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

\+ ARB.P. 1066/2024

VINAY MITTAL .....Petitioner

Through: Ms. Bani Brar, Adv.

versus

SUSHIL CHAUDHARY AND ANR. .....Respondents

Through: Mr. Niyas Valiyathodi, Ms. K. Pallavi, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

% **23.10.2024**

1. This is a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of the Sole Arbitrator to adjudicate the disputes between the parties.

2. It is stated that in 2017, respondent No. 1 approached the petitioner and represented that respondent No. 2 was in need of funding. Upon various assurances and representations made by the respondent No. 1, the petitioner subscribed to 2,283 compulsorily convertible preference shares at a face value of Rs. 8,760 per share, as a 'Pre-Series A Investor' by executing a Share Subscription and Shareholders Agreement with the respondents on 22.01.2018. The petitioner accordingly made a payment of Rs. 2 crores to the Respondent No. 2.

3. The respondents assured that respondent No. 1 would purchase CCPS held by the petitioner and executed a Share Sale and Purchase Agreement dated 01.10.2019 (*"SPA"*) under which respondent No. 1 agreed to clear the CCPS of the petitioner in two tranches of 1141 and 1142 CCPS.

4. The arbitration clause is Clause 17.1 and 17.2 of the SPA which read as under:

> "*17.1 All disputes, differences and questions, directly or indirectly, arising at any time under or in connection with or in relation to this Agreement or the subject matter of this Agreement including without limitation, all disputes, differences, controversies and questions relating to the validity, interpretation, construction, performance and enforcement of this Agreement ("Dispute") shall be resolved by mutual consultation.*
>
> *17.2 If the Parties are unable to resolve the Dispute by mutual consultation within 30 days, then the Parties shall be referred to and finally and conclusively settled by arbitration through a sole arbitrator as per rules framed under provisions of Indian Arbitration and Conciliation Act, 2013, as amended from time to time, and the rules of procedures prescribed for the conduct of the arbitration therein shall govern the arbitration proceedings. The place of arbitration shall be New Delhi. The arbitration shall be conducted in English language and the award of the arbitrators shall be final and binding on the parties. The losing party shall the bear the cost of arbitration.*"

5. Since there were violations by the respondents, the petitioner invoked arbitration *vide* legal notice dated 17.10.2023. Hence the present petition.

6. This Court *vide* Order dated 22.07.2024 issued notice to the respondents.

7. Mr. Valiyathodi, learned counsel appears for the respondents and has filed a reply wherein he objects to the maintainability of the present petition.

8. He states that in accordance with Clause 17.1 of SPA, it was incumbent on the petitioner to engage in mutual consultation with the respondents prior to invoking the arbitration. As the petitioner has failed to comply with the same, the present petition is premature.

9. Relying on Clause 10 of SPA, he states that there were obligations to be performed by the petitioner which has not been performed by the petitioner itself.

10. For the sake of perusal, Clause 10 of SPA reads as under:

> "*10. DIRECTOR NOMINATED BY SELLER TO RESIGN IMMEDIATELY UPON SIGNING*
> *The Director nominated by the Seller will resign immediately upon the signing of this Agreement and the Board Meeting held by the Company on the date of first closing date such resignation will be recorded in the minutes and the Purchaser shall nominate the replacement Director even before the Amendment of SHA*."

11. Further, the petitioner did not resign from respondent No. 2.

12. As regards the first objection is concerned, a perusal of the communications and more particularly communication dated 29.12.2022 and the minutes of the meeting dated 29.03.2023 shows the hostility between the petitioner and the respondents. The respondents removed the petitioner as its Investor Director of respondent No. 2.

13. In this view, I am of the view that there was a great deal of hostility between the petitioner and the respondents and the initiation of mutual consultation would be an empty formality as the parties already had 'daggers drawn'. Reliance is placed on ***Demerara Distilleries (P) Ltd. v. Demerara Distillers Ltd., (2015) 13 SCC 610*** and more particularly on para 5 which reads as under:-

> "*5. Of the various contentions advanced by the respondent Company to resist the prayer for appointment of an arbitrator under Section 11(6) of the Act, the objections with regard the application being premature; the disputes not being arbitrable, and the proceedings pending before the Company Law Board, would not*

merit any serious consideration. The elaborate correspondence by and between the parties, as brought on record of the present proceeding, would indicate that any attempt, at this stage, to resolve the disputes by mutual discussions and mediation would be an empty formality. The proceedings before the Company Law Board at the instance of the present respondent and the prayer of the petitioners therein for reference to arbitration cannot logically and reasonably be construed to be a bar to the entertainment of the present application. Admittedly, a dispute has occurred with regard to the commitments of the respondent Company as regards equity participation and dissemination of technology as visualised under the Agreement. It would, therefore, be difficult to hold that the same would not be arbitrable, if otherwise, the arbitration clause can be legitimately invoked. Therefore, it is the objection of the respondent Company that the present petition is not maintainable at the instance of the petitioners which alone would require an in-depth consideration."

14. As regards the other objections of non-compliance of Clause 10 of SPA is concerned, the same is a dispute on merits which shall be decided by the learned Arbitrator, reliance is placed on "***SBI General Insurance Co. Ltd. vs. Krish Spinning, (2024) SCC Online SC 1754***".

15. For the said reasons, the petition is allowed with the following directions:-

i) Mr. Sonal Kumar Singh, (Adv.) (Mob. No. 9958555776) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.

ii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi (hereinafter, referred to as the 'DIAC').

iii) The remuneration of the learned Arbitrator shall be in terms of DIAC (Administrative Cost and Arbitrators' Fees) Rules, 2018.

iv) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.

v) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims/counter-claims and merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.

vi) The parties shall approach the learned Arbitrator within two weeks from today.

16. The petition is disposed of in the above terms.

JASMEET SINGH, J

OCTOBER 23, 2024/DM

Click here to check corrigendum, if any