2022 LiveLaw (SC) 823

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
M.R. SHAH; J., KRISHNA MURARI; J.
CIVIL APPEAL NO. 6774 OF 2022; SEPTEMBER 30, 2022
M/s. EMAAR INDIA LTD. *versus* TARUN AGGARWAL PROJECTS LLP & ANR.

Arbitration and Conciliation Act, 1996; Section 11 - Court can undertake preliminary inquiry to ascertain if the dispute is arbitrable or falls under the excepted category in the agreement. *(Para 7) Referred Vidya Drolia vs Durga Trading Co, Indian Oil Corporation Limited v. NCC Limited, 2022 LiveLaw (SC) 616*

For Appellant(s) Mr. Dhanesh Relan, Adv. Mr. Arindam Dey, Adv. Mr. Gautam Narayan, AOR Ms. Asmita Singh, Adv.

For Respondent(s) Mr. Siddharth Mittal, AOR Mr. Prabhat Kumar, Adv. Mr. Kshitiz Chauhan, Adv. Ms. Shilpa G. Mittal, Adv.

J U D G M E N T

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 24.12.2021 passed by the High Court of Delhi at New Delhi in Arbitration Petition No. 637 of 2021, by which, the High Court in exercise of powers under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Arbitration Act) has appointed arbitrators to resolve the dispute between the parties, the original respondent – M/s EMMAR India Limited has preferred the present appeal.

2. That the original petitioners – respondents herein entered into a Collaboration Agreement dated 07.05.2009 for development of a residential colony in Sector 62 and 65, Gurugram. That thereafter, a further Addendum Agreement dated 19.04.2011 was executed between the parties. The dispute arose between the parties and it was the case on behalf of the original applicants – respondents herein that the appellant herein did not comply with the obligations under the Addendum Agreement dated 19.04.2011. The respondents – original applicants/petitioners issued a legal notice dated 20.11.2019 raising demand for physical possession of 5 plots measuring 2160 sq. yds. and claiming a sum of Rs. 10 crores for the losses/damages suffered by them. As according to the original petitioners – respondents herein the dispute between the parties were arbitrable, the original petitioners appointed a former judge of the High Court as their arbitrator. The appellant herein denied appointment of the arbitrator. Therefore, the respondents herein approached the High Court for appointment of the arbitrators in terms of Clause 37 of the Addendum Agreement by submitting an application under Section 11(5) & (6) of the Arbitration Act seeking appointment of arbitrators by the Court.

2.1 The said arbitration petition was opposed by the appellant herein by raising various grounds including one of the grounds that the dispute falls under Clause 36 of the Addendum Agreement and not under Clause 37 which incorporates arbitration clause.

2.2 Despite having noted that the Clause 36 of the Addendum Agreement stipulates that in the event of any dispute with regard to Clauses 3, 6 and 9, other party shall have a right to get the agreement specifically enforced through appropriate court of law, the High Court has appointed the arbitrators in terms of Clause 37 of the Addendum Agreement by observing that conjoint reading of Clauses 36 and 37 makes it clear that a party does have

a right to seek enforcement of agreement before the Court of law but it does not bar settlement of disputes through Arbitration and Conciliation Act, 1996. By observing so, the High Court has allowed the application under Section 11(5) & (6) and has appointed the arbitrators, who shall appoint the third arbitrator in terms of Clause 37.

2.3 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court allowing the application under Section 11(5) & (6) of the Arbitration Act and appointing the arbitrators with respect to the dispute between the parties, the original opponent – respondent has preferred the present appeal.

3. Shri Dhanesh Relan, learned counsel appearing on behalf of the appellant has vehemently submitted that while allowing the application under Section 11(5) & (6) and appointing the arbitrators, the High Court has not at all considered that according to the appellant the dispute falls within Clause 36 of the Agreement and not under Clause 37. It is submitted that as per Clause 36 in case of any conflict or difference arising between the parties or in case the either party refuses or neglects to perform its part of the obligations under Addendum Collaboration Agreement, *inter-alia*, as mentioned in Clauses 3, 6 and 9, then the other party shall have every right to get the agreement specifically enforced through the appropriate court of law. It is submitted that as per Clause 37, save and except Clause 36 or any dispute arising out of or touching upon or in relation to the terms of the addendum agreement…… shall be settled through under the provisions of the Arbitration and Conciliation Act, 1996. It is submitted that therefore any dispute with regard to the Clauses 3, 6, 9 shall have to be resolved through the appropriate court of law and such dispute is not arbitrable at all. It is submitted that despite the High Court has noted Clauses 36 & 37, without deciding whether the dispute falls within Clause 36 the High Court appointed the arbitrators.

3.1 Learned counsel appearing on behalf of the appellant submitted that as observed and held by this Court in the case of **Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coal Field Limited; (2020) 2 SCC 455,** the appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the dispute is beyond the arbitration agreement.

3.2 Learned counsel appearing on behalf of the appellant has further submitted that as observed and held by this Court in the case of **Vidya Drolia and Ors. Vs. Durga Trading Corporation; (2021) 2 SCC 1**, the Court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. It is further submitted that in the said decision it is also observed that such restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood.

3.3 Learned counsel appearing on behalf of the appellant has also relied upon the recent decision of this Court in the case of **Indian Oil Corporation Limited Vs. NCC Limited; 2022 SCC OnLine SC 896 (Civil Appeal No. 341 of 2022, decided on 20.07.2022)**, in which after considering the decision of this Court in the case of **Vidya Drolia** (supra), this Court after taking into consideration other decisions has observed and held that at the stage of Section 11 of the Arbitration Act, a preliminary inquiry is permissible if the dispute is raised with respect to the arbitrability.

3.4 Relying upon the above decisions, it is vehemently submitted by learned counsel appearing on behalf of the appellant that in the facts and circumstances of the case, the High Court has virtually ignored Clause 36 of the Agreement. It is submitted that the High Court was required to hold a preliminary inquiry on whether considering Clause 36 of the Agreement, the dispute between the parties falls within Clause 36 or not. It is submitted that if in preliminary inquiry it is found that the dispute falls within Clause 36 in that case such a dispute is not arbitrable at all. It is, therefore, prayed to allow the present appeal and quash and set aside the judgment and order passed by the High Court.

4. While opposing the present appeal Shri Siddharth Bhatnagar, learned Senior Advocate appearing on behalf of the respondents has vehemently submitted that even as observed and held by this Court in the case of **Vidya Drolia** (supra) whether the dispute is arbitrable or not, it should be best left to the arbitrator in an application under Section 16 of the Arbitration Act and it is for the arbitrator to decide the arbitrability of the dispute.

4.1 It is submitted that on conjoint reading of Clauses 36 and 37 of the Agreement and the intention of the parties to resolve the dispute through arbitration under the Arbitration Act, no error has been committed by the High Court in appointing the arbitrators.

5. We have heard learned counsel appearing on behalf of the respective parties at length.

6. The short question which is posed for consideration of this Court is whether in the facts and circumstances of the case, the High Court is justified in appointing the arbitrators in an application under Section 11(5) and (6) of the Arbitration Act without holding any preliminary inquiry or inquiry on whether the dispute is arbitrable or not?

6.1 While considering the aforesaid question/issue, the relevant provisions of the Agreement, namely, Clauses 36 and 37, are required to be referred to, which are as under:-

"Dispute Resolution & Jurisdiction

36. In case of any conflict or difference arising between the parties or in case the either party refused or neglects to perform its part of the obligations under this Addendum Collaboration Agreement, inter-alia as mentioned in Clauses 3, 6 & 9 hereinabove, then the other party shall have every right to get this agreement specifically enforced through the appropriate court of law.

37. Save & except clause 36 hereinabove mentioned, all or any dispute arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity thereof, and the respective rights and obligations of the parties, shall be settled through under the provisions of Arbitration & Conciliation Act, 1996 wherein both the parties shall be entitled to appoint one Arbitrator each and the Arbitrators so appoint shall appoint a third Arbitrator or rank of Retired Judge of any High Court. The arbitration proceedings shall be governed by the provisions of Arbitration and Conciliation Act, 1996 or any statutory amendments/modification thereto for the time being in force. The arbitration proceedings shall be held at Delhi."

On a bare reading of Clause 36 of the Agreement, it clearly stipulates that in the event of any dispute as mentioned in Clauses 3, 6 and 9, other party shall have a right to get the Agreement specifically enforced through the appropriate court of law. As per Clause 37, save and except Clause 36, all or any dispute arising out of or touching upon or in relation to the terms of the addendum agreement……. shall be settled through under the provisions of Arbitration and Conciliation Act, 1996. Thus, with respect to any dispute as mentioned in Clauses 3, 6 & 9, such disputes are not arbitrable at all. It cannot be disputed that both the parties are governed by the Addendum Agreement dated 19.04.2011.

6.2 In the case of **Oriental Insurance Co Ltd. Vs. Narbheram Power and Steel (P) Ltd., (2018) 6 SCC 534**, it is observed and held by this Court that the parties are bound by the Clauses enumerated in the policy and the Court does not transplant any equity to the same by rewriting a clause. It is further observed and held that an arbitration clause is required to be strictly construed. Any expression in the clause must unequivocally express the intent of arbitration. It can also lay the postulate in which situations the arbitration clause cannot be given effect to. It is further observed that if a clause stipulates that under certain circumstances there can be no arbitration and they are demonstrably clear then the controversy pertaining to appointment of Arbitrator has to be put to rest (Paras 1023).

6.3 In the case of **Rajasthan State Industrial Development and Investment Corporation Vs. Diamond and Gem Development Corporation Ltd.; (2013) 5 SCC 470**, it is observed and held by this Court that a party cannot claim anything more than what is covered by the terms of the contract, for the reason that the contract is a transaction between two parties and has been entered into with open eyes and by understanding the nature of contract. It is further observed that thus the contract being a creature of an agreement between two or more parties has to be interpreted giving literal meanings unless there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the Court to make a new contract, however reasonable, if the parties have not made it themselves. It is further observed that the terms of the contract have to be construed strictly without altering the nature of a contract as it may affect the interest of either of the parties adversely (Para 23).

6.4 In the case of **Harsha Construction Vs. Union of India and Ors.; (2014) 9 SCC 246**, it is observed and held by this Court in paragraphs 18 and 19 as under: -

"18. Arbitration arises from a contract and unless there is a specific written contract, a contract with regard to arbitration cannot be presumed. Section 7(3) of the Act clearly specifies that the contract with regard to arbitration must be in writing. Thus, so far as the disputes which have been referred to in Clause 39 of the contract are concerned, it was not open to the Arbitrator to arbitrate upon the said disputes as there was a specific clause whereby the said disputes had been "excepted". Moreover, when the law specifically makes a provision with regard to formation of a contract in a particular manner, there cannot be any presumption with regard to a contract if the contract is not entered into by the mode prescribed under the Act.

19. If a non-arbitrable dispute is referred to an Arbitrator and even if an issue is framed by the Arbitrator in relation to such a dispute, in our opinion, there cannot be a presumption or a conclusion to the effect that the parties had agreed to refer the issue to the Arbitrator. In the instant case, the respondent authorities had raised an objection relating to the arbitrability of the aforestated issue before the Arbitrator and yet the Arbitrator had rendered his decision on the said "excepted" dispute. In our opinion, the Arbitrator could not have decided the said "excepted" dispute. We, therefore, hold that it was not open to the Arbitrator to decide the issues which were not arbitrable and the award, so far as it relates to disputes regarding non-arbitrable disputes is concerned, is bad in law and is hereby quashed."

6.5 In the recent decision in the case of **Vidya Drolia** (supra), which, as such, is post-insertion of Section 11(6-A) of the Arbitration Act, it is observed and held that the issue of non-arbitrability of a dispute is basic for arbitration as it relates to the very jurisdiction of the Arbitral Tribunal. An Arbitral Tribunal may lack jurisdiction for several reasons and non-arbitrability has multiple meanings. After referring to another decision of this Court in the case of **Booz Allen & Hamiltan Inc. Vs. SBI Home Finance Ltd. [(2011) 5 SCC 532 (Para 34)]**, it is observed and held that there are facets of non-arbitrability, namely

"(i) Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).

(ii) Whether the disputes are covered by the arbitrationagreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "excepted matters" excluded from the purview of the arbitration agreement.

(iii) Whether the parties have referred the disputes toarbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of an arbitration agreement, will not be "arbitrable" if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such a joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal."

6.6 After referring to and considering in detail the earlier decisions on the point, more particularly, with respect to non-arbitrability and the 'excepted matters', it is ultimately concluded in para 76 as under:

"76. In view of the above discussion, we would like to propound a four-fold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable:

76.1. (1) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

76.2. (2) When cause of action and subject-matter of the dispute affects third-party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;

76.3. (3) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable;

76.4 (4) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

76.5 These tests are not watertight compartments; theydovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable.

76.6 However, the aforesaid principles have to beapplied with care and caution as observed in **Olympus Superstructures (P) Ltd. Vs. Meena Vijay Khetan and Ors.; (1999) 5 SCC 651**: (SCC p. 669, para 35)

"35. …Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (Soilleux v. Herbst, Wilson v. Wilson and Cahill v. Cahill)."

6.7 On the question, who decides on non-arbitrability of the dispute, after referring to and considering the earlier decisions on the point, more particularly, the decisions in the cases of **Garware Wall Ropes Ltd. Vs. Coastal Marine Constructions & Engg.; (2019) 9 SCC**

209; United India Insurance Co. Ltd. Vs. Hyundai Engg. & Construction Co. Ltd.; (2018) 17 SCC 607, and **Narbheram Power & Steel (P) Ltd.** (supra), it is observed and held that the question of non-arbitrability relating to the inquiry, whether the dispute was governed by the arbitration clause, can be examined by the Courts at the reference stage itself and may not be left unanswered, to be examined and decided by the Arbitral Tribunal. Thereafter, in para 153, it is observed and held that the expression, "existence of arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the Court at the reference stage would apply the prima facie test. It is further observed that in cases of debatable and disputable facts and, good reasonably arguable case etc., the Court would force the parties to abide by the arbitration Agreement as the Arbitral Tribunal has the primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability. Ultimately in para 154, the proposition of law is crystallized as under:

"154. Discussion under the heading 'Who decides Arbitrability?' can be crystallized as under:

154.1. Ratio of the decision in *Patel Engineering Ltd.* on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of thecourt under Section 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of thelegislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competencecompetence, is that the arbitral tribunal is the preferred first authority to determine and decide all questions of nonarbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at the Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

6.8 In the case of **Vidya Drolia** (supra), it is specifically observed and held by this Court that rarely as a demurrer, the Court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that "**the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable**", though the nature and facet of nonarbitrability would, to some extent, determine the level and nature of judicial scrutiny. It is further observed that the restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable and to cut off the deadwood." It is further observed that the prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage.

7. Applying the law laid down by this Court in the aforesaid decisions and considering Clauses 36 and 37 of the Agreement and when a specific plea was taken that the dispute falls within Clause 36 and not under Clause 37 and therefore, the dispute is not arbitrable, the High Court was at least required to hold a primary inquiry/review and prima facie come to conclusion on whether the dispute falls under Clause 36 or not and whether the dispute is arbitrable or not. Without holding such primary inquiry and despite having observed that a party does have a right to seek enforcement of agreement before the Court of law as per Clause 36, thereafter, has appointed the arbitrators by solely observing that the same does not bar settlement of disputes through Arbitration and Conciliation Act, 1996. However, the High Court has not appreciated and considered the fact that in case of dispute as mentioned in Clauses 3, 6 and 9 for enforcement of the Agreement, the dispute is not arbitrable at all. In that view of the matter, the impugned judgment and order passed by the High Court appointing the arbitrators is unsustainable and the same deserves to be quashed and set aside. However, at the same time, as the High Court has not held any preliminary inquiry on whether the dispute is arbitrable or not and/or whether the dispute falls under Clause 36 or not, we deem it proper to remit the matter to the High Court to hold a preliminary inquiry on the aforesaid in light of the observations made by this Court in the case of **Vidya Drolia** (supra) and in the case of **Indian Oil Corporation Limited** (supra) and the observations made hereinabove and thereafter, pass an appropriate order.

8. In view of the above and for the reasons stated above the present appeal succeeds. The impugned judgment and order passed by the High Court appointing the arbitrators in terms of Clause 37 of the Addendum Agreement dated 19.04.2011 is hereby quashed and set aside. The matter is remitted to the High Court to decide the application under Section 11(5) and (6) of the Arbitration Act afresh and to pass an appropriate order after holding a preliminary inquiry/review on whether the dispute is arbitrable or not and/or whether the dispute falls within Clause 36 of the Addendum Agreement or not. The present appeal is accordingly allowed. No costs.