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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **ARB.P. 958/2023****KONE ELEVATOR INDIA PVT LTD**Petitioner
Through: **Mr. Kunal Kher, Adv.**

versus

MBL INFRASTRUCTURE LIMITEDRespondent
Through: **Ms. Anusuya Salwan, Mr. Bankim Garg, Ms. Rikita Salwan and Mr. Rachit Wadhwa, Advs.****CORAM:****HON'BLE MR. JUSTICE C. HARI SHANKAR****JUDGMENT (ORAL)**

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09.08.2024**ARB.P. 958/2023**

1. This is a petition under Section 11(6)¹ of the Arbitration and Conciliation Act, 1996² for reference of the disputes between the parties to arbitration.

2. The dispute arises in the context of a work order dated 25 August 2015, placed on the petitioner by the respondent. Clause 18 of

¹ (6) Where, under an appointment procedure agreed upon by the parties,—
(a) a party fails to act as required under that procedure; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,
the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

² “the 1996 Act” hereinafter



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the work order envisaged resolution of disputes by arbitration and read thus:

“18 Arbitration

In the event of difference or dispute arising out or in connection with this contract, over the rights or obligation of parties, the dispute would first be attempted to be resolved by consultations between the parties. Upon failure of such mutual consultations, the dispute or difference would be referred to Arbitration by a Sole Arbitrator, to be appointed by mutual consent of the parties. The provisions of the Arbitration and Conciliation Act, 1996 shall be applicable to such Arbitration.

For the purpose of jurisdiction, the courts in the city of New Delhi shall have jurisdiction in relation to Arbitration and any other remedy under this agreement.”

3. On 5 March 2021, the respondent addressed a communication under Section 21³ of the 1996 Act to the petitioner, raising certain claims against the petitioner and seeking reference of the disputes that had arisen in that regard to arbitration. Paras 13 and 14 of the said notice read thus:

“13. Since disputes have arisen between the parties and the same have to be adjudicated by means of Arbitration as per Arbitration Clause in the Agreement which envisages that the *"In the event of difference or dispute arising out or in connection with this contract, over the rights or obligation of parties, the dispute would first be attempted to be resolved by consultation, the dispute or differences would be referred to Arbitration by a Sale Arbitrator, to be appointed by mutual consent of the parties the provisions of the Arbitration and Conciliation Act, 1996, shall be applicable to such Arbitration*". Therefore by way of present notice M/s MBL Infrastructures Ltd. have invoked the Arbitration clause stipulated under clause no. 18 of the agreements between the parties and serves the present notice under Section 21 of the Arbitration Act. The disputes which need to be referred to the Arbitration are mentioned in the present notice. Detailed claim statement shall be submitted to the Arbitral Tribunal.

³ 21. **Commencement of arbitral proceedings.** – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.



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14. In view of the Arbitration Clause and to keep the process of Arbitration fair, we suggest to you to select a sole arbitrator out of a panel of 5 independent Arbitrators mentioned below:

1. Mr. S.K. Verma, Executive Director- Civil (Retired), TCIL.
2. Mr. N.K. Jindal, Chief Engineer (Retd.) HP, PWD.
3. Mr. V.K. Shrotriya, Engineer-in-Chief (Retd) PWD.
4. Mr. V.D. Gautam, IDSE (Retd.), MES,
5. Mr. S.S. Agarwal, Chief Surveyor (Retd.), MES.”

4. It may be noted, even at this juncture – though it is not particularly relevant – that the suggestion, in para 14 of the aforesaid notice dated 5 March 2021 from the respondent to the petitioner, to choose an arbitrator out of a panel of five arbitrators, suggested by the respondent, is not in consonance with Clause 18 of the Work Order. The respondent was, therefore, acting in derogation of the contract with the petitioner in offering the said suggestion of which, therefore, no cognizance can be taken. Nonetheless, the notice dated 5 March 2021 was indisputably a notice under Section 21 of the 1996 Act, seeking reference of the dispute to arbitration.

5. The petitioner, predictably, responded to the aforesaid notice on 7 April 2021, pointing out that the arbitration clause between the parties envisaged arbitration by a sole arbitrator and did not envisage providing of a panel of arbitrators by the respondent to the petitioner, for the petitioner to choose one amongst them. The petitioner, therefore, proposed the name of a retired District and Sessions Judge as the arbitrator to arbitrate of the disputes.



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6. The respondent, in its reply dated 10 April 2021, did not accept the suggestion for arbitration of the dispute by arbitrator named in the petitioner's communication dated 7 April 2021.

7. As the petitioner and respondent have thereby reached an impasse regarding the identity of the arbitrator who would arbitrate on the dispute, the petitioner has moved the present petition before this Court under Section 11(6) of the 1996 Act, seeking intervention of this Court to appoint an arbitrator to arbitrate on the dispute.

8. Before this Court, Ms. Anusuya Salwan appearing for the respondent, seeks to place the clock back to a point prior to the issuance of Section 21 by the respondent to the petitioner on 5 March 2021. She submits that the claims of the petitioner against the respondent arose in 2016, as was noted by the petitioner in its communication on 31 March 2017. Thereafter, she submits that the respondent was subjected to Corporate Insolvency Resolution Proceedings⁴, in terms of the Insolvency and Bankruptcy Code 2016, in the course of which the National Company Law Tribunal⁵, by order dated 30 March 2017 framed a resolution plan and appointed an Interim Resolution Professional⁶ to oversee the affairs of the respondent. She submits that the petitioner specifically filed its claim before the IRP, which was rejected. Against the said rejection, the legal avenue available to the petitioner was by way of appeal to the

⁴ "CIRP" hereinafter

⁵ "the learned NCLT" hereinafter

⁶ "IRP" hereinafter



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National Company Law Appellate Tribunal⁷, which the petitioner never availed. Ultimately, the resolution plan was accepted by the NCLT on 18 April 2018. The said decision was successively upheld by the NCLAT on 16 August 2019 and by the Supreme Court on 18 January 2022.

9. Ms. Salwan submits that the claims of the petitioner against the respondent stood extinguished as a consequence of acceptance, by the NCLT, of the Resolution Plan on 18 April 2018, which decision stands upheld all the way up to the Supreme Court.

10. She, therefore, submits that there is no arbitrable dispute in existence, as could be referred to arbitration.

11. Mr. Kunal Kher, learned Counsel for the petitioner, by way of rejoinder, submits, initially, that the arguments advanced by Ms. Salwan cannot be examined by the Court exercising jurisdiction under Section 11(6) of the 1996 Act, for which purpose, he places reliance on the judgment of the Supreme Court in *SBI General Insurance Co Ltd v. Krish Spinning*⁸.

12. Without prejudice, Mr. Kher submits that Ms. Salwan's contention that the petitioner's claims were rejected by the IRP is not correct. In fact, he submits that his client did not receive any communication from the IRP regarding the claims preferred by it. Rather, in letter dated 9 October 2020, addressed by the respondent to

⁷ "NCLAT" hereinafter



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the petitioner, it is specifically stated as under:

“(viii) Admittedly you the claimant/Operational Creditor had submitted your claims before the IRP/RP under IBC, 2016. Your claim amount was rejected *and was not admitted in full* by the IRP/RP, and if it is found due as per specifications and on quantity and quality verification, shall be paid as per the approved Resolution Plan subject to reconciliation.

(ix) It is further an admitted fact that the Claimant had submitted his claim but *the claim was only partially admitted* subject to reconciliation and other rights and remedies available. The claimant had not submitted any objection before the IRP/IRP or any other forum. The claim of the Claimant is barred by provision of IBC, 2016.”

(Emphasis supplied)

Analysis

13. The first issue that arises for consideration is whether it is open to this Court, in exercise of its jurisdiction under Section 11(6) of the 1996 Act, to enter into the arena opened up by Ms. Salwan and the submissions advanced by her. The answer, in my considered opinion, has necessary to be in the negative, in view of the recent decision of the Supreme Court in ***SBI General Insurance***. The Supreme Court has, at more places than one in the said judgment, been at pains to point out that Section 11(6) Court can examine only “*whether an arbitration existed between the parties or not and nothing more or nothing less*”. The only other aspect which, if at all, can be seen by the Section 11(6) Court, is whether the petition under Section 11(6) has been filed within three years of issuance of the statutory notice under Section 21 of the 1996 Act proposing to invoke arbitration.

⁸ 2024 SCC OnLine SC 1754



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14. The following passages from the decision in *SBI General Insurance* make this position abundantly clear:

“110. The scope of examination under Section 11(6-A)⁹ is confined to the existence of an arbitration agreement on the basis of Section 7¹⁰. The examination of validity of the arbitration agreement is also limited to the requirement of formal validity such as the requirement that the agreement should be in writing.

111. The use of the term ‘examination’ under Section 11(6-A) as distinguished from the use of the term ‘rule’ under Section 16¹¹ implies that the scope of enquiry under section 11(6-A) is limited to a *prima facie* scrutiny of the existence of the arbitration agreement, and does not include a contested or laborious enquiry, which is left for the arbitral tribunal to ‘rule’ under Section 16. The *prima facie* view on existence of the arbitration agreement taken by the referral court does not bind either the arbitral tribunal or the court enforcing the arbitral award.

114. In view of the observations made by this Court in *In Re : Interplay*¹², 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*¹³ and adopted in *NTPC v. SPML*¹⁴ that the jurisdiction of the referral court when dealing with the issue

⁹ (6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.

¹⁰ 7. Arbitration agreement. –

(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

¹¹ 16. Competence of arbitral tribunal to rule on its jurisdiction. –

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

¹² *In Re : Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act, 1966 and the Indian Stamp Act, 1899*, (2024) 6 SCC 1

¹³ *Vidya Drolia v. Durga Trading Co.*, (2021) 2 SCC 1

¹⁴ *NTPC Ltd v SPML Infra Ltd.*, (2023) 9 SCC 385



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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***.

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.

118. Tests like the “eye of the needle” and “ex-facie meritless”, although try to minimise the extent of judicial interference, yet they require the referral court to examine contested facts and appreciate prima facie evidence (however limited the scope of enquiry may be) and thus are not in conformity with the principles of modern arbitration which place arbitral autonomy and judicial non-interference on the highest pedestal.

120. The principle of subsequent judicial review has been enshrined in the US doctrine of “Second Look”. In a leading U.S. Supreme Court judgment of ***PacifiCare Health Systems***,



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*Inc. v Book*¹⁵, it was held that the question of non-arbitrability should be considered in the first instance by the arbitral tribunal. The Court observed that, “since we do not know how the arbitrator will construe the remedial limitations, the question ... whether they render the parties’ agreements unenforceable is better left for initial arbitral consideration”. This doctrine has also been affirmed by judgments of the U.S. lower courts in cases of *Dillon v. BMO Harris Bank, NA*¹⁶ and *Escobar v. Celebration Cruise Operator, Inc.*¹⁷ wherein it was reasoned that the issues of U.S. statutory law and arbitrability should be submitted first to arbitration, with the possibility of subsequent judicial review in recognition and enforcement proceedings.

125. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the arbitral tribunal is equally, if not more, capable to decide upon the appreciation of the evidence adduced by the parties. We say so because the arbitral tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material.

127. In *Arif Azim*¹⁸, while deciding an application for appointment of arbitrator under Section 11(6) of the Act, 1996, two issues had arisen for our consideration:

- i. Whether the Limitation Act, 1963 is applicable to an application for appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996? If yes, whether the petition filed by M/s Arif Azim was barred by limitation?
- ii. Whether the court may decline to make a reference under Section 11 of Act, 1996 where the

¹⁵ 538, U.S. 401 (U.S. S. Ct. 2003)

¹⁶ 856 F.3d 330, 333 (4th Cir. 2017)

¹⁷ 805 F.3d 1279, 1288-89 (11th Cir. 2015)

¹⁸ *Arif Azim Co Ltd v Aptech Ltd*, (2024) 5 SCC 313



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claims are *ex-facie* and hopelessly time-barred?

128. On the first issue, it was observed by us that the Limitation Act, 1963 is applicable to the applications filed under Section 11(6) of the Act, 1996. Further, we also held that *it is the duty of the referral court to examine that the application under Section 11(6) of the Act, 1996 is not barred by period of limitation as prescribed under Article 137 of the Limitation Act, 1963, i.e., 3 years from the date when the right to apply accrues in favour of the applicant. To determine as to when the right to apply would accrue, we had observed in paragraph 56 of the said decision that “the limitation period for filing a petition under Section 11(6) of the Act, 1996 can only commence once a valid notice invoking arbitration has been sent by the applicant to the other party, and there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice.”*

130. On the second issue it was observed by us in paragraph 67 that the *referral courts, while exercising their powers under Section 11 of the Act, 1996, are under a duty to “prima-facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time-consuming and costly arbitration process.”*

131. Our findings on both the aforesaid issues have been summarised in paragraph 89 of the said decision thus:—

“89. Thus, from an exhaustive analysis of the position of law on the issues, we are of the view that while considering the issue of limitation in relation to a petition under Section 11(6) of the Act, 1996, the courts should satisfy themselves on two aspects by employing a two-pronged test - first, whether the petition under Section 11(6) of the Act, 1996 is barred by limitation; and secondly, whether the claims sought to be arbitrated are ex-facie dead claims and are thus barred by limitation on the date of commencement of arbitration proceedings. If either of these issues are answered against the party seeking referral of disputes to arbitration, the court may refuse to appoint an arbitral tribunal.”

132. Insofar as our observations on the second issue are concerned, we clarify that *the same were made in light of the observations made by this Court in many of its previous*



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decisions, more particularly in *Vidya Drolia* and *NTPC v. SPML*. However, in the case at hand, as is evident from the discussion in the preceding parts of this judgment, we have had the benefit of reconsidering certain aspects of the two decisions referred to above in the light of the pertinent observations made by a seven-Judge Bench of this Court in *In Re : Interplay*.

133. Thus, we clarify that while determining the issue of limitation in exercise of the powers under Section 11(6) of the Act, 1996, the referral court should limit its enquiry to examining whether Section 11(6) application has been filed within the period of limitation of three years or not. The date of commencement of limitation period for this purpose shall have to be construed as per the decision in *Arif Azim*. As a natural corollary, it is further clarified that the referral courts, at the stage of deciding an application for appointment of arbitrator, must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time barred and should leave that question for determination by the arbitrator. Such an approach gives true meaning to the legislative intention underlying Section 11(6-A) of the Act, and also to the view taken in *In Re : Interplay*.

(emphasis supplied)”

15. The following proposition may usefully be extracted from *SBI General Finance*:

(i) The Court exercising jurisdiction under Section 11(6) can only examine the existence of the arbitration agreement between the parties and *nothing else*.

(ii) The examination of whether an arbitration agreement exists between the parties has also to be at a *prima facie* level and the Court is not permitted to enter into any laborious and contested inquiry even on this aspect.

(iii) Matters, which fall within the exclusive jurisdiction of



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the Arbitral Tribunal, should not be examined by the referral court even *prima facie*.

(iv) The question of arbitrability of the dispute, and whether the agreement between the parties is enforceable or unenforceable, has to be left for initial consideration by the Arbitral Tribunal and cannot be examined by the Section 11(6) Court.

(v) Frivolity and dishonesty in litigation is also matter which has to be examined by the Arbitral Tribunal and not by the Section 11(6) Court.

(vi) In its earlier decisions in *Vidya Drolia* and *NTPC*, the Supreme Court had observed that the Section 11(6) Court could also *prima facie* examine claims which were *ex facie* frivolous, dead or non-arbitrable claims. This position could not, however, continue to hold any further, in view of *In re. Interplay*.

(vii) The only other aspects which the Section 11(6) Court was required to examine was whether the Section 11(6) petition has been filed within three years of issuance of Section 21 notice. Even this aspect had only to be examined at a *prima facie* level.

(viii) The Section 11(6) Court cannot examine whether the claims of the petitioner are, or are not, barred by time. That is an exercise which, again, has to be relegated to the Arbitral



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Tribunal.

16. Ms. Salwan seeks to contend that the claims of the petitioner do not survive in view of the intervening CIRP proceedings and the orders passed therein. Even if, in law, these contentions were to be treated as meriting consideration, that consideration, in view of the judgment in ***SBI General Finance*** has to be left to the learned Arbitral Tribunal. Mr. Kher, learned Counsel for the petitioner has, as already noted, disputed Ms. Salwan's submissions on facts, relying, *inter alia*, on the communication dated 9 October 2020 from the respondent to the petitioner. All these aspects, however, cannot be examined by me in exercise of the jurisdiction vested in me by Section 11(6) of the 1996 Act. They have necessarily to be seen by the Arbitral Tribunal.

17. The requisite *indicia* for appointing an arbitrator, to arbitrate on the disputes between the parties, stand satisfied. Though the petitioner did not issue any notice to the respondent under Section 21 of the 1996 Act, the respondent unquestionably did so, on 5 March 2021, by way of response to the claim notice of the petitioner dated 5 October 2020. Section 21, thereby, stands exhausted.

18. As the parties have not been able to arrive at a consensus regarding appointment of an arbitrator to arbitrate on the disputes, this Court has necessarily to step in. This Court, therefore, appoints Ms. Sriparna Chatterjee, Advocate (Tel. 9999941193), as the arbitrator to arbitrate on the disputes between the parties.



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19. The arbitration would take place under the aegis of the Delhi International Arbitration Centre (DIAC) and would abide by its rules and regulations. The learned arbitrator shall be entitled to fees as per Schedule of fees maintained by the DIAC.

20. The learned arbitrator is also requested to file the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on reference.

21. All questions of fact and law including the issue of whether the claims of the petitioner against the respondent in view of IBC proceedings shall remain to be adjudicated before the learned Arbitral Tribunal.

22. The petition stands allowed accordingly, with no order as to costs.

C.HARI SHANKAR, J

AUGUST 9, 2024

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Click here to check corrigendum, if any