further effect or consequences upon the parties. In case 10% of the amount be kept as lien in the

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saving account of the SECOND PARTY, or in an escrow account, the SECOND PARTY shall be at liberty to get the lien discharged without any further liability on them, in the eventuality of non-acceptance of OTS. However, the parties shall be at liberty to renegotiate with the Bank for a fresh OTS proposal and accordingly the terms of the present MOD shall be varied or extended on mutual consent in writing signed by all the parties.”

9. He submits that the bank and the CoC have not accepted the OTS proposal made by the petitioner. Inasmuch as acceptance of the OTS proposal by the bank and CoC is a pre-condition for the MoU to come into force, Mr. Srivastava’s contention is that the MoU has not come into force as yet.

10. Ergo, there being no MOU, there cannot be any arbitration agreement. Consequently, this petition cannot be entertained.

11. Mr. Deshpande, learned Counsel for the petitioner, submits, *per contra*, that Clause (c) is dependent on Clause (b), which reads thus:

“(b) That SECOND PARTY has agreed to infuse aforementioned 10% (5% + 5% by 20.03.2023) of the OTS amount by opening a saving Bank account in the same Bank and allowing the Bank. to charge/create a lien on the said account to satisfy the condition of the Bank so as to fortify the OTS proposal. That the infusion of the amount by the Second party shall be subject to RBI and FDI approvals/guidelines if any.”

12. Mr. Deshpande submits that the MoU would not come into effect, as per Clause (c), only if the bank and the CoC do not accept the MoU *and the 10% amount deposited by the respondent under Clause (b) is refunded to the respondent.*

13. He submits that the respondent never deposited the requisite

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10% under Clause (b) and that, therefore, it cannot be said that the MOU has not come into effect.

14. Mr. Srivastava disputes the contention that his client has not deposited the 10% as required by Clause (b).

15. The result is that the very issue of whether the MOU is, or is not existence, is highly debatable.

16. The Supreme Court has, in ***SBI General Insurance Co Ltd v Krish Spinning***⁵ held that court exercising jurisdiction under Section 11(6) is to examine only whether there exists an arbitration agreement between the parties and whether the Section 11(6) petition has been filed within three years of the Section 21 notice.

17. The second condition clearly stands satisfied.

18. Insofar as the first condition, of existence of an arbitration agreement is concerned, the Supreme Court has made it clear that the court has to examine the matter only *prima facie* and cannot embark on a detailed examination of facts or evidence. In case, it is not possible to arrive at a conclusive decision on the existence of the arbitration agreement, on a *prima facie* view of the matter, it has to be relegated to the arbitral proceedings.

19. Accordingly, this Court appoints Mr. Rakesh Kumar Dudeja,



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Advocate (Mob: 9810147798) as the arbitrator to arbitrate on the dispute between the parties.

20. The learned arbitrator shall be entitled to charge fees as per the Fourth schedule of the 1996 Act.

21. The learned arbitrator is also requested to file requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on the reference.

22. The Court has not expressed any opinion on any aspect of the matter, whether relating to maintainability or merits. All questions of facts and law are left open to be agitated in the arbitral proceedings.

23. The petition stands allowed in the aforesaid terms.

C. HARI SHANKAR, J

AUGUST 22, 2024

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Click here to check corrigendum, if any

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