

+ **Arb.P.118 of 2007**

M/S JAI PRAKASH ASSOCIATES LTD. Petitioner

Versus

Through: Mr. Kailash Vasudeva, Sr. Advocate
with Mr. Ajit Pudussery, Advocate

1.	Whether reporters of Local papers may be allowed to see the judgment?	YES
2.	To be referred to the reporter or not?	YES
3.	Whether the judgment should be reported in the Digest?	YES

1. The petition under Section 11 of the Arbitration Act, 1996 is for consideration. Notice of the petition was issued to the respondent first on 20th April, 2007 for 24th July, 2007. The respondent did not file any reply to the petition and on 24th July, 2007 sought time for filing the reply. The request of the respondent for filing the reply was declined and the counsels heard. The opposition orally made to the petition was not successful and this court allowed the petition and appointed a retired judge of this court as the arbitrator. The respondent preferred SLP Civil No.17785/2007 to the Supreme Court and vide order dated 11th November, 2008 the same was allowed and the order of this court appointing the arbitrator was set

aside and the matter remitted to this court for passing a fresh order on the petition under Section 11(6) of the Act after giving an opportunity to the respondent herein to file its counter affidavit and after hearing the parties. The respondent has since filed its counter affidavit. The senior counsels for the parties were heard at length on 11th September, 2009 and by order of that date the petition was dismissed with reasons to follow and which are recorded herein below.

2. In the petition as preferred, there is a reference only to the agreement dated 18th July, 1999 between the parties and along with the petition, a copy of the said agreement only along with General Conditions of contract containing an arbitration clause was annexed. In the said agreement between the petitioner and the respondent, it is inter-alia mentioned that the petitioner along with three other parties described in the agreement as “other contracting parties” had submitted a coordinated bid for execution of the Chamera Hydroelectric Project Stage-II in District Chamba, Himachal Pradesh of the respondent on turnkey basis; that pursuant to post bid discussions, clarifications, negotiations, the respondent had agreed to award the contract for execution of the project to the petitioner and the other contracting parties and at the request of the petitioner and the other contracting parties, the respondent had further agreed that the project shall be executed on a coordinated basis, inter-alia through three separate contracts to be signed by each contracting party which shall be directly responsible for the supplies and/or the portion of the works covered by each contract. The contract dated 18th July, 1999 between the petitioner and the respondent was for the civil and certain other works. During the course of hearing, it was informed that on the same date separate contracts were entered

by the respondent with the other three contracting parties for other works in relation to the said project.

3. Clause 38.2 of the General Conditions of contract appended to the aforesaid agreement is as under:-

“Any dispute or difference which may arise between the parties out of or in connection with this Contract which the parties are unable to settle amicably, shall be settled by reference to arbitration by three arbitrators. Each party shall appoint one arbitrator and the third shall be appointed by the Court of Arbitration of the International Chamber of Commerce, Paris (ICC) in accordance with the provisions of the Rules of Arbitration of the International Chamber of Commerce, Paris (ICC). The rules governing the proceedings before the arbitrators shall be those of the ICC. Save as above, the Indian Arbitration and Conciliation Act, 1996 shall govern the arbitration. The venue of arbitration proceedings shall be New Delhi, India.”

4. It is further the case of the petitioner in the petition that subsequent to the aforesaid contract, a letter dated 9th April, 2003 was written by the respondent to the petitioner whereunder the respondent agreed to, in the event of commissioning of the project earlier to the agreed date, to pay incentive of the total sum of Rs.30 crores. Disputes and differences were alleged to have arisen with respect to the payment of the said incentive. In this regard, it may also be mentioned that out of the agreed incentive of Rs.30 crores, a sum of Rs.10 crores was released to the petitioner as advance, to be refunded in the event of the incentive ultimately not being due. During the hearing, it was informed that it is the case of the respondent that the petitioner did not become entitled to the incentive and the respondent claimed refund of the said sum of Rs.10 cores from the petitioner. In fact, it is the contention of the senior

counsel for the respondent that this petition was filed as an afterthought and with a malafide intention only to ward off/delay the refund of the said sum of Rs.10 crores, when the same was demanded by the respondent from the petitioner and the petitioner had prior thereto neither claimed to be entitled to the incentive nor raised any other dispute.

5. Having noticed the facts leading to the filing of the petition, and before considering the defense/opposition of the respondent, the scope of enquiry in a proceeding under Section 11 may be noticed. The Supreme Court in ***National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd.*** AIR 2009 SC 170 has held that the Chief Justice/his designate in exercise of powers under Section 11 will have to necessarily decide; (a) whether the party making the application has approached the appropriate High Court; (b) whether there is a arbitration agreement and whether the party who has applied under Section 11 of the Act is a party to such an agreement. It was further held that the Chief Justice/his designate may choose to decide or leave the same for the decision of the Arbitral Tribunal; (a) whether the claim is a dead (long barred) claim or a live claim; (b) whether the parties have concluded the contract/transactions by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It was further held that the Chief Justice or his designate should exclusively leave for the decision of the Tribunal; (1) whether the claim may fall within the arbitration clause; (2) merits of any claim involved in the arbitration. The scope of enquiry being limited as aforesaid, it is deemed appropriate to notice the defense raised in this context.

6. The senior counsel for the respondent has contested the petition on three grounds. Firstly, this court being not the appropriate court i.e. not having territorial jurisdiction to entertain the petition. Secondly, on the ground of there being no agreement for arbitration of the disputes as to the incentive aforesaid. Thirdly, it is contended that the petitioner is not competent to alone invoke the arbitration clause or to approach this court.

Re. Territorial Jurisdiction.

7. The senior counsel for the petitioner has referred to Clause 5 of the General Conditions of contract, a complete copy whereof was handed over in the court during the hearing. Sub Clause 5.2 provides that in respect of all matters or actions arising out of the contract the courts at Delhi/Chandigarh shall have exclusive jurisdiction. Attention was invited to ***Rajasthan State Electricity Board Vs. Universal Petrol Chemicals Ltd.*** (2009) 3 SCC 107 in support of the proposition that where two or more courts have jurisdiction, the parties can agree to vest the jurisdiction in one such court only. It was contended that in the present case the parties had vested the said jurisdiction in the courts either at Delhi or Chandigarh and thus the petitioner could in its discretion invoke the jurisdiction of either of the said two courts. It being admitted that the works to be executed under the contract were outside the territorial jurisdiction of this court, it was enquired as to where the contract was executed. It was informed that the contract was executed at Faridabad. It was put to the senior counsel for the petitioner that the parties could not by consent vest jurisdiction in this court if it otherwise had none under the law. The senior counsel while agreeing with the proposition contended that the contract for payment of incentive was

“an independent contract” contained in the letter dated 9th April, 2003 (Supra) of the respondent and the same was addressed to the petitioner at New Delhi. It was stated that certain other correspondence also from the respondent to the petitioner was at New Delhi and thus the cause of action had partly accrued to the petitioner at Delhi. Reliance was also placed on ***Telephone Cables Ltd. Vs. Chief General Manager, Haryana Telecom Circle*** (2005) 10 SCC 294. However, in that case it was not disputed that formal acceptance of the contract was at Chandigarh and the payment under the contract was paid and was payable at Chandigarh and it was in that context that it was held that the courts at Chandigarh had jurisdiction.

8. Per contra, the senior counsel for the respondent has drawn attention to the letter dated 23rd April, 2003 of the petitioner to the respondent in response to the letter dated 9th April, 2003 (Supra). It was urged that the petitioner had concealed the said letter from this court and in fact was not entitled to any relief on this ground alone. The said letter dated 23rd April, 2003 is addressed from the petitioner at Chamba to the respondent at Chamba. It is contended that the agreement with respect to the payment of incentive came into being only on acceptance by the petitioner on 23rd April, 2003 of the proposal of the respondent contained in the letter dated 9th April, 2003. The said acceptance was outside the jurisdiction of this court. Reliance in this regard was placed on ***Bhagwandas Goverdhandas Kedia Vs. M/s Girdharilal Parshottamdas & Co.*** (1966) 1 SCR 656 laying down that it was the place of the acceptance of the offer and not of the place of making of the offer which formed part of the cause of action. ***A.B.C. Laminart Pvt. Ltd. Vs. A.P. Agencies*** (1989) 2 SCC 163 was also cited to contend that the parties could

not by consent vest jurisdiction in a court which under the law had none. Reference was also made to ***Shree Ram Mills Ltd. Vs. Utility Premises (P) Ltd.*** (2007) 4 SCC 599 to contend that the question of territorial jurisdiction has to be gone into at this stage.

9. A reading of the letters dated 9th April, 2003 & 23rd April, 2003 would show that though the proposal for payment of incentive had emanated from the petitioner but the terms & conditions on which the respondent had agreed to pay commission were listed out in the letter dated 9th April, 2003. One of the conditions stipulated therein for advancing incentive of Rs.10 crores as demanded by the petitioner was submission of a bank guarantee for the said amount in favour of the respondent. The respondent by the said letter also called upon the petitioner to contact the Engineer Incharge “for further needful in this regard”. Thus the letter dated 9th April, 2003 was a proposal only and which was accepted by the petitioner vide letter dated 23rd April, 2003. The fact that such acceptance of the petitioner was necessary is evident from the language of the letter conveying the irrevocable unconditional acceptance of the petitioner to the terms for payment of incentive. The said acceptance had become necessary because the petitioner had first, after receipt of letter dated 9th April, 2003 sought variation of its terms and which was not acceptable to the respondent. The said acceptance having been issued from and delivered outside the jurisdiction of this court, the contention of the senior counsel for the petitioner that the “independent contract contained in the letter dated 9th April, 2003” fructified within the territorial jurisdiction of this court giving this court jurisdiction to entertain this petition is meritless.

10. As far as the argument of certain correspondence having been exchanged at Delhi, in my view the same cannot constitute the cause of action. Each and every dealing between the parties is not part of or constitutes cause of action. It is only such bundle of facts which it is necessary for petitioner to prove to be entitled to relief, which constitute a cause of action. The senior counsel for the petitioner has not shown anything of the nature having happened in Delhi or being required to happen in Delhi, within the territorial jurisdiction of this court, from which it can be said that cause of action had accrued to the petitioner against the respondent at Delhi. Reference may also be made to the letter dated 9th May, 2006 of the respondent to the petitioner denying the arbitrability of the petitioner's claim for incentive. The said letter undoubtedly has been issued by the respondent from Faridabad to the petitioner at Delhi. The contention of the senior counsel for the petitioner was that on this account this court would have territorial jurisdiction. However, merely because such a letter has been issued at Delhi, perhaps owing to the same being in response to the letter issued by the petitioner from Delhi would again in my opinion remain a triviality not forming part of the cause of action. I may also notice that the only averment in the petition for invoking the territorial jurisdiction of this court is, the venue of arbitration clause being Delhi. It is settled law that the venue of arbitration does not govern the "court" within the meaning of Section 2 (e) of the Act.

11. Thus it is found that this court is not appropriate court or the court within the meaning of Section 2 (e) of the Act or the appropriate court to entertain this petition.

12. Though the petition can be disposed of on this aspect alone but it is deemed appropriate to deal with the other oppositions raised as well.

Re. Arbitrability of the claim for incentive.

13. The contention of the senior counsel for the respondent is that payment of incentive was not a part of the agreement containing an arbitration clause; thus the dispute with respect thereto could not be covered by the arbitration clause in the agreement. It was further argued with reference to the clauses of the contract that the same provided for the time for completion of the project and the letter dated 9th April, 2003 does not vary/alter any of the terms or conditions of the agreement containing an arbitration clause for the letter dated 9th April, 2003 to form part/subject matter of the said agreement.

14. Per contra, the senior counsel for the petitioner has urged that the arbitration clause as set out herein above is very wide containing the expressions “out of”, “in connection with” and the claim for incentive was in connection with the contract and thus was arbitrable. Reliance was placed on ***Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan*** (1999) 5 SCC 651 (para 30) where the Supreme Court held the matters connected with the subject matter of the main agreement to be also arbitrable in terms of the arbitration clause contained in the main agreement. Attention was also invited to Clause 2.5 of the General Conditions of contract whereunder the Engineer Incharge is entitled to issue instructions directing the manner in which the works are to be carried out. It was

urged that it cannot be argued that the disputes arising out of such directions of the Engineer Incharge would not be arbitrable.

15. The senior counsel for the respondent contended that the reliance by the petitioner on ***Olympus Superstructures Pvt. Ltd.*** (Supra) is misconceived. Attention was invited to the arbitration clause and the facts in that case to contend that therein arbitration was agreed not only of disputes by virtue of the agreement but even otherwise as to any other matter in any way connected with or in relation to the subject matter of the agreement. It was further urged that the court had in that case found the disputes and payments to be integrally connected and overlapping with the main agreement. It was urged that it is not so in the present case.

16. The expression “out of” or “in connection with this contract” used in Clause 38.2 (supra) of the General Conditions of Contract can only refer to a dispute of difference arising out of or in connection with the contract executed between the parties. The said contract admittedly did not provide for any incentive for commissioning of the project before the agreed date. Thus it cannot be urged that the aforesaid expression in the arbitration clause would apply to all disputes which may arise between the parties with respect to the project. The same can have reference/relevance only to the disputes arising out of the terms and conditions of that contract. That contract did not at all provide for any incentive for commissioning before the scheduled date and thus it cannot be said that the dispute between the parties as to the entitlement, if any, of the petitioner to incentive could have been agreed by the parties to be referred to arbitration. The principles of interpretation of an arbitration agreement are the same as of any other contract. What

has to be determined is whether the parties can be said to have been ad idem. In the absence of anything in the contract as signed on 18th July, 1999, qua incentive, it cannot possibly be said that the parties could have intended to arbitrate on the claims qua incentive.

17. The agreement for incentive came into being between the parties only pursuant to letters dated 9th April, 2003 & 23rd April, 2003 (supra). The Agreement for incentive is thus an independent agreement, as also repeatedly urged by the counsel for the petitioner, i.e. independent from the contract signed in 1999. What has to be thus determined is whether the parties intended to incorporate the arbitration clause contained in their agreement of 1999 in their agreement of 2003 qua incentive, relating to the same project.

18. The first thing to be noticed is that the terms and conditions contained in the letters dated 19th April, 2003 and 23rd April, 2003 are self contained agreement qua incentive and are not dependent upon the agreement of 1999. In fact in the letter dated 9th April, 2003 of the respondent it is expressly stated that the proposal for incentive was “without altering the terms of the contract” of 1999. The parties in the agreement of incentive contained in the aforesaid letters did not even depend upon the agreement of 1999 for defining the scheduled date of completion. The said letters contain the dates also, on achieving completion whereon the incentive would be payable. The manner of payment of incentive is also contained in the said letters and an independent bank guarantee was sought to be furnished for the advance against the incentive. The agreement borne out of the said letters is a supplementary or additional, or subsidiary or subsequent or later contract to the contract of 1999

providing for arbitration. There is no statement in any of the said letters that “other terms and conditions shall be as per the agreement of 1999”. I thus do not find any intention of the parties to incorporate the arbitration clause in the main contract in such supplementary contract.

19. A similar question had arisen in ***Seth Thawardas Pherumal Vs. Union of India*** AIR 1955 SC 468. There also the claim was grounded not on any clauses of the contract nor implied in the contract but on a collateral promise evidenced not by the contract but by two letters written by the department. The Supreme Court held that the claim on such a subsidiary contract could not be said to be arising out of a contract to which the arbitration clause applied. Lord Macmillan in ***Heyman Vs. Darwins Ltd.*** 1942 AC 356 was referred to in support of the proposition that if the parties chose to add a fresh contract in addition to the old then the arbitration clause cannot cover the new contract.

20. ***In Umraosingh & Co. Vs. State of Madhya Pradesh*** AIR 1976 MP 126 the facts also were identical. In that case also after the execution of the agreement, a bonus was agreed to be paid for completing the works within the stipulated time. The Division Bench held that since in the original contract there was no provision for bonus and since in the supplementary agreement relating to bonus there was no provision for arbitration, the arbitration clause in the original contract was not applicable for resolving the disputes relating to bonus. It was held that the agreement pertaining to bonus was an entirely independent agreement and there was nothing to show that the arbitration clause in the original agreement got incorporated in the agreement for bonus.

21. Even though the aforesaid two judgments are of prior to the 1996 Act, in my view the position remains the same. Section 7(5) of the 1996 Act lays down the same test. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement only if reference is such as to make that arbitration clause part of the contract. In the present case, neither do I find any reference in the supplementary contract qua incentive, to the main contract nor any intent to make the arbitration clause in the main contract part of the contract qua incentive.

22. The Supreme court recently in ***M.R. Engineers & Contractors Pvt Ltd Vs Som Datt Builders Ltd.*** MANU/SC/1150/2009 has held that even though the contract between the parties does not contain a provision for arbitration, an arbitration clause contained in an independent document will be imported and engrafted in the contract between the parties, by reference to such independent document in the contract, if the reference is such as to make the arbitration clause in such document a part of the contract i.e., it must be evident that the parties intended to incorporate the arbitration clause contained in the document into the contract. Russell on Arbitration was quoted to the effect that general words of incorporation are not sufficient, rather particular reference to the arbitration clause needs to be made to comply with the provisions unless special circumstances exist. It was held that an arbitration clause in other document, would get incorporated into a contract by reference only when the contract contains a clear reference to the documents containing the arbitration clause; the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract and the arbitration clause should be appropriate,

i.e. capable of application in respect of the disputes under the contract and should not be repugnant to any term of the contract. It was further held that when a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then the terms of the referred contract in regard to the execution/performance alone will apply and not the arbitration agreement in the referred contract unless there is special reference to the arbitration clause also. Though certain other parameters were also laid down by the Supreme Court in that case but the same are not found relevant for the present case.

23. Russell on Arbitration, 21st Edition (i.e. of prior to the English Arbitration Act, 1996) while dealing with a situation where a contract is varied and disputes have arisen about whether the contract as varied includes or excludes the original arbitration agreement cites; i) ***EB Aaby's Rederi A/S Vs Union of India*** (1974) 2 Lloyd's Rep 57 where the arbitration clause was held to be not incorporated in the variation to the agreement for the reason of the claims under the original arbitration agreement being required to be made within 12 months and the variation requiring many years; and ii) ***Faghirzadeh Vs Rudolf Woolf SA (PTI) Limited*** (1977) 1 Lloyd's Rep 630 where the arbitration clause was held to apply to variations also for the reason of the variation being unintelligible without reference back to the original agreement.

24. Mustill and Boyd in their work on Commercial Arbitration, 2nd Edition opine that where one contract operates by variation or replacement of another and only one of them contains an arbitration

clause, it is a question of construction whether disputes under both contracts or only under one fall within the clause.

25. Applying the aforesaid tests, neither can it be said that the subsequent agreement qua incentive is unintelligible without reference back to the main contract, nor is the arbitration clause in the main contract consistent with the subsequent agreement qua incentive. The main agreement on the basis whereof the petition under Section 11 of the Arbitration Act is filed, is between the petitioner (in its individual capacity) and the respondent only and relating only to the works which the petitioner alone, as one of the members of the consortium aforesaid, was to carry out for the project. However, the agreement qua incentive is between the petitioner, as leader of the consortium and for and on behalf of itself as well as other members of the consortium on the one hand and the respondent on the other hand. Also, while the main agreement is concerned only with the works which the petitioner was to carry out in the entire project (and not the works which other consortium members were required to do with respect to same project but under different agreements with the respondent), the subsequent agreement qua incentive is concerned with commissioning of the project, which could only be on completion of works by other consortium members also under their respective contracts with the respondent. Yet also, while payments under the main agreement on basis whereof petition is filed, were to be made by respondent to petitioner only and were to be received by petitioner on its own behalf only, the payment of incentive under the subsequent agreement was to be made by respondent to all the consortium members and advance incentive was received by the petitioner on

behalf of itself as well as other consortium members and under authority from them.

26. For the aforesaid differences, there cannot be said to be any intent to make the arbitration clause in the main agreement on basis whereof petition is filed, a part of the agreement qua incentive described by senior counsel for petitioner also during arguments as “independent”.

27. I do not thus find the dispute arising from agreement qua incentive to be arbitrable.

Re. Locus of the petitioner.

28. The senior counsel for the petitioner in his opening submissions had in response to a query from the court categorically stated that the agreement for payment of incentive (disputes with respect whereto had arisen) was between the petitioner and the respondent only and the other contracting parties referred to in the agreement (Supra) between the petitioner and the respondent (on basis whereof petition is filed) were not concerned with the same. This query was raised since the arbitration provided in the General Conditions of contract is of International Chamber of Commerce. It was felt strange as to why the petitioner and the respondent with no foreign party involved would for their said dispute of incentive provide for arbitration of International Chamber of Commerce, Paris (ICC). In fact this query was made in the context of finding out whether it could have been the intention of the parties that the disputes qua payment of incentive with which the other consortium members being foreigners were not stated to be concerned, could be intended to be covered by arbitration of ICC.

29. However, subsequently during hearing, when letters dated 9th April, 2003 & 23rd April, 2003 containing agreement qua incentive were read and it was found that the same was of all the consortium members with the respondent, it was again enquired as to how the disputes therefrom could be covered by arbitration agreement between petitioner & respondent only, on the contract on basis whereof petition was filed. The senior counsel for petitioner then drew attention to an “overall agreement” dated 18th July, 1999, i.e. of the same day as the agreement between petitioner and respondent and on basis whereof petition is filed and to which not only the petitioner and the respondent but the other consortium members are also a party. A copy of the said agreement was filed not with the petition but along with the rejoinder to reply of respondent. The same also provides for settlement of disputes in Clause 11 thereof as under:-

“11.0 SETTLEMENT OF DISPUTES

Any dispute or difference which may arise between the parties out of or in connection with the Agreement which the parties are unable to settle amicably, shall be settled in accordance with the provisions of Article 38 (Settlement of Disputes) of the GENERAL CONDITIONS provided that for the purposes of this Agreement in the said Article 38 of the GENERAL CONDITIONS the Owner shall be one party and all the Contracting Parties collectively acting through the leader, shall be other party. “

This agreement is signed by other consortium members also. However the same also does not cover incentive.

30. The scheme for appointment of an arbitrator framed by this court in 1996 requires a request under Section 11(4) or (5) or (6) to be accompanied by the original arbitration agreement or true copy thereof. The only agreement copy whereof was filed along with the

request in this petition was the agreement between the petitioner and respondent only. Thus the plea/request of the petitioner is for arbitration under that agreement only and not under the overall agreement which surfaced for the first time in rejoinder.

31. The agreement qua incentive is found to be between parties other than the petitioner & respondent also and who are not parties to the arbitration agreement on basis whereof petition is filed. The said parties are also not parties to this petition. The senior counsel for the petitioner at this stage admitted that other consortium members are also parties to agreement qua incentive and the overall agreement was relied upon in this regard only. Even then the other consortium members, even if admitted to be parties to agreement qua incentive and contended to be arbitrable, ought to have been impleaded as parties to this petition. They have not been so impleaded. Neither were their particulars given in the petition as required to be given under the scheme aforesaid. After the judgment in ***SBP & Co. Vs. Patel Engineering Ltd.*** AIR 2006 SC 450 notice is required to be given to all parties to arbitration and they are to be heard.

32. Moreover, the claim for incentive if any is under an agreement made jointly by petitioner and other consortium members, with the respondent. The petitioner alone cannot claim under the said agreement. The petitioner thus does not have the locus to alone make a request under Section 11 of the Act, under such agreement.

33. I have also considered the effect of the petition, under the arbitration clause aforesaid in the overall agreement (on basis whereof though petition is not filed) being entitled to act as a leader

of the consortium to appoint the arbitrator. However, in my view the same would not obviate all parties to the dispute being before this court. The respondent can be considered to be at best an agent of the other consortium members. An agent of a disclosed principal, under Section 230 of the Contract Act, cannot be sued. Thus for the petition to be covered by the arbitration clause in the overall agreement also, the other contracting parties were required to be a party hereto.

34. Faced with this situation, the senior counsel for the petitioner stated that an opportunity be given to him to implead the other contracting parties as parties hereto. No ground was found for giving such opportunity. This court cannot guide the petitioner, especially when the petitioner is found to have taken inconsistent stand i.e. in the opening submissions urged that the petitioner alone and not the other consortium members was party to the agreement qua incentive and upon failing in the said submission wanting to implead the other parties. It is the contention of the senior counsel for the respondent that the petitioner had suppressed the “overall agreement” also from this court and by such suppression in the first round had managed to obtain an order for appointment of arbitrator.

35. There is yet another aspect of the matter. The correspondence required under Section 11 of the Act to precede a request to Chief Justice/his designate, is also by petitioner for itself only and not on behalf of other consortium members. There is nothing to show that they were in any way concerned with the dispute.

35. I, therefore, do not find any merit in the petition. Though the order of dismissal of petition was announced in court itself on

conclusion of hearing, the senior counsel for the respondent had pressed for costs and order with respect thereto also was reserved. In the facts and circumstances aforesaid, costs of these proceedings of Rs.1 lac are also awarded to the respondent against the petitioner.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**September 18th, 2009
M/PP**