Sr. No.7
Suppl. List

IN THE HIGH C0URT 0F JAMMU & KASHMIR AND LADAKH AT SRINAGAR

Arb P. No.41/2023

Reserved on:21.12.2023
Pronounced on:10.05.2024

RAMTECH SOFTWARE PRIVATE LIMITED …Petitioner(s)/appellant(s)

Through: Mr. Nishant Kishore, Advocate with
Mr. Sanjay Agnihotri, Advocate

Vs.

UT of J&K and another ...Respondent(s)

Through: Mr. Mohsin S. Qadri, Sr. AAG with
Ms. Maha Majeed, Assting Counsel
Mr. Syed Musaib, Dy. AG

CORAM:

HON'BLE THE CHIEF JUSTICE

HIGH COURT
JAMMU & KASHMIR AND LADAKH

JUDGMENT

01. The present application has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of an arbitrator to resolve the dispute that has arisen between the contesting parties.

02. It is the case of the petitioner that the petitioner was awarded the contract for "Modernization of Land Records" in the erstwhile State of Jammu and Kashmir vide Request For Proposal (RFP) document no.01/CEO/JaKLaRMA/27/128 dated 04.12.2014. After the petitioner's proposed tender was found most acceptable in terms of tender floated by the respondents, the petitioner was awarded a contract vide Letter of Award dated 12.05.2015 issued by the respondents.

03. It is the case of the petitioner that while executing the project and the works under the contract, the petitioner started facing multitude of problems, none of which were attributable to the petitioner, because of which the petitioner remained in constant communication with the respondents for resolving the issues in question. However, in spite of earnest and prompt efforts on the part of petitioner to get these issues resolved, because of non-communicative, non-responsive and lackadaisical attitude of the respondents, the disputes remained unresolved.

04. It is also the case of the petitioner that in spite of the difficulties and problems being faced, the petitioner completed all the works under the scope of the project as per the Service Level Agreement (SLA) entered between the parties. However, the petitioner has not been paid the dues for the period of more than 6 to 7 years and as such, being aggrieved of such inaction on the part of the respondents, the petitioner sent demand notices for payment of the dues and ultimately, for initiating arbitration proceedings, which also was not responded by the respondents, thus, leaving no other option but to approach this Court by filing this present application for appointment of an arbitrator.

05. It is the case of the petitioner that in order to execute the said contract, a Service Level Agreement (SLA) was executed between the parties on 02.06.2015 which contains an arbitration clause i.e., Clause 14 which provides that in the event of any dispute or difference at any time arising between the parties relating to the work an endeavour shall be made to resolve the same by mutual negotiations. However, if it does not fructify into any positive results, then the issues will be decided by arbitration of three arbitrators, two of whom are to be appointed by each of the parties to the dispute or differences and an Umpire is to be appointed by the two appointed arbitrators in writing before taking upon the exercise of arbitration.

06. The aforesaid Clause 14 reads as follows:

> *"In the event of any dispute or difference at any time arising between the parties relating to the construction, meaning or effect of this agreement or any other clause or any content of the rights and liabilities of the parties or other matters specified herein or with reference to anything arising out of or incidental to this agreement or otherwise in relation to the terms, whether during the continuance of this agreement or thereafter, such disputes or differences shall be endeavoured to be solved by the mutual negotiations. If, however, such negotiations are infructuous, these shall be decided by arbitration of two Arbitrators, one to be appointed by each party to the dispute or difference and to an Umpire to be appointed by Arbitrators in writing before taking upon the burden of arbitration. Such a reference shall be deemed to be a submission to arbitrators under the provisions of J&K Arbitration and Conciliation Act, 1997 and of any modification or re-enactment thereof. The venue of arbitration shall be Jammu or Srinagar only and the expense of the arbitration shall be paid by either party as may be determined by the Arbitrators."*

07. According to the petitioner, in spite of his sincere efforts to get the disputes and differences resolved amicably, the same did not yield any fruitful results and accordingly, the petitioner was constrained to issue demand notices to appoint the Arbitrator in terms of the aforesaid Clause 14 of the SLA which also did not elicit any positive response from the respondents.

08. It has been stated that in terms of aforesaid Clause 14 of the SLA, the petitioner had already appointed a former Chief Justice of this Court, Hon'ble Justice Gita Mittal from his side but no arbitrator has been appointed by the respondents from their side.

09. This petition has been contested by the respondents denying the averments and allegations made therein. It may not be necessary for this Court to deal with all the averments and allegations made in the petition as well as in the objections raised by the respondents except those which are relevant for the purpose of considering this petition/application for appointment of arbitrator for which this Court has to see as to whether there was any agreement between the parties which contains an arbitration clause and whether there was any

dispute which is required to be resolved by way of arbitration and whether the conditions precedent for invoking arbitration clause have been fulfilled.

10. As far as the existence of the contract for execution of works is concerned there is no dispute. It is also not in dispute that there is a Service Level Agreement (SLA) executed between the parties which contains an arbitration clause. The existence of dispute between the parties as alleged by the petitioner has not been also contested by the respondents. The contention of the respondents is that before any dispute is referred to arbitration in terms of Clause 14 of the aforesaid SLA, it was necessary that an endeavour be made by the parties to resolve the dispute by mutual negotiations and only when such endeavour fails, the dispute can be referred for arbitration.

11. It is thus the specific plea of the respondents that no endeavour was made by the petitioner to get the dispute resolved by mutual negotiations which was a condition precedent for referring the dispute to arbitration.

12. It is the case of the respondents that from the pleadings and submissions it is evident that there is nothing to show that any endeavour was made by the parties to resolve the dispute by mutual negotiations. Hence, the present arbitration petition is pre-mature and not maintainable.

13. In view of the rival contentions, it is necessary to examine the scope of the aforesaid arbitration clause.

14. As discussed above, there is no dispute about the existence of the arbitration clause, nor of any dispute. However, what is being contested is that the arbitration clause cannot be invoked as contended by the respondents unless an endeavour was made by the parties to resolve the dispute by mutual negotiations, and it failed. Certainly, if an arbitration clause provides certain conditions to be fulfilled before invoking the arbitration clause for appointment of an arbitrator, the said condition precedent must be fulfilled as it was intended by the

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parties themselves to do so which reflects the autonomy of the parties to lay down such terms and conditions as they deem appropriate.

15. There is no doubt about the contention of the respondents that the aforesaid arbitration clause contains a condition which is required to be fulfilled before referring the dispute for arbitration, which is that an endeavour must be made by the parties to resolve the problem by mutual negotiations. Thus, as contended by the learned Senior AAG, appearing on behalf of respondents, if it is found that no endeavour was made to resolve the dispute by mutual negotiations, the parties cannot straightaway seek for reference of the dispute to an arbitrator for his decision.

16. Keeping the aforesaid position in mind, in terms of the contract as mentioned in Clause 14 referred to above, this Court will proceed to examine as to whether there any endeavour was made by the parties to resolve the dispute by mutual negotiations. For this we have to understand as to the meaning and scope of this expression "*such disputes or differences shall be endeavoured to be solved by the mutual negotiations"* found in the arbitration clause.

17. It is to be observed that while the aforesaid clause 14 provides for making an endeavour to resolve the dispute by mutual negotiations, no specific modality has been mentioned in the agreement how such exercise is to be undertaken. The word used is "endeavour" which means an attempt. Further, the expression "mutual negotiations" is of a very broad nature. As to what amounts to mutual negotiations has not been defined in the agreement. No specified format has been given provided or suggested in the agreement how the mutual negotiation has to be undertaken. Therefore, we have to understand the words and 'endeavour" and "mutual negotiations" in the ordinary parlance as these are understood. In the ordinary parlance, mutual negotiations may consist of following processes, first, making a demand requesting the other side to meet the said demand. In response to any such demand if the other side makes a counter proposal, the existence of

"mutual negotiations" can be inferred. However, if, to such a demand made by one party, there is no response from the other party, obviously it can mean that the other side is not interested in mutual negotiations. If repeated demands are made by one party to which there is no response from the other party, it would not be wrong to say that the first party has been making an attempt or endeavour to get the dispute resolved. However, merely because there was no response from the other side to the demand made by a party cannot be construed to mean that there was no endeavour or attempt made by one of the parties to resolve the dispute by mutual negotiations. The silence or non-communication by the other party cannot be a used to take the plea that there was no endeavour to resolve the dispute by mutual negotiations.

18. In the present case, as mentioned in the application it has been contended that the petitioner had been writing to the respondents on various occasions regarding pending payment and also to extend the time line for completion of the project work which had occurred on account of various reasons like (a) Administrative and procedural formalities, b) Disturbance in Kashmir, (c) Frequent Strikes, hartal calls and unprecedented law and order situation in Kashmir Valley, and d) Delay in survey work due to non-supply of satellite imagery date of district Srinagar and Jammu by the NRSC, Hyderabad.

19. According to the petitioner, the petitioner had been writing and representing before the respondents on various occasions as mentioned in the legal notices dated 12.12.2022, 03.01.2023 and 28.02.2023. However, there was no response from the side of the respondents. It has also been alleged by the petitioner that the petitioner had incurred heavy in executing the work. However, if the respondents do not respond to the said letters and demand notices, it could not perhaps be said that the petitioner did not make any endeavour to get the dispute resolved by mutual negotiations. The

mutual negotiations will commence only when the other party responds or makes a counter claim.

20. In the present case, it appears that the respondents neither responded to the demands of the petitioner not made any counter claim except by making the contention before this Court that various demand notices issued by the petitioner only indicate that the petitioner had been only making demand for payment and extension of timeline for execution of works and these acts on the part of the petitioner cannot really considered to be an attempt or endeavour to resolve the dispute by mutual agreement.

21. This Court, under the circumstances, however, would hold that if the respondents had not responded to various demands and requests made by the applicant/petitioner, the respondents cannot invoke this part of the clause that such disputes and differences shall be an endeavoured to be resolved by mutual negotiations as a condition precedent for invoking the arbitration clause.

22. It may be noted that the scope of consideration by the Court in exercise of Section 11 of the Arbitration and Conciliation Act, 1996 is extremely limited and primarily concerned with ascertaining whether a dispute exists, and whether there is an arbitration clause which provides for resolution of the dispute by arbitration and, even if such dispute and arbitration clause exist, whether such a dispute would be beyond the scope of arbitration.

23. It is also well settled that there are some disputes which may not be arbitrable for example disputes involving insolvency or intra company disputes which are required to be adjudicated by the Courts of Special forum, disputes relating to grant and issue of patent of registration of trademarks and such disputes which are exclusive maintained within the sovereign of government functions which have *erg omnes* on this effect or disputes involving criminal cases as these relate to sovereign function of the State or matrimonial disputes or matters relating to probate testimony etc. or clearly time barred claims to "cut the

deadwood". In this regard it may also be opposite to reproduce the following paragraphs of the decision In ***Vidya Drolio and others versus Durga Trading Corporation reported in (2021) 2 SCC 1***,

> ***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.*

The aforesaid principle was also reiterated in ***Intercontinental Hotels Group (India) (P) Ltd. v. Waterline Hotels (P) Ltd., (2022) 7 SCC 662 : (2022) 4 SCC (Civ) 209***: and the Court also observed that when in doubt, do refer if there is any doubt on any of the aforesaid issues, it would be advisable to refer the matter to the Arbitral Tribunal to decide the issue.

> ***19.*** *At the outset, we need to state that this Court's jurisdiction to adjudicate issues at the pre-appointment stage has been the subject-matter of numerous cases before this Court as well as*

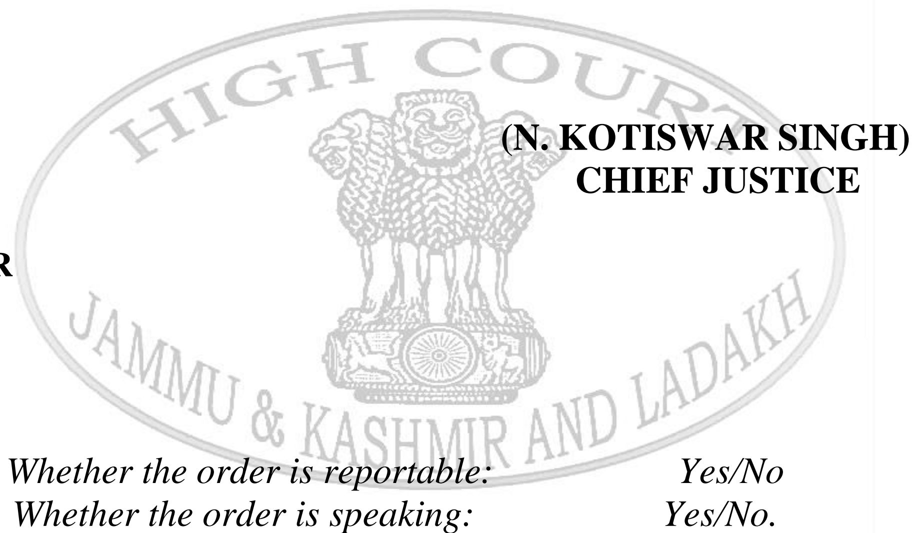
the High Courts. The initial interpretation provided by this Court to examine issues extensively, was recognised as being against the pro-arbitration stance envisaged by the 1996 Act. Case by case, Courts restricted themselves in occupying the space provided for the arbitrators, in line with party autonomy that has been reiterated by this Court in Vidya Drolia v. Durga Trading Corpn., which clearly expounds that Courts had very limited jurisdiction under Section 11(6) of the Act. Courts are to take a "prima facie" view, as explained therein, on issues relating to existence of the arbitration agreement. Usually, issues of arbitrability/validity are matters to be adjudicated upon by arbitrators. The only narrow exception carved out was that Courts could adjudicate to "cut the deadwood". Ultimately the Court held that the watchword for the Courts is "when in doubt, do refer". This Court concluded as under: (Vidya Drolia case, SCC pp. 156-57, para 225)

24. Under the circumstances, this Court is satisfied that the condition precedent for invoking arbitration clause has been fulfilled by the petitioner and as such, such disputes and differences would be required to be decided by the two arbitrators one to be appointed by each party to the dispute or difference and to an Umpire to be appointed by Arbitrators. Since the petitioners/applicants have already appointed their own arbitrator namely Smt. Gita Mittal, former Chief Justice of Jammu and Kashmir High Court. The respondents shall appoint an arbitrator of their choice who shall then in consultation with the first arbitrator appoint an Umpire in terms of Clause 14 of the agreement.

25. For the reasons discussed above, the petition is disposed of with the direction to the respondents to appoint their own arbitrator who in with consultation with other arbitrator will appoint the Umpire to be decided in terms of the Clause 14 of the Service Level Agreement.

26. This Court, however, makes it very clear that as the aforesaid finding that the condition precedent for invoking the Arbitration Clause has been fulfilled by the petitioner may not be considered to be a conclusive finding so as to enable the Arbitral Tribunal to revisit the issue if the respondents so desires, inasmuch as, the aforesaid issue

would also hinge upon proper appreciation of evidence, which this Court while exercising jurisdiction under Section 11 of the Arbitration and Conciliation Act, would normally avoid doing so as also observed in case **Vidya Drolia** (supra) that Court by default would refer the matter to the arbitral tribunal when contentions relating to non-arbitrability are clearly arguable, as consideration in summary proceedings would be insufficient and inconclusive when facts are contested and the stage under Section 11 is not a stage where a Court may enter into a mini trial or elaborate review of evidences so as to usurp the jurisdiction of the arbitral tribunal.



(N. KOTISWAR SINGH)
CHIEF JUSTICE

SRINAGAR
10.05.2024
Shameem H.

Whether the order is reportable: Yes/No
Whether the order is speaking: Yes/No.