



**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Arbitration Application No. 138/2023

Railtel Corporation Of India Limited, Through Its Authorized Representative, Having Its Registered Office At Plate-A, 6Th Floor, Office Block-2, NBCC Building, East Kidwai Nagar, New Delhi-110053.

-----Applicant

Versus

Rajcomp Info Services Limited, (RISL) Through Its Chairman And Managing Director, Having Its Head Office At First Floor, Yojana Bhawan, Tilak Marg, C-Scheme, Jaipur, Rajasthan

-----Respondent

For Applicant(s)	:	Mr. Aslam Kham, Adv.
For Respondent(s)	:	Mr. Divanshu Gupta, Adv.

HON'BLE MR. JUSTICE SUDESH BANSAL

Order

23/08/2024

1. Instant arbitration application under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "the A&C Act"), has been filed by applicant – Railtel Corporation of India Limited (for short "applicant - Railtel") for appointment of an Arbitrator to adjudicate the dispute, that has arisen with respondent in respect of a Project, namely, "Supply, Installation and Maintenance of RF Links and Outdoor Wi-Fi Access Point across Rajasthan on Rate contract basis under RajNET Project".
2. Heard learned counsel for both the parties and perusal the record.

3. The fact is not in dispute that pursuant to the notice inviting bid dated 04.07.2017 by respondent - RajCOMP Info Services Limited, (for short "RISL"), applicant - Railtel stood successful bidder and the project of "Supply, Installation and Maintenance of RF Links and Outdoor Wi-Fi Access Point across Rajasthan" was allotted to applicant - Railtel under the work order dated 15.11.2017 and additional work order dated 02.07.2018 issued by respondent - RISL.

4. According to the applicant - Railtel, supply of equipments in requisite quantities for all the locations where necessary permissions were received, was issued by applicant - Railtel in terms of Request for Proposal (for short "RFP") dated 04.07.2017, to the complete satisfaction of respondent - RISL and the PMC appointed by respondent - RISL, namely, Engineers India Limited (EIL), but due to some laches on the part of respondent - RISL, applicant - Railtel has to face hurdle to deliver the project in its full spirit. Respondent - RISL is required to remove its shortfalls.

5. Further, the grievance of the applicant - Railtel is that despite raising invoices in terms of RFP, due payments has not been released by respondent - RISL; therefore, because of lack of support by RISL and withholding the due payments of the applicant - Railtel unlawfully, it became unfeasible for applicant - Railtel to further carrying out the work.

In such situation, applicant - Railtel served a legal notice dated 25.10.2023 (Annexure-3) upon the respondent - RISL, invoking Arbitration Clause No.27, contained in RFP for settlement of dispute by the Arbitrator under the provisions of A&C Act. Through the legal notice dated 25.10.2023, applicant - Railtel

asked respondent -RISL to appoint the Arbitrator, but no Arbitrator was nominated by the respondent within the period of 30 days, hence, applicant – Railtel constrained to file the instant arbitration application before the High Court on 06.12.2023 for appointment of an Arbitrator.

6. For ready reference, the Arbitration Agreement contained in Clause-27 of RFP, which exists between the parties in writing, reads as under:-

“Any disputes which may arise out of this Agreement, and cannot be settled in discussions or negotiations between the Parties, shall be referred to the appropriate management or higher authorities of the respective parties to resolve such dispute in good faith. In case no settlement is reached the parties shall refer it to a sole arbitrator appointed and selected by parties. Arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation (Amendment) Act, 2015 or any other subsequent modifications or enactments thereof. The venue For Arbitration proceedings shall be Jaipur or any suitable place agreed by all parties. The Arbitration shall be conducted in English Language and the award shall be binding upon all Parties.”

7. Respondent – RISL has filed reply to the arbitration application and in the reply, release of work order dated 15.11.2017 and additional work order dated 02.07.2018 to the applicant – Railtel in terms of RFP dated 04.07.2017 has not been disputed, nor the existence of arbitration agreement indicated in Clause-27 of RFP has been disputed. However, the present arbitration application has been resisted by the respondent on the ground of availability of an alternative remedy to the applicant for filing of the appeal for redressal of its grievances under Section 38 of RTPP Act, 2012. Learned counsel for the respondent – RISL

drew attention of this Court to Clause-31 of the RFP, which provides for a remedy of appeal.

8. It is worthy to note that in the later part of the reply, in Para 25, respondent has made an alternative prayer that in case, this Court deems it appropriate to appoint an Arbitrator in the matter, the respondent hereby reserves its right to present and contest its counter claims against the applicant.

9. It is also noteworthy that during the pendency of this arbitration application, respondent issued one letter dated 02.04.2024 to the applicant, granting a final opportunity for furnishing explanation as to why the action for termination of the contract on default in accordance to Clause-34(A) and other relevant conditions of tender and contract should not be initiated against the applicant. The applicant has replied the letter dated 02.04.2024 vide reply-letter dated 05.04.2024 and pointed out that the arbitration application for appointment of Arbitrator to resolve the dispute between the parties is subjudice before the High Court. The copies of the letter dated 02.04.2024 issued by the respondent and reply-letter dated 05.04.2024 given by the application have been placed on record as Annexure-R/3 with the reply to the arbitration application.

10. Having considered the rival submissions of learned counsel for both the parties, this Court finds that it is clear that a dispute has arisen between the parties in respect of the project and a written arbitration agreement as contained in Clause-27 of RFP also exists between the parties, for settlement of dispute as per the provisions of the A&C Act. The objection of the respondent that the dispute may not be referred for adjudication by the

Arbitrator, because of availability of an alternative remedy of filing appeal by the applicant is not supposed to be considered by the High Court under the arbitration application.

11. The Supreme Court in a recent decision delivered in case of *NTPC Ltd. Versus SPML Infra Ltd.:* **(2023) 9 SCC 385**, while discussing the scope of Courts as Referral Court of the dispute to arbitration, explained the test of “Eye of the needle” as follows:-

“Eye of the Needle:

25. The above-referred precedents crystallise the position of law that the pre-referral jurisdiction of the Courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the *parties to the agreement* and the *applicant’s privity* to the said agreement. These are matters which require a thorough examination by the Referral Court. The secondary inquiry that may arise at the reference stage itself is with respect to the non- arbitrability of the dispute.

26. As a general rule and a principle, the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the referral court may reject claims which are manifestly and ex-facie non-arbitrable. Explaining this position, flowing from the principles laid down in *Vidya Drolia [(2021) 2 SCC 1]*, this Court in a subsequent decision in *Nortel Networks [(2021) 5 SCC 1]* held:

“45.1 ...While exercising jurisdiction under [Section 11](#) as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the courts would ensure expeditious and efficient

disposal at the referral stage. At the referral stage, the Court can interfere “only” when it is “manifest” that the claims are ex facie time-barred and dead, or there is no subsisting dispute...”

27. The standard of scrutiny to examine the non-arbitrability of a claim is only prima facie. Referral courts must not undertake a full review of the contested facts; they must only be confined to a primary first review and let facts speak for themselves. This also requires the Courts to examine whether the assertion on arbitrability is bona fide or not. The prima facie scrutiny of the facts must lead to a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable. On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration.

12. Hon’ble Supreme Court in an another case of *MTNL Versus Canara Bank*: **(2020) 12 SCC 767**, observed as under:-

“9.5. A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An “arbitration agreement” is a commercial document inter parties, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities.”

13. In the opinion of this Court, it is an established canon of law for referring the dispute to the Arbitration Tribunal for its resolution that if the intention of the parties is manifestly clear to refer the dispute to the arbitration and a valid arbitration agreement exists between the parties as much as dispute has arisen, the Court, at the referral stage, should refer the dispute to the Arbitration Tribunal for its decision on merits barring exceptions as pointed out in cases of *Vidya Drolia Versus Durga Trading Corporation*: **(2021) 2 SCC 1** and *SPML Infra Ltd.* (supra).

14. The High Court being a referral Court, while exercising its powers under Section 11 of the A&C Act, 1996, is expected to look into the matter as to existence of an arbitration agreement between parties in view of clause 11(6A) of the A&C Act, 1996 which reads as under:-

“(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.”

15. A seven judges' Bench of the Hon'ble Supreme Court in recent judgment dated 13th December 2023, delivered **In Re: Interplay Between Arbitration Agreements Under The Arbitration and Conciliation Act 1996 And the Indian Stamp Act, 1989 [AIR 2024 SC 1]**, has observed in Para Nos.152 & 154 that the omission of Section 11(6A), through Arbitration and Conciliation (Amendment) Act, 2019 (Act 33 of the 2019), has not been notified in the official gazette and therefore, the said provision continues to remain in full force. In this judgment, placing reliance on previous judgments of the Apex Court delivered in cases of **Duro Felguera, S.A. Vs. Gangavaram Port Limited [(2017) 9 SCC 129]** and **Mayavati Trading Private Limited Vs. Pradyut Deb Burman [(2019) 8 SCC 714]**, it has been held that the legislature confined the scope of reference under Section 11(6A) to the examination of existence of an arbitration agreement. It has been held that the referral Court only need to consider one aspect to determine the existence of an arbitration agreement- whether underlying contract contains arbitration agreement which provides for arbitration pertaining to

the dispute which has arisen between parties to the agreement. Thus, this Court has to rely upon the provision of Section 11(6A) of the A&C Act, which is extracted hereinabove.

16. It may be noted that Section 11(6A) was added by the Legislature by introducing the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016), and there was an impression that the provision of Section 11(6A) has been omitted vide Arbitration and Conciliation (Amendment) Act, 2019 (Act 33 of the 2019), but the present prevailing position about such proposition of law, has been clarified by the seven judges' Bench of the Apex Court in the above referred judgment recently delivered on 13th December 2023.

17. In view of the above, this Court is of the considered opinion that being a Referral Court and in view of existence of an arbitration agreement to adjudicate the dispute between the parties, the present arbitration application deserves to be allowed and an independent, impartial and neutral Arbitrator needs to be appointed by this Court in exercise of its jurisdiction under Section 11 of the A&C Act. The objection of the respondent, about availability of remedy of appeal to applicant under Section 38 of RTPP Act, 2012, may be considered by the Arbitration Tribunal itself, who rules on its own jurisdiction by virtue of Section 16 of the A&C Act.

18. As a result, this arbitration application succeeds and this Court constitutes Arbitration Tribunal of Sole Arbitrator of Hon'ble Mr. Justice Mohammad Rafiq, Retired Chief Justice, Mobile No.9414055777, [Email - justicemrafiq@gmail.com](mailto:justicemrafiq@gmail.com), Address:- 7-Bhagat Vatika, Civil Lines, Jaipur, to adjudicate the dispute

between parties in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

19. The arbitration fee to the Sole Arbitrator shall be payable in accordance with the provisions of contained in the Manual of Procedure for Alternative Dispute Resolution, 2009 as amended by the Manual of Procedure for Alternative Resolution (Amendment), 2017 vide notification dated 23.03.2017 read with 4th Schedule appended to the Act of 1996.

20. The Registry is directed to intimate Arbitrator - Hon'ble Mr. Justice Mohammad Rafiq, Retired Chief Justice, for his approval and declaration in terms of Section 11(8) read with Section 12(1) of the A&C Act, 1996.

21. All other issues may be raised by the parties before the Arbitrator, which shall be considered in accordance with law.

22. Since as per Section 29A of the Arbitration and Conciliation Act, 1996, the arbitration proceedings are required to be concluded within scheduled time as stipulated therein, it is expected from the parties to appear before the Arbitrator on 14.09.2024 or any other date as informed by the Arbitrator to parties or agreed between parties with the consent of Arbitrator, and further parties shall provide their respective E-mail/ Contact Number/ Mobile Number as also of their authorized representatives/lawyers, appearing on their behalf before the Arbitration Tribunal, in order to facilitate the Arbitrator to send information to the parties, whenever required. The information send by the Arbitrator, on such address/ E-mail/ cellphone of the parties/ their authorized representatives/lawyers, shall be treated as sufficient unless same is not changed.



23. The Arbitration Application stand disposed of.

(SUDESH BANSAL),J

SUNIL SOLANKI /PS