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

\+ ARB.P. 222/2024

PROFIN CAPITAL SERVICES LIMITED .....Petitioner

Through: Mr. Indresh Upadhaya, Mr. Vipul Agrawal and Ms.Tanya Mittal, Advocates

versus

NIVAYA RESOURCES PRIVATE LIMITED .....Respondent

Through: Mr. Praveen Agrawal and Mr. Dinkar Kumar, Advocates with Mr. Surinder Kr. Gupta A.R.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

O R D E R

% **10.03.2025**

1. The instant petition has been preferred under Section 11(5) & (6) of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the 'A&C Act'), seeking constitution of Arbitral Tribunal comprising of a Sole Arbitrator to adjudicate the disputes between the parties.

2. Learned counsel for the petitioner submits that the petitioner and respondent entered into a Loan Agreement dated 18.02.2022, Clause 10 of which stipulates resolution of disputes through arbitration as governed under the A&C Act and further provides for place of the arbitration to be at Delhi.

3. The present dispute arises in the context of a Loan Agreement entered into between the parties, wherein the respondent availed a short-term loan of I.N.R.20,00,00,000/- from the petitioner, a Non-Banking Financial Corporation, for business development, out of which Rs. 14,72,50,000/- was

disbursed. Disputes arose between the parties when the respondent allegedly breached various terms of the Agreement, including pledging insufficient shares as collateral and defaulting on interest payments.

4. Disputes having arisen between the parties, the petitioner invoked arbitration vide notice dated 16.12.2023 issued to the respondent under Section 21 of the A&C Act.

5. Learned counsel for the respondent neither disputes the subject agreement nor the jurisdiction of this Court. However, he objects to the reference of the present dispute to arbitration by contending that the petitioner has played fraud upon the respondent inasmuch as the petitioner sold the pledged shares to the third party, even before the loan was disbursed, without even serving a notice to the respondent company, which is in violation of the contract executed between the petitioner and the respondent. It is submitted that by selling the pledged share by the petitioner company, the petitioner has committed fraud upon the respondent. He further submits that the respondent has, on 29.08.2023, lodged a complaint with the Jt. Commissioner of Police, Economic offence Wing against the petitioner for the fraudulent act of petitioner causing wrongful loss to the respondent. He, therefore, claims that the disputes being fraudulent in nature are non-arbitrable. In support of his contention, he relies particularly on paragraph 94 of the Supreme Court's decision in Cox & Kings Ltd. v. SAP India (P) Ltd. & Anr., reported as **(2024) 4 SCC 1.**

6. At the outset, in terms of Section 11 (6-A) of the A&C Act, the scope of examination is limited to the existence of the arbitration agreement. It is well-established law that courts are mandated to refer disputes to arbitration if the agreement between the parties provides for such reference. To shut out

the arbitration at the initial stage itself would destroy the very purpose for which the parties had entered into arbitration.

Furthermore, in Vidya Drolia & Ors. v. Durga Trading Corporation, reported as **(2021) 2 SCC 1**, the Supreme Court clarified that courts, at the referral stage, do not merely perform a ministerial function. Instead, they are required to refer parties to arbitration "unless it finds that *prima facie* no valid arbitration agreement exists."

7. The contention that the disputes between the petitioner and the respondent are non-arbitrable as the respondent has made the allegation of fraud is unsustainable. In N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. reported as **2021 SCC OnLine SC 13**, the Supreme Court had observed as under:

> *39.7. Mere allegations of fraud simplicitor are not a sufficient ground to decline reference to arbitration. Parties may be referred to arbitration where allegations of fraud pertain to disputes between parties inter se, and have no implication for third parties. The courts may, however, refuse to make a reference to arbitration only in those cases where there are very serious allegations of fraud, which make a virtual case of criminal offence of fraud, or where allegations of fraud are so complicated, that it becomes absolutely essential that such complex issues be decided only by the civil courts on appreciation of voluminous evidence. This would also include those cases where there are serious allegations of forgery or fabrication of documents, or where fraud is alleged with respect to the arbitration clause itself, or where the fraud alleged is of such a nature that it permeates the entire contract, including the agreement to arbitrate. The judicial authority must carefully sift the materials for the purpose of determining whether the defence is merely a pretext to avoid arbitration.*
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> ...

> *50. The ground on which fraud was held to be non arbitrable earlier was that it would entail voluminous and extensive evidence and would be too complicated to be decided in arbitration. In contemporary arbitration practice, arbitral tribunals are required to traverse through volumes of material in various kinds of disputes such as oil, natural gas, construction industry, etc. The ground that allegations of fraud are not arbitrable is a wholly archaic view, which has become obsolete, and deserves to be discarded. However, the criminal aspect of fraud, forgery, or fabrication, which would be visited with penal consequences and criminal sanctions can be adjudicated only by a court of law, since it may result in a conviction, which is in the realm of public law.*

8. Moreover, the respondent's reliance on the decision rendered by the Supreme Court in Cox and Kings Private Limited v. SAP India Private Limited & Anr. reported as **(2024) 4 SCC 1**, is misplaced. It has been held that while exercising jurisdiction under Section 11 of the A&C Act, this court is required to enquire about the existence of the arbitration agreement, which is a sine qua non for referring the parties for arbitration. The allegations of fraud are generally arbitrable, unless they are so serious as to invalidate the arbitration agreement itself or have implications in the public domain.

9. The respondent's contention that before disbursing the loan, the petitioner sold the pledged shares, without commenting on the merits but merely on a *prima facie* view, appears to be at worst a breach of contractual understanding. There is no dispute as to the existence of an arbitration agreement and the petitioner admittedly having invoked the arbitration clause, this Court finds no reason as to why the Arbitral Tribunal cannot adjudicate the dispute including the allegation of fraud against the petitioner.

Considering the above noted facts and legal position, this court deems it apposite to refer the matter to the Arbitral Tribunal comprising of a Sole Arbitrator. Accordingly, the present petitioner is disposed of with the following directions:

i) The disputes between the parties under the said agreement are referred to the Arbitral Tribunal comprising of a Sole Arbitrator.

ii) Mr. Percival Billimoria, Senior Advocate (Mob: 9810747468) is appointed as the Sole Arbitrator to adjudicate upon the disputes between the parties uninfluenced by any observation made in this order.

iii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi (hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of DIAC (Administrative Cost and Arbitrators' Fees) Rules, 2018 or as the parties may agree.

iv) The learned Arbitrator shall furnish a declaration in terms of Section 12 of the A&C Act prior to entering into the reference.

v) It is made clear that all the rights and contentions of the parties, including on the existence and validity of the Arbitration agreement, arbitrability of any of the claim/counter claim, any other preliminary objection, need and legality of interim relief, as well as contentions on merits of the dispute by either of the parties, are left open for adjudication by the learned arbitrator.

vi) The parties shall approach the learned Arbitrator within four weeks from today.

MANOJ KUMAR OHRI, J

MARCH 10, 2025/na