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

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*Date of Judgment: 1<sup>st</sup> September, 2021*

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**ARB.P. 658/2021**

M/S FOODWORLD

..... Petitioner

Through Mr Khushboo Singh, Advocate.

versus

INDIAN RAILWAY CATERING AND TOURISM  
CORPORATION LTD.

..... Respondent

Through Mr Nikhil Majithia, Standing  
Counsel for IRCTC.

**CORAM:**

**HON'BLE MR. JUSTICE VIBHU BAKHRU**

**VIBHU BAKHRU, J. (ORAL)**

1. The petitioner has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act'), *inter alia*, praying that a Sole Arbitrator be appointed to adjudicate the disputes between the parties.

2. On 27.05.2013, Northern Railways had issued a Notice Inviting Tender (NIT) for Onboard Catering Services in Train no. 12263-64 (Hazarat Nizamuddin - Pune: Duronto Express). Subsequently, on 09.10.2013 and 23.10.2013, the Railway Board issued two circulars – CC no. 63/2013 and CC no. 67/2013. In terms of Circular no. 63/2013, the Railway Board revised the menu and catering service. In terms of Circular no. 67/2013, the Railway Board directed provision of Regular

Meals in place of Combo Meals.

3. The petitioner submitted its bid and, on 13.12.2013, it was awarded the license to provide Onboard Catering Services for the train in question (Train no. 12263-64, Hazarat Nizamuddin - Pune: Duronto Express).

4. Thereafter, on 27.03.2014, a Master License Agreement was executed between the petitioner and Northern Railways. It is averred in the petition that the same contained a Menu, as introduced by Circular no. 63 of 2013 and as partially modified by Circular No. 67 of 2013.

5. The petitioner states that on 06.08.2014, the Railway Board issued another circular (Circular no. 32/2014) in terms of which the petitioner was required to serve a Welcome Drink without reimbursement of any costs. This is the subject matter of some controversy and the petitioner claims that it approached the Indian Railway Mobile Caterers Association for making a representation to the concerned authority. It claims that such a representation was made in the month of June 2015.

6. In terms of the Catering Policy 2017, the respondent took over the services in respect of the train in question from Northern Railways, with effect from 1<sup>st</sup> May, 2017. To implement the same, a tripartite agreement dated 01.05.2017 was entered into between the petitioner, the Northern Railways and the respondent.

7. The petitioner claims that its grievances regarding the said

charges persisted and, on 07.06.2019, a meeting was convened between the various licensees and the concerned authorities of the respondent.

8. It is averred that by a letter dated 23.09.2019, the respondent informed the petitioner that it was eligible for renewal of license but the same was subject to it accepting the unbundling of services.

9. On 03.10.2019, the Railway Board took a decision that the licensees shall be reimbursed at the rate of regular meal tariff instead of at the tariff of a combo meal. According to the petitioner, this was pursuant to the representations made by the Licensees, including the petitioner, for resolution of the pending issues.

10. The dispute, essentially, relates to the petitioner's claim for reimbursement of the difference in tariff of a 'regular meal' and a 'combo meal' in terms of the said decision. According to the respondent, the said decision is applicable prospectively and therefore, the petitioner's claim for a difference in the tariff for a regular meal and a combo meal for a period prior to 03.10.2019, is unsustainable.

11. The petitioner disputes the same and contends that the said decision settled a long standing dispute and therefore, it is entitled to differences in tariffs even in respect of services rendered prior to 03.10.2019. In addition, the petitioner claims that there are other disputes between the parties as well, including in respect of the reimbursement costs of the Welcome Drink.

12. The learned counsel appearing for the respondent states that on

01.03.2021, the petitioner sent a letter claiming a sum of ₹2,40,40,995/ from the respondent. The petitioner also raised provisional invoices aggregating the aforesaid amount, towards reimbursement of the differences in the tariff of combo meals and regular meals for the period 01.07.2017 till 31.03.2020.

13. On 02.03.2021, the respondent terminated the license awarded to the petitioner. Following the same, the petitioner invoked the clause to refer the disputes to arbitration by a notice dated 12.03.2021.

14. Admittedly, the Arbitral Tribunal has not been constituted as yet.

15. The Master License Agreement dated 27.03.2014 includes an Arbitration Clause that reads as under: -

**“ 20. ARTICLE 20 DISPUTE RESOLUTION**

20.1 In the event of any dispute, controversy or claim of any kind or nature arising under or in connection with this Agreement between the parties (“**Disputes**”), the parties shall firstly attempt to amicably resolve such Disputes through the highest level of negotiations and discussions.

20.2 In the event that Disputes between the parties subsist beyond 30 days of negotiations between the parties, then the Dispute shall be settled as per the provisions of the Arbitration and Conciliation Act, 1996. The dispute shall be referred to.

(a) Sole arbitration of a Gazetted Railway Officer appointed to be the arbitrator, by the General Manager of the Zonal Railway awarding the License. The Gazetted Railway Officer to be appointed as

arbitrator however will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of their duties as railway servant have expressed views on all or any of the matters under dispute or difference.

- (b) In the event of the arbitrator dying , neglecting or refusing to act or resigning or being unable to act for any reason, or his award being set aside by the court for any reason, it shall be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.
- (c) It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitrator at all.
- (d) The arbitrator may from time to time with the consent of all the parties to the contract enlarge the time for making the award.
- (e) Upon every and any such reference the assessment of the cost incidental to the reference and award respectively shall be in the discretion of the arbitrator.
- (f) Subject as aforesaid, the Arbitration and Conciliation Act, 1996 and the rules thereunder and any statutory modifications thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause.
- (g) The venue of the arbitration shall be the

place from which the acceptance note is issued or such other place as the arbitrator at his discretion may determine.

- (h) In this clause the authority to appoint the arbitrator includes, if there be no such authority, the officer who is for the time being discharging the functions of that authority, whether in addition to other functions or otherwise.

20.3 The award passed shall be final and binding and both Parties waive the right to appeal or contest the arbitral award.

20.4 It is further clarified that during the resolution of the Disputes, the License shall be obligated for the continued performance of its obligations under the Agreement until the resolution of the Disputes.

20.5 It is further clarified that Article – 20 (dispute resolution) shall not be applicable on para 4.6.

16. Mr. Majithia, learned counsel appearing for the respondent, states that there is no dispute as to the existence of the agreement to refer the subject disputes to arbitration in terms of Article 20 of the Master License Agreement. He, however, submits that the claims made by the petitioner are, *ex-facie*, barred by limitation and therefore the present petition is liable to be dismissed. He states that the payments were made to the petitioner in terms of the Circular nos. 63 of 2013 and 67 of 2013 and the same have never been challenged by the petitioner. He submits that the petitioner cannot claim any amount on account of difference between the combo meals and regular meals as the said issue is clearly covered by the aforementioned circulars.

17. He further submits that the petitioner's claim on account of meals served in the year 2017 is also barred by limitation as the notice invoking arbitration was issued on 12.03.2021 and therefore, any claim for any amount due prior to three years from the said date (prior to 12.03.2017) would be barred by limitation. He referred to the decision of the Supreme Court in ***Bharat Sanchar Nigam Ltd. And Ors. v. Nortel Networks India Pvt. Ltd.: SLP (C) No. 1531-32/2021 decided on 10.03.2021*** and contended that since the claims made by the petitioner are *ex-facie* barred by limitation, the present petition is liable to be dismissed.

18. After the introduction of Sub-section (6A) of Section 11 of the A&C Act, by virtue of the Arbitration and Conciliation (Amendment) Act, 2015, the scope of examination under Section 11 is limited to the existence of an arbitration agreement.

19. In ***M/s Duro Felguera, S.A. v. M/s Gangavaram Port Limited: (2017) 9 SCC 729***, the Supreme Court held as under:-

“48. Section 11(6-A) added by the 2015 Amendment, reads as follows:

“11. (6-A) 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.”(emphasis supplied)

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.\*\*\*

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618 and *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.”

20. The aforesaid view was reiterated by the Supreme Court in its later decision in *Mayawati Trading (P) Ltd. v. Pradyut Deb Burman*: (2019) 8 SCC 714.

21. In a subsequent decision in *Vidya Drolia and Ors v. Durga Trading Corporation*: (2021) 2 SCC 1, the Supreme Court held that even though examination under Sections 8 and 11 of the A&C Act is limited, the courts would not refer the parties to arbitration or appoint an arbitral tribunal in cases where the same would be a futile exercise. Thus, in cases where the disputes are non-existent or *ex-facie* not arbitrable, the courts would not relegate the parties to arbitration.



22. In *Bharat Sanchar Nigam Ltd. And Ors. v. Nortel Networks India Pvt. Ltd.* (*supra*), the Supreme Court referred to the decision in *Vidya Drolia and Ors v. Durga Trading Corporation* (*supra*) and held as under:-

“45.1...While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the Courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere “only” when it is “manifest” that the claims are ex facie time barred and dead, or there is no subsisting dispute.”

23. Thus, in cases where it is *ex-facie* clear that the disputes are barred by limitation, this Court would refrain from allowing an application under Section 11 of the A&C Act. However, it is necessary to bear in mind that the standard of examination under Section 11 of the A&C Act, does not permit this Court to undertake any detailed adjudicatory exercise.

24. At this stage it is also relevant to refer to the decision of the Supreme Court in *Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.: (2020) 2 SCC 455*. The relevant extracts of the said judgement are set out below:

“7.10. 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.

7.11. The doctrine of “kompetenz-kompetenz”, also referred to as “compétence-compétence”, or “compétence de la reconnu”, 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.

The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified [*Dresser Rand S.A. v. Bindal Agro Chem Ltd.*, (2006) 1 SCC 751. See also *BSNL v. Telephone Cables Ltd.*, (2010) 5 SCC 213 : (2010) 2 SCC (Civ) 352. Refer to *PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust*, (2018) 10 SCC 525 : (2019) 1 SCC (Civ) 1]. If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement.

Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement “is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”.

7.12. The legislative intent underlying the 1996 Act is party autonomy and minimal judicial intervention in the arbitral process. Under this regime, once the arbitrator is appointed, or the tribunal is constituted, all issues and objections are to be decided by the Arbitral Tribunal.

7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, “*including any objections*” with respect to the existence or validity of the arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator.”

[ underlined for emphasis]

25. Thus, the statutory scheme is that this Court will not decide any contentious issue concerning the dispute including whether the claim/dispute is barred by limitation, in proceedings under Section 11

of the A&C Act. At this stage, the examination is confined to existence of the agreement to refer the disputes to arbitration. However, an exception is made in cases where the courts finds that the disputes are *ex facie* not arbitrable, barred by limitation or where it is apparent that the disputes are frivolous, vexatious or dishonest. In such cases, the court would not exercise its jurisdiction to appoint arbitrators(s). The perspective that the court bears in such cases is not one of adjudicating any dispute but to refrain from exercising jurisdiction to appoint arbitrator(s) so as to not relegate the parties to a futile proceeding.

26. The question whether the disputes are barred by limitation must be apparent on the anvil of the '*ex-facie*' or the '*prima facie*' test. The object is clearly to weed out frivolous litigation in respect of the claims that are *ex-facie* meritless and dishonest or otherwise not maintainable. The object is not to preclude the parties from agitating their *bona fide* disputes before the forum of their choice.

27. Applying the aforesaid test, it is clear that the question of limitation as raised in the present case, is a contentious one and it would not be apposite for this Court to enter into an adjudicatory exercise to decide the same in these proceedings.

28. In view of the above, this Court considers it apposite to allow the present petition as there is no dispute as to the existence of an agreement to refer the disputes arising out of the Master License Agreement to arbitration. It is also apparent that the parties have been unable to concur on the appointment of a Sole Arbitrator. Accordingly, this Court

proposes to appoint Justice M. C. Garg, a former Judge of this Court (Mobile No: 9899337979) as the Sole Arbitrator to adjudicate the disputes between the parties.

29. The parties are at liberty to approach the learned Arbitrator for eliciting his consent and the necessary disclosure under Section 12(1) of the A&C Act. Let the same be furnished to this Court before the next date of hearing.

30. List on 22.09.2021.

**SEPTEMBER 1, 2021**

pkv

**VIBHU BAKHRU, J**