



2024:DHC:1047



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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 01st February, 2024

+ ARB.P. 1204/2023

HOME AND SOUL INFRATECH PVT. LTD. Petitioner

Through: Mr. Alok K. Aggarwal & Mr.
Amushruti, Mr. R. Duggal,
Advocates.

versus

RAJ KRISHNA CONSTRUCTION COMPANY PVT. LTD.

.... Respondent

Through: Mr. Shubhankar Sengupta, Mr.
Shaleen Srivastava, Ms. Janavi
Srinivasan & Ms. Angna Dewan,
Advocates.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T (oral)**I.A.22737/2023 (Exemption)**

1. Allowed, subject to all just exceptions.
2. The application is disposed of.

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3. The present Petition under Section 11(5) read with Section 11(6) of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as the "Act, 1996"*) has been filed on behalf of the petitioner seeking appointment of a Sole Arbitrator for adjudication of disputes having arisen between the parties.



4. It is submitted that the respondent was given by the petitioner the Work Order No. H&S/P3/18-19/14 dated 12.10.2018 for RCC and allied works as per Tender BOQ, drawing and specifications for the Project Page Three Residencies located at B-8, L and I, Sector 19 to 25, Jaypee Greens, Greater NOIDA. The timelines for completion of the Contract as stated under Clause 20, was 24 months till 12.10.2020.

5. In addition to the aforesaid work, three Addendums i.e., Addendum No. H&S/P3/18-19/14/001 dated 09.01.2019 for additional works to the amount of Rs. 1,76,8921/-, Addendum No. H&S/P3/18-19/14/002 dated 14.12.2020, were entered into between the parties wherefor the billing was processed through *New Era Solution Pvt. Ltd.* By the Addendum No. H&S/P3/18-19/14/003 dated 14.03.2022, the Contract period was extended upto 30.09.2022 on the respondent's request to complete the work. Further assurance to complete the same in timely manner, were issued.

6. It is submitted that despite repeated reminders by the petitioner to the respondent to adhere to the terms of the Agreement, the respondent failed to do so. The petitioner invoked the Arbitration Clause contained in Clause 52 of the Work Order *vide* Legal Notice dated 19.01.2023, despite which the respondent has not agreed to the name and appointment of the Arbitrator. Therefore, the present petition has been filed on behalf of the petitioner.

7. **The respondent in its Reply** has admitted that the Work Order dated 12.10.2018 being issued by the petitioner in favour of the respondent. However it is submitted that, on 05.12.2020, the petitioner and one M/s New Era Solutions Pvt. Ltd. (in short 'NESPL') entered into a Memorandum of Understanding (in short 'MoU') and in pursuance thereof, an Addendum dated 07.12.2020 was entered into between the NESPL and the respondent



and Addendum dated 14.12.2020 was entered into between the respondent and the petitioner, whereby the Work Order dated 10.12.2018 stood novated and the petitioner stood replaced by NESPL under the Original Work Order.

8. The respondent has claimed that for the purpose of invoking Section 11 of the Act, 1996, there are two queries which need to be answered viz., (i) existence and the validity of an Arbitration Agreement; and (ii) non-arbitrability of the dispute.

9. It is submitted that pursuant to the novation, the NESPL has been substituted in place of the petitioner and, therefore, there is no valid Agreement between the petitioner and the respondent. After novation, the Arbitration Clause does not survive and Section 11 of the Act, 1996 cannot be invoked.

10. It is asserted that there is no privity of Agreement between the parties and after the novation of the original Work Order *vide* Addendums dated 07.12.2020 and 14.12.2020, there ceased to exist any form of contractual or jural relationship between the petitioner and the respondent with respect to the Project.

11. It is also claimed that the Arbitration Notice is improper and invalid. The Arbitration Clause contained in the original Work Order is silent about the number of Arbitrators that can be appointed and, therefore, as per Section 10 of the Act, 1996, the disputes, if any, have to be adjudicated by the Sole Arbitrator and not in the manner suggested in the Arbitration Notice dated 19.01.2023. Therefore, the Arbitration Notice dated 19.01.2023 is bad in law.

12. Furthermore, in the Arbitration Notice dated 19.01.2023, the petitioner has notified the appointment of a former Judge, High Court of



Telangana State and Andhra Pradesh as nominee Arbitrator to adjudicate the alleged disputes and had called upon the respondent to appoint a nominated Arbitrator within 15 days. The appointment of two Arbitrators is *ex facie* illegal and invalid and in contravention of Section 10 of the Act, 1996 which contemplates that number of Arbitrators shall not be an even number. Therefore, it is submitted that the present petition is liable to be rejected.

13. **Learned counsel for the petitioner has submitted** that the plea of novation can be agitated by the respondent before the Arbitrator as the inquiry under Section 11 of the Act, 1996 is summary in nature and the Court cannot go into the question of the novation of the Contract as claimed by the respondent. For this reliance has been placed on the decisions in Meenakshi Solar Power Pvt. Ltd. vs. Abhyudaya Green Economic Zones Pvt. Ltd. and Others 2022 SCC OnLine SC 1616 and Sanjiv Prakash vs. Seema Kukreja and Others (2021) 9 SCC 732.

14. Learned counsel for the petitioner has further submitted that even otherwise the plea of the respondent is not tenable as it had approached the National Company Law Tribunal, New Delhi Bench (in short “NCLT”) against NESPL, the NCLT *vide* Order dated 26.10.2023 rejected the Petition under Section 9 of Insolvency and Bankruptcy Code, 2016.

15. The respondent had filed before the NCLT the Arbitration Notice dated 19.01.2023. In reference to this Legal Notice dated 19.01.2023, it was observed that the petitioner herein which had issued the said Notice, had made a reference of dispute in respect of Work Order dated 12.10.2018 which involved an amount of Rs. 11,94,56,470/-, while the respondent herein, (*which was the Operation Creditor before the NCLT*), raised an issue in respect of the work of value of Rs. 46,06,371/- only. It was observed that



in terms of Arbitration Notice dated 19.01.2023, the petitioner herein had raised the disputes relating to the quality of services in respect of the work for which the Work Order dated 12.10.2018 was issued.

16. Learned counsel for the petitioner has thus, argued that the Addendum No. H&S/P3/18-19/14/002 dated 14.12.2020 had been entered into with NESPL only for the purpose of making payments against the bills to the respondent while the overall responsibility under the Contract remained that of the petitioner. The Addendum No. H&S/P3/18-19/14/002 dated 14.12.2020 was only to ensure the payments since the Project was being financed by NESPL.

17. It is argued that there is neither any novation nor any independent liabilities created in respect of the Work Order as is claimed by the respondent.

18. **Learned counsel for the respondent**, however, has refuted the assertions and has argued that under Section 11 of the Act, 1996, the matters that may be arbitrated must be ascertained and the validity of the Arbitration Agreement, must also be considered.

19. It is further submitted that it is essential that the privity of Contract between the parties be considered by the Court.

20. Reliance has been placed on the decision in Magic Eye Developers Private Limited vs. Green Edge Infrastructure Private Limited and Others (2023) 8 SCC 50.

21. **Submissions heard.**

22. The petitioner herein has claimed its disputes under the Work Order No. H&S/P3/18-19/14 dated 12.10.2018 for RCC and allied works as per Tender BOQ, drawing and specifications for the Project Page Three



Residencies located at B-8, L and I, Sector 19 to 25, Jaypee Greens, Greater NOIDA. There is no denial that there existed a valid Arbitration Agreement in the Work Order dated 12.10.2018 in Clause 52 of the Work Order.

23. The respondent is now seeking to avoid arbitration on the ground that the Contract had stood novated. However, as explained on behalf of the petitioner, there has been no novation, but only because the Project was being financed by NESPL, the billing has been directed to be done directly by the respondent to NESPL for the purpose of payments.

24. At this stage, it is pertinent to analyse whether the scope of Section 11 of the Act, 1996 and whether this Court can consider the question of novation of the Work Order.

25. Section 11(6-A) of the Arbitration Act, 1996 provides that the Court, while considering any application under sub-sections (4), (5) or (6), shall confine itself to '*the examination of the existence of an arbitration agreement*'.

26. The Court in the case of Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, examined the meaning of "existence" in Section 11(6-A) of the Act, 1996 and considered whether it merely refers to contract formation and whether there is an arbitration agreement or does it also include the question of enforcement and validity of the agreement. It was observed that existence of an arbitration agreement presupposes a valid agreement which would be enforced by the Court by relegating the parties to arbitration. A reasonable and just interpretation of "existence" requires an understanding of the context, the purpose and relevant legal norms applicable for a binding an enforceable arbitration agreement. It was observed that the expression "existence of an arbitration agreement", included vital aspects of the validity



of an arbitration agreement, albeit at the referral stage would apply the prima facie test as under:-

“Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straight forward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial.”

27. The Apex Court then proceeded to differentiate between contractual aspects of the arbitration agreement which the court can examine at referral stage and jurisdictional aspects of arbitration agreement which should be left to the Arbitral Tribunal. It observed that:

“The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to more thorough examination in comparison to the second and third categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, we would add and include the dispute affects third party rights, have erga omnes effect, requires centralized adjudication; whether the subject matter relates to inalienable sovereign and public interest functions of the State; and whether the subject matter of dispute is expressly or by necessary implication non-arbitrable



as per mandatory statute(s). Such questions arise rarely and, when they arise, are on most occasions questions of law. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the arbitral tribunal to decide.”

28. Thus, under Section 11 of the Act, 1996 the Court must only conduct a prima facie inquiry into the validity of the arbitration agreement and the issues relating to contract formation, existence, validity and non-arbitrability should be left for the Arbitral Tribunal to decide.

29. In the case of Sanjiv Prakash (Supra) where a similar question arose before the Supreme Court that whether the petition for the appointment of an arbitrator could be rejected on the premise that the Agreement which contained the clause, stood novated and superseded? The Court took into consideration the limited scope of Section 11 of the Act, 1996 which is narrow to view whether an arbitration agreement exists between the parties or not and relied on the law laid down in the case of Vidya Drolia (Supra) to observe that the question of novation of the Agreement containing the Arbitration clause, cannot be decided in exercise of the limited prima facie review. It was observed that as the case did not fall within the category of cases which ousts arbitration altogether, the parties were referred to arbitration of a sole arbitrator.

30. Thus, whether in fact, a novation took place and there ceased to be any Agreement *inter se* the parties as is claimed by the respondent, is a disputed fact which the respondent is at liberty to agitate the same before the Arbitrator who may consider the same in accordance with law.



31. For the same reasons, the question of arbitrability that is raised on behalf of the respondent is not tenable as there is no denial that the disputed claims have been raised which relate to the Work Order.

32. It is also pertinent to note that the case of Magic Eye Developers Private Limited (Supra), relied upon by the respondent considered whether the disputes fell under MOU-2 which did not contain a valid arbitration agreement or was the MOU-2 required to be read with other Agreements which contained an arbitration clause? In this factual background, the Apex Court observed that a finding on whether the Agreement was valid or not, is required to be given at the referral stage. The Impugned order which did not finally decide the issue conclusively and left it to the Arbitral Tribunal by stating that “*this Court cannot finally pronounce one way or the other on this aspect*”, was set aside. The case does not aid the case of the respondent as in the present case there is a valid arbitral Agreement and the plea of Novation can be effectively agitated before the learned Arbitrator.

33. The twin tests required to be decided upon by the Court under Section 11 as per the case of Magic Eye Developers Private Limited (Supra) are existence and validity of the arbitration agreement and non-arbitrability of the dispute. The same stand *prima facie* satisfied; there being a valid Arbitration Agreement and arbitrable disputes *inter se* the parties. The parties are at liberty to raise their respective objections before the learned Arbitrator.

34. In view of the above, the present petition is allowed, Justice Vineet Saran, Former Judge, Supreme Court of India, Mobile No.9937233336 is hereby appointed as the Sole Arbitrator to adjudicate the disputes between the parties.



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35. The fees of the learned Arbitrator would be fixed in accordance with the Schedule-IV of the Act, 1996 or as consented by the parties.
36. This is subject to the Arbitrator making necessary disclosure as under Section 12(1) of the Act, 1996 and not being ineligible under Section 12(5) of the Act, 1996.
37. Learned counsels for the parties are directed to contact the learned Arbitrator within one week of being communicated a copy of this Order to them by the Registry of this Court.
38. Accordingly, the present petition is disposed of in the above terms.
39. The aforesaid discussion is for the purpose of appointment of Arbitrator and is not an expression on the merits of the petition.

(NEENA BANSAL KRISHNA)
JUDGE

FEBRUARY 01, 2024
S.Sharma/nk