

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on: 3rd June, 2016*
Judgment pronounced on : 17th June, 2016

+ **ARB.P. 475/2015**

SMS AAMW TOLLWAYS PRIVATE LIMITED Petitioner
Through Mr.Sachin Datta, Sr. Adv. with
Ms.Gayatri Verma, Ms.Prity
Sharma & Ms.Nauras
Suhrawardy, Advs.

versus

SOUTH DELHI MUNICIPAL CORPORATIONRespondent
Through Mr.Sudhir Nandrajog, Sr. Adv.
with Ms.Eshita Baruah &
Mr.Gaurang Kanth, Advs.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner has filed the abovementioned petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act"). Initially, the petition was filed against the respondents including South Delhi Municipal Corporation (SDMC). However, by order dated 22nd September, 2015 on the statement of the learned counsel for the petitioner, the names of the respondent Nos. 2 to 6 were deleted from the array of the parties.

2. Brief facts of the case as per petition are that the petitioner is a company registered under the Companies Act, 1956, having its corporate office at K-17, AB, Ground Floor, Kalkaji, New Delhi - 110019. The petitioner is engaged in, amongst other activities, the

process of developing and operating Toll Tax barriers, Posts and Toll Plazas etc. on highways and roadways.

2.1 The petitioner has been involved in the toll collection process from the Rajokri Toll Plaza, an integrated toll plaza, the toll collection which is governed by the provisions of the State Support Agreement (hereinafter referred to as "the SSA") dated 27th May, 2004/22nd February, 2005. The understanding under the said SSA is that the Concessionaire of the NHAI shall not only collect the toll under the concession agreement executed between NHAI and its Concessionaire, but also the entry toll levied by the respondent-SDMC on entry of commercial vehicles into the territory of NCT of Delhi. The respondent is a 'designated agency' of the Government of NCT of Delhi under the SSA.

2.2 The respondent floated a tender for "Engagement of a Contractor by MCD for toll collection at border points from specified commercial vehicles entering Delhi", which was awarded to the petitioner vide Award letter dated 14th May, 2011, and a Bilateral Agreement was also executed by the petitioner and respondent-SDMC on even date. Under the agreements, the petitioner is obliged to pay an amount of Rs. 26.00 Crore every month to the respondent in lieu of the tax collected from all entry points of NCT of Delhi, however, the said toll tax for Rajokri integrated toll plaza is collected vide the mechanism elaborated under the SSA i.e. it is collected by NHAI's Concessionaire and passed on to the petitioner. The cumulative effect of the SSA and the Bilateral Agreement executed in pursuance of the SSA to effectively fulfil the terms of the SSA, is that the entry toll tax thus collected by NHAI's Concessionaire is passed onto the petitioner after deduction of services charges.

2.3 The scope of activities, roles and responsibilities contemplated under the SSA [Clause 3.1 (xii)], and the terms of the Bilateral Agreement [Clause 8.5.2 which establishes the maximum rate of service charge to be paid by the petitioner to NHAI's Concessionaire; and Clause 8.6.5 which expressly binds the petitioner to honour the SSA whereby the Rajokri toll plaza was made an integrated toll plaza] executed pursuant thereto makes it abundantly clear that the petitioner as well as the respondent No.1 SDMC are inextricably involved with the toll collection process of integrated toll plazas under the SSA. The petitioner has been expressly recognized as a "designate agency" under the SSA and has been obliged to deal with NHAI's concessionaire.

3. Clause 9 of the SSA provides for settlement of disputes by way of arbitration.

4. It is not denied by the respondent that the said arbitration clause was invoked and relied upon by the respondent-SDMC vide OMP No. 171 of 2014 (a petition under Section 9 of the Arbitration and Conciliation Act, 1996) instituted by it before this Court.

5. Even in the Bilateral Agreement, the intention of the parties has always been to resolve issues and disputes through the process of arbitration, by way of appearing before an Authority, raising their contentions and adducing evidence in support of such contentions. It is admitted by the respondent that there is process of disputes resolution provided as per Clause 16 of the Bilateral Agreement dated 14th May, 2011.

6. On 19th February, 2014, the Rajokri integrated toll plaza was dismantled apparently as a result of an understanding between the parties to the SSA. It is submitted by the petitioner that as far as the

collection of toll tax on entry of specified commercial vehicles into NCT of Delhi was concerned; no viable alternative was put in place for the same, nor was the petitioner consulted before such an act. Under neither agreement was the petitioner contractually obliged or required to make any arrangement on its own for collection of toll tax, as this was to be done by NHAI's Concessionaire as per the SSA. In such a situation, the petitioner was forced to undertake expenses to arrange for collection of respondent's toll tax from the Rajokri integrated toll plaza. This was done on the specific understanding that the petitioner would be recompensed for such expenses and that the respondent-SDMC would indemnify the petitioner in respect of loss in toll tax collection. Although the petitioner made attempts to conduct collection of toll tax itself, yet out of the 16 lanes at the relevant toll plaza, only 4 to 6 lanes were available to the petitioner for collection of toll tax which led to massive leakages and losses. Still the petitioner was continuously burdened with the obligation of making the payment of Rs. 26 Crores every month to the respondent-SDMC, despite the fact that the very premises on the basis of which this obligation was founded was no longer extant. This amount ought to be adjusted to the extent of losses caused on account of shortfall in collection. Furthermore, the petitioner was denied its entitlement of excessive service charge @11 % extricated from it, although service charge was being paid to the agent/NHAI's concessionaire who was collecting toll from Rajokri toll plaza prior to February, 2014. The other infrastructural costs/ claims were also denied to the petitioner.

7. It is alleged by the petitioner that the respondent had also increased the entry fee from vehicles entering NCT of Delhi on

extension of the agreement dated 14th May, 2011. The extension of contract was accepted by the petitioner till 16th May, 2015, on the condition that the petitioner would be entitled to adjust/ deduct the losses in toll collection from the Rajokri toll plaza from the monthly payable amount to respondent-SDMC. As the toll tax upon entry was increased, the corresponding per vehicle loss also increased.

8. In a nut shell, it is stated by the petitioner that a huge loss amounting to approximately Rs. 80 Crore is suffered by the petitioner due to the afore-stated disputes, which are required to be adjudicated by the Arbitral Tribunal.

9. Prior to the institution of this petition, the petitioner was also constrained to file OMP No. 185 of 2014, in which (and in related litigation between the parties) various protective orders were passed by this Court from time to time.

10. A notice of Arbitration dated 9th March, 2015 was sent by the petitioner to the respondent-SDMC, as well as to the other parties of SSA, detailing the issues and disputes that had arisen and in terms of Clause 9 of the SSA, the petitioner appointed Mr. Justice M.L Mehta, former Judge of this Court, as its nominee Arbitrator. The petitioner also requested the other parties to SSA including the respondent-SDMC to appoint their respective nominees.

11. The petitioner has also approached the Indian Council of Arbitration (hereinafter referred to as the "ICA"). However, the ICA, while accepting the request of the petitioner insisted on payment of fees amounting to Rs.38,43,335/-, even prior to constitution of the Arbitral Tribunal.

12. The argument on behalf of the petitioner is that in terms of the categorical understanding reached between the parties by way of the Bilateral Agreement and the SSA, the collection of toll from the integrated Rajokri Toll Plaza was entirely outside the work requirement specified in both the afore-stated agreements. This has further been fortified by the conduct of the parties as well as respondent-SDMC's unqualified admission in previous related litigations that neither it nor the petitioner was obliged to undertake collection of toll.

Despite this, the petitioner's claims were denied rather the unreasonable demands were raised on the petitioner which were communicated by the respondent to the petitioner vide letter dated 7th May, 2015, when final re-conciliation of accounts was sought to be done, even though the request for constitution of an Arbitral Tribunal was already pending with the ICA. The above said letter was responded by the petitioner vide reply letter dated 11th May, 2015.

13. In view thereof, the petitioner was asked to appear before the Additional Commissioner (FA & P), North DMC on 13th May, 2015. On the very same date, a decision was rendered which was entirely unacceptable, and as such the petitioner invoked Clause 16.3 which is in nature of arbitration vide its letter dated 26th May, 2015. No steps were taken on this letter by the respondent except that a vague response dated 17th June, 2015 was given for the initiation of arbitration from the ADC (Toll Tax Department). The petitioner submits that in fact the said response of the respondent for demand of an arbitration clause in the SSA is completely contrary to the respondent's own sworn statements in OMP No.171 of 2014 filed by

it before this Court, relying upon the very same arbitration clause in the SSA which it has claimed to be inapplicable to it in this letter. Thereafter, the petitioner had received a letter dated 19th June, 2015 from the ICA, bringing to the petitioner's notice the respondents' challenge to the maintainability of the arbitration initiated by the petitioner. The said letter was responded by the petitioner while making its detailed submissions as well as a legal note on the maintainability of the arbitration proceedings.

14. Written submissions on behalf of respondent-SDMC have been filed.

15. The submissions made by the respondent are that the respondent is one of the entities created under the amended Delhi Municipal Corporation Act, 1957 after the trifurcation of erstwhile Municipal Corporation of Delhi and thereafter, the responsibility to collect Toll Tax is entrusted upon it.

By virtue of Section 113(2)(g) of the Delhi Municipal Corporation Act, 1957 and Toll Tax Bye Laws, 2007, the respondent is entitled to levy and collect toll tax from specified commercial vehicles entering in NCT of Delhi.

In the year 2004-2005, the Government of India through the Ministry of Road Transport and Highways had authorised National Highway Authority of India (NHAI) for conversion of Delhi-Gurgaon Section of National Highway No. 8 (NH-8) into access controlled eight/ six lane highway from 14.3 KM to 42.0 KM falling partly in the NCT of Delhi and partly in the State of Haryana.

16. It is alleged by the respondent that NHAI invited proposal for qualification of bidders. In pursuance of invitation, M/s. Jaypee-DSC Ventures Limited-consortium submitted a proposal which was

accepted by NHA I and a Concession Agreement was entered into between NHA I and M/s. Jaypee-DSC Ventures Limited. However, later on it was noticed that for effective implementation of the said Concession Agreement, support was required from Government of NCT of Delhi and State of Haryana. Accordingly, the SSA was entered into between Government of NCT of Delhi, State of Haryana, NHA I and M/s Jaypee-DSC Ventures Limited.

The respondent had decided to engage a contractor for the collection of toll tax from all border entry point within the NCT of Delhi. Accordingly, the respondent floated a tender for inviting bid offers from interested parties.

It was also admitted that the petitioner being the successful bidder was awarded the work for collection of toll tax for a period of 3 years and the Bilateral Agreement dated 14th May, 2011 was entered into between the respondent and the petitioner.

Later on certain disputes and differences arose between the respondent and the petitioner arising out of the Bilateral Agreement; however the said disputes are presently not the issue before this Court in the present petition. Accordingly, the petitioner while relying upon Clause 9 of the SSA issued notice dated 9th March, 2015 for referring the disputes to the arbitration.

The respondent not being a direct party to the SSA and not bound by the terms and conditions of the SSA is not bound to act upon the notice dated 9th March, 2015 issued under Clause 9 of the SSA.

17. The main argument of the respondent is that the petitioner has filed the present application under Section 11 (6) of the Arbitration and Conciliation Act, 1996 for the appointment of an Arbitrator

relying upon Clause 9 of the SSA and upon Clause 16 of the Bilateral Agreement which does not have any arbitration clause and therefore the petition is not maintainable.

18. It is further argued on behalf of the respondent-SDMC that since neither the respondent nor the petitioner is a party to SSA, the terms and conditions of the SSA are only binding upon the parties to the SSA and not upon the respondent or the petitioner.

19. On this issue the respondent is relying upon the following judgments:-

- i. In case of **M.C. Chacko v. The State Bank of Travancore**, Trivandrum (1969) 2 SCC 343, wherein the Supreme Court has observed as follows:-

"9. The Kottayam Bank not being a party to the deal was not bound by the covenants in the deed, nor could it enforce the covenants. It is settled law that a person not a party to a contract cannot subject to certain well recognized exceptions, enforce the terms of the contract: the recognized exceptions are that beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant."

- ii. In **Krishna Lal Sadhu v. Promila Bala Dasi** AIR 1928 Cal 518 C.,J. observed:

"Clause (d) of Section 2 of the Contract Act widens the definition of consideration so as to enable a party to a contract to enforce the same in India in certain cases in which the English Law would regard the party as the recipient of a purely voluntary promise and would refuse to him a right of action on the ground of nudum pactum. Not only, however, is there nothing in Section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but this

notion is rightly excluded by the definition of 'promisor' and 'promisee'."

20. It is also submitted that under the English Common Law only a person who is a party to a contract can sue on it and that the law knows nothing of a right gained by a third party arising out of a contract: **Dunlop Pneumatic Tyre Company v. Selfridge and Company** (1915) A.C. 847. It has however been recognized that where a trust is created by a contract, a beneficiary may enforce the rights which the trust so created has given him. The basis of the rule is that though the trust is not a party to the contract his rights are equitable and not contractual. The Judicial Committee applied the same rule to an Indian case **Khawaja Muhammad Khan v. Husaini Begam** (1910) 12 BOMLR 638. Later in case **Jamna Das v. Ram Autar** (1912) 14 BOMLR 1, the Judicial Committee pointed out that the purchaser's contract to pay off a mortgage debt could not be enforced by the mortgagee who was not a party to the contract. It must therefore be taken as well that except in the case of a beneficiary under a trust created by a contract or in the case of a family arrangement, no right may be enforced by a person who is not a party to the contract.

Hence, in view of the settled position of law provided hereinabove in **M.C.Chacko (supra)**, Clause 9 of the SSA cannot be made applicable for referring the disputes between the petitioner and the respondent to arbitration.

21. It is also submitted by the respondent that with regard to Clause 16 of the Bilateral Agreement to be construed as arbitration clause, a bare reading of clause 16 of the said agreement makes it clear that there is no intention of the respondent and the petitioner

to refer the disputes and differences to arbitration. Clause 16 of the Bilateral Agreement is only a mechanism by which the petitioner has been given a right for seeking redressal of its grievances during the period of contract before the Competent Officer and in the event of failure to get any relief there, the petitioner has a right to file an appeal before the Commissioner, for resolution of ongoing disputes during the period of contract for successful implementation of the contract without the petitioner facing any hardships in the manner as follows:

- i) If the petitioner is aggrieved that the work is outside the purview of the contract or any record with regard to contract is disputed or any decision of Competent Officer is not acceptable to the petitioner then the petitioner can request the Competent Officer to give his instructions or decision in writing within 15 days.
- ii) If the Competent Officer fails to give decision or the petitioner is not satisfied with the decision of the Competent Officer, then the petitioner can file an appeal before the Commissioner.

22. It is alleged by the respondent that as per Section 7 of the Act, an arbitration agreement has to be an agreement by which the parties may submit to arbitration all disputes or certain disputes which have arisen between them. From the language of Section 7 of the Act, it is absolutely clear that the intent of legislation under Section 7 of the Act is to provide a mechanism for dispute resolution by arbitration "if the disputes arise between both the parties to the written agreement or contract and not to provide mechanism for resolution only to one party to written agreement or contract". Such

a decision of the authority has to be final and binding upon the parties.

However, from the reading of Clause 16 of the Bilateral Agreement, only the petitioner has been given right to seek redressal of its grievances either before the Competent Officer or the Commissioner. Clause 16 does not refer that the disputes between both the parties i.e. the respondent and the petitioner should be referred before the Competent Officer or the Commissioner for resolution by arbitration. The Clause 16 also does not specify that the decision of the Competent Officer or the Commissioner shall be final and binding on the parties. Hence, there is no intention of either of the parties to refer the disputes to arbitration under Clause 16 as such Clause 16 of the Bilateral Agreement fails to qualify the test of Section 7 as well as Section 20, 22 and 24 of the Act.

23. In the written submissions, it is further submitted that Clause 16 of Bilateral Agreement is only a one sided mechanism to provide relief or assistance to the petitioner with regard to difficulties which might be faced by the petitioner in the implementation of the Bilateral Agreement during the period of the contract. The said clause does not help the case of the petitioner. The respondent submits that the interpretation of a similar clause as Clause 16 has been examined in case which came up before the Supreme Court titled as **Karnataka Power Transmission Corp. Limited v. M/s. Deepak Cables (India) Ltd.** (2014) 11 SCC 148, wherein the Supreme Court after referring to various judgments on similar issues has observed as follows:

"22. On a careful reading of the said clause, it is demonstrable that it provides for the parties to amicable settle any disputes or difference arising in

connection with the contract. This is the first part. The second part, as is perceptible, is that when disputes or differences of any kind arise between the parties to the contract relating to the performance of the works during progress of the works or after its completion or before or after the termination, abandonment or breach of the contract, which, on being referred to and settled by the engineer, who, on being requested by either party, shall give notice of his decision within thirty days to the owner and the contractor. There is also a stipulation that his decision in respect of every matter so referred to shall be final and binding upon the parties until the completion of works and is required to be given effect to by the contractor who shall proceed with the works with due diligence. To understand the intention of the parties, this part of clause is important. On a studied scrutiny of this postulate, it is graphically clear that it does not provide any procedure which would remotely indicate that the concerned engineer is required to act judicially as an adjudicator by following the principles of natural justice or to consider the submission of both the parties. That apart, the decision of the engineer is only binding until the completion of the works. It only casts a burden on the contractor who is required to proceed with the works with due diligence. Besides the aforesaid, during the settlement of disputes and the court proceedings, both the parties are obliged to carry out the necessary obligation under the contract. The said clause, as we understand, has been engrafted to avoid delay and stoppage of work and for the purpose of smooth carrying on the works. It is interesting to note that the burden is on the contractor to carry out works with due diligence after getting the decision from the engineer until the completion of the works. Thus, the emphasis is on the performance of the contract. The language employed in clause does not spell out the intention of the parties to get the disputes adjudicated through arbitration. It does not really provide for resolution of disputes."

24. In view of the above, it is submitted by the respondent that this Court should dismiss the present petition as not maintainable.

25. The main argument of the petitioner is that Clause 16 of Dispute Resolution agreement is in the nature of an arbitration clause and has all the attributes of an arbitration agreement, even though the word "arbitration" has not been specifically used herein.

26. For the purpose of convenience, Clause 9 of the SSA and Clause 16 of the Bilateral Agreement dated 14th May, 2011, respectively read as follows:-

Clause 9.1. of State Support Agreement (SSA)

"9.1 Any dispute, difference or claim arising out of or in connection with or in relation to this Agreement, which is not resolved amicably shall be decided finally by reference to arbitration to a Board of Arbitrators comprising of one nominee of each party to the dispute. Such arbitration shall be held in accordance with the Rules of Arbitration of the Indian Counsel of Arbitration and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996. The Arbitrators shall issue a reasoned award. The venue of such arbitration shall be New Delhi, India. The Award shall be final and binding on the parties."

Clause 16 of agreement dated 14th May, 2011

"16.1 Except where otherwise provided in the agreement, all questions and disputes in any way arising of or relating to the agreement shall be dealt with as mentioned below:

16.2 In the event the Contractor considers any work demanded of it as being outside the requirements of the Agreement, or disputes any record or decision given in writing by the Competent Officer in any matter in connection with or arising out of agreement to be unacceptable, it shall promptly within [15] days request the Competent Officer in writing to give his

instructions or decision with respect to the same. Thereupon, the Competent Officer shall give his written instructions or decision within period of [30] days from the receipt of the Contractor's letter.

16.3 If the Competent Officer fails to give his instructions or decision in writing within the aforesaid period or if the Contractor IS dissatisfied with instructions or decision of the Competent officer the Contractor may, within [15] days of receipt of the Competent Officer's instructions or decision, appeal to the Commissioner who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of its appeal. The Commissioner shall give his decision in writing within [30] days of receipt of Contractor's appeal which shall be acceptable to the Contractor."

27. Incase the petitioner's case is covered under Clause 16 of the Bilateral Agreement and it is held that the said clause amounting to be an arbitration clause, then there is no need to labour on the Clause 9 of the SSA. The same can only be used for the purpose of drawing the inference i.e. the intention of the parties to the matter. Even this Court is also having the same view. In case the petitioner is able to satisfy the Court on clause 16 of Bilateral Agreement, then the Court need not go into the aspect of clause 9 of the SSA although for the purpose of intention of the parties, the Court considered the said agreement.

28. Mr.Sachin Datta, learned Senior Counsel has argued that the following are the essential features of the aforesaid Clause 16 of the Bilateral Agreement:

- i) All the question and disputes in any way arising out of or relating to the agreement are within the ambit of the clause.

- ii) The clause contemplates that an opportunity of hearing will be given.
- iii) The clause expressly affords an opportunity to adduce evidence.
- iv) The clause mandates that the decision will be given in writing.
- v) The said decision shall be acceptable to the Contractor.

29. His argument is that the said clause makes it abundantly clear that all the necessary attributes of a valid arbitration agreement are satisfied in the facts of the present matter. He has referred various decisions in support of his submission. He says that in view of facts and circumstances, the said clause speaks for itself that it is an arbitration clause. Let me now deal with the judgments referred by the petitioner.

(i) In **Jagdish Chander v. Ramesh Chander & Ors.** (2007) 5 SCC 719, the Supreme Court has held as under:-

"Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them."

30. It is evident that while laying down the essential attributes of an arbitration agreement, the Supreme Court in that case did not construe the relevant clause before it to be in the nature of an arbitration clause only because the said clause provided that reference to arbitration shall take place only "if the parties so determine."

31. The principles laid down in **Jagdish Chander** (supra) were reiterated by the Supreme Court in **Punjab State & Ors. v. Dina Nath**, (2007) 5 SCC 28 where the relevant clause was construed to be an arbitration clause despite absence of the word 'arbitration'.

32. In **Karnataka Power Transmission Corporation Limited** (supra), the test laid down in **Jagdish Chander** (supra) was once again reiterated although again, the Court did not construe the relevant clause before it to be in the nature of an arbitration clause since (i) the decision of the "Engineer" was to operate only till completion of the works; (ii) there was no indication that the "Engineer " was required to act judiciously, and (iii) the contract contained a specific clause providing that all differences or disputes arising out of the agreement or touching the subject matter of the agreement shall be decided by a competent Court at Bangalore.

In **Sh.B.R. Ganesh & Ors. v. The Commissioner, The Bruhat Bangalore Mahanagara Palika**, ILR 2015 Kar. 2130, the Karnataka High Court has applied the principles laid down in **Jagdish Chander (supra)** and **Karnataka Power Transmission Corporation Limited (supra)** to infer existence of a valid arbitration agreement in a situation where the relevant clause contemplated that:

- i) Any dispute, difference or controversy arising under or relating to the agreement shall be dealt with in terms thereof (akin to clause 16.1 in the present case);
- ii) Unless the agreement itself provides for disputes between the parties to be resolved as agreed therein, all disputes would be resolved under the relevant arbitration clause therein (akin to Clause 16.1 in the present case);
- iii) The dispute shall be "finally settled" by the named Authority (again akin to Clause 16.3 which contemplates that the Authority shall give its "decision" in writing, which "shall be acceptable" to the Contractor).

33. Mr. Datta, learned Senior Counsel has referred the judgement of High Court of Orrisa in **Keshab Charan Mohanty v. State of Odisha & Anr.** being Arbitration Petition No.11 of 2008, wherein, it has construed almost similar clause to be in the nature of an arbitration clause.

34. In paragraph 96 of **Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.** (2013) 1 SCC 641, it has been laid down by the Supreme Court that the legislative objective is the necessity to encourage arbitration and therefore the endeavour of the Courts should be to hold the parties to arbitration instead of adopting a strict and narrow interpretation of arbitration clauses/agreements. This position has also been reiterated by the Orissa High Court in **Keshab Charan** (supra).

35. It is argued by Mr.Datta that since there has been failure on the part of the named authority to act within the stipulated time

period, only this Court now has the jurisdiction to appoint an Arbitrator. Even otherwise, the named authority, namely the Commissioner of respondent No.1, is ineligible to act as an Arbitrator as held in **Bihar State Mineral Development Corporation & Anr. V. Encon Builders (I)(P) Ltd.** (2003) 7 SCC 418 and **Keshab Charan** (supra).

36. There is a force in the submissions of Mr. Sachin Dutta, learned Senior Counsel and in view of the decisions referred by him, I am clear in my mind after having gone through the pleadings and documents that in Clause 9 of SSA and Clause 16 of Bilateral Agreement, the attributes of arbitration agreement are present and it is immaterial if the word 'Arbitration' is not mentioned. Inference can be drawn from the said Clause 16 that the parties were ready to resolve their all disputes arising out of or in relation to the agreement. It is also the admitted position that the respondent has not taken any steps to appoint the Arbitral Tribunal despite of the receipt of notice or before filing of the present petition. The respondent is merely taking the plea that the said clause is not an arbitration clause. Thus, it is held that it is an arbitration clause and on the failure of appointing the Arbitral Tribunal, the respondent has now lost its right.

37. Therefore, the prayer of the petitioner is allowed.

38. Hon'ble Mr. Justice Deepak Verma (Retd. Judge of Supreme Court) (Mobile No.9717393521) is appointed as the sole Arbitrator to adjudicate the disputes arising out of the agreement in question between the parties as mentioned in the present petition. The parties are also allowed to file their respective claims and counter-

claims before the Arbitrator. Liberty is granted to the respondent to raise all the grounds as mentioned in the reply to the petition.

39. The learned Arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The fees of the learned Arbitrator shall be in terms of the amended schedule of the Act. The parties to appear before the learned Arbitrator on 3rd August, 2016 for directions.

40. The petition is accordingly disposed of.

41. Copy of this order be given *dasti* to the learned counsel for the parties and a copy thereof be delivered to the learned Arbitrator as well as Additional Coordinator, DAC forthwith.

JUNE 17, 2016

**(MANMOHAN SINGH)
JUDGE**