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**IN THE HIGH COURT OF DELHI AT NEW DELHI
ARB.P. 741/2023**

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M/S PROMAX POWER LIMITED Petitioner

Through: Mr. Chetan Singh & Mr. Vidit
Gupta, Advs.

versus

AMAN KUMAR

..... Respondent

Through: Mr. Sermon Rawat & Mr. Vikas
Rathee, Advocates (M-
9818185456).

CORAM:

JUSTICE PRATHIBA M. SINGH

ORDER

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09.01.2024

1. This hearing has been done through hybrid mode.
2. The present petition has been filed by the Petitioner-M/s Promax Power Ltd. under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of arbitrator in terms Memorandum of Understanding (*hereinafter*, 'MoU') dated 26th July, 2022.
3. An MoU was executed between the Respondent- Mr. Aman Kumar with the Petitioner, in terms of which the Respondent agreed to attempt to arrange a loan of Rs.10 crores for the Petitioner. In addition, certain loan transactions were also contemplated in the said MoU. The MoU contains an arbitration clause to the following effect:

"16) That it is further agreed between the parties that if at any time any dispute, differences or question shall arise touching the construction or effect of this MOU or any clause or thing therein contained or respective the rights or liabilities of the parties here under, the same shall be referred to be adjudicated by a sole arbitrator to be appointed with the Mutual Consent of both the Parties in accordance with



provisions of the Arbitration and Conciliation Act. The decision of the said arbitrator shall be final and binding upon both the parties. The place of arbitration shall be at the New Delhi, New Delhi and the language used will be English. Each party shall pay its own costs and fees in connection with the arbitration.”

4. In terms of Section 21 of the Arbitration and Conciliation Act, 1996, the Petitioner invoked the arbitration on 11th May, 2023 which was not acceded to by the Respondent in its reply dated 17th May, 2023. Hence the present petition under Section 11 of the Arbitration and Conciliation Act, 1996.

5. The submission of Id. Counsel for the Petitioner is that the MoU is not in dispute and the Petitioner is, therefore, entitled to agitate its claims against the Respondent before the Arbitral Tribunal. On the other hand, the Respondent's case is that an independent loan transaction was entered into, which had no connection with the MoU. In addition, the letter dated 26th July, 2022 issued to Mr. Jasbir Singh itself would show that he is a third party to the transaction, and therefore the Id. Sole Arbitrator ought not to be appointed.

6. Recently, the Supreme Court in ***NTPC Ltd. v. M/s. SPML Infra Ltd. [2023 LiveLaw (SC) 287]***, held that under Section 11(6) of the Arbitration and Conciliation Act, 1996, the pre-referral jurisdiction of the Courts is very narrow and inheres two inquiries:

- The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the referral court.
- The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute. The standard of scrutiny to examine the non-arbitrability of a claim is only prima



facie. Referral courts must not undertake a full review of the contested facts; they must only be confined to a primary first review and let facts speak for themselves.

7. After perusing the MoU, it is clear that there are several clauses which spell out the obligations and counter-obligations of the parties. These include an arrangement of a loan, payment of interest and other details in clauses 1 to 5 of the MoU.

8. Considering *NTPC Ltd. (supra)*, the question as to whether the transaction at page 29 is connected to the MoU or not or whether the MoU is frustrated, would be an issue on merits which is not to be considered at this stage. Thus, as long as the arbitration clause itself is admitted and the MoU is admitted, the Sole Arbitrator deserves to be appointed.

9. Accordingly, ***Dr. Amit George, Advocate [M:9910524364]*** is appointed as the Sole Arbitrator. The arbitration proceedings shall be conducted under the aegis of the Delhi International Arbitration Centre (*'DIAC'*). The rules applicable to the arbitration shall be that of the DIAC. Let the parties appear before the Id. Arbitrator on **18th March, 2024 at 4 pm.**

10. The present petition is disposed of in these terms.

11. Copy of this order be communicated to the DIAC, by the Registry.

PRATHIBA M. SINGH, J.

JANURARY 09, 2024

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