2024:DHC:6370

$~53

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

% ***Decided on: 21.08.2024***

\+ ARB.P. 533/2022

M/S. DHANLAXMI SALES CORPORATION .....Petitioner

Through: Mr. Sachin S. Pujari, Advocate.

versus

BOSTON SCIENTIFIC INDIA PVT LTD .....Respondent

Through: Mr. Jyoti Kumar Chaudhary, Ms. Sonali Khanna & Ms. Vanshika Gupta, Advocates.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

1. By way of this petition under Section 11 of the Arbitration and Conciliation Act, 1996 ["the Act"], the petitioner seeks appointment of an arbitrator for adjudication of disputes between the parties under a Dealership Agreement dated 01.01.2020 ["the Agreement"].

2. The controversy between the parties relates to existence of an arbitration agreement, which would govern the resolution of disputes between them.

3. I have heard Mr. Sachin S. Pujari, learned counsel for the petitioner, and Mr. Jyoti Kumar Chaudhary, learned counsel for the respondent.

4. The petitioner relies on Clause 7.6 of the Agreement which reads as follows:

"7.6 Dispute resolution by Arbitration. Any and every dispute,

> *controversy or claim between the parties and/or their valid and lawful assignees and successors, including, but not limited to (i) any and every dispute, controversy or claim arising out of or relating to this Agreement and/or its amendments, and (ii) any and every dispute, controversy or claim not arising out of or not relating to this Agreement and of its amendments, shall be referred to the courts of New Delhi*."

5. Mr. Chaudhary resists reference to arbitration, submitting that Clause 7.6 does not constitute an "*arbitration agreement*", within the meaning of Section 7 of the Act at all, as no intention to resolve disputes by binding arbitral adjudication can be inferred from the text of the clause. Learned counsel draws my attention to the judgment of the Supreme Court in *Jadgish Chander v. Ramesh Chander & Ors.*[1] to submit that the mere use of the word "*arbitration*", in the caption or in the heading of the clause, is inadequate to constitute an arbitration agreement. He submits that this position is fortified by reference to Clause 7.9 of the Agreement, which reads as follows:

> *"7.9 Captions. The captions of provisions in this Agreement are for convenience only and shall not control or affect the meaning or construction of any of the provisions of this Agreement."*

6. In response to this argument, Mr. Pujari submits that whether or not a clause constitutes an arbitration agreement must be answered with reference to the intention of the parties. In this context, he submits that the petitioner had invoked arbitration by a communication dated 07.10.2021, relying upon Clause 7.6 of the Agreement. The reply dated 29.11.2021 sent by the respondent, through counsel, clearly rejected the request for reference, but not on the ground that the Agreement did not contain an arbitration clause. In fact, it is clear, according to Mr. Pujari,

[1] (2007) 5 SCC 719.

that the existence of the arbitration clause was admitted by the respondent. He submits that this Court in *MS KGPS Mechanical Pvt. Ltd. v. Cinda Engineering & Construction Pvt. Ltd.*[2] has emphasised that the correspondence exchanged by the parties can be used as an aid to construction of the clause. In the alternative, he submits that correspondence itself establishes an agreement to refer the disputes to arbitration, within the meaning of Section 7(4)(b) of the Act.

7. Before dealing with these submissions in detail, it may be borne in mind that the task of the referral Court is limited to a *prima facie* determination with regard to the existence of the arbitration agreement. The judgments of the Supreme Court delineating the scope of adjudication under Section 11 have recently been explained in *SBI General Insurance Co. Ltd. v. Krish Spinning*[3]. The Court has held that all questions of arbitrability, including final determination of the existence of the arbitration agreement, are best left to the arbitral tribunal, consistent with the principle of *kompetenz-kompetenz*. The following observations of the Court make this position clear:

> *"110. The scope of examination under Section 11(6-A) is confined to the existence of an arbitration agreement on the basis of Section 7.* ***The examination of validity of the arbitration agreement is also limited to the requirement of formal validity such as the requirement that the agreement should be in writing.***
>
> *111. The use of the term 'examination' under Section 11(6-A) as distinguished from the use of the term 'rule' under Section 16 implies that the scope of enquiry under section 11(6-A) is* ***limited to a prima facie scrutiny of the existence of the arbitration agreement, and does not include a contested or laborious enquiry, which is left for the arbitral tribunal*** *to 'rule' under Section 16. The prima facie view on existence of the arbitration agreement taken by the referral court does*

[2] Judgment dated 22.04.2024 in ARB. P. 143/2024.
[3] 2024 SCC OnLine SC 1754.

not bind either the arbitral tribunal or the court enforcing the arbitral award.

112. The aforesaid approach serves a two-fold purpose - firstly, it allows the referral court to weed out non-existent arbitration agreements, and secondly, it protects the jurisdictional competence of the arbitral tribunal to rule on the issue of existence of the arbitration agreement in depth.

113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in In Re : Interplay [(2024) 6 SCC 1] 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:

> *"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 (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 [(2023) 9 SCC 385] 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)."*[4]

[4] Emphasis supplied.

8. The requirements of an arbitration agreement are set out in Section 7 of the Act, which provides as follows:

> *"7. Arbitration agreement.—(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*
>
> *(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
>
> *(3) An arbitration agreement shall be in writing.*
>
> *(4) An arbitration agreement is in writing if it is contained in—*
>
> > *(a) a document signed by the parties;*
> >
> > *(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or*
> >
> > *(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.*
>
> *(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."*

9. It may be stated at the outset that, on a textual reading of Clause 7.6, without any other indication, I would have been disinclined to read it as an arbitration agreement. The word "*arbitration*" appears only in the heading or caption. The judgment in *Jadgish Chander*[5], as pointed out by Mr. Chaudhary, clearly holds that mere reference to the word "*arbitration*" in the heading of a contractual clause is inadequate, particularly if the text of the clause, as in this case, indicates to the contrary. Mr. Chaudhary also refers to the judgment in *Foomill Pvt. Ltd. v. Affle (India) Ltd.*[6] which holds that an arbitration clause cannot be

[5] Supra (note 1), paragraph 8.
[6] Judgment dated 25.03.2022 in ARB. P. 325/2022.

inferred merely by the use of the word "*arbitration*" in the heading of the clause. Additionally, Mr. Chaudhary is also right in relying upon Clause 7.9, set out above.

10. However, the matter does not rest there. The question of whether a clause is to be construed as an arbitration clause is, like all contractual provisions, ultimately dependent upon the intention of the parties, i.e., whether there was a consensus *ad idem* between them with regard to resolution of disputes by arbitration. If the Court reaches such a finding, even on a *prima facie* basis, a reference to arbitration would be justified.

11. The judgments of the Supreme Court in *Visa International Ltd. v. Continental Resources (USA) Ltd.*[7] and *Powertech World Wide Ltd. v. Delvin International General Trading LLC.*[8], make it clear that the intention of the parties can be gleaned from the correspondence and attendant circumstances, read conjointly. In *Visa International*[9], the Supreme Court referred to the notice invoking arbitration, and reply thereto, and observed as follows:

> *"16.* ***The Court is required to decide whether the existence of an agreement to refer the dispute to arbitration can be clearly ascertained in the facts and circumstances of the case. This, in turn, may depend upon the intention of the parties to be gathered from the correspondence exchanged between the parties and the surrounding circumstances.***
>
> *xxxx xxxx xxxx*
>
> *25. The submission is unsustainable for more than one reason. No party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and material on record including surrounding circumstances.*

[7] (2009) 2 SCC 55.
[8] (2012) 1 SCC 361.
[9] Supra (note 7).

> *26.* ***What is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties and the evidence such as exchange of correspondence between the parties.*** *The respondent in none of its letters addressed to the applicant suggested that the dispute between the parties is required to be settled through conciliation and not by arbitration. In response to the applicant's letter invoking the arbitration clause the respondent merely objected to the names inter alia contending that the suggested arbitration would not be cost-effective and the demand for arbitration itself was a premature one."*[10]

12. In *Powertech*[11], after reference to the statutory provisions, the Supreme Court held thus:

> *"26. It is in light of these provisions, one has to construe whether the clause in the present case, reproduced above, in para 3, constitutes a valid and binding agreement. It is clear from a reading of the said clause that the parties were ad idem to amicably settle their disputes or settle the disputes through an arbitrator in India/UAE.* ***There was apparently some ambiguity caused by the language of the arbitration clause. If the clause is read by itself without reference to the correspondence between the parties and the attendant circumstances, may be the case would clearly fall within the judgment of this Court in Jagdish Chander [(2007) 5 SCC 719] . But once the correspondence between the parties and the attendant circumstances are read conjointly with the petition of the petitioner and with particular reference to the purchase contract, it becomes evident that the parties had an agreement in writing and were ad idem in their intention to refer these matters to an arbitrator in accordance with the provisions of the Act.***
>
> *27. Vide their letter dated 30-3-2008, the respondent had raised certain claims upon the petitioner and had also repelled the threat extended by the petitioner to take steps before ECGC. This notice had been responded to by the petitioner vide letter dated 4-4-2008 wherein it had raised its claims demanding payment of money within seven days and also stated that any default thereto would constrain it to take legal action. Finally, vide letter dated 30-5-2008, the petitioner had invoked arbitration clause between the parties and, in fact, had even nominated an arbitrator calling upon the respondent to concur to the said appointment.*
>
> *28. Replying to this letter vide letter dated 27-6-2008, the respondent*

[10] Emphasis supplied.
[11] Supra (note 8).

> *had neither denied the existence nor the binding nature of the arbitration clause. On the contrary, it had requested the petitioner not to take any legal action for appointment of an arbitrator, as they wanted to suggest some other name as an arbitrator, that too, subject to the consent of the petitioner.* ***This letter conclusively proves that the respondent had admitted the existence of an arbitration agreement between the parties and consented to the idea of appointing a common/sole arbitrator to determine the disputes between the parties.*** *However, thereafter there had been complete silence from its side, necessitating the filing of the present petition under Section 11(6) of the Act by the petitioner.*
>
> *29.* ***Thus, any ambiguity in the arbitration clause contained in the purchase contract stood extinct by the correspondence between the parties and the consensus ad idem in relation to the existence of an arbitration agreement and settlement of disputes through arbitration became crystal clear. The parties obviously had committed to settle their disputes by arbitration, which they could not settle, as claims and counterclaims had been raised in the correspondence exchanged between them. In view of the above, even the precondition for invocation of an arbitration agreement stands satisfied.*** *"*[12]

13. It is clear from the judgment in *Powertech*[13] that the textual reading of a contractual provision would yield to a holistic construction in the light of the conduct and correspondence of the parties. In *KGPS*[14], cited by Mr. Pujari, the Coordinate Bench relied upon the judgment of the Supreme Court in *Powertech*[15], which enjoins reference to the correspondence between the parties and the attendant circumstances to determine whether the parties were *ad idem*. The judgment of this Court in *S. Ghosh & Associates v. DDA*[16], is also to the same effect.

14. It is in this background that we must examine the correspondence in the present case. The notice invoking arbitration dated 07.10.2021 was addressed by learned counsel for the petitioner to the respondent.

---

[12] Emphasis supplied.
[13] Supra (note 8).
[14] Supra (note 2).
[15] Supra (note 8).
[16] Judgment dated 28.03.2017 in ARB. A. (COMM) 7/2017.

Reliance in the said notice was upon Clause 7.6 of the Agreement. After adverting to the factual dispute, the notice stated as follows:

> *"14. It is apparent that there is thus arisen a dispute inter se between you noticee and my client which arises out of and relates to the agreement referred to hereinabove. Moreover, even as per the notice and the complaint filed by you noticee under Section 138 of the Negotiable Instruments Act, 1881, it is apparent that there has emerged a dispute related to and arising from the agreement under reference. As such,* ***in terms of Clause 7.6 it was mandatory upon you noticee to have taken recourse to the dispute resolution through arbitration.*** *However, you noticee have brazenly misused the cheques issued by my client towards accounting purposes in the year 2013.*
>
> *15. As such,* ***in terms of clause 7.6 of the Agreement under reference, my client hereby calls upon you noticee to suggest a suitable name of any retired Judge*** *of the Hon'ble High Court of Delhi or in the alternative accord your approval for reference of the dispute to Arbitration through the Delhi International Arbitration Centre.*
>
> *16. Kindly treat the instant notice as a notice under Section 11 of the Arbitration & Conciliation Act, 1996 and further notes that in case of failure to respond to the same, my client shall be constrained to take recourse to such remedy as may be available and permissible in law."*[17]

15. The respondent, through its counsel, replied on 22.10.2021 and 12.11.2021, stating that it would revert to the notice dated 07.10.2021 after obtaining necessary documents. The reply was ultimately sent - again through counsel – on 29.11.2021. None of the three letters addressed to learned counsel for the petitioner by learned counsel for the respondent, dispute the characterisation of Clause 7.6 as an arbitration clause. To the contrary, the letter dated 29.11.2021 indicates that the parties are subject to an agreement to arbitrate, but that the pendency of proceedings under Section 138 of the Negotiable Instruments Act, 1881 renders the disputes non-arbitrable. This indication is to be found in

[17] Emphasis supplied.

paragraph 'R' and 'U' of the letter dated 29.11.2021, as also in the para-wise reply to paragraph 14, 15 and 16, which read as follows:

> *"R. Based on the above narrated true facts the said notice is not maintainable. Pursuant to this,* ***Your Client furnished a notice dated 07.10.2021 invoking Arbitration. That, Your Client cannot invoke a dispute resolution proceeding pertaining to the same cause of action on the basis of which the Complaint under Section 138 of Negotiable Instruments Act 1881 has been filed by Our Client****, as such an act would be in violation of the settled principles of law. Furthermore, the concept of Res Judicata also comes into play in the present matter vide which invoking a dispute in the same subject matter that is already sub- judice cannot be maintainable.*
>
> *xxxx xxxx xxxx*
>
> *U. That one of the key ingredients for filing a case under Section 138 of Negotiable Instruments Act 1881 and thereby attracting criminal liability on the defaulter is, the dishonouring of a cheque. Furthermore, one can file a complaint under the said provision where there arises a liability or debt to be paid. Furthermore, several landmark cases have been cited wherein the Hon'ble Supreme Court has stated that* ***disputes relating to rights and liabilities which give rise to or arise out of criminal offences are non- arbitrable in nature and therefore the present "dispute" which is already pending before the Hon'ble Magistrate under Section 138 of the Negotiable Instruments Act, is not an arbitrable dispute*** *and thus your Notice, which in any case is sham, bogus, illusory and a ploy to only delay the ongoing proceedings under Section 138 of the Negotiable Instruments Act, and as such your captioned Notice is not maintainable and the same merits outright withdrawal.*
>
> *xxxx xxxx xxxx*
>
> *10. That, Your Client in Para No. 14, 15 and 16 invoked Arbitration with respect to disputes arising out of the Dealership Agreement dated 01.01.2020 executed between the parties, and appointment of the sole arbitrator for adjudication of disputes was called upon by Your Client in this respect further contending that a dispute was to be resolved only in terms of Clause 7.6 of the Agreement calling for a Dispute Resolution Process.* ***In respect of the Arbitration proceedings invoked by Your Client., it is pertinent to mention that an accused cannot invoke an arbitration proceeding clause pertaining to the same cause of action of an ongoing proceeding. That since a complaint under Section 138 of Negotiable Instruments Act has already been filed by Our Client, Your Client cannot raise a simultaneous dispute for arbitration for the same cause of action. Merely because there is an arbitration clause in the***

> ***agreement, the same cannot prevent criminal prosecution*** *against the accused if an act constituting a criminal offence is made out even prima facie. Furthermore, several landmark cases have been cited wherein the Hon'ble Supreme Court has stated that disputes relating to rights and liabilities which give rise to or arise out of criminal offences are non- arbitrable in nature.*
>
> *11. As noticed by the Hon'ble Supreme Court in a plethora of judgments, an arbitration cannot substitute for an ongoing trial wherein the offence is arising from the same set of facts. Furthermore, the Supreme Court in various matters has also held that where there are serious allegations on matters related to finances,* ***the Court has the power to dismiss an arbitration clause if invoked as such matters are not appropriate to be dealt by an Arbitrator.***"[18]

16. The petitioner's notice invoking arbitration dated 07.10.2021 clearly proceeded on the basis that Clause 7.6 was an arbitration clause. The respondent's response dated 29.11.2021 did not controvert this position. Instead, it, *inter alia*, raised the plea that pending proceedings under the Negotiable Instruments Act, 1881 barred the petitioner from raising any claims under arbitration and disputing the arbitrability of its claims. These contents of the letters – all sent by counsel, who would doubtless have been aware of the legal implications of the word "*arbitration*" – demonstrate *prima facie*, that the parties were *ad idem* on the existence of the arbitration agreement.

17. In view of this finding, it is not necessary for this Court to examine whether, in any event, an arbitration agreement was concluded by exchange of correspondence, *de hors* the contract, in terms of Section 7(4)(b) of the Act.

18. For the aforesaid reasons, I hold, *prima facie*, that the parties did intend to refer the disputes to arbitration by incorporation of Clause 7.6 of the Agreement. The respondent's plea with regard to arbitrability of the

[18] Emphasis supplied.

disputes, as held in *SBI General Insurance*[19], is not capable of adjudication in Section 11 proceedings, and must be reserved for the arbitral tribunal to adjudicate.

19. The petition is, therefore, allowed and the disputes between the parties are referred to arbitration of Hon'ble Ms. Justice Asha Menon, former Judge of this Court [Tel:+91-9910384664]. The arbitration will be held under the aegis of Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi-110503 ["DIAC"], and will be governed by the Rules of DIAC, including as to the remuneration of the learned Arbitrator. The learned Arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.

20. It is made clear that the parties will be entitled to raise their claims and counter claims, which may be adjudicated by the learned Arbitrator in accordance with law. All rights and contentions are left open, including a determinative adjudication on the existence of the arbitration clause, and arbitrability of the disputes.

21. The petition stands disposed of with these observations, but with no order as to costs.

PRATEEK JALAN, J

AUGUST 21, 2024
'pv'/Adhiraj/

[19] Supra (note 3).