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BEFORE RETIRED JUSTICE SAMARTH PANDA, FORMER JUDGE OF THE SUPREME COURT OF INDIA, HON'BLE SOLE ARBITRATOR AT NEW DELHI

IN THE ARBITRAL PROCEEDINGS BETWEEN:

CALLBURRY PRIVATE FINANCIAL SERVICES LIMITED

CLAIMANT

AND

NESTELL PRIVATE LIMITED AND OTHERS

RESPONDENTS

BRIEF FACTUAL OVERVIEW OF THE CLAIM

1. Callburry Private Financial Services Limited is Non-Banking Financial Company registered under the Companies Act, 2013, having its registered office at 13th Floor, Callburry Towers, New Delhi-110001, and engaged in the business of providing loans and advances (hereinafter referred to as "**Claimant**").
2. Nestell Private Limited is a company registered under the Companies Act 2013, having its registered office at 8th Floor Tower B, Lindt Complex, Gurugram, Haryana 122002 and engaged in the manufacturing of IT hardware (hereinafter referred to as "**Respondent No. 1**").
3. Mr Gaurav Krishnan and Mr Rahul Prasad were the Directors of Nestell Private Limited (hereinafter referred to as "**Respondent No. 2**" and "**Respondent No. 3**" respectively). Mr Gaurav Krishnan is a citizen of the United Kingdom since 2015. All investments and positions held by him in Respondent No. 1 Company or otherwise in India, are in line with the applicable notifications, orders and circulars of the Reserve Bank of India and any other applicable law. Further, and all compliances and permissions, where applicable, have been complied with.
4. A "Loan Agreement" executed on 06 January 2018 between the Claimant and Respondent No. 1 whereunder Respondent No. 1 would receive a sum of INR 60,00,00,000 (Indian Rupees Sixty Crore only) from the Claimant. As per the Loan Agreement, Respondent No. 2 and Respondent No. 3, the Directors in Respondent No. 1 acted as personal guarantors for the repayment of the loan extended to Respondent No. 1 and had executed an undertaking in relation thereto. Under the said Deed of Personal Guarantee, the Respondents No. 2 and 3 provided an undertaking to the Claimant to pay the unpaid outstanding amounts and discharge all obligations and liabilities of the Respondents No. 1 under the Loan Agreement.
5. Respondent No. 2 and Respondent No. 3 were also Directors and on the boards of the three other companies - FiveStar Limited, Toblerr Limited and MarsKing Limited. All three companies have their registered offices in Gurugram, Haryana. Further, Respondent Nos. 1, 2 and 3 held certain

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shares in the aforesaid companies, not constituting a majority shareholding. This had been disclosed to the Claimant at the time when the Loan Agreement had been executed. In any event, FiveStar Limited, Toblerr Limited and MarsKing Limited were not signatories to the Loan Agreement.

Relevant Terms of the Loan Agreement

For the purpose of the Agreement, Callburry Private Financial Services Limited has been referred to as the "**Lender**", Nestell Private Limited as the "**Borrower**" and Mr Gaurav Krishnan and Mr Rahul Prasad have collectively been referred to as "**Guarantors**" and all the aforesaid may have been referred to as "**Party**" or collectively as "**Parties**".

(a) **Clause 1.2:**

"Interest Payment Date" shall mean the last calendar date of every calendar month and if such date is not a Business Day then the immediately following Business Day;

(b) **Clause 3:**

End Use: The funds received under this Agreement were to be used for the following purposes:

- i. For repayment of the loans extended by Toblerr Limited to the Borrower that have become due; or
- ii. For the reduction of debt in Toblerr Limited; or
- iii. For general corporate purposes.

(c) **Clause 4.2:**

Interest: The Borrower is liable to pay interest of 9% p.a., on a monthly basis, after the lapse of a period of 12 months from the date that the loan amount is transferred to the entities. No interest shall be payable for the period of 12 months from the date that the loan amount is transferred to the entities.

(d) **Clause 4.4:**

Default Interest: The Borrower shall be liable to pay the Lender default interest at the rate of 2% p.a. for any delay in payment of interest, fees, costs, charges payable under this Agreement on such amount as may be overdue

(e) **Clause 4.4:**

Repayment Date: The principal amount of INR 60,00,00,000 is to be repaid on 06 November 2020.

(f) **Clause 7.2:**

(1) The Borrower shall ensure that within a period of thirteen months from the date that the loan amount is transferred to the entities that a security is created by way of pledge over

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equity shares of FiveStar Limited and / or Toblerr Limited and/or mortgage by way of a mortgage over properties acceptable by the Claimant, to ensure that the collateral cover for the Loan Outstanding Amounts shall be at least 1.2x.

- (2) On or before expiry of 24 months from the date that the loan amount is transferred to the entities, the Borrower shall ensure that collateral cover over the security referred to in Clause 7.2.1. is increased to 1.9X of the Loan Outstanding Amount.

(g) **Clause 12.2:**

The Borrower and the Guarantors are prohibited from:

- i. Issuing any fresh equity or preference shares or any other instruments convertible into equity or preference shares by FiveStar Limited, Toblerr Limited and MarsKing Limited:
- ii. Sell, transfer or dispose of shares in FiveStar Limited, Toblerr Limited and MarsKing Limited held by Respondent No. 2 and Respondent No. 3 without prior consent of Callburry Private Financial Services Limited.

(h) **Clause 12.3**

The Guarantors shall at all times hold shares aggregating to a value of INR 50,00,00,000 of FiveStar Limited and Toblerr Limited free and clear from encumbrance.

(i) **Clause 12.4**

The Lender, the Borrower and the Guarantors, shall execute a Share Pledge Agreement in terms of the Loan Agreement whereby 10,00,000 compulsorily convertible preference shares ("CCPS") of MarsKing Limited, which were held by the Guarantors were pledged in favour of the Claimant ("**Share Pledge Agreement**").

(j) **Clause 13**

Governing Law

This Agreement, and all non-contractual obligations arising from or in connection with this Agreement, is governed by Indian law.

(k) **Clause 14.1**

Arbitration

Any disputes arising out of this Agreement shall be settled in accordance with provisions of the Arbitration and Conciliation Act, 1996.

- i. The Parties shall mutually appoint a sole arbitrator to conduct the arbitration proceedings. In case the Parties fail to so appoint the sole arbitrator then the

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arbitrator/arbitrators shall be appointed in accordance with provisions of the Arbitration and Conciliation Act, 1996.

- ii. The venue for arbitration shall be Delhi and the language for arbitration shall be English.
- iii. Any award made by the arbitrator shall be final and binding upon the Parties and shall be enforceable against each one of them.

(l) **Clause 14.2**

Jurisdiction of Courts

Subject to Clause 14.1, the courts in New Delhi shall have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement.

6. On 10 January 2018, Callburry Private Financial Services Limited, Nestell Private Limited and the Guarantors, Mr Gaurav Krishnan and Mr Rahul Prasad executed a Share Pledge Agreement in terms of Clause 12.4 of the Loan Agreement whereby 10,00,000 compulsorily convertible preference shares ("CCPS") of MarsKing Limited, which were held by the Guarantors were pledged in favour of the Claimant. On the same date the principal amount of INR 60,00,00,000 was released.
7. On 06 June 2019, the Claimant issued a notice to Respondents No. 1, 2 and 3 requiring them to create security in terms of Clause 7.2.1 of the Loan Agreement by 06 July 2019. However, as on 10 July, the Respondents failed to create requisite security to ensure that security cover for the outstanding loan amount stood at 1.2X thereof.
8. On 09 July 2019, the Claimant issued a notice addressed to Respondents No. 1, 2 and 3 recording the fact of failure on its part to create security in terms of the Loan Agreement.
9. Further, on 31 July 2019 and 31 August 2019, Respondent No. 1 defaulted in making payments towards interest in terms of the Loan Agreement. Respondents No. 1, 2 and 3 assured the Claimant that they would make the requisite payments and no further action was taken.
10. On 06 September 2019, the Claimant, Respondent No. 1, Respondent No. 2 and Respondent No. 3 entered into an agreement pursuant to Share Pledge Agreement whereby the 10,00,000 CCPS of MarsKing Limited pledged in favour of the Claimant were converted into equity shares.
11. Subsequently, on the expiry of 24 months, i.e., on 10 January 2020, the Claimant found that Respondent No. 1 had failed to ensure that the security cover of the outstanding loan amount stood at 1.9X thereof as required under Clause 7.2.2 of the Loan Agreement.

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12. Further, Respondent No. 1 had defaulted on making the requisite interest payments yet again for the months of November 2019 and December 2019. On 15 January 2020, the Claimant issued notices recording such default of the terms of the Loan Agreement for breach thereof to Respondent No. 1, Respondent No. 2 and Respondent No. 3 demanding payment of the interest that had become due.
13. Over the next few days, there were verified news reports that Respondent No. 1 had been facing financial crises and had been operating in huge losses. It was apprehended by the Claimant that the Respondent No. 1 will not have any assets to honour the terms of the Loan Agreement. Further in view of breach of the other covenants of the Loan Agreement pertaining to the creation of security in favour of the Claimant, the Claimant invoked the terms of arbitration under the Loan Agreement and a nominated a sole arbitrator for the adjudication of matter.
14. A notice invoking arbitration was sent to the following parties on 13 February 2020 highlighting the aforementioned defaults by the Respondents No. 1, 2 and 3.
 - (a) Nestell Private Limited;
 - (b) Mr Gaurav Krishnan and Mr Rahul Prasad who had provided an irrevocable, unconditional and continuing guarantee in favour of the Claimant to repay the entire amount in case of default by Nestell Private Limited;
 - (c) FiveStar Limited, on the premise that Respondent No. 1, 2 and 3 together hold 20% of the equity shares of the Company;
 - (d) Toblerr Limited, on the premise that Respondent No. 1, 2 and 3 together hold 10% of the equity shares of the Company;
 - (e) MarsKing Limited, on the premise that Respondent No. 1, 2 and 3 together hold 30% of the equity shares of the Company.
15. Under the notice invoking arbitration, the Claimant has raised claims pertaining to the principal amount of INR 60,00,00,000; the interest amount until the date of payment, i.e., 06 November 2020; default interest calculated at the rate of 2%; and arbitration costs.
16. Accordingly, this Arbitral Tribunal had been constituted in line with the procedure prescribed by the Arbitration and Conciliation Act 1996 and Retired Justice Samarth Panda, Former Judge of the Supreme Court of India has been appointed as the sole arbitrator for the adjudication of the claims. The Arbitral Tribunal was constituted on 01 March 2020. The Sole Arbitrator has signed and provided the disclosure of independence and impartiality as required under law and there is no conflict of interest between the Sole Arbitrator and the Parties.
17. The Respondents agreed to the nomination of the Sole Arbitrator and proceeded to file their Statements of Defence denying the claims and allegations raised by the Claimant as being premature. Further, it was submitted that the security that the Respondents No. 1, 2 and 3 had

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created in favour of the Claimant was of cumulatively of the same value as the principal amount in question.

18. Each of FiveStar Limited, Toblerr Limited and MarsKing Limited have challenged the jurisdiction of the Arbitral Tribunal qua them on the following grounds:
 - (a) Contentions have been raised by each of FiveStar Limited, Toblerr Limited and MarsKing Limited that no documents which were executed as part of the subject transaction have been signed by the said companies and therefore are bound neither by the Loan Agreement and the Arbitration Agreement contained thereunder.
 - (b) Contention has also been raised that while the Guarantors may have been directors and shareholders of the said three companies, however, the Loan Agreement cannot bind the non-signatory companies in the absence of express consent of the companies to have been bound. Therefore, the involvement of the shares of these companies which may have been used by the parties to the Loan Agreement as collateral could in no way imply that the companies themselves are bound by the said Agreement.
19. The arbitration proceedings commenced on 28 March 2020 with weekly hearings. All procedural compliances have been fulfilled by the parties and the pleadings are complete. The final arguments were concluded on 11 May 2020. The award is to be pronounced.