



WEB COPY



Arb..O.P(Com.Div). No.299 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.10.2023

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P(Com.Div).No.299 of 2023

Tilak Raj

... Petitioner

Vs.

1. M/s. Alphaprime Engineering Private Limited,
(Formerly known as M/s Alpha Prime,
Logistics and Engineering Pvt. Ltd.,)
S.No.30/31, C Block, Suriyadevi Groups,
Suryadevi Complex, Singaperumalkoil Main Road,
Orgadam, Kancheepuram,
Tamil Nadu- 602 105
(Through its Directors).
2. Mr.Bhaskaran K.S. Anil
Director- M/s Alphaprime Engineering Private Limited,
S.No.30/31, C Block Suriyadevi Groups,
Suryadevi Complex, Singaperumalkoil Main Road,
Oragadam, Kancheepuram, Tamil Nadu- 602105.
Also at- 10-A, c Block, Rajatvihar Noida 201301 Uttar Pradesh.
3. BijoTharakan
Director-M/s Alphaprime Engineering Private Limited,
S.No.30/31, C Block, Suriyadevi Groups,
Suryadevi Complex, Singaperumalkoil Main Road,
Oragadam, Kancheepuram,
Tamil Nadu- 602 105.

... Respondents



Arb..O.P(Com.Div). No.299 of 2023

Prayer: Original Petition is filed under Section 11(4)(a) of the Arbitration and Conciliation Act, 1996, praying to

a) appoint Sh.T.T.Biju, Advocate, Old No.21, New No.35, 1st Street, P.S.Sivasamy Salai, Mylapore, Chennai - 600 004, to act as the sole arbitrator for the adjudication of the disputes mentioned hereinabove; or

b) to appoint a sole arbitrator with the consent of the parties to adjudicate the dispute between the Petitioner and the Respondents under the Arbitration and Conciliation Act, 1996;

c) for cost of the Petition. and

d) pass such further or other orders as Hon'ble Court may deem to fit and proper in this circumstances of this case and thus render justice.

For Petitioner : Mr.S.Sivakumar

For Respondents : Mr.Adeesh Anto

ORDER

This petition has been filed for appointment of the Arbitrator under Section 11(4)(a) of Arbitration and Conciliation Act, 1996. The Petitioner claims to be a shareholder of the 1st Respondent/company which was incorporated by the 2nd and 3rd Respondents herein in the year 2013.



WEB COPY

2.It is the case of the petitioner that the petitioner was made 30% of the shareholder of the 1st respondent/company and functioned as a Director from 2014 upto 2020. After the resignation of the petitioner from the post of Director, the same was accepted by 2nd and 3rd respondents as Directors of the company. It is submitted that in terms of Articles of Association of the 1st respondent/company, the Petitioner was entitled for remuneration under Clause 24 of the Articles of Association which reads as under:

:24. Remuneration to the directors

(a) Subject to the provisions of the Act the Board may give the directors or any of them such remuneration by way of monthly payment or at a specified percentage of the net profit or turnover of the company or partly by one way and partly by another, as it may deem fit, for attending to the business and affairs of the company.

(b) Subject to the provisions of the act the board of directors may also give the directors or any of them the benefits of the provident fund, superannuating fund, pension scheme, bonus, gratuity funds and other as it may deem fit.”

3.It is therefore submitted that since the respondents have failed to pay the amount, the petitioner is aggrieved and therefore the petitioner is entitled to resolve the dispute under the mechanism prescribed under Clause 49 of the Articles of Association which reads as under:-



WEB COPY

“49. Arbitration

All questions of difference between the company and its share holders or between share holders interests as touching the affairs of the company shall be decided by arbitration.”

4.The learned counsel for the respondents on the other hand would submit that there is no scope for Arbitration, as Clause 49 is applicable only these disputes between the company and its shareholders or between shareholders interests as touching the affairs of the company.

5.It is submitted that the petitioner is not seeking any relief based on the shares held by the petitioner. Rather the petitioner is seeking to recover money in terms of Clause 24 of the Article of Association. It is therefore submitted that the dispute is not arbitrable. The Hon'ble Supreme Court in Para 59 of ***Duro Felguera, S.A. Vs. Gangavaram Port Limited*** [(2017) 9 SCC 729], the Court held as under:-

“59.The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in *SBP and Co. and Boghara Polyfab*. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as



incorporated in Section 11(6-A) ought to be respected.

WEB COPY

and in *Bharat Sanchar Nigam Limited and Another Vs. Nortel Networks*

India Private Limited [(2021) 5 SCC 738, the Court held as under:-

29.1.It replaced the Chief Justice of the High Court as the appointing authority for exercising the default power of appointment in the case of domestic arbitrations, by the High Court concerned; and, in respect of international commercial arbitrations, the default power would be exercised by the Supreme Court, in place of the Chief Justice of India.

29.2.It inserted sub-sections (6-A) and (6-B) in Section 11, which reads as:

“11. Appointment of arbitrators.—(1)-(6)

(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.

(6-B) The designation of any person or institution by the Supreme Court, or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.”

Sub-section (6-A) by a non-obstante clause provided that notwithstanding any judgment, decree or order of any court, the scope of examination at the Section 11 stage, would be confined to the existence of the arbitration agreement. The effect of the amendment was that if the existence of the arbitration agreement was not in dispute, all other issues would be left for the Arbitral Tribunal to decide. This was in



WEB COPY

reinforcement of the doctrine of *kompetenz-kompetenz*, which empowers the tribunal to rule on its own jurisdiction, including any objections with respect to the validity of the arbitration agreement; and thereby minimise judicial intervention at the pre-reference stage.

29.3.Sub-section (6-B) was inserted to provide that the designation of any person or institution, by either the Supreme Court or the High Court, as the appointing authority under Section 11, would not be regarded as a delegation of judicial power.

30.The amendments to Section 11 were brought in to legislatively overrule the line of judgments including *SBP & Co. v. Boghara Polyfab, Master Construction, etc.*, which had enlarged the scope of power of the appointing authority to decide various issues at the pre-reference stage.

31.Sub-section (6-A) came up for consideration in *Duro Felguera, S.A. v. Gangavaram Port Ltd.* wherein this Court held that the legislative policy was to minimise judicial intervention at the appointment stage. In an application under Section 11, the Court should only look into the existence of the arbitration agreement, before making the reference. Post the 2015 Amendment, all that the courts are required to examine is whether an arbitration agreement is in existence — nothing more, nothing less : (SCC pp. 759 & 765, paras 48 & 59)

“48. Section 11(6-A) added by the 2015 Amendment, reads as follows:

‘11. (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.*’

From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only



WEB COPY

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.

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in *SBP & Co.* [*SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618] and *Boghara Polyfab* [*National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]. *This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.*” (emphasis in original and supplied)

34. In view of the legislative mandate contained in the amended 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. The doctrine of kompetenz-kompetenz implies that the Arbitral Tribunal is empowered, and has the competence to rule on its own jurisdiction, including determination of all jurisdictional issues. This was intended to minimise judicial intervention at the pre-reference stage, so that the arbitral process is not thwarted at the threshold when a preliminary objection is raised by the parties.

The 2019 Amendment to Section 11

35. Section 11 has been further amended by the Arbitration and Conciliation (Amendment) Act, 2019 to



promote institutionalisation of arbitration in India. The 2019 Amendment Act has deleted sub-section (6-A) in Section 11. However, the amendment to Section 11 is yet to be notified. Consequently, sub-section (6-A) continues to remain on the statute book, and governs the scope of power under Section 11 for the present. The notification giving effect to the provisions of the 2019 Amendment Act which have been brought into force, reads as:

**“MINISTRY OF LAW AND JUSTICE
(Department of Legal Affairs)**

NOTIFICATION

New Delhi, 30-8-2019

S.O. 3154(E).—In the exercise of the powers conferred by sub-section (2) of Section 1 of the Arbitration and Conciliation (Amendment) Act, 2019 (33 of 2019), the Central Government hereby appoints 30-8-2019 as the date on which the provisions of the following sections of the said Act shall come into force:

- (1) Section 1;
- (2) Section 4 to Section 9 (both inclusive);
- (3) Section 11 to Section 13 (both inclusive);
- (4) Section 15.

[F. No. H-11018/2/2017-Admn.-III(LA)]
Dr RAJIV MANI, Jt. Secy. and Legal Adviser”

37.After the amendment by the 2019 Amendment to Section 11 is notified, it will result in the deletion of sub-section (6-A), and the default power will be exercised by arbitral institutions designated by the Supreme Court, or the High Court, as the case may be.

Issue of limitation

38.Limitation is normally a mixed question of fact and law, and would lie within the domain of the Arbitral Tribunal. There is, however, a distinction between jurisdictional and admissibility issues. An issue of “jurisdiction” pertains to the power and authority of the arbitrators to hear and decide a



WEB COPY

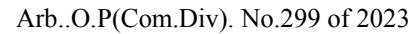
case. Jurisdictional issues include objections to the competence of the arbitrator or tribunal to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. Issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, since these issues pertain to the jurisdiction of the tribunal.

40.The issue of limitation, in essence, goes to the maintainability or admissibility of the claim, which is to be decided by the Arbitral Tribunal. For instance, a challenge that a claim is time-barred, or prohibited until some precondition is fulfilled, is a challenge to the admissibility of that claim, and not a challenge to the jurisdiction of the arbitrator to decide the claim itself.

41.In *Swissbourgh Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho* [*Swissbourgh Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho*, (2019) 1 SLR 263 : 2018 SGCA 81] , the Singapore Court of Appeal distinguished between “jurisdiction” and “admissibility” in paras 207 and 208, which read as:

“207. Jurisdiction is commonly defined to refer to the “power of the tribunal to hear a case”, whereas admissibility refers to “whether it is appropriate for the tribunal to hear it” : *Waste Management Inc. v. United Mexican States* [*Waste Management Inc. v. United Mexican States* ICSID Case No. ARB(AF)/98/2, dissenting opinion of Keith Highet dated 8-5-2000, para 58 (Arbitral Award).] . To this, Zachary Douglas adds clarity to this discussion by referring to “jurisdiction” as a concept that deals with “the existence of [the] adjudicative power” of an Arbitral Tribunal, and to “admissibility” as a concept dealing with “the exercise of that power” and the suitability of the claim brought pursuant to that power for adjudication : [Zachary Douglas, *The Press*, 2009] at paras 291 and 310.

208. The conceptual distinction between jurisdiction and admissibility is not merely an exercise in linguistic



7. Mr.R.Anburaj, Retired District Judge, No.F-1, C-Block, Serene Enclave, No.24, Aarnimuthu Street, Choolai, Chennai – 600 112 (Ph.No.9488852340) is appointed as an Arbitrator to resolve the dispute between the petitioner and the 1st respondent.



Arb..O.P(Com.Div). No.299 of 2023

8. The learned Arbitrator is entitled to fix the fees. All the issues are left open to the decision of the Arbitrator including preliminary objections.

9. This Arbitration Original Petition is allowed. No costs.

05.10.2023

jas

C.SARAVANAN, J.

jas

Arb.O.P(Com.Div).No.299 of 2023



WEB COPY



Arb..O.P(Com.Div). No.299 of 2023

05.10.2023