



2024:DHC:8415



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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision : 24.10.2024

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ARB.P. 1203/2024**DISHA ENTERPRISES**

.....Petitioner

Through: Mr. Ishkaran Singh Bhandari, Mr.
Milan Deep Singh, Mr. Sahasradeep
Sharma, Mr. Shadab Husain,
Advocates.

versus

J S S INTERIOR AND EXTERIOR PVT LTD AND ORS

.....Respondents

Through: Mr. Suresh Kumar and Mr. Vasu
Baisoya, Advocates.

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

1. The present petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter '*the A&C Act*') seeking constitution of an Arbitral Tribunal to adjudicate the disputes between the parties. The disputes between the parties have arisen in the context of a Memorandum of Understanding (MoU) (with addendum) dated 14.06.2019. The said MoU contains an arbitration clause which reads as under :

"14. Arbitration - That the parties hereby agree that in case of any dispute regarding the right, liabilities, obligations or any other matter/ dispute concerning the present MOU or the Project, arising or unsettled till this MOU is in existence, than the same shall be referred to Arbitration, and the arbitration proceedings shall be conducted as per the provisions of Arbitration and Conciliation Act, 1996. Each of the party shall select one arbitrator and the two designated arbitrators shall select a third arbitrator, the decision of the Arbitration shall be final and binding upon both the parties to this MOU. The place of Arbitration shall be at New Delhi and the cost of



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arbitration shall be borne equally by both the parties.”

2. It is contended by the petitioner that it had approached the respondent no.1 for its monetary remuneration in terms of the aforesaid MoU dated 14.06.2019, however, despite several requests to the respondent, the requisite payment was not made. It is submitted that to discharge its liability, the respondent furnished certain post-dated cheques which were also dishonoured.
3. The petitioner has initiated proceedings under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter '*the NI Act*') which are stated to be pending. With a view to resolve the disputes, the petitioner also sought to avail pre-litigation meditation as contemplated under the Commercial Courts Act, 2015 (hereinafter '*the CC Act*') which was also of no avail, inasmuch as the respondent did not participate in the said exercise.
4. Consequently, the petitioner invoked the arbitration clause and issued a notice dated 16.02.2024. A response thereto, was sent by the respondent on 12.03.2024 whereby the existence of the arbitration agreement was not disputed, however, various contentions were made by the respondent on the merits of the disputes. Subsequently the present petition came to be filed.
5. Learned counsel for the respondent opposes the present petition on three grounds. Firstly, it is submitted that the present petition is hopelessly time barred, inasmuch as it has been filed after the expiry of more than three years from the date of execution of the MoU. Secondly, it is submitted that the proceedings are precluded on account of the pending proceedings under Section 138 of the NI Act. Thirdly, it is contended that since the petitioner has already sought to avail pre-litigation mediation, as contemplated under



the CC Act, it is incumbent on the petitioner to file a civil suit and the petitioner is precluded from taking recourse to arbitration.

6. I find no merit in the aforesaid contentions.

7. The understanding of the learned counsel for the respondent that the limitation period for invocation of the arbitration would begin from the date of execution of the MoU dated 14.06.2019 is *ex-facie* incorrect. It is only after the disputes arose between the parties that the occasion arose for the petitioner to take recourse to arbitration. In *M/s B and T AG vs. Ministry of Defence* 2023 INSC:549, the Apex Court has observed as under:

“53. Mookerjee, J. in Dwijendra Narain Roy v. Joges Chandra De and others, reported in AIR 1924 Cal 600 has explained the true test to determine when a cause of action could be said to have accrued observing as under:

“10....The substance of the matter is that time runs when the cause of action accrues and a cause of action accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed ; Coburn v. Colledge [(1897) 1 Q.B. 702] ; Gelmani v. Morriggia [(1913) 2 K.B. 549]. The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief : Whalley v. Whalley [(1816) 1 M.R. 436]. The statute does not attach to a claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. Consequently the true test to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result.”

(Emphasis supplied)

54. “Cause of action” means the whole bundle of material facts, which it is necessary for the plaintiff to prove in order to entitle him to succeed in the suit. In delivering the judgment of the Board in



Mussummat Chand Kour and Another v. Partab Singh and Others, reported in ILR (1889) 16 Cal 98, Lord Watson observed:

“Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff it refers entirely to the grounds set forth in the plaint as the cause of action, or in other words to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour.”

(Emphasis supplied)

55. Cause of action becomes important for the purposes of calculating the limitation period for bringing an action. It is imperative that a party realises when a cause of action arises. If a party simply delays sending a notice seeking reference under the Act 1996 because they are unclear of when the cause of action arose, the claim can become time-barred even before the party realises the same.

56. Russell on Arbitration by Anthony Walton (19th Edn.) at pp. 4-5 states that the period of limitation for commencing an arbitration runs from the date on which the “cause of arbitration” accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned. The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued:

“Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.”

Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred to until an award is made, time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause.



57. In *Law of Arbitration* by Justice Bachawat at p. 549, commenting on Section 37, it is stated that subject to the Act 1963, every arbitration must be commenced within the prescribed period. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date when the cause of action accrues, so in the case of arbitrations the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of Section 37(1) “action” and “cause of arbitration” should be construed as arbitration and cause of arbitration. The cause of arbitration arises when the claimant becomes entitled to raise the question, that is, when the claimant acquires the right to require arbitration. An application under Section 11 of the Act 1996 is governed by Article 137 of the Schedule to the Act 1963 and must be made within 3 years from the date when the right to apply first accrues. There is no right to apply until there is a clear and unequivocal denial of that right by the respondent. It must, therefore, be clear that the claim for arbitration must be raised as soon as the cause for arbitration arises as in the case of cause of action arisen in a civil action.”

(Emphasis supplied)

8. It is also noticed that prior to invoking arbitration, the petitioner also made an attempt to amicably resolve the matter, however to no avail.
9. In the circumstances, in the facts of the present case, it cannot be said that the claims sought to be raised by the petitioner are *ex-facie* barred by the limitation so as to preclude any reference to arbitration. In any event, as held in *SBI General Insurance Co. Ltd. v. Krish Spinning, 2024 INSC 532*, at the reference stage, all that is required to be examined is whether there exists an arbitration agreement. All other aspects touching upon the merits or maintainability of the claim/s are required to be dealt with by a duly constituted Arbitral Tribunal. In *SBI General Insurance Co. Ltd.*, it has been observed as under :-



“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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118. Tests like the “eye of the needle” and “ex-facie meritless”, although try to minimise the extent of judicial interference, yet they require the referral court to examine contested facts and appreciate prima facie evidence (however limited the scope of enquiry may be) and thus are not in conformity with the principles of modern arbitration which place arbitral autonomy and judicial non-interference on the highest pedestal.

119. Appointment of an arbitral tribunal at the stage of Section 11 petition



also does not mean that the referral courts forego any scope of judicial review of the adjudication done by the arbitral tribunal. The Act, 1996 clearly vests the national courts with the power of subsequent review by which the award passed by an arbitrator may be subjected to challenge by any of the parties to the arbitration.

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125. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the arbitral tribunal is equally, if not more, capable to decide upon the appreciation of the evidence adduced by the parties. We say so because the arbitral tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material.”

10. Likewise, the fact that there are proceedings pending under Section 138 of the NI Act as also the fact that the petitioner, in the first instance, sought to seek resolution of the matter through pre-litigation mediation under the CC Act, would not preclude the petitioner from taking recourse to arbitration and seek adjudication of the disputes on merit. A Co-ordinate bench of this Court in **Newton Engineering and Chemicals Limited and Ors. v. UEM India Pvt. Ltd.** 2023:DHC:8476, following the decision of the Supreme Court in **Sri Krishna Agencies v. State of A.P. & Anr.**, (2009) 1 SCC 69, has held as under:-

“6. The relevant part of the Supreme Court judgment in **Sri Krishna Agencies** (supra) is set out below:-

“4. Mr Adhyaru, learned Senior Counsel appearing in support of the appeal, submitted that the High Court has apparently confused the issue relating to the continuance of the arbitration proceedings as also the criminal proceedings, since when the cheques were dishonoured, a separate liability arose in terms of Section 138 of the Act, whereas the arbitration proceedings were under the agreement signed between the parties. It was submitted by him that the commencement and the continuance of the arbitration



proceedings could in no way affect the criminal proceedings taken separately.

5. In support of his submissions, Mr Adhyaru referred to the decision of this Court in Trisuns Chemical Industry v. Rajesh Agarwal where the same question arose in relation to arbitration proceedings taken during the continuance of a complaint filed under Sections 415 and 420 of the Code of Criminal Procedure. In the said decision, it was held that merely because arbitration proceedings have been undertaken, the criminal proceedings could not be thwarted. 6. On behalf of Respondent 2, the submissions which had been urged before the High Court were reiterated which however appear to be unacceptable having regard to the decision cited by Mr Adhyaru.

*7. We are also of the view that **there can be no bar to the simultaneous continuance of a criminal proceeding and a civil proceeding if the two arise from separate causes of action.** The decision in Trisuns Chemical Industry case appears to squarely cover this case as well."*

7. It is clear from the above that the arbitration proceedings as well as the proceedings under Section 138 of the NI Act arise from separate causes of action and the pendency of the arbitration proceedings would not affect the proceedings under Section 138 of the NI Act. There is no merit in the contention of the petitioners that the complaint under Section 138 of the NI Act is not maintainable in view of the ongoing arbitration proceedings between the parties. Additionally, whether the aforesaid cheque was given as a security or not is something which can only be proved as a matter of defence during trial."

11. In the circumstances, there is no impediment to constitution of an Arbitral Tribunal to adjudicate the disputes between the parties.

12. A perusal of the arbitration agreement shows that it contemplates a three-member Arbitral Tribunal. At this stage, learned counsel for the respondent submits that a Sole Arbitrator be appointed by this Court. The same request is also made by the learned counsel for the petitioner.

13. Accordingly, as jointly prayed, Mr. Tushar Sannu, Advocate (Mob. No.: +91.9911991166) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.



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14. It is also agreed by the parties that any preliminary/jurisdictional objection raised by the respondent including as to whether the claim sought to be raised by the petitioner are barred by limitation or otherwise, shall be considered and decided by the Arbitrator at the outset before adjudicating the disputes on merit. It is directed accordingly.

15. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosure as required under Section 12 of the A&C Act.

16. It is agreed between the parties that the arbitration shall take place under the aegis of and under the rules of Delhi International Arbitration Centre (DIAC). It is directed accordingly.

17. It is clarified that this Court has not expressed any opinion as regards the merits of the controversy between the parties.

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

SACHIN DATTA, J

OCTOBER 24, 2024/at