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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMM. ARBITRATION APPLICATION NO. 193 OF 2024

Sushil Kumar Rout

...Applicant

Versus

Bajel Projects Ltd.

...Respondents

Ms.Siddh Vidya, a/w *Ms. Divya Maniar, Ms. Shalaka Karkar and Mr.Arjun Yadav i/b Siddh Vidya & Associates for the Applicant.*
Mr.Atul Daga, a/w *Ms. Poorva Gard and Mr. Simon Mascarenhas i/b Mulla & Mulla And Craigie Blunt & Caroe for the Respondent.*

CORAM : SOMASEKHAR SUNDARESAN, J.

DATE : JANUARY 14, 2025

PC :

1. This is an Application under Section 11 of the Arbitration and Conciliation Act, 1996 (***“the Act”***) seeking appointment of an arbitrator to resolve disputes and differences arising out of an agreement dated April 23, 2018, (***“Agreement”***) and two Minutes of Meeting dated August 13, 2019 and November 5, 2020 (by which the parties readjusted the obligations owed to each other) after a project connected to the construction of the 220 KV Sheopur substation civil work, was undertaken.

2. A primary objection presented by Learned Counsel on behalf of the Respondent is that the two Minutes of Order as agreed by the parties, and found at Exhibit “A” and Exhibit “B” of the affidavit in reply, do not contain an arbitration agreement. Upon perusal of the same, it is apparent

that the disputes and differences indeed arose in terms of the Agreement. *Prima facie*, the Minutes of Meeting, only reduce to writing the positions of the parties in relation to the Agreement and they constitute modification or amendment of the Agreement. The obligations contained in these Minutes of Meeting are but in continuance of the bargain entered into by the parties under the Agreement. Therefore, what is evident from the record is that there exists a formally executed arbitration agreement between the parties.

3. It is now trite law that the role of the Court exercising jurisdiction under Section 11 of the Act is confined to the examination of the existence of a formally executed arbitration agreement. The questions about validity of the arbitration agreement or substance of the agreement are matters that fall squarely and exclusively in the domain of the arbitral tribunal, which shall decide all these issues in exercise of its jurisdiction under Section 16 of the Act.

4. In this regard, it would be quite useful to reproduce a summary of the march of the law on the jurisdiction under Section 11 of the Act, as set out in Paragraph 65 of a judgment of the Supreme Court in ***Ajay Madhusudan Patel & Ors. Vs. Jotrindra S. Patel***¹, which, for felicity, is extracted below:-

¹ 2024 SCC OnLine SC 2597

65. The position of law that emerges from the aforesaid discussion can be summarized as follows;

- *SBP & Co.(supra)* expanded the scope of the Court's power under Section 11 while empowering the referral courts to decide several preliminary issues. *Boghara Polyfab (supra)* went to the extent of identifying three categories of preliminary issues that may arise for consideration in an application under Section 11. Of these, in the first category which had to be mandatorily decided by the referral Court, the question whether there was an arbitration agreement and whether the party who has applied under Section 11 of the Act, 1996 is a party to such an agreement, was also included.
- The insertion of Section 11(6A) through the 2015 Amendment to the Act, 1996 stipulated that the Courts under Section 11 shall confine their examination to the 'existence' of an arbitration agreement. It legislatively overruled the decisions in *SBP & Co. (supra)* and *Boghara Polyfab (supra)* by virtue of its non-obstante clause.
- *Duro Felguera (supra)*, in clear terms, clarified the effect of the change brought in by Section 11(6A) and stated that all that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less.
- *Vidya Drolia (supra)* endorsed the *prima facie* test in examining the existence and validity of an arbitration agreement both under Sections 8 and 11 respectively. However, it was clarified that in cases of debatable and disputable facts and reasonably good arguable case, etc. the Court may refer the parties to arbitration since the arbitral tribunal has the authority to decide disputes including the question of jurisdiction. It was further stated that jurisdictional issues concerning whether certain parties are bound by a particular arbitration under the group-company doctrine etc. in a multi-party arbitration raise complicated questions of fact which are best left to the tribunal to decide.
- In *Re : Interplay (supra)* the position taken in *Vidya Drolia (supra)* was clarified to state that the scope of examination under Section 11(6) should be confined to the "existence of the arbitration agreement" under Section 7 of the Act, 1996 and the "validity of an arbitration agreement" must be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. Therefore, substantive objections pertaining to existence and validity on the basis of evidence must be left to the arbitral tribunal since it can "rule" on its own jurisdiction.
- *Krish Spinning (supra)* cautioned that the Courts delving into the domain of the arbitral tribunal at the Section 11 stage run

the risk of leaving the claimant remediless if the Section 11 application is rejected. Further, it was stated that a detailed examination by the courts at the Section 11 stage would be counterproductive to the objective of expeditious disposal of Section 11 application and simplification of pleadings at that stage.

- *Cox and Kings (supra) specifically dealt with the scope of inquiry under Section 11 when it comes to impleading the non-signatories in the arbitration proceedings. While saying that the referral court would be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory party is a veritable party to the arbitration agreement, it also said that in view of the complexity in such a determination, the arbitral tribunal would be the proper forum. It was further stated that the issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the arbitral tribunal and can be decided under its jurisdiction under Section 16.*

5. From the foregoing, it is evident that the Hon'ble Supreme Court is now unequivocal about the law under Section 11 of the Act and that the role of the Court is restricted to considering whether a formally executed contract exists and whether it contains an arbitration agreement between the parties. Being satisfied that the Agreement, in particular Clause 23 thereof (found at Page No.45 and 46 of the Application), constitutes an arbitration agreement, this Application deserves to be finally disposed of by appointing an Arbitral Tribunal in the following terms:-

a) Mr. Prateek Pansare, an Advocate of this Court, is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement referred to above. The contact are set out below :

Address : 11C, Examiner Press Building, Dalal Street,

Near BSE, Fort, Mumbai – 400 001.

Email id : prateek@pansare.in

- b) A copy of this Order shall be communicated to the Learned Sole Arbitrator by the Advocates for the Applicant within a period of one week from today. The Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this Order;
- c) The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties within a period of two weeks from receipt of a copy of this Order;
- d) The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers of the respective Advocates of the parties to the Arbitral Tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration;
- e) All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance, and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

6. It is made clear that nothing contained in this order is an expression of an opinion on the merits of the matter. The parties are at liberty to raise all issues on merits before the Learned Sole Arbitrator hereby appointed. The Application is ***finally disposed of*** in the aforesaid terms.

7. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]