**HIGH COURT OF JUDICATURE FOR RAJASTHAN**
**BENCH AT JAIPUR**

S.B. Arbitration Application No. 23/2021

Vimlesh Baregama



----Applicant

Versus

Manglam Cement Ltd. Through Its President, Registered Office At P.o. Aditya Nagar-326520, Morak, District Kota (Raj)

----Respondent

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| For Applicant | : | Mr. Vimlesh Baregama, petitioner in person. |
| For Respondent(s) | : | Mr. Rishabh Khandelwal Advocate. |
| Amicus Curiae | : | Mr. Susshil Daga, Advocate. |

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**HON'BLE THE CHIEF JUSTICE MR. MANINDRA MOHAN SHRIVASTAVA**

**Order**

**Reportable**

**28/03/2024**

1. Applicant has preferred an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act of 1996') for appointment of sole arbitrator for adjudication of the dispute, which is said to have arisen between the applicant and non-applicant with reference to appointment letter dated 16.07.2012.

2. The applicant claims that he was initially appointed with the respondent on the post of Assistant in purchase department vide appointment letter dated 16.07.2012. In the application, it has been stated that one of the condition in the appointment letter was that all the disputes regarding the service of the applicant will

be referred to the arbitrator for adjudication. Pursuant to a departmental enquiry initiated vide charge-sheet dated 18.03.2020 by the respondent against the applicant, the applicant was dismissed from service vide order dated 20.08.2020. On representation made to the Collector, dispute was referred to the Joint Labour Commissioner, who vide order dated 11.09.2020 closed the case stating that it lacked the jurisdiction. Finally a notice was given to the respondent by invoking arbitration clause and seeking appointment of an arbitrator. The applicant sent a notice invoking arbitration clause and nominated an arbitrator of his choice. The respondent refused to concur with the nomination made by the applicant. In these circumstances, the applicant has filed the present application seeking appointment of an arbitrator in terms of the arbitration clause as contained in his appointment order dated 16.07.2012.



3. In the reply, respondent has come out with the case that the applicant has filed application concealing the fact that after legal notice for appointment of an arbitrator was given by the applicant, the applicant settled the dispute and entered into a full & final settlement with the respondent Company through letter dated 05.12.2020, whereby, the applicant had accepted cheques against full & final settlement towards all his disputes, which was duly counter signed by the applicant himself. As per clause No.4(d) of the appointment letter dated 16.07.2012, either party could terminate the appointment by giving three months notice or salary in lieu thereof. Three months salary had already been paid in full & final account settlement dated 05.12.2020, which was duly signed and accepted by the applicant, therefore, no dispute exists

between the parties. Copy of letter dated 05.12.2020 has also been placed on record. It is also averred in the reply that the applicant had encashed all the cheques towards full & final settlement and has received the payments also. Concealing all the facts as above, the applicant has filed application seeking appointment of an arbitrator. In sum and substance, the reply of the respondent is that the applicant entered into settlement of all disputes, received cheques and also got the amount encashed without any demeanur or protest, the dispute as raised through this application is non-arbitrable, frivolous and afterthought.



4. While the applicant has submitted that he was illegally terminated from services and has raised various grounds to assail correctness and validity of the order of dismissal from service, respondent-non-applicant's case has been that on a *prima-facie* view, it is a non-arbitrable dispute on account of full & final settlement of all the claims.

5. We have heard learned counsel for the parties as also Amicus Curiae.

6. The issue which arises for consideration is whether, on the facts of the case, the dispute is non-arbitrable on account of full & final settlement of all the claims.

7. Before I deal with the factual aspects of the case, it is apposite to refer to recent judicial pronouncements of the Hon'ble Supreme Court on the aspect of non-arbitrability of the dispute and scope of judicial review with regard to non-arbitrability of the dispute.

8. In the case of **Indian Oil Corporation Limited Versus NCC Limited, (2023) 2 Supreme Court Cases 539**, the Hon'ble

Supreme Court, after survey of its earlier judicial pronouncements, particularly the decision in the case of **Vidya Drolia & Others Versus Durga Trading Corporation, (2021) 2 Supreme Court Cases 1**, observed as below:-

> "73. In the recent decision of this Court in *DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd* (2021) 16 SCC 743) in which this Court also had an occasion to consider Section 11(6-A) of the Arbitration Act and ultimately has observed, after referring to and considering the decision of the three-Judge Bench of this Court in *Vidya Drolia (supra)* that the jurisdiction of the Court under Section 11 of the Arbitration Act is primarily to find out whether there existed a written agreement between the parties for resolution of the dispute and whether the aggrieved party has made out a prima facie arguable case, it is further observed that limited jurisdiction, however, does not denude the Court of its judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood. In the said decision, this Court had taken note of the observations made in the case of *Vidya Drolia (supra)* that with a view to prevent wastage of public and private resources, the Court may conduct 'prima facie review' at the stage of reference to weed out any frivolous or vexatious claims."

9. In another decision in the case of **NTPC Limited Versus SPML Infra Limited, (2023) 9 Supreme Court Cases 385**, the Hon'ble Supreme Court considered the aspect as to whether it was an arbitrable dispute, in the factual background of that case that though initially there existed a dispute between the parties and a writ petition was also filed, negotiations between the parties culminated into a settlement agreement whereunder one of the party agreed to release the withheld bank guarantees and the

other party agreed to withdraw its pending writ petition and undertook not to initiate any other proceedings, including arbitration, under the subject contract. However, after its implementation by one of the parties, the other party sought to repudiate the settlement agreement and filed the application under Section 11 (6) of the Act of 1996 alleging coercion and economic duress in the execution of the settlement agreement.



10. In the aforesaid factual background and scanning through development of law and the legal position, it was explained by the Hon'ble Supreme Court as below:-

> "16. **Position of Law:** In the present case, we are concerned with the pre-referral jurisdiction of the High Court under Section 11 of the Act and would like to underscore the limited scope within which an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 has to be considered.
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> 17. The position of law with respect to the pre-referral jurisdiction, as it existed before the advent of Section 11(6-A) in the Act, was based on a well-articulated principle formulated by this Court in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd (2009) 1 SCC 267*. In *Boghara Polyfab*, this Court held that the issue of non-arbitrability of a dispute will have to be examined by the Court in cases where accord and discharge of the contract is alleged. Following the principle in *Boghara Polyfab*, this Court in *Union of India v. Master Construction Co*. (2011) 12 SCC 349 observed that when the validity of a discharge voucher, no-claim certificate or a settlement agreement is in dispute, the Court must *prima facie* examine the credibility of the allegations before referring the parties to arbitration. Yet again in *New India Assurance Co. Ltd. v. Genus Power Infrastructure Ltd*. (2015) 2 SCC 424, this Court observed that allegations of fraud, coercion, duress or undue influence must be *prima facie*

substantiated through evidence by the party raising the allegations.

18. In a legislative response to these precedents, through the Arbitration and Conciliation (Amendment) Act 2015, sub-section (6-A) was added to Section 11 of the Act, which 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*."
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> (emphasis supplied)

19. Taking cognizance of the legislative change, this Court in *Duro Felguera*, SA Versus Gangavaram Port Ltd., (2017) 9 SCC 729 noted that post the 2015 Amendments, the jurisdiction of the Court under Section 11(6) of the Act is limited to examining whether an arbitration agreement exists between the parties-"nothing more, nothing less"

20. However, in the year 2019, in *United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd*. (2019) 5 SCC 362, this Court had nevertheless accepted an objection of "accord and satisfaction" in opposition to an application for reference to arbitration.

21. It did not take much time for this Court to reverse the approach in *Antique Art Exports (P) Ltd*. (Supra). A three-Judge Bench in *Mayavati Trading (P) Ltd. Versus Pradyuat Deb Burman (2019) 8 SCC 714* expressly overruled the abovereferred decision in *Antique Art Exports*, observing that: (*Mayavati Trading case*, SCC pp. 724-25, Para-10)

> "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, 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.

(emphasis in original)



22. The entire case law on the subject was considered by a three-Judge Bench of this Court in Vidya Drolia (Supra), and an overarching principle with respect to the pre-referral jurisdiction under Section 11 (6) of the Act was laid down. The relevant portion of the judgment is as follows: (SCC pp. 120-21, paras 153-54)

"153. Accordingly, we hold that the expression "existence of an arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the Court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the Court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non- arbitrability.

154. Discussion under the heading "*Who Decides Arbitrability*?" can be crystallised as under:

154.1. Ratio of the decision in SBP & Co. Versus Patel Engg.Ltd. (2005) 8 SCC 618 on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

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

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

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

(emphasis in original and supplied)

23. The limited scope of judicial scrutiny at the pre-referral stage is navigated through the test of a 'prima facie review'.

This is explained as under: (Vidya Drolia case, SCC pp. 110-13, Paras 133-34 and 138-40)

> 133. Prima facie case in the context of Section 8 is not to be confused with the merits of the case put up by the parties which has to be established before the Arbitral Tribunal. It is restricted to the subject-matter of the suit being prima facie arbitrable under a valid arbitration agreement. *Prima facie case means that the assertions on these aspects are bona fide*. When read with the principles of separation and competence-competence and Section 34 of the Arbitration Act, the referral court without getting bogged down would compel the parties to abide unless there are good and substantial reasons to the contrary.
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> 134. *Prima facie examination is not full review but a primary first review* to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. *The prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage*. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject-matter are not arbitrable, the application under Section 8 would be rejected. At *this stage, the Court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial*…
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> 138. …. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the Arbitral Tribunal to decide.

139. We would not like to be too prescriptive, *albeit observe that the court may for legitimate reasons*, to prevent wastage of public and private resources, can *exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the Arbitral Tribunal*. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. *Conversely, if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration and the court*. There are certain cases where the prima facie examination may require a deeper consideration. The court's challenge is to find the right amount of and the context when it would examine the prima facie case or exercise restraint. *The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non-arbitrable*.

140. Accordingly, *when it appears that prima facie review would be inconclusive, or on consideration inadequate as it requires detailed examination, the matter should be left for final determination by the Arbitral Tribunal* selected by the parties by consent. The underlying rationale being not to delay or defer and to discourage parties from using referral proceeding as a ruse to delay and obstruct. In such cases a full review by the courts at this stage would encroach on the jurisdiction of the Arbitral Tribunal and violate the legislative scheme allocating jurisdiction between the courts and the Arbitral Tribunal. Centralisation of litigation with the Arbitral Tribunal as the primary and first adjudicator is beneficent as it helps in quicker and efficient resolution of disputes."

(emphasis supplied)

Having navigated through various judicial pronouncements and the common thread of *prima-facie* test, it was authoritatively held as below:-

"24. Following the *general rule and the principle* laid down in *Vidya Drolia*, this Court has consistently been holding that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. In *Pravin Electricals (P). Ltd. v. Galaxy Infra and Engg. (P). Ltd*. (2021) 5 SCC 671, *Sanjiv Prakash v. Seema Kukreja* (2021) 9 SCC 732 and *Indian Oil Corporation Ltd. v. NCC Ltd* (2023) 2 SCC 539., the parties were referred to arbitration, as the *prima facie* review in each of these cases on the objection of non-arbitrability was found to be inconclusive. Following the *exception to the general principle* that the Court may not refer parties to arbitration when it is clear that the case is manifestly and *ex facie* non-arbitrable, in *BSNL v. Nortel Networks (India) (P) Ltd*. (2021) 5 SCC 738 (hereinafter "Nortel Networks") and *Secunderabad Cantonment Board v. B. Ramachandraiah & Sons (2021) 5 SCC 705*, arbitration was refused as the claims of the parties were demonstrably time-barred.

**Eye of the needle**

25. The above-referred precedents crystallise the position of law that the pre-referral jurisdiction of the courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the *parties to the agreement* and the *applicant's privity* to the said agreement. These are matters which require a thorough examination by the referral court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

26. As a general rule and a principle, the arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and *rarely as a demurrer*, the Referral Court may reject claims which are *manifestly and ex-facie non-arbitrable*. Explaining this position, flowing from the principles laid down in *Vidya Drolia* (supra), this Court in a subsequent decision in *Nortel Networks* (supra) held: (*Nortel Networks case*, SCC p.764, para 45)

> "45. ..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."

27. The standard of scrutiny to examine the non-arbitrability of a claim is only *prima facie*. Referral courts must not undertake a full review of the contested facts; they must only be confined to a *primary first review* and let facts speak for themselves. This also requires the Courts to examine whether the assertion on arbitrability is *bona fide* or not. The *prima facie* scrutiny of the facts must lead to a clear conclusion that there is *not even a vestige of doubt that the claim is non-arbitrable*. On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration.

28. The limited scrutiny, through the *eye of the needle*, is necessary and compelling. It is intertwined with the duty of the Referral Court to *protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable*. It has been termed as a *legitimate* interference by Courts to refuse reference in order *to prevent wastage of public and private resources*. Further, as noted in *Vidya Drolia*, if this duty within the limited compass is not exercised, *and the Court*

*becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court*. Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to *act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator,* as explained in *DLF Home Developers Limited v. Rajapura Homes (P). Ltd.* (2021) 16 SCC 743"



11. In yet another recent judicial pronouncement in the case of **Magic Eye Developers Private Limited Versus M/s. Green Edge Infrastructure Private Limited & Others, (2023) 8 Supreme Court Cases 50**, following pertinent observations were made by the Hon'ble Supreme Court:-

"8. While considering the aforesaid issue, Section 11(6-A) of the Arbitration Act which has been added through the Arbitration and Conciliation Amendment Act, 2015 is required to be read, which 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)

9. Thus, post Arbitration and Conciliation Amendment Act, 2015, the jurisdiction of the court under Section 11(6) of the Act is limited to examining whether an arbitration agreement exists between the parties- "nothing more, nothing less". Thus, as per Section 11(6-A) of the Act, it is the duty cast upon the Referral Court to consider the dispute/issue with respect to the existence of an arbitration agreement.

> 10. At this stage, it is required to be noted that as per the settled position of law, pre-referral jurisdiction of the court under Section 11(6) of the Arbitration Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. The said matter requires a thorough examination by the Referral Court. (para 25 of the decision in NTPC). The Secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute. Both are different and distinct."

12. If the law consistently laid down in the aforesaid recent judicial pronouncements is applied to the facts and circumstances of the present case, we find that the applicant has sought appointment of an arbitrator painting a picture as if there exist a dispute between the parties, whereas, from the respondent's reply, it is revealed that a full & final settlement of all the claims of the applicant has been made, as would be clear from emphatic and specific reply filed by the respondent in which, it has been clearly stated that the parties have entered into full & final settlement vide letter dated 05.12.2020 whereby, the applicant accepted cheques. The letter dated 05.12.2020 was issued to the applicant in which it has been stated that cheques towards full & final settlement have been issued in his favour. As many as four cheques dated 03.12.2020 for a total amount of Rs.3,92,809/- were issued in favour of the applicant. The applicant not only acknowledged the receipt which is clear from his signature thereon, but also proceeded to encash the amounts under various cheques.

13. Having accepted four cheques of Rs.3,92,809/- towards full & final settlement, the applicant conveniently filed application before this Court seeking appointment of an arbitrator, suppressing and concealing the important fact regarding receipt of cheques and encashment of the same towards full & final settlement of all the disputes. There is no whisper in the application regarding acceptance and encashment of cheques towards full & final settlement of disputes. Even after reply was filed, no rejoinder has been filed supported by any affidavit.

14. While filing written submission along with copy of judgment in the case of **Magic Eye Developers Private Limited (Supra)** as also copy of judgment in the case of **M/s. Mayavati Trading Pvt. Ltd. Versus Pradyuat Deb Burman (Civil Appeal No.7023 of 2019, decided on 05.09.2019)** and certain documents without even supported by any affidavit, an attempt has been made to wriggle out of settlement aspect once the applicant is exposed that by concealing material fact regarding settlement, application was filed so as to raise afterthought grounds.

15. In the case of **NTPC Limited (Supra)**, having settled dispute, an application was filed seeking appointment of an arbitrator on various grounds only in order to wriggle out of settlement, alleging coercion and economic duress in execution of the settlement agreement. Upon screening of the case in hand, their Lordships in the Supreme Court concluded that the allegations of coercion and economic duress were not *bona fide* and that there were no pending claims between the parties for submission to arbitration. It was further observed that belated and

afterthought claim fits in the description that it was an attempt to initiate "ex-facie meritless, frivolous and dishonest litigation", followed by reasons for such conclusion. Present is a case where not even any allegation of coercion, fraud, misrepresentation or economic duress has been raised in the application seeking appointment of an arbitrator, warranting minute screening. Present is a case where the applicant has completely concealed the fact regarding settlement. Things would have been different had the applicant alleged coercion, fraud, misrepresentation or economic duress as the background in which he accepted and encashed four cheques given to him towards settlement and accepted by him. Present is a case where application seeking appointment of an arbitrator is based on concealment of fact regarding settlement between the parties.

16. In view of the above, I am of the view that present is a case where the applicant having settled all the disputes and towards full & final satisfaction of all his claims accepted four cheques and encahsed them also, seeks appointment of an arbitration. Present is clearly a non-arbitrable dispute and the application is as frivolous as it could be. Therefore, I am inclined to dismiss the application. Before parting with the case, I place on record my appreciation for the assistance rendered by the learned Amicus Curiae.

17. Accordingly, the application is dismissed.

(MANINDRA MOHAN SHRIVASTAVA),CJ

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