IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION APPLICATION NO.215 OF 2021

22Light through its Sole Proprietor Baljit Harbans Kohli … Applicant

Vs.

OESPL Private Limited … Respondent

Mr. A. S. Pal a/w. Mr. Siddharth Mehta and Mr. Siddhartha Puthoor i/b. Mehta & Padamsy for Applicant.

Mr. Anurag Bhatt a/w. Mr. Lokesh Pathak i/b. Mr. Abhiishek Bhaduri for Respondent.

CORAM : MANISH PITALE, J.
DATE : AUGUST 22, 2023

P.C. :

. Heard learned counsel for the parties.

2. By this application filed under Section 11 of the Arbitration and Conciliation Act, 1996, the applicant has approached this Court for appointment of an arbitrator in the light of an arbitration clause in a memorandum of understanding (MoU) executed between the parties. It is the case of the applicant that the arbitration clause was duly invoked and since there was no response on behalf of the respondent, the applicant was constrained to move this application under Section 11(6) of the aforesaid Act.

3. This application was adjourned on 19.04.2023 by a detailed order, recording arguments addressed on behalf of the rival parties on the central question that arises for consideration in the present application i.e. whether an arbitrable dispute at all exists for the present application to be considered and allowed for appointment of an arbitrator.

4. Mr. Pal, learned counsel appearing for the applicant invited attention of this Court to the MoU dated 30.03.2021, concerning various clauses including a specific clause pertaining to arbitration, which stipulates that disputes between the parties in connection with the agreement shall be referred to arbitration before a sole arbitrator and that such an arbitrator shall be a counsel practicing in the High Court of Bombay.

5. It is the case of the applicant that it was engaged by the respondent for financial services and to utilize its expertise in the said field for arranging finance for the respondent. It is also the case of the applicant that in pursuance thereof, the aforesaid MoU was executed and that the applicant took all necessary steps under the said MoU. Reliance is placed on exchange of e-mails between the parties, which referred to term sheet being prepared by the applicant in the context of arranging finances for the respondent. It is the case of the applicant that the term sheet was finally accepted by the respondent and in that light, specific amounts became due and payable to the applicant under the MoU. Attention of this Court was then invited to two invoices, both dated 10.08.2021, raised on behalf of the applicant, demanding specific fees as per the terms of the MoU that, according to the applicant, were due and payable from the respondent. The learned counsel then relied upon invocation notice dated 10.08.2021, wherein specific reliance was placed on the two invoices and claims were made on the basis of the same. The applicant referred to the arbitration clause and then invoked the same, suggesting the name of the sole arbitrator before whom disputes between the parties could be arbitrated. It is submitted that there was no response to the said notice and hence, the applicant filed the present application.

5. The learned counsel appearing for the applicant placed reliance

on judgment of the Supreme Court in the case of *Meenakshi Solar Power Pvt. Ltd. Vs. Abhyudaya Green Economic Zones Pvt. Ltd.*, **2022 SCC OnLine SC 1616**, to contend that the objection being raised by the respondent regarding alleged non-arbitrability of the dispute ought to be left to the arbitrator and that there are sufficient grounds made out for allowing the present application.

6. On the other hand, Mr. Bhatt, learned counsel appearing for the respondent submitted that the claim of the applicant, in the present case, is based on the aforesaid two invoices dated 10.08.2021 and this is further evident from the contents of the present petition, wherein the applicant has reiterated the claim relatable to the said two invoices. It is submitted that the claim, as manifested in those two invoices, is based on the MoU and even if the relevant clauses of the MoU are to be accepted as they are, it can be demonstrated that the claim is frivolous and that in such a situation, there is no question of an arbitrable dispute existing for the matter, to be sent for arbitration as per the arbitration clause in the MoU.

7. It is submitted that as per the two invoices, the claims being raised on behalf of the applicant relate to firstly, preparation of an investment memorandum and secondly, amount being due and payable as fee to the applicant upon first disbursal. It is submitted that neither of the events have occurred and this is evident from the exchange of e-mails and term sheet communicated by the applicant. It is submitted that, from the contents of the e-mails exchanged between the parties, it is clear that the respondent never accepted the term sheet forwarded on behalf of the applicant and that there was no disbursal of amount at all. On this basis, it was submitted that in such a situation, the claims, as part of the dispute being raised by the applicant, are demonstrably frivolous and therefore, it cannot be said that there is an arbitrable

dispute between the parties. The learned counsel for the respondent placed reliance on the judgement of the Supreme Court in the case of *NTPC Limited Vs. SPML Infra Limited*, **2023 SCC OnLine SC 389**, wherein the Supreme Court referred to the narrow and confined jurisdiction available to the Court while deciding an application under Section 11 of the said Act as regards the question of the very arbitrability of the disputes. By relying upon the said judgement, it is submitted that this Court, upon examining the material on record, may hold that no case is made out for referring the alleged disputes to arbitration. On this basis, it is submitted that the petition deserves to be dismissed.

8. This Court has heard the learned counsel for the parties in the backdrop of the material placed on record. The arguments of the counsel have revolved around the question as to whether there is any arbitrable dispute at all between the parties, for the present petition to be allowed and the matter be sent to arbitration.

9. There is no dispute about the fact that the aforesaid MoU does consist of an arbitration clause. It is also not in dispute that the applicant did invoke the arbitration clause by issuing notice dated 10.08.2021.

10. In order to examine as to whether the applicant is justified in claiming that the objection sought to be raised on behalf of the respondent ought to be left for the decision of the arbitrator and that sufficient material is brought to the notice of this Court for allowing the petition, it is necessary to peruse the material on record, which includes the e-mails exchanged between the parties and the invoices dated 10.08.2021 on the basis of which, the applicant claims that an arbitrable dispute indeed arises in the facts of the present case.

11. The two invoices dated 10.08.2021 show that the applicant claims

specific amounts from the respondent towards fee, on the basis that such fee became due and payable as per the terms of the MoU. The invoices are, therefore, relatable to specific clauses of the MoU. A perusal of the same shows that one of the invoices pertaining to claim of fee of Rs.10,00,000/- is based on the applicant asserting that the fee was towards preparation of an investment memorandum and the other invoice pertains to claim of fee of Rs.17,90,00,000/- relatable to a clause in the MoU. The said clause specifically provides that the aforesaid amount of fees would be 2.5% on the date on which the first disbursement of financial assistance is received by the respondent, in pursuance of the services provided by the applicant. Thus, the specific claims raised on behalf of the applicant on the basis of which two invoices were issued were relatable to happening of specific events as per the MoU. It is significant that even in this application filed before this Court, the applicant has specifically raised claims relatable only to the two invoices.

12. It is the case of the applicant in support of the aforementioned claims that the term sheet was forwarded with e-mails to the respondent and that such documents would show that eventually, the term sheet was accepted by the respondent giving rise to the claims made by the applicant as manifested in the two invoices.

13. On the other hand, the respondent denies that the term sheet led to an acceptance on the part of the respondent and that, in any case admittedly, no disbursal of amount ever took place. In fact, it is stoutly denied by the respondent that any investment memorandum was prepared and communicated to the respondent. Reliance is also placed on behalf of the respondent on the communication by e-mail dated 01.06.2021, whereby the respondent specifically stated that engagement of the applicant came to be terminated. In this communication there is

also reference to Rs.34,75,500/- as fees paid to the applicant.

14. This Court is of the opinion that in order to examine as to whether it can be said that an arbitrable dispute has indeed arisen in the matter or not, the position of law clarified by the Supreme Court needs to be appreciated. In the case of **NTPC Limited Vs. SPML Infra Limited** (*supra*), the Supreme Court has referred to the narrow scope available to this Court under Section 11 of the said Act to examine the question of arbitrability of the dispute and in that context, it has been held as follows:-

> "25. Eye of the Needle: 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.
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> 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:
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> > "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..."
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> 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.
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> 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 (supra), 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 Pvt. Ltd."

15. Applying the said position of law, this Court is entitled to examine as to whether it can be said that an arbitrable dispute indeed exists between the parties. If it is found on a *prima facie* scrutiny of the material on record that the dispute sought to be raised on behalf of the applicant cannot be said to be a dispute at all, that can be raised in the facts and circumstances of the case, the present application cannot be granted.

16. As noted hereinabove, the claims, which form the disputes raised on behalf of the applicant, are based on the aforementioned invoices, which in turn are relatable to specific clauses of the MoU. The claim of the applicant as regards fee amounting to Rs.10,00,000/- is clearly relatable to the clause pertaining to preparation of investment memorandum. In the documents available on record including e-mails

exchanged between the parties, the invocation notice or the contents of the application filed under Section 11 of the said Act, there is no reference to, much less production of, any such investment memorandum on behalf of the applicant. When pointed queries were put to the learned counsel for the applicant in that regard, an attempt was made to seek time to take instructions. This Court refused to grant any further time in the matter, as this application was adjourned as far back as on 19.04.2023 after it was substantially heard. Be that as it may, it is an admitted position that there is nothing on record to even faintly suggest that the applicant ever prepared such investment memorandum and / or communicated the same to the respondent. Thus, the event as per the MoU, which would lead to a claim of fee of Rs.10,00,000/- being payable to the applicant, on the face of it, cannot be said to have occurred.

17. The other invoice is based on a clause of the MoU, which stipulates that the fees would be 2.5% of the amount eventually disbursed and that too, would be payable on the first such disbursement. It is not even the case of the applicant that there was any disbursal of amount in favour of the respondent in pursuance of the action undertaken by the applicant. Therefore, the specific event that would lead to a claim that could be raised by the applicant as per the MoU demonstrably has not occurred even on a *prima facie* appreciation of the material on record.

18. Apart from this, a perusal of the e-mails exchanged between the parties does not bring out the stated claim of the applicant that the respondent had finally accepted the term sheet as forwarded by the applicant. This aspect further pales into insignificance when it is an admitted position on facts that disbursal of amount never took place in the facts and circumstances of the present case.

19. The aforesaid material clearly indicates that the present case is one of those few cases, where this Court while exercising jurisdiction under Section 11 of the said Act within the narrow compass available, on a *prima facie* scrutiny of the material on record, can come to a conclusion that the dispute sought to be raised on behalf of the applicant is frivolous and merit less. In fact, this Court comes to the aforesaid conclusion on the basis of the material available on record and facts undisputed by the applicant itself.

20. Insofar as judgement of the Supreme Court in the case of **Meenakshi Solar Power Pvt. Ltd. Vs. Abhyudaya Green Economic Zones Pvt. Ltd.** (*supra*) is concerned, there cannot be any quarrel with the proposition laid down therein as regards classification and categories of issues that can be decided by the Court and / or the arbitral tribunal. The said judgement cannot take the case of the applicant any further, in the light of the findings rendered hereinabove that within the narrow compass of the jurisdiction available to this Court under Section 11 of the said Act, it is found on the basis of the material on record that the dispute sought to be raised by the applicant can be categorized as merit less and frivolous. In the face of such finding, this Court is not inclined to allow the present application.

21. In view of the above, the application is dismissed.

(MANISH PITALE, J.)

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