

Court No. - 44

Case :- ARBITRATION AND CONCILI. APPL.U/S11(4) No. - 47 of 2023

Applicant :- M/S Ajay Construction Through Its Partner Mr. Ajay Agrawal

Opposite Party :- Union Of India And 3 Others

Counsel for Applicant :- Hari Om Ojha,Ran Vijay Singh,Rishi Kant Rai

Counsel for Opposite Party :- A.S.G.I.,Ajay Singh

With

Case :- ARBITRATION AND CONCILI. APPL.U/S11(4) No. - 45 of 2023

Applicant :- M/S Ajay Construction Through Its Partner

Opposite Party :- Union Of India And 3 Others

Counsel for Applicant :- Hari Om Ojha,Ran Vijay Singh,Rishi Kant Rai

Counsel for Opposite Party :- A.S.G.I.,Archit Mehrotra

With

Case :- ARBITRATION AND CONCILI. APPL.U/S11(4) No. - 46 of 2023

Applicant :- M/S Ajay Construction

Opposite Party :- Union Of India And 3 Others

Counsel for Applicant :- Hari Om Ojha,Ran Vijay Singh,Rishi Kant Rai

Counsel for Opposite Party :- A.S.G.I.,Archit Mehrotra

With

Case :- ARBITRATION AND CONCILI. APPL.U/S11(4) No. - 48 of 2023

Applicant :- M/S Ajay Construction Through Its Partner

Opposite Party :- Union Of India And 3 Others

Counsel for Applicant :- Hari Om Ojha,Ran Vijay Singh,Rishi Kant Rai

Counsel for Opposite Party :- A.S.G.I.,Ajay Singh

Hon'ble Saumitra Dayal Singh,J.

1. Heard Shri Ran Vijay Singh, learned counsel for the applicant and Shri Ajay Singh as well as Shri Archit Mehrotra, learned counsel for the respondents.

2. These four applications filed under Section 11(4) of the Arbitration and Conciliation Act, 1996 seek appointment of an Arbitral Tribunal.

3. Brief details of the applications with reference to the Contract are as below :

S.No.	Arbitration & Conciliation Applications	Contract description
1	Arbitration & Conciliation Application u/S 11(4) No. 47 of 2023 (M/S Ajay Construction through its Partner Mr. Ajay Agrawal Vs. Union of India and 3 others).	Subway (LHS) at LC no. 19/C unmanned at Km- 20/8-9 between DRN-BHI station in BRY-LKU section vide E tendering 'open' tender notice no. 13/2018 dated 22.05.2018.
2	Arbitration & Conciliation Application u/S 11(4) No. - 45 of 2023 (M/S Ajay Construction through its Partner Vs. Union of India and 3 others)	Subway (LHS) at LC No. 2A/C km 3/3-4, 8/C Km-4/6-7, 23/C km-14/1-2, 32/C-km, 20/0-1 & LC no. km 42/C km – 23/3-4 between Rampur-Lalkaun section (under sanctioned work of construction of LHS in place of total LCs 17 nos. in Sr.Den/I Section, vide E tendering 'open' tender notice no. 20/2018 dated 27.06.2018.
3	Arbitration & Conciliation Application u/S 11(4) No. - 46 of 2023 (M/S Ajay Construction Vs. Union of India and 3 others)	Subway (LHS) at LC No. 20/C unmanned at Km- 20/8-9 between DRN-BHI station in BRY-LKU section vide E tendering 'open' tender notice no. 13/2018 dated 22.05.2018.
4	Arbitration & Conciliation Application under Section 11(4) No. - 48 of 2023 (M/S Ajay Construction through its Partner Vs. Union of India and 3 others)	Subway (LHS) in place of L.C. No. 254 C manned at km 331/01 between RGB-BMY station in jurisdiction of ADEN/L/IZN (under sanctioned work construction of subway (LHS) at LC no. 78, 48C, 254C & 295C in DEN/HQ's section vide E tendering 'open' tender notice no. 12/2019 dated 05.02.2019.

4. Briefly, it may be noted that against four separate tenders invited by the North Eastern Railway, amongst others the present applicant had participated in that process by submitting tender documents. According to the applicant, it had submitted tender documents after completing all formalities of law, as prescribed. First, the technical bid was opened. On the applicant qualifying technical bid stage, its financial bid was opened. Upon due selection, it was awarded the

four contracts by the North Eastern Railway. Details of those contracts are as above.

5. Thus, the following acceptance letter were issued to the applicant with respect to the above four works.

S.No.	Acceptance Letter No.	Date of issuance	Under the signature	Cost of the work
1.	W/362/4/T.C/70/2000	6.9.2018	Divisional Engineer HQ, Izzatnagar Division, Bareilly.	2,36,29,157.25
2.	W/362/4/T.C/94/785	20.12.2018	Sr. Divisional Engineer-I, Izzatnagar Division, Bareilly.	16,11,30,558.43
3.	W/362/4/T.C/69/1999	6.9.2018	Divisional Engineer HQ, Izzatnagar Division, Bareilly.	2,36,22,073.00
4.	W/362/4/T.C/251/1252	6.9.2019	Divisional Engineer HQ, Izzatnagar Division, Bareilly.	2,38,68,557.26

6. Against the contract thus executed between the parties, the applicant claims that it had executed 100% of the work awarded to it giving rise to Arbitration & Conciliation Application u/S 11(4) Nos. - 47 of 2023 and 48 of 2023. Also, the applicant claims that it had executed 70% work awarded to it which has given rise to Arbitration & Conciliation Application u/S 11(4) Nos. - 45 of 2023 and 46 of 2023. The percentage of work executed is not disputed to the North Eastern Railway. Also, it has been submitted that the applicant has been paid all dues for the quantum of work executed by it.

7. The reason why dispute has arisen between the parties is- according to the North Eastern Railway, the applicant was

ineligible to submit a valid tender. That ineligibility sprung from the fact that it did not have the necessary work experience and therefore, financial capacity to participate in the tender process. Concealing that fact and by misleading the North Eastern Railway on the strength of certain partnership deeds, the applicant wrongly set up eligibility. That fact was never disclosed to the North Eastern Railway at the time of submission of the tender documents. Later, it became known to the North Eastern Railway that the partnership firm M/s Ajay Constructions of which partnership deed was filed, stood dissolved and reconstituted on the date of submission of the tender document. The applicant wrongly represented that such partnership was existing and it mislead the North Eastern Railway to consider that work experience (of the dissolved firm), in the technical evaluation of the bids submitted by the applicant.

8. The above position of fact is not admitted to the applicant. It has been submitted that full and correct facts had been disclosed. The applicant would submit that it had not concealed any fact from the Railways. In any case, after execution of the contract documents, the plea of ineligibility in the tender documents may not have been set up as a plea to cancel the contract itself. By cancelling the concluded contract in the manner it has been done, a valid dispute has arisen between the parties which is arbitrable under Clause 64. (1)(i) of the General Conditions of Contract. For ready reference that Clause read as below :

"64.(1)(i): In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the Contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the "excepted matters" referred to in Clause 63.1 of these Conditions, the Contractor, after 120 days but within 180 days of his presenting his final claim on disputed

matters shall demand in writing that the dispute or difference be referred to arbitration."

9. In **M/s. ABCI Infrastructures Pvt. Ltd. Vs. Union of India and others, 2025 SCC OnLine SC 327**, it has been observed as below :

"12. BRO justified encashing the bank guarantee by citing delays caused by issuing a second notice inviting bids. This claim is baseless, as BRO was aware of the Rs. 1,569/- error. Instead of declaring the bid non est due to the clear mistake, BRO asked the appellant to justify the bid, cancelled the notice, declared the Appellant a defaulter, invoked the bank guarantee, and issued a fresh notice inviting bids.

13. Thus, BRO's claim that the delay was entirely due to the Appellant's mistake is flawed, ignoring BRO's own lapses. Mistakes, including by authorities, should be resolved through corrective steps. A practical approach could have avoided the delay, which was caused by BRO's refusal to acknowledge the Appellant's genuine error and the unwarranted cancellation of the bid.

16. In view of the aforesaid discussion, we direct the Appellant to pay Rs. 1 crore to BRO, as a consequence of their error. Upon receiving this payment, BRO shall return the Appellant's original bank guarantee or demand draft of Rs. 15.04 crores within one week."

10. On the other hand, Shri Archit Mehrotra and Shri Ajay Singh objected that by concealing all material facts, the applicant has committed fraud on the Railways. Therefore, by virtue of Clause 63 of the General Conditions of Contract read with Clause 8 of Standard General Conditions of Contract, the dispute being raised by the present applicant would fall in the category of 'excepted matters'. For ready reference, Clause 63 of the General Conditions of Contract read with Clause 8 of Standard General Conditions of Contract read as below :

"63. Matters Finally Determined by the Railway: All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the Contractor to the GM and the GM shall, within 120 days after receipt of the Contractor's representation, make and notify decisions on all matters referred to by the Contractor in writing provided that matters for which provision has been made in

Clauses 8, 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57A, 61(1), 61(2) and 62(1) of Standard General Conditions of Contract or in any Clause (stated as excepted matter) of the Special Conditions of the Contract, shall be deemed as 'excepted matters' (matters not arbitrable) and decisions of the Railway authority, thereon shall be final and binding on the Contractor; provided further that 'excepted matters' shall stand specifically excluded from the purview of the Arbitration Clause.

8. If the tenderer(s) deliberately gives / give wrong information in his / their tender or creates / create circumstances for the acceptance of his / their tender, the Railway reserves the right to reject such tender at any stage."

11. Reliance has been placed on the three judge bench decision of the Supreme Court in **N.N. Global Mercantile Private Limited Vs. Indo Unique Flame Limited and others, (2021) 4 SCC 379.**

12. Having heard learned counsel for the parties and having perused the record, originally, there existed two partnership firms – M/s Ajay Constructions Bareilly and M/s Narendra Dev Railways, Bareilly. M/s Ajay Constructions Bareilly was constituted vide partnership dated 1.4.2016 by two partners – M/s Ajay Kumar Agarwal with 85% share and Mr Ajay Agarwal with 15% share. That firm underwent total reconstitution on 10.11.2017. The majority partner Ajay Kumar Agarwal retired from the firm. Thereafter, two other partners Arvind Kumar Gangwar and Pankaj Agarwal were inducted as partners. In that reconstituted firm, Ajay Kumar Agarwal gained majority share 70% while Arvind Kumar Gangwar held 20% share and Pankaj Agrawal held 10% share. These facts are admitted to the applicant.

13. Also, the firm M/s Narendra Dev Railways, Bareilly was constituted on 1.4.2012. Mr Ajay Kumar Agarwal; Mr Maheshwar Dayal; Ashish Singh; Mansi Singh and, Aryan Singh as these partners shares 50%; 1.5%; 18.5%; 10% and, 20%, respectively. There is no dispute to the constitution of that firm.

14. At the time of submission of the tender documents, the

applicant relied on the partnership deed of M/s Ajay Constructions, Bareilly, dated 1.4.2016 disclosing 85% shares of Ajay Kumar Agarwal. On the strength of that deed, the applicant claimed eligibility to participate in the tender by relying on the financial credentials of the said Ajay Kumar Agarwal. This fact is also admitted to the applicant.

15. Further, material to the objection raised here, it is admitted to the applicant that at the time of the tender documents being furnished, the fact of reconstitution of the firm M/s Ajay Constructions Bareilly, was known to the applicant. In that regard, it would be relevant to extract the contents of paragraph 11 of the application. They read as below:

“That the Para 8 of tender form invoked by a competent authority in support of impugned action is based on misinterpretation and misconstruction of the facts in as much as the said provision can be involved in a case when deliberately any wrong information was given by the tenderer but in the present case, applicant along with tender had annexed 2016 partnership deed by bonafide mistake, but had also annexed the balance sheet of the year 2017-18 containing detail of profit shareholders of reconstituted firm. Hence, it is very important to mention that the tenderer had no intention to give any wrong information deliberately, hence on account of annexing of 2016 partnership deed with the tender no inference can be drawn even by a stretch of the imagination that the tenderer deliberately had given any wrong information.”

16. On objection being raised by the Railways through Counter Affidavit filed in these proceedings, by means of paragraph 7 of the Rejoinder Affidavit, it has been pleaded (by the applicant), as below:

“That the contents of the paragraph Nos. 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of the counter affidavit are matter of record, in reply, the opposite party No. 4 accept or approve the Tender submitted by the applicant and executed contract agreement also only after being satisfied with the technical and Financial Scrutiny along with the applicant's Experience, capability and Financial Stability etc. and it is further submitted that Mr. Ajay Kumar the major partner of M/s. Ajay Construction, which has

two partner, retired on 10.11.2017 and M/s. Ajay Construction had prepared three partnership deed on the same day i.e. (on 10.11.2017. But since it was not registered due to only this reason, the applicant attached the old partnership deed having two partner also, along with power of attorney, in which Mr. Ajay Kumar Agrawal/Major Partner has been already provide credential and financial stability etc. to the applicant and applicant has not uploaded their new partnership deed in Railways website, except balance sheet of three partnership although the tender was opened on 26.06.2018 and acceptance letter was issued by Rail Administration to the applicant on 06.09.2018 and Railways executed contract agreement with the applicant on 17.10.2018. Thereafter the applicant has successfully completed about all the contractual work without any complain. It is necessary to mention here that the attachment of old partnership deed, having this partner with balance sheet of three partner along with tender documents by the applicant are itself proves that the applicant neither wants to hide anything from Railways Administration deliberately nor mislead it.”

17. Undeniably, on the date of tender documents being submitted, in the year 2018, the firm M/s Ajay Constructions Bareilly, stood constituted afresh. According to the applicant, that reconstitution was evidenced vide deed dated 13.03.2017 w.e.f. 1.4.2017. Even the photocopy of the deed, as has been annexed with the Counter Affidavit and is not disputed to the applicant. It was executed on 10.11.2017, made effective on 1.4.2017.

18. Therefore, it cannot be gainsaid that the applicant was fully aware of the retirement of one of the only two partners of the firm M/s Ajay Constructions, Bareilly, namely, Shri Ajay Kumar Agarwal. Consequently, that partnership firm stood dissolved by operation of law and the firm constituted by the same name w.e.f. 1.4.2017 was another partnership firm, first born on that date.

19. Therefore, to claim that the applicant somehow believe that it was a bonafide mistake on its part to rely on the pre-existing partnership firm-which stood dissolved, would be a misnomer inasmuch it is not denied to the applicant that in the pre-existing firm there were only two partners one of whom was retired before

the induction of two other partners. The first firm has been dissolved (through by operation of law), the claim of reconstitution of that firm is not real. It is a case of fresh constitution of another firm by the same name. The subsequent partnership deed constitutes a fresh partnership firm with the same trade name. But, it is not the same firm inasmuch as that deed does not evidence simultaneous introduction of new partners and retirement of Shri Ajay Kumar Agarwal, through one/single deed during the continuance of the first partnership firm. In fact, the retiring partner, left first.

20. The above position of fact and therefore the necessary consequence in law were facts in the special knowledge of the applicant. The Railways were not in a position to have independent knowledge of such fact. Therefore, by relying on the old partnership deed, and by actively concealing the subsequent deeds, the applicant withheld necessary fact disclosure from the Railways. By that, it precluded the Railways from making any enquiry as to the financial capacity of the tenderer/newly constituted, on strength of its own constitutional documents.

21. Second, to the extent Ajay Kumar Agarwal, 85% share holder in the dissolved firm was not a partner in the new firm, the new constituted firm may also have remained prevented from relying on the financial status/eligibility of Ajay Kumar Agarwal, for the purpose of technical evaluation of its bid.

22. Insofar as the decision in **M/s ABCI Infrastructure Pvt. Ltd (supra)** is concerned, the issue involved was different to the extent that in those facts the mistake by the bidder was found to be unintentional and committed inadvertently. Having realized its mistake on 24.08.2023, the petitioner/bidder (in that case), sought to rectify the same on 25.08.2023 by itself informing the the

authorities that their actual bid was Rs. 1569 crores and not Rs. 1569.

23. Both with respect to the nature of that mistake and the stage of correction that too offered by the bidder, voluntarily, the very next day, facts of that case are wholly distinguishable from the present. Here, there is no typographical or inadvertent error. The fact of reconstitution of the firm is fundamental and basic to the eligibility to submit a tender. Second, it is a fact in the special knowledge of the tenderer/bidder but not the contractee party. Third, no correction was ever offered by the applicant inasmuch as it is not the case of the applicant that after submitting the tender document, it immediately approached the Railway Authorities and apprised it of the correct position with respect to the reconstituted new firm M/s Ajay Constructions Bareilly.

24. By conducting itself as it has, the applicant drew unfair advantage in its favour by preventing the Railway Authority from examining the financial eligibility of the applicant to tender. It is also not the case of the applicant that even if the old firm is ignored, the new firm would somehow be eligible to tender.

25. In **N.N. Global Mercantile Pvt. Ltd (supra)**, after considering the entire gamet of law, in paragraph Nos. 45, 46, 47, 48, 49 and 50, it has been observed as below:

*"45. The civil aspect of fraud is considered to be arbitrable in contemporary arbitration jurisprudence, with the only exception being where the allegation is that the arbitration agreement itself is vitiated by fraud or fraudulent inducement, or the fraud goes to the validity of the underlying contract, and impeaches the arbitration clause itself. Another category of cases is where the substantive contract is "expressly declared to be void" under Section 10 ["10. **What agreements are contracts.**—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.Nothing herein contained shall affect any law in force in India and not hereby expressly*

repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.**11. Who are competent to contract.**—Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.”] of the Contract Act, 1872 where the agreement is entered into by a minor (without following the procedure prescribed under the Guardians and Wards Act, 1890) or a lunatic, which would be with a party incompetent to enter into a contract.

46. The civil aspect of fraud can be adjudicated by an Arbitral Tribunal. The civil aspect of fraud is defined by Section 17 of the Contract Act, 1872 as follows:

“17. “Fraud” defined.— **“Fraud”** means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract—

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.”

47. We will now consider whether voidable agreements are arbitrable. Voidable agreements are defined by Section 19 of the Contract Act as:

“19. Voidability of agreements without free consent.—When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party of whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.”

In the case of voidable agreements, such disputes would be arbitrable, since the issue whether the consent was procured by coercion, fraud, or misrepresentation requires to be adjudicated upon by leading cogent evidence, which can very well be decided through arbitration. Until it is so proved and upheld as per Sections 2(i) and (j) of the Contract Act, 1872 such an agreement would remain enforceable, and is not void.

48. *In Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee [Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677 : (2014) 3 SCC (Civ) 642] , a Single Judge (exercising powers under Section 11) opined that when a plea is taken to avoid arbitration on the ground of the underlying contract being void, the court is required to ascertain the true nature of the defence. Often, the terms “void” and “voidable” are used loosely and interchangeably. The court ought to examine the plea by keeping in mind the provisions of the Contract Act, 1872. In cases where the court comes to a conclusion that the contract is void without receiving any evidence, it may be justified in declining the reference to arbitration in a few isolated cases. These would be cases where the court can readily conclude that the contract is void upon a meaningful reading of the contract document itself. However, it would not be permissible to circumvent arbitration where the defence taken is that the contract is voidable, which are cases covered under circumstances mentioned inter alia in Sections 12, 14, 15, 16, 17, 18 of the Contract Act, 1872.*

49. *Even though Swiss Timing Ltd. [Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677 : (2014) 3 SCC (Civ) 642] was a decision of a designate of the Chief Justice under Section 11 of the 1996 Act (prior to the Amendment), and would have no precedential value in view of the judgment of this Court in State of W.B. v. Associated Contractors [State of W.B. v. Associated Contractors, (2015) 1 SCC 32 : (2015) 1 SCC (Civ) 1] , the reasoning in Swiss Timing Ltd. [Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677 : (2014) 3 SCC (Civ) 642] has been cited with approval by this Court in Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd. [Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713]*

50. *The ground on which fraud was held to be non-arbitrable earlier was that it would entail voluminous and extensive evidence, and would be too complicated to be decided in arbitration. In contemporary arbitration practice, Arbitral Tribunals are required to traverse through volumes of material in various kinds of disputes such as oil, natural gas, construction industry, etc. The ground that allegations of fraud are not arbitrable is a wholly archaic view, which has become obsolete, and deserves to be discarded. However, the criminal aspect of fraud, forgery, or fabrication, which would be visited with penal consequences and criminal sanctions can be*

adjudicated only by a court of law, since it may result in a conviction, which is in the realm of public law. [Malhotra's Commentary on the Law of Arbitration, 4th Edn., Vol. I (Wolters Kluwer, 2020), p. 339.]"

26. In view of the discussion made above, I am of the view that by concealing material fact of the firm M/s Ajay Constructions Bareilly being a newly constituted firm w.e.f. 01.04.2017, a clear/misrepresentation of fact was made by the applicant to the Railways consciously by relying on the partnership deed of the dissolved firm, by the same name. The Railways did not have the mean to verify the same. It also amounts to active concealment of fact by the applicant. It is also undenied that the applicant alone stood to gain by practicing such active concealment. It gained technical eligibility to bid which it otherwise did not possess. Hence, that amounts to a fraudulent act, in law.

27. To the extent the above fact inference has been drawn not on the strength of evidence led by the Railways but on the own admissions by the applicant (extracted above), I do not find it a case where any evidence is required to be led by the parties before inference of such legal fraud may be reached.

28. It is equally true that all facts were known to the Railways, the contracts in question, containing the arbitral clause would not have been executed. Therefore, the present case may fall in the category of cases where the fraud goes to the validity of the underlying contract which contains an arbitral clause.

29. In view of such facts, the applications must fail and they are **dismissed**. No orders as to costs.

Order Date :- 25.7.2025
SA/prakhar/faraz

(S.D. Singh, J.)