

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

Date of decision: 05th August, 2022

+ ARB.P. 797/2020 & I.A.12516/2020

SHRISTI INFRASTRUCTURE DEVELOPMENT CORPORATION
LTD Petitioner

Through: Mr. Anand Mishra, Advocate.

versus

IRCON INTERNATIONAL LIMITED Respondent

Through: Mr. Sandeep Garg with Mr. Jatin
Kumar, Advocate.

J U D G M E N T

(Judgment released on 08.08.2022)

ANUP JAIRAM BHAMBHANI J. (ORAL)

By way of the present petition under section 11 of the Arbitration & Conciliation Act 1996 ('A&C Act' for short), the petitioner seeks appointment of an arbitrator to adjudicate upon the disputes that are stated to have arisen with the respondent from Agreement dated 05.01.2005.

2. Notice on this petition was issued on 08.04.2021; whereupon the respondent has filed its reply dated 29.07.2022.

3. Mr. Anand Mishra, Advocate, for the petitioner has drawn the attention of this court to clause 72.2 of Agreement dated 05.01.2005 which comprises the arbitration agreement; and contemplates reference

of disputes between the parties to arbitration in accordance with the A&C Act.

4. Counsel has also invited attention to a separate territorial jurisdiction provision contained in clause 72.7 of Agreement dated 05.01.2005, which subjects the disputes between the parties to the jurisdiction of the courts of law at New Delhi.
5. As per the record, the petitioner invoked arbitration *vidé* Notice dated 01.10.2019; to which the respondent sent no reply.
6. However, in its reply dated 29.07.2022 filed to the petition, the only legal objection taken by the respondent is that the Special Conditions of Contract ('SCCs' for short) supersede the General Conditions of Contract ('GCCs' for short) insofar as the arbitration clause is concerned. To support this submission, Mr. Sandeep Garg, learned counsel for the respondent has called upon the court to consider the provision in clause 31.0 of the SCCs which relates to settlement of disputes, to say that the said clause supersedes clause 72.0 of the GCCs which would imply supersession of clause 72.2, which (latter) provision is cited by the petitioner to comprise the arbitration agreement between the parties.
7. Attention has also been drawn to clause 1.0 of the SCCs which reads as follows:

"1.0 The conditions of the Contract shall be General Conditions of Contract (herein after called as the General Conditions) as modified and added to by the following Special Conditions of Contract which shall be read and construed with the General Conditions as if they were incorporated therewith.

*Insofar as any of the conditions of Special Conditions of Contract **conflict or be inconsistent with** any of the General Conditions, the special conditions shall prevail.”*

(emphasis supplied)

8. Counsel for the respondent has further invited attention to the dispute settlement provision contained in clause 31.0 of the SCCs, which reads as under:

“31.0 SETTLEMENT OF DISPUTES

(This clause supersedes the clause '72.0' of General Conditions of Contract).

All disputes or differences of any kind whatsoever that may arise between the Employer/Engineer and the Contractor in connection with or arising out of the contract or subject matter thereof or the execution of works, whether during the progress of works or after their completion, whether before or after determination of contract shall be referred by the Contractor to the Employer in writing for resolving the same through mutual discussions, negotiations, deliberation etc. associating representatives from both the sides and concerted efforts shall be made for reaching amicable settlement of disputes or differences.”

(emphasis supplied)

9. It is the submission of learned counsel for the respondent, that by reason of the above provisions, the entire clause 72.0 which comprises the disputes settlement clause, including clause 72.2 which the petitioner is citing as the arbitration agreement, stands superseded and that therefore, there is no arbitration agreement between the parties by reason of the SCCs overriding and superseding the GCCs.
10. In the opinion of this court, while it is true that clause 1.0 of the SCCs gives an overriding effect to the SCCs over the GCCs, such effect is

restricted *only to the extent there is a conflict or inconsistency* between the provisions of the SCCs and those of the GCCs.

11. In so far as the respondent's submission that clause 31.0, which is the disputes settlement provision in the SCCs supersedes clause 72.0 of the GCCs is concerned, in the opinion of this court, for one, the question whether clause 31.0 of the SCCs overrides *only* clause 72.0 or also the specific arbitration agreement in clause 72.2 of the GCCs, requires detailed interpretation of the provisions of the contract, to decide which is not the remit of this court in the present proceedings. Besides, clause 31.0 of the SCCs contemplates only a mechanism for "... *amicable settlement of disputes or differences ...*" and does not provide any alternate mechanism for adjudication of disputes; and therefore, at least at this *stage of reference*, without a detailed consideration of the interplay of the GCCs and the SCCs, it cannot be said if clause 31.0 of the SCCs overrides the specific arbitration agreement in clause 72.2 of the GCCs.
12. To be sure, there is no provision in the SCCs that *specifically* overrides or supersedes the arbitration agreement contained in clause 72.2 of the GCCs. There is also no evident conflict or inconsistency between the arbitration clause comprised in clause 72.2 of the GCCs and clause 31.0 or any other provision contained in the SCCs.
13. A brief reference to some recent decisions of the Hon'ble Supreme Court that are relevant for deciding the issue at hand, is required at this point.

14. In its decision in *Intercontinental Hotels Group (India) Pvt. Ltd. & Anr. vs. Waterline Hotels Pvt. Ltd*¹, the Hon'ble Supreme Court has relied upon the supplementary opinion rendered by Hon'ble Chief Justice N.V. Ramana in the judgment in *Vidya Drolia & Ors. vs. Durga Trading Corporation*² and observed as follows:

“18. At the outset, we need to state that this Court's jurisdiction to adjudicate issues at the pre-appointment stage has been the subject matter of numerous cases before this Court as well as High Courts. The initial interpretation provided by this Court to examine issues extensively, was recognized as being against the pro-arbitration stance envisaged by the 1996 Act. Case by case, Courts restricted themselves in occupying the space provided for the arbitrators, in line with party autonomy that has been reiterated by this Court in Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1, which clearly expounds that Courts had very limited jurisdiction under Section 11(6) of the Act. Courts are to take a 'prima facie' view, as explained therein, on issues relating to existence of the arbitration agreement. Usually, issues of arbitrability/validity are matters to be adjudicated upon by arbitrators. The only narrow exception carved out was that Courts could adjudicate to 'cut the deadwood'. Ultimately the Court held that the watch word for the Courts is 'when in doubt, do refer'. This Court concluded as under:

* * * * *

“19. Following is the opinion of one of us (N.V. Ramana, J., as His Lordship then was):—

“244. Before we part, the conclusions reached, with respect to question No. 1, are:

244.1 Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

244.2 Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it's a clear case of deadwood.

¹2022 SCC OnLine SC 83

²(2021) 2 SCC 1

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.

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’.

244.5 The scope of the Court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1 Whether the arbitration agreement was in writing ? or

244.5.2 Whether the arbitration agreement was contained in exchange of letters, telecommunication etc?

244.5.3 Whether the core contractual ingredients qua the arbitration agreement were fulfilled ?

244.5.4 On rare occasions, whether the subject-matter of dispute is arbitrable?”

(emphasis supplied)

15. In another recent judgment in *N.N. Global Mercantile (P) Ltd. vs. Indo Unique Flame Ltd.*³, the Hon’ble Supreme Court has made the following observations :

“4.3. The doctrine of kompetenz-kompetenz implies that the Arbitral Tribunal has the competence to determine and rule on its own jurisdiction, including objections with respect to the existence, validity, and scope of the arbitration agreement, in the first instance, which is subject to judicial scrutiny by the courts at a later stage of the proceedings. Under the Arbitration Act, the challenge before the Court is maintainable only after the final award is passed as provided by sub-section (6) of Section 16. The stage at which the order of the tribunal

³(2021) 4 SCC 379

regarding its jurisdiction is amenable to judicial review, varies from jurisdiction to jurisdiction. The doctrine of kompetenz-kompetenz has evolved to minimise judicial intervention at the pre-reference stage, and reduce unmeritorious challenges raised on the issue of jurisdiction of the Arbitral Tribunal.

* * * * *

“4.10. The doctrine of kompetenz-kompetenz is based on the premise that the arbitration agreement is separate and independent from the substantive underlying contract in which it is embedded. Equally, an arbitration agreement exists and can be acted upon irrespective of whether the main substantive contract is valid or not.”

(emphasis supplied)

16. Therefore, insofar as reference to arbitration is concerned, keeping in view the position of law as expatiated in the aforementioned rulings, this court is of the view that : *firstly*, an arbitration agreement embedded in a contract is always considered a separate and severable clause, with a standing of its own; by reason of which, supersession of an arbitration agreement must not be lightly inferred. *Secondly*, in consonance with the overarching principle *viz.* ‘*when in doubt, do refer*’ whereby the extant, preponderant legal view is that if there is an arbitration agreement between the parties, which is sought to be negated by a party by citing other provisions of a contract, which requires interpretation of the contract, courts must lean towards referring the matter to arbitration. And *thirdly*, despite reference being made by court, the arbitrator must be left free to decide on his/her own jurisdiction including the existence of the arbitration agreement, as permissible under section 16 of the A&C Act which enshrines the *kompetenz-kompetenz* principle.

17. In the above view of the matter, this court is inclined to allow the present petition.
18. Accordingly, while leaving it to the arbitrator to consider whether the provisions of the SCCs override and efface the arbitration agreement between the parties as contained in the GCCs, this court is *prima-facie* satisfied that there is a valid and subsisting arbitration agreement between the parties; that this court has territorial jurisdiction to entertain and decide the present petition; and also that the disputes that are stated to have arisen between the parties as set-out *inter-alia* in the demand notices sent by the petitioner to the respondent between 29.03.2011 and 20.03.2019, do not appear *ex-facie* to be non-arbitrable.
19. Accordingly, the present petition is allowed and Hon'ble Ms. Justice Indu Malhotra, former Judge of the Supreme Court (Cellphone No. : +91 9810026757) is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties.
20. The learned Sole Arbitrator may proceed with the arbitral proceedings, subject to furnishing to the parties requisite disclosures as required under section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.
21. The learned Sole Arbitrator shall be entitled to fee as may be agreed to between the parties and the learned Sole Arbitrator.
22. Parties shall share the arbitrator's fee and arbitral costs, equally.
23. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.

24. Parties are directed to approach the learned Sole Arbitrator appointed within 10 days.
25. The petition stands disposed of in the above terms.
26. Other pending applications, if any, also stand disposed of.

ANUP JAIRAM BHAMBHANI, J

AUGUST 5, 2022

ds

Signature Not Verified

Signed By: SUNITA RAWAT
Location:
Signing Date: 05.08.2022
17:07:45

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