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

Date of Decision: 26.05.2023

\+ ARB.P. 542/2023

SHIVALAYA CONSTRUCTION CO. PVT. LTD. ..... Petitioner

Through: Mr. Shishir Mathur, Ms. Muskan Tyagi, Advocates (Enrolment No. D/1917/2005, Mobile No. 9810038657).

versus

NATIONAL INSURANCE COMPANY LTD. ..... Respondent

Through: Mr. Prateek Mishra, Mr. Mohit Kumar, Advocates (Enrolment No. MAH/342A/2013, Mobile No. 7838046337).

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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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 to adjudicate disputes between the parties under an insurance policy bearing No. 370800441710000038, entitled *"Contractor All Risk"* policy ["the Policy"]. The Policy is for a period of 05.01.2018 to 20.11.2019. Clause 7 of the General Conditions of Contract contains an arbitration clause, which contemplates reference

of disputes to a sole arbitrator.

2. The petitioner has made a claim under the Policy, which has been partially accepted by the respondent. The petitioner seeks to raise a dispute as to the balance amount of the claim, in which connection it has invoked the arbitration clause by letters dated 22.06.2022 and 15.02.2023. The respondent replied to the letter dated 22.06.2022 on 21.07.2022, declining reference to arbitration on the ground that the claim has been settled.

3. In these circumstances, the petitioner has approached this Court by way of the present petition under Section 11 of the Act.

4. Notice was issued in this petition on 16.05.2023 and the respondent has also filed a reply to the petition.

5. The principal contention of Mr. Prateek Mishra, learned counsel for the respondent, is that the dispute between the parties is one of liability under the contract, and not of quantum. He submits that disputes as to liability are excluded from the scope of the arbitration clause, as evident upon a plain reading of the arbitration clause. Clause 7 is reproduced below:-

> *"7. **<u>If any dispute or difference shall arise as to the quantum to be paid under this Policy (liability being otherwise admitted)</u>** such difference shall independently of all other questions be referred to the decision of a sole arbitrator, to be appointed in writing by the parties to or, if they cannot agree upon a single arbitrator within 30 days of any party invoking Arbitration, the same shall be referred to a panel of three Arbitrators comprising of two Arbitrators - one to be appointed by each of the parties to the dispute/difference, and the third Arbitrator to be appointed by such two Arbitrators and arbitration shall be conducted under and in accordance with the provisions of the Arbitration and Conciliation Act 1996.*

> *It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if the Company has disputed or not accepted liability under or in respect of this Policy.*
>
> *It is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this Policy that the award by such Arbitrator/ Arbitrators of the amount of the loss or damage shall be first obtained.*"[1]

6. In support of this argument, Mr. Mishra relies upon a decision of the Calcutta High Court in *Kohinoor Steel Pvt. Ltd. vs. Bajaj Allianz Insurance Company*[2] and on the judgments of the Supreme Court in *Vidya Drolia and Others vs. Durga Trading Corporation*[3] and *Indian Oil Corpn. Ltd. v. NCC Ltd.*[4]

7. Mr. Mishra submits that the petitioner's claim arises under various heads, including *"muck removal"*. The Surveyor appointed by the respondent has taken the view, in Survey Report dated 26.06.2020, that the claim of muck removal is not covered by the Policy. In these circumstances, he submits that the present case is one in which liability for the claim in question is contested, rather than the quantum.

8. Mr. Shishir Mathur, learned counsel for the petitioner, disputes the interpretation of the Survey Report, as suggested by Mr. Mishra.

9. Having heard learned counsel for the parties, I am of the view that it is not necessary to decide this question conclusively at the pre-referral stage, and the parties' contentions with regard to arbitrability can appropriately be reserved for adjudication by the arbitral tribunal.

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[1] Emphasis supplied.
[2] 2011 SCC OnLine Cal 3252.
[3] (2021) 2 SCC 1.
[4] (2023) 2 SCC 539.

10. The judgments of the Supreme Court in *Vidya Drolia*[5] and the judgments following it, make it clear that, at the stage of proceedings under Section 11 of the Act, the Court is primarily required to examine the existence of an arbitration clause. Issues of arbitrability can be left to the arbitral tribunal, unless a claim is *ex facie* barred. The purpose of such scrutiny at this stage is to remove the *"deadwood"*,[6] i.e. to obviate the necessity of arbitral proceedings in respect of a claim, which is *"demonstrably 'non-arbitrable'"*.[7]

11. The principles have been summarised in *Vidya Drolia*[8] (per Sanjiv Khanna, J) as follows:-

> "***154.*** *Discussion under the heading* ***"Who Decides Arbitrability?"*** *can be crystallised as under:*
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> *xxxx xxxx xxxx*
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> ***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.*
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> ***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.*
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> ***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*

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[5] Supra (note 3).
[6] Paragraph 134 of *Vidya Drolia* (per Sanjiv Khanna, J).
[7] Paragraph 154.4 of *Vidya Drolia* (per Sanjiv Khanna, J).
[8] Supra (note 3).

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."

12. N.V. Ramana, J, in a concurring judgment, formulated the position this:-

> "***244.*** *Before we part, the conclusions reached, with respect to Question 1, are:*
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> ***244.1.*** *Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.*
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> ***244.2.*** *Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.*
>
> ***244.3.*** *The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.*
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> ***244.4.*** *The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer".*
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> ***244.5.*** *The scope of the court to examine the prima facie validity of an arbitration agreement includes only:*
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> ***244.5.1.*** *Whether the arbitration agreement was in writing? or*
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> ***244.5.2.*** *Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?*
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> ***244.5.3.*** *Whether the core contractual ingredients qua the arbitration agreement were fulfilled?*
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> ***244.5.4.*** *On rare occasions, whether the subject-matter of dispute is arbitrable?"*

13. These principles have since been followed *inter alia* in *VGP*

Marine Kingdom (P) Ltd. v. Kay Ellen Arnold[9], *DLF Home Developers Ltd. vs. Rajapura Homes Pvt. Ltd. & Anr*[10] and *Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd.*[11]

14. Mr. Mishra refers me to the judgment of the Supreme Court in *Indian Oil Corpn. Ltd.*[12], wherein the arbitration clause provided for reference of notified claims alone. The Supreme Court held that, in the absence of notification of the claim, the disputes ought not to have been referred to arbitration. Relying upon *Vidya Drolia*[13] and other authorities, the Court came to the conclusion that, in some of the appeals before it, the question of notification of the claims was clear and unambiguous, not requiring reference to arbitration. However, the Court also recognised the principle that questions of jurisdiction and non-arbitrability may be decided by the arbitral tribunal, subject to a condition that they can also be considered by the Court if the facts are very clear and glaring, keeping in view specific clauses of the agreement. The Court held that *"...it is always advisable and appropriate that in cases of debatable and disputable facts, good reasonably arguable case, the same should be left to the Arbitral Tribunal."*[14]

15. In the present case, the claims of the petitioner have not been rejected in totality. One of the heads of the claim is disputed. The question of arbitrability in these circumstances-whether, on a proper

[9] (2023) 1 SCC 597.
[10] 2021 SCC OnLine SC 781.
[11] (2021) 5 SCC 671.
[12] Supra (note 4).
[13] Supra (note 3).
[14] Paragraph 90 of *Indian Oil Corporation.*

interpretation of the arbitration clause, the dispute is as to *"quantum to be paid under this policy"*[15] as opposed to liability-is one which requires adjudication. I am, therefore, of the view that, in the present case, interpretation of the arbitration clause is not so clear and unambiguous as to render the reference impermissible. The question ought to be left open for adjudication by the arbitral tribunal, rather than arriving at a conclusive decision at the pre-reference stage.

16. In light of the aforesaid authorities of the Supreme Court, the judgment of the Calcutta High Court in *Kohinoor Steel Private Limited*[16] is also of little assistance to the respondent.

17. It may also be mentioned that in another claim between the same parties, arising out of the very same policy, the petitioner had filed a petition under Section 11 of the Act [ARB.P. 241/2023], in which the respondent had accepted reference to arbitration, leaving open the rights and contentions of the parties on arbitrability and maintainability of any of the petitioner's claims for adjudication by the learned arbitrator.[17] The same course commends to me in the present case also.

18. For the aforesaid reasons, the petition is liable to be allowed.

19. At this stage, learned counsel for the parties jointly submit that if an arbitrator is to be appointed, a sole arbitrator may be appointed, the arbitration may be held under the aegis of Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi ["DIAC"] and a former Judge of this Court may be appointed as the

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[15] Arbitration clause.
[16] Supra (note 2).
[17] Order dated 11.05.2023 in ARB. P. 241/2023.

arbitrator.

20. Having regard to the above, the petition is allowed with the following directions:-

a. Disputes under the insurance policy bearing No. 370800441710000038, entitled *"Contractor All Risk"* policy, are referred to the arbitration of Hon'ble Ms. Justice Indermeet Kaur, former Judge of this Court [Tel:- 9910384614].

b. The arbitration will be held under the aegis of DIAC and will be governed by the Rules of DIAC, including as to the remuneration of the learned arbitrator.

c. Learned arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.

21. It is made clear that all rights and contentions of the parties, including on arbitrability, are left open for adjudication by the learned arbitrator.

PRATEEK JALAN, J

May 26, 2023

'vp'/