



2024:DHC:9508



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

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Date of Decision: 09.12.2024+ **ARB.P. 1585/2024****MONEYWISE FINANCIAL SERVICES PVT LTD**PetitionerThrough: Ms. Mehvish Khan and Ms. Preeti
Kumari, Advs.

versus

**SHALIBHADRA TRADERS THROUGH ITS PROPRIETOR SMT
REENA RAVINDRA KHONA AND ANR**RespondentsThrough: Ms. Pratiksha Sharma, Mr. Ankit
Acharya, Mr. Ramjeet Sharma and
Ms. Ritu Chaudhary, Advs.**CORAM:****HON'BLE MR. JUSTICE SACHIN DATTA****SACHIN DATTA, J. (ORAL)**

1. The present petition filed 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.
2. The disputes between the parties have arisen in the context of a Loan Agreement dated 30.11.2017 (hereinafter '*the agreement*') executed between the parties. In terms thereof, a sum of Rs. 25 Lacs was disbursed to the respondents, which was to be re-paid in 36 equal monthly installments of Rs.91,640/- (Rupees ninety one thousand six hundred forty only).
3. It is stated that on account of the respondents' failure to adhere to the repayment schedule, the petitioner was constrained to issue a Loan Recall / Termination notice dated 12.02.2019 to the respondent.
4. The loan agreement, admittedly, contains an arbitration clause as



under:

“10.1 Arbitration

Notwithstanding anything contained in Clause 9 above, 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. The Chairman of Lender shall nominate any reputed person conversant with financing as the Sole Arbitrator. In the event the person so nominated refuses or is unable to act as Arbitrator the Chairman of Moneywise shall nominate another person as the sole arbitrator and so on. 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.”

5. Disputes having arisen between the parties, a notice of invocation of arbitration was issued by the petitioner on 13.05.2024. The same was, however, not responded to.
6. Consequently, the present petition has been filed seeking constitution of an arbitral tribunal to adjudicate the disputes between the parties.
7. Learned counsel for the respondent does not dispute the existence of the arbitration agreement as incorporated in the Loan Agreement. However, she strenuously opposes the present petition on the basis that the invocation notice in the present case was issued long after the cause of action had accrued in favour of the petitioner for initiating arbitration. As such, it is contended that the invocation is bad in law and the claims sought to be raised are hopelessly time barred.



8. Learned counsel relies upon para-68 of the judgment of the Supreme Court in *Arif Azim Co. Ltd. v. Aptech Ltd.* (2024) 5 SCC 313 to contend that it is within the province of this Court to *prima facie* examine and reject the non-arbitrable or dead claims, that have been sought to be raised, so as to protect the respondent from being drawn into a time consuming and costly arbitration process.

9. Having considered the contentions of respective counsel for the parties, I find that there is no impediment to constituting an arbitral tribunal to adjudicate the disputes between the parties. The scope of examination in the present proceedings is confined to ascertaining, the *prima facie* existence of an arbitration agreement. The arbitral tribunal would also necessarily consider the objections raised by the respondents as regards the claims / invocation notice being time barred.

10. Reference is apposite to the judgment in *SBI General Insurance Co. Ltd. v. Krish Spinning* 2024 SCC OnLine SC 1754, where it has been held by the Supreme Court as under:

“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.

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.

124. Section 11 also envisages a time-bound and expeditious disposal of the application for appointment of arbitrator. One of the reasons for this is also the fact that unlike Section 8, once an application under Section 11 is filed, arbitration cannot commence until the arbitral tribunal is constituted by the referral court. This Court, on various occasions, has given directions to the High Courts for expeditious disposal of pending Section 11 applications. It has also directed the litigating parties to refrain from filing bulky pleadings in matters pertaining to Section 11. Seen thus, if the referral courts go into the details of issues pertaining to “accord and satisfaction” and the like, then it would become rather difficult to achieve the objective of expediency and simplification of pleadings.

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.”

11. After taking note of the judgment in **Arif Azim Co. Ltd. v. Aptech Ltd.** (supra), the Supreme Court has specifically observed as under:

“132. Insofar as our observations on the second issue are concerned, we clarify that the same were made in light of the observations made by this Court in many of its previous decisions, more particularly in Vidya Drolia (supra) and NTPC v. SPML (supra). However, in the case at hand, as is evident from the discussion in the preceding parts of this judgment, we have had the benefit of reconsidering certain aspects of the two decisions referred to above in the light of the pertinent observations made by a seven-Judge Bench of this Court in In Re : Interplay (supra).

133. Thus, we clarify that while determining the issue of limitation in exercise of the powers under Section 11(6) of the Act, 1996, the referral court should limit its enquiry to examining whether Section 11(6) application has been filed within the period of limitation of three years or not. The date of commencement of limitation period for this purpose shall have to be construed as per the decision in Arif Azim (supra). As a



*natural corollary, it is further clarified that the referral courts, at the stage of deciding an application for appointment of arbitrator, must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time barred and should leave that question for determination by the arbitrator. Such an approach gives true meaning to the legislative intention underlying Section 11(6-A) of the Act, and also to the view taken in *In Re : Interplay* (supra).*

134. The observations made by us in Arif Azim (supra) are accordingly clarified. We need not mention that the effect of the aforesaid clarification is only to streamline the position of law, so as to bring it in conformity with the evolving principles of modern-day arbitration, and further to avoid the possibility of any conflict between the two decisions that may arise in future. These clarifications shall not be construed as affecting the verdict given by us in the facts of Arif Azim (supra), which shall be given full effect to notwithstanding the observations made herein.”

12. In the light of the aforesaid observations, it would be apposite to leave the issue of limitation for consideration by a duly constituted arbitral tribunal. This is particularly so, since same involves an intricate factual enquiry. Also, one of the issues that would arise for consideration in this context is whether the petitioner is entitled to the benefit of the judgment of the Supreme Court in *Cognizance for Extension of Limitation, In re*, (2022) 3 SCC 117, and if so, to what extent.

13. In the circumstances, this court does not find any impediment to constituting an arbitral tribunal to adjudicate the disputes between the parties, while also making it clear that the objection/s raised on behalf of the respondents, including as regards limitation shall be duly considered and decided by the arbitral tribunal as a preliminary issue at the very outset. It is agreed by respective counsel that the same shall be decided before adjudication of the claims on merits.

14. Accordingly, Ms. Shubha Yadav, Advocate (Mob. No.: +91 9953280076) is appointed as the Sole Arbitrator to adjudicate the disputes



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between the parties.

15. 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.

16. 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).

17. All rights and contentions of the parties in relation to the claims/counter claims are kept open, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.

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

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

DECEMBER 9, 2024/cl

SACHIN DATTA, J