M/S Pavan Metals Refiners vs Union Of India & Anr. on 28 March, 2025

Author: Manoj Kumar Ohri

Bench: Manoj Kumar Ohri

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*      IN THE HIGH COURT OF DELHI AT NEW DELHI
%                              Date of Decision: 28.03.2025

+                        ARB.P. 1097/2024

M/S PAVAN METALS REFINERS                  .....Petitioner
                  Through: Mr. Umesh Kumar Shukla, Mr. S.
                           Mukharjee and Mr. Avinash Shukla,
                           Advocates.

                         versus

UNION OF INDIA & ANR                                  .....Res
                   Through:           Ms. Radhika Biswajit Dub
                                      for UOI with Mr.Devvrat
                                      Advocate.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

                          JUDGMENT (ORAL)
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1. The instant petition has been preferred under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the „A&C Act), seeking constitution of Arbitral Tribunal (hereinafter, referred to as the „AT) comprising of a Sole Arbitrator to adjudicate the disputes between the parties.

2. The petitioner firm purchased Scrap Lot No. 100550498 - containing 262.303 Metric Ton of Scarp Bronze Foundry Clinker III C - 1 which was auctioned by Northern Railway, Alambagh, Lucknow ("the department") on 16.05.2001 for Rs. 19,26,400/-. In this regard, Sale Suspense Note dated 28.05.2001 was issued by the department. The arbitration clause is contained in Clause 2905(a) of Indian Railways Standard Conditions Contract, as revised vide Railway Board s letter no. 2018/TF/Civil/Arbitration Policy dated 12.12.2018.

3. It is the petitioner s case that the concerned department supplied only 112.300 Metric Ton instead of 262.303 Metric Ton which cost only Rs. 11,66,380/- and hence, an excess amount of INR 7,60,020/- was deposited by the petitioner firm for the purchase. It is submitted that despite various communications by the petitioner seeking refund of the excess amount, no refund has been made till date. The respondent vide letter dated 20.10.2021 sought the consent of the petitioner to

waive off applicability of Section 12(5) of the A&C act. However, the respondent in their letter dated 18.03.2024 stated that petitioners request for appointment could not be entertained since the claim was time barred. Thereafter, the petitioner sent the notice under Section 21 of the A&C Act on 05.04.2024.

4. Learned Counsel for the petitioner submits that the present petition is not barred by limitation and that there has been no delay on part of the petitioner. It is submitted that the petitioner has made continuous efforts over the years to recover its dues. In this regard, he relies on various communications and representations dated 25.07.2001, 12.08.2001, 02.11.2015, 12.03.2016, 06.05.2016, 25.07.2016, 21.02.2017, 3.03.2021, 20.09.2021, 23.12.2021, 30.12.2021, 30.04.2022, 9.05.2022, 21.06.2022, 8.10.2022, and 11.08.2023 addressed to various representatives of the respondents before the petitioner was finally constrained to send a notice under Section 21 of the A&C Act. Lastly, it is submitted that the letter dated 20.10.2021 addressed by the respondents to the petitioner seeking waiver of the applicability of Section 12(5) of A&C Act would show that the respondents were agreeable to the reference to mediation.

5. Learned Counsel for the respondents has vehemently opposed the present petition and contends that there is no arbitration clause between the parties. It is submitted that the circular of Railways pertains to 2018 and would not apply to a dispute which has arisen in 2001. It is further contended that the claims are deadwood and hopelessly time barred as the purchase pertains to the year 2001 whereas the petitioner first sought appointment of arbitrator on 03.03.2021 and finally sent a notice under Section 21 of the A&C Act on 05.04.2024 i.e. well after more than twenty years. It is stated that since the foundry ceased operations over twenty three years prior, no documents in relation to the lot were available and moreover, the sale was on an "as is where is" basis. Moreover, it is further contended that no remarks regarding undelivered or short delivery of materials were noted in the final delivery letter. It is further stated that no joint note was issued by the delivery team certifying short delivery of materials which was required as per the Uniform Sales Terms and Conditions of Railways. Lastly, it is submitted that the letter dated 20.10.2021 was sent inadvertently and the letter does not imply that the Respondents were agreeable to a reference to arbitration.

6. I have heard learned counsels for the parties and gone through the record.

7. Two major grounds for opposition to the present petition have been raised by the respondents, namely, non-existence of arbitration clause and limitation. In so far as the first contention is concerned, it has been argued on behalf of the respondents that clause 2900 which speaks of dispute resolution and clause 2905(a), which provides for appointment of sole arbitrator, are not applicable to the present dispute, the same having first arisen in 2001. However, a perusal of the letter dated 20.10.2021 would show that the respondents had not only informed the petitioner that Clause 2900 had been revised, but also sought waiver under Section 12(5) and consent under Section 31(5) of the A&C Act. Not even a sliver of doubt was raised regarding the applicability of the arbitration clause. It has been contended that this letter was sent inadvertently, however this argument also does not hold water since the respondent in the subsequent communication dated 18.03.2024 refused the request of the petitioner for appointment of sole arbitrator on the ground that case was old and claims were time barred. However, again, it was neither stated that the arbitration clause was non-

existent nor was it stated that the letter dated 20.10.2021 was sent inadvertently.

8. Since the second major preliminary objection has been raised that the claims are time barred, it would be beneficial to discuss the prevailing position in law regarding the applicability of the Limitation Act to petitions under Section 11 of the A&C Act. A lack of time limit being prescribed in Section 11 and a combined reading of Section 43(1) of the A&C Act with the residual provision in Article 137 of the Limitation Act would make clear that a limitation period of three years from the time when the right accrues applies to Section 11. A petition under Section 11 of the Act may be barred by limitation in two ways; (i) either the petition itself may be barred by limitation from sending of the notice under Section 21 of the Act or (ii) the claims to be sought to be arbitrated are ex-facie dead and thus barred by limitation on the date of commencement of arbitration. The objection of respondent falls in the latter category.

9. The issue of limitation is one of admissibility and disputes which are factual in nature would be best left to be decided by the Arbitrator. Gainful reference can be made to the recent decision of the Constitutional Bench of the Supreme Court in Interplay Between Arbitration Agreements under Arbitration, 1996 & Stamp Act, 1899, In re,1 holding that at the stage of appointment of arbitrator, only the prima facie existence of an arbitration agreement has to be examined and nothing else. Relying on the decision in In re Interplay(Supra), the Supreme Court in SBI General Insurance Co. Ltd. v. Krish Spinning, 2 doubted that the approach of weeding out ex-facie non- arbitrable and frivolous disputes by the referral Court would still be applicable and held that matters which are in the sole domain of AT should not be looked at by the Court, even for a prima facie determination. It further held that Tests like the "eye of the needle" and "ex-facie meritless"

> are not in conformity with modern arbitration principles. The relevant portion of the said decision is extracted below:-
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> 113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in In Re :
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> Interplay (supra) that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a prima facie arbitration agreement and not any other issues. The relevant observations are extracted hereinbelow:
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> "209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a prima facie arbitration agreement and not other issues".

These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, (2024) 6 SCC 1 2024 SCC OnLine SC 1754 and dealing with an

unstamped instrument under the Stamp Act is not a timebound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. [...]"

(Emphasis supplied)

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 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).

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116. The question of "accord and satisfaction", being a mixed question of law and fact, comes within the exclusive jurisdiction of the arbitral tribunal, if not otherwise agreed upon between the parties. Thus, the negative effect of competence-competence would require that the matter falling within the exclusive domain of the arbitral tribunal, should not be looked into by the referral court, even for a prima facie determination, before the arbitral tribunal first has had the opportunity of looking into it.

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118. Tests like the "eye of the needle" and "ex-facie meritless", although try to misuse 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.

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125. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the arbitral tribunal is equally, if not more, capable to decide upon the appreciation of the evidence adduced by the parties. We say so because the arbitral tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material.

10. The Supreme Court in Krish Spinning(Supra) went on to clarify the findings in Arif Azim Co. Ltd. V. Aptech Ltd. 3 to hold that the referral Court, while determining the issue of limitation, should limit its enquiry to examining whether the petition has been filed within the period of limitation of three years or not. It further held that the commencement of such period would be determined as per the decision in Arif Azim (Supra), which holds that this period would commence once a valid notice invoking arbitration has been sent by the applicant to the other party, and there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice. It held as follows:-

> 132. Insofar as our observations on the second issue are concerned, we clarify that the same were made in light of the observations made by this Court in many of its previous decisions, more particularly in Vidya Drolia (supra) and NTPC v. SPML (supra). However, in the case at hand, as is evident from the discussion in the preceding parts of this judgment, we have had the benefit of reconsidering certain aspects of the two decisions referred to above in the light of the pertinent observations made by a seven-Judge Bench of this Court in In Re : Interplay (supra).
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> 133. Thus, we clarify that while determining the issue of limitation in exercise of the powers under Section 11(6) of the Act, 1996, the referral court should limit its enquiry to examining whether Section 11(6) application has been filed within the period of limitation of three years or not. The date of commencement of limitation period for this purpose shall have to be construed as per the decision in Arif Azim (supra). As a natural corollary, it is further clarified that the referral courts, at the stage of deciding an application for appointment of arbitrator, must not conduct an intricate evidentiary enquiry 1 (2024) 5 SCC 313 into the question whether the claims raised by the applicant are time barred and should leave that question for determination by the arbitrator. Such an approach gives true meaning to the legislative intention underlying Section 11(6-A) of the Act, and also to the view taken in In Re : Interplay (supra).
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> 134. The observations made by us in Arif Azim (supra) are accordingly clarified. We need not mention that the effect of the aforesaid clarification is only to streamline the position of law, so as to bring it in conformity with the evolving principles of modern-day arbitration, and further to avoid the possibility of any conflict between the two decisions that may arise in future.

These clarifications shall not be construed as affecting the verdict given by us in the facts of Arif Azim (supra), which shall be given full effect to notwithstanding the observations made herein.

11. Keeping in view import of In re Interplay and Krish Spinning (Supra), this Court refrains from giving a prima facie opinion on the aspect of the claims being time barred before the AT even has an opportunity to look at the same. The latest notice under Section 21 of the Act was sent on 05.04.2024. Thus, the petition is not time barred in itself. Whether the claims are deadwood or not, the AT could examine as a preliminary issue, after considering the evidence led by both sides.

12. Considering the facts and circumstances, this court deems it apposite to refer the matter to the AT comprising of a Sole Arbitrator. Accordingly, the present petition is disposed of with the following directions:

i) The disputes between the parties under the said agreement are referred to the AT comprising of a Sole Arbitrator.

ii) Mr. Vaibhav Tomar, Advocate (Mob: 9971446628) is appointed as the Sole Arbitrator to adjudicate upon the disputes between the parties uninfluenced by any observation made in this order.

iii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi (hereinafter, referred to as the „DIAC). The remuneration of the learned Arbitrator shall be in terms of DIAC (Administrative Cost and Arbitrators Fees) Rules, 2018 or as the parties may agree.

iv) The learned Arbitrator shall furnish a declaration in terms of Section 12 of the A&C Act prior to entering into the reference.

v) It is made clear that all the rights and contentions of the parties, including on the existence and validity of the Arbitration agreement, arbitrability of any of the claim/counter claim, any other preliminary objection, need and legality of interim relief, as well as contentions on merits of the dispute by either of the parties, are left open for adjudication by the learned arbitrator.

vi) The parties shall approach the learned Arbitrator within four weeks from today.

MANOJ KUMAR OHRI (JUDGE) MARCH 28, 2025/rd