



2024:DHC:8819



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

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Date of Decision : 13.11.2024+ **ARB.P. 840/2024****MAHALAXMI ELECTRONICS**

.....Petitioner

Through: Mr. Somdev Tiwari and Mr. Dev
Karn Singh, Advocates.

versus

M/S XTREME MEDIA PVT LTD

.....Respondent

Through: Mr. Ankur Singhal and Ms. Anam
Ikram, Advocates.**CORAM:****HON'BLE MR. JUSTICE SACHIN DATTA****SACHIN DATTA, J. (Oral)**

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as '*the A&C Act*') seeks appointment of a Sole Arbitrator to adjudicate the disputes between the parties. These disputes stem from a "Memorandum of Understanding" dated 25.09.2018 (hereinafter '*the MOU*'). As per the MOU the petitioner was required to find business opportunities for the respondent and was entitled to commission on successful culmination of deals.

2. The arbitration clause in the MOU between the parties is in the following terms:-

"4. Arbitration: All or any disputes relating to or arising in connection with the terms of this MOU, or its termination, including the interpretation and validity thereof, and the respective rights and obligations of the parties, shall be settled amicably by mutual discussion within 15 (fifteen) days from the receipt of the written



notice (setting out the dispute or claim), failing which the same shall be settled through Arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996, or any statutory amendments, modifications or re-enactment thereof for the time being in force. A sole arbitrator (Judicial) shall be nominated by mutual consent of both the parties, who shall hold the arbitration proceedings at New Delhi, in the English language. Cost of Arbitration proceedings shall be borne by both the parties in equal proportion. The courts at Delhi alone, as also the High Court of Delhi, at New Delhi, shall have the exclusive jurisdiction.”

3. The petitioner submits that it successfully negotiated a contract with M/s Shapoorji Pallonji and Company Pvt. Ltd. (SPCPL) via their System Integrators/Sub-Contractors (M/s Hitech AVI India LLP, M/s Hitech Audio Systems Pvt. Ltd., and M/s Havi Design India LLP). The details of the same was duly communicated to the respondent, as per the terms of the MOU. However, disputes arose when the respondent breached the terms of the MOU by bypassing the petitioner, and directly dealing with SPCPL through their System Integrators/Sub-Contractors. The respondent reportedly sold goods worth ₹9+ crore to SPCPL without the petitioner's involvement, depriving the petitioner of the agreed-upon commission.
4. The petitioner contends that, as per the MOU, it is entitled to a 6% commission, amounting to ₹63,72,000/- (inclusive of GST). An invoice for this amount was raised on 16.04.2022, but the respondent did not honour the invoice.
5. In order to resolve the dispute amicably the petitioner initiated mediation through the “Samadhan” Mediation Centre of the Delhi High Court. However, the respondent failed to cooperate, rendering the mediation unsuccessful as per the report dated 04.02.2023.



6. Subsequently, the petitioner issued a notice dated 19.09.2023, invoking the arbitration clause and requesting for appointment of a sole arbitrator. Despite follow-ups, including an email on 25.04.2024, the respondent failed to respond or engage in the process.

7. Therefore, the petitioner has approached this Court, through the present petition, seeking the appointment of a Sole Arbitrator to adjudicate the dispute.

8. The respondent is contesting the present petition on the ground that the MOU has already been cancelled and to substantiate the same the respondent has placed reliance on an email dated 11.04.2022, send by the respondent to the petitioner, wherein it has been stated as under:—

“As material supply is not happening as per the original PO given by Hitech or as per the tender terms and specs the agreement stands cancelled.”

9. The legal position is now settled that the scope of inquiry in a petition under Section 11 of the A&C Act is limited to ascertaining the existence of the arbitration agreement. In *Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re, 2023 SCC OnLine SC 1666* the Supreme Court has held as under -

“G. The doctrine of competence-competence

...

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.”

10. In **SBI General Insurance Co. Ltd. v. Krish Spinning** 2024 INSC 532, the Supreme Court has observed as under :-

“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*, 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* and adopted in *NTPC v. SPML Infra Ltd.* 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*.”

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123. The power available to the referral courts has to be construed in the light of the fact that no right to appeal is available against any order passed by the referral court under Section 11 for either appointing or refusing to appoint an arbitrator. Thus, by delving into the domain of the arbitral tribunal at the nascent stage of Section 11, the referral courts also run the risk of leaving the claimant in a situation wherein it does not have any forum to approach for the adjudication of its claims, if its Section 11 application is rejected.”

11. Consequently, since the existence of the arbitration agreement is *prima facie*, apparent from a perusal of the agreement, there is no impediment to constituting an arbitral tribunal to adjudicate the disputes between the parties.



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12. Accordingly, Ms. Mishika Bajpai, Advocate (Mob. No.: +91 9811840277) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

13. The respondent shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability, which shall be decided by the learned arbitrator, in accordance with law.

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

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

16. The parties shall share the arbitrator's fee and arbitral costs, equally.

17. 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.

18. Needless to say, nothing in this order shall be construed as an expression of this court on the merits of the case.

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

SACHIN DATTA, J

NOVEMBER 13, 2024/sv