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

+ **ARB. P. 467/2023**

AJANTA INDIA PRIVATE LIMITED

..... Petitioner

Through: Mr. Rohan Swarup and Mr. Sanyam
Suri, Advs.

versus

FLUXLITE NIMS PRIVATE LIMITED

..... Respondents

Through: Ms. Awantika Manohar and Mr.
Nilesh Sharma, Ms. Parul Dhruvey,
Advs.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

ORDER

12.01.2024

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1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (*in short 'A&C Act'*) seeks appointment of an independent sole arbitrator to adjudicate the disputes between the parties.
2. The disputes between the parties are stated to have arisen in the context of an MOU dated 08.10.2019. The said MOU contains an arbitration clause which reads as under:-

"j. In the event of any dispute or difference between the parties hereto regarding the interpretation or meaning of any provision of this Memorandum of Understanding, the same will be referred to arbitration of a common arbitrator as agreed upon for one or to two arbitrators, one to be appointed by each party and the arbitration will be governed by the Arbitration and Conciliation Act, 1996. The venue of arbitration will be at New Delhi."

3. Disputes having arisen between the parties, an invocation notice dated 28.11.2022 was sent by the petitioner to the respondent whereby the



petitioner invoked the arbitration clause and also proposed the name of a person who could be appointed as the sole arbitrator to adjudicate the disputes between the parties. No response thereto having been sent by the respondent to the petitioner, the present petition came to be filed by the petitioner.

4. Learned counsel for the respondent strenuously opposes the present petition on the ground that the scope of arbitration clause is limited and confined only to disputes as regards “*interpretation or meaning of any provision of this Memorandum of Understanding*”. It is submitted that disputes sought to be raised do not concern the “interpretation or meaning” of the MOU in question. It is therefore contended that it is not open for the petitioner to take recourse to the arbitration to seek adjudication of the claims sought to be raised. In this regard, learned counsel for the respondent relies upon a judgment of a Coordinate Bench of this Court in ***Avantha Holdings Ltd. v. CG Power & Industrial Solutions Ltd.***, (2021) 4 HCC (Del) 267.

5. *Per contra*, learned counsel for the petitioner submits that it is not open for the respondent to restrict the scope of the arbitration agreement, in the manner suggested by the respondent. He submits that the legal position is well settled that an arbitration clause is to be construed liberally and an attempt should be made to bind the parties to arbitration rather than to permit parties to avoid an arbitration. In this regard, the reliance has been placed upon following judgments:

a. *N.N. Global Mercantile Pvt. Ltd. vs. Indo Unique Flame Ltd.* (2021) 4 SCC 379

b. *Vidya Drolia & Ors. Vs. Durga Trading Corporation* (2021) 2 SCC 1



c. Intercontinental Hotels Group (India) Pvt. Ltd. & Anr. Vs. Waterline Hotels Pvt. Ltd. (2022) 7 SCC 662

d. Babanrao Rajaram Pund Vs. Samarth Builders and Developers & Anr. (2022) 9 SCC 691

e. Printers (Mysore) Pvt. Ltd. vs. Pothan Joseph AIR 1960 SC 1156

f. Mohammed Imaduddin Farooqi vs. Karkhana Zinda Tilismath (2017) 5 ALT 47 (DB)

6. He further relies upon a judgment of the Division Bench of this Court in ***Ranjit Kaur v Union of India & Ors.*** ILR (1996) 1 Delhi 568 to contend that the since ‘interpretation’ of the agreement is expressly within the scope of arbitration, “*a dispute as to whether the agreement, according to its true construction did or did not warrant a particular thing to be done there under, was referable to and came within the scope of the authority of the arbitrators.*”

7. Further, reference is also made to the judgment of a Constitution Bench of the Supreme Court in ***Re: Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899***, 2023 SCC OnLine SC 1666, wherein, it has been held as under :-

“G. The doctrine of competence-competence

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162. The legislature confined the scope of reference under Section 11(6A) to the examination of the existence of an arbitration agreement. The use of the term “examination” in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of “existence” of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In *Duro Felguera (supra)*, this Court held that the referral courts only need to consider one aspect to determine the existence of an arbitration agreement - whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have



arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by arbitral tribunal under Section 16. We accordingly clarify the position of law laid down in *Vidya Drolia* (supra) in the context of Section 8 and Section 11 of the Arbitration Act.

163. The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence-competence, only *prima facie* proof of the existence of an arbitration agreement must be adduced before the referral court. The referral court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the arbitral tribunal. This position of law can also be gauged from the plain language of the statute.

164. Section 11(6A) uses the expression “examination of the existence of an arbitration agreement.” The purport of using the word “examination” connotes that the legislature intends that the referral court has to inspect or scrutinize the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression “examination” does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provides that the arbitral tribunal can “rule” on its jurisdiction, including the existence and validity of an arbitration agreement. A “ruling” connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the referral court is only required to examine the existence of arbitration agreements, whereas the arbitral tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by this Court in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*

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166. When the referral court renders a *prima facie* opinion, neither the arbitral tribunal, nor the court enforcing the arbitral award will be bound by such a *prima facie* view. If a *prima facie* view as to the existence of an arbitration agreement is taken by the referral court, it still allows the



arbitral tribunal to examine the issue in-depth. Such a legal approach will help the referral court in weeding out prima facie non-existent arbitration agreements. It will also protect the jurisdictional competence of the arbitral tribunals to decide on issues pertaining to the existence and validity of an arbitration agreement.”

8. In the present case, the existence of the arbitration agreement is not disputed although the parties are at divergence as to the scope thereof and whether the same subsumes the dispute/s sought to be raised by the petitioner. This is an aspect which can be gone into by the arbitral tribunal itself.

9. After some hearing, respective counsel are in agreement that an independent sole arbitrator be appointed, subject to the aforesaid objection of the respondent as regards limited scope of the arbitration agreement being considered by the learned sole arbitrator.

10. Accordingly, Mr. Nikhil Singhvi, Advocate, (Mobile No.: 8826130600) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

11. The respondent shall be at liberty to raise preliminary objections as regards jurisdiction/ arbitrability, including objection/s as regards the limited scope of the arbitration agreement and/or as regards non-maintainability of the claims sought to be raised by the petitioner, which shall be duly considered and adjudicated by the learned sole arbitrator.

12. The learned Sole Arbitrator may proceed with arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A& C Act.

13. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A& C Act; or as may otherwise be agreed to between



the parties and the learned Sole Arbitrator.

14. Parties shall share the arbitrator's fee and arbitral costs, equally.

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 opinion of this court on the merits of the contentions of the parties.

17. The present petition stands disposed of in the above terms.

SACHIN DATTA, J

JANUARY 12, 2024/AT