



2024:DHC:8165



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

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Date of Decision : 21.10.2024+ **ARB.P. 1143/2024**

SUBHASH CHAND AMAR

.....Petitioner

Through: Mr. Kamal Mehta and Mr. Nishant
Mankoo, Advs.

versus

MOHD JAMSHED

.....Respondent

Through: None.

CORAM:**HON'BLE MR. JUSTICE SACHIN DATTA****SACHIN DATTA, J. (Oral)**

1. The present petition has been filed by the petitioner seeking appointment of a Sole Arbitrator to adjudicate the disputes that have arisen between the parties. These disputes stem from a “collaboration agreement” dated 06.10.2017 with respect to construction of a five storied residential property at Khasra No. 134/1, 167 & 169 at Village Jogabai, Gali No.37, Zakir Nagar, New Delhi-110025 to be carried out by the respondents.
2. Clause 20 of the collaboration agreement contains an arbitration clause as under :-

“20. That in case of any dispute between the OWNER and the BUILDER regarding the interpretation of these presents, documents, rights, duties, obligation, accounts etc., the same shall be referred to arbitration of a person mutually, acceptable by both the parties whose decision shall be final and binding on them that in case if dispute between the parties is not settled then. That this transaction has taken place at New Delhi and as such Delhi Courts shall have exclusive jurisdiction to entertain any dispute arising out or in any way touching or concerning this deed.”

3. Following the emergence of disputes between the parties, the



petitioner issued a notice dated 14.05.2024, under Section 21 of the Arbitration and Conciliation Act, seeking to initiate arbitration proceedings for the resolution of these disputes. The notice was dispatched to the address specified in the Agreement, as well as to three additional addresses known to the petitioner. However, as per the tracking reports filed by the petitioner, the notice sent to one of the respondent's addresses was returned with the remark "refused." For the remaining addresses, the notices were returned with remark "no such person."

4. The petitioner has evidently discharged the onus to effect service of the said notice under Section 21, by sending a written communication at the last known address of the respondent, which is the same address as mentioned in the agreement. In the context of Section 3 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the A&C Act'), a Co-ordinate Bench of this Court in ***G4S Secure Solutions (India) Private Limited v. LI Consulting Private Limited*** 2021 SCC OnLine Del 4146, has observed as under –

"19. However, it is settled that the notice will be deemed to have been served if it is sent at the correct address and the record of an attempt to deliver exists."

20. It is relevant to refer to Section 3 of the A&C Act which reads as under:

"3. Receipt of written communications.—

(1) Unless otherwise agreed by the parties,—

(a) any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and

(b) if none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual



residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

(2) The communication is deemed to have been received on the day it is so delivered.

(3) This section does not apply to written communications in respect of proceedings of any judicial authority.”

21. It is clear from the express language of Section 3 of the A&C Act that any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence address or mailing address. However, if none of the said places is found after making a reasonable inquiry, written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by a registered letter or by any means, which provide a record of an attempt to deliver.

22. In the present case, it is established that an attempt to deliver the notice dated 24-9-2018 was made at the petitioner's address at 803, Ansal Bhawan, 16 KG Marg, New Delhi 110 001.

23. Even if it is accepted that the notice was not received by the petitioner at its registered office, it is established that an attempt to deliver was made at the address on which the notices were agreed to be delivered by the parties, in terms of the contract.

24. In *Shabnam Gulati v. Religare Finvest (P) Ltd.*³, this Court had explained the effect of Section 3 of the Act as under:

“18. Section 3(1) of the Arbitration and Conciliation Act, specifically states that a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual address or mailing address by registered letter or by any other means which provides a record of ‘attempt to deliver it’. Therefore, unlike sub-rule (5) of Rule 9 of Order 5 CPC requiring proof of acknowledgment or any other receipt of due delivery of the summons, or drawing of a presumption of due service only where the summons were properly addressed but the acknowledgement was lost or misled or for any other reason was not received by the court, under the Arbitration and Conciliation Act sending of notice by registered letter or by other means at last known place of business, habitual residence or mailing address which provides



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the record of 'attempt to deliver it'.”

5. The petitioner has now approached this Court, through the present petition, seeking the appointment of a Sole arbitrator to adjudicate the dispute.

6. Notice in the present petition was issued on 31.07.2024. The petitioner has taken the requisite steps to serve the respondent at all the addresses known to the petitioner, one of the said addresses being that mentioned in the Agreement itself. An affidavit of service has been filed by the petitioner. The relevant portion of the said affidavit is reproduced as under –

“2. That in compliance of the directions of this Hon’ble High Court vide order dated 31.07.2024, the summons in the case were collected from the dispatch section of the registry of the Hon’ble High Court for service of the respondents through Speed Post. The details of the summons sent to the respondents are as given below:-

S.NO	CONSIGNMENT NO.	ADDRESS	STATUS/REMARKS
1.	SU001956185IN	House No.63/2, 4 th Floor, Gali No. 20, Zakir Nagar, New Delhi-110025	Item Returned Addressee cannot be located
2.	SU002056784IN	House No.A-50, Flat No.302 4 th Floor, Abdul Fazal Enclave, near Okhla Vihar metro station & Police Station Jamia Nagar, Okhla, New Delhi-110025	Item Returned, No such person in the address



3.	SU001956194IN	R-292 Khasra No.253, Shop No.3, Ground Floor Jogabia Extentsion, Jamia Nagar, HR Public New Delhi-110205	Item Returned, No such person in the address
4.	SU002056775IN	123 C, Jogabia Extension, Jamia Nagar, Okhla, New Delhi-110025	Item Returned, Refused
5.	SU002056767IN	T-30, 3 rd Floor, DDA SFS Flats, Sector-7, Jasola Vihar, New Delhi-110025	Item Delivered (to addressee)

7. In the aforesaid circumstances, the matter has been taken up for consideration despite non-appearance of the respondent.

8. The scope of inquiry in the present proceedings is confined to ascertaining whether there exists an arbitration agreement between the parties. In this regard it is apposite to refer to the observations of the Supreme Court in ***In Re: Interplay between Arbitration Agreement under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899*** bearing the Curative Petition (C) No. 44/2023 decided on 14.12.2023, wherein it has been observed 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 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.”

In ***SBI General Insurance Co. Ltd. v. Krish Spinning***, 2024 INSC 532, the Supreme Court has further clarified that at the stage of appointing an arbitrator, the Court’s role is limited to determining the prima facie existence of an arbitration agreement, and “nothing else”. It was observed therein as follows:

“113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in *In Re: Interplay (supra)* 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 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 (supra), 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 (supra) and adopted in NTPC v. SPML (supra) 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 (supra).

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123. The power available to the referral courts has to be construed in the light of the fact that no right to appeal is available against any order passed by the referral court under Section 11 for either appointing or refusing to appoint an arbitrator. Thus, by delving into the domain of the arbitral tribunal at the nascent stage of Section 11, the referral courts also run the risk of leaving the claimant in a situation wherein it does not have any forum to approach for the adjudication of its claims, if it Section 11 application is rejected.”

9. In the present case, the existence of the arbitration agreement is apparent from a perusal of a copy of the Agreement which has been placed on record. In the circumstances, there is no impediment to this Court



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appointing an independent Sole Arbitrator for adjudicating the disputes between the parties, as prayed for.

10. Accordingly, Ms. Warisha Farasat, Advocate (Mob. No.:9953825580) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

11. 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; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.

12. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

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

14. 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.

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

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

SACHIN DATTA, J

OCTOBER 21, 2024/dn