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

% ***Date of Decision: 14.11.2024***

\+ **O.M.P.(I) (COMM.) 251/2024**

(70) TECHNO GLOBAL SERVICES PRIVATE LIMITED.....Petitioner

Through: Mr. Anirudh Wadhwa, Mr. Hiren Choudhary, Mr. Kartik Gupta and Mr. Sarthak Bhardwaj, Advs.

versus

GAIL INDIA LIMITED & Anr. .....Respondent

Through: Mr. Sacchin Puri, Sr. Adv. along with Mr. Azmat H. Amanullam, Ms. Nitya Sharma, Ms. Aashna Bhola, Mr. Suman Raj and Mr. Sonu Kumar, Advs.

\+ **ARB.P. 1536/2024**

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CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (*Oral*)

ARB.P. 1536/2024

1. The present petition filed under section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as *'the A&C Act'*) seeks appointment of a sole arbitrator to adjudicate the disputes between the

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parties.

2. The disputes between the parties have arisen in context of an e-tender awarded to the petitioner by respondent no.2 on behalf of respondent no.1 for the work of '*laying and construction of 8"6" and 4" NB underground steel pipeline network and associated works at Jamshedpur GA for CGD project at six geographical areas (GAs)*'.

3. The work was awarded to the petitioner *vide* a Fax of Acceptance (hereinafter referred as *"FoA"*) dated 16.05.2018 and Letter of Acceptance dated 05.06.2018 (hereinafter referred as "*LoA*"). The tender documents read with the LoA and FoA formed the agreement between the parties. The agreement was valid for a period of 10 months from the date of FoA.

4. The applicable Special Condition Clause (SCC) contains an arbitration clause in the following terms:

> *"59.1 Clause No.107.1 of* GCC *pertaining to Arbitration shall be replaced by the following: -*
>
> *59.1.1 All disputes, controversies, or claims between the parties (except in matters where the decision of the Engineer-in-Charge is deemed to be final and binding) which cannot be mutually resolved within a reasonable time shall be referred to Arbitration by sole arbitrator.*
>
> *59.1.2 The Employer/Consultant (GAIL) shall suggest a panel of three independent and distinguished persons to the other party (Bidder/Contractor/ Supplier/Buyer as the case may be) to select any one among them to act as the sole Arbitrator.*
>
> *59.1.3 In the event of failure of the other party to select the sole Arbitrator within 30 days from the receipt of the communication suggesting the panel of arbitrators, the right of selection of sole Arbitrator by the other party shall stand forfeited and the Employer/Consultant shall have discretion to proceed with the appointment of the sole Arbitrator. The decision of the Employer/Consultant on the appointment of Sole Arbitrator shall be*

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final and binding on the parties.

5 9.1.4 The award of the Sole Arbitrator shall be final and binding on the parties and unless directed/awarded otherwise by the Sole Arbitrator, the cost of arbitration proceedings shall be shared equally by the Parties. The arbitration proceeding shall be in English language and the venue shall be at New Delhi, India.

59.1.5 Subject to the above, the provisions of (Indian) Arbitration & Conciliation Act, 1996 and the rules framed there under shall be applicable.

5 9.1.6 All matters relating to this contract are subject to the exclusive jurisdiction of the Courts situated in the State of Delhi (India).

59.1.7 Bidders/ Supplier/ Contractors may please note that the Arbitration & Conciliation Act, 1996 was enacted by the Indian Parliament and is based on United Nations Commission on International Trade Law (UNCITRAL, model law), which were prepared after extensive consultation with Arbitral Institutions and centres of International Commercial Arbitration. The United Nations General Assembly vide resolution 31 /98 adopted the UNCITRAL Arbitration rules on 15 December 1976."

5. It is averred that on 08.03.2024, the petitioner filed a complaint with the Corporate Vigilance Department (hereinafter referred as *"CVD"*) of the respondents followed by a complaint with the Economic Offences Wing, Bhubaneswar, *inter alia* on account of the petitioner allegedly suffering severe financial losses due to the failure of the respondents to clear the pending RA bills despite several communications/representations and reminders.

6. Thereafter, a Suspension Order cum Show Cause Notice dated 18.06.2024 was issued to the petitioner. The same was premised on the ground that the petitioner without taking prior approval from respondents, sub-contracted the work, to a third party i.e. M/s Maitri Enterprises, thereby violating Clause 37.1 of the General Conditions of Contract (GCC) and

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Signing Date:04.12.2024 13:39:37

Clause A.2 and A.3 of the Annexure -III to ITB.

7. The petitioner *vide* letter dated 01.07.2024 responded to the aforesaid notice and protested against the action of the respondents and vehemently opposed the allegations/averments levied against them.

8. On 03.07.2024, another communication was issued by the respondents wherein it was *inter alia* stated as under:-

> *"During the period of suspension, M/s. Techno Global Services Pvt. Ltd., Noida shall be under suspension for any business dealing with GAIL for an initial period of Six (06) months effective from 18.06.2024 wherein no enquiry/ bid/ tender shall be entertained from M/s Techno Global Services Pvt. Ltd., Noida as long as the name of M/s. Techno Global Services Pvt. Ltd., Noida appears in the suspension list. Further, ARC No. 4100000539 dated 05.08.2020/ 18.09.2020 and all Release Orders (Ros) issued against the said ARC and its payment is suspended with effect from 18.06.2024, i.e. the date of issue of the Suspension Order Cum Show Cause Notice."*

9. Subsequently, the petitioner sent a notice invoking arbitration stipulation contained in Clause 59.1 of SCC *inter alia* stating as under:-

> *"11) We are issuing this notice in terms of Section 21 of the Arbitration and Conciliation Act, 1996. It is relevant to note that while Clause 44 of 1TB provides for exhausting the process of conciliation prior to invocation of arbitration, the said clause is superseded by Clause 59 of the sec which governs resolution of disputes and does not mandate any conciliation prior to proceeding for arbitration. In any case, it is settled law that conciliation as a dispute resolution mechanism is a voluntary process and can only be initiated by consent and no party can be mandated to participate in conciliation. In any case, conciliation can be terminated by any party at any time. In the present case, no meaningful purpose would be fulfilled by participating in any conciliation proceedings. We have made multiple attempts to amicably and mutually resolve the issues raised in this notice. These attempts have failed due to the non-cooperation of GAIL and its officials.*
>
> *12) In view of the arbitrary, unreasonable and unlawful actions of the concerned officials of GAIL, there is no likelihood that the process of conciliation will bear any fruit. Accordingly, we expressly reject the conciliation process, even if applicable, and seek reference of the*

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Signing Date:04.12.2024 13:39:37

abovementioned disputes to arbitration in terms of Clause 59 of the SCC read with Section 21 of the Arbitration and Conciliation Act, 1996.

13) You may note that the process of appointment of sole arbitrator as provided in SCC Clause 59 of the Agreement is inapplicable being contrary to the settled legal principles regarding appointment of arbitrators as laid down in various judgments of the Hon'ble Supreme Court. You are hereby requested to participate in joint discussions to appoint a mutually agreeable independent and impartial sole arbitrator to decide our claims within a period of 30 days from the date of receipt of this notice."

10. *Vide* reply dated 10.09.2024, the respondents strongly refuted the request of the petitioner seeking arbitration on the ground that the claims sought to be raised by petitioner were excluded from the ambit of the arbitration clause and the present petition has been filed seeking constitution of an Arbitral Tribunal. In this regard it was specifically stated in paragraph 12 of the said communication as under:-

"12.Given that clause 38.3 of the ITB categorically excludes the application of the arbitration clause under the contractual documents to any consequential issue/ dispute arising from action taken in terms of the procedure for banning specified in Annexure III to the ITB, i.e., as has happened in the present case, your alleged claims related to / arising from the actions pertaining to banning, including the suspension notice stand excluded from the ambit of the arbitration clause and, as such cannot be adjudicated in an arbitration or proceedings ancillary thereto. Thus, the same are not arbitrable and cannot be referred to arbitration at all."

11. Consequently, the present petition has been filed seeking constitution of an Arbitral Tribunal to adjudicate the disputes between the parties.

12. In the reply filed on behalf of the respondents, the respondents have again ascertained that the present petition is not maintainable since the subject matter of the arbitration is excluded from the ambit of the arbitration clause. It has been averred in the reply as under:-

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Signing Date:04.12.2024 13:39:37

> *"7) As such, the present petition under section 11 of the Arbitration and Conciliation Act, 1996* ***("the Act")*** *is not maintainable since the arbitration clause has no application and stands expressly excluded from this subject matter. Thus, no reference can be made to an Arbitrator with respect to the suspension cum show cause notice for banning and any related/consequential issues.*
>
> *17) Given that clause 38.3 of the ITB categorically excludes the application of the arbitration clause under the contractual documents to any consequential issue / dispute arising from action taken in terms of the procedure for banning specified in Annexure III to the ITB, i.e., as has happened in the present case, the present petition under section 11 of the Act is not at all maintainable as all the claims alleged arise out of and/or are consequential to the issue of banning and payments have been suspended under the subject contract owing to the initiation of the banning process.*
>
> *18) Thus, any issue or dispute related to the procedure for banning, including the alleged claims raised by the Petitioner's ostensible notice u/s 21 of the Act are expressly excluded from the ambit of the arbitration clause and, as such, cannot be adjudicated in an arbitration or proceedings ancillary thereto, and the subject matter cannot be referred to arbitration. Notably, an essential prerequisite for a petition under section 11 of the Act must be the existence of a valid arbitration clause where the subject matter has not been excepted".*

13. The respondents have relied on a Judgment of this Court in ***AVM Oil Fields Services v. GAIL Gas Limited***, 2019 SCC OnLine Del 11231.

14. Having heard respective counsel for the parties at length, this Court does not find any merit in the contentions raised on behalf of the respondents. In the invocation notice sent on behalf of the petitioner, the claim sought to be raised by the petitioner in the arbitral proceedings has been set out as under:-

> *10. We hereby invoke the dispute resolution mechanism to claim our pending payments and to challenge the validity of suspension orders passed by GAIL. Our monetary claims against GAIL exceed Rs. 10 Crores. A summary of our claims is provided below:-*
>
> *a. Payment of amounts mentioned in Annexure A, tentatively*

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Signing Date:04.12.2024 13:39:37

quantified and subject to modification, supplementation, addition or deletion at the time of submission of statement of claim.

b. *Interest on all amounts claimed @ 18% per annum from the date they became contractually due till date of actual payment.*
c. *Declaration that the Suspension Order cum Show Cause Notice dated 18.06.2024 and Suspension Order dated 03.07.2024 were issued without any factual or legal basis and treated as void ab initio.*
d. *Declaration that TGSPL has not breached provisions of GCC Clause 37 as alleged by GAIL.*
e. *Mandatory injunction directing GAIL to release our Bank Guarantees."*

15. It is noticed that the relief qua payment of outstanding amounts as referred to in the notice invoking arbitration and interest thereon cannot be said to be *ex facie* barred. Also, whether or not the other reliefs falls within the scope of "Excepted Matters" is an aspect which will require an interpretative exercise construing the relevant terms of the contract between the parties in juxtaposition with the relief sought to be claimed.

16. It has been held in a number of cases that the decision as to whether, a particular claim falls within the scope of "Excepted Matters" is itself an aspect that is best left to be decided by a duly constituted Arbitral Tribunal. In this regards, reference is apposite to the judgments of this Court in ***N.K Sharma v. General Manager Northern Railway***, 2023 SCC OnLine Del 7576 and ***Braithwaite Burn and Jessop Construction Co. Ltd v. Northern Railway***, 2023 SCC OnLine Del 8176.

17. Importantly, in ***SBI General Insurance Co. Ltd. Vs. Krish Spinning***, 2024 INSC 532 and ***Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899, In re***, 2023 SCC OnLine SC 1666 and it has now been exclusively and authoritatively laid down that the scope of enquiry in the present

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Signing Date:04.12.2024 13:39:37

proceedings is confined to ascertaining the existence of an Arbitration Agreement and "nothing else".

18. ***In re, Interplay*** (Supra) observes as under:-

> *"163. 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.*
>
> *164. Section 11(6A) 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 scrutinize 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. 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."*

19. In ***SBI General Insurance Co. Ltd.*** (supra) it has been held as under:-

> *"113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in In Re: Interplay (supra) that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a prima facie arbitration agreement and not any other issues. The relevant observations are extracted hereinbelow:*

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Signing Date:04.12.2024 13:39:37

> *"209. The above extract indicates that the **Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a prima facie arbitration agreement and not other issues". These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings**. Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a timebound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. […]"*
>
> *(Emphasis supplied)*
>
> *114. In view of the observations made by this Court in In Re. Interplay, it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in Vidya Drolia and adopted in NTPC v. SPML Infra Ltd. that the jurisdiction of the referral court when dealing with the issue of "accord and satisfaction" under Section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in In Re. Interplay."*
>
> *123. The power available to the referral courts has to be construed in the light of the fact that no right to appeal is available against any order passed by the referral court under Section 11 for either appointing or refusing to appoint an arbitrator. Thus, by delving into the domain of the arbitral tribunal at the nascent stage of Section 11, the referral courts also run the risk of leaving the claimant in a situation wherein it does not have any forum to approach for the adjudication of its claims, if it Section 11 application is rejected."*

20. In the circumstances, there is no impediment to constituting an Arbitral Tribunal to adjudicate the disputes between the parties. Moreover, in terms of the Judgment of the Supreme Court in ***Central Organisation for Railway Electrification Vs. ECI SPIC SMO MCML (JV) A Joint Venture***

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Signing Date:04.12.2024 13:39:37

Company, MANU/SC/1190/2024, an appointment procedure which contemplates appointment from a panel offered by one of the contracting parties to the other has held to be an invalid appointment procedure.

21. It is also relevant to note that upon receipt of the notice of invocation of arbitration, even the respondents have not followed the rigours/ appointment procedures envisaged in the arbitration clause.

22. As such, it is incumbent on this Court to appoint an independent Sole Arbitrator to adjudicate the disputes between the parties.

23. Accordingly, Justice (retd.) J.R.Midha (+91 9717495003) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

24. The respondents shall be at liberty to raise preliminary objections as before the learned sole arbitrator regards arbitrability/jurisdiction, including the objection as to whether any of the claim/s falls within the scope of "excepted matter". The learned sole arbitrator shall duly consider and decide the same in accordance with law.

25. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosure as required under Section 12 of the A&C Act.

26. It is agreed that the arbitration shall take place under the aegis of and under the rules of the Delhi International Arbitration Centre (DIAC).

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

28. Needless to say, nothing in this order shall be construed as an expression of opinion of this Court on the merits of the case.

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Signing Date:04.12.2024 13:39:37

29. The present petition stands disposed of in the above terms.

O.M.P.(I) (COMM.) 251/2024

30. This petition under Section 9 of the A&C Act seeks urgent interim orders.

31. It is averred in the present petition, *inter-alia* that the respondents seek to render the petitioner remediless by seeking to take advantage of ITB Clause 38.3 which provides that once a banning order is passed, the petitioner shall have no right to submit its claims to arbitration.

32. Since the Arbitral Tribunal has already been constituted to adjudicate the disputes between the parties, it would be apposite if the present petition under Section 9 of the A&C Act is treated as an application under Section 17 of the A&C Act and accordingly dealt with by the learned Sole Arbitrator. It is directed accordingly.

33. In view of the urgency emphasized by the learned counsel, the petitioner shall be at liberty to request the learned Sole Arbitrator for expeditious consideration of the application under Section 17 of the A&C Act.

34. The present petition is disposed of with the aforesaid directions. The pending applications are also disposed of.

SACHIN DATTA, J

NOVEMBER 14, 2024/*sl/uk*

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