$~O-10 & 11

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

Date of Decision**: 03.11.2025**

IN THE MATTER OF:

\+ **ARB.P. 1440/2025**

M/S THARU AND SONS PVT LTD

.....Petitioner

Through: Mr. Ankit Jain, Sr. Adv. with Mr. Mohit Gupta, Mr. Vishal Saxena and Ms. Deepakshi Jain, Advs.

versus

DIVISIONAL RAILWAY MANAGER NORTHERN RAILWAYS

.....Respondent

Through: Mr. Ayush Tanwar, Ms. Ayushi Srivastava, Mr. Arpan Narwal and Mr. Kushagra Malik, Advs. for Mr. Amit Tiwari, CGSC for UoI.

\+ **O.M.P.(I) (COMM.) 396/2024 & I.A. 45210/2024**

M/S THARU AND SONS PVT LTD

.....Petitioner

Through: Mr. Ankit Jain, Sr. Adv. with Mr. Mohit Gupta, Mr. Vishal Saxena and Ms. Deepakshi Jain, Advs.

versus

DIVISIONAL RAILWAY MANAGER NORTHERN RAILWAYS

.....Respondent

Through: Mr. Ayush Tanwar, Ms. Ayushi

Srivastava, Mr. Arpan Narwal and Mr. Kushagra Malik, Advs. for Mr. Amit Tiwari, CGSC for UoI.

CORAM:
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

JUDGEMENT

PURUSHAINDRA KUMAR KAURAV, J. (ORAL)

ARB.P. 1440/2025

1. This petition has been filed seeking appointment of the Arbitrator.

2. The facts of the case indicate that the petitioner was awarded a contract by the respondent for the maintenance of laundry machines. The contract was governed by the General Conditions of Contract, 2018 (GCC). There is a dispute regarding the arbitrability of the present claim, specifically whether it falls within the "excepted matters" enumerated in Clause 7.4. The respondent places emphasis on Clause 7.4(i), contending that the dispute concerning the cumulative penalty is an excepted matter and therefore not arbitrable.

3. Conversely, Clause 8.1 has been relied upon by Mr. Jain, learned senior counsel for the petitioner. He contends that the dispute essentially relates to termination of the contract and, consequently, debarment and damages. Such issues, according to him, do not fall within the excepted matters. He further submits that the principle laid down by the Supreme Court in ***Interplay Between Arbitration Agreements under Arbitration Act, 1996 & Stamp Act, 1899, In re***[1], particularly paragraph 141.1(iii), clearly

[1] (2024) 6 SCC 1

leaves this determination to the arbitrator.

4. He also places reliance on the decision of this Court in the case of ***Union of India (Ministry of Railways) and Ors. v. M/s. J. Sons Engineering Corporation Ltd. and Anr.***[2] and ***N. K. Sharma v. The General Manager Northern Railway***[3]**.**

5. On the other hand, Mr. Ayush Tanwar placed reliance in the decision of the Supreme Court in the case of ***General Manager Northern Railways and Ors. v. Sarvesh Chorpa***[4] and ***Aroon Avaiation Services Pvt. Ltd. v. Union of India***[5].

6. The law with respect to the scope and standard of judicial scrutiny under Section 11(6) of the Act has been fairly well settled. This Court in ***Pradhaan Air Express Pvt Ltd v. Air Works India Engineering Pvt Ltd***[6], has extensively dealt with the scope of interference at the stage of Section 11. Furthermore, this Court, in ***Axis Finance Limited Vs. Mr. Agam Ishwar Trimbak***[7] has held that the scope of inquiry under Section 11 of the Act is limited to a *prima facie* examination of the *existence* of an arbitration agreement. Further, it was also reiterated that the objections relating to the arbitrability of disputes are not to be entertained by a referral Court acting under Section 8 or 11 of the Act. The relevant extract of the aforesaid decision reads as under: -

> *19.In In Re: Interplay , the Supreme Court confined the analysis under Section 11 of the Act to the existence of an arbitration agreement and under Section 8 of the Act to the existence and validity of an arbitration agreement. Under both the provisions, examination was to be made at*

[2] 2015 SCC OnLine Del 8765
[3] 2023:DHC:8576
[4] Civil Appeal No.1791 of 2002
[5] CS(COMM) 71/2021 dated 10.10.2022
[6] 2025 SCC OnLine Del 3022
[7] 2025:DHC:7477

the touchstone of Section 7 of the Act. Further, issues pertaining to the arbitrability of the dispute fell outside the scope of both Section 11(6A) and Section 8 of the Act. The material part of the judgement of the Supreme Court in In Re: Interplay reads as under:

> *164. The 2015 Amendment Act has laid down different parameters for judicial review under Section 8 and Section 11. Where Section 8 requires the referral Court to look into the prima facie existence of a valid arbitration agreement. Section 11 confines the Court's jurisdiction to the examination of the existence of an arbitration agreement. Although the object and purpose behind both Sections 8 and 11 is to compel parties to abide by their contractual understanding, the scope of power of the referral Courts under the said provisions is intended to be different. The same is also evident from the fact that Section 37 of the Arbitration Act allows an appeal from the order of an arbitral tribunal refusing to refer the parties to arbitration under Section 8, but not from Section 11. Thus, the 2015 Amendment Act has legislatively overruled the dictum of Patel Engineering (supra) where it was held that Section 8 and Section 11 are complementary in nature. Accordingly, the two provisions cannot be read as laying down a similar standard. 165. The legislature confined the scope of reference under Section 11(6A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In Duro Felguera (supra), this Court held that the referral Courts only need to consider one aspect to determine the existence of an arbitration agreement – whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6A) should be confined to the existence of an arbitration agreement on the basis of Section 7Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by arbitral tribunal under Section 16. We accordingly clarify the position of law laid down in Vidya Drolia (supra) in the context of Section 8 and Section 11 of the Arbitration Act.*

166. The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competencecompetence, only prima facie proof of the existence of an arbitration agreement must be adduced before the referral Court. The referral Court is not the appropriate forum to conduct a minitrial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the arbitral tribunal. This position of law can also be gauged from the plain language of the statute. 167. Section 11(6A) uses the expression "examination of the existence of an arbitration agreement." The purport of using the word "examination" connotes that the legislature intends that the referral Court has to inspect or scrutinize the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression "examination" does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provides that the arbitral tribunal can "rule" on its jurisdiction, including the existence and validity of an arbitration agreement. A "ruling" connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the referral Court is only required to examine the existence of arbitration agreements, whereas the arbitral tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by this Court in Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd." [Emphasis supplied]

20. The effect of In Re: Interplay was further explained by a Three Judge Bench of the Supreme Court in SBI General Insurance Co. Ltd. v. Krish Spinning[8] wherein the Court declared Vidya Drolia and NTPC Ltd.'s findings qua scope of inquiry under Section 8 and Section 11 of the Act to no longer be compatible with modern principles of arbitration. The material portions of the judgement read as under:

"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

[8] 2024 SCC OnLine SC 1754

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). ... 118. Tests like the "eye of the needle" and "ex-facie meritless", although try to minimise the extent of judicial interference, yet they require the referral Court to examine contested facts and appreciate prima facie evidence (however limited the scope of enquiry may be) and thus are not in conformity with the principles of modern arbitration which place arbitral autonomy and judicial non-interference on the highest pedestal." [Emphasis supplied]

21. Similarly, in BGM and M-RPL-JMCT (JV) v. Eastern Coalfields Ltd[9] *the Supreme Court succinctly explained the effect of In Re: Interplay on a Referral Court's powers under Section 11 of the Act. The relevant part of the judgement is as under:*

15. ...

(a) Section 11 confines the Court's jurisdiction to the examination regarding the existence of an arbitration agreement.

(b) The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination.

(c) Referral Courts only need to consider one aspect to determine the existence of an arbitration agreement — whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6-A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Such a legal approach will help the Referral Court in weeding out prima facie non-existent arbitration agreements.

(d) The purport of using the word "examination" connotes that the legislature intends that the Referral Court has to inspect or scrutinise the dealings between the parties for the existence of an arbitration agreement. However, the expression "examination" does not connote or imply a laborious or contested inquiry.

(e) The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. Only prima facie proof of the existence of an arbitration agreement must be adduced before the Referral Court. The Referral Court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to

[9] 2025 SCC OnLine SC 1471

> *the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the Arbitral Tribunal.*
>
> *(f) Section 16 provides that the Arbitral Tribunal can "rule" on its jurisdiction, including the existence and validity of an arbitration agreement. A "ruling" connotes adjudication of disputes after admitting evidence from the parties. Therefore, when the Referral Court renders a prima facie opinion, neither the Arbitral Tribunal, nor the Court enforcing the arbitral award is bound by such a prima facie view. If a prima facie view as to the existence of an arbitration agreement is taken by the Referral Court, it still allows the Arbitral Tribunal to examine the issue in depth.*
>
> *[Emphasis supplied]*
>
> *22. Thus from the above-mentioned authorities it is clear that a Court's scope of inquiry under Section 11 of the Act has been limited to a prima facie examination of the existence of an arbitration agreement while the adjudication under Section 8 is to be made for both existence and validity. Further, the examination so undertaken under both the said provisions must be within the confines of Section 7 of the Act. Objections relating to arbitrability of disputes are not to be entertained by a referral Court acting under Section 8 or 11 of the Act."*

7. If the enunciation of the law as it stands today is considered in the correct perspective, it clearly indicates that the arbitrability of the nature of the dispute sought to be raised can be examined by the arbitrator concerned.

8. Under these circumstances, leaving all issues to be open to be adjudicated by the arbitrator, the Court does not find any impediment in appointing the Arbitrator.

9. Accordingly, this Court appoints Ms. Sapna Nirwan, Advocate (Mobile No: +91 9999450823 , e-mail id: sapnanirwan407@gmail.com) as the sole Arbitrator.

10. The Sole Arbitrator may proceed with the arbitration proceedings, subject to furnishing to the parties the requisite disclosures as required under Section 12 of the Act.

11. The Sole Arbitrator shall be entitled to fee in accordance with the IVth Schedule of the Act or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

12. The parties shall share the arbitrator's fee and arbitral cost, equally.

13. All rights and contentions of the parties in relation to the claims/counter claims are kept open, to be decided by the Sole Arbitrator on their merits, in accordance with law.

14. Needless to state, nothing in this order shall be construed as an expression of opinion of this Court on the merits of the controversy. All rights and contentions of the parties in this regard are reserved. Let the copy of the said order be sent to the Sole Arbitrator through the electronic mode as well.

15. Accordingly, the instant petition stands disposed of.

O.M.P.(I) (COMM.) 396/2024 & I.A. 45210/2024

1. The pleadings in this case are completed. The Court since has an appointed arbitrator, it would be appropriate if the arbitrator should consider the instant application and to pass appropriate order after extending opportunity to the parties.

2. Let an expeditious disposal on this application which shall be treated to be an application under Section 17 be appreciated within 30 days from the first date of hearing.

3. The matter stands disposed of along with the pending application.

PURUSHAINDRA KUMAR KAURAV, J

NOVEMBER 3, 2025/p/sph