



2024:DHC:9797



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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 18.12.2024

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ARB.P. 1235/2024**M/S MONEYWISE****FINANCIAL SERVICES PRIVATE LIMITED****.....Petitioner****Through: Ms. Mehvish Khan, Advocate.****versus****LAKSHYA POLYTEX PRIVATE LIMITED****THROUGH ITS DIRECTORS (FORMERLY KNOWN****AS LAKSH POLYTEX PRIVATE LIMITED) AND OTHERS****.....Respondents****Through: None for respondent no(s). 1 and 2.****Mr. Mukul Katyal, Advocate for
respondent no(s). 3 & 4.****CORAM:****HON'BLE MR. JUSTICE SACHIN DATTA****SACHIN DATTA, J. (ORAL)**

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter '*the A&C Act*') seeks constitution of an arbitral tribunal to adjudicate the disputes between the parties in the context of a Loan Agreement dated 20.10.2018 (hereinafter '*the Agreement*').

2. The respondent no.1 i.e. Lakshya Polytex Private Limited is the principal borrower under the said Agreement whereas the respondent no(s) 2 to 4 are the co-borrowers. A perusal of the Agreement which is filed as document no.2 alongwith the present petition, reveals, *prima facie*, that the same was duly executed. The same also contains an arbitration clause which reads as under:-

"ARBITRATION

10.1 Any disputes, differences, controversies and questions directly or



indirectly arising at any time hereafter between the Parties or their respective representatives or assigns, arising out of or in connection with this Agreement (or the subject matter of this Agreement), including, without limitation, any question regarding its existence, validity, interpretation, construction, performance, enforcement, rights and liabilities of the Parties, or termination ("Dispute"), shall be referred to a sole arbitrator duly appointed by the Lender. The language of the arbitration shall be English. The seat of the arbitration shall be at New Delhi and the language of proceedings shall be English. The award rendered shall be in writing and shall set out the reasons for the arbitrator's decision. The costs and expenses of the arbitration shall be borne equally by each Party, with each Party paying for its own fees and costs including attorney fees, except as may be determined by the arbitration tribunal. Any award by the arbitration tribunal shall be final and binding."

3. None appears for the respondent no(s). 1 and 2 despite notice.
4. Learned counsel for respondent no(s). 3 and 4 submits that although the respondent no. 3 was initially a director of the respondent no.1/company, he had resigned from the said post and thereafter his father had joined as the director of the respondent company. He submits that the respondent no(s). 3 and 4 never agreed to be co-borrower/s nor had they signed the Agreement in question.
5. On a *prima facie* conspectus, this Court is satisfied that the Agreement was executed. It is undisputed that pursuant to the Agreement, loan amount was also disbursed by the petitioner to the respondent no.1. In ***Fujifilm India Pvt. Ltd. vs Rahul Lumba Proprieter of M/S Rahul Enterprises***, ARB. P 769/2024 where one of the parties to the agreement sought to deny its signatures on the agreement, it was held by Coordinate Bench of this Court as under:

"5. The scope of adjudication under Section 11 of the Act is very limited. As far as the existence of an arbitration agreement is concerned, the recent judgment of the Supreme Court in SBI General Insurance Co. Ltd. v. Krish Spinning [2024 SCC OnLine SC 1754], makes it clear that a prima facie determination is to be made by the referral Court, leaving a



final adjudication, even on this question, to the arbitral tribunal. The relevant observations of the Court are as follows:

“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.”

[Emphasis supplied.]

6. In the present case, Document No.2 annexed to the petition is stated to be a copy of the Distributorship Agreement. It purportedly bears the stamp and signature of the respondent on each page, as also at the end of the Agreement. The disputes raised by the respondent, as to the veracity of the document, would require evidence to be led and a factual determination to be returned. This task must be left to the arbitrator as, prima facie, there appears to be an agreement between the parties providing for resolution of disputes by arbitration.”

6. The contention of the respondent no(s). 3 that the said respondent cannot be fastened with any liability on the basis that he resigned as director of the respondent company even prior to the Agreement being entered into, is also an aspect which can be considered by a duly constituted arbitral tribunal. Even the issue as to whether the claim/s sought to be raised in the arbitral tribunal are barred by limitation or not (as contended by the learned



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counsel for respondent no.3), is an aspect that can be adjudicated by a duly constituted arbitral tribunal. In ***Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re***, 2023 SCC OnLine SC 1666, the Supreme Court has held as under: -

“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 ARB.P. 1535/2024 & O.M.P.(I) (COMM.) 251/2024 Page 10 of 13 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. 164. Section 11(6A) uses the expression “examination of the existence of an arbitration agreement.” The purport of using the word “examination” connotes that the legislature intends that the referral court has to inspect or scrutinize the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression “examination” does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provides that the arbitral tribunal can “rule” on its jurisdiction, including the existence and validity of an arbitration agreement. A “ruling” connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the referral court is only required to examine the existence of arbitration agreements, whereas the arbitral tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by this Court in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*”

7. Furthermore, in terms of the judgment in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd*** (2020) 20 SCC 760, ***TRF Limited v. Energo Engineering Projects Ltd***, (2017) 8 SCC 377 and ***Bharat Broadband***



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Network Limited v. United Telecoms Limited, 2019 SCC OnLine SC 547, it is incumbent on this Court to appoint an independent sole arbitrator to adjudicate the disputes between the parties.

8. Accordingly, Mr. Shashank Dewan, Advocate (Mob. No.: +91 9999130505) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

9. Needless to say, the respondents including respondent no(s). 3 and 4 shall be entitled to raise appropriate objections as regards arbitrability/jurisdiction before the learned arbitrator which shall be considered by the learned sole arbitrator in accordance with law. The learned sole arbitration shall make an endeavour to decide the said objection at the very outset.

10. The respondents shall be at liberty to raise counter-claims, if any, in the arbitral proceedings, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.

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

12. At request of respective counsel, it is directed that the arbitration shall take place under the aegis of and as per the rules of the Delhi International Arbitration Centre (DIAC).

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

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

DECEMBER 18, 2024/at

SACHIN DATTA, J