

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/PETN. UNDER ARBITRATION ACT NO. 141 of 2023

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POLL CONT ASSOCIATES  
Versus  
NARMADA CLEAN TECH LTD

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Appearance:

MR JF MEHTA(461) for the Petitioner(s) No. 1  
MR ABHISHEK M MEHTA(3469) for the Respondent(s) No. 1

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CORAM:HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA  
AGARWAL

Date : 09/02/2024  
ORAL ORDER

1. The instant application has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 seeking for appointment of Arbitrator on refusal on the part of the respondent, in terms of the arbitration clause which reads as under :-

*"f. Arbitration & Law*

*Except as otherwise provided herein, any dispute arising out of this Agreement/ Contract shall be settled by arbitration as provided in clause 36 (page-31) of the Volume-1 bid document."*

2. Seeking for rejection of the instant petition, Mr.Abhishek Mehta, learned advocate appearing for

the respondent, Narmada Clean Tech Limited, subsidiary of GIDC seek to argue that all claims of the applicant under the agreement had been settled in the year 2015 with the issuance of 'No Due Certificate' on 25.11.2015. The applicant has left with no claim in respect of the work carried out under the contract in question. The contention, thus, is that the claims raised in the present petition are stale and as such non-arbitrable. The application is, thus, liable to be rejected outrightly. It was vehemently argued that the arbitration clause in the original contract is no more in force and stood extinguished way back in the year 2015 when the petitioner had received the due amount, no claim as such can be said to survive to appoint Arbitrator. Reliance is placed on the decisions of the Apex Court in (i) **United India Insurance Company Limited vs. Antique Art Exports Private Limited – (2019) 5 SCC 362** and (ii) **National Insurance Company Limited vs. Boghara Polyfab Private Limited** and the judgment of this Court (i)

dated 03.11.2023 in Jayantbhai Chelabhai Prajapati vs. Sardar Sarovar Narmada Nigam Limited, being Arbitration Petition No.183 of 2021 and (ii) order dated 10.06.2022 in Balkrishna Spintex Private Limited vs. The New India Assurance Company Limited, being Arbitration Petition No.66 of 2020, to assert that it is held therein that the referral Court can make a *prima facie* scrutiny as to the existence of the dispute, before referring the matter to the Arbitrator.

3. Taking note of the above submissions, this Court may record that the petitioner herein gave a notice of claim dated 01.10.2018, a copy whereof is appended with the petition. On the denial to the claim in reply sent by the respondent, a Commercial Suit was instituted in the year 2019 wherein on an application filed by the respondent under Section 8 of the Arbitration and Conciliation Act, 1996, the Principal Senior Civil Judge, Ankleshwar, District Bharuch passed an order dated 26.07.2022 allowing the application, dismissing the suit referring a

dispute to the arbitrator as per Section 8 of the Arbitration and Conciliation Act, 1996. A notice dated 16.05.2023 was thereafter sent by the petitioner calling upon the respondent to give consent for appointment of Arbitrator to resolve the dispute suggesting the names of the Arbitrators in the notice. The said notice was refuted by the respondent on 22.07.2023, with the assertion that the petitioner had unequivocally issued 'No Claim Certificate' and accepted the amount paid under the terms of the contract, the claims made by him being belated and barred, there is no arbitrable dispute. The occasion for filing the instant petition on 18.08.2023 had, thus, arisen.

4. Having noted the chronology of events which has led to the filing of the instant arbitration application, this Court does not find any substance in the submission of the learned advocate for the respondent that the claim of the petitioner has become stale and the dispute is non-arbitrable.

Reliance placed on the decisions of the Apex Court and of this Court noted hereinabove is misplaced as none of them would come to the rescue of the respondent.

5. At this juncture, the 'eye of the needle' principle propounded by the Apex Court in **NTPC Limited vs. SPML Infra Limited – 2023 SCC Online SC 389** in paragraphs 25, 26, 27 and 28 are relevant to be noted hereinunder :

*“25. Eye of the Needle: The above-referred precedents crystallize 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:*

*"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 (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."*

6. A careful reading of the said decision indicates that inquiry at a pre-referral stage under Section 11(6) of the Act is very narrow and is confined to the preliminary inquiry about the existence and validity of an arbitration agreement and the applicant's privity to the agreement. With reference to the inquiry with respect to the non-arbitrability of the dispute, at the referral stage, it is settled that such an inquiry is an exception to the general rule and the principle that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The referral Court, in the narrow compass of inquiry which may be conducted by

it, may reject claims which are manifestly and *ex-facie* non-arbitrable. The standard of scrutiny to examine the non-arbitrability of a claim is only *prima facie* and no inquiry can be conducted as a mini trial. The Court can also examine whether the assertion of arbitrability is *bona fide* or not.

7. It is held in **NTPC Limited (supra)** that on *prima facie* scrutiny of the facts, if the Court reaches at a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable, it may refuse to refer the dispute to arbitration. However, on the other hand, even if there is a slightest doubt, the rule is to refer the dispute to arbitration.

8. Taking note of the above position of law, on a *prima facie* scrutiny of the material brought before this Court, it cannot be concluded without any doubt that the dispute is non-arbitrable, or the claim of the petitioner had become stale for issuance of 'No Claim Certificate' on 25.11.2015.



It is clear that the petitioner herein was agitating the dispute by issuance of notice of claim dated 01.10.2018. The arbitration application under Section 11(6) has been filed after dismissal of the Commercial Suit and refusal by the respondent to the notice under Section 21 of the Act, 1996.

9. For the above, it is not possible for this Court to refuse to refer the matter to the Arbitrator. The objections taken by the learned counsel for the respondent as to the maintainability of the instant application is, thus, turned down.

10. Hence, I pass the following

**ORDER**

(i) Petition is allowed.

(ii) Mr.Ashutosh J. Shastri, Former Judge of this Court, having address at: 18, Trimurti Society, Opp. Vasundhara Society, Behind Navkar School, Gulbai Tekra, Ellis Bridge, Ahmedabad-380015 and having contact

numbers 9825047078 and 7069074820 and Email ID: ajsadvocate@gmail.com, is hereby appointed as the sole Arbitrator to resolve the disputes between the parties in accordance with the Arbitration Centre (Domestic and International), High Court of Gujarat Rules, 2021. Both Parties would also be governed by said Rules.

(iii) Registry to communicate this order to the sole Arbitrator forthwith by Speed Post.

(iv) Pending application/s, if any, stands consigned to records.

**(SUNITA AGARWAL, CJ)**

GAURAV J THAKER