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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 285/2023

GOYAL MG GASES PRIVATE LIMITED

.....Petitioner

Through: Mr. Tarun Singla, Mr. K.C.
Joshi and Mr. Prakash Chand, Advs.

versus

EDAC ENGINEERING LIMITED

.....Respondent

Through: Mr. Suresh Sah, Adv.

CORAM:**HON'BLE MR. JUSTICE C. HARI SHANKAR****JUDGMENT (ORAL)**

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27.08.2024

1. This is a petition under Section 11(5) of the Arbitration and Conciliation Act, 1996¹, seeking reference of the dispute between the parties to arbitration.

2. Though, the respondent is stated to have filed reply to this petition, the Registry reported that it was under objections.

3. Accordingly, on 31 July 2024, this Court granted a final opportunity to the respondent to remove the objections and have the reply placed on record. It is still not on record. Given the limited scope of examination by the Court under Section 11(5)/ Section 11(6) of the 1996 Act, the Court is not inclined to protract this matter

¹ "the 1996 Act" hereinafter



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awaiting the reply being placed on record.

4. However, the Court has heard Mr. Suresh Sah, the learned Counsel for the respondent, who has argued at length.

5. Mr. Suresh Sah submitted, at the outset, that he was willing for settlement of the dispute with the petitioner.

6. Mr. Tarun Singla, learned Counsel appearing for the petitioner, however, submits that there is no possibility of settlement.

7. It is not possible to clap with one hand.

8. As such, for the present, the avenue of settlement appears to be unavailable. Nonetheless, it shall be open to the parties, should they so choose, to request the arbitrator, being appointed by the order passed today, to permit them to settle the dispute. Any such request, if made, would be decided by the arbitrator on its own merit.

9. The dispute that the petitioner seeks referred to arbitration deals with supply of goods by the petitioner to the respondent.

10. As is common in these cases, the respondent raised purchase orders on the petitioner, against which the petitioner supplied goods under invoices. Delivery of the goods was taken by the respondent under delivery challans.



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11. The petitioner seeks to invoke the following arbitration clause, contained in the terms and conditions of the delivery challans:

“16. Any dispute or differences whatsoever arising between the parties i.e., Purchaser & Seller out of or relating to the constructions, meaning, scope operation or effect of any or all transactions, between the parties, whether past present / further, including non-payment and or non return of assets on the validity or the any obligation by either party shall be settled by the sole arbitration and an arbitrator to be appointed by the Managing Director of Goyal MG Gases (P) Ltd. who would also have right to appoint alternate arbitration in place of any arbitrator appoint in case of his death, incapacity of refusal to act. Further the parties agree in at arbitration so appointed may be an employee and / or the arbitrator so appointed shall be raised. The award given by the sole arbitrator shall be final and binding upon the parties, the arbitrator proceedings shall be held at New Delhi only.”

12. Though Clause 16 of the terms and conditions set out in the delivery challan envisages arbitration of dispute by an arbitration to be appointed by the Managing Director of the petitioner, that is obviously impermissible in view of the law enunciated by the Supreme Court in *Bharat Broadband Network Ltd v United Telecoms Ltd*², *Perkins Eastman Architects DPC v HSCC (India) Ltd*³ and *Haryana Space Application Centre (HARSAC) v Pan India Consultants Pvt Ltd*⁴, read with Section 12(5) of the 1996 Act, which proscribe a party to the contract either from arbitrating on the dispute between the parties or appointing an arbitrator to do so.

13. As such, the petitioner addressed a notice to the respondent on 2 January 2023, invoking the arbitration clause contained on the reverse of the delivery challan and seeking resolution of the dispute between

²(2019) 5 SCC 755

³(2020) 20 SCC 760

⁴(2021) 3 SCC 103



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the parties by arbitration.

14. According to the petitioner, an amount of ₹ 9,23,028/- was payable by the respondent to the petitioner as on 31 December 2022.

15. The respondent not having condescended for reference of the dispute to arbitration, the petitioner has approached this Court under Section 11(5)/ Section 11(6) of the 1996 Act.

16. Mr. Suresh Sah submits that many of the delivery challans filed by the petitioner are illegible.

17. The Court has perused the delivery challans and finds that, the handwritten words and figures on some of them may be unintelligible, the typed portion of the delivery challans is perfectly legible, and the Court is also in a position to read the arbitration clause on the delivery challans, which stands reproduced in para 11 *supra*.

18. Needless to say, it would be for the petitioner to produce legible copies of the delivery challans before the arbitrator, if it seeks to base any claim on the delivery challans.

19. Mr. Suresh Sah secondly submits that the purchase orders raised on the petitioner by the respondent did not contain any arbitration clause, and envisage jurisdiction to be with Courts at Chennai.

20. Be that as it may, there cannot be any dispute about the fact that



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the delivery challan did not contain an arbitration clause, fixing New Delhi as the arbitral seat.

21. In that view of the matter, unless the Court is to wish away the arbitration clause on the delivery challan, the Court cannot, acting within its jurisdiction under Section 11(5)/ Section 11(6) of the 1996 Act, non-suit the petitioner merely because there was no arbitration clause on the purchase order.

22. Needless to say, liberty would stand reserved with the respondent to contend before the arbitrator that the claim is actually relatable to the purchase order and not to the delivery challan. It would equally be open to the petitioner to contend otherwise. Any such controversy, if raised, shall be decided by the arbitrator on its own merit.

23. The third submission of Mr. Suresh Sah is predicated on the judgment of the Division Bench of this Court in *Hetampur Tax Fab v Daksh Enterprises*⁵.

24. Mr. Suresh Sah seeks to contend, on the basis of the said decision, that the arbitration clause contained on the reverse of the delivery challan cannot be a basis for seeking reference of the dispute to arbitration.

25. There is a factual distinction between the position which

⁵ 2022 SCC OnLine Del 3895



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obtained in *Hetampuria Tax Fab* from which obtains in the present case. In *Hetampuria Tax Fab*, the Division Bench had observed that the signature of the contesting respondent was below a certificate. Paragraphs 9 and 10 of the decision in *Hetampuria Tax Fab* read thus:

“9. It is material to note that after the aforesaid clause, there is dotted line that separates the text below the line. The said text is reproduced below:

“This is Certified that the goods purchased from M/s. HETAMPURIA TEX FAB, 1, bagh Diwar (Shop No.6), Fatehpuri, Delhi-6 Under their Bill No. In good condition. Dated..... Signature”

10. The appellant claims that since the respondent had signed the Delivery Challan, he had also accepted the arbitration clause. This contention is unmerited. A plain view of the Delivery Challan indicates that the signature has been appended below the statement to the effect that the goods have been received in good condition. It is apparent that the signatures relate to the said certification. It is well settled that a unilateral document issued by a party cannot, absent anything more, be construed as a binding arbitration agreement.”

26. The Division Bench further expressed the view that the delivery challan was a unilateral document and that, therefore, the existence of an arbitration clause in the delivery challan could not constitute a basis to refer the dispute to arbitration.

27. As is already been noted in the present case, the signature of the parties is contained on the face of the delivery challan, and not below any separate certificate as was the case in *Hetampuria Tax Fab*.

28. Besides, the exercise of ratiocination, which was undertaken by the Division Bench in *Hetampuria Tax Fab*, may now not be



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permissible in view of the recent decision of the Supreme Court in ***SBI General Insurance Co Ltd v. Krish Spinning***⁶. The Supreme Court, in the said case, has considerably delimited the scope of examination by a Court exercising jurisdiction under Section 11(6)/Section 11(5) of the 1996 Act. Paragraphs 110 to 114 and 120 of the said decision read thus:

“110. The scope of examination under Section 11(6-A) is confined to the existence of an arbitration agreement on the basis of Section 7. The examination of validity of the arbitration agreement is also limited to the requirement of formal validity such as the requirement that the agreement should be in writing.

111. The use of the term ‘examination’ under Section 11(6-A) as distinguished from the use of the term ‘rule’ under Section 16 implies that the scope of enquiry under section 11(6-A) is limited to a prima facie scrutiny of the existence of the arbitration agreement, and does not include a contested or laborious enquiry, which is left for the arbitral tribunal to ‘rule’ under Section 16. The prima facie view on existence of the arbitration agreement taken by the referral court does not bind either the arbitral tribunal or the court enforcing the arbitral award.

112. The aforesaid approach serves a two-fold purpose - firstly, it allows the referral court to weed out non-existent arbitration agreements, and secondly, it protects the jurisdictional competence of the arbitral tribunal to rule on the issue of existence of the arbitration agreement in depth.

113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in ***In Re. Interplay***⁷ that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a prima facie arbitration agreement and not any other issues. The relevant observations are extracted hereinbelow:

“209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall “examine the existence of a prima facie arbitration agreement and not other issues”. These other issues not

⁶ 2024 SCC OnLine SC 1754

⁷ In re. Interplay between Arbitration Agreements under Arbitration & Conciliation Act, 1996 and Stamp Act, 1889, (2024) 6 SCC 1



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only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the “other issues” also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a timebound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. [...]”
(Emphasis supplied)

114. In view of the observations made by this Court in *In Re. Interplay*, it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of *prima facie* existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in *Vidya Drolia*⁸ and adopted in *NTPC v SPML*⁹ that the jurisdiction of the referral court when dealing with the issue of “accord and satisfaction” under Section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in *In Re. Interplay*.

120. The principle of subsequent judicial review has been enshrined in the US doctrine of “Second Look”. In a leading U.S. Supreme Court judgment of *PacifiCare Health Systems, Inc. v. Book*¹⁰, it was held that the question of non-arbitrability should be considered in the first instance by the arbitral tribunal. The Court observed that, “since we do not know how the arbitrator will construe the remedial limitations, the question ... whether they render the parties' agreements unenforceable is better left for initial arbitral consideration”. This doctrine has also been affirmed by judgments of the U.S. lower courts in cases of *Dillon v. BMO Harris Bank, NA*¹¹ and *Escobar v. Celebration Cruise Operator, Inc.*¹² wherein it was reasoned that the issues of U.S. statutory law and arbitrability should be submitted first to arbitration, with the possibility of subsequent judicial review in recognition and enforcement proceedings.”

⁸ *Vidya Drolia v Durga Trading Corpn*, (2021) 2 SCC 1

⁹ *NTPC Ltd v SPML Infra Ltd*, (2023) 9 SCC 385

¹⁰ 538, U.S. 401 (U.S. S. Ct. 2003)

¹¹ 856 F.3d 330, 333 (4th Cir. 2017)



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29. Thus, the Supreme Court has held that, while the Section 11(6)/ Section 11(5) Court can examine the existence of the arbitration agreement between the parties, that examination has to be purely *prima facie* and, in fact, is essentially required to be limited to determining whether the agreement between the parties is in writing. No contested or laborious inquiry can be undertaken by the Court exercising jurisdiction under Section 11(6)/ Section 11(5) of the 1996 Act, even while examining whether an arbitration agreement is in existence between the parties. Paragraph 114 of the decision reiterates this principle by ordaining that “the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of *prima facie* existence of the arbitration agreement, *and nothing else*”.

30. In that view of the matter, I have my reservations as to whether Section 11(6)/ Section 11(5) of the 1996 Act can, given the position of law, enunciated in ***SBI General Insurance*** embark on an incisive examination of the various documents executed between the parties such as the purchase order, invoices, delivery challan and arrive at a finding that, even though the signatures of the parties are contained on the delivery challan, their location on the body of the delivery challan does not indicate consensus *ad idem* to the arbitration clause contained therein. These are matters which, after the decision in ***SBI General Insurance***, have to be left for decision by the arbitral tribunal.

31. The claim of the petitioner against the respondent in the present case is stated to be in the realm of ₹ 9,23,028, apart from interest.

¹² 805 F.3d 1279, 1288-89 (11th Cir. 2015)



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32. Accordingly, this Court appoints Mr. Ashwin Romy, Advocate (Tel. 7025087486) as the arbitrator to arbitrate on the dispute between the parties.

33. The learned arbitrator shall be entitled to charge fees as per the Fourth schedule of the 1996 Act.

34. The learned arbitrator is also requested to file requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on the reference.

35. This Court has not expressed any opinion on any aspect of the matter factual or legal.

36. All contentions shall remain open to be urged by both the parties before the learned arbitrator. It shall also be open to the parties, should they so choose, to attempt for a settlement of the dispute before the arbitrator.

37. The petition stands disposed of in the aforesaid terms.

C.HARI SHANKAR, J

AUGUST 27, 2024/aky

Click here to check corrigendum, if any