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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 1259/2023

PK HEALTHCARE PRIVATE LIMITED

..... Petitioner

Through: Mr. Vikas Kakkar, Mr. Amit
Dubey, Mr. Sarthak Dubey, Mr.
Dilip Rana & Mr. Rajeev Ahuja,
Advocates.

versus

WIKREATE WORLDWIDE PRIVATE LIMITED Respondent

Through: Mr. Tarun Aggarwal, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

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22.02.2024

1. By way of this petition under Section 11 of the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner seeks appointment of an arbitrator to adjudicate disputes between the parties under a Work Order and Memorandum of Understanding dated 09.05.2022 [“the Agreement”]. The Agreement contains an arbitration clause (Clause 15) which provides that disputes between the parties would be adjudicated by arbitration. Although the arbitration clause provided for the petitioner to nominate and appoint an arbitrator, this petition has been filed in view of the prevailing jurisprudence that unilateral appointment of an arbitrator is impermissible. Clause 15 also provides for exclusive jurisdiction in the Courts in Delhi.

2. Disputes having arisen between the parties, the arbitration clause was invoked by petitioner’s communication dated 09.11.2023. The respondent replied to this communication by counsel’s letter dated



16.11.2023 in which it was stated that the respondent had approached National Company Law Tribunal [“NCLT”] under the Insolvency Bankruptcy Code, 2016 in respect of certain claims under the Agreement. As the parties were unable to agree upon the appointment of an arbitrator, the petitioner filed this petition under Section 11 of the Act.

3. Notice was issued on 29.11.2023, pursuant to which learned counsel entered appearance on behalf of the respondent on 16.01.2024. The contention of Mr. Tarun Aggarwal, learned counsel for the respondent, was noted and the following *prima facie* observations were made:-

“4. Mr. Tarun Aggarwal, learned counsel for the respondent, submits that there is in fact no dispute between the parties, as the petitioner has not addressed any communication prior to the notice dated 09.11.2023 raising its claims against the respondent. He submits that the respondent has raised its claims in a petition filed before the NCLT.

5. I am *prima facie* of the view that these grounds are not relevant to the present petition for appointment of an arbitrator under Section 11 of the Act. The existence of the arbitration clause is undisputed and the invocation letter was also duly received by the respondent. The contentions of Mr. Aggarwal really attack the credibility of the petitioner’s claims and go to the merits of the matter, which the parties have reserved for adjudication before the learned Arbitrator.

6. However, Mr. Aggarwal seeks time to file a detailed reply. At his request, one week’s further time is granted for this purpose. The petitioner may file a rejoinder, if any, within one week thereafter.

7. It is made clear that, in the event the appointment of an arbitrator is sought to be resisted on grounds entirely outside the scope of adjudication under Section 11 of the Act, the Court may pass an order of costs as appropriate.”

4. The respondent has since filed a reply which has not come on record, but a copy has been handed up in Court and is taken on record.

5. The respondent has essentially taken the same grounds as noted in



the aforesaid order, namely, that the petitioner is not entitled to file a separate case when the matter is already sub-judice before the NCLT for the same subject matter at the instance of the respondent, and that the petitioner's decision to invoke arbitration is an afterthought as it had not raised any claims prior to invocation of the arbitration clause. Mr. Aggarwal, cites the decision of the Supreme Court in *BSNL vs. Nortel Networks (India) (P) Ltd.* [(2021) 5 SCC 738] to submit that in these circumstances, there is in fact no dispute between the parties susceptible to a reference to arbitration.

6. It is clear from the legal notice dated 09.11.2023 sent on behalf of the petitioner and its reply that this position is wholly untenable. The petitioner's legal notice reiterates a claim of approximately ₹9.76 crores, originally made in a communication dated 23.09.2023, for which the petitioner seeks arbitration. In the reply, the respondent has not admitted the claim. There is thus a dispute which requires adjudication.

7. At the stage of Section 11 adjudication, the Court is not called upon to decide the claims comprehensively. All that is required is to ascertain on a *prima facie* basis that an arbitration clause exists, that it has been duly invoked, and that arbitrable disputes are sought to be referred. The first two elements are undisputed in the present case. As far as arbitrability is concerned, there is no statutory or contractual basis for the suggestion that the disputes do not require reference. The only position taken is that the disputes have not been agitated by the petitioner prior to invocation of arbitration, and are a counterblast to the respondent's invocation of the NCLT jurisdiction. These do not impinge upon arbitrability of the disputes. It is for the learned arbitrator to determine as



to whether the petitioner's claims and or any counter claims which the respondent may chose to raise are legally tenable or not. The judgment of the Supreme Court, including in *BSNL [supra]*, cited by Mr. Aggarwal, make it clear that a refusal to refer can only be founded upon a finding that a claim is *ex facie* non-arbitrable, beyond any vestige of doubt. No such case is made out here.

8. In these circumstances, the petition is allowed and the disputes between the parties are referred to arbitration of Hon'ble Ms. Justice Indira Banerjee, former Judge, Supreme Court of India [Tel:9560808777].

9. With the consent of learned counsel for the parties, it is directed that the arbitration proceedings will be held under the aegis of Delhi International Arbitration Centre, Shershah Road, New Delhi-110503 ["DIAC"], and will be governed by the Rules of DIAC, including as to remuneration of the learned Arbitrator.

10. The learned Arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.

11. If the respondents have any counter claims, those may also be placed before the learned Arbitrator in accordance with law.

12. It is made clear that this Court has not entered into the rights and contentions of the parties, including as to maintainability of claims and on merits, which are left open for adjudication before the learned Arbitrator.

13. The petition stands disposed of with these observations.

PRATEEK JALAN, J

FEBRUARY 22, 2024/'pv'/