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

+ **ARB.P. 935/2023, I.A. 17373/2023**

CG ENGINEERING COMPANY

..... Petitioner

Through: Mr. Nitin S. Tambwekar, Mr.
Seshatalpa Sai Bandaru, Advs.

versus

**IRCON INFRASTRUCTURE AND SERVICES LIMITED (IRCON
ISL) AND ANR**

..... Respondent

Through: Mr. Nishit Kush, Mr. Siddharth Sikri,
Ms. Kirti Singh, Advs. for R-1.
Mr. Subhash Tanwar (CGSC), Mr.
Ashish Choudhary, Mr. Sandeep
Mishra, Advs., Mr. Kapil Yadav (GP)
for Respondent/ UNION OF INDIA.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

ORDER
07.03.2024

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1. By way of the present petition filed under Section 11(4) of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the '*A&C Act*'), the petitioner seeks appointment of an Arbitral Tribunal comprising of a Sole Arbitrator to adjudicate the disputes between the parties.
2. The facts in brief are that the parties had entered into a Sub-lease Agreement dated 26.08.2014 vide which the lessee i.e. M/s Ircon Infrastructure And Services Limited (IRCON ISL) developed a Multi-Functional Complex (MFC) comprising a building constructed over the plot of land owned by the lesser i.e. Rail Land Development Authority (RLDA) admeasuring 360 sq.



Meters situated at Railway Station Bilaspur Near Gate No.1, Dist. Bilaspur, Chhattisgarh as mentioned in Clause-6 of the Sub-lease Agreement in accordance with the terms of the Memorandum of Understanding dated 21.08.2009 and a lease agreement dated 04.07.2013 executed between the lessor and the lessee.

3. The petitioner approached the lessee who is the respondent for taking on lease all the units comprised in the MFC having a total built-up area of 940.29 square meters, the Sub-lease Agreement was executed on certain terms and conditions.
4. Clause-17.11 of the Sub-lease Agreement clearly provided as under:

“17.11. The Leased Premises under this Agreement is a 'Public Premises' as defined in the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as the 'Act of 1971') and the same shall be subject to the provisions of the Act of 1971.”

5. Clause-19 of the Agreement provides Dispute Resolution and Governing Law and reads as under:

“All disputes, except matters provided for in the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as the 'Act of 1971'), arising out of this Agreement shall be settled through Arbitration, in accordance with the Arbitration and Conciliation Act, 1996. Arbitration proceedings shall be conducted in English and the venue of arbitration shall be New Delhi. The tribunal shall consist of a sole arbitrator who shall be appointed as per the Rules of Indian Council of Arbitration which shall be binding on the Lessee and the Lessor. Any award made in any arbitration held pursuant to this Clause shall be final and binding on the parties.



Subject to above, the courts at New Delhi shall have exclusive jurisdiction over this Agreement.

This Agreement shall be governed by and construed in accordance with the laws of India.

This Clause shall survive the termination or expiry of the Agreement.

While any dispute under this Agreement is pending, including the commencement and pendency of any dispute referred to arbitration, the Sub-Lessee shall continue to perform all of its obligations under this Agreement without prejudice to the final determination of such dispute in accordance with the provisions of this Clause.”

6. Learned counsel for the petitioner had submitted that the respondents have illegally terminated the Sub-lease Agreement vide termination notice dated 05.01.2023. Aggrieved of this the petitioner filed the arbitration petitioner No. 14/2023 against the respondent in the High Court of Chhattisgarh, Bilaspur where the respondents took a plea regarding the jurisdiction. Upon the plea being taken the arbitration petition was dismissed by Hon’ble the Chief Justice, High Court of Chhattisgarh vide order dated 21.04.2023.
7. Learned counsel for the petitioner has submitted that in Para-10 of the order dated 21.04.2023, the High Court of Chhattisgarh had specifically mentioned that in the case at hand it appears that both the parties are agreeable to the settlement of the dispute amicably by way of arbitration however, the question is with regard to the venue of the arbitration. Learned counsel submits that therefore the petition has been filed at Delhi and the respondents now



cannot oppose the petition on frivolous grounds.

8. In the reply, respondents have taken predominantly two objections. First, the notice given under Section 21 of the Arbitration and Conciliation Act has not been served. Secondly, Clause-19 of the Sub-lease Agreement specifically provides that if the premises falls in the definition of public premises it shall be out of the purview of the arbitration.
9. The jurisdiction of the court at the time of the pre-reference is quite well settled that while exercising jurisdiction under Section 11(6) of the A&C Act, the court is not expected to act mechanically, and that the limited scrutiny of the court at the pre-reference stage, through the “eye of the needle”, is necessary and compelling. The Apex court in ***NTPC LTD. versus M/S SPML INFRA LTD.*** (Civil Appeal No. 4778/2022) *inter-alia* held as under:

“25. Eye of the Needle: The above-referred precedents crystallise the position of law that the pre-referral jurisdiction of the courts under Section 11(6) of the Act 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.

26. As a general rule and a principle, the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the referral court may reject



claims which are manifestly and ex facie non-arbitrable. Explaining this position, flowing from the principles laid down in Vidya Drolia (supra), this Court in a subsequent decision in Nortel Networks ((2021) 5 SCC 738) held:

“45.1 ...While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere “only” when it is “manifest” that the claims are ex facie time-barred and dead, or there is no subsisting dispute...”

27. 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. This also requires the courts to examine whether the assertion on arbitrability is bona fide or not. The prima facie scrutiny of the facts must lead to a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable. On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration.

28. The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the referral court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable. It has been termed as a legitimate interference by courts to refuse reference in order to prevent wastage of public and private resources. Further, as noted in Vidya Drolia (supra), if this duty within the limited compass is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court. Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely



to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator, as explained in DLF Home Developers Limited v. Rajapura Homes Pvt. Ltd.”

10. The prima facie view after the perusal of the Sub-lease Agreement makes it clear that the premise which was leased out is a public premise and as per clause 19, the matters pertaining to public premises “(Eviction of Unauthorized Occupants) Act, 1971” are kept out of the purview of the arbitration. Thus the present dispute is non-arbitrable in accordance with the terms of the agreement entered into between the parties.
11. The court at the time of the reference is under a duty to see whether the matter which is to be referred to the arbitration has been agreed to be referred by the parties. If the parties have agreed certain matters to be kept out of the purview of the arbitration the same cannot be referred to the arbitration. Hence there is no doubt that the dispute is non-arbitrable. It is also pertinent to mention that notice under Section 21 of the Arbitration and Conciliation Act, 1996 has also not been served in accordance with law.
12. Thus the petition is liable to be dismissed. Hence, the present petition stands dismissed.

DINESH KUMAR SHARMA, J

MARCH 7, 2024/AR..