

IN THE HIGH COURT OF JUDICATURE AT PATNA

Request Case No.6 of 2014

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Ayoleeza Consultants Pvt. Ltd. having its registered office at 5-G, Patliputra Colony, Patna-800013, through its Managing Director Mr. Abhishek Kumar, son of Sri Anil Kumar, resident of 201, Manav Enclave, Patliputra, Patna-800013, P.S. Patliputra, District- Patna.

.... Petitioner/s

Versus

1. IL & FS Infrastructure Development Corporation Ltd. (IIDC) now has been changed IIDC Limited, having its registered office at UG Floor, Mahindra Tower, 2A Bhikajicama Place, New Delhi-110066 through its Managing Director Mr. Harishankaran.
2. Mr. Harishankaran the Managing Director IL & FS, (IIDC)/IIDC Limited, Financial Centre, Plot C-22, G-Block, Bandrakurla Complex, Bandra East, Mumbai-400051 (India)
3. Mr. Paritosh Gupta, CEO, IL & FS/ IIDC Limited, Second Floor, Ambience Corporate Tower, Gurgaon-122001, India.
4. Mr. H.N. Jha, Senior Vice President, IL & FS/IIDC Limited, 4 B First Floor, S.K. Puri, Patna-8000001

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Umesh Prasad Singh, Sr. Advocate.
Mr. Aparna Bharti, Advocate.

For the Respondent/s : Mr. Mrigank Mauli,
Mr. Avanish Kumar Singh Rana,
Mr. Sanjay Kumar, Advocates.

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 15.4.2015

Heard the parties.

2. In the present case, petitioner has requested for appointment of independent Arbitrator in exercise of power under Sections 11(5)(6) of the Arbitration Conciliation Act, 1996 (hereinafter referred to as 'the Act').

3. The petitioner is a consultant company provides consultancy service to its customer. The main object and purpose of this



Company is to prepare detailed Project Report (DPR), preparation of tender documentation and evaluation of tenders for Rural Road Improvement Programme. The petitioner being Company entered into an agreement vide agreement dated 3.10.2007 and 9.7.2009 with IL & FS (now IIDC) (respondent no.1). In terms of agreement the petitioner was appointed as consultant to provide consultancy service for the project mentioned in the agreement and to prepare Detailed Project Report (DPR), preparation of tender documentation and evaluation of tender for Rural Road Improvement Programme @ Rs.10,000 per Kilometer. In terms of the aforesaid two agreements six work orders were issued in favour of the petitioner. The Company (petitioner) successfully completed the work of preparation of DPR and work for 2542.523 KM roads as per the terms and condition of agreement to the satisfaction of respondents as no complaint was ever made in respect of quality and quantity of work. Certain payment against service rendered was made to the petitioner but also entered into another agreement for similar nature of work and issued fresh work order and for remaining amount, the petitioner's representative were assured from time to time that payment will be made in this regard. Several emails beginning from February, 2012 were



received by the petitioner in which assurances were given by the respondents in response to the demands made by the petitioner. Instead of making payment of outstanding dues the representative of respondent no.1 differed to the terms and condition of agreement, recalled the amount paid for the work executed by issuing debit notes for Rs.96,20,324/-. This debit note gave rise to the dispute as implicitly rejected the claim of the respondent. In terms of the agreement two separate notices dated 25.5.2013 and 9.7.2009 were served upon the respondent for amicable settlement of dispute across a table. The petitioner made separate claim under two agreements, two notices were issued and served on 25.5.2013 along with enclosures. In response to the said notice the petitioner received communication dated 3.6.2013 conveying to meet at the earliest at agreed time in his office for settlement of dispute. The petitioner sent reply dated 10.6.2013, denied the statements and assertions made in the aforesaid letter and sent proposal to meet on 17.6.2013. When no positive result came out, all efforts went in vain, petitioner sent letter to the Managing Director of the respondent under Clause 10 of both the agreements on 26.8.2013. As per Clause 10.2 of both the agreements, deals with, in case of non-settlement of dispute within 30 days then under Clause 10.3, the Managing Director of



respondents was required to refer the dispute to adjudicator for resolution. But nothing came out to settle the dispute. Several correspondence were made with a view to resolve enter party dispute in failure to give any positive result the petitioner served a notice on 19.2.2014 (Annexure-12), in paragraph no.15 of the notice, the petitioner has made out a claim of Rs.2,99,56,655/-. The petitioner, vide paragraph no.14 of notice nominated Sri Ravi Shankar Sinha, retired Chief Engineer as sole Arbitrator, requested to concur his appointment as arbitrator within 30 days of service of notice, otherwise the Arbitrator appointed/nominated will be entitled to act as an Arbitrator. In response to the said notice the respondent filed reply notice on 11.3.2014 (Annexure-13) rejected the claim of the petitioner and did not agree to appoint Sri Ravi Shanker Sinha rather suggested for the appointment of Mr. Gopal Jain, Sr. Advocate, B-93, Gulmohar Park, New Delhi, Mr. Sanjiv Sen, Sr. Advocate, H-3 Kailash Colony New Delhi and Mr. Rajiv Virmani, Sr. Advocate, I, Link Road (2nd Floor), Jungpura Extension, New Delhi as a sole Arbitrator. The said notice was replied vide letter dated 19.3.2014 (Annexure-14) thereby rejected the suggestion of the respondent for the appointment of Arbitrator named in the notice. Hence this application has been filed.

4. The respondents appeared and took preliminary objection about the maintainability of the application before the delegate of the Chief Justice of the Patna High Court as has been claimed that in terms of Clause 12 of the agreements all dispute relating to the terms and interpretation of contract has to be adjudicated by the Court at NCT Delhi and this Court lacks territorial jurisdiction to entertain an application under Section 11(6) of the Act for appointment of Arbitrator to resolve the dispute. Even if any dispute is there, it is the Delhi Court has jurisdiction, not to this Court. On 12.9.2014 the Advocate representing respondents proposed to file a comprehensive counter affidavit accordingly the case was fixed for 10th, October 2014. The case was again taken up on 22.9.2014. The counsel for the respondent, on the basis of instruction submitted that the respondent does not require to file any counter affidavit and formally asserted that this Court should decide as preliminary issue of territorial jurisdiction before entering into the merit of the case, whereupon counsel for the petitioner submitted that this Court has territorial jurisdiction in terms of Clause 10.8 of the Agreement where it has been provided that any arbitration proceeding shall unless otherwise agreed by the parties be held in the State Capital/Delhi and as such Clause 12 of the agreement which is subsequent one in the



same piece of paper can not divest jurisdiction of this Court in the matter of appointment of Arbitrator. He has further submitted that if two clauses are in the agreement dealing with jurisdiction of the Court both are conflicting to each other endeavour of the Court would be harmonies them, in a situation when both clauses cannot be harmonised, in that circumstances earlier clause in the agreement will be given in preference over the later clause. He has further submitted that proceeding of arbitration starts on service of notice under Section 21 of the Act upon the respondent. He has further submitted that Clause 12 of the agreement will not decide the situs of the Court rather Clause 10.8 provides that arbitration proceeding will be held in the State Capital or NCT Delhi. There is no dispute the court at NCT Delhi as well Patna being capital of State of Bihar has territorial jurisdiction to hold the arbitration proceeding as cause of action has taken at both places, when this clause of agreement provides that State Capital or NCT Delhi will have jurisdiction to decide the matter then, in that circumstances the objection raised by the respondent that only Delhi Court has jurisdiction to entertain the application for appointment of arbitrator is not sustainable. In support of his contention he has relied on the following judgments: (i) Radha Sunder Dutta V. Mohd. Jahadur Rahim and



others, AIR 1959 SC 23, paragraph nos. 13 and 14. (ii) Arasmeta Captive Power Co. (P) Ltd. Vs. Lafarge India (P) Ltd., reported in (2013)15 SCC 414=AIR 2014 SC 525 (iii) Hakam Singh V. M/s Gammon (India) Ltd., AIR 1971 SC 740 paragraph nos. 3 and 5 and (iv) Branch Manager, Magma Leasing and Finance Limited and another V. Potluri Madhavalata and another, (2009) 10 SCC 103 paragraph no.15.

5. Learned counsel for the respondents vehemently opposed the point raised by the petitioner and submitted that any person designated by the Chief Justice of this Court does not have the jurisdiction to entertain the application. He has further submitted that Clause 10.8 of the agreement talks about the commencement of arbitration proceeding that does not mean the commencement of proceeding before the Arbitrator. He has further submitted that under the Arbitration Act save and otherwise provided in the Arbitration Act, 1996 the Court will not make any intervention in the arbitration proceeding. Appointment of Arbitrator under Section 11(6) of the Arbitration Act is an intervention by the judicial authority in case the party does not agree to settle the dispute and Arbitrator could not be appointed within 30 days of the notice from the other side. The award can be challenged by the parties aggrieved before the principal civil court of the



original jurisdiction of District or the High Court exercising of original civil court jurisdiction. He has further submitted that the proceeding before this Court in the appointment of Arbitrator is a judicial proceeding, not administrative proceeding. He has further submitted that this Court is not the Court but a highest judicial authority of the State designated by Chief Justice for the appointment of an Arbitrator. He further submits that Clause 12 of the Agreement deals with the jurisdiction of the Court in deciding the issue of appointment of an Arbitrator. As Clause 10.2 of the agreement provides, in failure to resolve the dispute within 30 days after receipt of notice, on request of party for amicable settlement may be submitted by either party for settlement, in terms of Clause 10(3) of agreement. Clause 10(3) deals with, reference of dispute to adjudicator who will give decision in writing within 14 days whereas Clause 10.4 of agreement deals with making reference of arbitrator steps for resolution of dispute through adjudicator, Clause 10.5 and 10.8 deal with situation where dispute could not be resolved by adjudicator, matter relates to appointment of Arbitrator and proceeding before him. He has further submitted that notice under Section 21 of the Arbitration Act is starting point of proceeding under Arbitration Act but unless the matter is referred



to the Arbitrator for arbitration it cannot be said to be a proceeding before the Arbitrator. He has further submitted that the ouster clause that has been used under Clause 12 of the agreement itself suggest that Court at NCT Delhi has only jurisdiction to appoint Arbitrator. The Clause 10.8 of the agreement deals with arbitration proceeding which can either be held in the State Capital or NCT Delhi deals with the proceeding before the Arbitrator not of earlier period. In support of his contention relied on the following judgments: (i) M/s S.B.P. & Co. V. M/s Patel Engineering Ltd. and another, (2005)8 SCC 618=AIR 2006 SC 450, paragraph nos. 3 to 20, 25, 30, 31, 32, 35, 36, 39, 40 and 45. (ii) Milk Food Ltd. V. GMC Ice Cream, (P) Ltd.(2004) 7 SCC 288, paragraph nos. 10, 22, 23, 29, 30, 31, 32, 40, 41, 42, 45, 46, 47, 49 and 69. and (iii) Swastik Gases Private Limited V. Indian Oil Corporation Limited, (2013)9 SCC 32.

6. On the strength of the aforesaid judgment learned counsel for the respondent has submitted that as there is ouster clause which provides only Delhi Court has jurisdiction in the matter of appointment of Arbitrator and in that circumstances this Court should reject this application and asked the parties to approach the Judicial Authority designated by the Chief Justice of Delhi

High Court for the aforesaid purposes.

7. In response, learned counsel for the petitioner submits that proceeding in respect of appointment of Arbitrator is not a proceeding before the Court but before a judicial authority as is clear from Section 11 of the Arbitration Act as proceeding before the Court will be the principal civil court of original jurisdiction is synonymous to Clause 12 of the agreement does not talk about the proceeding before the authority but talk about the proceeding before Court for interpretation of agreement. He has further submitted the Clause 12 of the agreement does not postulate about resolution of dispute with respect to appointment of Arbitrator will be entertained by the designate of Chief Justice of Delhi High Court alone. In absence of dealing with the appointment of Arbitrator the Clause 12 of the agreement does not apply rather Clause 10.8 of the agreement applies. He has relied on the judgment in the case of S.A.L.Narayan Row and Anr. Vs. Ishwarlal Bhagwandas and Anr., reported in AIR 1965 SC 1818, Nimet Resources INC and another Vs. Essar Steels Limited, reported in (2009) 17 SCC 313 and Pandey & Co. Builders (P) Ltd. Vs. State of Bihar and another, reported in (2007)1 SCC 467.

8. In such view of the matter this Court has to examine as to

whether this Court has jurisdiction to appoint the Arbitrator as a designate of Chief Justice of this Court.

9. For arriving to a right conclusion this Court will essentially go for forensic examination of different provisions of Arbitration Act.

10. Section 2(b) of the Arbitration Act defines of “Arbitration Agreement” means an agreement referred to in Section 7. Section 2(c) defines of ‘Arbitral Award’ which includes an interim award. Section 2(e) defines “Court” means the principal Civil Court of original jurisdiction in a district and includes the High Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the question forming the subject matter of the arbitration if the same had been the subject matter of a suit but does not include any Civil Court of a grade inferior to such principal Civil Court. Section 5 deals with extent of judicial intervention postulate notwithstanding a thing contained in any other law for the time being in former, no judicial authority shall intervene except where so provided in this part. Section 7 defines the arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have been or which may arise between them in respect of a defined legal relationship, whether contractual or otherwise. Sub-section(2) of



Section 7 provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-section (3) of Section 7 insists that it must be in writing and also explains in sub-section (4) the manner and forms, the written agreement could be formulated. Section 8 conferred power on judicial authority before whom an action has been brought is a matter which is the subject matter of arbitration agreement to refer the dispute to arbitration if a party so applies for the same before submitting his first statement on the substance of dispute. Section 9 deals with power of the Court to pass an interim order and give the interim protection before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36 of the Arbitration Act. Section 11 deals with appointment of arbitrator which is subject matter of the present dispute. Sub Section (1) indicates that a person of any nationality may be an arbitrator unless otherwise agreed by the parties. Under sub-section (2) subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Under sub-section (3) failing any agreement in terms of sub-section (2) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed



arbitrators shall appoint the third arbitrator who would act as presiding arbitrator. Sub-section (4) postulates that if a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party or two appointed arbitrators fail to agree on third arbitrator within thirty days from the date of their appointment, the appointment would be made, upon the request of a party, by the Chief Justice or any person or institution designated by him. In the case of appointment of sole arbitrator, sub-section (5) provides that the Chief Justice or any person or institution designated by him appoint the arbitrator on a request being made by one of the party fails to agree on appointment of arbitrator. Sub Section (6) provides that where an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure or the parties or two appointed arbitrators, fail to reach an agreement expected of them under that procedure or a person including an institution fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him for securing arbitrator. Section 34 deals with application for setting aside the arbitration award. Section 37 provides appeal.

11. The provisions of Arbitration Act came up for consideration



about the nature of proceeding in the case of SBP & Co. Vs. Patel Engineering Ltd. and another, reported in (2005) 8 SCC 618 where the Hon'ble Supreme Court in Constitution Bench has minutely examined and dealt with each and every section of Arbitration 1996 Act. As there was earlier view that the proceeding before the Chief Justice or its designate is in the nature of administrative proceeding, that view has been changed and the Court has taken a view that proceeding before the Hon'ble Chief Justice or his designate it is not a court but order passed under section 11(6) is a judicial order. It has further been held, and has held that under Section 11(6) of the Act, a Chief Justice or a person or institution designated by him is bound to decide his jurisdiction to entertain such request if there is arbitration agreement. The Chief Justice or his designate, while exercising the power will consider whether the applicant before him is a party, whether service of conditions of exercise of power have been fulfilled, and if an arbitrator is to be appointed who is the fit person in terms of the provisions. The Court has also taken the view that when the Chief Justice decides that he has jurisdiction to proceed with the matter that there is an arbitration agreement and that one of the parties to it has failed to act according to the procedure agreed upon it cannot be said that he



is adjudicating the rights of the parties who are raising these objections. The duty to decide the preliminary facts enabling the exercise of jurisdiction or power under sub-sections (4) (5) and (6) of Section 11 of the Arbitration Act and it is very difficult to call the order of the Chief Justice merely an administrative order and to say that the opposite side need not even be heard before the Chief Justice exercises his power of appointing an arbitrator. Even otherwise, when a statute confers a power or imposes a duty on the highest judicial authority in the State or in the country, that authority, unless shown otherwise has to act judicially and has necessarily to consider whether his power has been rightly invoked or the conditions for the performance of his duty are shown to exist. Thus, it is clear, the highest judicial authority is entitled to act is bound to decide the jurisdictional issue with regard to his own jurisdiction. It would be incongruous to permit the order of the Chief Justice under Section 11(6) of the Act being subjected to scrutiny under Article 226 of the Constitution at the hands of another judge of the High Court. It will apt to quote paragraph 47 of the aforesaid judgment:

“47. We, therefore, sum up our conclusions as follows:

(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

(ii) The power under Section 11(6) of the

Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(iii) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(v) Designation of a District Judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.

(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.

(viii) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section

11(6) of the Act.

(ix) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) Since all were guided by the decision of this Court in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.*² and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus far made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the Act.

(xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the High Court concerned or a Judge of that Court designated by the Chief Justice.

(xii) The decision in *Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.* is overruled."

12. In the case of Milk Food Ltd. (supra) a dispute was referred for the arbitration. In that case the parties entered into an agreement before the advent Arbitration act 1996 consisting the clause of Arbitration mentioning applicability of Arbitration act 1940 and amendment from time to time. The dispute arose in between the parties, arbitrators were appointed after enforcement of Arbitration Act, 1996. The point was raised about the



applicability of Arbitration act, 1940 or Arbitration act, 1996. There the question arose when the arbitration proceeding has treated to have commenced. The Hon'ble Supreme Court has interpreted Section 37 of 1940 Act relating to commencement of proceeding is the service of notice to another party requiring appointment of an arbitrator whereupon the arbitral proceeding is set in motion. Such commencement of arbitration proceeding is in context of Section 37 of the Act but it is also determinative factor with respect to applicability of the application of 1940 Act or 1996 Act. The Hon'ble Court has also determined at what point of time the arbitration proceeding will be treated to have been commenced considering contour of Section 21 of 1996 Act for the purposes of applicability of the Act in consideration of Section 85(2)(a) of 1996 Act. After discussing and analyzing, the Hon'ble Supreme Court has arrived to a conclusion that the service of notice for appointment of arbitrator would be the relevant date for commencement of arbitration proceeding. On the basis of the aforesaid judgment, learned counsel for the petitioner submits that arbitration proceeding has commenced on the date when the petitioner has served the notice upon the other side for the appointment of arbitrator and even the proceeding before this Court is part of the arbitration proceeding. In the



aforesaid judgment the Hon'ble Supreme Court has also considered the difference in between the commencement of arbitration proceeding and commencement the proceeding before the arbitrator are two different expression, carried different meaning and altogether different proceeding. The question would arise in such view of the matter when the Hon'ble Supreme Court is of the view that the arbitration proceeding starts upon giving notice for appointment of arbitrator is commencement of arbitration proceeding does not mean that it is a proceeding before arbitrator. Proceeding before arbitrator starts on appointment of arbitrator appearance before the arbitrator after the date.

13. In view of the aforesaid discussions, it is very much clear, the proceeding before the Chief Justice or his delegate is a proceeding before highest Judicial Authority of country or State under Section 11 of the Arbitration Act, 1996 in the matter of appointment of arbitrator which is quite different to proceeding before the Court as mentioned in 1996 Act. It will be relevant to rely on the judgment of the Hon'ble Supreme Court in the case of Niment Resources INC (supra), Pandey and Co Builder Pvt. Ltd. (supra) and State of W.B. Vs. Associated Contractors, reported in (2015)(1) SCC 32. It will be apt to quote paragraph 25 of the

aforesaid judgment:

“ 25. Our conclusions therefore on section 2(1)(e) and Section 42 of the Arbitration Act, 1996 are as follows:

(a) Section 2(1)(e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as “court” for the purpose of Part I of the Arbitration Act, 1996.

(b) The expression “with respect to an arbitration agreement” makes it clear that Section 42 will apply to all applications made whether before or during arbitral proceedings or after an award is pronounced under Part I of the 1996 Act.

(c) However, Section 42 only applies to applications made under part I if they are made to a court as defined. Since applications made under Section 8 are made to judicial authorities and since applications under Section 11 are made to the Chief Justice or his designate, the judicial authority and the Chief Justice or his designate not being court as defined, such applications would be outside Section 42.

(d) Section 9 applications being applications made to a court and Section 34 applications to set aside arbitral awards are applications which are within Section 42.

(e) In no circumstances can the Supreme Court be “court” for the purposes of Section 2(1)(e), and whether the Supreme Court does or does not retain seisin after appointing an arbitrator, applications will follow the first application made before either a High Court having original jurisdiction in the State or a Principal Civil Court having original jurisdiction in the district, as the case may be.

(f) Section 42 will apply to applications made after the arbitral proceedings have come to an end provided they are made under Part I.

(g) If a first application is made to a court which is neither a Principal Court of Original

Jurisdiction in a district or a High Court exercising original jurisdiction in a State, such application not being to a court as defined would be outside Section 42. Also, an application made to a court without subject-matter jurisdiction would be outside Section 42.
The reference is answered accordingly.”

Further it is held that arbitration proceeding commences upon service of notice to other side in terms of Section 21 of 1996 Act but commencement of arbitration proceeding is quite different to proceeding before the Arbitrator.

14. Another question in the present case, about jurisdiction of this Court to appoint arbitrator taking a plea that Court at NCT Delhi has only jurisdiction relevant to rely on the case of Swastik Gases Private Limited (supra) about the jurisdiction of the Court which would entertain the application with respect to appointment of an arbitrator. Clause 18 of the agreement mentioned in the agreement will be subject to the jurisdiction of courts at Kolkata. The Hon’ble Supreme Court has considered the effect of such clauses which provides jurisdiction to a particular court. There the point was taken, part cause of action has taken place within the jurisdiction at Jaipur and Clause 18 of the agreement does not expressly oust the jurisdiction of other court, claim was made the Rajasthan High Court has territorial jurisdiction to try and entertain the petition under Section 11 of



1996 Act, it was contended Clause 18 of the agreement can not be construed as ouster clause because word like alone, only, exclusive or exclusive jurisdiction have not been used in the clause. The Hon'ble Supreme Court has taken note of earlier judgment *Hakam Singh v. Gammon (India) Ltd.*, reported in (1971) 1 SCC 286 where it has been decided that where two courts have territorial jurisdiction to try the dispute between the parties and the parties have agreed that dispute should be tried by only one of them, the court mentioned in the agreement shall have jurisdiction. That principle has been followed in many subsequent decisions. The Hon'ble Supreme Court has considered large number of earlier judgments where similar expression has been used in the agreement. The Court in paragraph 32 of the judgment has culled out about the jurisdictional authority of the Court in the following manner. It will be relevant to quote paragraph 32 of the aforesaid judgment:

"32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties—by having Clause 18 in the agreement—is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts



at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim *expressio unius est exclusio alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner."

15. The question of ouster of jurisdiction has also come up for consideration before the Hon'ble Supreme Court in the case of Harshad Chiman Lal Modi V. DLF Universal Ltd. , reported in (2005)7 SCC 791=AIR 2005 SC 4446 considered the aspect of ouster clause in the agreement, in which it has been held, if two Courts have jurisdiction to adjudicate the dispute, but by an agreement, it can be confined to one but jurisdiction cannot be created by an agreement if that Court has no jurisdiction, in that context it has been held that neither the consent nor the waiver nor the acquiescence can confer jurisdiction to the Court. It has further been held where the Court to exercise the jurisdiction does not possess, it's decision nullity. A decree passed by the

Court having no jurisdiction is nonest and its authority can be challenged whenever it is sought to be enforced even at the stage of execution or in collateral proceeding, as decree passed by him is a coram non judice.

16. In view of the aforesaid judgment of the Hon'ble Supreme court this Court will have to examine, before entering into in exercising the power to appoint an arbitrator as delegate of the Chief Justice, as highest judicial authority of the State, as to whether this Court has territorial jurisdiction to entertain application for appointment of arbitrator, for that it requires a minute forensic examination of clauses of agreement, particularly Clause 10, specially Clause 10.8 of agreement as to whether it applies to the arbitration proceeding or it applies to the proceeding before the arbitrator. If this Court arrives to a conclusion that Clause 10.8 applies to the arbitration proceeding and also to a proceeding before arbitrator, in that circumstances, in view of the judgment reported in the case of Radha Sundar Dutta (supra) taking into consideration Clause 12 of the Agreement, is subsequent clause, deals with the jurisdiction of the Court, and if it is found to be conflicts to each other, it is obligation and duty of the court to give harmonious construction of the agreement so that it would operate its own field but, in a

situation cannot be done, earlier clause of agreement will prevail over the subsequent clause. It will be relevant to quote paragraph 11 of the aforesaid judgment:

"11. Now, it is a settled rule of interpretation that if there be admissible two constructions of a document, one of which will give effect to all the clauses therein while the other will render one or more of them nugatory, it is the former that should be adopted on the principle expressed in the maxim "*ut res magis valeat quam pereat*". What has to be considered therefore is whether it is possible to give effect to the clause in question, which can only be by construing Exhibit B as creating a separate *Patni*, and at the same time reconcile the last two clauses with that construction. Taking first the provision that if there be other persons entitled to the *Patni* of lot Ahiyapur they are to have the same rights in the land comprised in Exhibit B, that no doubt posits the continuance in those persons of the title under the original *Patni*. But the true purpose of this clause is, in our opinion, not so much to declare the rights of those other persons which rest on statutory recognition, but to provide that the grantees under the document should take subject to those rights. That that is the purpose of the clause is clear from the provision for indemnity which is contained therein. Moreover, if on an interpretation of the other clauses in the grant, the correct conclusion to come to is that it creates a new *Patni* in favour of the grantees thereunder, it is difficult to see how the reservation of the rights of the other *Patnidars* of lot Ahiyapur, should such there be, affects that conclusion. We are unable to see anything in the clause under discussion, which militates against the conclusion that Exhibit B creates a new *Patni*."

17. The Hon'ble Supreme Court has taken a view that if there be two possible constructions of a document, one of which,

will be giving effect to all the clauses therein, while another construction render one or more of them nugatory, it is the former that should be adopted on the principle expressed in the maxim “ut res magis valeat quam pereat”. It is the duty of this Court to effectuate two clauses in a harmonious manner.

18. On analyzing Clause 10 of the Agreement it provides that in what manner the dispute will be resolved in between the parties and also provides the steps to be taken for resolution of the dispute between the parties. Ultimately Clause 10.5 of the Agreement provides that except where the decision has become final, binding and conclusive in terms of sub Clause 10.4 above, the disputes or difference shall be referred for adjudication through arbitration by a sole Arbitrator and Clause 10.6 of the agreement provides that it is the term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with notice for the appointment of Arbitrator and giving reference to the rejection by the adjudicator. Clause 10.7 of the Agreement deals with the cost and expenses of arbitration proceedings shall be paid as determined by the arbitrator. Clause 10.8 of the Agreement provides that proceedings shall unless otherwise agreed by the parties be held in the State Capital/ Delhi. So close



examination of Clause 10 of the Agreement which provides that in what manner the parties will resort to resolve the dispute, step by step in case of failure, arbitrator would be appointed. This Court is of the view that Clause 10.8 of the Agreement does not deal with commencement of arbitration proceeding but it deals with the proceeding before the arbitrator. So this Court is of the view that whole of Clause 10 of the Agreement, it applies to, what steps and what process would be adopted for resolution of the dispute before the case is referred for arbitration in failure only arbitrator would appointed. So far Clause 12 of the Agreement is concerned that deals with a different area that is, as to which Court will have a jurisdiction to deal with the validity, construction, interpretation and legal effect, and in that circumstances NCT of Delhi will have a jurisdiction. The question would arise whether the validity, construction, interpretation and legal effect will include resolution of jurisdictional dispute by the Court with respect to appointment of arbitrator. As in Clause 12 of the agreement it has not been specially mentioned dealing with the matter of appointment of arbitrator. Petitioner submits, this Clause deals with the jurisdiction of the court whereas proceeding before this Court in the matter of appointment of arbitrator is not a court but it is

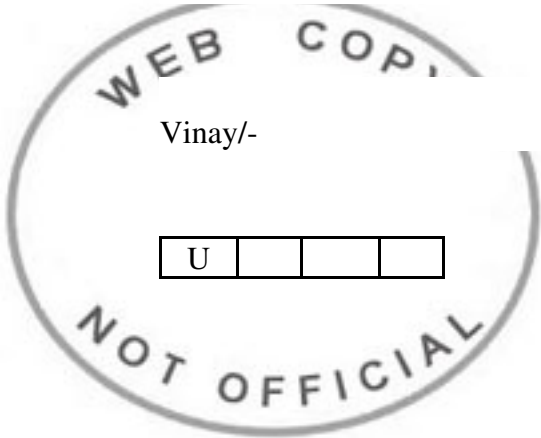


delegate of highest judicial authority of the State resolving this dispute. This Court will have to see not actual word that has been used but that circumstance this Clause has been mentioned in the agreement. When the question comes for validity, construction, interpretation, this Court, taking add of judgment of the Hon'ble Supreme Court in the case was Swastic (supra), is of the view that Clause 12 of the Agreement deals with the matter with respect to appointment of arbitrator and Clause 10.8 of the Agreement operates in different field as stated hereinabove and this interpretation has been given so that both Clauses would operate in its own field this Court is of the view, this is the best method, taking option, to harmonies both clauses of the agreement.

19. In view of the aforesaid discussions applying the principle of ouster clause when the agreement provides that NCT Delhi Court has jurisdiction to decide the issue of validity, construction and interpretation of the agreement that includes appointment of arbitrator also. The Chief Justice of the Delhi High Court ((or his delegate) has only jurisdiction to deal with the matter of appointment of arbitrator. In such view of the matter, this Court is of the view that present application is not maintainable.

20. Accordingly this application is dismissed with the liberty

to the parties to approach before appropriate forum.



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(Shivaji Pandey, J)