Supreme Court of India
Magic Eye Developers Pvt. Ltd. vs M/S. Green Edge Infrastructure ... on 12 May, 2023
Author: M.R. Shah
Bench: M.R. Shah, C.T. Ravikumar

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. OF 2023
(@SLP (C) Nos. 18339-42/2021)

Magic Eye Developers Pvt. Ltd. …Appellant(s)

Versus

M/s. Green Edge Infrastructure
Pvt. Ltd. & Ors. Etc. …Respondent(s)

JUDGMENT

M.R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned common judgment and order passed by the High Court of Delhi at New Signature Not Verified Digitally signed by Neetu Sachdeva Delhi in respective Arbitration Petitions, by Date: 2023.05.12 15:47:40 IST Reason:

which, the High Court has referred the disputes for arbitration and has appointed the sole arbitrator, the original opponent – Magic Eye Developers Pvt. Ltd. has preferred the present appeals.

2. The issue involved in the present appeals is as such in a very narrow compass, namely, pre-referral jurisdiction of the Court under Section 11(6) of the Arbitration and Conciliation Amendment Act, 2015. 2.1 At the outset, it is required to be noted that before the High Court the appellant herein specifically raised an objection with regard to the existence of an arbitration agreement/clause. It was the case on behalf of the appellant that the dispute revolves entirely around MOU-2 which does not contain the arbitration clause. However, on the other hand, it was the case on behalf of the contesting respondent herein – original applicant that other agreement(s) i.e., SHA-1, SHA-2 and MOU-1 are interlinked/interconnected with the MOU-2 which contained the arbitration clause/agreement and therefore, all the aforesaid agreements are required to be read along with MOU-2.

2.2 By the impugned common judgment and order and relying upon the decision of this Court in the case of Vidya Drolia and Ors. Vs. Durga Trading Corporation, (2021) 2 SCC 1 and by observing that

the arbitrability of the dispute raised, viz-a-viz the arbitration clause 27.3 of SHA-1, is an involved issue and the said issue can be addressed by the learned Arbitral Tribunal, given the complexity of the transaction involved, the High Court has referred the disputes for arbitration and has appointed the arbitrator.

3. Shri Preetesh Kapur, leanred Senior Advocate has appeared on behalf of the appellant and Shri Neeraj Kishan Kaul, learned Senior Advocate has appeared on behalf of the contesting respondent – original applicant. 3.1 Shri Preetesh Kapur, learned Senior Advocate appearing on behalf of the appellant has taken us to Section 11(6A) of the Arbitration Act and has submitted that post-Arbitration and Conciliation Amendment Act, 2015 by which sub-section (6A) has been added to Section 11 of the Arbitration Act, while deciding the application under Section 11(6) of the Act and while exercising the pre- referral jurisdiction, the Court has to consider and examine the existence of an arbitration agreement and it should not be left to the Arbitral Tribunal.

3.2 It is vehemently submitted that there is a difference and distinction between the existence and validity of an arbitration clause and non-arbitrability of the dispute. It is submitted that so far as the issue with respect to the existence and validity of an arbitration agreement at the stage of pre-referral jurisdiction under Section 11(6) of the Act, the Court has to give a specific finding finally on such issue and such an issue should not be left to the Arbitral Tribunal. It is submitted that therefore, the High Court has misapplied and/or misread the decision of this Court in the case of Vidya Drolia (supra).

3.3 It is vehemently submitted by Shri Kapur, learned Senior Advocate appearing on behalf of the appellant that as such it is the duty cast upon the referral court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable. It is submitted that the dispute with respect to the existence and validity of an arbitration agreement/clause goes to the root of the matter and has to be decided first by the referral court. It is submitted that if ultimately it is held that there is no existence of an arbitration agreement and/or there is no valid arbitration agreement and the said issue is left to be decided by the arbitral tribunal in that case the entire exercise by the arbitral tribunal will be futile. It is submitted that therefore in order to prevent wastage of public and private resources and taking into consideration Section 11(6A) of the Act, the referral court has to finally conclude the issue with respect to the existence and validity of the arbitration agreement. Reliance is placed upon the recent decision of the Constitution Bench of this Court in the case of N.N. Global Mercantile Private Limited Vs. Indo Unique Flame Ltd. and Ors., 2023 SCC Online SC 495. It is submitted that in the said decision it is observed and held by this Court that Sans an agreement, there cannot be a reference to arbitration. It is submitted that it is further held that an arbitration agreement must satisfy the requirements of Section 7(1). It is submitted that it is further observed and held that the true intention behind the insertion of Section 11(6A) in the Act was to confine the Court, acting under Section 11, to examine and ascertain about the existence of an arbitration agreement.

3.4 Shri Kapur, learned Senior Advocate appearing on behalf of the appellant has also relied upon the recent decision of this Court in the case of NTPC Ltd. Vs. SPML Infra Ltd., 2023 SCC Online SC 389 (paragraphs 19, 25 and 28).

4. While opposing the present appeals, Shri Neeraj Kishan Kaul, learned Senior Advocate appearing on behalf of the original applicant has vehemently submitted that in the facts and circumstances of the case, the High Court has rightly followed the decision of this Court in the case of Vidya Drolia (supra) and has rightly referred the disputes between the parties to the arbitration.

4.1 It is vehemently submitted by Shri Kaul, learned Senior Advocate appearing on behalf of the original applicant that in the present case all the agreements, namely, SHA-1, SHA-2 and MOU-1 are required to be read along with MOU-2. It is submitted that the agreements other than MOU-2 do contain the arbitration clause, more particularly, clause 27.3 in SHA-1. It is submitted that the High Court in paragraph 22 has specifically observed and opined that the four agreements are indisputably interconnected. It is submitted that once there is a specific finding given that all the agreements are interconnected, the agreement in which there is an arbitration clause has to be read along with MOU-2 and therefore, the High Court has rightly referred the disputes to the arbitration.

4.2 Shri Kaul, learned Senior Advocate appearing on behalf of the original applicant has heavily relied upon the decision of this Court in the case of Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. and Ors., (2013) 1 SCC 641 as well as the decision of this Court in the case of Olympus Superstructures (P) Ltd. Vs. Meena Vijay Khetan, (1999) 5 SCC 651 in support of his submission that all the four agreements are interconnected and therefore, are required to be read altogether.

5. Heard. The short question which is posed for the consideration of this Court is, the jurisdiction of the referral court at pre-referral stage when the issue with respect to the existence and validity of an arbitration agreement is raised.

5.1 While considering the aforesaid issue Section 11(6A) of the Arbitration Act which has been added through Arbitration and Conciliation Amendment Act, 2015 is required to be read which reads as follows: -

“(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under subsection (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.” 5.2 Thus, post-Arbitration and Conciliation Amendment Act, 2015, the jurisdiction of the court under Section 11(6) of the Act is limited to examining whether an arbitration agreement exists between the parties – “nothing more, nothing less”. Thus, as per the Section 11(6A) of the Act, it is the duty cast upon the referral court to consider the dispute/issue with respect to the existence of an arbitration agreement.

5.3 At this stage, it is required to be noted that as per the settled position of law, pre-referral jurisdiction of the court under Section 11(6) of the Arbitration Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant’s privity to the said agreement. The said matter requires a thorough examination by the referral court. [paragraph 25 of the decision in the case of NTPC Ltd. (supra)]. The Secondary inquiry that may arise at the

reference stage itself is with respect to the non-arbitrability of the dispute. Both are different and distinct. So far as the first issue with respect to the existence and the validity of an arbitration agreement is concerned, as the same goes to the root of the matter, the same has to be to conclusively decided by the referral court at the referral stage itself. Now, so far as the non-arbitrability of the dispute is concerned, even as per the law laid-down by this Court in the case of Vidya Drolia (supra), the court at pre- referral stage and while examining the jurisdiction under Section 11(6) of the Act may even consider prima facie examining the arbitrability of claims. As observed, 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. However, so far as the dispute with respect to the existence and validity of an arbitration agreement is concerned and when the same is raised at pre-referral stage, the referral court has to decide the said issue conclusively and finally and should not leave the said issue to be determined by the arbitral tribunal. The reason is that the issue with respect to the existence and validity of an arbitration agreement goes to the root of the matter. As observed by the Constitution Bench in the case of N.N. Global Mercantile Pvt. Ltd. (supra) Sans an agreement, there cannot be any reference to the arbitration. In the said decision this Court has also specifically observed and held that the intention behind the insertion of Section 11(6A) in the Act was to confine the Court, acting under Section 11, to examine and ascertain about the existence of an arbitration agreement. We are of the opinion that therefore, if the dispute/issue with respect to the existence and validity of an arbitration agreement is not conclusively and finally decided by the referral court while exercising the pre-referral jurisdiction under Section 11(6) and it is left to the arbitral tribunal, it will be contrary to Section 11(6A) of the Arbitration Act. It is the duty of the referral court to decide the said issue first conclusively to protect the parties from being forced to arbitrate when there does not exist any arbitration agreement and/or when there is no valid arbitration agreement at all.

6. From the impugned common order passed by the referral court, it appears from the observations made in paragraphs 11 to 13 that the referral court has not decided the said issue conclusively and finally and referral court has left it to be decided by the arbitral tribunal. The submission on behalf of the contesting respondent relying upon some observations made in paragraph 22 of the impugned order that the referral court has in fact opined that the four agreements are indisputably interconnected is concerned, it is required to be noted that the observations made in paragraph 22 are to be read along with the prayer of the appellant to appoint different arbitrator(s). However, in paragraph 13, it is specifically observed by the referral court that “this Court cannot finally pronounce one way or the other on this aspect.” In paragraph 14 also, it is specifically observed that the arbitrability of the dispute raised viz-a-viz the arbitration clause 27.3 of SHA-1, is an involved issue, can be addressed by the learned arbitral tribunal. Thus, the referral court has not pronounced anything finally on the existence and validity of the arbitration agreement which ought to have been done by the referral court.

7. Now, so far as the submission made by Shri Kaul, learned Senior Advocate that all the agreements being interlinked and interconnected and reliance placed on the decision of this Court in the cases of Chloro Controls India Pvt. Ltd. (supra) and Olympus Superstructures (P) Ltd. (supra), we do not propose to go into the merits as the same has to be considered by the referral court. We have not

even permitted learned counsel appearing on behalf of the appellant to make submission on merits.

8. In view of the above and for the reasons stated above, the impugned common judgment and order passed by the High Court in respective Arbitration Petitions, referring the disputes to arbitration is hereby quashed and set aside. The matter is remitted back to the High Court/referral court to decide the respective arbitration petitions afresh and in light of the observations made hereinabove and to decide the issue conclusively and finally with respect to the existence and validity of the arbitration agreement. The aforesaid exercise to be completed within a period of three months from the date of receipt of the present order. However, it is observed that we have not expressed anything on merits on the existence and validity of the arbitration agreement and on the four agreements being interconnected/interlinked. It is ultimately for the High Court/referral court to take an appropriate decision in accordance with law and on its own merits. Present appeals are accordingly allowed to the aforesaid extent. In the facts and circumstances of the case, there shall be no order as to costs.

.....J.

[M.R. SHAH] .....J.

NEW DELHI; [C.T. RAVIKUMAR]
MAY 12, 2023