* IN THE HIGH COURT OF DELHI AT NEW DELHI

% ***Reserved on: 31st May, 2022***
Decided on: 07th October, 2022

\+ **ARB.P.809/2019**

ESHA KEDIA

P 12 Hauz Khas Enclave,
New Delhi- 110016 ..... Petitioner

Through: Mr. Arun Saxena, Advocate (appeared through video conferencing).

versus

1. **MILAN R. PAREKH**
314- Veena Vihar,
17 A Fla.nk Road,
Sion Mumbai-400022

2. **BAKUL R. PAREKH**

Flat No.7/B,3rd Floor,
Ashish Building,
Plot No. 253, Sion
Matunga Main Road,
Sion Mumbai-400022

3. **M/S ACTION-FINANCIAL SERVICES (INDIA) LIMITED**

46 & 47 Rajgir Chambers, 6th Floor,
12/14, Shahid Bhagat Singh Road,
Fort, Mumbai. ..... Respondents

Through: Mr. Sanjay Mann, Advocate (appeared through video conferencing).

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CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G E M E N T

1. The present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 *(hereinafter referred to as* 'A&C Act, 1996'*)* seeking appointment of an independent and impartial arbitrator for adjudication of disputes having arisen between the parties.

2. It is submitted that the respondent Nos. 1 and 2 are brothers and are in the business of share broking for the last 35 years. The respondent No. 3-M/s Action Financial Services India Limited is a Company registered under the provisions of Companies Act, 1956, having its registered office at 31, Rajgir Chambers, 4th Floor, 12/14, ShahidBhagat Singh Road, Fort, Mumbai and is listed with Bombay Stock Exchange through respondent No. 1-Director, *vide* Resolution of Board of Directors dated 13th March, 1995.

3. The petitioner and the respondents entered into a Memorandum of Understanding *(hereinafter referred to as* 'MoU'*)*dated 01st April, 2012 for the purpose of share broking business, wherein the respondent Nos. 1 and 2 agreed to take the petitioner as their business partner as per the terms and conditions enshrined in the MoU dated 01st April, 2012.

4. The petitioner decided to exit from the business partnership with the respondents and they entered into an Exit MoU dated 14th November, 2014, containing terms and conditions for the exit of the petitioner from the business. The respondents failed to comply with the Exit MoU dated 14th November, 2014 and also requested the petitioner not to initiate any legal action for recovery of the money and an addendum MoU dated 16th

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February, 2016 was executed between the parties, containing the terms and conditions for the exit of the petitioner. However, the respondents failed to abide by the Addendum Agreement as well and miserably failed to carry out their reciprocal obligations.

5. The petitioner sent a Letter dated 20th May, 2018 to the respondents, demanding her legitimate payments, but the respondents neither expedited nor made the payments and nor did they comply with the MoU dated 16th February, 2016. The respondents *vide* their Letter dated 07th June, 2018 denied the claims of the petitioner and failed to come forward to solve the disputes between the parties.

6. The disputes and differences have thus arisen between the parties. Clause 9 of the MoU provides for Arbitration for resolution of the disputes, which reads as under:

> ***"Clause 9 –***
> *This MoU shall be governed by or construed and enforced in accordance with laws of India. In case of any dispute with respect to any clause of this MoU, the matter will be referred to the joint arbitrators duly nominated each by the party of the third part and party of the first part and second part as per the provisions of Arbitration and Conciliation Act, 1996 and the jurisdiction of arbitration shall be in Delhi only."*

7. Left with no option, the petitioner wrote a Letter dated 16th July, 2018 to the respondents for Invocation of Arbitration Clause and nominated Mr. Justice V.K. Shukla, former Judge of Allahabad High Court, as the Arbitrator in accordance with the terms and conditions enumerated in MoU dated 14th November, 2014 to adjudicate upon the claims of the petitioner. However, the respondents *vide* their Letter dated 06th August, 2018 refused

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to accept the Arbitrator nominated by the petitioner and also failed to honour the provisions of the A&C Act, 1996 for appointment of Arbitrator.

8. It is asserted that the petitioner tried to settle the disputes by way of negotiation and even fixed a meeting with the respondents in November, 2018 but the respondents have been delaying the payments even after negotiations. Hence, a final legal Notice dated 20th May, 2019 was sent to the respondents, in response to which the respondents *vide* their Letter dated 13th June, 2019 demanded the copy of MoU dated 14th November, 2014 along with the addendum to the said MoU. It is claimed that the letter of the respondents is only a sham exercise to delay the payments. No steps have been taken by the respondents to discharge their liability or to make payments and the attempts to settle the disputes through negotiations have failed. Hence, the present petition has been filed for appointment of an independent and impartial arbitrator to resolve the disputes having arisen between the parties.

9. **The respondents in their Reply** have taken a preliminary objection that there exists no Arbitration Agreement between the parties as is claimed to be contained in the two MoUs. It is asserted that the two MoUs never fructified and the same were not executed by all the parties. The MoUs are incomplete and unenforceable.In the absence of validly entered into Agreement based on which the alleged disputes purportedly have arisen between the parties, the alleged disputes cannot be referred to arbitration.

10. It is explained that MoU dated 01st April, 2012 was entered into between the petitioner and the respondents but it contained no Arbitration Agreement. Subsequently, the Addendum Agreementswere executed which provided for an Arbitration clause *inter alia* for redressal of disputes

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between the parties. However, MoU dated 14th November, 2014 and an Addendum MoU dated 16th February, 2016 are not valid and legal. The MoU dated 14th November, 2014 was not executed in the manner as disclosed by the petitioner. It is not signed and executed at New Delhi. The respondent Nos. 1 and 2 signed the same at Mumbai under threat and coercion, when the father of petitioner was visiting Mumbai and the petitioner was not even present. The MoU was supposed to be signed by the petitioner and then sent back for the same to be accepted and executed on behalf of the confirming party i.e., the respondent No. 3-M/s Action Financial Services India Limited. The MoU dated 14th November, 2014 was never sent to confirming party and was not placed before the Board of Directors. The respondent No. 3 is a listed Company and any agreement/MoUexecuted on its behalf, is required to be placed before the Board of Directors for approval and authorization. The respondent No. 3, the confirming party is not a signatory to MoU dated 14th November, 2014 and the addendum MoU dated 16th February, 2016 and thus two MoUs are not signed by all the parties. The agreement is, therefore, not enforceable, being *void ab initio*.

11. It is further asserted that the petitioner has concealed material facts in regard to the Understanding which was arrived at in MoU dated 14th November, 2014 and the addendum MoU dated 16th February, 2016, which did not fructify as binding and concluded Agreements. The parties had to execute further documents and deeds concerning 40% shareholders, who had invested in the equity shares in the said Company. The parties had to evolve a scheme whereunder 40% shares in the Company could be redistributed to

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the public at large as the petitioner had begun to claim that the investment by such shareholders was arranged by the petitioner.

12. In this context, an Understanding was reached that the respondents would pay the amount mentioned in the MoU dated 14th November, 2014 and the addendum MoU dated 16th February, 2016 in the manner provided therein but it was subject to another Agreement, being duly concluded for dealing with 40% shareholdings. It is for this reason that the Company though mentioned as confirming party in the two MoUs, did not execute any of those documents which were to be undertaken once the Agreement regarding the manner of dealing with 40% shareholdings was sorted out in accordance with law.

13. The essence of payments mentioned in the MoU was the consideration of the shareholding issues being appropriately sorted out. It was not that the payments were to be made to the petitioner without the shareholding issue being finalized. This is more so when 40% shareholding was not held by the petitioner but others and the petitioner was required to arrange for the shares to be transferred to the persons in public and the amount realized was to be adjusted and the scheme for the above was to be formulated consistent with law. These aspects did not materialize as the persons who were holding 40% shares, had mostly transferred/sold their shareholdings in the Stock Exchange and the entire scheme proposed in the MoU dated 14th November, 2014 and the addendum dated 16th February, 2016 was not implemented.

14. It is further asserted that the stamp paper for MoU dated 16th February, 2016 was apparently procured on 17th February, 2016 i.e., one day after the alleged execution of MoU dated 16th February, 2016. It is evident

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that this MoU is forged and fabricated document, which is not admissible in evidence.

15. Moreover, the stamp papers of rupees one hundred each for the MoU dated 14th November, 2014 and the addendum MoU dated 16th February, 2016 are in the name of the petitioner and the respondent No. 3 but the two MoUs are not executed/signed by the respondent No. 3, despite being made a party to the Agreement. The MoU dated 16th February, 2016 is not even signed by any witness.

16. It is further stated that even otherwise as per the MoU dated 14th November, 2014, the parties to the Agreement could not alienate the shares held by them without the approval or permission of the other party. However, the shareholding of the petitioner has reduced during this period. The petitioner has violated the terms of the MoU and has maliciously concealed the material facts. A party which conceals the facts and circumstances, is not entitled to any relief as per law. The petitioner has failed to fulfill the pre-requisite condition and has liquidated her shares in open market. Further, the petition is barred by limitation as it has been filed beyond a period of three years from the date of alleged cause of action.

17. It is thus submitted that the petition is without merit and is liable to be dismissed.

18. **The petitioner in her Rejoinder** has re-affirmed the assertions made in the petition and has denied that the MoUs were not validly executed. It is further submitted that the question as to the validity of the Agreements is to be decided by the Arbitral Tribunal after taking evidence along with the merits of the case.

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19. It is further asserted that the MoU dated 01st April, 2012 was entered into between the parties to do share broking business and is not a subject matter of present dispute nor for invoking the arbitration clause. The MoUs dated 14thNovember, 2014 and 16th November, 2016 are duly signed by the petitioner. It is denied that the respondent Nos. 1 and 2 had signed the MoU at Mumbai under the threat and coercion. If so was the case, there is no explanation why they did not take any steps in the last more than five years to repudiate them.

20. It is further asserted that though the respondents are making conflicting statements but even if it is accepted that valid issues have been raised, they are all triable issues which are required to be proved by way of evidence and can be raised in the arbitration proceedings.

21. The last and final demand of payment was raised in May, 2019 and the present petition is within limitation. It is, therefore, submitted that the present petition is maintainable and the Arbitrator may accordingly be appointed.

22. **Submissions heard.**

23. **The first objection taken in the Reply by the respondents** is that the MoU dated 01st April, 2012 was executed between all the parties, including the respondent No. 3, but it contained no Arbitration Agreement. Subsequently, the MoU dated 14th November, 2014 and the Addendum MoU dated 16th February, 2016 were executed, but they are not valid and legal documents. It is asserted that from the bare perusal of the documents, it is evident that the Stamp Paper has been purchased apparently on 19th August, 2014, while the document has been executed on 14th November, 2014. The Stamp Paper for the Addendum MoU has been

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purchased on 17th February, 2016, while as per the contents of the Addendum MoU, the same was executed on 16th February, 2016. Furthermore, both the MoU dated 14th November, 2014 and the Addendum MoU dated 16th February, 2016 are claimed to have been signed at New Delhi, but in fact, the parties were never together at New Delhi. The MoU dated 14th February, 2014 was signed between respondent Nos. 1 and 2 at Mumbai under the threat and coercion of father of the petitioner who was visiting Mumbai and the petitioner was not present at the time of signing of the documents. It was argued that the MoU was never signed at Delhi as is mentioned in the two documents.

24. The basic plea which is being taken is that these two documents were signed under threat and coercion and not at Delhi. Be that as it may, it is not disputed that both MoU dated 14th November, 2014 and Addendum MoU dated 16th February, 2016 have been signed by both the respondent Nos. 1 and 2 as well as the petitioner and the MoU dated 14th November, 2014 contains Clause 9 providing for Arbitration and, therefore, there exists a binding Arbitration Clause in writing between the petitioner and the respondent Nos. 1 and 2. Further, no averment of threat and coercion has been pleaded in respect of Addendum MoU dated 16th February, 2016. The plea that the signatures were obtained by threat and coercion cannot be considered while considering the Application under Section 11 of A&C Act, 1996 for appointment of the Arbitrator.

25. The other argument taken is that the Stamp Paper of the Addendum MoU dated 16th February, 2016 has been purchased a day after the document was alleged executed on 17thFebruary, 2016 which again shows that it is not a genuine document. However, the Stamp Paper may have been purchased

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subsequently but it cannot be denied at this stage what the Court has to consider is that *prima facie* there exists an Arbitration Agreement in writing. The MoU dated 14th November, 2014 and Addendum MoU dated 16thFebruary, 2016 admittedly bear the signatures of the petitioner and the respondent Nos. 1 and 2. Any challenge to the genuineness of the said document or any issue of threat and coercion in signing the said documents by respondent Nos. 1 and 2 cannot be a subject matter of adjudication in the present petition. The parties are at liberty to raise these issues before the Arbitrator.

26. The other limb of the arguments is that neither MoU dated14th November, 2014 nor Addendum MoU dated 16th February, 2016 bears the signature of the respondent No. 3 and, therefore, there being no written Agreement to refer the disputes to arbitration vis-à-vis respondent No. 3, the matter cannot be referred to arbitration.

27. In this context, it has been submitted on behalf of the petitioner that essentially the MoU dated 14th November, 2014 as well as Addendum MoU dated 16th February, 2016 imposes liabilities on respondent Nos. 1 and 2 and the respondent No. 1is, in fact, the MD of respondent No. 3.Therefore, the signatures by him on the MoU can also be deemed to be the signatures on behalf of respondent No.3-Company.

28. This has been countered by the counsel for the respondents who has asserted that the respondent No. 3 being a Company, respondent No.1 cannot be considered competent to sign any MoU or Addendum thereby unless it is approved by the Board of Directors by way of a Resolution. These two documents were never before the Board of Directors and, therefore, the respondent No.3 cannot be held bound under those two documents.

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29. The arguments addressed on behalf of respondent No. 3 have some merit, but the courts have evolved the concept of *"Group of Companies"*.

30. In this regard, as per the principles of contract law, an agreement entered into by one of the Companies in a group, cannot be binding on the other members of the same group, as each Company is a separate legal entity which has separate legal rights and liabilities. However, in certain exceptional circumstances, an arbitration Agreement can be binding on non-signatories. The Group of Companies doctrine was first applied in the case of *Dow Chemical v. Isover-Saint-Gobain, (1984 Rev Arb 137)*. The said doctrine irrespective of the distinct juridical identity of each of its members, rests on the concept of a 'single economic reality'. In other words, the doctrine states that a group of companies constitutes one and the same economic reality of which the arbitral tribunal should take account when it rules on its own jurisdiction. The Hon'ble Supreme Court in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641* referred to two theories that could be applied to compel non-signatories to an arbitration agreement to arbitrate, these are: (i) Theory of Implied Consent; this theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle.; (ii) Theory of the legal doctrines of agent-principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. This theory does not rely on the parties' intention but rather on the force of the applicable law. The issue whether a non-signatory can be referred to Arbitration has been exhaustively dealt by the Delhi HC in *Shapoorji Pallonji& Co. Pvt. Ltd. v. Rattan India Power Ltd. & Anr., (2021) 281 DLT 246*, wherein it was observed that the Courts in different jurisdictions have

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evolved various principles on the basis of which, in certain exceptional circumstances non-signatories may be compelled to arbitrate. Placing reliance on Supreme Court & other foreign judgements, this court concluded that when a party is a direct beneficiary of the contract then it can be compelled to arbitrate. Further, a non-signatory Company which is an alter ego to a signatory can also be compelled to arbitration. The Court also held that a non-signatory can be compelled to arbitration under equitable estoppel principles, because it received a copy of the contract, did not object to it, offered no persuasive reason for its action and knowingly accepted benefits of contract. Further, in *Mahanagar Telephone Nigam Ltd. v. Canara Bank, VIII (2019) SLT 188=IV (2019) BC 371 (SC)=(2020) 12 SCC 767* , one of the principal controversies raised before the Supreme Court was whether CANFINA, who was a subsidiary of Canara Bank and was also the initial subscribers to the bonds issued to MTNL, should be made a party to the arbitration. The Supreme Court applied the doctrine of 'Group of Companies' and held that CANFINA was undoubtedly a necessary and proper party to the arbitration proceedings. It was observed that a non-signatory can be bound by an arbitration agreement on the basis of the "Group of Companies" doctrine where the conduct of the parties evidences a clear intention of the parties to bind both the signatory as well as the non- signatory parties. Courts and Tribunals have invoked this doctrine to join a non-signatory member of the group, if they are satisfied that the non-signatory company was by reference to the common intention of the parties, a necessary party to the contract. Where an Arbitration Agreement is entered into by one of the Companies in the group, the non-signatory affiliate or sister or parent concern is held to be bound by the Arbitration Agreement, provided that the

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facts and circumstances of the case demonstrate that it was the mutual intention of all parties to bind both the signatories and the non-signatory affiliates in the group. The doctrine provides that a non-signatory may be bound by an arbitration agreement where the parent or holding Company, or a member of the Group of Companies is a signatory to the arbitration agreement and the non-signatory entity on the group has been engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, the non-signatory will also be bound and benefitted by the relevant contracts.

31. The circumstances in which the "Group of Companies" doctrine could be invoked to bind the non-signatory affiliate of a parent Company, or inclusion of a third party to an arbitration are- if there is a direct relationship between the party which is a signatory to the arbitration agreement; direct commonality of the subject-matter; the composite nature of the transaction between the parties is the same. A "composite transaction" refers to a transaction which is interlinked in nature; or, where the performance of the agreement may not be feasible without the aid, execution, and performance of the supplementary or the ancillary agreement, for achieving the common object, and collectively having a bearing on the dispute.

32. Recently, the Delhi High Court in *Shivakritit Agro (P.) LTD. v. UmaizaInfracon LLP &Ors., 2022(1) R.A.J. 130(Del)*,observed that there is no dispute on the proposition that the scope of an Arbitration Agreement is limited to the parties who entered into it & those claiming under or through them. However, under exceptional circumstances, a non-signatory or third party can also be subjected to arbitration. The Court relied on its judgement in *Shapoorji Pallonji& Co. Pvt. Ltd. v. Rattan India Power Ltd. & Anr.,*

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(2021) 281 DLT 246, and held that, keeping in mind that (a). the non-signatories are the alter ego of the signatories, (b). the subject matter of the agreement, (c). the direct commonality of the subject matter viz. the assets of the non-signatory and (d). the composite nature of the transaction between the parties which is interlinked, the reference of disputes would not be feasible without the aid off the non-signatory.

33. While the Courts have invoked the Group of Companies doctrine to refer a non-signatory party Company to arbitration, but considering that *prima facie* the respondent No. 3 is not a party to the Arbitration Agreement, though respondent No.1 who is MD of respondent No. 3 has signed in his personal capacity, it is left open for the parties to move an appropriate application for impleadment of respondent No. 3, if so advised.

34. The other arguments raised on behalf of the respondents is that though MoU dated 14th November, 2014 nor Addendum MoU dated 16th February, 2016 were signed but they did not fructify into binding Agreements as the parties failed to evolve the security and to redistribute the shares as was mentioned in the two documents. It is quite evident from these submissions that because the terms of two documents were not complied with, the disputes have arisen between the parties which require adjudication. In fact, this assertion of the respondents clearly reflects the existence of arbitrable disputes between the parties which require adjudication.

35. The third challenge which has been raised is in respect of the limitation. It is asserted that the two documents viz. **MoU** are dated 14th November, 2014 and **Addendum MoU** dated 16th February, 2016, while the present petition has been filed only in 2019. In the case of *Vidya Drolia and Ors vs. Durga Trading Corporation* (2019) SCC Online SC 358, it has been

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observed that the question of limitation is a mixed question of fact and law, and the thumb rule is *'when in doubt refer'*.

36. In the present case, there is a binding Clause 9 in the Agreement document which is signed by the petitioner and the respondent Nos. 1 and 2.

37. Considering that there is a valid Arbitration Agreement between the parties (petitioner, respondent Nos. 1 and 2) and in the light of the facts and submissions made, Mr. Justice Brijesh Sethi, Judge (Retd.) Delhi High Court, Mobile Nos. 9810957380 and 9910384669, is hereby appointed as the Sole Arbitrator to adjudicate the disputes between the parties (petitioner, respondent Nos. 1 and 2).

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

39. 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. This is without prejudice to the rights and contentions of the parties, which are expressly reserved for adjudication by the Arbitrator.

40. The fees of the learned Arbitrator would be fixed in accordance with the Fourth Schedule to A&C Act, 1996 or as may be otherwise agreed between the Arbitrator and the parties.

41. It will be open to the petitioner to make an application before the Arbitrator for impleadment of respondent No. 3-Company.

42. 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.

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

(NEENA BANSAL KRISHNA)
JUDGE

OCTOBER 7, 2022
S.Sharma

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