2024 INSC 853

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 12234 OF 2024

(ARISING OUT OF SLP (C) NO. 15562 OF 2024)

GOQII TECHNOLOGIES PRIVATE LIMITED …APPELLANT

VERSUS

SOKRATI TECHNOLOGIES PRIVATE LIMITED …RESPONDENT

J U D G M E N T

J. B. PARDIWALA, J.:

1. Leave granted.

2. This appeal arises from the final judgment and order dated 30.04.2024 ("**impugned judgment**") passed by the High Court of Judicature at Bombay in Commercial Arbitration Application No. 6 of 2024. The High Court dismissed the application preferred by Goqii Technologies Private Limited ("**the appellant"**) under Section 11 of the Arbitration and Conciliation Act, 1996 ("**the Act, 1996**") seeking appointment of an arbitrator to adjudicate disputes and claims in terms of Clause 18.12 of the Master Services Agreement ("**MSA**") executed between the appellant and Sokrati Technologies Private Limited ("**the respondent"**).

A. FACTUAL MATRIX

3. The appellant, a technology-based wellness venture *inter alia* providing life style consultancy services, executed the MSA with the respondent, an entity engaged in digital marketing services, and a subsidiary of Dentsu International Limited, to manage its digital advertising campaigns. The MSA was subsequently extended on 29.04.2022 for a period of three years, with certain amendments.

4. Between August 2021 and April 2022, the appellant paid a sum of Rs 5,53,26,690/- to the respondent for the services rendered by it. It is the case of

the appellant that for the subsequent 10 invoices raised between 12.05.2022 and 07.10.2022, the appellant was in the process of initiating and making payments when, in September 2022, certain media reports alleged malpractices in the advertising industry implicating major players. It was later discovered by the appellant that the Economic Offences Wing, Mumbai had lodged a complaint (EOW CR No. 08 of 2022) against Dentsu International Limited, the parent company of the respondent**,** and its senior officials alleging serious irregularities and malpractices in their service.

5. In light of the aforesaid developments, the appellant engaged an independent auditor in November 2022 to prepare a report on the activities of the respondent from April 2021 to 31.12.2022. The auditor submitted its report in February 2023. The conclusion given by the auditor is extracted hereinbelow:

> *"**CONCLUSION***
>
> *The average ROI for the campaigns analyzed has been abysmally low at 0.35x compared to industry benchmark of 3x to 4x. We estimate an overcharge of ₹4,48,53,580.*
>
> *The audit identified significant areas of concern within the media plan, including but not limited to:*
> - *Media buying cost of inventory, from different publishers at various points during the engagements have been found to be significantly more than the industry benchmarks.*
> - *Traffic was poor and exposed to the wrong audience.*
> - *Number of times the ad was shown (Frequency) has been increased as the reach numbers were being achieved, this only shows that the targeting of the customer/audience has been poor.*
> - *The clicks generated were fraudulent.*

- *The leads garnered were junk.*
- *Cost of acquisition was higher than the category competition.*

We also recommend further detailed investigation across all the media campaigns by Sokrati."

6. On 22.02.2023, the respondent served a demand notice on the appellant under Section 8 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") seeking Rs 6,25,67,060/- towards the outstanding invoices. In response, on 04.03.2023, the appellant rejected the demand, citing the audit findings, and invoked arbitration under Clause 18.12 of the MSA. The appellant also filed a counter claim, demanding a refund of Rs 5,53,26,690/- with 18% interest per annum and an additional Rs 6 crore by way of damages towards the alleged misrepresentations by the respondent.

7. Subsequently, upon failure of the respondent to comply with the arbitration notice, the appellant filed Commercial Arbitration Application No. 06 of 2024 before the High Court, seeking appointment of a sole arbitrator to adjudicate the disputes between the parties. However, on 05.10.2023, while the application was pending, the respondent filed Company Petition (IB) No. 27 of 2024 under Section 9 of the IBC before the National Company Law Tribunal, Mumbai (NCLT, Mumbai) for initiating the corporate insolvency resolution process of the appellant.

8. The High Court *vide* the impugned judgment, dismissed the application seeking the appointment of an arbitrator, observing that it lacked in merit and substance.

The High Court noted that the independent audit report revealed significant concerns regarding the performance of the digital marketing campaigns executed by the respondent. The High Court was of the view that although the report highlighted poor returns on investment and inconsistent metrics, yet it did not support the assertions made by the appellant regarding fraudulent practices of the respondent. Further, the High Court observed that the appellant failed to demonstrate any substantial discrepancies in the report that would justify withholding payment for the invoices raised. It observed that while further investigation was suggested in the report, the appellant's attempt to invoke arbitration based on non-existent disputes constituted a manifestly dishonest claim and therefore dismissed the application. The relevant observations from the impugned judgment are extracted hereinbelow:

> *"19. It can be well understood that upon the further investigation, being directed to be carried out as indicated in the report, if it is concluded that the services were not rendered at all or they were deficient and the invoices do not deserve to be cleared, the demand of the money due and payable could have been resisted, but without any justification, by projecting the report of the independent auditor to be its shield to avoid the payment, the attempt on part of the applicant can only be described as 'dishonest'.*
>
> *A manifestly dishonest claim or a contest, which is sought to be raised to a lawful demand of the money due and payable under the MSA, particularly, when, while availing the services, at no point of time, any deficiency in services is pointed out, but only by way of defence to the invoices raised, an independent agency's report is being projected, as a support to canvass the deficiency in service, by attributing fraudulent acts to the*

respondent which, in fact, is not the finding of the independent auditor.

Nonetheless, it is open for the applicant to follow the pursuit of detail investigation across all the media campaigns by Sokrati, as suggested in the report, however, without doing so, in order to avoid its liability for the claims under the invoices, the assertion of an arbitrable dispute, is an attempt to defeat the proceedings, which may be instituted on behalf of Sokrati before the Company Law Tribunal under the IBC.

Drawing guidance from the observations of the Apex Court in case of NTPC Ltd (supra) that the limited scrutiny through the eye of the needle is necessary and compelling, as it is the duty of the referral code to protect the parties from being forced to arbitrate, when the matter is demonstrably non- arbitrable. I am convinced that an attempt is made to create a dispute when there exist none at this stage. It is not just for the sake of invoking the arbitration clause, because the agreement between the parties provide so, the parties shall resort to arbitration, premised on the basis of a purported dispute, which infact, do not exist.

For the aforesaid reason, I am not inclined to consider the request of appointing an Arbitrator in exercise of power conferred on this Court, merely because the arbitration has been invoked by the applicant and it intend to take a non-existent dispute for arbitration. Being unconvinced with the submissions of Mr. Kanade, the application seeking appointment of Arbitrator is dismissed being found without any merit and substance."

9. Aggrieved by the aforesaid order refusing to appoint an arbitrator for adjudicating the disputes between the parties, the appellant has come up before this Court with the present appeal.

B. SUBMISSION ON BEHALF OF THE APPELLANT

10. Mr. H.D. Thanvi, the learned counsel appearing for the appellant, submitted that the scope of interference by a referral court acting in exercise of its jurisdiction under Section 11 of the Act, 1996 is limited. At this stage, the court is required to conduct a preliminary inquiry for the purpose of ascertaining whether a *prima facie* case exists for referring the dispute to arbitration. Contrary to this narrow scope, in the present case the High Court proceeded to erroneously undertake a full review of the contested facts, thereby exceeding in its jurisdiction at this stage.

11. He further submitted that the High Court failed to take into account the nature of the services rendered by the respondent, along with the technical details contained in the Audit Report, which require subject-matter expertise for accurate determination of the disputes. Given the technical complexity of the issues involved, the High Court ought to have referred the parties to arbitration.

12. He submitted that the finding of the High Court as regards the alleged dishonesty of the appellant rests on the erroneous assumption that the appellant had not raised any dispute prior to issuing the demand notice dated 22.02.2023. It was contended that this finding overlooks the sequence of events and also the undisputed fact that the Audit Report was provided to the appellant only in February 2023, i.e., the same month in which the Demand Notice was issued.

Consequently, the appellant had no prior opportunity to raise the disputes, as they only came to light upon receiving the Audit Report in February 2023. The appellant argued that even otherwise, it had sent multiple emails to the respondent raising various objections regarding the invoices issued to the appellant prior to the issuance of the Audit Report.

C. SUBMISSION ON BEHALF OF THE RESPONDENT

13. Ms. Shweta Bharti, the learned counsel appearing for the respondent, on the other hand, submitted that it is settled law that before referring the parties to arbitration, the High Court must reach to a *prima facie* satisfaction that a genuine dispute exists between the parties. Furthermore, the mere inclusion of an arbitration clause in a contract or agreement does not render a matter automatically arbitrable and a *prima facie* case establishing the existence of a dispute must first be made. The Court must apply a *prima facie* test to weed out and dismiss claims that are *ex facie* meritless, frivolous, or dishonest. She submitted that seen thus the dispute raised in the present petition is nothing more than an afterthought.The counsel placed reliance on the decision of this Court in ***Indian Oil Corporation vs. NCC Ltd.***[1], ***B&T AG v. Ministry of Defence***[2], and

[1] (2023) 2 SCC 539
[2] 2023 SCC OnLine SC 657

Sushma Shiv Kumar Daga & Anr. vs. Madhur Kumar Ramkrishnaji Bajaj & Ors[3] to fortify her submission.

14. She further submitted that the appellant is not entitled to any damages or refund for the alleged overcharges on the services rendered by the respondent as the appellant had previously not raised any concerns or identified deficiencies while utilizing these services. Furthermore, the claim now raised by the appellant is unfounded, vague, and lacks supporting documentation.

15. She submitted that the appellant has filed the present petition with a *mala fide* intent and has approached this Court with unclean hands, being fully aware of the ongoing legal proceedings before the NCLT, Mumbai. The petition of the appellant is an attempt to create duplicative legal proceedings aimed at evading liability for admitted dues and disrupting the CIRP process.

D. ANALYSIS

16. Having heard the learned counsels appearing for the parties and having gone through the materials on record, the short question that falls for our consideration is whether the High Court committed any error in dismissing the appellant's application under Section 11 of the Act, 1996.

[3] 2023 SCC OnLine SC 1683

17. In a recent pronouncement, relying on the Constitution Bench judgment of this Court in ***In Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899***,[4] this Court in ***SBI General Insurance Co. Ltd. vs. Krish Spinning*** reported in **2024 INSC 532**, summarised the law on the scope and standard of judicial scrutiny that an application under Section 11(6) of the Act, 1996 can be subjected to. The relevant parts are produced herein below:

> *"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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> ***xxx xxx xxx***
>
> *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*

[4] 2023 INSC 1066.

hearings itself, with the benefit of extensive pleadings and evidentiary material."

18. The scope of inquiry under Section 11 of the Act, 1996 is limited to ascertaining the *prima facie* existence of an arbitration agreement. In the present case, the High Court exceeded this limited scope by undertaking a detailed examination of the factual matrix. The High Court erroneously proceeded to assess the auditor's report in detail and dismissed the arbitration application. In our view, such an approach does not give effect to the legislative intent behind the 2015 amendment to the Act, 1996 which limited the judicial scrutiny at the stage of Section 11 solely to the *prima facie* determination of the existence of an arbitration agreement.

19. As observed in ***Krish Spinning*** *(supra)*, frivolity in litigation too is an aspect which the referral court should not decide at the stage of Section 11 as the arbitrator is equally, if not more, competent to adjudicate the same.

20. Before we conclude, we must clarify that the limited jurisdiction of the referral Courts under Section 11 must not be misused by parties in order to force other parties to the arbitration agreement to participate in a time-consuming and costly arbitration process. This is possible in instances, including but not limited to, where the claimant canvasses the adjudication of non-existent and *mala fide* claims through arbitration. With a view to balance the limited scope of judicial

interference of the referral Courts with the interests of the parties who might be constrained to participate in the arbitration proceedings, the Arbitral Tribunal may direct that the costs of the arbitration shall be borne by the party which the Tribunal ultimately finds to have abused the process of law and caused unnecessary harassment to the other party to the arbitration. Having said that, it is clarified that the aforesaid is not to be construed as a determination of the merits of the matter before us, which the Arbitral Tribunal will rightfully be equipped to determine.

E. CONCLUSION

21. The existence of the arbitration agreement in Clause 18.12 of the MSA has not been disputed by the respondent. The question whether there exists a valid dispute to be referred to arbitration can be addressed by the Arbitral Tribunal as a preliminary issue.

22. As a result, the appeal filed by the appellant is allowed and the impugned order passed by the High Court of Bombay is hereby set aside.

23. We appoint Mr. S.J. Vazifdar, former Chief Justice of the Punjab & Haryana High Court, as the sole arbitrator to adjudicate the disputes between the parties.

24. All legal contentions, including objections, if any, available to the respondent, are kept open to be taken up before the learned Arbitrator.

25. Pending application(s), if any, shall stand disposed of.

…...……..…….……CJI.
(Dr. Dhananjaya Y. Chandrachud)

…….…..…….…..……J.
(J.B. Pardiwala)

……...J.
(Manoj Misra)

New Delhi;
7th November, 2024.