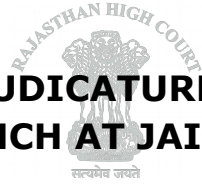




**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**



S.B. Arbitration Application No. 7/2024

M/s Larsen And Toubro, Office At Campus, 2Nd Floor, TC 1 Building, Mount Poonamallee Road, Manapakkam, Chennai-600 089, Through Its Authorized Signatory, C.P. Rajesh S/o C. Pitchai, Age 43 Years, R/o S/125 Ashiana Amar Bagh, New Pali Road, Jodhpur.

-----Petitioner-Applicant

Versus

1. Rajasthan Urban Sector Development Project, (RUIDP), Through Its Project Director, Avs Building, Jawaharlal Nehru Marg, Jaipur, 302017, Rajasthan.
2. Superintending Engineer, RUIDP, 1898-A, Vaishnav Colony, Sojat Road, Pali, Rajasthan 206401.

-----Respondents

For Petitioner(s) : Mr. Vinay Kothari,
Mr. Mehul Kothari,
Mr. Pranjul Chopra

For Respondent(s) : Mr. Rishabh Khandelwal

HON'BLE MR. JUSTICE SUDESH BANSAL
Order

Reserved on :

26th July, 2024

Pronounced on :

13th August, 2024

1. Heard learned counsel for both parties and perused the record placed before this Court.
2. Instant application has been filed by and on behalf of applicant M/s Larsen and Toubro Limited (for short "L&T Company) under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short "A&C Act) for appointment of Arbitrators to adjudicate the dispute that has arisen with respondent- Rajasthan Urban Sector Development Project (for short "RUIDP") in connection with claiming new rate of variation in terms of clause 13.3 of GCC for excess work carried out beyond the original BOQ (Bills of



Quantity) agreed under the tender contract dated 24.09.2015, between applicant and respondent-RUIDP pursuant to tender bid dated 23.04.2015. For ready reference Clause 13.3, as reproduced in the letter of applicant dated 24.05.2023 (Ann-P3) is being extracted hereunder:-

"In case of Variation, except as otherwise stated in the Contract, the Employer's representative shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine the Contract Price by evaluating each item of work, applying the measurement agreed or determined the appropriate rate or price for the item. For each item of work, the appropriate rate or price for the item shall be the rate or price specified for such item in the Contract. The RUIDP Schedule of Rates (SOR) of 2013 shall be part of the Contract Agreement.

Variation will be dealt as follows:

(i) for items having weightage of each item upto 0.1% of the Accepted Contract Amount, quantity variations will be paid on BOQ rate. No new rate will be given.

ii) for items having weightage of each item more than 0.1% of the Accepted Contract Amount, quantity variation (plus or minus) upto 20% of the BOQ quantity will be paid on the BOQ rates. Quantity variation will generally be limited to 20% of BOQ quantity.

New rate for BOQ item for quantities more than 20% of BOQ quantity and non BOQ items and items of Major Maintenance:

* Each new rate or price shall be derived from any relevant rates or prices in the Contract, with reasonable adjustments. The adjustment in rates shall be based on RUIDP Schedule of Rates (SOR) 2013.

* no rates or prices are relevant for the derivation of a new rate or price from BOQ items, it shall be derived from the reasonable cost of executing the work (rate analysis on current market rate), together with profit of 20%. The rate analysis method will be based on RUIDP SOR analysis.

Until such time as an appropriate rate or price is agreed or determined, the Engineer shall determine a provisional rate or price for the purposes of Interim Payment Certificates as soon as the concerned work commences."

3. The Arbitration Clause 20.8 contained in documents of tender contract dated 24.09.2015, arrived at between parties is being extracted hereunder:



"20.8(a) Arbitration to be administered by: For a contract with a local Contractor: In the case of a dispute between the Employer and the Contractor, the dispute shall be settled by arbitration in accordance with the rules of procedure for Indian arbitration act as in force on the date of the Contract.

Place of arbitration: Jaipur, State of Rajasthan India [....].

(b) Dispute shall be settled by sole or three Arbitrators. Dispute to be arbitrated upon shall be referred to a sole Arbitrator where the total value of claims does not exceed to Rs.10 millions. Beyond the claim limit of Rs. 10 Million, there shall be three arbitrators. For this purpose the Employer will make out a panel of Engineers with the requisite qualifications and professional experience relevant to the field to which the Contract relates. This panel, will be for serving or retired Engineers Departments of Government or of Public Sector. The Arbitrator/Arbitrators shall be appointed within a period of 30 days from the date of receipt of written notice/demand of appointment of Arbitrator by either party. In case of a single arbitrator, the will be of three Engineers, out of which the contractor will choose one. In case three arbitrators are to be appointed, the Employer will make out a panel of five. The contractor and the employer will choose one arbitrator each and the two so chosen will chose the third arbitrator from the panel. Neither party shall be limited in the proceeding before such arbitrator/s to the evidence or arguments put before the Engineer for the purpose of obtaining his decision. No decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as witness and giving evidence before the arbitrator/s on any matter whatsoever, relevant to dispute or difference referred to arbitrator/s. The arbitration proceeding shall be held at Jaipur. The arbitrators shall always give item-wise and reasoned awards in all cases where the value of total claim exceeds to Rs. 5.00 million. Where three arbitrators have been appointed, the award by the majority will prevail.

(c) The language for proceeding, documents and communication shall be English and the awards shall be made in writing. Add the following at the end of the Clause:

Provision of this sub clause will be applicable only for settlement of claims of disputes between the parties for values less than or equal to 10% of the Design Build contract value. In case of more claim value, this provision will not be applicable and arbitration will not be remedy for settlement of such disputes."





4. Learned counsel for the applicant submits that applicant-contractor awardee is entitled to claim new rate of variation from the respondent-RUIDP, for the extra work done due to facing with hard rock strata, while commencing trenchless work of laying down pipeline for water supply. Learned counsel submits that several communications were exchanged between parties in respect of the issue, pertaining to release of payment as per variation rate under Clause 13.3 of GCC, than the original BOQ, but dispute is still persisting.

5. Learned counsel for applicant submits that prior to seeking settlement of dispute through Arbitration under Clause 20.8 of GCC, the applicant also pressed Clause 20.3 to appoint the Dispute Adjudication Board (DAB) and when dispute was declined to be placed before DAB by the respondents, then, lastly applicant invoked arbitration agreement to appoint Arbitrators to adjudicate the dispute.

6. Learned counsel submits that the claimed amount of escalated cost is above 10 millions i.e. more than one crore but is less than 10% of the total bid price of Rs.496 crore, therefore, under the agreed terms of arbitration agreement, panel of three Arbitrators is required to be constituted as per Clause 20.8 (b). As per Arbitration Agreement, both parties were required to nominate one Arbitrator from their side and then both Arbitrators would appoint third Arbitrator.

7. Learned counsel for the applicant submits that before filing the instant application for appointment of Arbitrators, applicant invoked Arbitration Clause by serving the legal notice dated



18.11.2023 (Ann-P5) upon the respondents, raising a claim for escalated cost of Rs.35,15,39,030/- (plus financing charges calculated at the annual rate of 3 percentage points above the discounted rate of Central Bank). The estimated escalated cost amount is subject to modification. In the legal notice, one Arbitrator from the applicant's side has been nominated asking to appoint Arbitrator from the side of respondents. In response thereof, respondent No.2 wrote letter dated 19.12.2023 to the Project Director of RUIDP (Ann-P6) seeking guidance to nominate Arbitrator from their side in terms of Arbitration Clause. Copy of this letter dated 19.12.2023 was forwarded to applicant's counsel as well as to the Arbitrator nominated from the side of applicant. But thereafter no further response in furtherance to such communication was given by the respondents, hence, applicant has filed the instant application before the High Court on 09.01.2024 for appointment of Arbitrators.

8. Respondents have filed reply to the Arbitration Application and have raised various objections to reject the prayer of the applicant to appoint Arbitrators for adjudication of dispute, but this Court feels that before adverting to the objections so raised by and on behalf of respondents, it is necessary to refer few relevant facts, in brief, which have emerged from the record, to show the background of the case whereunder the dispute between parties in respect of claiming escalated price of excess work beyond the rates agreed in the tender contract, BOQ has arisen and prayer for appointment of Arbitrators by the High Court has been made by the applicant:



8.1 An invitation for bid was advertised by the RUIDP vide tender dated 23.04.2015 (Ann-P1) for "Construction of Work of Water Supply, Distribution Network Improvement and providing Sewage Network with House Connections, Construction of Sewerage Treatment Plants & allied works of entire system for 10 years at Pali."

8.2 Applicant- L&T Company participated in the bid and emerged as a successful bidder. A Letter of Acceptance dated 24.09.2015 (Ann-P2) was issued by RUIDP in favour of applicant-Company and the contract to carry out such project was awarded under contract No.RUSDP/Pali/01 against total bid price of Rs. 4,96,00,00,000/- (Rs.496 Crores).

8.3 It appears that thereafter, RUIDP issued communication dated 19.10.2015 to L&T Company to proceed with the work and work was started from 02.11.2015.

8.4 It has been pointed out by the applicant, which has not been disputed from the side of respondents as well that the contract awarded on 24.09.2015 for Construction of Work of Water Supply, Distribution Network Improvement and Operation Services of the entire system is for a period of 10 years and such contract is still ongoing. The work of excavation, laying down of the trenches and other misc. work including operational services of the system is continuing and is an ongoing process, thus, it has been noted as undisputed fact that the work by the applicant under the awarded contract is still continuing and in progress even during course of the present arbitration application seeking appointment of Arbitrators.



8.5 According to the applicant-Company, once the construction work was started at site, various site-specific constraints emerged at spot because Hard Rock Strata were encountered along with alignment of pipe and therefore, in order to complete the trenchless work, applicant had to mobilize specialized machinery on the site and applicant-Company had to do excess work in the rock affected areas. Thus, the case of applicant-Company is that the L&T Company had to execute work beyond the original BOQ, in order to complete the project progress, hence, in this eventuality, applicant-Company is entitled for the new rates for such items, which are in excess of approved quantity of work for the Rock Strata; Therefore, the applicant-Company requested time and again to RUIDP to consider the above variation and to proceed to make payment of the excess work, done by L&T Company, as per the new rates in view of Clause 13.3 of the tender agreement, which deals with for variation procedure. The Clause 13.3 of GCC has already been extracted hereinabove.

8.6 Counsel for applicant contends that the claim of applicant for escalated cost has not been honored by the respondents and to settle such dispute, the prayer of applicant to appoint DAB and to place the dispute before the DAB has been refused by the respondents, therefore, the applicant has to file the present arbitration application invoking Clause 20.8 of GCC for appointment of Arbitrators to adjudicate such dispute.

9. Coming to the objections, taken by the respondents in their reply, it appears that following three objections have been raised:-



(i) Applicant has not followed pre-arbitration step for appointment of the Dispute Adjudication Board, (DAB) and it is mandatory condition that prior to invoking of the arbitration Clause, applicant has to place the dispute before the DAB for adjudication as per Clauses 20.1, 20.3, 20.4 and 20.6 of the Contract, hence, the Arbitration Application is pre-mature.

(ii) The claim of applicant relating to variation in rate of contract, has turned out of limitation, therefore, the claim being barred by the limitation has become stale and cannot be sent to arbitration.

(iii) The quantum of escalated cost exceeds 10% of the total contract value, hence, as per proviso to Clause 20.8 (c), the claim is not arbitrable.

Objection No.(i):

10. In respect of the issue about seeking appointment of DAB in order to place the dispute before the DAB for adjudication, prior to appointment of Arbitrators by the parties as per Clause 20.8, counsel for applicant drew attention of this Court on the detailed communication dated 24.05.2023, which was sent by the applicant to respondents demanding to reimburse the payment of excess work at the new rate as per Clause 13.3 of GCC. In this communication, applicant asked the respondents to constitute DAB so as to place the dispute between DAB. For ready reference, in Clause 31 of the communication dated 24.05.2023, it was specifically stated by the applicant that "L&T in series of communications being sent before, making the instant representation before the Employers Representative for it to be awarded its rightful dues in accordance with the terms and



conditions of the contract failing which it proposes to place the present dispute before the DAB in accordance with Clause 20.3 as provided in Particular condition of Contract.”

11. Learned counsel for applicant submits that thereafter another letter dated 03.07.2023 was also sent to respondents whereby a prayer was made to constitute the DAB, but respondents vide letter dated 24.07.2023 has rejected the proposal of the applicant to constitute and refer the dispute before the DAB. The copies of both letters dated 24.05.2023 and 03.07.2023 sent by applicant have been placed on record as Ann-P3 and copy of letter dated 24.07.2023, replied by respondents is enclosed as Ann-P4 with the arbitration application as also Ann-4 with the reply of respondents.

12. Learned counsel for applicant contends that in the letter dated 24.07.2023 (Ann-P4), respondents clearly denied to appoint DAB, stating inter alia that the claim put forth by the applicant and sought to be placed before the DAB, is no longer a valid claim. Learned counsel contends that even thereafter, applicant sent one more communication dated 17.08.2023 (Ann-P7, enclosed with the rejoinder), stating inter alia, that the rejection of the proposal of the applicant to constitute DAB is fallacious and the matter may be placed before the DAB, but this communication was never responded by the respondents.

13. Learned counsel for the applicant contends that in such circumstances, applicant lastly served one legal notice dated 18.11.2023 (Ann-P5) upon respondents and invoked the arbitration Clause 20.8. He submits in para 9 of the legal notice



dated 18.11.2023, that the applicant quantified the quantum of escalated cost of Rs.35,15,39,030/-, which was subject to modification and in para 10. also disclosed the name of Arbitrator nominated from the side of applicant.

14. Learned counsel for applicant submits that through this legal notice, applicant asked the respondents to nominate Arbitrator from their side within a period of 15 days, but since respondents did not appoint Arbitrator from their side, hence, the applicant has filed the present application before the High Court on 09.01.2024 for appointment of Arbitrators.

15. The contention of the counsel for applicant is that in the above referred facts and circumstances, it may not be said that the applicant has not undertaken the process to appoint DAB. He submits that prior to seeking reference of dispute to be adjudicate by the Arbitrators, applicant has made an attempt to get the DAB constituted and to refer the dispute to DAB for adjudication, but since respondents refused to appoint DAB as much as declined to refer the dispute to DAB alleging the claim of applicant to be no longer valid claim through its letter dated 24.07.2023 (Ann-P4), therefore, now the plea of respondents to allege that the present Arbitration Application seeking appointment of the Arbitrators is pre-mature, due to not undertaking the pre-arbitration steps, is misconceived and unsustainable.

16. In addition to above, the contention of counsel for applicant is that the requirement of pre-mature step may not be held as mandatory.



17. Per contra, counsel for respondents contends that the condition to appoint DAB and to place the dispute before the DAB for adjudication, is a mandatory requirement prior to invocation of the arbitration agreement and because the applicant did not adopt the procedure for appointment of DAB, his prayer was refused, therefore, it may not be said that the applicant has undertaken the pre-mature steps, hence, the present arbitration application is liable to be dismissed as pre-mature and at the most, applicant be relegated to appoint DAB and to place the dispute before the DAB.

18. Having considered rival contentions of counsel for both parties, this Court finds at the outset that arising out of dispute between parties is not in question. Further the respondents have not denied to receive the communication dated 24.05.2023 and 03.07.2023 (Ann-P3) as also the communication dated 17.08.2023 (Ann-P7), sent by the applicant to the respondents or to representatives of respondents. Respondents have also not disputed their reply letter dated 24.07.2023 (copy of which has been enclosed by the applicant as Ann-P4 as also by the respondents as Ann-4 with the reply), wherein respondents denied to appoint the DAB and did not agree to refer the dispute before the DAB, stating inter alia, that the claim put forth by the applicant is no longer a valid claim.

19. Thus, in view of such undisputed exchange of communications between parties in respect of seeking appointment of DAB and to place the dispute before the DAB, the applicant cannot be blamed for not adhering to the pre-arbitration steps and for by-passing the procedure to appoint DAB and to



place the dispute before the DAB. It appears that on the contrary, prayer of the applicant to constitute DAB in order to place the dispute before DAB, was out-rightly rejected by the respondents, turning the claim of the applicant, in the nature of "no longer a valid claim" as stated by the respondents in their reply letter dated 24.07.2023. This letter given by the respondents to the applicant, in response to the communication of the applicant dated 24.05.2023 and 03.07.2023 (Ann-P3), is an admitted document, therefore, the plea of respondents that applicant has not undertaken the procedure to place the dispute before the DAB as per Clauses 20.1, 20.3, 20.4 and 20.6 of the Contract is not acceptable.

20. In this regard, the additional contention of counsel for applicant that the understanding between parties to place the dispute before the DAB prior to appointment of Arbitrators by the parties to adjudicate the dispute, cannot be treated as mandatory in nature is also worthy and merit acceptance, more particularly, in the given facts and circumstances of the present case. In the opinion of this Court, it is not appropriate to dismiss the application for appointment of Arbitrators only for the reason that dispute between parties could not be placed before the DAB. As has already been observed hereinabove that from the side of application, proposal to constitute DAB and to place the dispute before the DAB was made which had been turned down by the respondents. Thus, the procedure to appoint DAB and to adjudicate the dispute by DAB as envisaged in Clauses 20.1, 20.3, 20.4 and 20.6 indeed could not fructify between parties.



21. Here it would not be out of place to refer Clause 20.7 which says that both parties shall attempt to settle the dispute amicably before the commencement of arbitration. In this respect, reference of the judgment of the Supreme Court in case of **Demerara Distilleries (P) Ltd. Vs. Demerara Distillers Ltd. [(2015) 13 SCC 610]**, would be suffice wherein the Hon'ble Supreme Court observed that "the Elaborate correspondence by and between the parties, as brought on record of the present proceeding, would indicate that any attempt, at this stage, to resolve the disputes by mutual discussion and mediation would be an empty formality." In case of **Sarvesh Security Services Limited Vs. DSIIDC [2018 SCC OnLine Del 7996]**, the Delhi High Court held such type of pre-arbitration Clause as of only directory in nature.

22. It is well established principle of law through various judgments of the Hon'ble Supreme Court that an arbitration agreement is a commercial document inter parties and must be interpreted so as to give effect to the intention of parties, rather than to invalidate it on technicalities. To buttress such proposition, reference of the judgments of the Hon'ble Supreme Court in cases of **MTNL Vs. Canara Bank [(2020) 12 SCC 767]** and **M/s Govind Rubber Limited Vs. M/s Louids Dreyfus Commodities Asia (P) Ltd. [(2015) 13 SCC 477]** would be suffice. Thus, in the present case, it is manifestly clear that the parties had intention to refer the disputes arisen under the tender agreement to the Arbitrators for which they agreed to enter into arbitration agreement, hence, when the other pre-arbitration steps



to place the dispute before DAB and to settle the dispute by way of amicable settlement have not fructified, it would be inappropriate and unjust to deny the prayer of applicant to appoint the Arbitrators to adjudicate the dispute that has arisen between parties as discussed hereinabove.

23. In view of above discussions and reasons, objection No.(i) of the respondents is hereby rejected and the Arbitration Application cannot be treated as pre-mature.

Objection No.(ii)

24. Counsel for respondents contends that a letter dated 11.01.2018 was issued by the applicant raising the issue to claim the new rates of variation as per Clause 13.3 of GCC and this letter has been enclosed with the reply as Ann-3. Hence, the contention of the counsel for respondents is that cause of action to claim new rates of variation as per Clause 13.3 of GCC has arisen to applicant at the time of issuance of letter dated 11.01.2018, therefore, the application for appointment of Arbitrator filed on 08.01.2024, is barred by the limitation and the claim has virtually turned into a stale claim.

25. In counter, counsel for applicant has relied upon a letter dated 17.10.2022 (Ann-P8 placed on record along with rejoinder), stating inter alia that through this letter, respondents acknowledged the fact of variation in work as much as agreed about the usage of excess resources by the applicant in execution of the work in the rock strata areas. Thus, virtually the RUIDP has approved the variation proposal but the payment was agreed to be made as per the contract agreement, hence, the cause of action to



claim the payment of the extra work items according to new rates of variation as per Clause 13.3 of GCC has accrued after issuance of letter dated 17.10.2022 by the respondents.

26. Learned counsel for the applicant submits that thereafter the applicant sent communications dated 24.05.2023, 03.07.2023 and 17.08.2023, then lastly legal notice dated 18.11.2023 and, thereafter has filed this arbitration application on 08.01.2024, therefore, in such factual backdrop, the arbitration application cannot be rejected as barred by limitation.

27. This Court finds that the issuance of letter dated 17.10.2022 by the respondents is an admitted fact because from the side of respondents, an additional affidavit dated 25.07.2024 of one Mr. Sanjay Mathur, Office In-charge and working as Superintending Engineer, PIU, Pali, has been placed on record. In this additional affidavit, it has been admitted that in the letter dated 17.10.2022, respondents had approved variation and in pursuance thereof, applicant has received payment of Rs.16.92 crores till date for carrying out the trenchless work in the rock under the contract after approval of the variation of the said work. Thus, when the respondents have acknowledged and approved the variation of work in the rock affected areas in its letter dated 17.10.2022, the cause of action allegedly accrued to applicant to claim variation rate at the time of issuing letter dated 11.01.2018, has virtually been revived because it was also stated therein that payment shall be made as per agreed contract terms only. This letter dated 17.10.2022 also gives rise to a cause of action as well as revives the cause of action.



28. Furthermore, this is an undisputed fact that the contract was awarded for a period of 10 years in the year 2015 and term of contract is upto year 2025; indisputably, the work of excavation laying down the trenches and operational services of water supply project is continuing, therefore, it may not be held that the present application for appointment of Arbitrators is barred by limitation.

29. However, it is made clear that this Court has dealt with the issue of limitation only for the purpose of appointment of Arbitrators and whether the claim of escalated cost made by the applicant against the respondents falls within period of limitation or not, shall be considered finally on merits by the Arbitrator and parties would be at liberty to make their respective contentions in this regard.

30. For aforesaid reasons, the objection No.(ii) raised by respondents is hereby rejected.

Objection No.(iii)

31. Counsel for respondents contends that since the quantum of escalated cost exceeds 10% of the total value of bid contract, therefore, the dispute is non-arbitrable in view of proviso to Clause 20.8(c) of Tender Agreement. In this respect, it is noteworthy that undeniably the total value of bid contract is Rs.496 crores. In the legal notice dated 18.11.2023 (Ann-P5, in para No.9), applicant has disclosed the quantum of escalated cost as Rs.35,15,39,030/- subject to modification. This escalated cost is less than 10% of the total value of the contract. Counsel for respondents contends that payment of Rs.16.92 crores has



already been released to the petitioner pursuant to letter dated 17.10.2022 and after receiving that amount, applicant is claiming additional escalated cost of Rs.35,15,39,030/-, hence, the quantum of escalated cost comes to (Rs.35,15,39,030/- + Rs.16,92,00,000/- = Rs.52,07,39,030/-), which exceeds 10% of the contract value of Rs.496 crores, as such the dispute be treated as non-arbitrable.

32. *Per contra*, counsel for applicant disputes to receive the payment of Rs.16.92 crores against the escalated cost, however, he submits that the applicant shall not claim the escalated cost, quantum of which exceed 10% of the total contract value, hence, the proviso to Clause 20.8(c) is not applicable at this stage. He submits that the quantum of escalated cost is not yet determined, however, same would certainly be less than 10% of the total contract value, therefore, the dispute to claim escalated cost is arbitrable and the proviso to Clause 20.8 (c), does not apply.

33. Having considered the rival contentions of counsel for both parties, this Court finds that the quantum of claimed escalated cost is yet to be assessed by the applicant and it is to be considered by the Arbitration Tribunal, that the claimed amount does not exceed 10% of the total contract value and the bar envisaged under Clause 20.8 (c) is not applicable to adjudicate the dispute. At this stage, appointment of Arbitrator may not be declined on this count.

34. Accordingly, the objection No.(iii) is hereby decided against the respondents.



35. Indisputably, a written Arbitration Agreement as contained in Clause 20.8 of the Tender Agreement extracted hereinabove, exists between parties and while considering the application for appointment of Arbitrators under Section 11 of the A&C Act, the High Court is required to examine the existence of an Arbitration Agreement as envisaged under Section 11(6A) of the A&C Act. For ready reference the provision of Section 11(6A) of A&C Act is being reproduced hereunder:-

"(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (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."

36. In a recent judgment dated 30.12.2023, delivered by the Seven Judges Bench of the Hon'ble Supreme Court in **Re: Interplay Between Arbitration Agreements Under The Arbitration and Conciliation Act 1996 and the Indian Stamps Act, 1989 [AIR 2024 SC 1]**, in para No.152 and 154, it has clearly been observed that the omission of Section 11(6A) proposed by introducing Arbitration and Conciliation (Amendment) Act, 2019 (Act 33 of the 2019) has not been notified in the Official Gazette and therefore, the said provision continues to remain in full force. In this judgment, placing reliance on previous judgments of the Apex Court delivered in the cases of **Duro Felguera, S.A. Vs. Gangavaram Port Limited [(2017) 9 SCC 129]** and **Mayavati Trading Private Limited Vs. Pradyuat Deb Burman [(2019) 8 SCC 714]**, it has been held that the legislature confined the scope of reference under Section 11(6A)



to the examination of existence of an arbitration agreement. It has been held that the referral Court only needs to consider one aspect to determine the existence of an arbitration agreement- whether underlying contract contains arbitration agreement which provides for arbitration pertaining to the dispute, which has arisen between parties to the agreement. Thus, this Court has to rely upon the provision of Section 11(6A) of the A&C Act, which is extracted hereinabove.

37. Coming to the issue of appointment of panel of three Arbitrators, the agreement between parties was that the employer will make out a panel of five arbitrators, out of which, the contractor and the employer will choose one Arbitrator each and then the two Arbitrators so chosen, will choose the third Arbitrators from the panel. Undeniably, parties have not been able to appoint the Arbitrators as per the above procedure, therefore, in the opinion of this Court, provisions of Section 10(2) of the A&C Act, comes in play and the Arbitration Tribunal of a sole Arbitrator will be appropriate and valid. No specific qualifications have been contemplated by parties to appoint Arbitrators and in the opinion of this Court, appointment of Arbitrator from the panel of respondents would be against the spirit of Section 12(1) & 12(5) of the A&C Act. The Arbitrator, being the most crucial part of the Arbitration proceedings, is expected to be an independent, impartial and unbiased with either of the parties in the decision making. If any expert opinion of any Chief Engineer or other Officer of Public Works Department, relating to the subject matter in issue, would be required, the sole Arbitrator has the discretion



to call for the expert comments/ opinions to adjudicate the dispute.

38. In case of **Citibank Vs. TLC Marketing PLC [(2008) 1 SCC 481]**, the Hon'ble Supreme Court observed that a composition of Arbitral Tribunal comprising of three Arbitrators, is not necessary or expedient nor it can be said to be fair and reasonable in the larger interest of parties because such an order may lead to burdening the parties to bear extra amount of money in prosecuting the arbitral proceedings, which as per objectives of the Act, are less expensive and more efficacious remedy to the parties to settle their disputes. Thus, it is well settled that the arbitration proceedings must be simple, less expensive and expedient for the parties to adjudicate the dispute.

39. In case of **Union of India Vs. M/s Singh Builders Syndicate [(2009) 4 SCC 523]**, the High Court of Delhi rejected the contention on behalf of the Government that Court was not vested with any powers to appoint a sole Arbitrator in distinction to the arbitration agreement, which provided in the panel of three Arbitrators. The Apex Court upheld the order passed by the High Court of Delhi, appointing a sole Arbitrator by observing that the appointment of the sole Arbitrator by the High Court is valid. Such proposition has recently been followed by the High Court of Delhi, in **Arbitration Petition No.24/2024 decided on May 22, 2024**, in the case of **Twenty-Four Secure Services Pvt. Ltd. Vs. Competent Automobiles Company Limited [2024 SCC OnLine Del 4358]**.



40. Thus, this Court finds that instead of appointing a panel of three Arbitrators from the panel of named Arbitrators of respondents, appointment of sole Arbitrator would meet the aim and object of the A&C Act to settle the dispute through Arbitration.

41. The final outcome of the aforesaid discussions is that the present Arbitration Application deserves to be allowed and the Arbitration Tribunal of sole Arbitrator may be appointed to adjudicate the dispute between parties in accordance with provision of the A&C Act, 1996.

42. Hence, the present Arbitration Application succeeds and same is hereby allowed. This Court constitutes the Arbitration Tribunal of sole Arbitrator of *Hon'ble Mr. Justice Ajay Rastogi, Former Judge of the Supreme Court, Address:- A-6, Anand Niketan, New Delhi-110021 Mobile No.98290-11638; E-mail:- rasajay18@gmail.com*, to adjudicate the dispute between parties in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

43. The Arbitration fee shall be payable in accordance with the provisions contained in the Manual of Procedure for Alternative Dispute Resolution, 2009 as amended by the Manual of Procedure for Alternative Resolution (Amendment), 2017 vide notification dated 23.03.2017 read with 4th Schedule appended to the Act of 1996.

44. The Registry is directed to intimate the Arbitrator Hon'ble Mr. Justice Ajay Rastogi, for his approval.



45. Parties are at liberty to raise their respective objections before the Arbitrator, who is supposed to consider and decide the objections as well as the dispute between parties in accordance with law.

46. Since as per Section 29A of the Arbitration Act, 1996, the arbitration proceedings are required to be concluded within scheduled time as stipulated therein, it is expected that parties shall provide E-mail/ Contact Number/ Mobile Number of themselves as also of their authorized representatives/ lawyers, appearing on their behalf respectively, before the Arbitration Tribunal, in order to facilitate the Arbitrator to send information to the parties, whenever required. The information send by the Arbitrator, on such address/ E-mail/ cellphone of the parties/ their authorized representative lawyers, shall be treated as sufficient unless same is not changed.

47. As per arbitration agreement, the arbitration proceedings are to be commenced at Jaipur, hence, same may be commenced accordingly or at the place, which is convenient to both parties as also of the Arbitrator either physically or through Video Conferencing. Both parties shall mark their presence before the Arbitrator on 09th September, 2024 or on any other date as informed by the Arbitrator to the parties or agreed between both parties with the consent of Arbitrator.

48. All pending application(s), if any, stand disposed of.

(SUDESH BANSAL),J

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