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

+ **ARB.P. 2111/2025**

M/S KISAN CONSTRUCTION CO._HISARPetitioner

Through: Mr. S W Haider, Ms. Pooja Dua, Mr.
Arvind Bishwabandu, Ms. Aayushi
Diwan and Ms. Urzika Chauhan,
Advocates

versus

UNION OF INDIARespondent

Through: Mr. Abhishek Mahajan, Advocate
(SPC)

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

ORDER

22.12.2025

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1. This Petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator to adjudicate upon the disputes which have arisen between the parties under the Contract Agreement dated 07.01.2021.

2. It is stated that under the said Agreement, the Petitioner herein was entrusted with the work of Construction of Road Under Bridges in lieu of L-xing No. 49/C at Km 8215-7, L-Xing No. 58/C at Km 95/23-25 & L-xing No. 73/C at Km 127/19-21 on Delhi Ambala section of Delhi Division and Construction of one Limited Height Sub way (LHS) in lieu of L-xing No. 9 at Km 12/1- 2 near Maman Halt station & Balance work of road approaches of LHS in lieu of L-xing No. 14 at Km 24/1-2 near Bulandshahar Railway

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Station on Khurja-Meerut section of Moradabad Division of Northern Railway. It is stated that disputes arose between the parties regarding completion of the project. It is stated that Clause 64 of the General Conditions of Contract (GCC) contains an Arbitration Clause which provides that disputes arising between the parties under the Agreement shall be decided by means of Arbitration and the seat of Arbitration shall be Delhi. It is stated that Notice under Section 21 of the Arbitration Act was issued by the Petitioner on 12.08.2025. It is stated that the Respondent has failed to reply to the said Notice. The Petitioner has, thereafter, approached this Court by filing the present Petition.

3. Issue Notice.

4. Learned Counsel for the Respondent accepts notice. He states that no disputes have arisen between the parties. He draws the attention of this Court to Clause 64.1(v) of the GCC which reads as under:

“64.(1)(v): If the Contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.”

5. Learned Counsel for the Respondent, therefore, states that in view of the abovementioned clause, the Petitioner cannot raise the disputes.

6. The said contention of the learned Counsel for the Respondent cannot be accepted in view of the settled law that the referral Court under Section 11 of the Arbitration & Conciliation Act, 1996, has to only examine the *prima facie* existence of an arbitration agreement and the determination of



the substantive rights, maintainability of claims, and the issue of limitation etc., should be left to the Arbitral Tribunal. The Apex Court in Interplay Between Arbitration Agreements under Arbitration, 1996 & Stamp Act, 1899, In re, (2024) 6 SCC 1, has observed as under:-

*“165. The legislature confined the scope of reference under Section 11(6-A) to the examination of the existence of an arbitration agreement. The use of the term “examination” in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of “existence” of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , this Court held that the Referral Courts only need to consider one aspect to determine the existence of an arbitration agreement — whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. **Therefore, the scope of examination under Section 11(6-A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by Arbitral Tribunal under Section 16. We accordingly clarify the position of law laid down in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] in the context of Section 8 and Section 11 of the Arbitration Act.***



166. The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence-competence, only prima facie proof of the existence of an arbitration agreement must be adduced before the Referral Court. The Referral Court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the Arbitral Tribunal. This position of law can also be gauged from the plain language of the statute.

167. Section 11(6-A) uses the expression “examination of the existence of an arbitration agreement”. The purport of using the word “examination” connotes that the legislature intends that the Referral Court has to inspect or scrutinise the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression “examination” does not connote or imply a laborious or contested inquiry. [P. Ramanatha Aiyar, The Law Lexicon (2nd Edn., 1997) 666.] On the other hand, Section 16 provides that the Arbitral Tribunal can “rule” on its jurisdiction, including the existence and validity of an arbitration agreement. A “ruling” connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the Referral Court is only required to examine the existence of arbitration agreements, whereas the Arbitral Tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by



this Court in Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. [Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234]”

(emphasis supplied)

7. Similarly, the Apex Court in SBI General Insurance Co. Ltd. v. Krish Spinning, 2024 SCC OnLine SC 1754, has observed as under:-

“122. Once an arbitration agreement exists between parties, then the option of approaching the civil court becomes unavailable to them. In such a scenario, if the parties seek to raise a dispute, they necessarily have to do so before the arbitral tribunal. The arbitral tribunal, in turn, can only be constituted as per the procedure agreed upon between the parties. However, if there is a failure of the agreed upon procedure, then the duty of appointing the arbitral tribunal falls upon the referral court under Section 11 of the Act, 1996. If the referral court, at this stage, goes beyond the scope of enquiry as provided under the section and examines the issue of “accord and satisfaction”, then it would amount to usurpation of the power which the parties had intended to be exercisable by the arbitral tribunal alone and not by the national courts. Such a scenario would impeach arbitral autonomy and would not fit well with the scheme of the Act, 1996.

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.”

8. Since it is well-settled that referral courts should normally follow the policy of ‘when in doubt, refer’ and in view of the fact that disputes have certainly arisen between the parties, this Court is inclined to appoint an Arbitrator to adjudicate upon the disputes between the parties.

9. Accordingly, Justice Indira Banerjee, Former Judge of the Supreme Court (Mob. No: 9560808777) is appointed as the Sole Arbitrator to adjudicate upon the disputes between the parties.

10. The arbitration would take place under the aegis of the Delhi International Arbitration Centre (DIAC) and would abide by its rules and regulations. The learned Arbitrator shall be entitled to fees as per the Schedule of Fees maintained by the DIAC.

11. The learned Arbitrator is also requested to file the requisite disclosure under Section 12(2) of the 1996 Act within two weeks of entering on reference.

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

13. It is made clear that nothing in this order shall be construed as an expression of this Court on the merits of the contentions of the parties.

14. It is further made clear that the observations made in this Order are squarely limited to the appointment of an Arbitrator. Needless to say, it is open for the Respondent to urge its contention regarding arbitrability etc.



before the Arbitrator.

15. The petition stands disposed of in the above terms, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

DECEMBER 22, 2025

Rahul