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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% ***Date of decision: 22nd May, 2024***
+ **ARB.P. 212/2024, I.A. 9821/2024**

PITAMBAR SOLVEX PVT LTD AND ANR. Petitioners

Through: Mr. B.B. Gupta, Sr. Advocate with
Ms. Arundhati Kajju, Mr. Sanyam
Khetarpal, Mr. Achal Gupta and Ms.
Lekha, Advocates

versus

MANJU SHARMA AND ORS. Respondents

Through: Mr. Ankit Sareen, Adv. for R-1.
Mr. Prakul and Mr. Yash Tandon,
Advocates for R-2

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

JUDGMENT (oral)

1. The present Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as the "Act, 1996"*) has been filed on behalf of the petitioners seeking appointment of an independent Arbitrator.
2. Briefly stated, Pitambar Solvex Pvt. Ltd. petitioner No.1 is a Company engaged in the business of manufacturing of edible oils, de-oiled cakes, refining of edible oils and its by-products and the respondents are the erstwhile shareholders and Directors of the petitioner No.1. Presently, the petitioner No.1 is effectively owned and controlled by the OAgri Farms



Private Limited i.e. petitioner No.2. In January, 2022 the respondent who were the founders/promoters of petitioner No.1 approached OFB Tech Private Limited and OAgri petitioner No.2 with an intent of selling them 100% shares in petitioner No.1 to OAgri. After discussions, the respondent signed and executed a term sheet, wherein the respondents projected the average Earning Before Taxes to be around Rs.17,92,00,000/- in the Financial Year 2021-22 based on the Turnover of Rs.501 Crores and 390 Crores for the years 2021-22 and 2022-23 respectively. However, the actual average EBITDA of Petitioner NO.1 as per the books for Financial Year 2021 and 2022 was approximately around Rs.4,50,36,307/- which was around 1.025%. The erstwhile shareholders had assured and represented to OAgri that EBITDA reflected in the books of accounts was not the true indicator of their valuation and the actual EBITDA was around 17.92 Crores. It is claimed that the erstwhile shareholders spun a web of life around the Management of OAgri and depicted a rosy picture that EBITDA had been achieved by utilizing only 75% of the plant capacity and there was a lot of scope for the growth of OAgri. On these representations the plaintiff No.2 and respondents entered into *Share Purchase Agreement* dated 07.10.2022 which was amended on 26.01.2022. The *Credit Facility Agreement* was also entered into between petitioner no.1 and respondent no.1, 2 and 3.

3. It is asserted that the MOU/Term sheet provided for payment of purchase consideration in Tranches, but respondent No.1 to 3 agreed to advance interest free facility of Rs.13,84,82,993/- to the Company and further subjected the repayment facility to fulfilment of indemnity obligations to the respondents under the Share Purchase Agreement. The



entire purchase consideration of Rs.92,32,19,950/- was paid to the respondents prior to the closing date i.e. 28.10.2022 which included 100% Enterprise value of Rs.84,08,25,000/- and NCA of Rs.8,23,94,950/-.

4. It is submitted that subsequently the petitioners discovered that a fraud had been played upon them as the accounting figures for the past years were false and the average MIS EBITDA of 17.92 Crores was reflected. Furthermore, the respondents failed to fulfil their obligation of providing Transitional services in achieving the operational efficiency in business and in building and maintaining relationship with the customer, which result in adverse effect on the Company. Despite having spent huge amount of Rs.92,32,19,950/- in purchase of Company, it could realize only a meagre revenue of Rs.154 Crores from its manufacturing operation from 1st November 2022 to 31st March, 2023 and Rs.2.16 Crore of EBITDA thereon.

5. The petitioners have further asserted that in order to take care of direct loss to the petitioner, the *Share Purchase Agreement* dated 07.10.2022 contained an indemnity covenant to indemnify any losses caused due to misrepresentation inaccuracy or breach of the Warranties or any wilful misconduct or fraud by any of the indemnifying person. It is asserted that the fraud had been committed upon the petitioners.

6. Thus, various disputes have been raised under the two Agreements namely Share Purchase Agreement and Credit Facility Agreement.

7. Consequently, **Notice of Invocation dated 01.12.2023** was served by the petitioner on the respondent to which a detailed reply dated 12.07.2023 has been sent by the respondents, wherein they have denied all the averments made in the Legal Notice. It was clarified that the parties had duly negotiated the terms of the Agreement. It was denied that there was



any fraud or mis-representation made by the respondents and asserted that the Notice and various amounts were in fact due from the petitioners which they asked the petitioner to clear up in order to avoid any civil litigation.

8. Notice of invocation of arbitration dated 02.12.2023 was then served by the petitioners on the respondent seeking appointment of the Arbitrator which was responded by the respondents vide reply dated 21.12.2023. Since, no Arbitrator was appointed, the present petition under Section 11(6) has been filed.

9. **Learned counsel on behalf of the respondent** has opposed the petition on the ground that there are two independent Agreements i.e. *Share Purchase Agreement* and *Credit Facility Agreement* and different parties are signatory to the two Agreements. There is misjoinder of cause of action in combining the disputes allegedly having arisen under these two Agreements. The petition is, therefore, bad on this ground.

10. It is further submitted that in fact there is no dispute inter se the parties. Rather, the amounts due from the petitioner are admitted consequent to which a petition under Section 7 IBC has been filed by the respondent in NCLT, Jaipur. It is purely to defeat the petition before the NCLT that this present petition has been filed to fake the disputes when none exist.

11. **Submissions heard.**

12. The first objection is of two independent Agreements have been clubbed in one petition. However, the learned Arbitrator shall be at liberty to register the two arbitrations separately in respect of the two Agreements, if it is found that these two Agreements constitute separate causes and cannot be clubbed together in one arbitration.



13. The second objection taken by the respondents is that there is no dispute inter-se the parties, and the outstanding amounts are admitted amounts, but there are various disputes which have been disclosed in the Legal Notice as well as Notice of Invocation of Arbitration. Moreover, that there are disputes is also evident from the Reply dated 02.12.2023 sent by the respondent in response to Notice of Invocation, where they have made claims for certain amounts as due from the petitioner. There are different amounts being claimed by the petitioner and the respondent and prima facie at this stage it cannot be said that there are no inter-se disputes between the parties.

14. It has been pointed out by the counsel for the petitioner that the disputes had arisen followed by Legal Notice much prior to the filing of the petition under Section 7 IBC and, therefore, the claim of the respondent that this petition for appointment of arbitrator is malafide, is not tenable.

15. Merely initiation of the arbitration proceedings does not bar the corporate debtor from pursuing his other remedies including those under the Insolvency Bankruptcy Code. Without prejudice to the rights and contentions of the parties, which they are at liberty to agitate before the Arbitrator, Justice Mukta Gupta (Retd.) 9650788600 is hereby appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

16. The parties are at liberty to raise their respective objections before the Arbitrator.

17. This is subject to the Arbitrator making necessary disclosure as under Section 12(1) of A&C Act, 1996 and not being ineligible under Section 12(5) of the A&C Act, 1996.

18. The appointment of the Arbitrator shall be governed by the rules



framed by the DIAC including the fees and the disclosure to be made by the learned Arbitrator in conformity of Section 12 of the Arbitration and Conciliation Act, 1996.

19. Learned counsels for the parties are directed to contact the learned Arbitrator within one week of being communicated a copy of this Order to them by the Registry.

20. A copy of this Order be also forwarded to the learned Arbitrator, for information.

21. The petition is accordingly disposed of in the above terms.

(NEENA BANSAL KRISHNA)
JUDGE

MAY 22, 2024
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