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

+ **ARB.P. 331/2020**

SMT. MANJU GUPTA & ORS. Petitioners

Through: Mr. S.D. Singh, Mr. Rahul
Kumar Singh and Mr. Jitender Singh, Advs.

versus

SHRI VILAS GUPTA & ORS. Respondents

Through: Mr. Yogesh Jagia, Adv. for R-1,
2 and 3

Mr. Ankit Singh, Adv. for R-4, 5 and 6

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

J U D G M E N T (O R A L)

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22.01.2021

(Video-Conferencing)

1. By this petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”), the petitioners seek reference of disputes that had arisen *vis-a-vis* the respondents, to arbitration, in accordance with Clause 3.15 of a Memorandum of Family Settlement (hereinafter referred to as “MFS”), dated 28th April, 2007, executed among the petitioners and the respondents, being the members of one family.

2. A reading of the MSF reveals that disputes among the petitioners and the respondents, *vis-a-vis* certain corporate entities being managed by them, had arisen, resulting in CP 31/2007 being filed before the Company Law Board, Principal Bench. In order to

settle their disputes and differences amicably, the petitioners and respondents executed the MFS, agreeing to be bound by the terms thereof. The purpose to the MFS was specifically stated, in Clause 1(i) thereof, as being “to reduce in writing the terms and conditions of settlement of disputes and differences as agreed by and between the parties to this MFS and further terms and conditions to avoid any future controversy, disagreement, confusion and misunderstanding”. The MFS also manifested the decision, of the petitioners and respondents to seek disposal of CP 31/2007, in terms thereof. It was further recited, in the MFS that the parties thereto would make a joint application, recording the terms of the MFS, for withdrawal of Co. Pet. 31/2007 and vacation of all interim orders passed in the said petition by the Company Law Board (hereinafter referred to as “CLB”). Insofar as the shareholdings of the parties to the MFS, in the companies, relating to which it was executed, were concerned, clause 2(iii), in the MFS, merits reproduction:

“iii) That notwithstanding the shareholding of the Parties and their Constituents in the Companies/businesses, properties and other assets, the parties hereto have agreed to carry out the division of the joint businesses, undertakings and properties in two parts in such a manner that one part shall be owned, controlled and managed by '**Group - I**' and the other part shall be owned, controlled and managed by '**Group - II**'. The businesses and properties shall be shared by two Groups in the ratio of 1:1 and the difference in values shall be settled by way of transfer of funds from one Group to the other as hereinafter determined.”

3. The MFS, nevertheless, did envisage the possibility of disputes arising among the parties thereto and, in that regard, provided thus, in clauses 3.15 and 3.16:

“3.15 That in the event of any differences between the parties on the implementation and execution of the present MFS or with regard to any terms thereto, the parties agree to refer the said matter and issue to joint arbitration of Shri Ramanand Gupta and S. Devender Singh Kohli. In case of difference of opinion between the said two arbitrators, the matter shall be referred to Shri R.K. Gupta Son of Late Shri Munshi Ram Gupta, Resident of D-13, Naraina Vihar, New Delhi-110028, whose decision shall be final and binding upon the parties.

3.16 That *the right to refer to arbitration any question in the event of difference or dispute amongst the parties shall be in addition to and not in derogation of the right of the parties to approach the Hon'ble Company Law Board, Principal Bench for giving effect to or execution of the terms of present MFS.*”

(Emphasis supplied)

4. CA 157/2007 was preferred, before the CLB, as a joint application among the petitioners and respondents, seeking withdrawal of CP 31/2007, in terms of the MFS. This application, as also CP 31/2007, were disposed of, by the Company Law Board, *vide* the following order, passed on 1st May, 2007:

“In view of the family settlement dated 28/4/07 arrived at between the parties a copy of which is attached with the joint application, the petition is disposed of in terms of settlement.”

5. Respondent No.1 Shri Vilas Gupta, thereafter, filed CA 42/2008 under Section 634A(2) of the Companies Act, 1956, before the CLB, for enforcement of the aforesaid order dated 1st May, 2007, passed by the CLB, disposing of CP 31/2007. The said application was disposed of, by the CLB, *vide* a detailed order dated 20th August, 2014. The CLB adopted the view that its earlier order, dated 1st May, 2007 was “to be construed to be an order permitting withdrawal of the petition

in view of the clear and unambiguous purport of CA 157/2007”. In view thereof, the CLB held that nothing remained, in the order dated 1st May, 2007, of which enforcement, under Section 634A of the Companies Act, could be sought. Para 12 of the order dated 20th August, 2014, which so holds, read thus:

“12. The order dated 01.05.2007 is therefore to be construed to be an order permitting withdrawal of the petition in view of the clear and unambiguous purport of CA 157/2007. A clear intention is reflected in the MFS to seek unconditional withdrawal of Company Petition No. 31/2007 and to seek vacation of all interim orders, which is also indicative of the intention of the parties not to seek any further intervention of the CLB to pass any order u/s 397 or 398 of the Companies Act, 1956 or to retain seisin thereunder. Therefore, nothing remains in the order dated 1.5.2007 passed by the Company Law Board which the parties could seek enforcement of u/s 634-A of the Companies Act, 1956. I, therefore, decline to exercise jurisdiction u/s 634A of the Companies Act, 1956.”

6. Respondent No. 1 has preferred Co. A. (SB) 47/2014, challenging the aforesaid order dated 20th August, 2014 of the CLB, which is presently pending before this Court. Notice was issued in the said appeal on 15th October, 2014, with a direction to the parties to maintain *status quo* in respect of the properties and shares covered by the MFS, as well as order dated 9th May, 2013 of Hon’ble Mr. Justice K. Ramamoorthy (Retd.), who had earlier been appointed by the CLB, in CA 333/2008, as a facilitator to implement the covenants of the MFS.

7. The petitioners allege that Respondent Nos. 1 to 3 started violating the covenants of the MFS, especially with respect to

shareholdings, ownership rights, management and control over the corporate entities constituting subject matter thereof. Detailed assertions, regarding the infractions of the MFS, as alleged to have been perpetrated by the respondents, are to be found in sub-paras j to x of para 7 of the present petition. Given the limited scope of examination by this Court, while exercising jurisdiction under Section 11(6) of the 1996 Act, in view of Section 11(6A) thereof, it is not necessary to allude, in detail, to the said allegations. Suffice it to state that they make out a case of a clear dispute, between the petitioners and the respondents, relatable to the terms of the MFS and due compliance therewith. In fact, it may be noted that the existence of such disputes is not a matter of contest by any of the parties in the present petition.

8. The petitioners submit that the aforesaid disputes are arbitrable in nature.

9. It is an admitted position that, in order to resolve the disputes between the parties, relating to the MFS, an arbitral tribunal, consisting of the arbitrators named in Clause 3.15 of the MFS, reproduced hereinabove, i.e. Mr. Ramanand Gupta and S. Devender Singh Kohli, was constituted. On 13th August, 2007, the said learned arbitrators passed the following order:

“Raamanand Gupta

D-65, Narain Vihar
New Delhi-110028
98-100-35542

Dated: August 13, 2007

To,

All parties

- | | |
|---|----------------------------|
| 1.Mr.G.R. Singhal | 11. Mr. Pawan Singhal |
| 2.Mrs.Pista Devi Singhal | 12. Mrs. Meenu Singhal |
| 3.Mr. Shri Vilas Gupta | 13. Ms. Shreya Singhal |
| 4.Mrs. Sunita Gupta | 14. Mt.Shaishav Singhal |
| 5.Mr. Akshit Gupta | 15. Mr. R.K. Gupta |
| 6.Mr. Kishan Gupta | 16. Mr. Ramesh Chand Gupta |
| 7.Mrs. Manju Gupta | 17. Mr. Ravi Gupta |
| 8.Ms. Kamika Gupta | 18. P.K.M.Garg |
| | Through Mr.Ravi Gupta |
| 9.Ms. Vipeksha Gupta | |
| 10.Mr.Keshav Gupta (Through Kishan Gupta) | |

Please refer to the correspondences exchanged between the parties mentioned above. In terms of clause 3.15 of the Memorandum Recording family settlement dated 28.4.2007, we have been appointed Arbitrators to resolve differences between the parties on the implementation and execution of the settlement. From the correspondences exchanged it is apparent that there are differences between the parties. Mr. G.R.Singhal one of the party to the Agreement has specifically sought our intervention and has requested that we initiate proceedings in this connection.

In view of the duty cast on us, we propose to hold a meeting in connection with the Arbitration on 30.8.2007 at A-73, Naraina Industrial Area, Phase-I, New Delhi-110028 at 1000 hours.

All parties are instructed to file their claim and /or representation, on or before 21.8.2007 in order that the Arbitrators could give further appropriate directions to enable implementation and execution of the Memorandum Recording Family Settlement.

If any of the parties wishes to file documents in support of their claims and representation they may do so also on or before 21.8.2007 at **D-65, Narain Vihar, New Delhi-110028.**

Parties may also give their suggestions as to what is the best possible manner the agreement could be implemented expeditiously. The same would be considered in the meeting to be held on 30.8.2007 itself.

Ramanand Gupta

S. Devender Singh Kohli

**MR.VILAS GUPTA
C-108, ANAND NIKETAN
NEW DELHI-110021
TFN NO. 981002082”**

10. Subsequently, however, S. Devender Singh Kohli, being one of the named arbitrators, resigned from the arbitral proceedings on 21st August, 2007. This resulted in the arbitration clause (clause 3.15 of the MFS) becoming incapable of enforcement, as it contemplated arbitration by arbitrators specified by name.

11. On 3rd March, 2020, the petitioners wrote to the respondents, invoking Clause 3.15 of the MFS and seeking reference of the disputes, between them, to arbitration. As there was no response to the said communication, the petitioners have approached this Court, invoking the jurisdiction of this Court under Section 11(6) of the 1996 Act, and requesting for reference of the disputes to a sole arbitrator to be appointed by this Court.

12. Mr. S.D. Singh, learned Counsel appearing for the petitioners has relied, for the said purpose, on paras 7.3 to 7.11 of the report in

Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.¹, which read thus:

“7.3. The 2015 Amendment Act brought about a significant change in the appointment process under Section 11 : first, the default power of appointment shifted from the Chief Justice of the High Court in arbitrations governed by Part I of the Act, to the High Court; second, the scope of jurisdiction under sub-section (6-A) of Section 11 was confined to the examination of the existence of the arbitration agreement at the pre-reference stage.

7.4. Prior to the coming into force of the 2015 Amendment Act, much controversy had surrounded the nature of the power of appointment by the Chief Justice, or his designate under Section 11. A seven-Judge Constitution Bench of this Court in *SBP & Co. v. Patel Engg. Ltd.*², defined the scope of power of the Chief Justice under Section 11. The Court held that the scope of power exercised under Section 11 was to first decide:

- (i) whether there was a valid arbitration agreement; and
- (ii) whether the person who has made the request under Section 11, was a party to the arbitration agreement; and
- (iii) whether the party making the motion had approached the appropriate High Court.

7.5. Further, the Chief Justice was required to decide all threshold issues with respect to jurisdiction, the existence of the agreement, whether the claim was a dead one; or a time-barred claim sought to be resurrected; or whether the parties had concluded the transaction by recording satisfaction of their mutual rights and obligations, and received the final payment without objection, under Section 11, at the pre-reference stage. The decision in *Patel Engg.*² was followed by this Court in *Boghara Polyfab*³, *Master Construction*⁴, and other decisions.

¹ (2020) 2 SCC 455

² (2005) 8 SCC 618

³ (2009) 1 SCC 267

⁴ (2011) 12 SCC 349

7.6. The Law Commission in the 246th Report⁵ recommended that:

“33. ... the Commission has recommended amendments to Sections 8 and 11 of the Arbitration and Conciliation Act, 1996. *The scope of the judicial intervention is only restricted to situations where the court/judicial authority finds that the arbitration agreement does not exist or is null and void.* Insofar as the nature of intervention is concerned, it is recommended that *in the event the court/judicial authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be.* The amendment envisages that the judicial authority shall not refer the parties to arbitration *only if it finds that there does not exist an arbitration agreement or that it is null and void.* If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal.”

7.7. Based on the recommendations of the Law Commission, Section 11 was substantially amended by the 2015 Amendment Act, to overcome the effect of all previous judgments rendered on the scope of power by a non obstante clause, and to reinforce the *kompetenz-kompetenz* principle enshrined in Section 16 of the 1996 Act. The 2015 Amendment Act inserted sub-section (6-A) to Section 11 which provides that:

“(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, *notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.*”

(emphasis supplied)

⁵ Amendments to the Arbitration and Conciliation Act, 1996, Report No. 246, Law Commission of India (August 2014), p. 20

7.8. By virtue of the non obstante clause incorporated in Section 11(6-A), previous judgments rendered in *Patel Engg.*² and *Boghara Polyfab*³, were legislatively overruled. The scope of examination is now confined only to the existence of the arbitration agreement at the Section 11 stage, and nothing more.

7.9. Reliance is placed on the judgment in *Duro Felguera S.A. v. Gangavaram Port Ltd.*⁶ wherein this Court held that: (SCC p. 759, para 48)

“48. ... From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. *the court should and need only look into one aspect—the existence of an arbitration agreement*. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple — it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.”

(emphasis supplied)

7.10. In view of the legislative mandate contained in Section 11(6-A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the *kompetenz-kompetenz* principle.

7.11. The doctrine of “*kompetenz-kompetenz*”, also referred to as “*compétence-compétence*”, or “*compétence de la reconnue*”, implies that the Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties. The doctrine of *kompetenz-kompetenz* is, however, subject to the exception i.e. when the arbitration agreement itself is

⁶ (2017) 9 SCC 729

impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified⁷. If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement “is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”.”

13. Mr. Yogesh Jagia, learned Counsel for Respondent Nos. 1 to 3 opposes the petition. He submits that the order dated 1st May, 2007 (*supra*), passed by the CLB was, by virtue of Section 634A of the Companies Act, 1956, an executable decree and that the MFS stood merged in the said order. Once such merger had taken place, and the order resulting in such merger was executable as a decree, Mr. Jagia submits that no dispute, referable to arbitration under Clause 3.15 of the MFS, could be said to survive. In fact, submits, Mr. Jagia, CA 42/2008 was preferred, by Respondent No.1 before the CLB, seeking execution of the order dated 1st May, 2007, whereupon the CLB had appointed a facilitator, to facilitate the execution of the order and efforts, at implementing the covenants of the MFS continued for over a period of five years, from 2008 to 2013. Mr. Jagia submits that in

⁷ *Dresser Rand S.A. v. Bindal Agro Chem Ltd.*, (2006) 1 SCC 751. See also *BSNL v. Telephone Cables Ltd.*, (2010) 5 SCC 213. Refer to *PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust*, (2018) 10 SCC 525

fact, over the course of this period, the covenants of the MFS were implemented to a large extent.

14. Apropos the order dated 20th August, 2014 (*supra*), passed by the CLB, Mr. Jagia submits that, assailing the decision, in the said order, to treat the earlier order of 1st May, 2007 as one of unconditional withdrawal of CP 31/2007, Co A (SB) 47/2014 has been preferred before this Court, which is presently pending. He, therefore, submits that adjudication of the present petition should either await the outcome of Co A (SB) 47/2014, or that his submission, that the order dated 1st May, 2007 (*supra*) passed by the CLB was an executable decree and that, therefore, no scope for referring the disputes between the parties to arbitration under Clause 3.15 of the MFS existed, should be accepted and the present petition dismissed as not maintainable. He has relied on para 4 of the judgment of the Supreme Court in ***Manish Mohan Sharma and Others v. Ram Bahadur Thakur Ltd. and Others.***⁸ Mr. Jagia has also relied on an order dated 23rd May, 2012, passed by the CLB in CP 83(ND)/2009 which, though a cognate dispute between some of the parties in this case, involved an interpretation of the order dated 1st May, 2007 (*supra*) passed by the CLB. Mr. Jagia points out that, in the said order, the CLB had held that the proper course of action to be followed by Respondent No. 1 was to seek enforcement of the order dated 1st May, 2007 under Section 634A of the Companies Act, and not by way of the application filed before the CLB, which was under Section 399 thereof. Mr. Jagia also placed reliance on paras 222 and

⁸ 2006 4 SCC 416

229 of the recent judgment of the Supreme Court in *Vidya Drolia v. Durga Trading Corporation*⁹ which read thus:

“222. At first blush, the Court seems to have read the existence of the arbitration agreement by limiting the examination to an examination of its factual existence. However, that is not so, as the existence of arbitration agreement does not mean anything unless such agreement is contractually valid. This view is confirmed by the *Duro Felguera case*⁶ (*supra*), wherein the reference to the contractual aspect of arbitration agreement is ingrained under the Section 7 analysis. A mere agreement is not legally binding, unless it satisfies the core contractual requirements, concerning consent, consideration, legal relationship, etc. In *Mayavati Trading Case*¹⁰ and *Garware Wall Ropes Ltd. v. Coastal Marine Construction and Engineering Ltd.*, (2019) 9 SCC 209, the aforesaid stand has been confirmed. Therefore, the scope of the Court to examine the *prima facie* validity of an arbitration agreement includes only the determination of the following:

92. Whether the arbitration agreement was in writing? or
93. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc?
94. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?
95. On rare occasions, whether the subject-matter of dispute is arbitrable?

229. Before we part, the conclusions reached, with respect to question no. 1, are:

- a. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

⁹ 2020 SCC OnLine SC 1018
¹⁰ (2019) 8 SCC 714

b. Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it's a clear case of deadwood.

c. The Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a *prima facie* (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

d. The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a *prima facie* basis, as laid down above, i.e., 'when in doubt, do refer'.

e. The scope of the Court to examine the *prima facie* validity of an arbitration agreement includes only:

- a. Whether the arbitration agreement was in writing? or
- b. Whether the arbitration agreement was contained in exchange of letters, telecommunication etc?
- c. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?
- d. On rare occasions, whether the subject-matter of dispute is arbitrable?"

Mr. Jagia specifically places reliance on the observations, of the Supreme Court, that, on rare occasions, under Section 11(6) of the 1996 Act, Court is entitled to examine whether the subject matter of the dispute is arbitrable. This, submits Mr. Jagia, marks a departure from the earlier line of judicial thought, which was to the effect that arbitrability was a matter outside the ken of a Section 11 Court, to be left to the arbitral tribunal. He submits that, in view of the order dated 1st May, 2007 (*supra*) passed by the CLB, there is no dispute, referable to arbitration under Clause 3.15 of the MFS. No arbitrable

dispute, therefore, being in existence, Mr. Jagia submits that the present petition is not maintainable.

15. I have also heard Mr. Ankit Singhal, learned Counsel appearing for Respondent Nos. 4 to 6. I may observe that Mr. Singhal submitted that he had no objection to the disputes, forming subject matter of this petition, being referred for arbitration to an independent arbitrator, subject to the petitioners and Respondent Nos. 1 to 3 being agreeable. Mr. Jagia, however, submits on instructions that his clients were adhering to the view that no arbitrable dispute existed, in view of the order dated 1st May, 2007 (*supra*), passed by the CLB, which constituted an executable decree under Section 634A of the Companies Act. As such, the suggestion, by Mr. Singhal, was not acceptable to Respondent Nos. 1 to 3.

16. Mr. Singhal also placed reliance on the judgment of a Division Bench of this Court in *Mohd. Amin v. Mohd. Iqbal*¹¹. Given the view that I am taking in this matter, it is not necessary to advert to the said decision.

Analysis

17. Having heard learned Counsel and considering the submissions advanced, in my view, the existence of an arbitrable dispute, amongst the parties to this litigation, can hardly be gainsaid. Detailed allusion, to the infractions, alleged to have been committed by the respondents,

¹¹ 2009 SCC OnLine Del 861

with respect to the covenants of the MFS, is to be found in the petition. These allegations, even by themselves, constitute an arbitrable dispute between the parties. The allegations against the respondents, as made by the petitioner, needless to say, are not accepted by the respondents, resulting in a dispute. This dispute cannot be said, for any reason, not to be amenable to adjudication or resolution by an arbitrable process. The submission, of Mr. Jagia, that no arbitrable dispute exists between the parties is, therefore, clearly misconceived.

18. Apropos paras 222 and 229 of the judgment of the Supreme Court in *Vidya Drolia*⁹, a holistic reading of para 229 in fact, makes it clear that the Supreme Court has, in effect, reiterated the existing legal position that arbitrability of a dispute *is not, ordinarily*, to be examined by a Court exercising jurisdiction under Section 11(6) of the 1996 Act. It is only “on rare occasions”, where “a clear case of deadwood” is made out, and “a *prima facie* (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case” of entitlement, to a finding regarding non-existence of a valid arbitration agreement, exists, that a Section 11 Court can enter into the arbitrability of the dispute being sought to be referred to arbitration. The context in which the Supreme Court has carved out this rare exception, where a Section 11 Court may examine the arbitrability of the dispute, may be gleaned from the following passages from *Vidya Drolia*⁹ itself:

“**115.** We would now examine the principles of separability and competence-competence. *Clauses (a) and (b) to sub-section (1) to Section 16 enact the principle of separation of*

the arbitration agreement from the underlying or container contract. Clause (a), by legal fiction, gives an independent status to an arbitration clause as if it is a standalone agreement, even when it is only a clause and an integral part of the underlying or container contract. Clause (b) formulates a legal rule that a decision by the arbitral tribunal holding that the main contract is null and void shall not ipso jure entail invalidity of the arbitration clause. Successful challenge to the existence or invalidity or rescission of the main contract does not necessarily embrace an identical finding as to the arbitration agreement, provided the court is satisfied that the arbitration clause had been agreed upon. The arbitration agreement can be avoided only on the ground which relates directly to the arbitration agreement. Notwithstanding the challenge to the underlying or container contract, the arbitration clause in the underlying or container contract survives for determining the disputes. The principle prevents boot-strapping as it is primarily for the arbitral tribunal and not for the court to decide issues of existence, validity and rescission of the underlying contract. Principle of separation authorises an arbitral tribunal to rule and decide on the existence, validity or rescission of the underlying contract without an earlier adjudication of the questions by the referral court.

121. *The courts at the referral stage do not perform ministerial functions. They exercise and perform judicial functions when they decide objections in terms of Sections 8 and 11 of the Arbitration Act. Section 8 prescribes the courts to refer the parties to arbitration, if the action brought is the subject of an arbitration agreement, unless it finds that prima facie no valid arbitration agreement exists. Examining the term ‘prima facie’, in *Nirmala J. Jhala v. State of Gujarat*¹², this Court had noted:*

“48. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the case were [to be] believed. While determining whether a prima facie case had been made out or not

¹² (2013) 4 SCC 301

the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence.”

122. *Prima facie case in the context of Section 8 is not to be confused with the merits of the case put up by the parties which has to be established before the arbitral tribunal. It is restricted to the subject matter of the suit being prima facie arbitrable under a valid arbitration agreement. Prima facie case means that the assertions on these aspects are bona fide. When read with the principles of separation and competence-competence and Section 34 of the Arbitration Act, referral court without getting bogged-down would compel the parties to abide unless there are good and substantial reasons to the contrary.*

123. *Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straight forward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial.*

125. The nature and facet of non-arbitrability could also determine the level and nature of scrutiny by the court at the referral stage. *Stravos Brekoulakis*¹³ has differentiated between contractual aspects of arbitration agreement which the court can examine at referral stage and jurisdictional aspects of arbitration agreement which he feels should be left

¹³ In his paper titled “On Arbitrability: Persisting Misconceptions and New Area of Concern” by Prof. Stavros Brekoulakis

to the arbitral tribunal. *John J. Barcelo III*¹⁴, referring to some American decisions had divided the issue of non-arbitrability into procedural and substantive objections. The procedural are 'gateway questions' which would presumptively be for the arbitrator to decide at least at the first stage. In the Indian context, we would respectfully adopt the three categories in *Boghara Polyfab Private Limited*³. *The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to more thorough examination in comparison to the second and third categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, we would add and include the question or issue relating to whether the cause of action relates to action in personam or rem; whether the subject matter of the dispute affects third party rights, have erga omnes effect, requires centralized adjudication; whether the subject matter relates to inalienable sovereign and public interest functions of the State; and whether the subject matter of dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s). Such questions arise rarely and, when they arise, are on most occasions questions of law. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the arbitral tribunal to decide. We would not like be too prescriptive, albeit observe that the court may for legitimate reasons, to prevent wastage of public and private resources, can exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the arbitral tribunal. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. Conversely, if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration and the court. There are certain cases where the prima*

¹⁴ In his paper titled 'Who Decides the Arbitrator's Jurisdiction? Separability and Competence-Competence in Transnational Perspective'

facie examination may require a deeper consideration. The court's challenge is to find the right amount of and the context when it would examine the prima facie case or exercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non-arbitrable.

126. *Accordingly, when it appears that prima facie review would be inconclusive, or on consideration inadequate as it requires detailed examination, the matter should be left for final determination by the arbitral tribunal selected by the parties by consent. The underlying rationale being not to delay or defer and to discourage parties from using referral proceeding as a ruse to delay and obstruct. In such cases a full review by the courts at this stage would encroach on the jurisdiction of the arbitral tribunal and violate the legislative scheme allocating jurisdiction between the courts and the arbitral tribunal. Centralisation of litigation with the arbitral tribunal as the primary and first adjudicator is beneficent as it helps in quicker and efficient resolution of disputes.*

127. *The Court would exercise discretion and refer the disputes to arbitration when it is satisfied that the contest requires the arbitral tribunal should first decide the disputes and rule on nonarbitrability. Similarly, discretion should be exercised when the party opposing arbitration is adopting delaying tactics and impairing the referral proceedings.”*

(Emphasis supplied)

19. The Supreme Court, in the said decision, also quoted, with approval, the following passages from the judgement of a learned Single Judge of this Court in *N.C.C. Ltd v. Indian Oil Corporation Ltd*¹⁵:

“107. In my view, the scope of examination as to whether or not the claims lodged are Notified Claims has narrowed down considerably in view of the language of Section 11(6A) of the

¹⁵ 2019 SCC OnLine Del 6964

1996 Act. To my mind, *once the Court is persuaded that it has jurisdiction to entertain a Section 11 petition all that is required to examine is as to whether or not an arbitration agreement exists between the parties which is relatable to the dispute at hand. The latter part of the exercise adverted to above, which involves correlating the dispute with the arbitration agreement obtaining between the parties, is an aspect which is implicitly embedded in sub-section (6A) of Section 11 of the 1996 Act, which, otherwise, requires the Court to confine its examination only to the existence of the arbitration agreement. Therefore, if on a bare perusal of the agreement it is found that a particular dispute is not relatable to the arbitration agreement, then, perhaps, the Court may decline the relief sought for by a party in a Section 11 petition. However, if there is a contestation with regard to the issue as to whether the dispute falls within the realm of the arbitration agreement, then, the best course would be to allow the arbitrator to form a view in the matter.*

108. Thus, *unless it is in a manner of speech, a chalk and cheese situation or a black and white situation without shades of grey, the concerned Court hearing the Section 11 petition should follow the more conservative course of allowing parties to have their say before the arbitral tribunal.”*

(Emphasis supplied)

20. Tested on this touchstone, it cannot be said by any stretch of imagination that no arbitrable dispute exists. The Supreme Court has clearly held, in the afore-extracted passages from *Vidya Drolia*⁹, that, inasmuch as the arbitration agreement (i.e. the arbitration clause) has a stand-alone existence, independent of the main agreement between the parties, the arbitration agreement would survive and be capable of enforcement, even if the main contract were found to be invalid or rescinded. All that is required is that the Court should be satisfied that the parties had agreed to the arbitration agreement. This approach has commended itself to the Supreme Court as “preventing bootstrapping,

as it is primarily for the arbitral tribunal and not for the court to decide issues of existence, validity and rescission of the underlying contract”. The principle of separation, emanating from the *kompetenz-kompetenz* doctrine, requires the Arbitral Tribunal to be provided the freedom to determine these issues “without an earlier adjudication of the questions by the referral court”.

21. Qua the existence of the arbitration agreement, as a consideration to be examined by a Court exercising jurisdiction under Section 11(6), the Supreme Court has held that it is only where the Court finds that “*prima facie* no valid arbitration agreement exists”, the Court can refuse to refer the parties to arbitration. It is in *this* context that the Court has held that the *prima facie* view, at the referral stage, is “to cut the deadwood and trim off the side branches *in straight forward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at first stage*”. This, in turn, is “only when the court is certain that no valid arbitration agreement exists or the disputes/subject matter are not arbitrable”.

22. It is in the obvious awareness of this legal position that Mr. Jagia sought to contend that, in the present case, no arbitrable dispute existed, and that this Court was not precluded from so holding, even in exercise of the limited jurisdiction conferred by Section 11(6). I find myself unable to agree. While I would be, immediately hereinafter, dealing with the submission of Mr. Jagia, advanced in the context of the order, dated 1st May, 2007, of the learned CLB, and its ramifications, para 125 of the decision in *Vidya Drolia*⁹ is sufficiently

clear and comprehensive, regarding the nature of the issue of “arbitrability” of the dispute, as a consideration to be borne in mind at the referral stage under Section 11(6). Cases in which the dispute could be regarded as “non-arbitrable”, clarifies the Supreme Court, are those in which the dispute

- (i) relates to an action *in rem* (this is an extremely involved issue, on which, too, *Vidya Drolia*⁹ has conclusively cleared the air, but as no such controversy arises here, I refrain from entering into further discussion thereon),
- (ii) affects third party rights,
- (iii) has *erga omnes* effect,
- (iv) requires centralized adjudication,
- (v) relates to inalienable sovereign and public interest functions of the State, or
- (vi) relates to subject matter which is expressly or by necessary implication non-arbitrable as per mandatory statute.

All scope for doubt is removed by the further clarification, in para 125 of the judgment, that “issues relating to contract formation, existence, validity and non-arbitrability ... would be factual and disputed and for the arbitral tribunal to decide”. The passage proceeds to sound a note of caution that, even “while the court may, for legitimate reasons, to prevent wastage of public and private resources, exercise judicial discretion to conduct an intense yet summary *prima facie* review”, it has to “remain conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the arbitral tribunal”. This observation, I may say with respect, undercores the very *raison d’etre* of the 1996 Act itself.

23. This Court, exercising jurisdiction in the present case under Section 11(6) of the 1996 Act, is, in my opinion, not required to enter into this aspect of the dispute in any greater detail.

24. The submission of Mr. Jagia, which merits deeper consideration, is, however, his assertion that, by virtue of the order dated 1st May, 2007 (*supra*), of the CLB, in CA 157/2017, the MFS stood merged with the said order, which was executable as a decree under Section 634A of the Companies Act and that, therefore, no reference to arbitration, under Clause 3.15 of the MFS, would be made.

25. In the first place, the order dated 1st May, 2007 (*supra*) of the CLB stood effectively modified by the subsequent order dated 20th August, 2014, whereby it was held that the earlier order dated 1st May, 2007 should be treated as an order withdrawing CP 31/2007 unconditionally. On this premise, the CLB held the application of Respondent No. 1, under Section 634A of the Companies Act, not to be maintainable, as the order dated 1st May, 2007 could not be treated as an executable decree, but was required to be treated as an order of unconditional withdrawal of CP 31/2007. This order continues to remain in force as on date, not having been disturbed, or even stayed, by this Court or by any other judicial order.

26. The order dated 20th August, 2014 of the CLB is, however, presently, subject matter of appeal in Co A (SB) 47/2014, pending before this Court. Were the issue of maintainability of the present

petition, under Section 11(6) of the 1996 Act, actually to be affected by the order dated 1st May, 2007 (*supra*) of the CLB, I may have been inclined to await the outcome of Co A (SB) 47/2017, despite no stay having been granted by this Court, of operation of the order dated 20th August, 2014 of the CLB. In my view, however, the submission, of Mr. Jagia, that the order dated 1st May, 2007 of the CLB was in the nature of an executable decree, is completely tangential to the maintainability of the present petition, seeking reference of the disputes between the petitioners and the respondents to arbitration under Clause 3.15 of the MFS. This, in fact, is made manifest even from Clause 3.16 of the MFS, which clearly states that “the right to refer to arbitration any question in the event of difference or disputes amongst the parties shall be in addition to and not in derogation of the right of the parties to approach the Hon’ble Company Law Board, Principal Bench, for giving effect to or execution of the terms of Clause 3.15 of the MFS.” Consequently, even if the order dated 1st May, 2007, of the CLB were to be treated as an executable decree, that would not derogate from the right of the parties, emanating from Clause 3.15 of the MFS, to have disputes arising under the MFS referred to arbitration. The right to seek recourse to arbitration, which flows from Clause 3.15 of the MFS is, in my view, not affected by the issue of whether the order dated 1st May, 2007, of the CLB is, or is not, an executable decree.

27. The existence of Clause 3.15 of the MFS, cannot, in my view, be gainsaid in any manner. The clause exists; ergo, it is enforceable. No valid ground, to hold that Clause 3.15 of the MFS cannot be

enforced, has been raised by Mr. Jagia, arguing for Respondent Nos.1 to 3. In fact, as already noted hereinabove, an arbitral tribunal had been constituted, in accordance with Clause 3.15 of the MFS, to arbitrate on the disputes between the parties but, owing to the resignation of one of the named arbitrators, Clause 3.15 has become incapable of enforcement in the terms set out in the said clause.

28. The inevitable sequitur is that, under Section 11(6) of the 1996 Act, the notice invoking arbitration, dated 3rd March, 2020, from the petitioners to the respondents having failed to invoke any reaction, this Court has to step in and appoint the arbitrator to arbitrate on the disputes. The reliance, by Mr. Singh, on the afore-extracted paras 7.3 to 7.11 of *Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd*¹ is also, in my opinion, apt, in this context.

29. Besides, under Section 16(1) of the 1996 Act, the arbitral tribunal is entirely competent to rule on its own jurisdiction, which would include the competence to adjudicate on any objections with respect to existence or validity of the arbitration agreement. For ready reference, Section 16(1) of the 1996 Act is reproduced thus:

“16. Competence of arbitral tribunal to rule on its own jurisdiction. –

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement

independent of the other terms of the contract;
and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.”

30. It is always open, therefore, to the petitioners as well as the respondents to raise all contentions, before the arbitral tribunal, regarding the existence of the arbitration agreement, the validity of the arbitration agreement as well as the existence of an arbitrable dispute between the parties. It cannot be said that the present case is one in which these issues cannot be examined by the arbitral tribunal.

31. In view thereof, I am of the opinion that, as there exist disputes between the parties which, *prima facie*, are arbitrable in nature, and Clause 3.15 of the MFS constitutes a valid arbitration agreement, the present petition under Section 11(6) of the 1996 Act, is maintainable. Owing to the resignation of S. Devender Singh Kohli, it is not possible for the arbitral tribunal to be constituted in the manner contemplated by Clause 3.15. The notice from the petitioner to the respondent, to appoint an arbitrator, to arbitrate on the dispute between them, has evoked no response. The task of appointing the arbitrator, therefore, falls on this Court under Section 11(6) of the 1996 Act.

32. Needless to say, it would be open to all parties in the arbitration to raise all contentions, including the existence and validity of the arbitration agreement or the existence of an arbitrable dispute, before the learned arbitrator appointed by this judgement. The observations

contained in this order are being rendered within the limited parameters of the jurisdiction, vested in this Court by Section 11(5) and (6) of the 1996 Act, in view of Section 11(6A) thereof, and are not intended to be treated as any final expression of opinion either on the existence or validity of the arbitration agreement, or regarding the dispute between the parties being arbitrable in nature. All these aspects are kept open, to be urged before the learned Arbitral Tribunal which shall adjudicate thereon, as and when these aspects are raised, uninfluenced by any observations contained in the present judgment.

33. In view of the aforesaid observations, I appoint Hon'ble Mr. Justice C. M. Nayar, a learned retired Judge of this Court and an experienced arbitrator, as the arbitrator, to arbitrate on the disputes between the parties. The contact details of the learned Arbitrator are as under:

C-490, Defence Colony,
New Delhi-110024

Phone No. 9811200328

Email ID: cmnayar2009@gmail.com

34. The learned Arbitrator will be entitled to fees in accordance with the Fourth Schedule to the 1996 Act.

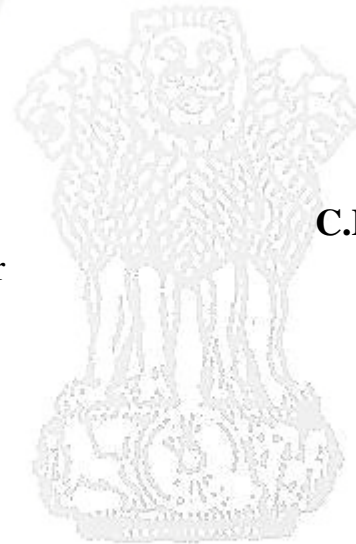
35. The learned Arbitrator would submit the requisite disclosure under Section 12(2) of the 1996 Act, within a week of entering on the reference.

36. The parties are directed to contact the learned Arbitrator, within a week of communication, to them, of a copy of this judgment, by e-mail by the Registry.

37. With the aforesaid observations, this petition stands disposed of.

JANUARY 22, 2021/kr

C.HARI SHANKAR, J



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