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

Date of decision: 07th OCTOBER, 2024

IN THE MATTER OF:

\+ **ARB.P. 1261/2024**

SH. RAJESH KUMAR GUPTA .....Petitioner

Through: Ms. Jyoti Nambiar, Advocate.

versus

SH. RAJENDER & ORS. .....Respondents

Through: Mr. Anil Kumar Singh, Advocate for Respondent Nos.2 to 6.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

1. Petitioner has approached this Court under Section 11(5) of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as "Arbitration Act"*) seeking appointment of a Sole Arbitrator in terms of the Arbitration Clause contained in the Agreement to Sell and Purchase dated 24.11.2005 entered into between the Parties, for adjudication of disputes which have arisen between the Petitioner and the Respondents.

2. Material on record indicates that *vide* Agreement to Sell and Purchase dated 24.11.2005 accompanied with GPA, Separate Deed of Wills, Affidavit, Receipt and Possession Letter, all dated 24.11.2005, the Respondents herein sold and transferred the ownership of an industrial plot being Plot measuring 300 Square Yards out of Khasra No.108/357 (0-06) situated with the extended Lal Dora Abadi of village Khera Kalan, Delhi –

110082 (*hereinafter referred to as "subject plot"*) allotted to them to the Petitioner. It is stated in the petition that these documents were executed since registration of Sale Deed was then not permissible. Material on record indicates that the subject plot was allotted to the Respondents on 06.05.2005 which was sold by the Respondents to the Petitioner herein within six months of the allotment of the subject plot i.e., on 24.11.2005. Material on record further indicates that on 10.12.2007, Khasra No.108/357(0-06) was withdrawn from the Respondents and in lieu of the same, Khasra No.108/176 (0-06) was allotted to them. It is stated that on 10.08.2020 when the Petitioner visited the plot, he noticed that somebody else was in the physical possession of the subject plot who did not disclose his identity and the Petitioner was informed that the subject plot was allotted to them after it was withdrawn from the Respondents. It is stated that the Petitioner, thereafter, approached the Respondents to make good the loss suffered by him which was not agreed upon by the Respondents.

3. Material on record indicates that a demand cum legal notice dated 27.08.2020 calling upon the Respondents to compensate the loss suffered by the Petitioner was sent to the Respondents. The Respondents *vide* letter dated 11.09.2020 sent a reply to the Petitioner wherein the Respondents denied to have executed the Agreement to Sell and Purchase dated 24.11.2005.

4. The Petitioner has, thereafter, approached this Court by filing the present petition seeking appointment of a Sole Arbitrator for adjudication of disputes between the Petitioner and the Respondents.

5. Notice was issued in the petition on 16.08.2024.

6. This Court has gone through the Agreement to Sell and Purchase

dated 24.11.2005 which has been entered into between the Petitioner and the Respondents. The said Agreement notes the sale consideration which is Rs.2,00,000/- which has been paid by the Petitioner by way of multiple cheques. The Agreement does disclose that the Respondents herein, who have been described as First Party in the Agreement, has represented themselves as the absolute owner of the subject plot. Clause 9 of the Agreement to Sell and Purchase dated 24.11.2005, which is an Arbitration Clause, reads as under:

> *"9. That in the eventuality of any dispute in between the parties on any matter relating to the said land/property/this agreement or any matter incidental thereof shall be referred to an arbitrator which shall be final and binding in between the parties hereto."*

7. Learned Counsel appearing for the Petitioner states that dispute has arisen between the parties and, therefore, as per the Arbitration Clause contained in the Agreement to Sell and Purchase dated 24.11.2005, a Sole Arbitrator may be appointed for adjudication of disputes.

8. *Per contra,* learned Counsel appearing for the Respondents states that since the Agreement to Sell and Purchase was entered into between the parties in the year 2005 and the arbitration has been invoked in the year 2020, the claim of the Petitioner is woefully barred by limitation. He states that the claim of the Petitioner is primarily against a third party since the subject plot is in the possession of a third party and, therefore, arbitration between the Petitioner and the Respondents is not possible. He also places reliance upon a Judgment passed by this Court in Pure Diets India Limited vs. Lokmangal Agro Industries Ltd, **2023 SCC OnLine Del 4486** and also a Judgment passed by the Apex Court in Vidya Drolia v. Durga Trading

Corpn., **(2021) 2 SCC 1** and more particularly Paragraph No.76 of the said Judgment which reads as under:

> *"**76.** In view of the above discussion, we would like to propound a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:*
>
> *(1) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.*
>
> *(2) **When cause of action and subject-matter of the dispute affects third-party rights; have erga omnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.***
>
> *(3) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.*
>
> *(4) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).*
>
> *These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject-matter is non-arbitrable. Only when the answer is affirmative that*

the subject-matter of the dispute would be non-arbitrable.

However, the aforesaid principles have to be applied with care and caution as observed in Olympus Superstructures (P) Ltd. [Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan, (1999) 5 SCC 651] : (SCC p. 669, para 35)

> *"35. ... Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman [Keir v. Leeman, (1846) 9 QB 371 : 115 ER 1315]). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter*
> *(Soilleux v. Herbst [Soilleux v. Herbst, (1801) 2 Bos & P 444 : 126 ER 1376] , Wilson v. Wilson [Wilson v. Wilson, (1848) 1 HL Cas 538] and Cahill v. Cahill [Cahill v. Cahill, (1883) LR 8 AC 420 (HL)])."* (emphasis supplied)

9. Learned Counsel for the Petitioner contends that the argument made by the Respondents regarding relief against the third parties does not find merit for the reason that the Petitioner herein is actually claiming for refund

of consideration amount and the Petitioner is not claiming any relief against a third party.

10. It is well settled that the principle of judicial non-interference in arbitral proceedings is fundamental to both domestic as well as international commercial arbitration and that the Arbitration Act is itself contained code.

11. The Apex Court in SBI General Insurance Co. Ltd. vs. Krish Spinning, **2024 SCC OnLine 1754** has observed as under:

> *"**114.** In view of the observations made by this Court in In Re : Interplay (supra), 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 (supra) and adopted in NTPC v. SPML (supra) 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 (supra).*
>
> *xxx*
>
> ***117.** By referring disputes to arbitration and appointing an arbitrator by exercise of the powers under Section 11, the referral court upholds and gives effect to the original understanding of the contracting parties that the specified disputes shall be resolved by arbitration. Mere appointment of the arbitral tribunal doesn't in any way mean that the referral court is diluting the sanctity of "accord and satisfaction" or is allowing the claimant to walk back on its contractual undertaking. On the contrary, it ensures that the principal of arbitral autonomy is upheld and the legislative intent of minimum judicial interference in*

arbitral proceedings is given full effect. Once the arbitral tribunal is constituted, it is always open for the defendant to raise the issue of "accord and satisfaction" before it, and only after such an objection is rejected by the arbitral tribunal, that the claims raised by the claimant can be adjudicated.

118. *Tests like the "eye of the needle" and "ex-facie meritless", although try to minimise the extent of judicial interference, yet they require the referral court to examine contested facts and appreciate prima facie evidence (however limited the scope of enquiry may be) and thus are not in conformity with the principles of modern arbitration which place arbitral autonomy and judicial non-interference on the highest pedestal.*

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122. *Once an arbitration agreement exists between parties, then the option of approaching the civil court becomes unavailable to them. In such a scenario, if the parties seek to raise a dispute, they necessarily have to do so before the arbitral tribunal. The arbitral tribunal, in turn, can only be constituted as per the procedure agreed upon between the parties. However, if there is a failure of the agreed upon procedure, then the duty of appointing the arbitral tribunal falls upon the referral court under Section 11 of the Act, 1996. If the referral court, at this stage, goes beyond the scope of enquiry as provided under the section and examines the issue of "accord and satisfaction", then it would amount to usurpation of the power which the parties had intended to be exercisable by the arbitral tribunal alone and not by the national courts. Such a scenario would impeach arbitral autonomy and would not fit well with the scheme of the Act, 1996."*

12. The Apex Court in SBI General Insurance Co. Ltd. vs. Krish Spinning

(supra) has distinguished the Judgment of the Apex Court in Vidya Drolia (supra) by holding as under:

> *"**92**. The position that emerges from the aforesaid discussion of law on the subject as undertaken by us can be summarised as follows:—*
>
> *i. There were two conflicting views which occupied the field under the Arbitration Act, 1940. While the decisions in Damodar Valley (supra) and Amar Nath (supra) took the view that the disputes pertaining to "accord and satisfaction" should be left to the arbitrator to decide, the view taken in P.K. Ramaiah (supra) and Nathani Steels (supra) was that once a "full and final settlement" is entered into between the parties, no arbitrable disputes subsist and therefore reference to arbitration must not be allowed.*
>
> *ii. Under the Act, 1996, the power under Section 11 was characterised as an administrative one as acknowledged in the decision in Konkan Railway (supra) and this continued till the decision of a seven-Judge Bench in SBP & Co. (supra) overruled it and significantly expanded the scope of judicial interference under Sections 8 and 11 respectively of the Act, 1996. The decision in Jayesh Engineering (supra) adopted this approach in the context of "accord and satisfaction" cases and held that the issue whether the contract had been fully worked out and whether payments had been made in full and final settlement of the claims are issues which should be left for the arbitrator to adjudicate upon.*
>
> *iii. The decision in SBP & Co. (supra) was applied in Boghara Polyfab (supra) and it was held by this Court that the Chief Justice or his designate, in exercise of the powers available to them under Section 11 of the Act, 1996, can either look into the question of "accord*

and satisfaction" or leave it for the decision of the arbitrator. However, it also specified that in cases where the Chief Justice was satisfied that there was indeed "accord and satisfaction", he could reject the application for appointment of arbitrator. The prima facie standard of scrutiny was also expounded, stating that the party seeking arbitration would have to prima facie establish that there was fraud or coercion involved in the signing of the discharge certificate. The position elaborated in Boghara Polyfab (supra) was adopted in a number of subsequent decisions, wherein it was held that a mere bald plea of fraud or coercion was not sufficient for a party to seek reference to arbitration and prima facie evidence for the same was required to be provided, even at the stage of the Section 11 petition.

iv. The view taken by SBP & Co. (supra) and Boghara Polyfab (supra) was seen by the legislature as causing delays in the disposal of Section 11 petitions, and with a view to overcome the same, Section 11(6-A) was introduced in the Act, 1996 to limit the scope of enquiry under Section 11 only to the extent of determining the "existence" of an arbitration agreement. This intention was acknowledged and given effect to by this Court in the decision in Duro Felguera (supra) wherein it was held that the enquiry under Section 11 only entailed an examination whether an arbitration agreement existed between the parties or not and "nothing more or nothing less".

v. Despite the introduction of Section 11(6-A) and the decision in Duro Felguera (supra), there have been diverging views of this Court on whether the scope of referral court under Section 11 of the Act, 1996 includes the power to go into the question of "accord and satisfaction". In Antique Art (supra) it was held that unless some prima facie proof of duress or

coercion is adduced by the claimant, there could not be a referral of the disputes to arbitration. This view, however, was overruled in Mayavati Trading (supra) which reiterated the view taken in Duro Felguera (supra) and held that post the 2015 amendment to the Act, 1996, it was no more open to the Court while exercising its power under Section 11 of the Act, 1996 to go into the question of whether "accord and satisfaction" had taken place.

vi. The decision in Vidya Drolia (supra) although adopted the view taken in Mayawati Trading (supra) yet it provided that in exceptional cases, where it was manifest that the claims were exfacie time barred and deadwood, the Court could interfere and refuse reference to arbitration. Recently, this view in the context of "accord and satisfaction" was adopted in NTPC v. SPML (supra) wherein the "eye of the needle" test was elaborated. It permits the referral court to reject arbitration in such exceptional cases where the plea of fraud or coercion appears to be ex-facie frivolous and devoid of merit.

93. ***Thus, the position after the decisions in Mayavati Trading (supra) and Vidya Drolia (supra) is that ordinarily, the Court while acting in exercise of its powers under Section 11 of the Act, 1996, will only look into the existence of the arbitration agreement and would refuse arbitration only as a demurrer when the claims are ex-facie frivolous and non-arbitrable****.* " (emphasis supplied)

13. The issue regarding limitation etc. can be decided by the Arbitrator on the basis of the material produced before the Arbitrator as to whether there was any acknowledgment in writing by the Respondents during the period of limitation or not. If the Arbitrator finds that the claim of the Petitioner *per se*

is not maintainable and the same is woefully barred by limitation, the Arbitrator has the power to impose costs on the claimant for raising a frivolous claim and direct the claimant to pay the entire costs of arbitration.

14. In view of the above, this Court is inclined to appoint Mr. Shobhit Chaudhary (Mob No.9999091964) as a Sole Arbitrator to adjudicate on the disputes between the Parties.

15. The arbitration would take place under the aegis of the Delhi International Arbitration Centre (DIAC) and would abide by its rules and regulations. The learned Arbitrator shall be entitled to fees as per the Schedule of Fees maintained by the DIAC.

16. The learned Arbitrator is also requested to file the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on reference.

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

18. Needless to say, nothing in this order shall be construed as an expression of this Court on the merits of the contentions of the parties.

19. The petition is disposed of along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

OCTOBER 7, 2024
S. Zakir