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* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ ARB.P. 1162/2023

TECPRO SYSTEMS LIMITED THROUGH ITS LIQUIDATOR

..... Petitioner

Through: Mr. Nipun Gautam, Ms. Pallavi Anand, Advs.

versus

GAIL (INDIA) LIMITED

..... Respondent

Through: Mr. ADN Rao, Sr. Adv. with Mr. Deepayan Mandal, Mr. Mridul Bansal, Mr. Naman Verma, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

O R D E R

% **28.05.2024**

1. This is a petition seeking appointment of an arbitrator to adjudicate the disputes between the parties.
2. The brief facts are that the petitioner was engaged in the business of providing material handling solutions on turnkey basis for power, cement, coal storage, steel and other metallurgical plants. The respondent owns and operates a gas-based Petrochemical Complex at PATA, District Auraiya near Kanpur in Uttar Pradesh.
3. The respondent floated a tender for work order of Structural Steel Works for LLDPE/HDPE for Gail Petrochemical Complex-II, Pata (U.P.). The petitioner submitted its offer and was declared as a successful bidder.
4. The contract was awarded to the petitioner *vide* award letter dated 16.09.2011, amended on 21.09.2011. The petitioner submitted performance bank guarantees in terms of the contract. Pursuant to the

award of the contract, the petitioner performed its obligations.

5. The petitioner underwent CIRP proceedings with effect from 17.08.2017 and thereafter, liquidation order was passed on 16.01.2020.

6. Pursuant to the said liquidation order, the liquidator was appointed and the present petition has been filed.

7. Mr. Gautam, learned counsel appearing for the petitioner states that in the present case, since there were disputes between the parties, the petitioner invoked arbitration *vide* legal notice dated 15.04.2022.

8. The respondent duly replied to the said notice on 11.05.2022, stating that since the petitioner had issued a No Claim Certificate ("NCC") dated 09.02.2016, there are no arbitral disputes between the parties.

9. Mr. Gautam, learned counsel states that the fact that there are disputes between the parties and the NCC is not binding on the liquidator, the disputes need to be referred to arbitration for adjudication.

10. Mr. Gautam, learned counsel relies upon the judgment dated 24.02.2023 in ARB.P. 1146/2022 of this Court titled as "***M/s Kuldeep Kumar Contractor vs. Hindustan Prefab Limited***" and more particularly, paragraphs 33, 39, 41, 48 and 51 to 53 which read as under:-

> *"33. It is the case of respondent that since petitioner has already issued a No-Claims Certificate, there are no disputes that are required to be adjudicated and that are arbitrable in nature. The respondent has contended that since nothing remains in the Agreement to be performed, the petitioner is only entitled to receive the compensatory amount from the beneficiary, i.e., SUDA. The respondent has advanced his argument on the ground that pre-arbitration procedure as stipulated under Clause 25 of the GCC has not been complied*

with, and therefore, on the above said grounds, the petition is untenable in the eyes of law.

. . . .

39. In the instant matter, the primary contention of the respondent while objecting to invocation of arbitration proceedings and appointing an arbitrator, is that the petitioner had issued a No-Claim Certificate, however, the discussion as aforesaid, which settles the principle of Doctrine of Severability by the interpretation of the Hon'ble Supreme Court, clarifies that the arbitration clause and agreement dare not vitiated because of the same. In view of the foregoing discussions, this Court while adjudicating the Issue No.I finds that if a No-Claim Declaration has been given by a party it would not render the entire arbitration agreement void on the basis of Doctrine of Severability.

. . . .

41. In the present petition, the parties do not contest the existence of arbitration clause, however, have placed their reliance on two different clauses of SCC and GCC. It is submitted that Article 2.1 of the agreement dated 18th November 2018 provides that the contract shall be performed in accordance with the terms and conditions of all the documents executed between the parties including GCC and SCC. Since all the agreements executed between the parties are to be construed harmoniously, the invocation of arbitration proceedings cannot be rendered void due to mere discrepancy arising out of these two respective clauses. The present issue invites the attention of this Court to discuss the applicability of Kompetenz-Kompetenz principle.

. . . .

48. In the instant petition, the foremost question that this Court has to determine is the existence of an arbitration clause and the same is answered in affirmative. The parties have not *objected to the existence of arbitration agreement but have placed their reliance on two different clauses of SCC and GCC. The Clause 25 in GCC begins with the phrase: "Except as otherwise provided in the contract….." whereas Article 2.1 of the agreement dated 18th November 2018 provides that the contract shall be performed as per the terms and conditions of all the documents including GCC and SCC. There is no doubt that arbitration clauses exist in both these agreements and as stipulated in GCC, a pre-arbitration procedure had to be followed but the same is not a mandate under SCC. Since both the agreements are to be construed harmoniously, the invocation of arbitration proceedings cannot be rendered void due to mere discrepancy arising out of these two respective clauses. The competence principle confers power upon the tribunal to adjudicate on all the issues and objections, inclusive of those arising out of jurisdiction as well as the validity of the arbitration clause. This Court is inclined to re-iterate the principle that a Section 11 petition ought to be allowed if the following trifold test is satisfied:*

a) There exists an arbitration agreement/clause in the agreement between the parties.

b) The core ingredients qua the invocation of arbitration proceedings are fulfilled.

c) The subject matter of dispute is arbitrable.

. . . .

51. In view of the facts, circumstances of the instant case and the position of law as discussed in the foregoing paragraphs, this Court is of the view that No-Claim Declaration given by the petitioner, would not extinguish its remedy to seek legal recourse as prescribed under the arbitration clauses in the agreement. The questions whether there is a non-joinder of the parties, and in what circumstances the earlier petition by the petitioner was *withdrawn and the No-Claim Declaration was given, are the questions of fact which this Court shall not delve into under while exercising its jurisdiction under Section 11 of the Act, 1996.*

52. This Court without going into the merits of the case, is prima facie of the view that there is an arbitrable dispute between the parties and the same must be adjudicated by the Arbitral Tribunal which would be the competent authority as per the Kompetenz-Kompetenz principle inclusive of the issues pertaining to non-joinder of beneficiary and to the dispute whether No Claim Declaration was obtained under economic duress or not.

53. This Court further holds forth that if there exists an arbitration clause between the parties in SCC which is sought to be overridden by another provision existing in GCC by the respondent, it requires interpretation of both the clauses to figure out the prevalence of one clause over the other. The settled rule of law in accordance with Vidya Drolia (supra) is "when in doubt, do refer". Therefore, the interpretation of the above-mentioned clauses pertaining to Arbitration can be adjudicated by the Arbitral Tribunal in exercise of its own competence and jurisdiction."

11. I have heard Mr. Gautam, learned counsel for the petitioner and Mr. Rao, learned senior counsel for the respondent.

12. In the present case, the memorandum of payment dated 09.02.2016 shows that an amount of Rs. 1,27,44,951/- was the amount due and payable to the petitioner. The said memorandum of payment is duly signed by all the parties.

13. NCC was issued by the petitioner on 09.02.2016 which reads as under:-

DOCUMENT No. 3 23

TECPRO SYSTEMS LIMITED

Tecpro Towers, 11-A17, 5th Cross Road,
SIPCOT IT Park, Siruseri - 603 103, Chennai
Ph : +91 44 37474747/+91 44 47443000
Fax : +9144 47443011
E-mail : tecpro_chn@tecprosystems.com
Website : www.tecprosystems.com

NO CLAIM CERTIFICATE

We M/s Tecpro Systems Limited, a company incorporated under the Laws of India, having its registered office at Tecpro Towers, 11-A17, 5th Cross Road, SIPCOT IT Park, Siruseri – 603103, Chennai and carrying on business under the name and style M/s Tecpro Systems Limited were awarded the contract by M/s GAIL (India) Ltd. in reference to Tender No A096/T-010/11-12/MS/29, (E-Tender No – 800003186).

After completion of the above work under the contract, we have scrutinized all our claims, contentions, disputes, issues with the project officials and we hereby confirm that after adjusting all payments received by us against our RA Bills, our balance entitlement under the contract is to a sum of Rs 1,28,08,995.55 (Rupees One Crore Twenty Eight Lakhs Eight Thousand Nine Hundred Ninety Five and Fifty Five paisa Only) as per our Final Bill dated 09.02.2016 towards full and final settlement of all our claims, dues, issues and contentions from GAIL (India) Limited.

We confirm and declare that with the receipt of aforesaid monies, all our claims, dues, disputes and differences between M/s Tecpro Systems Limited and GAIL (India) Ltd under and with reference to the above said contract stands fully and finally settled.

We further absolve GAIL (India) Limited from all liabilities present or future arising directly or indirectly out of the contract.

We further confirm that the present settlement has been arrived at after mutual negotiations and freely and fairly entered into between the parties. There is no economic duress or any other compulsion on us in entering into this settlement.

Signature with seal of contractor
For M/s Tecpro Systems Limited

TEC PRO SYSTEMS LTD
Pata-Auraiya
Uttar Pradesh
Pin - 206241
GAIL-PATA PROJECT

N.Sathish Kumar (PAH)
Resident Construction Manager
Dated: 09-02-2016

14. Thereafter another letter was issued by the petitioner on 06.04.2016 re-confirming the said amount and requesting the respondent to make payment out of the encashed bank guarantee to the petitioner's creditors. The said letter dated 06.04.2016 reads as under:-

DOCUMENT No. 5

TECPRO SYSTEMS LIMITED
Tecpro Towers, 11-A17, 5th Cross Road,
SIPCOT IT Park, Siruseri - 603 103, Chennai.
Ph.:+91-443747 4747 / +91-44-4744 3000
Fax:+91-44-4744 3011
Website:www.tecprosystems.com

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Ref: TSL/EIL-GAIL/PATA/SITE-16/2132
06.04.2016

PATA

To,
The Resident Construction Manager,
Engineers India Limited
GAIL Petrochemical Complex-II
Pata, Auraiya, UP.

7 MAY 2016
34060

Dear Sir,

Sub: Full and Final dues to the creditors, ~~suppliers and sub-contractors~~:-
Name of work: Structural steel works for LLDPE/HDPE at GAIL-PATA Petrochemical Complex-II, Pata.
Ref: FOA No. GAIL/ND/PC/C&P/2011/060 dated 16.09.2011

We have completed all the works as per contract and submitted the final bill. The same is now processed and an amount of Rs 127 lakhs is due for payments.
Apart from this, Our Performance Bank Guarantee was encashed and an amount of Rs 439 Lakhs is available in GAIL Account in cash for which the performance period ended on 25th December 2015 and Three months liability period expired on 25th March 2016.

Sl No	Description	Amount in Rs
01	Final Bill amount	1,27,00,000.00
02	Encashed Performace Bank Guranee	4,39,00,000.00
	Total Amount Due	5,66,00,000.00

Also an amount of Rs 185 Lakhs in cash is available in GAIL account against PRS. We are facing severe banking issues, cash flow problems and financial crisis. Due to these issues, we shall not be able to clear the dues through the present bank account. So, we request you to release the payment to the creditors directly as per the attached list amounting to Rs.2,55,86,728.00 (Rupees Two Crores Fifty Five Lakhs Eighty Six Thousand and Seven hundred Twenty Eight Only) and transfer the balance amount of Rs 3,10,13,272.00 (Rupees Three Crores Ten Lakhs Thirteen Thousand Two Hundred Seventy Two Only) to M/s Tecpro Infra Projects Ltd, Account Number 0000067072933004, IFSC SBTR0000067, State Bank Of Travancore, Chathanoor.

S. Venugopalan
DGM - Commercial
Power OF Attorney Holder
Tecpro Systems limited

15. In view of the said letters, I am of the considered opinion that the petitioner had duly calculated the full and final amount due to the petitioner, crystallised the same, and received the entire payment. On receipt of the entire payment, the petitioner issued a NCC.

16. The Hon'ble Supreme Court in ***NTPC Limited vs. SPML Infra Limited*** (2023) 9 SCC 385 has held as under:-

> *"Eye of the needle*
>
> *25. The abovereferred 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.*
>
> . . . .
>
> *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, 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 Ltd. v. Rajapura Homes (P) Ltd.

Analysis

. . . .

46. We will now examine whether the allegations of coercion and economic duress in the execution of the settlement agreement are bona fide or not. This inquiry has a direct bearing on the arbitrability of the dispute. It was during the subsistence of the writ petition and the High Court's interim order, when SPML had complete protection of the Court, that the parties entered into the settlement agreement. This agreement was comprehensive. It inter alia provided for: (i) the release of bank guarantees by NTPC, (ii) the withdrawal of SPML's writ petition, (iii) restraining NTPC from filing contempt proceedings against SPML for letting the bank guarantees expire, and finally, (iv) restraining SPML from initiating any proceedings under the subject contract, including arbitration. The settlement agreement also recorded *that there were no subsisting issues pending between the parties.*

. . . .

48. The foregoing clarifies beyond doubt that the claims sought to be submitted to arbitration were raised as an afterthought. Further, SPML's allegations of coercion and economic duress in the execution of the settlement agreement lack bona fide. They are liable to be knocked down as ex facie frivolous and untenable.

49. In view of the abovereferred facts, which speak for themselves, we are of the opinion that this is a case where the High Court should have exercised the prima facie test to screen and strike down the ex facie meritless and dishonest litigation. These are the kinds of cases where the High Court should exercise the restricted and limited review to check and protect parties from being forced to arbitrate."

17. Applying the eye of the needle test to the factual matrix of the present case, it seems that the petitioner had issued NCC after receipt of the entire amount as was due and payable as per the petitioner's own calculations.

18. The fact that the liquidator was appointed subsequently and invoked arbitration for receipt of some other amount, which, according to the liquidator was outstanding, seems to be untenable.

19. Even in the petition, there are no allegations that the NCC was issued under coercion or any duress by the previous management.

20. For the said reasons, I am of the opinion that the notice invoking arbitration and the present petition is untenable and there are no subsisting disputes which are required to be referred to arbitration.

21. The judgment relied upon by the learned counsel for the petitioner, ***M/s Kuldeep Kumar Contractor*** (supra), is distinguishable as it was prior to the judgment of the Hon'ble Supreme Court in "***NTPC Limited"*** (supra).

22. The petition is dismissed in the aforesaid terms.

JASMEET SINGH, J

MAY 28, 2024 / (MS)

Click here to check corrigendum, if any