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

Date of decision: 13th JANUARY, 2026

IN THE MATTER OF:

+ **ARB.P. 1897/2025**

M/S THEME ENGINEERING SERVICES PVT. LTD.Petitioner

Through: Ms. Nandadevi Deka, Mr. Arunabha Ganguli, Mr. Shashwat Pratyush, Ms. Shubhra Sharma and Mr.Sourav Sharma, Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIARespondent

Through: Mr. Santosh Kumar, SC with Mr. Ritik Dwivedi, Mr. Adithya Ramani and Mr. Devansh Malhotra, Advs. for R-1.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

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 Consultancy Contract Agreement dated 24.09.2019.

2. It is stated that under the said Agreement, the Petitioner herein was to provide Supervision Consultancy Services for construction supervision of Balance work of 4-laning of Ranchi-Rargaon-Mahulia section from KM 114.000 to km 277.500 of NH-33 in the State of Jharkhand. It is stated that disputes arose between the parties and the Respondent issued Order dated 17.12.2020 debarring the Petitioner for a period of two years. It is stated that



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the debarment Order was challenged by the Petitioner herein by filing W.P.(C) 1173/2021 before this Court. It is stated that this Court *vide* Order dated 23.05.2023 quashed the debarment Order. The said Order was challenged by the Respondent by filing SLP (C) No. 4741/2021, before the Apex Court. The said SLP was dismissed by the Apex Court *vide* Order dated 24.03.2021.

3. It is pertinent to mention that the General Conditions of Contract (GCC) Agreement dated 24.09.2019 contains a dispute resolution clause and the same reads as under:

“8. Settlement of Disputes

8.1 Amicable Settlement

The Parties shall use their best efforts to settle amicably all disputes arising out of or in connection with this Contract or the interpretation thereof.

8.2 Dispute Settlement

Any dispute between the Parties as to matters arising pursuant to this Contract which cannot be settled amicably within thirty (30) days after receipt by one Party of the other Party's request for such amicable settlement may be submitted by either Party for settlement in accordance with the provisions specified in the SCC.”

4. Clause 8.2 of the Special Conditions of Contract (SCC) provides for adjudication of disputes by way of arbitration and the same reads as under:

“8.2 Disputes shall be settled by arbitration in accordance with the following provisions:

8.2.1 Selection of Arbitrators



Each dispute submitted by a Party to Arbitration shall be heard by a sole arbitrator. NHAI shall within 30 days propose names of five (5) Arbitrators from the list of Arbitrators maintained by SAROD (Society for Affordable Redressal of Disputes) and Consultant shall within 30 days select one name from the list of five and the name so selected by the Consultant shall be the Sole Arbitrator for the matter in dispute. In case NHAI delays in providing the list of 5 names, President, SAROD will provide 5 names within 30 days of receipt of reference from aggrieved party in this regard. In case the Consultant falls in selecting one from the list of five, President, SAROD shall select one from the list of five provided by NHAI within 30 days of receipt of reference from aggrieved party in this regard.

8.2.2 Rules of Procedure

Arbitration proceedings shall be conducted in accordance with the procedures of the Arbitration and Conciliation (Amendment) Act, 2015 of India unless the Consultant is a foreign national/ firm, where arbitration proceedings shall be conducted in accordance with the rules of procedure of arbitration of the United Nations Commission on International Trade Law (UNCITRAL) as in force on the date of this Contract

8.2.3 Substitute Arbitrator

If for any reason an arbitrator is unable to perform his function, a substitute shall be appointed in the same manner as the original arbitrator,

8.2.4 Qualifications of Arbitrators The list of five and the sole arbitrator selected pursuant to Clause 8.2.1



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hereof shall be expert(s) with extensive experience in relation to the matter in dispute.

8.2.5 Miscellaneous

In any arbitration proceeding hereunder:

(a) Proceedings shall, unless otherwise agreed by the parties be held in

Delhi, (b) The English language shall be the official language for all purposes;

(c) The decision of sole arbitrator shall be final and binding and shall be enforceable in any court of competent jurisdiction, and the Parties hereby waive any objections to or claims of immunity in respect of such enforcement; and.....”

5. It is stated that after the SLP was dismissed, the Petitioner sent a letter dated 07.10.2023 to the Respondent detailing the claim for damages and financial loss incurred by the Petitioner due to unlawful debarment of the Petitioner. In the said letter, the Petitioner also made it clear that if the claims of the Petitioner are not settled by the Respondent, the Petitioner will invoke Arbitration in terms of Clause 8.2 of the SCC for adjudication of the disputes. Since the claims of the Petitioner were not settled by the Respondent, the Petitioner invoked Arbitration *vide* notice dated 09.12.2023.

6. *Vide* letter dated 28.12.2023, the Respondent agreed for settlement of disputes by way of conciliation. In the said communication, it was specifically mentioned that since the parties are now aiming to settle the disputes amicably through conciliation, the arbitration proceedings be kept in abeyance.



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7. As evident from the letter dated 15.02.2024, the conciliation proceedings began between the Petitioner and the Respondent. However, material on record does not disclose that the conciliation proceedings succeeded in settling the disputes. Therefore, the Petitioner once again sent a Notice dated 25.07.2025 under Section 21 of the Arbitration and Conciliation Act, 1996 invoking Arbitration. It is stated that since the Respondents failed to refer the disputes to Arbitration, the Petitioner has approached this Court by filing the present Petition.

8. Learned Counsel appearing for the Respondent contends that the claims raised by the Petitioner are for damages and financial loss incurred by the Petitioner on account of debarment of the Petitioner and, therefore, the same is not arbitrable as the claims do not arise from the Contract Agreement in question. He relies on the Judgment of the Apex Court in BSNL v. Telephone Cables Ltd., (2010) 5 SCC 213, to substantiate his contention. Learned Counsel for the Respondent has also raised objections regarding limitation. He, therefore, states that the present Petition is not maintainable.

9. The 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)

10. 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.”

11. 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



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certainly arisen between the parties, this Court is inclined to appoint an Arbitrator to adjudicate upon the disputes between the parties.

12. Unless the claims of the Petitioner are clearly barred by limitation, it is always open for the learned Arbitrator to adjudicate on the disputes between the parties. In any event, the Order of debarment was quashed by this Court on 23.05.2023 and, therefore, it cannot be said that the claim of the Petitioner is ex-facie bad. However, without observing anything on the merits of the case, and in view of the fact that disputes have arisen between the parties and there is an Arbitration Clause in the Contract Agreement and conciliation proceedings have failed, this Court appoints, Mr. Ranjit Kumar, Senior Advocate (Mob. No: 9810184723) as the Sole Arbitrator to adjudicate upon the disputes between the parties.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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



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open for the Respondent to urge its contention regarding arbitrability etc. before the Arbitrator.

18. The petition stands allowed in the above terms, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

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Rahul