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

+ W.P.(C) 16203/2024

SUMANA VERMA

.....Petitioner

Through: Mr. Ashish Dholakia, Senior Advocate with Mr. Sambit Nanda, Ms. Samaya Khanna, Mr. Subodhday, Advocates

versus

ARTI KAPUR & ANR.

.....Respondents

Through: Mr. Murari Tiwari, Mr. Rahul Kumar, Ms. Nimisha Gupta, Mr. Manoj Kumari, Mr. Arvind Pandey, Advocates

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

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25.11.2024

CM APPL. 68091/2024 (Exemption)

1. Exemption is granted, subject to all just exceptions.
2. The Applicant shall file legible and clearer copies of exempted documents, compliant with practice rules, before the next date of hearing.
3. Accordingly, the application stands disposed of.

CM APPL. 68090/2024 (for stay)

4. The present petition impugns order dated 26th October, 2024,¹ passed by the Sole Arbitrator in arbitration case No. DIAC/5257/09-22. These ongoing arbitration proceedings between Petitioner and Respondent No. 1

¹ "the impugned order"



arise from the “Subscription and Shareholding Agreement”² executed in July, 2004.

5. Undisputedly, the Agreement contains an arbitration clause and Respondent No. 1 instituted an arbitration petition bearing No. ARB. P. 497/2021 under Section 11 of the Arbitration and Conciliation Act, 1996.³ By order dated 9th September, 2022, the parties were referred to arbitration under the aegis of Delhi International Arbitration Centre,⁴ Respondent No.2.

6. The Petitioner was directed to submit their statement of defence, which she duly filed. During the hearing held on 29th July, 2024, the Petitioner expressed her inability to deposit her share of the arbitral fees due to financial constraints. The Arbitral Tribunal, however, directed her to pay the fees, cautioning that legal consequences would follow in case of non-compliance. Despite several reminders from the Tribunal, the Petitioner did not deposit her share of the fees. Subsequently, through the impugned order, the Petitioner’s defence was struck off on account of non-payment of fees of DIAC. To this effect, the Arbitral Tribunal made the following observations:

“6. Section 38(2) obligates the parties to bear arbitral expenses equally however the proviso reads:

Provided that where one party fails to pay his share of the deposit, the other party may pay that share:

If in case the Claimant also does not deposit the share of the Respondent’s fee the Proceedings may be terminated.

7. A provision of law cannot be read and interpreted in a way that one of the parties take the undeserving advantage of the situation. While entering into the Agreement and incorporating the arbitration clause the Respondent has impliedly undertaken the obligation to bear the expenses also. If it had no intention to pay the cost, the Agreement ought to have provided that one party shall bear all the expenses.

8. It is not the case of the Respondent that it is beyond its financial

² “the Agreement”

³ “the Arbitration and Conciliation Act”

⁴ “DIAC”



capacity to pay but has adopted an attitude of arms twisting and insisting that the Claimant should pay the price of invoking the arbitration clause. Such an attitude is in utter disregard to the spirit and objectives of Act 1996 itself.

9. In **Union Of India vs M/S Narinder Singh And Sons**, 2017 SCC OnLine P&H 5449, the Punjab & Haryana High Court held that the Arbitrator was right in striking off defence after giving an opportunity to pay the cost. The Supreme Court while dealing in appeal against the aforementioned judgment in **Narinder Singh & Sons v. UOI**, 2021 SCC OnLine SC 1082, directed as under:

“The appellant and the respondent would equally bear the said fee and expenses. The respondent would pay 50% of the arbitration fee and expenses to the learned arbitrator within one month from the date of the first hearing. The appellant would pay its share of 50% fee on the date when the final arguments commence. We have made the aforesaid direction in view of the conduct of the respondent in not paying their share of fee and expenses to the earlier arbitrator. We hope and trust that the parties would cooperate with the learned arbitrator now appointed to ensure expeditious disposal.”

10. While dealing with the similar case in **SGM Packaging Industries v. Goyal Plywood LLP**, AIR 2022 P&H 123, the Hon'ble High Court of Punjab & Haryana upheld the order of the Arbitral Tribunal striking off the defence of the Respondent for non-payment of fees of its share.

11. In the instant case, the Tribunal gave several reminders to the Respondent to deposit its share of fees, as is evident from the Orders dated 05.07.2024, 29.07.2024, 28.08.2024, and 03.10.2024. A party cannot be permitted to create a situation to succeed without trial as no one can take advantage of its mistake. (**Vide: G.S. Lamba v. Union of India**, (1985) 2 SCC 604)

12. The Respondent's non-compliance with the directions of the Tribunal and DIAC in spite of the various opportunities given to it, the Tribunal deems it appropriate to strike off the defence of the Respondent. However, the Respondent will have the right to cross-examine the witness of the Claimant and advance the submissions on merit.

13. The matter is listed for cross-examination on 27.11.2024 from 2 PM to 5 PM and on 28.11.2024 from 4 PM to 7 PM in physical mode. The Learned Counsel for the Respondent would cross-examine the Claimant's witness. The DIAC will make the arrangement for the same and will inform all concerned in advance.”

7. Mr. Ashish Dholakia, Senior Counsel for the Petitioner, submits that the instant case falls under rare and exceptional circumstances warranting



interference of this Court to exercise under Article 226 of the Constitution of India, 1950 as held by the Supreme Court in *Deep Industries Limited v. Oil and Natural Gas Corporation Limited and Another*.⁵

8. He contends that the Arbitral Tribunal has failed to consider that closing a parties' right to contest the arbitral proceedings is an extreme measure curtailing the substantive right of the parties which could only be exercised if a specific power to do so is provided under the framework of the Arbitration and Conciliation Act or the Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2023.⁶ He further submits in terms of Section 38 Arbitration and Conciliation Act and Rule 33 of the DIAC Rules, Respondent No. 1/Claimant can be directed to pay the balance arbitral fee. However, if Respondent No.1 refuses to pay the arbitral fee, then DIAC could either terminate the proceedings, or continue with the arbitration proceedings, in which case the DIAC would have had a lien on the arbitral award in terms of Section 39 of the Arbitration and Conciliation Act. In such circumstances, the Arbitral Tribunal ought not to have taken the unprecedented and exceptional step of striking off of the defence.

9. Contrarily, Mr. Murari Tiwari, counsel for the Respondents, strongly defends the impugned order and argues that Petitioner having consented to arbitration, must also bear her share of the arbitral fee. He further submits that the observations made by the Arbitral Tribunal are based on the case law relating to the issue, which is no longer *res integra*. It is evident in the present case that Petitioner has not complied with directions of the Arbitral Tribunal to pay their share of the fees, and therefore, the Tribunal was

⁵ (2020) 15 SCC 706

⁶ "the DIAC Rules"



justified in passing the impugned order, having regards to the facts and circumstances of the case.

10. Having considered the afore-noted contentions, the Court is *prima facie* convinced with the submissions advance by Mr. Dholakia as noted above. The Court recognizes that its jurisdiction under Article 227 of the Constitution is supervisory and is to be exercised sparingly. However, interference is warranted when there is a manifest disregard of justice or a fundamental violation of procedural law. Section 38(2) of the Arbitration and Conciliation Act stipulates that parties shall deposit equal shares of the arbitral fees. The first proviso to Section 38(2) allows the other party to pay the other party's share who fails to pay and the second proviso provides that if the required deposits are not paid, the Arbitral Tribunal may suspend or terminate the proceedings. Thus, the Arbitral Tribunal ought to have taken recourse to the provisions of the Arbitration and Conciliation Act, if the Petitioner had not paid the arbitral fee, rather than striking off of the defence. The Sole Arbitrator could have allowed the proceedings to continue, with the Claimant bearing the costs initially, subject to recovery in the final award. The drastic action of striking off the statement of defence, which is not premised on any specific provision in the Arbitration and Conciliation Act, exceeds the jurisdiction of the Arbitral Tribunal.

11. In view of the foregoing, till the next date of hearing, the Arbitral proceedings in case No. DIAC/5257/09-22 pending before the Sole Arbitrator under the aegis of DIAC shall remain stayed.

12. The Registry is directed to communicate the copy of the order to Respondent No.2 on delhiarbitrationcentre@gmail.com.

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13. Issue notice. Counsel represented for Respondents mentioned above accepts notice. Counter affidavit be filed within a period of four weeks from today. Rejoinder thereto, if any, be filed within a period of two weeks thereafter.

14. Re-notify on 22nd January, 2025.

SANJEEV NARULA, J

NOVEMBER 25, 2024/ab