



2024:DHC:9657



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

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Date of Decision : 13.12.2024+ **ARB.P. 1288/2024**

M/S ZILLION INFRAPROJECTS PVT. LTD

.....Petitioner

Through: Mr. Sumit Kumar, Mr. Nand Kishor
Jha, Advs.

versus

THE INDURE PRIVATE LTD.

.....Respondent

Through: Mr. Prashant Mehta, Mr. Varun
Gupta and Mr. Ronak Gupta,
Advocates.**CORAM:****HON'BLE MR. JUSTICE SACHIN DATTA****SACHIN DATTA, J. (Oral)**

1. The present petition under Section 11(4) and (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as '*the A&C Act*') seeks appointment of a sole arbitrator to adjudicate the disputes which have arisen under the Work Order No. I- 3062/RRVUNL-CHHABRA/DURHA/101 dated 17.08.2009, Work Order No. 13062/ CHHABRA/DCL/2123 dated 10.12.2010 and Supplementary Work Order No. I-3062/RRVUNL-CHHABRA/DHURA/103 dated 28.04.2012 executed by the respondent upon the petitioner.

2. This Court *vide* order dated 26.11.2024, directed the petitioner to file original/complete work orders *qua* which the present petition has been filed.

3. It transpires that there is no arbitration agreement in Work Order No. 13062/ CHHABRA/DCL/2123 dated 10.12.2010. In the circumstances the



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petitioner does not press for constitution of an Arbitral Tribunal in respect of the disputes arising under the aforesaid work order.

4. Admittedly, however, Work Order no. I-3062/RRVUNL-CHHABRA/DURHA/101 dated 17.08.2009 contains an arbitration clause as under:-

“16.0 SETTLEMENT OF DISPUTES

16.1 *Any dispute(s) or differences arising out of or in connection with the contract shall, to the extent possible, be settled amicably between the parties.*

16.2 *All unsettled dispute(s) or difference(s) arising out of or in connection with the contract shall be decided by the Engineer whose decision shall be final and binding on the parties.*

Prior to the initiation of any/or arbitration proceedings permitted by this contract to resolve disputes between them, in the event a dispute arises between you and us regarding the application or interpretation of this contract (a “Dispute”). Our Project Incharge and your representative shall use their best efforts in good faith to reach a reasonable and equitable resolution of the matter. If our Project Incharge and your representative are unable to resolve the matter within 30 days, either party by written notice may refer the matter for resolution by good faith negotiation between their respective senior officers with decision making power and who shall not have had substantive involvement in the matters involved in the dispute, unless the parties otherwise agree.”

“17.0 ARBITRATION

Where any dispute is not resolved as provided for in the clause 16 above then the following provisions shall apply:

- a) *The dispute shall be referred to arbitration at the request of either party upon written notice to that effect to the other party (a “Notice of Reference”) in accordance with the Arbitration Rules of Indian Arbitration and Conciliation Act, 1996 in force at the date of the agreement. Where the rules do not deal with any issue arising in connection with the conduct and/or procedure of the arbitration such issue shall be resolved in accordance with the law of the place in which the arbitration is held and clause 18 below shall be construed accordingly.*
- b) *Performance of the contract shall continue during any arbitration proceedings pursuant to above clause unless we shall order the suspension thereof.*
- c) *Upon every or any such reference, the cost of and incidental to the*



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reference and award respectively shall be on the direction of the Sole Arbitrator so appointed who may determine the amount thereof or direct the same as between party & parties by whom and in what manner the same is to be borne and paid.

- d) The place of arbitration shall be Delhi and the language of the arbitration shall be English.*
- e) The parties agree that any arbitration award shall be final and binding upon the parties (to the fullest extent permitted by applicable law) and the parties waive their right to any form of appeal or other similar recourse to a court or law.*
- f) The arbitration will take place before a Sole Arbitrator who shall be nominated by Mr. N.P. Gupta. The Chairman of Desein Private Limited, Desein House, Greater Kailash-II, New Delhi-110048.*

5. Admittedly, the Supplementary Work Order No. I-3062/RRVUNL-CHHABRA/DHURA/103 dated 28.04.2012 was issued by the respondent upon the petitioner, in furtherance of Work Order no. I-3062/RRVUNL-CHHABRA/DURHA/101 dated 17.08.2009, and therefore disputes arising under the said supplementary work order would fall within the scope of the aforesaid arbitration clause.

6. Learned counsel for the respondent while admitting the existence of the arbitration agreement raises a three-fold objection to the constitution of an arbitral tribunal in this case. First, it is submitted that the original work orders have not been filed by the petitioner, and that the work orders are unstamped. Second, it is contended that the claims sought to be raised in the arbitration proceedings are hopelessly barred by limitation. Furthermore, the petitioner himself before invocation of the arbitration had resorted to proceedings under Section 9 of the Insolvency and Bankruptcy Code (IBC) which came to be dismissed on the ground that the said petition filed by the petitioner before NCLT was time barred. Third, it is contended that in terms of Clause 16.2 of the work order, it is incumbent on the petitioner to approach the Engineer for adjudication of the disputes which avenue has not



been exhausted by the petitioner.

7. This Court does not find the aforesaid objections to be an impediment in constituting an arbitral tribunal.

8. As regards, the issue of stamping, it has now been authoritatively settled by the Supreme Court in *Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re*, 2023 SCC OnLine SC 1666 that the same does not obviate exercise of jurisdiction under Section 11 of the A&C Act and any objection as to deficiency in stamping can be left open to be considered by a duly constituted Arbitral Tribunal.

9. As regards the second objection that the claims are barred by limitation, in *SBI General Insurance Co. Ltd. v. Krish Spinning*, 2024 INSC 532 it has been held 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, 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 and adopted in NTPC v. SPML Infra Ltd. 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.”

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.”

10. Furthermore, it has been pointed out by the learned counsel for the petitioner that in response to the notice issued by the petitioner under Section 8 of the IBC, it was respondent’s own stand as under :-

“7. All the abovesaid shows that there is existence of dispute between the IPL and Zillion which requires further adjudication as per the terms of Contract. In view of such disputes IPL vide its reply dated 23.09.2017 has invoked dispute resolution Clause 16 of the Contract which provides for a settlement procedure which is followed by arbitration under clause 17. As per the said clause all the disputes arisen between the IPL and Zillion were referred to Mr. Vivek Kumar who is the Engineer as per the said clause. It was also informed to Zillion that Mr. Vivek Kumar can be approached by Zillion on 15th October 2017 between 2pm-5pm for such settlement and in case the said date is not suitable to you the same can be informed and a convenient date can be fixed thereafter.”

11. Also, it is contended by learned counsel for the petitioner that one of the reasons which impelled the NCLT to dismiss the petition filed under Section 9 of the Insolvency and Bankruptcy Code (IBC), was that in



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response to the notice issued prior to institution of the said proceedings, the respondent itself had taken the position that the claim/s sought to be raised by the petitioner are liable to be resolved through arbitration. It is further contended that proceedings under the IBC are circumscribed within the parameters thereof and do not preclude arbitration.

12. In the circumstances, the issue as to whether the claims sought to be raised by the petitioner are barred by limitation or not involves an adjudicatory exercise, which is best left to be done by duly constituted Arbitral Tribunal.

13. Even as regards the issue whether the claims are precluded on account of the petitioner not exhausting the avenue prescribed in Clause 16.2 of the work order, it is open to the respondent to raise the same before a duly constituted Arbitral Tribunal. The said aspect has a bearing on the arbitrability/maintainability of the claim/s sought to be raised, which can be gone into by a duly constituted arbitral tribunal.

14. As held in *Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re, 2023 SCC OnLine SC 1666 and SBI General Insurance Co. Ltd. v. Krish Spinning* (supra), the scope of examination in these proceedings is confined to ascertaining, prima facie, the existence of an arbitration agreement between the parties. Since the existence of the Arbitration Agreement is admitted, there is no impediment to constituting an Arbitral Tribunal to adjudicate the disputes between the parties.

15. Accordingly, Mr. Justice (Retd.) Siddharth Mridul, Former Chief Justice, Manipur High Court (Mob. No. +91 9871300042) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.



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16. It is agreed by respective counsel that before adjudication of the disputes on merits the learned Sole Arbitrator shall consider and decide the objections raised by the respondent as regards arbitrability/jurisdiction, including the objection that the claim/s sought to be raised are barred by limitation and/or are also barred on account of the petitioner not exhausting the avenue provided in Clause 16 of the work order.

17. Learned counsel for the respondent also submits that since the claims sought to be raised are stale and time barred, the respondent should not be burdened with the cost/s of arbitration and the petitioner be directed to bear the entire cost of arbitration. The respondent is at liberty to urge this aspect before the learned Sole Arbitrator.

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

19. The learned Sole Arbitrator shall fix his fees in consultation with the parties.

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

SACHIN DATTA, J

DECEMBER 13, 2024/uk