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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on: 17th October, 2022*
Judgment Delivered on: 28th October, 2022

\+ **CS(COMM) 92/2020 & I.A. 2712/2020(O-XXXIX R-1 & 2 of CPC), I.A. 1795/2021(O-XXXVII R-3(5) of CPC)**

SORIN GROUP ITALIA S.R.L .... Plaintiff
Through: Mr.Ananya Kumar and Mr.Kartikey Gupta, Advocates.

versus

NEERAJ GARG .... Defendant
Through: Mr.Manik Dogra along with Mr.Rohan Jaitley, Mr.Akshay Sharma, Mr.Dhruv Pande and Mr.Dev Pratap Shahi, Advocates.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

I.A. 8832/2022 (of the defendant u/S 45 of Arbitration & Conciliation Act, 1996)

1. By way of this judgment, I shall decide the application filed on behalf of the defendant under Section 45 of the Arbitration and Conciliation Act, 1996 (A&C Act) seeking that the parties be referred to arbitration and the plaint in the present suit be rejected.

2. The present suit has been filed by the plaintiff (hereinafter referred to as 'Sorin') under provisions of Order XXXVII of the Code of Civil

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Procedure, 1908 (CPC) as a summary suit seeking recovery of USD 3,08,203.45/- along with *pendent lite* and future interest. Sorin and the defendant entered into a Sole Distribution Agreement dated 1st July, 2017 (hereinafter referred to as 'Agreement'), in terms of which, the defendant placed a purchase order on Sorin to supply certain goods. Sorin supplied the said goods under the purchase order and raised three invoices on the defendant. Since the defendant failed to make full payment in terms of the said invoices, Sorin filed the present suit under Order XXXVII of the CPC seeking recovery of the balance payment in respect of the invoices raised by Sorin on the defendant.

3. Upon summons being issued in the suit, the defendants filed an application under Section 8 of the A&C Act and an application seeking leave to defend. The application under Section 8 of the A&C Act was withdrawn by the defendant on 5th May, 2022 with liberty to file an application under Section 45 of the A&C Act. Pursuant to the said liberty, the present application has been filed. Notice in this application was issued on 31st May, 2022 and reply has been filed on behalf of Sorin.

4. At the outset, the relevant clauses of the Agreement in relation to dispute resolution and choice of law are set out below:

> *"Article 15 -Enforcement of Agreement*
>
> *15.1 Choice of Law This Agreement, and any issues or disputes arising out of or in connection with it (Whether such disputes are contractual or non-contractual in nature such as claims in tort, for breach of statute or regulation, or regulation, or otherwise) shall be governed by and construed in accordance with the laws of Italy, excluding its rules governing conflicts of laws and the United Nations Convention on the International Sale of Goods.*

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15.2 Dispute Resolution and Forum

a) ***If a dispute arises between the Parties relating to the termination or the grounds for the termination (including expiration) including potential claims for indemnification or compensation thereof,*** *the exclusive dispute resolution mechanism for such disputes shall be as follows:*

(i) Representatives of the Parties with decision-making authority shall meet to attempt in good faith to negotiate a resolution of the dispute prior to pursuing other available remedies.

(ii) If within sixty (60) days after such meeting the Parties have not succeeded in negotiating a resolution of the dispute, such dispute shall be submitted to final and binding arbitration under the then current Commercial Arbitration Rules of the Chamber of Commerce Milan, by three (3) arbitrators.

(iii) The place of arbitration shall be Milan, Italy

(iv) The language used during the arbitration proceedings shall be exclusively English.

(v) The Parties shall bear the cost of arbitration equally and shall bear their own expenses, including professional fees. The decision of the arbitrators shall be final and non-appealable and may be enforced in any court of competent jurisdiction.

b) ***As for all other disputes between the parties resulting from the Agreement, the courts located within Milan, Italy shall have exclusive jurisdiction to adjudicate any disputes arising out of or in connection with this Agreement. Consequently, Distributor hereby consents to the personal jurisdiction of the courts located in Milan, Italy for***

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resolution of disputes as set forth in Article 15.

However, Sorin at its sole discretion, shall always have the right to invoke the jurisdiction of any court with competent jurisdiction and to commence proceedings, including but not limited to injunctive relief measures, to prevent violations of Articles 6, 7, and 8 hereof or to recover any monies owed by Distributor to Sarin hereunder."

5. Counsel appearing on behalf of the defendant submits that the dispute raised in the present suit is squarely covered by the aforesaid arbitration clause in the Agreement and therefore, the parties be referred to arbitration under Section 45 of the A&C Act. The counsel appearing on behalf of the defendant makes the following submissions:

i. The present case involves disputes relating to claims for compensation and non-extension of the Agreement. The same is squarely covered under the scope of the aforesaid arbitration clause and therefore, the parties should be referred to arbitration under section 45 of the A&C Act.

ii. The proviso to Clause 15.2(b) of the Agreement permits filing of cases in any court with competent jurisdiction only when the injunctive relief is claimed. The same is not applicable in the present case and therefore, the present suit is not maintainable.

iii. The defendant also has a counter claim against Sorin and the same would be covered under the arbitration clause. It would lead to absurd results if the claims under the present suit and the counter claim of the defendant are adjudicated by two different judicial authorities. A legal notice invoking arbitration in respect of the

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counter claim was issued by the defendant to Sorin on 2nd May, 2022. Sorin did not respond to the said notice.

iv. Reliance has been placed on the following judgments:-

a) ***Jes & Ben Groupo Pvt. And Ors* v. *Hell EnergyMagyarorzag KFT (Hell Energy Hungry Ltd.) And Anr.***, 2019 SCC OnLine Del 10225

b) ***Hindustan Petroleum Corpn. Ltd* v. *Pinkcity Midway Petroleums***, (2003) 6 SCC 503

c) ***Sasan Power Limited* v. *North American Coal Corporation (India) Private Ltd.***, (2016) 10 SCC 813

d) Judgment dated 11th October 2002 in Arb.P. 621/2021 titled ***Panasonic India Private Ltd.* v. *Shah Aircon through Its Proprietor Shadab Raza***.

e) ***Vidya Drolia And Ors* v. *Durga Trading Corporation***, (2021) 2 SCC 1

6. Per contra, the counsel appearing on behalf of Sorin has made the following submissions:

i. Clause 15.2(a) only relates to the disputes arising out of termination of the contract, grounds for termination (including expiration), potential claims for indemnification or compensation thereof. Therefore, the dispute in the present suit is not covered under the said clause.

ii. The dispute in the present suit is in respect of amount payable towards unpaid invoices raised by Sorin on the defendant. Therefore, the same is squarely covered under proviso to Clause 15.2(b).

iii. The proviso to Clause 15.2(b) is not confined to the cases

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where injunctive relief is sought, but the same would also be applicable in respect of suits for recovery of monies like the present suit.

iv. The defendant would be at liberty to invoke arbitration in terms of Clause 15.2(a)(ii) of the Agreement in relation to its alleged grievances, independent of the proceedings in the present suit.

v. Reliance is placed on the following judgments:-

a) ***Indian Oil Corporation Limited* v. *NCC Limited*** (2022) SCC OnLine SC 896

b) ***Emaar India Ltd* v. *Tarun Aggarwal Projects LLP And Anr.*** (2022) SCC OnLine SC 1328

c) ***Ms. Sancorp Confectionary Pvt. Ltd. & Anr.* v. *M/s Gumlink A/S*,** (2012) SCC OnLine Del 5507

7. I have heard the counsels for the parties and the rival submissions.

8. At this stage, it is deemed appropriate to refer to Section 45 of the A&C Act:

> *"45.* ***Power of judicial authority to refer parties to arbitration****. —Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."*

9. In ***Vidya Drolia*** (supra), a judgement relied by the counsel for the defendant, the Supreme Court while observing that the arbitral tribunal has the authority to decide on questions of non-arbitrability of a dispute, has

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recognized that the civil court can undertake a limited review to check and protect parties from being forced to arbitrate when the matter is clearly non-arbitrable. It was further observed that when the court is in doubt, the parties should be referred to arbitration. The dicta of ***Vidya Drolia*** (supra) contained in paragraph 154, is set out below:

> *"154. Discussion under the heading „Who decides Arbitrability?" can be crystallized as under:*
>
> *154.1. Ratio of the decision in Patel Engineering Ltd. on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23.10.2015) and even post the amendments vide Act 33 of 2019 (with effect from 09.08.2019), is no longer applicable.*
>
> *154.2. Scope of judicial review and jurisdiction of the court under Section 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 the 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***

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> ***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."*

10. In ***Indian Oil Corporation*** (supra), the Supreme Court noted that the parties can provide in an arbitration clause for '*excepted matters*' i.e. a specific matter to be excluded from the purview of the arbitration clause. In respect of such '*excepted matters*', the Arbitral Tribunal would have no jurisdiction to decide the same. Taking note of the judgment in ***Vidya Drolia*** (supra), the Supreme Court observed in ***Indian Oil Corporation*** (supra) that the issue of non-arbitrability of the dispute can be considered by the Court at the stage of deciding a Section 11 application, if the facts are very clear and glaring, and in view of the specific clauses of the agreement.

11. The judgments in ***Indian Oil Corporation*** (supra) and ***Vidya Drolia*** (supra) were followed by the Supreme Court in ***Emaar India Ltd.*** (supra). The Supreme Court reiterated its view in ***Indian Oil Corporation*** (supra) and held that a preliminary inquiry was required to be conducted on whether the dispute between the parties falls within the scope of arbitration clause in the agreement or not. Upon conducting preliminary inquiry, if it is found that the dispute is in respect of the '*excepted matters*", the matter cannot be referred to arbitration. The relevant observations of the Supreme Court as contained in paragraph 23 and 24 are set out below:

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"23. ***In the case of Vidya Drolia (supra), it is specifically observed and held by this Court that 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 nonarbitrability would, to some extent, determine the level and nature of judicial scrutiny. It is further observed that 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."*** *It is further observed that the prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage.*

24. Applying the law laid down by this Court in the aforesaid decisions and considering Clauses 36 and 37 of the Agreement and when a specific plea was taken that the dispute falls within Clause 36 and not under Clause 37 and therefore, the dispute is not arbitrable, the High Court was at least required to hold a primary inquiry/review and prima facie come to conclusion on whether the dispute falls under Clause 36 or not and whether the dispute is arbitrable or not. Without holding such primary inquiry and despite having observed that a party does have a right to seek enforcement of agreement before the Court of law as per Clause 36, thereafter, has appointed the arbitrators by solely observing that the same does not bar settlement of disputes through Arbitration and Conciliation Act, 1996. However, the High Court has not appreciated and considered the fact that in case of dispute as mentioned in Clauses 3, 6 and 9 for enforcement of the Agreement, the dispute is not arbitrable at all. In that view of the matter, the impugned judgment and order passed by the High Court appointing the arbitrators is unsustainable and the same deserves to be quashed and set aside. However, at the same time, as the High Court has not held any preliminary inquiry on whether the dispute is arbitrable or not and/or whether the dispute falls under Clause 36 or not, we deem it proper to remit the matter

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to the High Court to hold a preliminary inquiry on the aforesaid in light of the observations made by this Court in the case of Vidya Drolia (supra) and in the case of Indian Oil Corporation Limited (supra) and the observations made hereinabove and thereafter, pass an appropriate order."

12. In ***Sancorp Confectionary*** (supra), a coordinate Bench of this Court while considering an application filed on behalf of the defendant under Section 45 of the A&C Act, held that the Court has to examine and record a prima facie finding as to whether there is an arbitration clause or not and whether the disputes which are sought to be referred to arbitration are covered by an arbitration agreement or not.

13. The legal position that emerges from the judgments in ***Vidya Drolia*** (supra), ***Indian Oil Corporation*** (supra) and ***Emaar India Limited*** (supra) is that while considering an application under Section 8 or Section 45 of the A&C Act, the court is required to hold a preliminary enquiry as to whether the dispute is arbitrable or not and come to a prima facie view. The purpose of the said enquiry is to prevent the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable. Therefore, in light of the dicta of the aforesaid judgments, a preliminary enquiry is required to be held in the present case so as to determine whether the subject matter of the plaint is arbitrable or not, or if it falls within the scope of '*excepted matters*'.

14. The present suit has been filed by Sorin seeking recovery of amounts due and payable towards the invoices raised by Sorin on the defendant. In light of the aforesaid legal principles, the court has to determine if the aforesaid claim is covered within the scope of the arbitration clause contained in the Agreement between the parties.

15. A perusal of the dispute resolution clause set out above, reveals that it

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was the intention of the parties that if a dispute relating to termination or grounds of termination (including expiration) arises between the parties, the same would be referred to arbitration. The word '*including*' in Clause 15.2(a) clearly indicates that the subsequent phrase, '*potential claims for indemnification or compensation thereof*' is used in relation to termination or expiration of the agreement and not in relation to any other dispute. All other disputes will be „*excepted matters*" and will not be covered under the arbitration clause. I do not find merit in the submission of the counsel for the defendant that the word '*compensation*' has to be construed independent of the earlier part of the Clause 15.2(a). In any event, the amounts sought to be recovered in the plaint do not relate to any indemnification or compensation sought by Sorin from the defendant and are solely based on the unpaid invoices of Sorin.

16. As regards Clause 15.2(b), it was the intention of the parties that for all disputes other than those covered under Clause 15.2(a), the exclusive jurisdiction would vest in the courts located in the Milan, Italy. An option was also given to Sorin to invoke jurisdiction of any other court having competent jurisdiction, to file proceedings relating to injunctive relief or for recovery of monies owed by the defendant to Sorin.

17. It is nobody's case that this Court is not a court of competent jurisdiction. Counsel for the defendant submits that the proviso to Clause 15.2(b) has to be interpreted in a manner that only suits relating to injunctive relief can be filed before this Court. I do not agree with this submission. Language of the proviso to the aforesaid clause including the use of ',' and '*or*' clearly shows that the intention of the parties was that the suits relating to injunction as well as recovery suits could be filed by Sorin before the

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competent courts in India. The phrase '*including but not limited to injunctive relief measures*' clearly shows that the suit need not be limited to injunctive relief. The scope of a suit for recovery and that for injunctive relief is entirely different. The use of the word '*or*' clearly shows that in addition to the proceedings for injunctive relief, Sorin could also file suits for recovery of monies owed by the defendant to Sorin. Therefore, the present suit filed seeking recovery of monies would be maintainable before this Court.

18. Counsel for the defendant submits that the defendant has also issued a legal notice dated 2nd May, 2022 invoking arbitration under Clause 15.2(a) in respect of a counter claim of the defendant against Sorin, and if the interpretation of the aforesaid clauses as canvassed by Sorin is upheld, it would result in an anomalous situation, wherein the counter claim of the defendant would be adjudicated in the arbitration proceedings, whereas the claim of Sorin would be adjudicated before this Court by way of the present suit. I am not in agreement with the said submission. The parties had consciously decided to have different forums for adjudication of different disputes under the Agreement. The arbitration mechanism was chosen only in respect of disputes arising out of termination or expiration of the contract and in respect of all other disputes, the jurisdiction was given to the civil courts. It is no longer *res integra* that in arbitration matters, the choice of the parties has to be given supremacy. If the parties have consciously chosen two separate remedies in respect of different disputes under the Agreement, the same has to be respected. In the present case, both Sorin and the defendant are commercial entities and therefore, they ought to have known the consequences arising out of having two separate dispute resolution forums in the Agreement.

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19. I may also point out here that the legal notice invoking arbitration in respect of the counter claim, has only been issued on behalf of the defendant on 2nd May, 2022, just before filing of the present application, whereas the present suit was filed on 24th February, 2020. In my view, the aforesaid notice has been sent by the defendant at this belated stage only to highlight the so-called anomaly on account of two different forums being called upon to adjudicate different disputes between the parties and in support of the present application.

20. At this stage, I propose to deal with the judgments cited on behalf of the defendant.

21. In ***Jes & Ben Groupo*** (supra), a Coordinate Bench of this Court allowed an application filed on behalf of the defendant under Section 45 of the A&C Act and referred the parties to arbitration, relying upon the dicta of the Supreme Court in ***Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd.*,** (2005) 7 SCC 234. This judgment was in a completely different factual context, as the court was examining the issue whether the arbitration agreement was null and void, inoperative or incapable of being performed within the meaning of Section 45 of the A&C Act. It was in that context the court held that if the civil court is inclined to reject the request for reference, it must afford full opportunity to the parties to lead evidence. In the present case, the issue is with regard to non-arbitrability of the dispute and not with regard to the Agreement being null and void, inoperative or incapable of being performed. Therefore, this judgment is of no assistance to the defendant.

22. In ***Hindustan Petroleum Corpn.*** (supra), the issue was whether the dispute could be adjudicated under the Standard of Weights and Measures

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Act, 1976, and therefore, the same could not be the subject matter of arbitration. This was not a case of being an „*excepted matter*" under the arbitration clause. Therefore, this judgement would also not be of assistance to the defendant.

23. In ***Sasan Power Limited*** (supra), the Supreme Court observed that the civil court while exercising jurisdiction under Section 45 of the A&C Act could not examine the validity of the main agreement between the parties. The observations were made in the context of validity of the agreement between the parties, as the contention of the parties was that the principal agreement between the parties was contrary to the public policy and was hit by Section 23 of the Indian Contract Act, 1872. In the present case, the dispute is not with regard to the validity of the Agreement between the parties. Therefore, the aforesaid judgment is not applicable to the facts of the present case.

24. The judgment of the Coordinate Bench in ***Panasonic India*** (supra), turned on the interpretation of the arbitration clause contained therein, which is quite different from the arbitration clause contained in the Agreement in the present case.

25. In view of the discussion above, I have no doubt in my mind that the dispute raised in the present suit with regard to recovery of monies towards the unpaid invoices raised by Sorin on the defendant, falls under the „*excepted matters*" and is therefore, not arbitrable as per the arbitration clause in the Agreement entered into between the parties. Further, the present suit is maintainable before this Court in terms of proviso to Clause 15.2(b) of the Agreement. Therefore, I do not find any merit in the present application and the same is dismissed.

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26. List for consideration of pending applications on 27th February, 2023.

AMIT BANSAL, J

OCTOBER 28, 2022

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