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IN THE HIGH COURT OF DELHI AT NEW DELHI*Date of Decision :11.09.2023.*

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ARB.P. 800/2022

M/S. JRA INFRATECH

..... Petitioner

Through: Mr. Akshat Bajpai, Ishanee Sharma
and Mr. Shobhit Trehan, Adv.

versus

ENGINEERING PROJECTS(INDIA) LIMITED

..... Respondent

Through: Mr. Debarshi Bhadra, Adv.

CORAM:**HON'BLE MS. JUSTICE REKHA PALLI****REKHA PALLI, J (ORAL)**

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 seeks appointment of an arbitrator for adjudication of disputes which have arisen between the parties in relation to the Agreement dated 14.12.2021.
2. In support of the petition, learned counsel for the petitioner draws my attention to Clause 76 of the General Conditions of Contract (hereinafter referred to as "GCC") as modified by Clause 19 of the Additional Contract dated 14.12.2021 whereby Clauses 76.1 to 76.3 were added to the original Clause 76 of the GCC. By placing reliance on Clause 76.1, he submits that the disputes between the parties which



have arisen in the context of the Agreement dated 14.12.2021 are required to be referred to a sole arbitrator to be appointed mutually by the parties. However, upon the petitioner invoking arbitration, the respondent vide its communication dated 12.07.2022 proceeded to unilaterally appoint Shri Malu Ram Choudhary as the Sole Arbitrator thus compelling the petitioner to approach this Court.

3. On the other hand, learned counsel for the respondent, while not disputing that the parties are governed by the Agreement dated 14.12.2021 containing the arbitration clause, submits that since the agreement was executed on the basis of a forged experience certificate furnished by the petitioner, the agreement in itself stood vitiated by fraud. He submits that the respondent has, on 14.03.2023, lodged a complaint with Assistant Commissioner of Police, Economic Offence Wing against the petitioner for furnishing a fake experience certificate at the time of entering into the aforesaid agreement, which complaint has already been forwarded to the Deputy Commissioner of Police, South District, New Delhi on 13.06.2023. He, therefore, contends that the claims raised by the petitioner are based on violation of criminal law and are thus non-arbitrable. In support of his plea, he seeks to place reliance on a decision of the Apex Court in ***Rashid Raza vs. Sadaf Akhtar*** (2019) 8 SCC 710 as also on a decision of a Coordinate Bench in ***Avantha Holding Ltd. vs. CG Power and Industrial Solutions Ltd***, 2021 SCC OnLine Del 5202.
4. Learned counsel for the respondent further submits that merely because the respondent had inadvertently, upon the request of the



petitioner, proceeded to appoint Shri Malu Ram Chaudhary as the sole Arbitrator in July, 2022, that cannot be a ground to ignore the criminal complaint now filed by the respondent which shows that the agreement dated 14.12.2021 in itself was vitiated by fraud. Resultantly, when the fraud committed by the petitioner is going to be investigated, the disputes raised by the petitioner ought not to be referred to arbitration.

5. In response, learned counsel for the petitioner submits that the criminal complaint on which the respondent is seeking to rely is merely an afterthought and was admittedly lodged after the filing of the present petition. Furthermore, taking into account that the respondent had itself proceeded to appoint an Arbitrator in July, 2022, it cannot at this stage be said that the agreement is vitiated by fraud as is sought to be urged by the respondent.
6. He further contends, by placing reliance on a subsequent decision dated 18.04.2022 passed by a Coordinate Bench in ***Amrish Gupta v. Gurchait Singh Chima, 2022 SCC OnLine Del 1116***, that the disputes between the parties, being purely private in nature, cannot be treated as a matter *in rem* and, therefore, ought not to be characterised as ‘non-arbitrable’.
7. Having considered the submissions of learned counsel for the parties and perused the record, I may begin by noting the arbitration clause contained in para 76.1 of the GCC. The same reads as under:

“76.1 Before resorting to arbitration as per the clause given below, the parties if they so agree may explore the possibility of conciliation as per the provisions of Part III



of the Arbitration and Conciliation Act, 1996 as amended by Arbitration and Conciliation (Amendment) Act, 2015. When such conciliation has failed, the parties shall adopt the following procedure for arbitration:

i) Except where otherwise provided for in the contract, any disputes and differences relating to the meaning of the Specifications, Design, Drawing and Instructions herein before mentioned and as to the quality of workmanship or materials used in the work or as to any other questions, claim, right, matter or things whatsoever in any way arising out of or relating to the Contract, Designs, Drawings, Specifications, Estimates, Instructions, or these conditions or otherwise concerning the works of the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment there of shall be referred to the Sole Arbitrator appointed mutually by both the parties as per the provision of Arbitration & Conciliation Act (as amended in 2015 & 2019).

The Arbitrator shall be appointed within 30 days of the receipt of letter of invocation of arbitration duly satisfying the requirements of this clause.”

8. Further, given the admitted position that the respondent had appointed an Arbitrator on 14.07.2022 for adjudicating disputes between the parties arising out of the Agreement dated 14.12.2021, it may be apposite to now refer to the letter dated 12.07.2022 whereby an Arbitrator was appointed by the respondent. The same reads as under:

“DLI/CMD/ARB/021

12th July, 2022

IN THE MATTER OF ARBITRATION BETWEEN



M/s JRA Infratech,Claimant
Bhawnathpur, Garhwa,
Jharkhand
Email- jrginfratechgarhwa@gmail.com

And
Engineering Projects (India) Ltd. (EPI) Northern Regional
Office,Respondent

5th Floor, Core 3, SCOPE COMPLEX,
Lodhi Road, New Delhi-110003.
Email-nro@engineeringprojects.com

WHEREAS EPI placed work order for Construction of Medical College Campus for 100 MBBS admissions annually and modification in existing Govt. Hospital to convert into Teaching Hospital as per MCI/NMC norms at Rudrapur, Uttrakhand on M/s JRA Infratech vide LOI no. DLI/CON/883/757 dated 27.08.2021 and further agreement dated 14.12.2021, executed between both the parties.

AND WHEREAS certain disputes have arisen between the parties and Claimant has invoked Arbitration under the terms of Cl. 76 of GCC and Cl. 19 of ACC vide their letter dated 01.07.2022 Thereafter, the efforts made by the parties for resolving the issues have still not materialized.

NOW THEREFORE, in terms of powers conferred under the aforesaid Arbitration Clause, I,

D.S. Rana, Chairman-cum-Managing Director, Engineering Projects (India) Ltd., New Delhi do hereby appoint Shri Malu Ram Choudhary as Sole Arbitrator to adjudicate the claims of M/S JRA Infratech (Claimant) and the counter claims of EPI (Respondent), if any, subject to their admissibility in terms of Work Order/ Terms and



Conditions executed by and between the parties.

The Arbitrator shall give an undertaking in terms of Section 12 (1), as per format contained in Sixth Schedule of the Arbitration and Conciliation Act, 1996 (as amended by the Arbitration and Conciliation (Amendment) Act, 2015.

The award of Arbitrator shall be supported by reasons. The arbitration proceedings shall be conducted in accordance with the provisions of the aforesaid Act.

For Engineering Projects (India) Ltd.

Sd/-

(D.S. Rana)

Shri Malu Ram Choudhary
24, Shree Radha Appts,
Plot no. 3, Sec. 9, Dwarka
New Delhi-110077
Email-maluram53@gmail.com

9. From a perusal of the aforesaid, what emerges is that the respondent in its letter dated 12.07.2022, agreed that the claims raised by the petitioner arise out of the Agreement dated 14.12.2021. The respondent also did not deny that the Agreement between the parties provided that the disputes between them were, in terms of clause 76.1 of the GCC, required to be determined through arbitration. It also emerges that the respondent had at the request of the petitioner, proceeded to appoint an arbitrator for determination of disputes between the parties. Even before this Court, learned counsel for the respondent has not seriously denied any of the above. The only



ground on which the present petition is sought to be opposed is that the Agreement dated 14.12.2021 in itself stands vitiated as the same was entered into between the parties on the basis of a fake experience certificate produced by the petitioner. It has thus been urged that a criminal complaint in this regard has already been lodged by the respondent and now that the matter is pending investigation by the police, the genuineness of the certificate in question can only be determined in criminal proceedings and therefore this dispute cannot be decided by an Arbitrator.

10. This plea by the respondent may appear attractive on the first blush, but a closer scrutiny of the facts of the present case makes it evident that the disputes in the present case cannot be said to be non-arbitrable. Merely because after the filing of the present petition, the respondent chose to file a criminal complaint against the petitioner alleging therein that the petitioner had submitted a forged/fake experience certificate, cannot by itself lead to a conclusion that any fraud or forgery was committed by the petitioner. It is only when the Court comes to a definite conclusion that the arbitration agreement itself is void, that the Court should decline to refer the parties to arbitration despite the existence of an arbitration clause. Even otherwise, the disputes between the parties are purely private in nature and would not fall within the realm of disputes which would, in any manner, affect public interest. The petitioner is, therefore, justified in urging that in the facts of the present case, the learned Arbitrator would be competent to decide the question regarding the arbitrability



of the disputes as well.

11. I have also considered the decisions in *Rashid Raza (supra)* and *Avantha Holdings Ltd (supra)* relied upon by the respondent but find that the same do not in any manner support the case of the respondent. In *Rashid Raza (supra)*, the Apex Court, after noticing that the allegations regarding fraud pertained only to the private affairs of partnership between the parties therein, rejected a similar opposition to a petition under Section 11 of the Act. Similarly, in *Avantha Holdings Ltd. (supra)*, the Co-ordinate Bench, despite allegations of fraud having been levelled by the respondent therein, declined to hold that the disputes were non-arbitrable by emphasising that unless the Court comes to a conclusion that the arbitration agreement is void, the disputes, including the question of arbitrability thereof, ought to be referred to arbitration. At this stage, it may be useful to refer to paras 81 to 84 of the decision in *Avantha Holdings Ltd. (supra)* which read as under:

“81. The decision of the Supreme Court in N.N. Global Mercantile (P) Ltd. case [N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2021) 4 SCC 379 : (2021) 2 SCC (Civ) 555] has put the aforesaid issue to rest. The court has clearly held that it is only in such cases “where the court come to a conclusion that the contract is void without receiving any evidence, it may be justified in declining the reference to arbitration in a few isolated cases.

82. In the facts of the present case, there is no dispute that the respondent had entered into the agreement that includes the arbitration clause. The dispute, essentially, is



whether the said agreement is invalid as being part of the fraudulent exercise by the promoters of the respondent to siphon funds from the respondent Company. The dispute whether the consent is vitiated on account of fraud, as defined under Section 17 of the Contract Act, 1872, and the agreement is voidable under Section 19 of the said Act, is clearly a matter that can be referred to arbitration. The said issue is no longer res integra in view of the decision of the Supreme Court in N.N. Global Mercantile (P) Ltd. case [N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2021) 4 SCC 379 : (2021) 2 SCC (Civ) 555].

83. As noted above, an agreement, which is invalid on account of fraud, would undoubtedly have a bearing on the question of arbitrability of the disputes. If the arbitration agreement is invalid, it is obvious that recourse to arbitration would not be available for deciding any dispute. However, unless the court finally concludes that the arbitration agreement is invalid, it would not be apposite to deny the request to arbitration. As highlighted in the Law Commission's 246 Report, a reference by any judicial authority is required to be made to arbitration if prima facie an arbitration agreement exists. However, the conclusion that an arbitration agreement does not exist would be conclusive and not prima facie. The Supreme Court also clearly held that where the summary consideration in a summary proceeding would be insufficient and inconclusive, the parties are required to be referred to arbitration. Unless the court gives a conclusion that ex facie the arbitration agreement is non-existent, invalid or the disputes are not arbitrable, the parties would be referred to arbitration See : para 154.4 of the decision in Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549].

84. It is well settled that an Arbitral Tribunal is also competent to decide the question regarding arbitrability of disputes. See : Zostel Hospitality (P) Ltd. v. Oravel Stays (P) Ltd. [Zostel Hospitality (P) Ltd. v. Oravel Stays (P)



Ltd., (2021) 9 SCC 765 : (2021) 4 SCC (Civ) 625] and Arasmeta Captive Power Co. (P) Ltd. v. Lafarge India (P) Ltd. [Arasmeta Captive Power Co. (P) Ltd. v. Lafarge India (P) Ltd., (2013) 15 SCC 414 : (2014) 5 SCC (Civ) 302] .” (emphasis supplied)

12. There is yet another reason that compels me to hold that this is a fit case where the parties must be referred to arbitration. As already noted hereinabove, upon the petitioner’s request, the respondent itself had appointed a sole Arbitrator for adjudication of the very same disputes in respect whereof the present petition has been filed. Except for baldly stating that the letter dated 12.07.2022 appointing an arbitrator was issued on account of an oversight, no worthwhile explanation has been given as to why it should now be permitted to resile from its initial stand that the disputes were required to be adjudicated through arbitration alone.
13. For the aforesaid reasons, I am of the view that since it cannot be said at this stage that the agreement itself is vitiated by fraud, the question as to whether the disputes raised by the petitioner are arbitrable should be left to the wisdom of the learned Arbitrator who will be free to decide the same after taking into account the evidence led by the parties.
14. The petition is, therefore, entitled to succeed and is accordingly allowed by appointing Justice M. M. Kumar, former Chief Justice of High Court of Jammu and Kashmir (Mobile No.9888824752). The fees of the learned Arbitrator will be governed by Schedule IV of the Act. Before entering upon reference, the learned Arbitrator will



comply with Section 12 of the Act.

15. It is made clear that since this Court has not expressed any opinion on the merits of the rival claims of the parties, it will be open for them to file their respective claims/counter claims before the learned Arbitrator which will be considered in accordance with law.

16. A copy of this order be forwarded to the learned Arbitrator for information.

REKHA PALLI, J

SEPTEMBER 11, 2023
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