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

\+ ARB.P. 310/2024

ASCOT SOLAR PVT LTD .....Petitioner

Through: Mr. Tushar Kumar, Mr. Ishan Sehgal, Mr. Junaid Qureshi, Advs.

versus

GOVERNMENT OF INDIA PRESS .....Respondent

Through: Ms. Nidhi Banga, SPC and Mr.Siddhant Gupta, GP for UOI

**CORAM:**
**HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD**

**<u>O R D E R</u>**

**% 13.11.2024**

1. This Petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator as per the Clause 17.7(c) of the Power Purchase Agreement dated 26.08.2016 to adjudicate on the disputes which have arisen between the parties. It is stated that on 21.08.2020 the Petitioner terminated the Agreement. It is stated that a demand notice dated 13.08.2022 was sent to the Respondent regarding payment of dues in respect of deemed generation charges between February 2019 to August 2022.

2. Clause 17.7(c) of the Power Purchase Agreement reads as under:

> *"17.7(c) Arbitration Procedure:*
> *(i) In case of any dispute arising out of this. Agreement or otherwise, between the, parties hereto, CPWD manual dispute resolution methodology will be used. A period of not more than 15 days will be*

*allotted at each stage of resolution. Upon failure to resolve the said dispute through conciliation the dispute shall be referred to arbitration and the Chief Engineer CPWD, may appoint an arbitrator from the panel of arbitrators of MOUD. The arbitrator(s) shall be appointed wi:thin a period of 30 days from the date of receipt of written notice I demand of appointment of arbitrator form either Party. The cost of the arbitration will be shared equally by Power. Producer and the Purchaser.*

*ii) The venue of such arbitration shall be Delhi I New Delhi. The arbitral award shall be binding on both Parties. The arbitration proceedings shall be governed by the Indian Arbitration and Conciliation Act, 1996, as amended from time to time including provisions in force at the time the reference is made.* "

3. Notice in the present Petition was issued on 04.03.2024. Reply has been filed.

4. It is the stand of the Respondent that the Central Cabinet Unit of Faridabad was closed in 2019 and the premises was handed-over to the CPWD. It is stated that the Petitioner was in the know of the development and, therefore, the present Petition for appointment of Arbitrator is barred by time.

5. Material on record indicates that a notice under Section 21 of the Arbitration Act was sent by the Petitioner to the Respondent on 16.06.2021. The said notice was well within the period of limitation for raising the claim. There was no response from the Respondent to the notice dated 16.06.2021 and the Petitioner approached this Court for appointment of Arbitrator in January-February, 2024.

6. The question as to whether the present Petition is barred by limitation

or not will be covered by Article 137 of the Limitation Act which reads as under:

| | | Period of limitation | Time from which period begins to run |
|---|---|---|---|
| 137 | Any other application for which no period of limitation is provided elsewhere in this division. | Three years | When the right to apply accrues. |

7. In terms of Article 137 of the Limitation Act, the period of limitation in the present case would begin from the time when the Petitioner herein sent the notice under Section 21 of the Arbitration Act, i.e. from 16.06.2021, and the same would mark the commencement of the arbitration proceedings.

8. The present Petition has been filed within three years from the date when the right to apply accrued on the Petitioner, i.e. 16.06.2021, and, therefore, it cannot be said that the present Petition is barred by limitation.

9. It is well settled that the principle of judicial non-interference in arbitral proceedings is fundamental to both domestic as well as international commercial arbitration and that the Arbitration Act is itself contained code.

10. The Apex Court in SBI General Insurance Co. Ltd. vs. Krish Spinning, **2024 SCC OnLine 1754** has observed as under:

> *"**92**. The position that emerges from the aforesaid*

*discussion of law on the subject as undertaken by us can be summarised as follows:—*

*i. There were two conflicting views which occupied the field under the Arbitration Act, 1940. While the decisions in Damodar Valley (supra) and Amar Nath (supra) took the view that the disputes pertaining to "accord and satisfaction" should be left to the arbitrator to decide, the view taken in P.K. Ramaiah (supra) and Nathani Steels (supra) was that once a "full and final settlement" is entered into between the parties, no arbitrable disputes subsist and therefore reference to arbitration must not be allowed.*

*ii. Under the Act, 1996, the power under Section 11 was characterised as an administrative one as acknowledged in the decision in Konkan Railway (supra) and this continued till the decision of a seven-Judge Bench in SBP & Co. (supra) overruled it and significantly expanded the scope of judicial interference under Sections 8 and 11 respectively of the Act, 1996. The decision in Jayesh Engineering (supra) adopted this approach in the context of "accord and satisfaction" cases and held that the issue whether the contract had been fully worked out and whether payments had been made in full and final settlement of the claims are issues which should be left for the arbitrator to adjudicate upon.*

*iii. The decision in SBP & Co. (supra) was applied in Boghara Polyfab (supra) and it was held by this Court that the Chief Justice or his designate, in exercise of the powers available to them under Section 11 of the Act, 1996, can either look into the question of "accord and satisfaction" or leave it for the decision of the arbitrator. However, it also specified that in cases where the Chief Justice was satisfied that there was indeed "accord and satisfaction", he could reject the* *application for appointment of arbitrator. The prima facie standard of scrutiny was also expounded, stating that the party seeking arbitration would have to prima facie establish that there was fraud or coercion involved in the signing of the discharge certificate. The position elaborated in Boghara Polyfab (supra) was adopted in a number of subsequent decisions, wherein it was held that a mere bald plea of fraud or coercion was not sufficient for a party to seek reference to arbitration and prima facie evidence for the same was required to be provided, even at the stage of the Section 11 petition.*

*iv. The view taken by SBP & Co. (supra) and Boghara Polyfab (supra) was seen by the legislature as causing delays in the disposal of Section 11 petitions, and with a view to overcome the same, Section 11(6-A) was introduced in the Act, 1996 to limit the scope of enquiry under Section 11 only to the extent of determining the "existence" of an arbitration agreement. This intention was acknowledged and given effect to by this Court in the decision in Duro Felguera (supra) wherein it was held that the enquiry under Section 11 only entailed an examination whether an arbitration agreement existed between the parties or not and "nothing more or nothing less".*

*v. Despite the introduction of Section 11(6-A) and the decision in Duro Felguera (supra), there have been diverging views of this Court on whether the scope of referral court under Section 11 of the Act, 1996 includes the power to go into the question of "accord and satisfaction". In Antique Art (supra) it was held that unless some prima facie proof of duress or coercion is adduced by the claimant, there could not be a referral of the disputes to arbitration. This view, however, was overruled in Mayavati Trading (supra) which reiterated the view taken in Duro Felguera* *(supra) and held that post the 2015 amendment to the Act, 1996, it was no more open to the Court while exercising its power under Section 11 of the Act, 1996 to go into the question of whether "accord and satisfaction" had taken place.*

*vi. The decision in Vidya Drolia (supra) although adopted the view taken in Mayawati Trading (supra) yet it provided that in exceptional cases, where it was manifest that the claims were exfacie time barred and deadwood, the Court could interfere and refuse reference to arbitration. Recently, this view in the context of "accord and satisfaction" was adopted in NTPC v. SPML (supra) wherein the "eye of the needle" test was elaborated. It permits the referral court to reject arbitration in such exceptional cases where the plea of fraud or coercion appears to be ex-facie frivolous and devoid of merit.*

*93. **Thus, the position after the decisions in Mayavati Trading (supra) and Vidya Drolia (supra) is that ordinarily, the Court while acting in exercise of its powers under Section 11 of the Act, 1996, will only look into the existence of the arbitration agreement and would refuse arbitration only as a demurrer when the claims are ex-facie frivolous and non-arbitrable**.*

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***114.** In view of the observations made by this Court in In Re : Interplay (supra), 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 (supra) and adopted in NTPC v. SPML (supra) 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 (supra).*

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**117.** *By referring disputes to arbitration and appointing an arbitrator by exercise of the powers under Section 11, the referral court upholds and gives effect to the original understanding of the contracting parties that the specified disputes shall be resolved by arbitration. Mere appointment of the arbitral tribunal doesn't in any way mean that the referral court is diluting the sanctity of "accord and satisfaction" or is allowing the claimant to walk back on its contractual undertaking. On the contrary, it ensures that the principal of arbitral autonomy is upheld and the legislative intent of minimum judicial interference in arbitral proceedings is given full effect. Once the arbitral tribunal is constituted, it is always open for the defendant to raise the issue of "accord and satisfaction" before it, and only after such an objection is rejected by the arbitral tribunal, that the claims raised by the claimant can be adjudicated.*

**118.** *Tests like the "eye of the needle" and "ex-facie meritless", although try to minimise the extent of judicial interference, yet they require the referral court to examine contested facts and appreciate prima facie evidence (however limited the scope of enquiry may be) and thus are not in conformity with the principles of modern arbitration which place arbitral autonomy and judicial non-interference on the highest pedestal.*

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**122.** *Once an arbitration agreement exists between parties, then the option of approaching the civil court becomes unavailable to them. In such a scenario, if the* *parties seek to raise a dispute, they necessarily have to do so before the arbitral tribunal. The arbitral tribunal, in turn, can only be constituted as per the procedure agreed upon between the parties. However, if there is a failure of the agreed upon procedure, then the duty of appointing the arbitral tribunal falls upon the referral court under Section 11 of the Act, 1996. If the referral court, at this stage, goes beyond the scope of enquiry as provided under the section and examines the issue of "accord and satisfaction", then it would amount to usurpation of the power which the parties had intended to be exercisable by the arbitral tribunal alone and not by the national courts. Such a scenario would impeach arbitral autonomy and would not fit well with the scheme of the Act, 1996."* (emphasis supplied)

11. The issue as to whether the dispute is arbitrable or not or whether the claim of the Petitioner is barred by limitation would be decided by the Arbitrator.

12. In view of the above, this Court is inclined to appoint Mr. Raghavendra Srivatsa, Senior Advocate (Mob No.9818726501) as a Sole Arbitrator to adjudicate on the disputes between the Parties.

13. The arbitration would take place under the aegis of the Delhi International Arbitration Centre (DIAC) and would abide by its rules and regulations. The learned Arbitrator shall be entitled to fees as per the Schedule of Fees maintained by the DIAC.

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

15. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator

on their merits, in accordance with law.

16. Needless to say, nothing in this order shall be construed as an expression of this Court on the merits of the contentions of the parties.

17. The petition is disposed of along with pending application(s), if any.

**SUBRAMONIUM PRASAD, J**

**NOVEMBER 13, 2024**
*Rahul*