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

\+ ARB.P. 977/2022

SUPER BLASTECH SOLUTIONS ..... Petitioner

Through: Mr. Sanjay Hegde, Sr. Advocate with Mr. Zain A. Khan, Mr. Shahrukh Ali, Mr. Raghav Gupta, Advocates (M:9871500924)

versus

RAJASTHAN EXPLOSIVES AND CHEMICALS LIMITED ..... Respondent

Through: Mr. Aditya Wadhwa, Mr. Ayush Shrivastava, Advocates (M:9910412299)

CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA

J U D G M E N T

% **15.12.2022**

MINI PUSHKARNA, J.

1. The present petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (in short "The Act") seeking appointment of an Arbitrator to adjudicate upon the disputes that have arisen between the parties.

2. The respondent company is engaged in the business of manufacturing and sale of explosives and its accessories. On 24.01.2019, vide Business Advisory and Management Agreement (hereinafter referred as Business Agreement), respondent company appointed the petitioner company to provide various business advisory support for product development, market development, running and

managing functions including in relation to production, research and development.

3. Certain disputes arose between petitioner and respondent. Hence, they proposed to resolve their disputes amicably by negotiations in accordance with Clause 11 of the Business Agreement. Clause 11 of the said Business Agreement containing the arbitration clause is reproduced as below:

> ***"11. Dispute Resolution***
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> *"11.1.* ***Arbitration.*** *In the event there is a dispute, controversy or claim that arises between the parties relating to this agreement or any interpretation hereof ('Dispute'), the parties agree that prior to attempting to resolve the Dispute by litigation, they will attempt to settle the Dispute amicably by good faith negotiation. In the event the parties fail to resolve a Dispute amicably within thirty (30) days of either party notifying the other of such dispute, the dispute shall be referred to arbitration of a single arbitrator mutually agreed upon between the parties. The arbitration proceedings shall be held in accordance with the rules of the Arbitration and Conciliation Act, 1996.*
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> *11.2.* ***Venue and Procedure****. The place of arbitration shall be Delhi and the language of the proceedings shall be English. The Arbitrator's award shall be substantiated in writing and the decision of the Arbitrator shall be binding on the Parties with the award being enforceable in any competent court of law. The costs of the Arbitration shall be awarded by the Arbitrator and shall be borne accordingly."*

4. Thus, in furtherance of the negotiations between them, petitioner and respondent decided to terminate the Business agreement and entered into Memorandum of Understanding (MOU) dated 24.02.2022 for termination of agreement. By way of MOU dated 24.02.2022, both the parties agreed to terminate the Business Agreement dated 24.01.2019. The said MOU recorded that both the parties will execute a Memorandum of Settlement on mutually agreed terms and conditions on or before 28.02.2022.

5. Pursuant to the aforesaid MOU, a Memorandum of Settlement dated 16.03.2022 was entered between the petitioner and the respondent setting down the terms of settlement between the parties. As per the Memorandum of Settlement dated 16.03.2022, it was decided that the petitioner will continue to supervise the operations of the respondent till 31.05.2022.

6. It is the case of the petitioner that soon after entering into the Memorandum of Settlement dated 16.03.2022, respondent in gross violation of the agreed terms and conditions started ousting the petitioner from firm prior to the agreed period and thus, various disputes emerged between the parties. Petitioner addressed an email dated 04.06.2022 to the respondent stating therein that the petitioner was not willing to give any further time to the respondent to comply with the settlement terms. Consequently, petitioner filed a petition under Section 9 of the Act before this Court, being OMP (I) (COMM) 201/2022, wherein vide order dated 20.06.2022, this Court directed the respondent to maintain status quo with regard to the plant and machinery. The said order dated 20.06.2022 was subsequently

modified by this Court vide order dated 30.11.2022, wherein it was clarified that the status quo order shall operate only with respect to the plant and machinery which had been supplied by the petitioner and that the respondents shall not create any third party rights or encumber the same. The said petition was disposed of with the consent of the parties vide order dated 30.11.2022.

7. Petitioner invoked the arbitration clause being Clause 11, as contained in the Business Agreement dated 24.01.2019 by way of letter dated 10.05.2022. Since the respondent did not act thereafter, the present petition has come to be filed.

8. The petition has been vehemently opposed on behalf of respondent on the ground that the disputes sought to be adjudicated upon by the petitioner are neither related nor within the scope of the Business Agreement and that the said disputes are non-arbitrable. It is contended that the present petition is not maintainable as the grievance of the petitioner is beyond the ambit of and wholly unconnected to the Business Agreement. The grievance of the petitioner seems to be the alleged non-performance of the terms of Memorandum of Settlement, which does not contain an arbitration clause, as such the instant petition is not maintainable.

9. It is further submitted on behalf of the respondent that the Business Agreement dated 24.01.2019 was an agreement whereby the respondent had appointed the petitioner as its consultant to provide business advisory support in the nature of general, technical and managerial advice and assistance and support services to the respondent. The arbitration clause of the Business Agreement sought

to be invoked by the petitioner is limited to the disputes between the parties relating to the Business Agreement. Therefore, it is contended that the disputes cannot be referred for adjudication to an Arbitral Tribunal constituted under the terms of the Business Agreement.

10. In support of its contentions, respondent has relied upon the following judgments:

- *Oriental Insurance Co. Ltd. Vs. Narbheram Power and Steel (P) Ltd., (2018) 6 SCC 534*
- *Harsha Construction Vs. Union of India, (2014) 9 SCC 246*
- *Rajasthan State Industrial Development and Investment Corporation Vs. Diamond and Gem Development Corporation Ltd., (2013) 5 SCC 470*
- *Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coal Field Limited, (2020) 2 SCC 455*
- *Vidya Drolia Vs. Durga Trading Corporation, (2021) 2 SCC 1*
- *M/s Emaar India Ltd. Vs. Tarun Aggarwal Projects LLP & Anr., 2022 SCC OnLine SC 1328*
- *Indian Oil Corporation Limited Vs. NCC Limited, 2022 SCC OnLine SC 896*
- *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*

11. I have heard the parties and perused the record.

12. The arbitration clause as contained in Clause 11 of the Business

Agreement dated 24.01.2019 clearly stipulates that in the event there is any dispute, controversy or claim that arises between the parties relating to the agreement or any interpretation thereof, the parties will attempt to settle the disputes amicably by good faith negotiation. Thus, when disputes arose with respect to the business agreement dated 24.01.2019, in terms of the aforesaid Clause 11, the parties entered into MOU dated 24.02.2022 for termination of the Business Agreement dated 24.01.2019. The said MOU dated 24.02.2022 envisaged entering into a Memorandum of Settlement between the parties in order to set down the terms of settlement on mutually agreed terms and conditions. In pursuance thereof, Memorandum of Settlement dated 16.03.2022 was entered between the parties, which detailed the terms of settlement between the parties.

13. Examination of the aforesaid facts clearly manifests that the subsequent MOU dated 24.02.2022 and Memorandum of Settlement dated 16.03.2022 emanate from the Business Agreement dated 24.01.2019 entered between the parties. The disputes which have arisen pertain to non-compliance of the terms and conditions of the settlement agreement between the parties, which essentially deals with settlement of the disputes which arose out of the Business Agreement dated 24.01.2019 between the parties. Therefore, the contention on behalf of respondent that the disputes sought to be adjudicated are neither related to nor within the scope of the Business Agreement, is totally erroneous and liable to be rejected.

14. Clause 10.8 of the Business Agreement dated 24.01.2019 specifies unequivocally that the dispute resolution clause shall survive

the termination of the said agreement. Clause 10.8 of the Business Agreement dated 24.01.2019 reads as under:

> *"10.8. Survival. The provisions of clause 1 (Definitions and Interpretation), clause 6 (Representations and Warranties), clause 7 (Confidentiality), clause 9 (Consequences of Termination), clause 10 (Miscellaneous), clause 11 (Dispute Resolution) and clause12 (Governing Law) shall survive the termination of this Agreement."*

15. In view of the aforesaid, the arbitration clause has survived, even after termination of the Business Agreement dated 24.01.2019. Even otherwise, there is commonality of disputes that have arisen pursuant to transaction between the parties owing to various deeds/MOU signed between the parties, which are intrinsically linked to the Business Agreement dated 24.01.2019.

16. Law is well settled that an arbitration agreement is a separate and severable clause and survives even if the contract comes to an end. Justice DY Chandrachud, (as he was then) in a Division Bench case of Bombay High Court, ***Mulheim Pipecoatings GmbH Vs Welspun Fintrade Limited and Another***, reported as 2013 SCC OnLine Bom 1048, elucidated the principles of Doctrine of separability, thereby holding that upon termination of the main contract, the arbitration agreement does not ipso facto or necessarily come to an end. It was held as follows:-

> *"**46.** We now formulate the essential features of the doctrine of separability. These are:*
> *(i) The arbitration agreement constitutes a collateral term in the contract which relates to the resolution of disputes and not to the performance of the contract. Whereas the*

substantive terms of a contract define the rights and obligations of the parties, an arbitration agreement provides for modalities agreed upon by parties for the resolution of their disputes. Parties agree thereby to have their disputes resolved before an arbitral tribunal as distinct from the ordinary courts of law in the jurisdiction;

(ii) Upon the termination of the main contract, the arbitration agreement does not ipso facto or necessarily come to an end;

(iii) The issue as to whether the arbitration agreement survives or perishes along with the main contract would depend upon the nature of the controversy and its effect upon the existence or survival of the contract itself;

(iv) If the nature of the controversy is such that the main contract would itself be treated as non est in the sense that it never came into existence or was void, the arbitration clause cannot operate, for along with the original contract, the arbitration agreement is also void. Similarly, though the contract was validly executed, parties may put an end to it as if it had never existed and substitute a new contract solely governing their rights and liabilities thereunder. Even in such a case, since the original contract is extinguished or annihilated by another, the arbitration clause forming a part of the contract would perish with it;

(v) There may, however, be cases where it is the future performance of the contract that has come to an end. Such an eventuality may arise due to a number of circumstances, in which one or both the parties may be discharged from further performance. Termination of the contract by one party, repudiation of the contract by one party and its acceptance by the other and frustration of the contract are some of the circumstances. The controversy in such matters arises upon or in relation to or in connection with the contract. In all such cases, the contract is not put an end to for all purposes because there may be rights and obligations which had arisen earlier when it had not come to an end. The contract subsists for those purposes and the

arbitration clause would operate for those purposes;
(vi) The doctrine of separability requires, for the arbitration agreement to be null and void, inoperative or incapable of performance, a direct impeachment of the arbitration agreement and not simply a parasitical impeachment based on a challenge to the validity or enforceability of the main agreement. In other words, arguments for impeaching the arbitration agreement must be based on facts which are specific to the arbitration agreement. There may, of course, be facts which are specific to both the main agreement and the arbitration agreement, but there may well be facts which are specific to the main agreement, but not to the arbitration agreement. In the former case, the arbitration clause would perish with the main contract while in the latter case, it would not. Another way of considering the matter is whether it is the further performance of the contract that is brought to an end or it is the existence of the contract which is brought to an end. In the former case, where the further performance of the contract has been brought to an end, the arbitration clause would survive whereas when the existence of the contract is itself brought to an end, the arbitration clause would not survive."

17. Similarly, Supreme Court in the case of *N.N. Global Mercantile Pvt. Ltd. Vs. Indo Unique , 2021 SCC OnLine SC 13,* while dealing with the doctrine of separability in relation to arbitration agreements, has held as follows:-

*"**4.** It is well settled in arbitration jurisprudence that an arbitration agreement is a distinct and separate agreement, which is independent from the substantive commercial contract in which it is embedded. This is based on the premise that when parties enter into a commercial contract containing an arbitration clause, they are entering into two separate agreements viz. : (i) the substantive contract which contains the rights and*

obligations of the parties arising from the commercial transaction; and (ii) the arbitration agreement which contains the binding obligation of the parties to resolve their disputes through the mode of arbitration.

4.1. *The autonomy of the arbitration agreement is based on the twin concepts of separability and kompetenz-kompetenz. The doctrines of separability and kompetenz-kompetenz though inter-related, are distinct, and play an important role in promoting the autonomy of the arbitral process.*

4.2. *The doctrine of separability of the arbitration agreement connotes that the invalidity, ineffectiveness, or termination of the substantive commercial contract, would not affect the validity of the arbitration agreement, except if the arbitration agreement itself is directly impeached on the ground that the arbitration agreement is void ab initio.*

4.3. *The doctrine of kompetenz-kompetenz implies that the Arbitral Tribunal has the competence to determine and rule on its own jurisdiction, including objections with respect to the existence, validity, and scope of the arbitration agreement, in the first instance, which is subject to judicial scrutiny by the courts at a later stage of the proceedings. Under the Arbitration Act, the challenge before the Court is maintainable only after the final award is passed as provided by sub-section (6) of Section 16. The stage at which the order of the tribunal regarding its jurisdiction is amenable to judicial review, varies from jurisdiction to jurisdiction. The doctrine of kompetenz-kompetenz has evolved to minimise judicial intervention at the pre-reference stage, and reduce unmeritorious challenges raised on the issue of jurisdiction of the Arbitral Tribunal.*

4.4. *The doctrine of separability was expounded in the judgment of Heyman v. Darwins Ltd. [Heyman v. Darwins Ltd., 1942 AC 356 (HL)] by the House of Lords wherein it was held that English common law had been evolving towards the recognition of an arbitration clause as a separate contract which survives the termination of the*

main contract. Lord Wright in his opinion stated that: (AC p. 377)

"... an arbitration agreement is collateral to the substantial stipulations of the contract. It is merely procedural and ancillary, it is a mode of settling disputes, though the agreement to do so is itself subject to the discretion of the court."

Lord MacMillan in his opinion stated that: (Heyman case [Heyman v. Darwins Ltd., 1942 AC 356 (HL)], AC p. 374)

"... It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.""

18. Even if a contract comes to an end by way of termination or subsequent agreement between the parties, the arbitration clause will not be rendered inoperative, except in cases where the contract containing the arbitration clause is completely extinguished and substituted by a new contract that exclusively and entirely governs the relations between the parties. In the facts and circumstances of the present case the arbitration clause will survive for resolution of disputes, even after termination of the contract between the parties containing the arbitration clause. This is for the reason that in the present case, the Memorandum of Settlement essentially contains terms of settlement of disputes which originated from original Business Agreement between the parties. The Business Agreement dated 24.01.2019 envisaged that the petitioner herein provides various business advisory support for product development, market development and managing functions in relation to production,

research and development, manufacturing, marketing, human resource, etc. Subsequently, by Memorandum of Understanding dated 24.02.2022, it was agreed that the arrangement as envisaged in Business Agreement dated 24.01.2019 shall be discontinued w.e.f. 30.06.2022. Afterwards, parties entered into Memorandum of Settlement dated 16.03.2022 wherein they mutually agreed to discontinue the arrangement as contemplated in the Business Agreement dated 24.01.2019 w.e.f. 31.05.2022. Thus, in Memorandum of Settlement dated 16.03.2022, it is categorically recorded that the petitioner herein will continue to supervise the operations of respondent till May 31,2022 under the agreement. The present disputes, as sought to be referred to arbitration, arose on account of allegations of the petitioner against the respondent for violation of the agreed terms of MOU. As seen above, the MOU relates to the terms and conditions envisioned in the Business Agreement, thereby restricting supervisor role of petitioner over the operations of respondent under the said Business Agreement till 31.05.2022. Hence, it is apparent that the present disputes are directly, connected and linked to the Business Agreement, which contains the arbitration clause. Thus, the submission on behalf of respondent that present disputes are not related to the Business Agreement, is unacceptable.

19. Holding that arbitration clause relates to resolution of disputes and not performance, Supreme Court in the case of ***National Agricultural Coop. Marketing Federation India Ltd. Vs Gains Trading Ltd.***, 2007 SCC OnLine SC 800 has held as follows:-

> *"**6.** The respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution of disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. (Vide Heyman v. Darwins Ltd. [1942 AC 356 : (1942) 1 All ER 337 (HL)] , Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 13] and Naihati Jute Mills Ltd. v. Khyaliram Jagannath [AIR 1968 SC 522] .) This position is now statutorily recognised. Sub-section (1) of Section 16 of the Act makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contract, has to be treated as an agreement independent of the other terms of the contract; and a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. The first contention is, therefore, liable to be rejected."*

20. It is pertinent to note here that in a case under Section 11 of the Act, the court would generally refer the matter to arbitration, unless the court is ex facie satisfied that the disputes are not arbitrable. Courts have time and again held in favour of referring the disputes to arbitration, even when contentions have been raised with respect to arbitrability of disputes. Thus, Supreme Court in the case of ***A. Ayyasamy Vs A. Paramasivam and others,*** 2016 SCC OnLine SC 1110 has held that:-

*"**12.2.** When arbitration proceedings are triggered by one of the parties because of the existence of an arbitration agreement between them, Section 5 of the Act, by a non obstante clause, provides a clear message that there should not be any judicial intervention at that stage scuttling the arbitration proceedings. Even if the other party has objection to initiation of such arbitration proceedings on the ground that there is no arbitration agreement or validity of the arbitration clause or the competence of the Arbitral Tribunal is challenged, Section 16, in clear terms, stipulates that such objections are to be raised before the Arbitral Tribunal itself which is to decide, in the first instance, whether there is any substance in questioning the validity of the arbitration proceedings on any of the aforesaid grounds. It follows that the party is not allowed to rush to the court for an adjudication. Even after the Arbitral Tribunal rules on its jurisdiction and decides that arbitration clause is valid or the Arbitral Tribunal is legally constituted, the aggrieved party has to wait till the final award is pronounced and only at that stage the aggrieved party is allowed to raise such objection before the court in proceedings under Section 34 of the Act while challenging the arbitral award*

…….

***33.** Section 16 empowers the Arbitral Tribunal to rule upon its own jurisdiction, including ruling on any objection with respect to the existence or validity of an arbitration agreement. Section 16(1)(b) stipulates that a decision by the Arbitral Tribunal that a contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Hence, the invalidity of the contract between the parties does not render the arbitration agreement invalid as a consequence of law. This recognises as inhering in the arbitrator the jurisdiction to consider whether the main contract (other than the arbitration clause) is null and void. The arbitration agreement survives for determining whether the contract*

> *in which the arbitration clause is embodied is null and void, which would include voidability on the ground of fraud. The severability of the arbitration agreement is a doctrinal development of crucial significance. For, it leaves the adjudicatory power of the Arbitral Tribunal unaffected, over any objection that the main contract between the parties is affected by fraud or undue influence.*"

21. In view of the aforesaid discussion, the present petition is allowed. Justice Manmohan Singh (Retd.), former judge of this Court, (M): 9717495001 is appointed as Sole Arbitrator to adjudicate the disputes between the parties.

22. The parties are directed to seek requisite disclosures under Section 12 of the Act from the ld. Sole Arbitrator before commencement of arbitration proceedings.

23. The learned Sole Arbitrator shall be entitled to fee as stipulated in the Fourth Schedule to the Act.

24. All rights and contentions of parties are left open for consideration by the learned Sole Arbitrator.

25. The present petition is disposed of in the aforesaid terms.

(MINI PUSHKARNA)
JUDGE

DECEMBER 15, 2022
au/c