



2024:DHC:6535



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **ARB.P. 1192/2023****J P CONSTRUCTIONS**

.....Petitioner

Through: Mr. Jogy Scaria and Ms. M.
Priya, Advs

versus

TAHAL CONSULTING ENGINEERS INDIA PVT LTD

.....Respondent

Through: Mr. Kamal Mehta, Mr.
Abhishek Chauhan Mr. Nishant Mankoo,
Advs.**CORAM:****HON'BLE MR. JUSTICE C. HARI SHANKAR****JUDGMENT (ORAL)**

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27.08.2024

1. This is a petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996¹ for reference of the dispute between the parties to arbitration.

2. The dispute arises in the context of a Framework Agreement dated 25 March 2016. It cannot be disputed that, as per the recitals in the framework agreement, the agreement is executed between Tahal Consulting Engineers India Private Limited, organized and existing under the laws of India, whose principal place of business is in Plot No.34, Sector-44, Institutional Area, Gurgaon (Haryana) - 122003 ("Tahal"), of the one part and M/s. J.P Constructions, a company incorporated under the laws of India, whose principal place of

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business is at 3rd Main Road, 1st Block, Kuvempu Nagar, Tumkur, Karnataka-572102 on the other.

3. The agreement was signed, on behalf of the respondent, by its authorised signatory, and on behalf of the petitioner by one Jayaprakash C K, with the stamp showing him to be the “proprietor” of J P Constructions, for and on behalf of “M/s J P Constructions”.

4. Clause 18 of the Framework Agreement envisaged resolution of the dispute between the parties and read thus:

“18. Law and Dispute Resolution

18.1. This Agreement and the rights and obligations of the Parties hereunder shall be governed and construed in accordance with the laws of India without regard to its conflict of law principles.

18.2. If a dispute, claim or controversy arises out of or in connection with this Agreement, the Parties shall negotiate in good faith in an attempt to reach an amicable settlement. If the disputed matter is not settled amicably between the parties within 30 (thirty) days, such disputed matter shall be finally settled in arbitration as set out herein below.

18.3. Any dispute arising between the Parties with relation to this Agreement shall be referred to Arbitration comprising of a sole arbitrator to be appointed by Tahal. Any orders/ directions/ award of the sole arbitrator shall be final and binding on the Parties. The arbitration proceedings shall be held in English language in accordance with the Arbitration and Conciliation Act, 1996 and the Rules made thereunder, or any statutory modification(s) or re-enactment(s) thereto for the time being in force. The venue of Arbitration shall be at New Delhi.

18.4. The cost of the arbitration proceedings shall be first borne equally by the Parties and the arbitrator shall be requested to rule on the division of these costs between the Parties along with his principle decree.



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18.5. The Parties shall continue to perform their respective obligations under the Contract notwithstanding any referral of a dispute to arbitration herein.”

5. Disputes having arisen, the petitioner addressed a legal notice to the respondent on 4 August 2023, invoking Clause 18 of the Framework Agreement and seeking reference of the dispute to arbitration. The opening paragraph of the letter states that it was issued on behalf of “M/s J P Constructions, represented by its proprietor, Shri. Jayaprakash C K, having its principal office at 3rd Main Road, 1st Block, Kuvempu Nagar, Tumkur District, Karnataka 572102”.

6. The respondent failed to respond. The petitioner has approached this Court under Section 11(6) of the 1996 Act, seeking reference of the dispute to arbitration.

7. On 6 May 2024, the respondent advanced a preliminary objection to the fact that, though the petitioner claimed to be a partnership firm, no certificate of registration of the petitioner as a partnership firm was on record. The petitioner has, thereafter, placed, on record, a certificate of registration dated 29 July 2024 of M/s J P Constructions as a partnership firm.

Submissions of Mr Kamal Mehta for the respondent

8. Mr. Kamal Mehta, learned Counsel for the respondent has raised several objections to the maintainability of the present petition.

He firstly contends that the Certificate of Registration of the petitioner

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firm indicates that it was registered as a partnership only on 29 July 2024 and, therefore, on the date of institution of the present Section 11(6) petition before this Court, the petitioner was not registered as a partnership firm. Ergo, the petition, he says, is not maintainable.

9. His second contention is that the entity which has entered in to the Framework Agreement and the entity which has filed the present petition are different. He points out that the opening recitals in the Framework Agreement state that it was entered into by J P Constructions, “a company”. On the other hand, the Framework Agreement was signed, on behalf of M/s J P Constructions, by Mr. Jayaprakash C K, showing himself to be the “proprietor” of J P Constructions. Even the notice under Section 21 of the 1996 Act, he submits, was issued on behalf of J P Constructions, stated to be the proprietorship of Mr. Jayaprakash C K. As such, the petitioner who has instituted the present petition, claiming to be a partnership firm, was not the entity which entered into the Framework Agreement, or on whose behalf the Section 21 notice was issued to the respondent.

10. Mr. Mehta’s third objection is predicated on Section 19(2)(a)² of the Partnership Act. He submits that an individual partner in a firm does not have the right to submit a dispute relating to the business of the firm to arbitration, without the consent of other partners. He, therefore, submits that it would be incumbent on the petitioner to establish that Mr. Jayaprakash C K, assuming he signed the

² (2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to—

(a) submit a dispute relating to the business of the firm to arbitration,



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Framework Agreement as a partner in J P Constructions, and assuming J P Construction was a partnership firm at that time, had obtained the consent of the remaining partners to enter into the Framework Agreement.

Submissions of Mr. Jogy Scaria for the petitioner

11. Mr. Jogy Scaria, learned Counsel for the petitioner, submits, *per contra*, that Section 69(3)³ of the Partnership Act 1932, which proscribes the institution of proceedings for enforcing rights arising from a contract by a non-registered partnership firm, would not apply to arbitral proceedings. He placed reliance, in this context, on para 37 of the judgment of the Supreme Court in *Umesh Goel v Himachal Pradesh Cooperative Group Housing Society Ltd*⁴ which reads thus:

“37. Though the learned senior counsel for the appellant and the respondent referred to certain other decisions in support of their respective submissions, as we are fortified by our conclusion, based on the interpretation of Section 69 of the Partnership Act vis-à-vis the 1996 Act and the 1940 Act as well as supported by the decision in *Jagdish Chander*⁵ and *Kamal Pushp Enterprises*⁶, we do not find any necessity to refer to those decisions in detail. *Having regard to our conclusion that Arbitral Proceedings will not come under the expression “other proceedings” of Section 69(3) of*

³ **69. Effect of non-registration. –**

(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suits to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect—

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm; or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909 (3 of 1909), or the Provincial Insolvency Act, 1920 (5 of 1920), to realise the property of an insolvent partner.

⁴ (2016) 11 SCC 313

⁵ *Jagdish Chander Gupta v Kajaria Textiles (India) Ltd*, AIR 1964 SC 1882

⁶ *Kamal Pushp Enterprises v D.R. Construction Co.*, (2000) 6 SCC 659

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the Partnership Act, the ban imposed under the said Section 69 can have no application to Arbitral proceedings as well as the Arbitration Award. Therefore, the appeal stands allowed, the impugned judgment of the Division Bench is set aside and the judgment of the learned Single Judge stands restored. No costs."

(Emphasis supplied)

12. Mr Scaria further cites the judgment of a learned Single Judge of the High Court of Calcutta in in *Md. Wasim v Bengal Refrigeration and Company*⁷, which followed *Umesh Goel* and observed, in para 10, thus:

"10. The objection of the respondents is in respect of the bar contained under Section 69 of the Act of 1932. Sub-sections (1) and (2) of Section 69 of the Act of 1932 restrict filing of suit by any person as a partner of unregistered firm. Sub-section (3) of Section 69 of the Act of 1932 makes the provisions of Sub-sections (1) and (2) applicable also to a claim of suit of or "other proceedings" to enforce a right arising from a contract. Hon'ble Supreme Court in the matter of *Umesh Goel v Himachal Pradesh Cooperative Group Housing Society Limited* has settled that the arbitral proceedings will not come under the expression "other proceedings" of Section 69(3) of the Act of 1932 and that the ban imposed under Section 69 can have no application to arbitration proceedings as well as the arbitral award. Madras High Court in the matter of *M/s. Jayamurugan Granite Exports vs. M/s. SQNY Granites*⁸ reported in has considered the similar issue and held that:

"38. If these observations are looked in the context of Section 69 of the Partnership Act, the bar created for institution of the suit or other proceedings is in respect of the same being instituted in any "courts". But the aforesaid observation shows that the power has to be exercised under Section 11 of the 1996 Act by the Chief Justice or his delegate and not by the Court. In fact, it is observed in paragraph-20 that there are a variety of reasons as to why the Supreme Court cannot possibly be considered to be "court" within the meaning of Section 2(1)(e) even if it retains seisin over the arbitral proceedings. The Judgment is to the effect that the Chief Justice does not represent the High Court or the Supreme Court, as the case may be, when

⁷ Judgment dated 30 September 2022 in AP 27/2022

⁸ 2015-4-L.W. 385



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exercising power under Section 11, albeit a judicial power. This is also the reason for the decision of the Chief Justice or his designate not being the decision of the Supreme Court or High Court, as the case may be, as there is no precedential value being the decision of the judicial authority, which is not a court of record.

39. In addition, as has been discussed aforesaid, the scheme of the 1996 Act is different and the process of mechanism for alternate dispute resolution system has to be construed not identical to the 1940 Act, considering the difference in their schemes.

40. I am thus of the view that non-registration of the petitioner firm would not be a bar under Section 69 of the Partnership Act for institution of proceedings under Section 11 of the 1996 Act."

13. Mr. Jogy Scaria submits that the reflection of Mr. Jayaprakash C K as the proprietor of the J P Constructions, in the stamp accompanying the signature on the last page of the Framework Agreement, was an inadvertent error and, in fact, on that date, J P Constructions was a partnership firm. He has sought to support his submission by reference to

- (i) contemporaneous invoices raised by the petitioner as a partnership firm and which, he submits, were honoured by the respondent,
- (ii) the Income Tax Return (ITR) of J P Constructions for AY 2015-2016, which was signed by Jayaprakash C K in his capacity as partner and which bears the following endorsement at the foot of the ITR:

"This return has been digitally signed by JAYAPRAKASH C K in the capacity of PARTNER having PAN AIAPJ7108C from IP Address 122.167.1.202 on 19-09-2015 at TUMKUR Dsc SI No &. issuer 1921978CN=e-Mudhra Sub CA for Class 2 individual 2014, OU=Certifying Authority, O=eMudhra Consumer Services Limited, C=IN"

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- (iii) the PAN Card of M/s J P Construction which was issued to JP Constructions as a Firm and which is also reflected in the purchase order issued by the respondent, and
- (iv) the fact that the respondent had made demand against the work executed by the petitioner to accounts which stood in the name of the petitioner.

Analysis

14. Clearly, the issue of whether the arbitration agreement was executed by the Firm or by the proprietorship is, at the very least, arguable. Mr. Scaria has placed on record documents which, according to him, indicate that JP Constructions was, on the date of execution of the Framework Agreement, in fact a partnership firm. Mr. Mehta, on the other hand, has pointed out that, in the opening recitals of the Framework Agreement, JP Constructions is referred to as a company and the stamp accompanying the signature of Mr. Jayaprakash CK towards the end of the agreement shows him to be its proprietor. He has also placed reliance on the Section 21 notice issued by the petitioner which is stated to be under the instructions of Jayaprakash CK as a proprietor of J P Constructions.

15. The question that has to be addressed primarily is the extent to which this Court can enter into this factual morass while exercising jurisdiction under Section 11(6)/11(6-A) of the 1996 Act. One may profitably refer, in this context, to paras 110 to 114 and 120 of the judgment of the Supreme Court in *SBI General Insurance Co Ltd v*

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Krish Spinning⁹:

“110. The scope of examination under Section 11(6-A) is confined to the existence of an arbitration agreement on the basis of Section 7. 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 16 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.

112. The aforesaid approach serves a two-fold purpose – firstly, it allows the referral court to weed out non-existent arbitration agreements, and secondly, it protects the jurisdictional competence of the arbitral tribunal to rule on the issue of existence of the arbitration agreement in depth.

113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in *In Re: Interplay*¹⁰ 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

⁹ 2024 SCC OnLine SC 1754

¹⁰ In re. Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, (2024) 6 SCC 1



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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***¹¹ and adopted in ***NTPC v SPML***¹² 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***.”

120. The principle of subsequent judicial review has been enshrined in the US doctrine of “Second Look”. In a leading U.S. Supreme Court judgement of ***PacifiCare Health Systems, Inc. v. Book***¹³, 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 judgements of the U.S. lower courts in cases of ***Dillon v. BMO Harris Bank, NA***¹⁴ and ***Escobar v. Celebration Cruise Operator, Inc.***¹⁵ 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.”

16. From a reading of the aforesaid passages, it emerges that the Section 11(6) Court is not only required to limit its consideration to existence of an arbitration agreement between the parties, but *is also required to examine that issue only prima facie*.

¹¹ (2021) 2 SCC 1

¹² 2023 SCC OnLine SC 389

¹³ 538, U.S. 401 (U.S. S. Ct. 2003)

¹⁴ 856 F.3d 330, 333 (4th Cir. 2017)

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

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17. The examination, by the Section 11(6) Court, of any contentious issue of fact, even in arriving at the question of whether there is an arbitration agreement between the parties, stands proscribed, and the Supreme Court is clear in its opinion that, if the decision requires a detailed analysis, that analysis has to be left to the Arbitral Tribunal.

18. I do not find myself in a position to opine finally, one way or the other, as to whether the arbitration agreement should be said to have been executed by the petitioner as a partnership firm or by a proprietor. The entire matter would have to be examined in depth.

19. Even more impermissible would it be for this Court, given the position of law enunciated in ***SBI General Insurance*** to enter into the aspect of whether Jayaprakash C K had, at the time of executing Framework Agreement, the consent of other partners of the petitioner firm. That would be even a more intricate exercise, which would require comparative study of documents and the circumstances in which the Framework Agreement was executed which, again, would have to be left for examination by the arbitral tribunal.

20. *What cannot be denied, however, is the fact that there exists an arbitration agreement between J P Constructions and the respondent. The existence of the arbitration agreement per se is not in dispute. The respondent does not seek to contend that the agreement was forged or fabricated. Nor does the respondent seek to dispute the signature at the conclusion of the agreement.*

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21. In that view of the matter, given the law in that regard now declared in ***SBI General Insurance***, and given the fact that the parties have not been able to arrive at a consensus regarding arbitration, the court has necessarily to step in and appoint an arbitrator.

22. Needless to say, all issues would remain open for agitation before the learned arbitrator. The Court should not be treated as having expressed any conclusive view on the exact identity of the parties to the Framework Agreement, whether it was executed by Jayaprakash CK as proprietor or a partner, whether he had the necessary authority to execute the partnership agreement, or any other aspect of the matter.

23. All contentions advanced by Mr. Mehta before this Court shall remain open to be urged in the arbitral proceedings and this Court has not expressed any opinion on any of the said contentions one way or the other. It shall also be open to the respondent to question the maintainability of the arbitration itself, the jurisdiction in that regard being amply possessed by the Arbitral Tribunal in exercise of its powers under Section 16(3) of the 1996 Act and applying the *kompetenz-kompetenz* principle.

24. Keeping all these aspects alive, therefore, the Court appoints Mr. Nishe Rajen Shonker, Advocate (Mob: 9811342057) as the arbitrator to arbitrate on the dispute between the parties.

25. The arbitration shall take place under the aegis of the Delhi

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International Arbitration Centre (DIAC). The arbitrator shall also be entitled to charge fees in accordance with the schedule of fees maintained by the DIAC.

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

27. The petition stands disposed of in the aforesaid terms.

C. HARI SHANKAR, J

AUGUST 27, 2024

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Click here to check corrigendum, if any

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