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

+ ARB.P. 722/2024
SATINDER MAHAJANPetitioner

versus
UNION OF INDIARespondent

+ ARB.P. 723/2024
SATINDER MAHAJANPetitioner

versus
UNION OF INDIARespondent

Appearance: -

Mr. S.W. Haider and Ms. Pooja Dua, Advocates for Petitioner in Item Nos. 5 & 6.

Mr. Bhagwan Swarup Shukla, Standing Counsel with Mr. Dushyant Pratap Singh, G.P. and Ms. Pragya Panjat Singh, Advocate for UOI in Item No. 5 & 6.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

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20.09.2024

1. The petitioner has filed these two petitions under Section 11 of the Arbitration and Conciliation Act, 1996 [“the Act”] for appointment of arbitrators to adjudicate dispute between the parties under two Contract Agreements, one dated 24.03.2017 and the other dated 28.01.2017 [“the Agreements”].

2. The two Agreements were for construction to be carried out on behalf of the Railways. As both the Agreements are between the same



parties, the petitions are taken up for hearing together.

3. Both agreements contain Dispute Resolution Clauses incorporated under Clause 64 of the General Conditions of the Contract [“GCC”]. The clause provides for resolution of disputes by an arbitral tribunal constituted in terms thereof.

4. Disputes arose between the parties, pursuant to which the petitioner invoked arbitration by separate letters dated 02.02.2024. Neither of the invocation notices elicited a response, as a result of which the petitioner approached this Court under Section 11 of the Act.

5. I have heard Mr. S.W. Haider, learned counsel for the petitioner, and Mr. Bhagwan Swarup Shukla, learned Central Government Standing Counsel for the respondent.

6. Mr. Haider points out at the outset that, after the filing of these petitions, the petitioner has received separate letters dated 16.05.2024 from the respondent, copies whereof have been handed over in Court and are taken on record. In the said communications, the respondent has, *inter alia*, sought the petitioner’s consent for waiver of Section 12(5) of the Arbitration and Conciliation Act, 1996. Mr. Haider states that the petitioner does not wish to waive the applicability of the said statutory provision.

7. Mr. Shukla does not dispute the applicability of Clause 64 of the GCC, but submits that in both the cases, the final bills raised by the petitioner were, in fact, paid and Supplementary Agreements were entered into, signifying that the claim had been fully and finally settled. He, therefore, contends that no arbitrable dispute exists in either case for reference to arbitration. Copies of the Supplementary Agreements, both



dated 17.03.2023, have been annexed to the replies filed by the respondent.

8. Without prejudice to the above contention, Mr. Shukla submits that the petitioner may be directed to make a reference to the General Manager of the respondent for settlement of the disputes under Clause 63 of the GCC, prior to a reference to arbitration.

9. The ground with request to arbitrability of the disputes, is not available to resist the constitution of an arbitral tribunal under Section 11 of the Act. Questions of arbitrability, including accord and satisfaction, are beyond the jurisdiction of the Court at the referral stage, and have to be left to the arbitral tribunal for determination.

10. Although a narrow window for adjudication of such disputes in case of claims which were patently non-arbitrable, was earlier available, the recent judgments of the Supreme Court in *SBI General Insurance Co. Ltd. v. Krish Spinning* [2024 SCC OnLine SC 1754] and *Cox & Kings Ltd. v. SAP India (P) Ltd.* [2024 SCC OnLine SC 2452] make it clear that the said view does not survive the seven-judge decision in *Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re* [(2024) 6 SCC 1].

11. The relevant extracts of *SBI General Insurance (supra.)* are reproduced below:

“113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in In Re : Interplay (supra) 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 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* (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).

115. The dispute pertaining to the “accord and satisfaction” of claims is not one which attacks or questions the existence of the arbitration agreement in any way. As held by us in the preceding parts of this judgment, the arbitration agreement, being separate and independent from the underlying substantive contract in which it is contained, continues to remain in existence even after the original contract stands discharged by “accord and satisfaction”.

116. The question of “accord and satisfaction”, being a mixed question of law and fact, comes within the exclusive jurisdiction of the arbitral tribunal, if not otherwise agreed upon between the parties. Thus, the negative effect of competence-competence would require that the matter falling within the exclusive domain of the arbitral tribunal, should not be looked into by the referral court, even for a prima facie determination, before the arbitral tribunal first has had the opportunity of looking into it.

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."

[Emphasis supplied.]

12. In view of the aforesaid, the Court at this stage is only required to examine, *prima facie*, as to whether an arbitration clause exists, and if so, to refer the parties to arbitration leaving all questions (including on the question of arbitrability, accord and satisfaction, limitation, etc.) open for adjudication by the arbitral tribunal.

13. The applicability of Clause 64 of the GCC to the contracts is not disputed. The respondent's letters dated 16.05.2024 also indicate that the amenability of the disputes to arbitration is accepted.

14. As the provisions of Section 12(5) apply in absence of waiver by the petitioner, the contractual mechanism for appointment of the arbitral tribunal under Clause 64 is not permissible. The task of the Court is, therefore, to ensure that the arbitral tribunal is constituted so that the contentions of the parties can be appropriately adjudicated.

15. On the question of pre-arbitral dispute settlement, Mr. Haider submits that the respondent ought to have entered into this exercise upon receipt of the invocation letters dated 02.02.2024, which were addressed to the General Manager, Northern Railways. Even in its response dated 16.05.2024, no such suggestion was made by the respondent. However,



he submits that the petitioner is willing to make a representation to the General Manager which may be settled in a time-bound manner.

16. Having regard to the above, both petitions are disposed of with the following directions:

- (a) The invocation letters dated 02.02.2024 have already been served upon the General Manager, Northern Railways. To ensure substantial satisfaction of Clause 63 of the GCC, the General Manager is directed to notify his decision within two months from today.
- (b) In the event, the disputes are not settled with the mutual satisfaction of the parties, they will be resolved by arbitration under Clause 64 of the GCC. Without prejudice to the rights and contentions of the parties in the arbitral proceedings, learned counsel agree, upon instructions, that reference may be made to a sole arbitrator instead of a three-member arbitral tribunal as envisaged under Clause 64 of the GCC.
- (c) The parties are referred to the arbitration of Hon'ble Mr. Justice Vinod Goel, former Judge of this Court [Tel: 9910384637].
- (d) Although the disputes in both the Agreements have been referred to the same arbitral tribunal, it is made clear that the arbitrations will be treated as separate arbitrations for all purposes, and the parties will be entitled to raise their respective claims and defences independently. The learned Arbitrator may decide, in consultation with learned counsel for the parties, as to whether to hold proceedings jointly or separately.
- (e) The learned Arbitrator is requested to furnish declarations



under Section 12 of the Act, prior to entering upon the reference.

(f) The arbitrations will be conducted under the aegis of the Delhi International Arbitration Centre, Delhi High Court Shershah Road, New Delhi-110503 [“DIAC”], and will be governed by the Rules of DIAC, including as to the remuneration of the learned Arbitrator.

17. It is made clear that all rights and contentions of the parties are left open for adjudication before the learned Arbitrator, including as to the maintainability, arbitrability and merits of the claims.

18. The petition stands disposed of in terms of the above.

PRATEEK JALAN, J

SEPTEMBER 20, 2024/MR/