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* IN THE HIGH COURT OF DELHI AT NEW DELHI
Date of decision: 8th February, 2021

+ W.P.(C) 1478/2021

JEPH BEV PRIVATE LIMITED & ORS. Petitioners
Through: Mr. Vivek Chib, Advocate.
versus

DELHI INTERNATIONAL ARBITRATION
CENTRE & ORS. Respondents
Through: Mr. Jayant Mehta and Mr. Ashish
Padam, Advocates for DIAC/R-1.
(M:9872767290)
Mr. Rajshekhar Rao and Ms. Aanchal
Tikmani, Advocates for R-2.
Mr. Mayank Mehandru, Advocate for
R-3 (M: 9891949124)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh,J.(Oral)

1. This hearing has been done through hybrid mode (physical and virtual hearing).
2. The present petition has been filed challenging the communication dated 16th February, 2020, issued by the Coordinator/Additional Coordinator Delhi International Arbitration Center, Delhi High Court (*hereinafter*, "*DIAC*) and the reasons received by email dated 19th January, 2021 by the Petitioner. Vide Communication dated 16th February 2020, the DIAC informed the Petitioner as under:

"After due consideration of the submissions made by both the parties in the hearing conducted through VC and written arguments filed along with case laws by both the parties, the said application/objections have been dismissed by the Hon'ble Chairperson."

3. The brief background to this petition is that the Petitioner and Respondent No. 3 entered into an Agreement dated 17th January 2017. The Agreement contained an Arbitration clause 'U', to refer disputes arising out of the Agreement to the Delhi International Arbitration Center at the High Court of Delhi, as per the Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2018 (*hereinafter referred as "2018 Rules"*). The relevant clause is extracted herein as under:

"U. Governing Law and Jurisdiction: any dispute or differences arising between the parties shall be resolved amicably at the first instance. Unresolved disputes, controversies, contests, disputes, if any shall be submitted to arbitration. Any dispute, controversy, etc. shall be referred to Delhi International Arbitration Centre (Formerly Delhi High Court Arbitration Centre), at High Court of Delhi, New Delhi and arbitration shall be conducted as per rules of the Delhi International Arbitration Centre. In the event Delhi International Arbitration Centre, ceases to exist then arbitration shall be conducted in accordance with the provisions of the Arbitration of the Arbitration and Conciliation Act 1996 along with the Rules there under and any amendments thereto. The arbitration shall be conducted in English. The decision/award of the arbitrator shall be final/conclusive and binding on the Parties. The seat of the arbitration shall be at New Delhi. This Agreement and the relationship between the parties hereto shall be governed by and interpreted in accordance with the laws of India. The courts at Delhi alone shall have sole and exclusive jurisdiction

*over any dispute arising out of or relating to
this Agreement.”*

4. In September 2018, the Petitioner is stated to have withdrawn from the said Agreement, due to *inter se* disputes between the parties. Post this, the Respondent No. 3, Barista Coffee Company Limited (*hereinafter referred as “BCCL”*), invoked the Arbitration clause by way of a statement of claim filed before the DIAC, dated 4th September, 2019 and initiated Arbitration proceedings for adjudication of the disputes of the parties.

5. Upon invocation of the arbitration clause, the Respondents in the Arbitration Proceedings, i.e. the Petitioner No. 1 before this Court, filed an application under Rule 20 of the 2018 Rules, challenging the request for arbitration filed by the Claimant. Their stand in the application under Rule 20 of the 2018 rules was that they have approached the Micro & Small Enterprises Facilitation Council (*hereinafter referred as “MSEFC”*) under the Micro, Small and Medium Enterprises Development Act, 2006 (*hereinafter referred as the MSMED Act*), and thus, the arbitration ought not to be proceeded with before the DIAC. It was further argued by the Respondents/Petitioner No. 1 before the DIAC that the invocation of Arbitration is premature as there is bar on the jurisdiction of DIAC under Section 18(1), Section 18(4) and Section 24 of the MSMED Act.

6. Vide the impugned communications, the DIAC Co-ordinator has informed the Petitioner that its objections have been rejected on the ground that the Petitioner cannot claim the benefits under the MSMED Act.

7. The grievance of the Petitioners is that any objection raised before the DIAC in terms of the 2018 Rules ought to be placed before the Chairperson or Sub-Committee appointed by the Chairperson of the DIAC, which is

stated to have not been done in the present case.

8. Mr. Vivek Chib, Id. counsel appearing for the Petitioners submits that that the Coordinator himself has decided the objections raised by the Petitioners. This, in his submission, is contrary to the 2018 Rules. He further submits that the communication given by the Coordinator shows that the matter has not been placed before the Chairperson. In any event, it is his submission that the jurisdiction of the DIAC has been invoked, which is contrary to the scheme of the MSMED Act.

9. Mr. Mahendru, Id. counsel appearing for the Claimant/Respondent No. 3, submits that MSMED Act is not applicable in the case of the Claimant, inasmuch as the Claimant is not a registered Micro, Small or Medium Enterprise under the said Act. He further submits that the intention of the Petitioners is to wilfully delay the arbitration proceedings and nothing else.

10. Mr. Jayant Mehta, Id. Counsel appearing for the DIAC has produced the original file of DIAC in this matter, and submits that the Chairperson has, in fact, approved the communication issued by the Coordinator and it was only thereafter that the order note bearing No. DAC/2601/20-19, as well as the communication dated 16th February 2020 and 19th January 2021, have been sent to the Petitioners.

11. Heard Id. counsel for the parties. The question raised in this case is in respect of objections as to jurisdiction raised under Rule 20 of the 2018 Rules and the manner in which the same are to be treated. The 2018 Rules provide for the various procedures governing constitution of the tribunal by the DIAC, functioning of the arbitral tribunal, fast track arbitrations, emergency arbitration, interim relief etc., Rule 20 permits a party to raise

objections to the competence of the DIAC which reads:

“ 20. Jurisdiction

*20.1 Any objection by a party to the existence or, to the **competence of the DIAC** to **administer** an arbitration, before the Tribunal is appointed, shall be **placed** in the first instance before the Chairperson or the Sub- Committee appointed by the Chairperson for that purpose.*

20.2 If the Chairperson or the Sub-Committee appointed by the Chairperson sustains the objection, the proceedings shall be terminated. In all other cases, the Tribunal shall decide such objection in accordance with Section 16 of the Act.”

12. Rule 20 of the 2018 Rules is a provision which has been incorporated as part of the institutional arbitral mechanism in the DIAC to ensure that cases which do not have an Arbitration Agreement, or which *prima facie* do not fall within the scope of the Agreement, can be terminated at that stage itself. In fact, some commentaries are of the opinion that an Arbitral Institution’s examination of jurisdiction, if present in the rules, prior to the constitution of the Tribunal, is at such a nascent stage, that rejection of the objection does not even require a reasoned decision. The determination by the arbitral institution is not on the substantive dispute as to jurisdiction

13. One example of a similar provision in Institutional Arbitration Rules is Article 6(3) and Article 6(4) of the International Chamber of Commerce Arbitration Rules, 2021, in which the International Court of Arbitration of the International Chamber of Commerce, which is not a dispute resolution

body but rather a body to administer the resolution of disputes by constituted Arbitral tribunals, decides as to whether there is a *prima facie* basis to constitute the Arbitral Tribunal. At this preliminary stage, the claimant only has to have an “arguable case”, as the ultimate decision on admissibility as well as on merits, is of the Arbitral Tribunal.

14. In *International Commercial Arbitration: An Asia-Pacific Perspective*¹ the authors, while examining the provisions of examination of jurisdictional claims by Arbitral Institutions, before the formation of Arbitral Tribunals, have opined:

“5. Arbitral institution’s examination of jurisdiction

5.98 *The rules of some arbitral institutions expressly permit the institution to examine the prima facie existence of an arbitration agreement before the arbitral tribunal does so. If there is clearly no arbitration agreement, the case is dismissed. Conversely, if the institution finds prima facie that jurisdiction exists, then the arbitral tribunal may decide jurisdiction after hearing full argument on the issue.*

5.99 *The best known example is Article 6(2) of the ICC Rules. This provides:*

“If the Respondent does not file an Answer, as provided by Article 5, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the [ICC Court] may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie

¹ Simon Greenberg et.al, “*International Commercial Arbitration: An Asia-Pacific Perspective*” (Cambridge, 2010: Cambridge University Press) at pages 230-231

satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. If the [ICC Court] is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.”

5.100 As can be seen from its language, the ICC Court does not analyse sua sponte whether an arbitration agreement under the ICC Rules exists. Article 6(2) is triggered only when the respondent does not file an answer to the request for arbitration and/or objects to the arbitration clause. In such cases, the ICC Court’s analysis is limited to a mere prima facie review of the existence of an arbitration agreement under the ICC Rules. If there is a prima facie basis to start the arbitration the decision on jurisdiction is left to the arbitral tribunal. The main advantage of a provision like Article 6(2) of the ICC Rules is that it saves significant time and cost where there appears to be no way that an arbitral tribunal could accept jurisdiction over the case.

5.101 The ICSID Secretary-General also plays a role in determining jurisdiction 5.101 pursuant to Article 36(3) of the ICSID Convention. Under that provision, the Secretary-General ‘shall register the request [for arbitration] unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre’.

5.102 We have already explained above (Section 4.2) that it is common for Chinese 5.102 arbitral institutions

to rule on the jurisdiction of arbitral tribunals. This is very different from the prima facie examination of the existence of an arbitration agreement by the ICC Court under Article 6(2) of the ICC Rules. The Chinese institutions actually replace the arbitral tribunal's role in determining jurisdiction and are empowered to do so by the lex arbitri. In contrast, if the ICC Court decides that there is a prima facie agreement to arbitrate, this does not relieve the arbitral tribunal from its duty to decide jurisdiction. Quite to the contrary, the arbitral tribunal must fully examine and rule on jurisdiction in accordance with the competence-competence principle."

15. In *International Chamber of Commerce Arbitration*² the authors, while examining the scope of the authority to be exercised by the institution while examining claims of jurisdiction prior to the formulation of the Arbitral Tribunal, opine:

"Despite the fact that a defendant will get "another bite at the apple" on the issue of jurisdiction before the arbitral tribunal, most litigants, wish to present their full arguments before the Court of Arbitration in the hope of terminating the proceedings at the earliest stage. Accordingly, there are frequently fairly elaborate communications of correspondence by the parties to the Court. The most frequent arguments raised to show absence of arbitral jurisdiction are: (i) the "pathological" arbitration clause (a contract provision which manifests an interest to arbitrate but fails to specify an institution or any operative rules); (ii) the non-existence of an arbitration clause or agreement; (iii) the lack of defendant's signature of, or other form of acquiescence to, an arbitration

² W. Lawrence Craig et.al, "International Chamber of Commerce Arbitration" (2nd Edition, ICC Publication No. 414/2, 1990 Oceania Publications) at page no. 187

agreement; and (iv) the claim that a party was not bound by an agreement to arbitrate made by the beneficiary of a guarantee which in turn does not contain an arbitration clause, by an alleged but disavowed representative or agent, or by another company of the same group.

The Court's practice shows that while it will send even weakly arguable cases of jurisdiction to an arbitral tribunal for determination of the issue, it does not hesitate to refuse to constitute a tribunal when it is convinced that there is no prima facie arbitration agreement.

When the Court of Arbitration has determined whether or not a prima facie agreement to arbitrate is extant, the Secretariat will so notify the parties and, if appropriate, the arbitral tribunal. No reasons are given for the decision."

16. Thus, the role of the arbitral institution in the *prima facie* examination is only to ensure that in cases where it is apparent to the institution that there is no Arbitration Agreement, or that the parties who are a part of the dispute are not a part of the Agreement or have not agreed to the applicability of the Institutional rules, are not made to participate in protracted arbitral proceedings. So long as there is a *prima facie* basis to commence arbitration, objections raised before the arbitral institution, prior to the constitution of the Arbitral Tribunal, are rejected.

17. The DIAC, while exercising its jurisdiction under Rule 20.1, has to primarily see as to whether it has been chosen by the parties as the arbitral institution for adjudication of disputes or not. The said Rule deals with '**competence of the DIAC**' to administer and not of the competence of the arbitral tribunal to adjudicate. Secondly, DIAC shall have to place the

objections raised, if any, before the Chairperson of DIAC. The crucial words in Rule 20.1 are '*administer*' and '*placed*'. The DIAC merely has to see as to whether it can administer the arbitration or not. A detailed hearing is not required. The Chairperson is not expected to adjudicate upon the issue of jurisdiction under the Arbitration and Conciliation Act, 1996. The Chairperson has to merely consider the objections raised, and take a *prima facie* view in the matter. The fact that the Coordinator of the centre may have received the objections, responses thereto etc., and placed a note for the approval of the Chairperson, cannot be said to be contrary to the procedure, so long as the final decision is approved by the Chairperson. Rule 20.1 does not contemplate a detailed adjudication of the objection as to jurisdiction.

18. In the light of the above discussion, under Rule 20.1, it is clear that the question as to whether the arbitration clause in the Agreement can be invoked is merely determined in a *prima facie* manner by the DIAC. The objection of jurisdiction, if raised before the Tribunal, would have to be adjudicated by the Arbitral Tribunal, once constituted, without being affected or influenced by the decision under Rule 20. The said Rule 20 of the 2018 Rules of the DIAC cannot be equated with Section 16 of the Arbitration and Conciliation Act, 1996.

19. The original record of the DIAC has been produced before this Court by Mr. Mehta, ld. counsel. After perusing the file of DIAC, it is revealed that a detailed note was put up before the Chairperson along with the proposed decision on the objection, which has been approved by the Chairperson. Hence, it is clear that Rule 20.1 has been complied with. Moreover, a perusal of the arbitration clause in the contract leaves no doubt that the disputes are to be referred to the DIAC and the arbitration is to be

conducted as per the DIAC Rules. The objections relating to jurisdiction based on the interplay between the MSMED Act and the Arbitration and Conciliation Act 1996 are to be raised before the Arbitral Tribunal once constituted and be adjudicated in accordance with law. The opinion of the Chairperson under Rule 20.1 would not in any manner be binding or affect the adjudication of the jurisdictional issues by the Arbitral Tribunal.

20. Therefore, this court is of the opinion that there is no infirmity in the decision and the communications issued by DIAC to the Petitioners.

21. Accordingly, the present petition is dismissed. The DIAC may proceed further and constitute the Tribunal in accordance with the 2018 Rules. It is made clear that any objection to jurisdiction of the Arbitral Tribunal, which the Petitioners may raise before the Arbitration Tribunal, under Section 16 of the Arbitration and Conciliation Act, 1996, is open for being adjudicated in accordance with law by the concerned Tribunal.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 8, 2021/dk/Ak

(Corrected and released on 11th February, 2021)