2025:PHHC:138048

253

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ARB-255-2025 (O&M)
Date of Decision:30.09.2025

M/S ENIF EPC PRIVATE LIMITED

....Petitioner(s)

Versus

GAWAR CONSTRUCTION LIMITED

.....Respondent(s)

CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

Present: Mr. Pradeep Virk, Advocate,
for the petitioner.

Mr. Pravar Veer Misra, Advocate and
Mr. Shobit Phutela, Advocate,
for the respondent.

****

<u>JASGURPREET SINGH PURI, J. (Oral)</u>

1. The present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') seeking appointment of an independent Arbitrator to adjudicate the disputes and differences which have arisen between the parties pertaining to an agreement entered into between the parties.

2. Mr. Pradeep Virk, learned counsel appearing on behalf of the petitioner submitted that an agreement was entered into between the petitioner and the respondent in the nature of a sub-contract for construction of balance work for Four laning of Kiratpur to Nerchowk section of NH-21

(from Km 12+750 to Km 26+500, Km, 126+500 to Km 158+500 including ACC link road from Km 0+00 to Km 2+003) Greenfield Alignment (Package-2) in the State of Himachal Pradesh. He submitted that the agreement is attached with the present petition as Annexure P-1, which was in the nature of a sub-contract dated 11.12.2020. In the aforesaid agreement, there is an arbitration clause i.e. Clause 34 pertaining to the settlement of disputes, which provides in case of any dispute or difference arising out of this contract, the same shall be settled amicably through the discussion between the Directors/Partner/Proprietor of the parties in terms of the contract and in case of failure to settle the dispute amicably within 30 days, then the dispute shall be finally resolved by Sole Arbitrator in accordance with the Act. It further provided that the Sole Arbitrator shall be appointed by CEO of the respondent. He submitted that the aforesaid provision of Sole Arbitrator being unilateral and interested party itself is not valid in view of the provisions of Section 12(5) of the Act and also in view of the judgment passed by Hon'ble Supreme Court in ***Perkins Eastman Architects DPC and another versus HSSC (India) Limited, (2020) 20 SCC 760.***

3. Learned counsel further submitted that when the respondent was not cooperating with the petitioner, then a notice under Section 21 of the Act was sent to the respondent vide Annexure P-7 dated 08.08.2022 for appointment of a Sole Arbitrator and also suggested name of a retired Chief Engineer, to which reply was received by the petitioner vide which the respondent did not accede to the request made by the petitioner for appointment of a Sole Arbitrator. In this way, the present petition has been filed for appointment of a Sole Arbitrator in terms of the aforesaid clause.

4. Learned counsel further submitted that as per the reply which was given to the notice issued by the petitioner and the reply filed in the present petition as well, an objection was raised by the respondent that a Sole Arbitrator cannot be appointed in view of the fact that the matter was amicably settled between the parties vide Annexure R-1 dated 18.05.2021 and in fact the agreement itself stood terminated and it was further so objected by the respondent that vide Annexure P-3 dated 24.07.2021, an agreement for amicable settlement for final payment was made. However, the respondent did not even adhere to the aforesaid terms of amicable settlement between the parties and rather after the agreement which was signed vide Annexure R-1 dated 18.05.2021, the respondent had constantly been threatening the petitioner and had been forcing the petitioner for entering into the aforesaid amicable settlement (Annexure P-3) regarding which specific averments were made in paras No.9 to 12 of the notice (Annexure P-7) which was issued under Section 21 of the Act. He submitted that Annexure P-3 which is so stated to be an amicable settlement between the parties was a result of threat and coercion to restrain the petitioner from seeking judicial or arbitration proceedings and in fact a dispute had already arisen between the parties and *prima facie* there is a clause for arbitration available under the aforesaid Clause 34 and therefore, the only remedy available with the petitioner was to move the present petition under Section 11 of the Act for appointment of a Sole Arbitrator in terms of the aforesaid contract. He also submitted that after serving notice under Section 21 of the Act, the present petition has been filed within a period of three years.

5. On the other hand, Mr. Pravar Veer Misra, Advocate and Mr. Shobit Phutela, Advocates appearing on behalf of the respondent submitted

2025:PHHC:138048

that there is no dispute with regard to existence of the aforesaid Clause 34 i.e an arbitration clause in the agreement. They submitted that the respondent is neither disputing the sub-contract (Annexure P-1) nor is it disputing the existence of the aforesaid Clause 34. They submitted that the only objection which is raised by the respondent is that in terms of the aforesaid clause when the matter was amicably settled between the parties and duly signed by the authorized signatory, who was the Director of the company of the petitioner to have settled the dispute not only on 18.05.2021 vide Annexure R-1 but also vide Annexure P-3 dated 24.07.2021, the dispute was not arbitrable in nature. They submitted that since the dispute was amicably settled between the parties in terms of the aforesaid clause, now a petition under Section 11 of the Act would not be maintainable.

6. I have heard the learned counsels for the parties.

7. The Clause 34 pertaining to the arbitration is reproduced as under:-

> *"34. Settlement of Disputes: Any dispute or difference arising out of this contract shall be settled amicably through the discussion between the Directors/Partner/Proprietor of the Parties within the rems of this contract. In case of failure to settle the dispute amicably within 30 days of a request to this effect from either party to the other, the dispute shall be finally resolved by sole Arbitrator in accordance with the Arbitration & Conciliation Act, 1996, Arbitration & Conciliation (Amendment) Act, 2015 or any statutory amendment thereof and the Sole Arbitration shall be Appointed by CEO of GCL which is acceptable and agreed by both the parties. The decision of arbitrator shall be final & binding on both the parties. The place of*

arbitration shall be at Gurgaon. The cost of arbitration shall be shared by both the parties in equal proportion."

8. Learned counsels appearing on behalf of the respondent have neither disputed the existence and validity of the aforesaid clause nor have they disputed the execution of the contract. However, they have only disputed that the aforesaid clause cannot be invoked in view of the fact that the matter was amicably settled between the parties. A further objection was raised by the learned counsels for the respondent that the matter is not arbitrable in nature in view of the fact that the contract itself has been terminated by virtue of the amicable settlement dated 18.05.2021 (Annexure R-1) and also Annexure P-3 and since the contract itself has been terminated by virtue of the aforesaid amicable settlement, the present petition is liable to be dismissed.

9. The law with regard to maintainability of the present petition and power of the High Court to appoint an Arbitrator under Section 11 of the Act is no longer *res integra.* A Constitution Bench of Hon'ble Supreme Court in ***Interplay Between Arbitration Agreements Under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, in Re (2024) 6 SCC 1*** observed as under:-

"120. In view of the above discussion, we formulate our conclusions on this aspect. First, the separability presumption contained in Section 16 is applicable not only for the purpose of determining the jurisdiction of the Arbitral Tribunal. It encapsulates the general rule on the substantive independence of an arbitration agreement. Second, parties to an arbitration agreement mutually intend to confer jurisdiction on the arbitral tribunal to determine

> *questions as to jurisdiction as well as substantive contractual disputes between them. The separability presumption gives effect to this by ensuring the validity of an arbitration agreement contained in an underlying contract, notwithstanding the invalidity, illegality, or termination of such contract. Third, when the parties append their signatures to a contract containing an arbitration agreement, they are regarded in effect as independently appending their signatures to the arbitration agreement. The reason is that the parties intend to treat an arbitration agreement contained in an underlying contract as distinct from the other terms of the contract; and Fourth, the validity of an arbitration agreement, in the face of the invalidity of the underlying contract, allows the Arbitral Tribunal to assume jurisdiction and decide on its own jurisdiction by determining the existence and validity of the arbitration agreement. In the process, the separability presumption gives effect to the doctrine of competence-competence.*

10. Thereafter, in another judgment of Hon'ble Supreme Court in ***SBI General Insurance Co. Ltd. versus Krish Spinning, 2024 SCC OnLine SC 1754*** while referring to the aforesaid judgment of Constitution Bench observed that the scope of examination under Section 11 of the Act is confined only to existence of an arbitration agreement on the basis of Section 7 of the Act. The High Court at the time of reference under Section 11 of the Act is only to see *prima facie* existence of an arbitration agreement. The Court should not go into mini trial and look into the aforesaid aspect. Not only this, it was also held that the question as to whether the agreement has been terminated or not is to be seen by the Arbitrator only and not by the Court and is not within the scope of Section 11 of the Act but is within the

scope of the Arbitral Tribunal which is to be constituted. The relevant portion of the aforesaid in ***SBI General Insurance Co. Ltd.'s case (Supra)*** is reproduced as under:-

> *"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 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 (supra) 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 **<u>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</u>**. 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 (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).

115. The dispute pertaining to the "accord and satisfaction" of claims is not one which attacks or questions the existence of the arbitration agreement in any way. As held by us in the preceding parts of this judgment, the arbitration agreement, being separate and independent from the underlying substantive contract in which it is contained, continues to remain in existence

> *even after the original contract stands discharged by "accord and satisfaction"*
>
> *116. The question of "accord and satisfaction", being a mixed question of law and fact, comes within the exclusive jurisdiction of the arbitral tribunal, if not otherwise agreed upon between the parties. Thus, the negative effect of competence-competence would require that the matter falling within the exclusive domain of the arbitral tribunal, should not be looked into by the referral court, even for a prima facie determination, before the arbitral tribunal first has had the opportunity of looking into it.*

11. In view of the aforesaid settled law, this Court is of the considered view that the mere fact that as per the learned counsels for the respondent, the agreement itself stood terminated and there was some amicable settlement between the parties itself cannot become a bar for appointment of an Arbitrator under Section 11 of the Act. This Court is only to see *prima facie* existence of an arbitration clause which is certainly in existence and is undisputed by both the learned counsels for the parties.

12. Consequently, the present petition is allowed. Hon'ble Mr. Justice Ravi Shanker Jha, former Chief Justice of this Court, resident of H.No.913, Old B-68, Pandit Lajja Shankar Jha Road, Wright Town, Jabalpur, Mobile No.94251-53362, Email ID-jrsjha@gmail.com, is nominated as the Sole Arbitrator to adjudicate the dispute between the parties, subject to compliance of statutory provisions including Section 12 of the Act.

7. Parties are directed to appear before the learned Arbitrator on date, time and place to be fixed and communicated by the learned Arbitrator at his convenience.

8. Fee shall be paid to the learned Arbitrator in accordance with the Fourth Schedule of the Arbitration Act, as amended.

9. Learned Arbitrator is also requested to complete the proceedings as per the time limit prescribed under Section 29-A of the Act.

10. A request letter alongwith a copy of the order be sent to Hon'ble Mr. Justice Ravi Shanker Jha, former Chief Justice of this Court.

30.09.2025 **(JASGURPREET SINGH PURI)**
rakesh **JUDGE**

Whether speaking : Yes/No
Whether reportable : Yes/No