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

Pronounced on: 04.03.2024

+ **ARB.P. 1007/2023**

SHRI TARUN CHANDER MALIK Petitioner

Through: Mr. Amit Sethi and Mr. Arpit Goel,
Advocates.

Versus

M/S VARAHI DIAMONDS AND FINANCE LTD Respondent

Through: Mr. Akshay Makhija, Sr. Advocate
along with Mr. Vivek Singh,
Mr. Digvijay Singh and Mr. Harsh
Chugh, Advocates.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (the 'A&C Act') has been filed seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.
2. Briefly stated, the facts are that the petitioner is the owner/landlord of the building bearing Municipal No. 68, Janpath, New Delhi 110001, which he had leased out to the respondent company for a period of 15 years w.e.f. 01.08.2008 vide Lease Deed dated 07.08.2008. The respondent is stated to have defaulted in payment of monthly rent which has led to accumulation of huge arrears. The Lease Deed is also stated to have expired by efflux of time on 31.07.2023. The petitioner has served legal notices upon the respondent seeking payment of arrears of rent and calling upon the respondent to



handover the vacant possession of the leased premises, however, the respondent is neither paying the rent/occupation charges nor handing over the possession of the leased premises to the petitioner. Disputes having arisen between the parties, the petitioner vide letter dated 12.08.2023, invoked the arbitration clause contained in the Lease Deed and sought consent of the respondent for resolution of disputes by arbitration in accordance with the rules of Delhi International Arbitration Centre. Respondent is stated to have not replied to the said notice.

3. Consequently, the petitioner seeks appointment of a sole arbitrator, in terms of Clause 26(e) of the Lease Deed, which is reproduced below:

"26. Lastly it is agreed: -

(a) ... (d)

(e) in case of any dispute arising between the parties, matter will be referred to and adjudicated upon only by the courts at Delhi/New Delhi which alone shall have exclusive jurisdiction in the matter/s. That the disputes if any arising from the present agreement would be referred to Arbitration as per the provisions of Arbitration and Conciliation Act 1996. "

4. Learned senior counsel for the respondent vehemently opposed the averments made in the petition and disputes the validity of the arbitration clause. It is submitted that Clause 26(e) is divided in two parts viz. the principal first part - clause conferring jurisdiction on the courts at Delhi and the secondary second part – arbitration clause. It is submitted that there is a direct conflict between the said two parts, and in terms of the settled law the principal first clause will prevail and supersede the secondary clause. Reliance in this regard has been placed upon decisions in ***Sahebzada Mohd. Kamgarh Shah v. Jagdish Chandra Deo Dhabal Deb***¹, ***Radha Sundar***

¹ 1960 SCC OnLine SC 107 : (1960) 3 SCR 604



*Dutta v. Mohd. Jahadur Rahim*², *Sunil Kumar Chandra v. Spire Techpark (P) Ltd.*³, and *Blue Star Ltd. v. Rahul Saraf*⁴. It is submitted that the only remedy of the petitioner is to approach civil courts at Delhi.

5. *Per contra*, learned counsel for the petitioner submitted that there exists no inconsistency between the stipulation conferring jurisdiction upon courts in Delhi, and the arbitration agreement incorporated in Clause 26(e). It is submitted that the intention of the parties is manifestly clear to refer the disputes arising under the Lease Deed to arbitration. It is submitted that the stipulation regarding jurisdiction of civil courts in Delhi is with regard to the court's supervisory jurisdiction over the arbitration. Any other interpretation, it is submitted, would render the arbitration clause superfluous and otiose, which in terms of settled arbitration jurisprudence, has to be avoided. Reliance has also been placed on English decisions in *Melford Capital Partners (Holdings) LLP v. Wingfield Digby*⁵ and *Surrey County Council v. Suez Recycling and Recovery Surrey*⁶. Reliance has also been placed on decision of the Supreme Court in *Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. v. Jade Elevator Components*⁷, to contend that even if two parts of Clause 26(e) are irreconcilable, the said clause provides two options *viz.* option to approach "Court" or "Arbitrator". It is submitted that once the petitioner has elected/invoked the arbitration clause, the disputes shall be referred to arbitration. It is also submitted that in terms of the

² 1958 SCC OnLine SC 38 : 1959 SCR 1309

³ 2023) 1 HCC (Del) 391

⁴ 2023 SCC OnLine Cal 1406

⁵ [2021] EWHC 872 (Ch)

⁶ [2021] EWHC 2015 (TCC)

⁷ (2018) 9 SCC 774



decision of the Supreme Court in *Vidya Drolia v. Durga Trading Corpn.*,⁸ and *NTPC Ltd. v. SPML Infra Ltd.*⁹, even if the existence of an arbitration clause is in doubt, reference can be made to arbitration, leaving the said issue to be decided by the arbitrator.

6. I have heard the parties and perused the record. I find no merit in the objections raised by the respondent. The reasons are enumerated hereunder.

7. In terms of the settled legal position, the scope of inquiry in a petition under Section 11 of the A&C is limited to examination of the existence of an arbitration agreement. Recently, in *Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re*,¹⁰ a seven-Judges' Bench of 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

⁸ (2021) 2 SCC 1

⁹ (2023) 9 SCC 385

¹⁰ 2023 SCC OnLine SC 1666



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.”

8. In the present case, *prima facie*, an arbitration clause exists between the parties. The issue of interpretation of Clause 26(e) and/or substantive existence and validity of an arbitration agreement can be decided by an arbitral tribunal under Section 16 of the A&C Act.

9. On a *prima facie* conspectus, a bare perusal of Clause 26(e) reveals that it is in two parts; the first part confers exclusive jurisdiction on the courts at Delhi to adjudicate the disputes between the parties and the second part mandates reference of the disputes arising under the agreement to arbitration. This Court in ***Sunita Garg v. Scraft Product (P) Ltd.***¹¹, has held that if there is any contractual stipulation which undermines the scope of arbitration clause contained in any contract, the same will be accorded an

¹¹ 2023 SCC OnLine Del 1093 : (2023) 297 DLT 717



interpretation which gives full effect to the arbitration agreement between the parties. Relevant extracts of the said decision are as under:

“21. Regarding the ostensible dichotomy between Clauses 25 and 27, it is well settled that if there is any contractual stipulation which undermines the scope of arbitration clause contained in any contract, the same will be accorded an interpretation which gives full effect to the arbitration agreement between the parties. In this regard, it has been observed by the Supreme Court in the case of Chloro Controls India Private Limited v. Severn Trent Water Purification Inc., (2013) 1 SCC 641, as under:—

“96. Examined from the point of view of the legislative object and the intent of the framers of the statute i.e. the necessity to encourage arbitration, the court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious causes of action, parties and prayers.”

22. Also, in MTNL v. Canara Bank, (2020) 12 SCC 767, it was observed as under:

“9.5. A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An “arbitration agreement” is a commercial document inter partes, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities.”

23. In A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386, Dr. D.Y. Chandrachud, J. in his separate opinion observed that:

“53. The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. Minimising the intervention of courts is again a recognition of the same principle.”

24. In Govind Rubber Ltd. v. Louids Dreyfus Commodities Asia (P) Ltd., (2015) 13 SCC 477, it has been held as under:—

“17. We are also of the opinion that a commercial document having an arbitration clause has to be interpreted in such a



manner as to give effect to the agreement rather than invalidate it. On the principle of construction of a commercial agreement, Scrutton on Charter Parties (17th Edn., Sweet & Maxwell, London, 1964) explained that a commercial agreement has to be construed, according to the sense and meaning as collected in the first place from the terms used and understood in the plain, ordinary and popular sense (see Article 6 at p. 16). The learned author also said that the agreement has to be interpreted “in order to effectuate the immediate intention of the parties”. Similarly, Russell on Arbitration (21st Edn.) opined, relying on *Astro Vencedor Compania Naviera S.A. v. Mabanaft GmbH* [(1970) 2 Lloyd's Rep 267], that the court should, if the circumstances allow, lean in favour of giving effect to the arbitration clause to which the parties have agreed. The learned author has also referred to another judgment in *Paul Smith Ltd. v. H and S International Holdings Inc.* [(1991) 2 Lloyd's Rep 127] in order to emphasise that in construing an arbitration agreement the court should seek to “give effect to the intentions of the parties”.

25. The same approach to interpretation of arbitration agreements has been followed across jurisdictions. For instance, the United States Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 US 614 (1985), 626 (U.S. S.Ct. 1985), has affirmed as under:—

“... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”

26. Similarly, in the United Kingdom, in *Premium Nafta Products Ltd. v. Fili Shipping Company Ltd.*, [2007] UKHL 40 (House of Lords), it was held as under:—

“The proposition that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed promotes legal certainty. It serves to underline the golden rule that if the parties wish to face issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressively. Otherwise, they will be taken to have agreed on a single tribunal for the resolution of all such disputes.”

27. With regard to the view taken in some older authorities to the effect that the arbitration clauses must be interpreted restrictively, it is stated by Gary B. Born in *International Arbitration : Law and Practice*, Third Edition as under:



“The “restrictive” presumption is generally explained on the grounds that arbitration is a derogation from otherwise available access to civil justice and the “natural judge” of the contract, and that such derogations must be construed narrowly. Thus, in an older decision, a French appellate court declared that “[t]he arbitration agreement must be strictly interpreted as it departs from the norm - and in particular from the usual rules as to the jurisdiction of the courts.” ‘This restrictive interpretative presumption is archaic and out of step with the ordinary intentions of commercial parties; it is generally not applied in contemporary decisions.’”

10. The intention of the parties to refer disputes *“arising from the present agreement [lease deed] ... to Arbitration as per the provisions of Arbitration and Conciliation Act 1996”* is manifestly clear from Clause 26(e). On a harmonious reading, the first part of Clause 26(e) only confers supervisory jurisdiction of arbitration on the courts at Delhi. Clause 26(e) cannot be construed in any other way so as to defeat the very purpose of the arbitration clause or to render it otiose. Therefore, the conflict, if any, between the first and second part of Clause 26(e) has to be resolved in favour of arbitration.

11. The approach of the courts in other jurisdiction is also similar and courts have endeavoured to give effect to an arbitration stipulation rather than to adopt an interpretation which permits the parties to avoid the same. Recently, in ***Melford Capital Partners*** (supra), the High Court of England and Wales has harmoniously construed an exclusive jurisdiction clause with a later arbitration clause as under:

“79. I find it impossible to hold that the arbitration agreement was entered into for no good purpose. I would be very uneasy about adopting a course that would result in the evisceration of a clause designed to ensure that sophisticated business-people, engaged in the business of investment funds, could not resolve their dispute by arbitration when they have gone to some trouble to agree to that very course in their principal commercial agreement. I am not sure that it



requires any judicial manipulation at all to give effect to what the parties must have intended and that is what I propose to do here. As I indicated earlier, and as was Christopher Clarke J in Ace Capital, I am drawn to the words of the Court in Ideal Mutual that is to say “arbitration clauses retain their validity unless language compels the conclusion that the parties, having gone to the trouble of inserting a broad arbitration clause, intended to eviscerate the clause almost entirely by preceding it with a service of suit clause. But it is entirely possible to read these clauses in harmony, rather than in conflict with each other.”

80. In my judgment the parties can be taken to have agreed to a separable arbitration agreement and I will give effect to it. As necessary, I will give effect to cl.27.2 inasmuch as the English court retains a supervisory jurisdiction over any arbitration. I thus do not find that the agreement to arbitrate is inoperative as contended by Mr Grant QC”.

12. The decisions of the Supreme Court in **Sahebzada Mohammad** (supra) and **Radha Sundar Dutta** (supra), which say if two clauses in a deed cannot be reconciled then the earlier provision in the deed prevails over the later, are clearly not applicable to the facts of the present case. In the present case, the first part and second part of Clause 26(e) are certainly capable of being harmoniously read. Further, judgement of this court in **Sunil Kumar Chandra** (supra), relied upon by the respondent, itself notices the judgment of a Constitution Bench of the Supreme Court in **Ramkishorelal v. Kamal Narayan**¹², wherein it has been held as under:

“12. The golden Rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in their ordinary, natural sense. To ascertain this intention the Court had to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used. Very often the status and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very

¹² 1962 SCC OnLine SC 113 : 1963 Supp (2) SCR 417



*many words are used in more than one sense and that sense differs in different circumstances. Again, even where a particular word has to a trained conveyancer a clear and definite significance and one can be sure about the sense in which such conveyancer would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of convincing. Sometimes it happens in the case of documents as regards disposition of properties, whether they are testamentary or non-testamentary instruments, that there is a clear conflict between what is said in one part of the document and in another. A familiar instance of this is where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion. What is to be done where this happens? It is well settled that in case of such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given. (See *Sahebzada Mohd. Kamgar Shah v. Jagdish Chandra Deo Dhabal Deo*). It is clear, however, that an attempt should always be made to read the two parts of the document harmoniously, if possible; it is only when this is not possible, e.g., where an absolute title is given in clear and unambiguous terms and the later provisions trench on the same, that the later provisions have to be held to be void."*

13. In view of the aforesaid, there is no impediment in appointing an independent sole arbitrator to adjudicate the dispute between the parties.

14. Accordingly, Mr. Pulin Kumar, Advocate, (Mobile No.9810797445) is appointed as the sole arbitrator to adjudicate the disputes between the parties.

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

16. 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.

17. The learned Sole Arbitrator shall be entitled to fee in accordance with



Fourth Schedule of the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

18. Parties shall share the arbitrator's fee and arbitral costs, equally.

19. 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.

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

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

SACHIN DATTA, J

MARCH 04, 2024/SS