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

% ***Reserved on: 19.02.2020***
Pronounced on: 19.05.2020

\+ **ARB P. 710/2019**

PARSVNATH DEVELOPERS LIMITED & ANR. ……Petitioners

Through: Mr. Vijay Nair, Mr. Shubham Paliwal & Ms. Sakshi Kapoor, Advocates

versus

RAIL LAND DEVELOPMENT AUTHORITY …..Respondent

Through: Mr. Amit Kumar, Mr. Shaurya Sahay & Mr. Chetan Joshi, Advocates

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Present petition has been filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') for appointment of a Sole Arbitrator to adjudicate the disputes between the parties.

2. The brief facts as averred in the petition are that Respondent invited tenders from private parties for development (including re-development of an existing Railway Colony) of a plot measuring approximately 15.27 hectares situated at Sarai Rohilla, Kishan Ganj, New

Delhi (hereinafter referred to as 'Project Land') on 18.01.2010 through IL & FS Infrastructure Development Corporation Ltd.

3. Respondent represented that Project Land belonged to Indian Railways and the tender was issued to put the land to effective commercial utilization. Project was to be executed through a Special Purpose Vehicle (hereinafter referred to as 'SPV') i.e. Petitioner no.2. Project included re-development of existing Railway Colony over 4.37 hectares and development of balance 10.9 hectares.

4. Tender process was in two phases wherein those bidders who qualified the requirements under Request for Qualification document were allowed to place their financial bids. Petitioner no.1 was declared successful with its bid of Rs.1651.51 Crores on 12.11.2010 and Respondent issued a Letter of Demand dated 12.11.2010 demanding payment of Rs.33,03,02,000/- as Commitment Security to commence and complete the Project. Petitioner no.1 paid the said amount from the account of SPV vide letter dated 25.11.2010.

5. Respondent thereafter issued Letter of Acceptance dated 26.11.2010 awarding the work to Petitioner no.1. Respondent was aware that SPV was to implement the Project and finally by letter dated 07.02.2011, approved the work to be executed by the SPV.

6. On 29.03.2011 and 31.03.2011, Petitioner no.1 paid to the Respondent, amounts towards first instalment in terms of the RFP (Request For Proposal). As requested by the Respondent, Petitioner no.1 paid interest at the rate of 18% for delayed payment of first instalment, under protest. Petitioner no.1 requested the Respondent vide letter dated 12.02.2011 to waive and alter the condition precedent in relation to

Performance Bank Guarantee (hereinafter referred to as 'PBG') to the extent that it shall be allowed to submit the PBG before execution of first Lease Deed or from eighteen months of the effective date, whichever is earlier. However, as a measure of comfort, Petitioner no.1 authorised the Respondent to forfeit an amount equal to the amount of the proposed PBG from the amount of first instalment in addition to the element of 15% of the paid lease premium, which was forfeitable by Respondent. This request was accepted by the Respondent and it allowed Petitioner no.1 to submit PBG within six months after signing the Development Agreement (hereinafter referred to as the 'DA').

7. However, within days of granting the approval, Respondent withdrew its consent vide letter dated 16.03.2011 pursuant to instruction from the Railway Board to ensure that open and transparent tendering process is followed for selecting bidders for commercial development of land.

8. Contemporaneously, Government informed the Railway Board that a Policy was under way with respect to alienation of land held by the Government and a specific approval of the Cabinet was required in case of long term Lease or sale. In this background, Respondent was perhaps incapacitated from entering into the DA. Instead of notifying the incapacity, Respondent vide letter dated 22.03.2011 insisted on submission of PBG for execution of DA and directed Petitioner no.1 to pay the first instalment within seven days with interest. Finally, on 13.07.2011, Respondent unilaterally withdrew its consent accorded to the SPV disbalancing the entire plan of Petitioner no.1.

9. After delay of several months, approval for the SPV was granted on 02.08.2012 but the DA was not executed as the Respondent did not have Schedule 'L' of the land, ready. DA was finally executed on 31.05.2013 and Article 31 of the DA provided for a Dispute Resolution Mechanism / Arbitration.

10. Disputes having arisen between the parties, the Arbitral Tribunal was constituted (hereinafter referred to as 'First AT'). The reliefs claimed before the First AT were as follows :-

> *(i) Hold that the Respondent was estopped from issuing the letter dated 13.07.2011 or withdrawing the approval of PPDPL as the SPV granted vide letter dated 07.02.2011 and that the letter dated 13.07.2011 was issued by the Respondent without any basis whatsoever; and*
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> *(ii) Hold that the delay of 18 months, between 07.02.2011 and 03.08.2012, i.e., between the approval of PPDPL as the SPV and later PRLPPL as the SPV, is solely attributable to the Respondent; and*
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> *(iii) Hold that the delay of approximately 1 0 months from 03.08.2012 to 31.05.2013 in signing the DA after approval of the SPV was also attributable to the Respondent as the Claimants could not have signed the DA without the Respondent acknowledging that the disputes raised by the Claimants shall be considered by the Respondent and it was only on 03.04.2013 that the aforementioned assurance was provided by the Respondent and prior to the aforementioned date, the Respondent had flatly refused to even consider the requests of the Claimants.*
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> *(iv) Consequently, hold that the aforesaid period of 28 months, between 07.02.2011 and 31.05.2013 ought to have been considered as ZERO PERIOD, for the purposes of*

the time-lines for payment of installments of Lease Premium and the due dates of payments of each of the installments of Lease Premium were liable to be postponed by 28 months; and

(v) Consequently, hold that the payments received by the Respondent, both towards instalments of Lease Premium as well as interest claimed thereon as detailed in Annexure C-89 above have been received by the Respondent much prior to and much in excess of the entitlement of the Respondent.

(vi) Direct the Respondent to pay to the Claimants an amount of Rs. 134,10,82,192/- (Rupees One Hundred Thirty Four Crores, Ten Lakhs Eighty Two Thousand One Hundred Ninety Two only) towards interest on the amount received by the Respondent towards the 1st instalment of Lease Premium prior to the entitlement of the Respondent.

(vii) Withdrawn.

(viii) Direct the Respondent to pay to the Claimants an amount of Rs. 118,09,42,767/- (Rupees One Hundred Eighteen Crores, Nine Lakhs Forty Two Thousand Seven Hundred Sixty Seven only) towards interest on the amount received by the Respondent towards the 2nd instalment of Lease Premium prior to the entitlement of the Respondent.

(ix) Withdrawn.

(x) Direct the Respondent to pay to the Claimants an amount of Rs. 156,35,68,224/- (Rupees One Hundred Fifty Six Crores, Thirty Five Lakhs Sixty Eight Thousand Two Hundred Twenty Four only) towards interest on the amount received by the Respondent towards the 3rd instalment of Lease Premium prior to the entitlement of the Respondent, calculated from 22.08.2013 till 15.06.2015.

(xi) Award the costs of the arbitration proceedings to the Claimants.

11. By a majority Award passed on 01.06.2018, claims of Petitioner No. 1 were rejected. Cumulative payments received by the Respondent till the termination under the DA were Rs.11,66,65,85,913/-. Apart from the above, Respondent also received an amount of Rs.4,25,10,536/- towards damages, for non-achievement of financial close. In the scheme of DA, Petitioners were to achieve financial close under Article 4, failing which DA was to be automatically terminated, until extended. On 15.06.2015, last extension expired and Lease stood terminated. Petitioners became entitled to refund of Rs.10,34,53,77,913/-. In order to retain the entire money paid by the Petitioners, Respondent terminated the DA on 06.08.2015 with effect from 23.02.2015 and Petitioners refuted the retrospective termination of DA and retention of money by the Respondent.

12. This gave rise to another Arbitration (hereinafter referred to as 'Second Arbitration') in which Petitioner sought to recover part of the amount due, reserving its right to claim the balance money as damages under Clause 7.2.2 of the DA. Therefore, the issue in the Second Arbitration was whether the Termination was deemed or on account of alleged breach by the Petitioners under Article 29.8.2. The Second AT allowed the claim of the Petitioners and found that the action of the Respondent to insist on forfeiture of the entire amount was unsubstantiated and impermissible. The Second AT declared the PBG to be non-est and directed payment to the Petitioners with interest.

13. It is stated in the petition that this Award was challenged by the Respondent before this Court but the Objection Petition as well as the Appeal before the Division Bench was dismissed. Respondent challenged the order of the Division Bench in the Supreme Court but did not succeed. Execution Petition filed by the Petitioners was disposed of on 17.07.2019 recording the stand of the Respondent that it had made payment of Rs.11,99,39,52,552/-. However, PBG was never returned by the Respondent until 16.08.2019.

14. At the stage of dismissal of the Appeal under Section 37 of the Act, Petitioners vide letter dated 30.05.2018 called upon the Respondent to invoke Dispute Resolution Process in respect of Claims pertaining to retention of a total of Rs.132,12,08,000/-. Respondent refuted the claims and refused to appoint the Conciliation Committee in terms of Article 31 of the DA, vide its letter dated 25.06.2018, on the ground that the Petitioners had admitted in the second Arbitration that the Respondent was entitled to the said amount under Article 7.2.2 and also that the claim was barred by Limitation and under Order II Rule 2 CPC.

15. Petitioners thereafter called upon the Respondent to proceed to Arbitration and appointed their Nominee Arbitrator. Respondent refused to appoint its Nominee Arbitrator. Petitioners filed an Arbitration Petition being Arb. Pet. No.724/2018 and this Court appointed Respondent's Nominee Arbitrator.

16. Before the Third Arbitral Tribunal, Petitioners have raised claims in respect of the Retention money as well as losses due to various mis-representations made by the Respondent. It is averred in the petition that

the Third Arbitration is underway and was at the stage of evidence as on 15.12.2019.

17. Petitioners state that in the Second Arbitration, Arbitral Tribunal declared the PBG dated 30.05.2013 non-est and thus, illegal withholding of the PBG by the Respondent was affirmed. Respondent became liable for damages on account of delay in returning the PBG and also to compensate the Petitioners for costs, expenses and damages incurred by the Petitioners due to illegal retention. For issuance of the PBG, Punjab National Bank had required a 100% margin to secure the amount guaranteed, which the Petitioner had provided by tendering an FDR and a charge of the Bank on its immovable assets for the balance amount. For sourcing the funds to provide the FDR, Petitioner No. 1 had utilized funds received from IL & FS Financial Services at an interest rate of 16% p.a. Thus, the total claim on account of PBG charges due to the Petitioners was Rs.18,85,19,827/-.

18. Petitioners invoked Arbitration vide Notice dated 17.09.2019 demanding the said amount along with losses incurred between 02.11.2015 to 20.08.2019 due to non-availability of immovable assets charged to the Bank. Respondent again refused to appoint an Arbitrator on the ground of absence of subsisting Arbitration Agreement, bar of limitation and estoppel.

19. Petitioner has thus filed the present petition on the strength of the Arbitration Clause 31.4 which reads as under :

> *"31.4 Arbitration*
> *31.4.1 Any Dispute, which is not resolved amicably by conciliation, as provided in Clause 31.3, shall be finally*

decided by reference to arbitration by an Arbitral Tribunal appointed in accordance with Clause 31.4.2 (herein the "Arbitral Tribunal"). Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (herein the "Rules"), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996. The governing law of the arbitration shall be the laws of India. The venue of such arbitration shall be Delhi, and the language of arbitration proceedings shall be English.

31.4.2. A notice of the intent (herein the "Notice of Intent") to refer the dispute to arbitration may be given by one Party [herein the "Claimant(s)"] to the other Party [herein the "Respondent(s)"]. There shall be an Arbitral Tribunal consisting of three (3) arbitrators. The Claimant(s) and Respondent(s) shall be entitled to appoint one arbitrator each and the third arbitrator shall be appointed by the two arbitrators so appointed, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

31.4.3. The Arbitral Tribunal shall make a reasoned award (herein the "Award"). Any Award made in any arbitration held pursuant to this Article XXXI shall be final and binding on the Claimant(s) and Respondent(s) as from the date it is made, and the Developer and RLDA agree and undertake to obey and implement such Award without delay."

20. Reply was filed by the Respondent raising certain preliminary objections. The first objection against the maintainability of the petition is that the claims now sought to be referred are directly overlapping with the claims referred in the earlier Arbitrations and neither is there any

subsisting Arbitral Clause nor any dispute for adjudication. Disputes raised in the instant petition by the Petitioners were subject matter of Second Arbitration, in which an Arbitral Award has already been passed on 25.11.2017. Petitioners have already invoked the Arbitral Clause on three occasions with respect to the disputes arising out of a single DA between the parties.

21. Learned counsel for the Respondent contends that present petition is not maintainable. The issue of PBG which is being raised in the present petition was a subject matter of the Award dated 25.11.2017, wherein the Petitioner had specifically sought the relief of restraining the Respondent from encashing the PBG. Therefore, the entitlement of the Respondent to encash the PBG was directly an issue in second Arbitration and the dispute is no longer alive.

22. It is argued that the Petitioners in the opening submissions filed in second Arbitration specifically in para 8.3 sought a direction for release of the PBG. It is further contended that in the Award dated 25.11.2017, in paras 30 and 31, the Tribunal held that RLDA was entitled to the amount equivalent to PBG of Rs.82,57,55,000/- and in para 31 declared the PBG non-est. Core issues thus concerning the retention and invocation of PBG were subject matter of Second Arbitration. The Award was stamped only in April 2019 and became enforceable on the said date. Decree in terms of the Award including the relief of return of PBG stood satisfied when the Execution Petition was disposed of 17.07.2019. Thereafter, no claim can survive for any fresh reference by the Petitioners.

23. It is further submitted that the claim relating to expenses for maintaining the PBG was specifically raised in Third Arbitration where Petitioners have sought refund of the PBG amount along with interest at the rate of 18% p.a. with effect from 15.06.2015. Therefore, all charges allegedly incurred on maintenance of PBG are included in the claim before the Third Arbitral Tribunal. Section 7 of the Act does not permit the Petitioner to raise the dispute again in the present petition.

24. Learned counsel thus submits that there is no Arbitration Agreement in existence for adjudication of the disputes sought to be raised, in terms of Section 7 of the Act. Reliance is placed on the judgment in the case of ***Garware Wall Ropes Ltd. vs. Coastal Marine Constructions & Engineering Ltd. (2019 SCCOnLine SC 515)***, more particularly para 29. It is further argued that the dispute is for a period, after the termination of the Agreement, and is neither relatable nor arising out of or in relation to the Agreement and is not covered by the Arbitration Clause.

25. Counsel for the Respondent places reliance on the judgment in the case of ***M/s. Brightstar Telecommunications India Ltd. vs. M/s IWorld Digital Solutions Pvt. Ltd. [2018 SCC OnLine Del 13071], NCC Ltd. vs. Indian Oil Corporation [Arb P. 115 of 2018]*** and ***Western Constructions vs. Eden Buildcon Pvt. Ltd. [Arb. P. 447 of 2019]*** to argue that scope of inquiry under Section 11 of the Act involves (a) identification of binding Arbitration Agreement between the parties and (b) whether the dispute is at all relatable to such Agreement. In the present case, the claims raised do not fall within the definition of "dispute" in Article 1.1.29 of the DA

and also pertain to periods after the termination of the DA and cannot be referred.

26. Lastly, counsel for the Respondent contends that the conduct of the Petitioners also merits dismissal of the present petition. Till date, there have been three references out of the same Agreement and even the Tribunal has noticed that bifurcation of claims is resulting in confusion. Petitioner in Third Arbitration claimed Rs.132 Crores at the stage of filing Section 11 Petition, however, after the constitution of the Tribunal, the claim has gone up to Rs.4000/- Crores. Such a conduct is akin to playing fraud on the Court and the Tribunal.

27. Learned counsel for the Petitioners in rejoinder argues that there is no overlap of the reliefs sought in the present petition with any claims in the earlier Arbitrations. In Second Arbitration only restraint on encashment of PBG was sought as Respondent had retained amounts in excess of its entitlement. In Execution Petition, the relief sought was for return of the PBG which is distinct from the claim herein and in any event, the Executing Court had not passed any directions. In Third Arbitration, Mr. Pankaj Aggarwal, Claimant Witness 2, had categorically stated that only Bank charges till 02.11.2015 had been claimed. Issues of estoppel, waiver, res judicata and bar under Order II Rule 2 CPC cannot be raised by the Respondent, as the same objection was overruled by a Co-ordinate Bench in Arb. Petition no.724/2018 titled ***Parsvnath Developers Limited & Anr. v. Rail Land Development Authority*** between the same parties and with respect to the same DA. Court held that these issues are determinable by the Arbitral Tribunal and not by the Court under Section 11 of the Act.

28. Learned counsel further argues that a plea of overlap is essentially a plea of jurisdiction of the Court and accord and satisfaction and cannot be determined under Section 11 of the Act, after the insertion of Sub-Section (6A) in Section 11, by Amendment Act 3 of 2016, as has been clearly held by the Supreme Court in ***M/s Mayavati Trading Pvt. Ltd. v. Pradyuat Deb Burman [2019 8 SCC 714]***. The pleas raised by the Respondent to oppose the petition are clearly beyond the scope of examination under Section 11 of the Act. The Court can only examine the existence of the Arbitration Agreement and all other preliminary issues have to be left to be decided by the Tribunal under Section 16 of the Act.

29. Learned counsel sums up his arguments by submitting that vide Invocation Notice dated 17.09.2019, the claims sought to be referred by the Petitioners are costs, expenses and damages incurred by the Petitioner due to (a) illegal retention of PBG, post 02.11.2015 and (b) inability to have the charge of PNB release against immovable assets of the Petitioner.

30. I have heard the learned counsels for the parties and examined their rival contentions.

31. The narrow controversy that has arisen in the present case on account of the preliminary objections raised by the Respondent is whether the disputes / claims sought to be referred to Arbitration in the present petition are overlapping and are/were the subject matter of Third Arbitration and the Second Arbitration respectively, where the latter has culminated into an Arbitral Award. However, the larger issue that arises

before this Court is whether in a petition under Section 11 of the Act, this Court can even delve into this controversy.

32. The Supreme Court in the case of ***SBP and Co. v. Patel Engg. Ltd. [(2005) 8 SCC 618]***, had carved out three categories with respect to the preliminary issues that may arise for consideration in an Application under Section 11 of the Act viz : (i) issues which the Court is bound to decide (ii) issues that the Court may choose to decide; (iii) issues which should be left to the Arbitral Tribunal to decide. The Law Commission examined the matter and made recommendations in the 246th Report for insertion of sub-section (6A) in Section 11 of the Act. The Act was amended by an Amendment Act 3 of 2016 and sub-Section (6A) was inserted in Section 11. Section 11 (6A) reads as under :-

> *"(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."*

33. Post the amendment, scope of examination under Section 11 of the Act by a Court again came up before the Supreme Court in the case of ***Duro Felguera, S.A. v. Gangavaram Port Ltd., [(2017) 9 SCC 729]***. The Supreme Court in as many words held that while examining a petition under Section 11 of the Act, the Court would confine itself only to examining the existence of an Arbitration Agreement between the parties and no more. The Court also laid down a single test for such

examination and observed that the only requirement was to see if the contract between the parties contained an Arbitration Clause. Relevant part of the judgment is as under :-

> *"48. …… From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.*
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> *xxx xxx xxx*
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> *59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [SBP and Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] . This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6- A) ought to be respected."*

34. The Supreme Court again in the case of ***Mayavati (supra)*** after referring to the Pre-Amendment position and the Amendment in Section 11 held as under :

"10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment [United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd., (2019) 5 SCC 362 : (2019) 2 SCC (Civ) 785] , as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in Duro Felguera, SA [Duro Felguera, SA v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] — see paras 48 & 59"

35. Supreme Court recently in the case of ***Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited (2019 SCC OnLine SC 1518)***, where the High Court had dismissed the application under Section 11 of the Act on the ground that it was barred by limitation, after noticing the 2015 Amendment, observed that by virtue of the non-obstante clause in Section 11(6A), the earlier judgments in ***Patel Engineering and National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. [(2009) 1 SCC 267]***, were legislatively overruled and the scope of examination is now confined only to the existence of the Arbitration Agreement at this stage and nothing more. Court placed reliance on the judgment in case of ***Duro Felguera (supra)***. Court also held that the Arbitral Tribunal is empowered under Section 16 of the Act to rule on its own jurisdiction, including determining all other jurisdictional issues. This doctrine according to the Court is intended to minimize judicial

intervention so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties. Court held that limitation being a mixed question of fact and law is a jurisdictional issue and would be determined by the Arbitral Tribunal. It is not within the scope of examination under Section 11 by the Court to delve into issues of jurisdiction such as limitation etc. Relevant paras of the judgment are as under :

> *25. By virtue of the non obstante clause incorporated in Section 11(6-A), previous judgments rendered in Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117], were legislatively overruled. The scope of examination is now confined only to the existence of the arbitration agreement at the Section 11 stage, and nothing more.*
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> *26. Reliance is placed on the judgment in Duro Felguera S.A. v. Gangavaram Port Ltd. [Duro Felguera S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764. Refer to TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , wherein this Court held that: (SCC p. 759, para 48)*
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> > *"48. ... From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect— the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple — it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement."*

27. In view of the legislative mandate contained in Section 11(6-A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the kompetenz-kompetenz principle.

28. The doctrine of "kompetenz-kompetenz", also referred to as "compétence-compétence", or "compétence de la recognized", implies that the Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties.

xxx *xxx* *xxx*

35. Limitation is a mixed question of fact and law. In ITW Signode (India) Ltd. v. CCE [ITW Signode (India) Ltd. v. CCE, (2004) 3 SCC 48] a three-Judge Bench of this Court held that the question of limitation involves a question of jurisdiction. The findings on the issue of limitation would be a jurisdictional issue. Such a jurisdictional issue is to be determined having regard to the facts and the law."

36. Reading of Section 11(6A) and the judgments of the Supreme Court, as mentioned above, leaves no doubt that the law on the scope of examination by the Court in a petition under Section 11 is no longer *res integra*. At this stage, the scope and power is restricted only and only to examining the existence of the Arbitration Clause and not even its validity. Therefore, the objection raised by the Respondent requiring this

Court to examine whether the disputes sought to be raised are overlapping with the claims in the earlier arbitrations between the parties and / or are barred by principles of Order II Rule 2 CPC cannot be sustained in law. These are issues which clearly fall in the domain of the Arbitral Tribunal and would be decided if and when raised by the Respondent before the Tribunal.

37. At this stage, it is also important to note that in Arbitration Petition 724/2018 between the same parties, the Respondent had raised similar objections to the disputes being referred to Arbitration such as bar under Order II Rule 2 CPC, waiver, estoppel etc. The Co-ordinate Bench of this Court had observed that the Arbitration Agreement had been invoked by the Petitioners and its existence was not in question. The issues of *res judicata* or estoppel or claims being barred under the principles of Order II Rule 2 CPC touch upon the merits of the claim and can be decided only by the Tribunal. The Court also held that an Arbitration Agreement can be invoked any number of times as held by the Supreme Court in ***Dolphin Drilling Ltd. vs. Oil and Natural Gas Corporation Ltd. [(20l0) 3 SCC 267]***. Relevant part of the judgment dated 31.10.2018 is as under :-

> *"10. In my opinion, the existence of the Arbitration Agreement itself is not in dispute. The dispute is whether the claim now sought to be raised by the Petitioner would be barred by the principles of Order II Rule 2 of the CPC and/or principles of res judicata and/or estoppel. It cannot be denied that an Arbitration Agreement can be invoked a number of times and does not cease to exist only with the invocation for the first time. The Supreme Court in Dolphin Drilling Ltd. vs. Oil and Natural Gas Corporation Ltd. (20 l 0) 3 SCC 267, has held as under:*

> *"8. The plea of the Respondent is based on the words "all disputes" occurring in Para 28.3 of the agreement. Mr.Aggrawal submitted that those two words must be understood to mean "all disputes under the agreement" that might arise between the parties throughout the period of its subsistence. However, he had no answer as to what would happen to such disputes that might arise in the earlier period of the contract and get barred by limitation till the time comes to refer "all disputes" at the conclusion of the contract. The words "all disputes" in Clause 28.3 of the agreement can only mean "all disputes" that might be in existence when the arbitration clause is invoked and one of the parties to the agreement gives the arbitration notice to the other. In its present form Clause 2 8 of the agreement cannot be said to be a one-time measure and it cannot be held that once the arbitration clause is invoked the remedy of arbitration is no longer available in regard to other disputes that might arise in future. "*

11. The question whether the claim of the Petitioner would be barred by the principles of res judicata or estoppel or by Order II Rule 2 of the CPC are not matters to be considered by this Court while exercising its jurisdiction under Section 11 of the Act. (Indian Oil Corporation Ltd. vs. SPS Engineering Ltd. (2011) 3 SCC 507).

12. The legislature by amending the Act by way of the Arbitration and Conciliation (Amendment Act) 2015 and the insertion of Section 11 (6A) of the Act has also restricted the scrutiny of the Court at the stage of adjudicating an application under Section 11 of the Act only to the existence of the Arbitration Agreement."

38. In the present case also the Respondent is raising similar objections as raised in the earlier litigation on the maintainability of the petition. In my view, the judgment of the Co-ordinate Bench would squarely apply to the present case. This Court cannot expand the scope of examination beyond examining the existence of the Arbitration Agreement and the other issues raised by the Respondent are in the domain of the Arbitral Tribunal.

39. It can hardly be disputed by the Respondent that the Agreement between the parties contains an Arbitration Clause as the parties have already subjected themselves to three Arbitrations. The argument of the Respondent that the plea of overlapping is a plea of accord and satisfaction and, therefore, the petition cannot be allowed, has no merit. Supreme Court in the case of ***Mayavati (supra)*** overruled the judgment in the case of ***United India Insurance Co. Ltd. v. Antique Art Exports (p) Ltd. [2019 5 SCC 362]***, wherein the Supreme Court had held that once there was accord and satisfaction, no arbitral dispute subsisted for reference to Arbitration. This is clear from reading of para 10 of the judgment which has been extracted in the earlier part of the judgment. Even the issue of arbitrability or existence of any dispute, between the parties, is a matter to be adjudicated by the Tribunal.

40. This Court is satisfied that there exists an Arbitration Agreement between the parties and therefore, the disputes raised by the Petitioners herein deserve to be referred to Arbitration.

41. The earlier proceedings are being conducted by Mr. Justice Vikramajit Sen, Former Judge of the Supreme Court, as a Nominee Arbitrator of the Respondent.

42. I accordingly appoint Mr. Justice Vikramajit Sen, Former Judge of the Supreme Court, as the Nominee Arbitrator of the Respondent. The two Arbitrators shall proceed to appoint the Presiding Arbitrator as per the Arbitral Procedure agreed between the parties.

43. The address of the learned Arbitrator is as under :

Mr. Justice Vikramajit Sen,
Former Judge, Supreme Court of India
Off. D-17, 1st Floor, Kalandi Colony, New Delhi-110065.
Ph.: 8447333366, 26317274.
Email Id: senvikramajit@gmail.com

44. The Learned Arbitrators shall give disclosure under Section 12 of the Act before entering upon reference.

45. Petition is allowed in the above terms with no orders as to costs.

46. All contentions raised by the parties herein are left open to be decided by the Arbitral Tribunal, if and when raised.

47. Copy of this order be sent to the Learned Arbitrator.

JYOTI SINGH, J.

MAY 19th , 2020
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