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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMMERCIAL ARBITRATION APPLICATION (L) NO.136 OF 2019

Gold Prism Realty Pvt. Ltd	]	
a company within th meaning of the	]	
Companies Act, 2013 having its office at	]	
Sunrise, Ground floor, Plot No.32, Sector 8A,	]	
CBD Belapur, Navi Mumbai 400 614	]	Applicant
and also having it's office at 807, CTS 256	]	
Off Aary Road, Vishweshwar Nagar	]	
Goregaon East,Mumbai 400 063.	]	

V/s.

M/s Paradigm Ambit Buildcon	]	
a partnership firm having its address at	]	
G-52, 2 nd floor, Roop Mangal	]	Respondent
16 th Road, Main Avenue, Santacruz (West)	]	
Mumbai 400 054.	]	

- Mr. Simil Purohit i/by Ashwin C. Hawelikar, for the Applicant.
- Mr. Mayur Khandeparkar i/by Chetan Bhupendra Raithatha, for respondent

CORAM : G. S. KULKARNI, J.

DATE : 25th June 2019.

JUDGMENT

1] This is an application under Section 11 of the Arbitration and Conciliation Act, (for short, "Act"); whereby the applicant has prayed for appointment of an arbitral tribunal, for adjudication of the disputes which

are stated to have arisen between the parties under the works contracts bearing Nos.PAB/SHIMP-REHAB/WO/004 and PAB/SHIMP-SALE/WO/005 dated 16th November, 2015 (contract for short, "works contract").

2] It is the case of the applicant that the applicant is engaged in the business of civil construction, respondent a partnership firm is also engaged in the business of construction and development of properties.

3] In or around November, 2015, the respondent offered to execute contract in favour of the applicant of construction of a rehabilitation and a free sale building, forming part of slum rehabilitation project (for short, "SRA) undertaken by the respondent at Borivali (West), Mumbai. Pursuant to the negotiations between the parties the work contracts in question came to be awarded to the applicant.

4] Under these work contracts, it was agreed between the parties that the applicant shall purchase 'a tower crane' and 'a concrete pump' on the site of the said SRA. project to be used for construction of the rehabilitation building and sale building. It was agreed that the rent in respect of both these items would be paid to the applicant by the respondent.

5] The applicant having accepted the work contract, commenced

construction of the rehabilitation building and the sale building which included extra construction work for the sale building, the tower crane was also purchased by the applicant as also concrete pump was installed on the site of the said SRA project. The applicant obtained a bank loan for expenditure to be on these aspects. The applicant also engaged services of one Sunrise Enterprises, for providing requisite labour requirement for the construction of these buildings.

6] In the course of execution of the contracted work, the applicant from time to time, raised invoices in respect of work completed, and also in respect to rent due and payable for the tower crane and concrete pump. In making payment of these invoices, the respondent, however, deducted 5% amount towards retention amount, an aggregate amount of Rs.1,69,00,000/- was deducted by the respondent as retention amount.

7] The applicant has contended that till March 2017, the applicant completed about 90% construction work of the rehabilitation building and 1/3rd work of the sale building. The applicant has contended that initially timely payments were made by the respondents of the invoices as raised by the applicant, however, in or about March, 2017, the respondent started committing default in payment of the applicant's dues under various

invoices raised by the applicant. The respondent also defaulted in making the payment of rent of the tower crane and concrete pump.

8] Consequent to these defaults by the respondent, correspondence ensued between the parties. The applicant in this situation was constrained to use it's own funds for payment of sub-contractors, towards materials and towards fulfillment of various other obligations in relation to the construction of the rehabilitation and the sale building. This caused severe financial hardship to the applicant.

9] The applicant contends that the parties attempted to amicably resolve the issues which had arisen between the parties, and in pursuance to the negotiations between the parties, by letter dated 9th October, 2017, the respondent forwarded to the applicant certain terms and conditions towards amicable settlement of the issues which had arisen in the execution of the works under the contract. These terms and conditions as contained therein were accepted by the applicant through it's director Mr. Swatantrakumar, without prejudice. Without prejudice the qualification endorsed by Mr. Swatantrakumar, thereon which is the hand-written endorsement was made by the said director on the said settlement terms.

10] The applicant has contended the said settlement terms did not alter the principal contract and the objections of the respondent to honour the applicant's invoices remain undisturbed but was merely an agreement for the quantification of the claim under the main agreement. It is contended that settlement agreement provided a mechanism for discharge of the obligations of the respondent towards final dues.

11] The petitioner has contended that after the execution of the said settlement agreement dated 9th October, 2017, it came to the light of the applicant that two partners of the respondent Mr. Ketan Musle and Manoj Vishwakarma, had formed new partnership firm by the name of 'Dottom Realty', had entered into a contract with the respondent, for undertaking construction of the rehabilitation building and also of sale building as awarded to the applicant. It was also revealed that the applicant's labour contractor M/s Sunrise Enterprises had also joined the respondent and said Dottom Realty, in rendering its services for the said construction. The applicant being aggrieved by this conduct of the respondent, which was in breach of the terms and conditions of the works contract as awarded by the respondent, entered correspondence and more particularly when the materials of the applicant namely tower crane and concrete pump were still being used for construction of the said building, without making payment of

any rent to the applicant. The respondent had also defaulted in making payments under the settlement agreement.

12] The applicant accordingly addressed a letter dated nil (Exhibit "D") to the respondent, received by the respondent on 6th August, 2018, *inter alia* recording that the respondent had *inter alia* defaulted under the settlement agreement and raised a demand on the respondent for payment of an amount of Rs.43 lacs of the R.A. Bills together with interest thereon at the rate of 18% per annum. Respondent, by its letter dated 18th August, 2018 replied to the letter of the applicant thereby raising contentions not to pay the applicant which according to the applicant were false. Thereafter respondent informed the applicant that it would dismantle applicant's crane from the project site and that should be completed within 30 days. The applicant has contended that being aggrieved by this action on the part of respondent, applicant was constrained to approach this Court, under Section 9 the Act (Arbitration Petition No.1227 of 2018), *inter alia* praying for interim measures pending disposal of the arbitration proceedings. The prayers of the applicant were to restrain the respondent from dismantling the Tower Crane installed by the applicant on the site of the S.R.A. project. By order dated 6th December, 2018, this Court permitted the applicant to withdraw the said section 9 petition with liberty to file a Section 11

petition.

13] The applicant by its advocate's letter dated 19th December, 2018, addressed to the respondent and its partners invoked the arbitration agreement as contained in the works contract requesting for reference of the dispute to arbitration. The applicant also nominated a sole arbitrator. The respondent was called upon to confirm the said nomination failing which, it was recorded that the applicant will be required to approach this Court.

14] The applicant's invocation letter was replied by the respondent's advocate letter dated 4th January, 2019, whereby a reference of disputes to arbitration was refused. In so refusing the respondent contended that the deed of settlement dated 9th October, 2017, superseded the works contract dated 16th November 2015 which contained the arbitration agreement. It was asserted that the settlement agreement did not contain an arbitration agreement, hence there was no arbitration agreement between the parties, consequently there was no question of invocation of the arbitration agreement in the superseded works contract.

15] The respondent having refused to concur in appointment of an arbitrator, the applicant has filed the present application praying for

appointment of an arbitral tribunal contending that disputes and differences which have arisen between the parties under the works contract are required to be referred to arbitration, by appointing an arbitral tribunal.

16] Learned counsel for the applicant has drawn my attention to the works contract which contains arbitration clause/agreement. Learned counsel for the applicant has also drawn my attention to the correspondence as entered between the parties to contend that there are disputes and differences which have arisen between the parties under the work contract, to submit that the respondent in the facts of the case ought to have agreed in referring the disputes to arbitration. It is submitted that the commercial understanding between the parties that any disputes which are not being settled should be referred to arbitration, is clearly seen from the arbitration agreement as contained in Clause no.5(f) of the works contract. It is submitted that the arbitration agreement is required to be severed from the main agreement and even settlement dated 9 October 2017 would not extinguish the arbitration agreement as the disputes are principally under the works contract. It is submitted that it is not correct for the respondent to contend that the settlement agreement has superseded the works contract and in particular the arbitration agreement. In support of his contention, learned Counsel for the applicant has relied on the

decision of the Division Bench of this Court in "**Mulheim Pipecoatings GmbH. Vs. Welspun Fintrade Limited & Anr.**"¹

17] On the other hand, learned counsel for the respondent would contend that even considering clause 5 (f) of the works contract, it cannot be regarded as arbitration agreement between the parties as it clearly refers to anything left out beyond the contract. It is contended that even assuming that there is arbitration agreement, the contract between the parties under the works order stand superseded by the settlement agreement dated 9th October 2017, as entered into between the parties and which in any case does not contain an arbitration agreement. It is submitted that the intention of the parties, not have an arbitration agreement is clear from clause 11 of the settlement wherein the applicant has agreed fully and completely to waive, release, forever and covenant not to sue the respondent or any of its partners with respect to any and all claims/demands arising out or in any relating to the property, being full and final settlement towards both the contracts. It is submitted that in view of these clear terms, certainly there is no arbitration agreement between the parties and in the absence of existence of any arbitration agreement, application deserve to be rejected.

1. Appeal (L) No.206 of 2013, Judgment Dt.16/8/2013.

18] My attention is also drawn to the various averments as made in reply affidavit supporting these contentions. Learned Counsel for the respondent has placed reliance on the decision of the learned Single Judge of this Court in **Reshamsingh and Co. Prvt Ltd. Vs. Dharti Dredging and Infrastructure Ltd.**²

19] Having heard the learned counsel for the parties and having perused the record, it appears to be not in dispute the applicant executed works under the work contract and invoices were raised with effect from March, 2017. Disputes arose between the parties when the invoices of the applicant were not being honoured. It also appears that there were negotiations between the parties and parties decided to settle the disputes in terms of letter dated 9th October, 2017 addressed by the respondent to the applicant. The said letter termed as "settlement agreement" dated 9th October, 2017 is on the letterhead of the respondent, however, signed by the parties. The relevant contents of the settlement agreement are required to be noted which read thus:-

"Date:9th October,2017

To,
Gold Prism Realty Private Limited,
10th Floor, Dhukka Chamber,
Poddar Road, Malad East,
Mumbai-400097
Maharashtra.

2 2010(5) Mh.L.J. 438

Ref:

Sub: Full and Final Settlement for the outstanding dues with respect to said construction of the rehab building and sale building under the construction of rehab building contract and construction of sale building contract both dated 16/11/2015.

This letter is in the form of a settlement agreement between Gold Prism Realty Private Limited ("GPRL") and Paradigm Ambit Buildcon ("PAB") (unless referred to individually, shall collectively referred to as 'Parties') for fully and finally resolving the dispute and differences between the parties aroused under the construction of rehab building contract and construction of sale building contract both dated 16/11/2015 in respect of the said Property on the terms and conditions set forth in this letter.

1. You are aware that we had assigned you the construction of rehab building and sale building on the said property vide two separate contracts both dated 16/11/2015 (unless referred to individually, shall collectively be referred to as 'Contracts').

2. After several discussions held between us and after arriving at an amicably decision the contract entered into with you is rescinded verbally by us with respect to construction of rehab building as well as sale building on 25th July 2017 and 30th April, 2017 respectively. We hereby confirm the discontinuation of services under the said Contracts by Paradigm Ambit Buildcon of construction of rehab building as well as sale building as on the aforesaid dates.

3. The parties have amicably arrived at a full and final settlement amount of Rs.39,08,35,780/- (Rupees Thirty Nine Crores Eight Lakhs Thirty Five Thousand Seven Hundred and Eighty only) inclusive of all applicable statutory taxes, charges, levies, etc. ('Settlement amount') subject to retention of a portion of the settlement amount of Rs.1,69,48,649/- (Rupees One Crore Sixty Nine Lakhs Forty Eight Thousand Six Hundred and Forty Nine only) more particularly described herein below which is accepted by you and confirmed you thereby resolving to settle the dispute and differences amongst ourselves and yourselves at the aforesaid settlement amount and Shri.Swatantrakumar Anand, Director of Gold Prism Realty Pvt.Ltd. is hereby confirming and accepting the terms of the present letter for and on your behalf.

4. The payment schedule of the said Settlement amount and the retention amount is more particularly described in the Schedule hereunder written.

... ..

8. Summary of settlement amount of bills is as follows:

State showing amount to be payable on receipt of Final Pending Invoice:

Particulars	Amount Rs.
Final Settlement Amount	39,08,35,780/-
Less:-	
Amount Paid till 11-07-2017	25,54,30,312/-
Amount Paid to Sunrise Enterprises on behalf of GPRL	1,00,00,000/-
Amount Paid to Vendors on behalf of GPRL	1,42,74,427/-
Amount Paid to Devakshi Enterprises	38,07,457/-
Amount Paid to Kamlesh Contractor	2,50,00,000/-
Amount Payable to GPRL	8,23,23,584/-
Less:	
Retention Amount for construction of sale building (till 31 st December 2017)	64,53,718/-
Retention Amount for construction of rehab building (till 30 th April 2018)	1,04,94,931/-
Net Amount Payable as on today	6,53,74,935/-

9.

10. Neither the payment of the aforesaid settlement amount nor the execution of the present letters shall be construed as an admission of liability or fault by either of the parties.

11. You hereby fully, completely and finally waive, release, remise, acquit and forever discharge and covenant not to sue us or any of our Partners with respect to any and all claims, demands, suits, manner of obligation, debt, liability, tort, covenant, contract, or causes of action of any kind whatsoever, at law or in equity, including without limitation, all claims and causes of action arising out of or in any way relating to the aforesaid property and the amount of Rs.39,08,35,780/- (Rupees Thirty Nine Crores Eight Lakhs Thirty Five thousand Seven hundred and eighty only) being full and final settlement towards both the contracts covers all the claims of Gold Prism Realty Private Limited absolutely.

12. You hereby admit and acknowledge the contents of this

present and endorse your signature at the bottom of this letter.

Schedule hereinabove referred to:

Sr.no	Date	Cheque no	Bank Details	Gross Amt (Rs.)
1	09/10/2017	001493	HDFC BANK	5,00,00,000/-
2	16/10/2017	001494	HDFC BANK	50,00,000/-
3	23/10/2017	001495	HDFC BANK	50,00,000/-
4	02/11/2017	001496	HDFC BANK	53,74,935/-
		TOTAL		6,53,74,935/-

Note: The above mentioned gross amount payable as per the schedule are subject to tax deductibles at source (TDS) and on submission of final bills to Paradigm Ambit Buildcon.

Yours truly,
Paradigm Ambit Buildcon

sd/- sd/-
Parth Mehta Ketan Musale

Partners.

I, Swatantrakumar Anand, Director, Gold Prism Realty Private Limited hereby confirm and agree to the terms and conditions mentioned hereinabove. Without prejudice of claim and settle on Rs.39.20 cr. and physical possession of due payment PDC's stated in (Clause 8 & Clause 12) on or before mentioned date s above.

Date:9/10/2017".

Sd/-
(emphasis supplied)

It would be appropriate to note clause 5(f) of the works contract is stated to be arbitration agreement, which reads thus :-

"(f) Anything left out beyond this contract shall be settled down by amicable resolution/resolutions or/and monthly coordination meetings/arbitration or by contract law (applicable in Mumbai Jurisdiction).

20] A perusal of the above settlement would clearly indicate that the settlement is accepted on behalf of the applicant by a clear endorsement as recorded in the last paragraph that the same was without prejudice of the claim and settled on Rs.39.20 Cr. and physical possession of due payment PDC, as contained in (Clause 8 and 12) on or before mentioned dates as above. The settlement being without prejudice, was also informed by the applicant by its letter dated 6th August,2018 addressed to the respondent whereby it was recorded that the settlement deed was not honoured by the respondent and that the settlement had expired on 30th April,2018. The respondent's reply dated 18 August 2018 also indicates that a part payment was made by the respondent to the applicant under the settlement agreement and there is a clear reference in the said letter that the amount of Rs.1,69,48,649/- was retained by the respondent. There are also issues in regard to dismantling of the crane which was raised by the applicant and which was admitted on behalf of the respondent that the crane was on the site and the respondent was in the process of dismantling the crane. The applicant on this background had approached this Court by filing Commercial Arbitration Petition No.1237 of 2011 under Section 9 of the Act claiming interim measures pending arbitral proceedings, which was permitted to be withdrawn by an order dated 6th December 2018, with

liberty to file a Section 11 application. The applicant accordingly issued a notice dated 19th December 2018 invoking the arbitration agreement and contending that a claim was interalia due and payable to the applicant by the respondent as also nominated the name of the proposed arbitrator. The respondent replied to the said notice of the applicant invoking the arbitration agreement by its Advocate's letter dated 4th January, 2019 interalia contending that clause 5(f) by no stretch of imagination can be termed as arbitration agreement between the parties as the words of the said clause stipulate that "anything left out beyond the contract shall be settled down by amicable resolution by and between the parties. It was further stated that in any event even if such a clause is required to be considered as an arbitration agreement, the disputes between the parties stood resolved in view of the deed of settlement dated 9th October 2017.

21] From the above facts, it can be clearly seen that the disputes between the parties in fact have arisen under the principal contract/work contract dated 16th November, 2015. As disputes had arisen between the parties, the parties had agreed to settle the disputes and a settlement agreement to that effect dated 9th October, 2017 was arrived. However, it is seen that the applicant has a grievance of respondent not honouring the settlement as arrived between the parties and in fact the case of the applicant is that there

are still amounts outstanding/due and payable by the respondent to the applicant of disputes under the principal works contract dated 16th November,2015.

22] The question is as to whether Clause 5(f) can be regarded as arbitration agreement between the parties. A doubt is raised on behalf of the respondent that this is not an arbitration agreement emphasizing the use of the words "*anything left out beyond this contract*" which is succeeded by the words that the same "*shall be settled down by amicable resolution/ resolutions or/and monthly coordination meetings/ arbitration or by contract law.*" In my opinion the words "*anything left out beyond this contract*" are required to be attributed a meaning as the parties commercially understood. It needs to be noted that this clause is contained in a works contract which is contained in the letter of the respondent dated 16 November 2015 awarding the contractual work to the applicant. It is not a clause which is inserted by any person who is trained in law. It also cannot be conceived that the works contract is exhaustive.

23] On a cumulative reading of the various clauses as contained in the works contract, thus the only meaning which can be attributed is that in areas of dispute which would otherwise arise and which may be incidental

to the contract and specifically not provided for would be either settled by amicable resolution and/or by monthly coordination meeting or arbitration.

24] The contract in question is the contract of construction. The works contract although may contemplates and provide for certain aspects as arising under the contract, it cannot be conceived that all facets on which the dispute may arise can be envisaged under the works contract and it is for this reason the parties have provided that whatever not specifically provided in the contract can be resolved either by settlement or arbitration. It may be observed that the arbitration agreement is required to be construed broadly and a common sense approach is required to be employed in so construing. The works contract which in clause 5(f) contains the arbitration agreement, being a commercial document, must be interpreted by giving due regard to the intention of the parties which can be gathered from cumulative reading of the words and phraseology employed therein. The phrases or expression as used in the arbitration agreement would be required to be read meaningfully.

25] The interpretation as canvassed on behalf of the respondent referring to the said phraseology "*anything left out beyond this contract*" cannot be accepted as these words are required to be given commercial meaning as noted above and cannot be referred as surpluses or having no meaning. The

contention as urged on behalf of the respondent if accepted would lead to absurdity in rendering 5(f) meaningless.

26] In so far as the respondent's contention that clause 11 of the settlement agreement dated 9th October, 2017 superseded the work contract dated 16th November, 2015, cannot be accepted. It is quite clear that the disputes have arisen between the parties, the parties although arrived at settlement, nonetheless the disputes between the parties have persisted. This also for the reason that the arbitration agreement between the parties is required to be separated from the principal contract. It is well settled principle of law as enunciated and recognised in catena of judgments that an arbitration clause is a collateral term of the contract as distinguished from the substantive term which has also a statutory recognition in Section 16(1)(a) of the Act. The doctrine of separability of arbitration agreement is well established. The arbitration agreement between the parties is required to be severed from the principal contract and is required to be given effect independently. The Division Bench in "**Mulheim Pipecoatings GmbH**" (supra) in paragraph 31 has formulated the essential features of doctrine of separability, which reads thus:-

"31. We now formulate the essential features of the doctrine of separability. These are:-

(i) The arbitration agreement constitutes a collateral term in the contract which relates to the resolution of disputes and not to

the performance of the contract. Whereas the substantive terms of a contract define the rights and obligations of the parties, an arbitration agreement provides for modalities agreed upon by parties for the resolution of their disputes. Parties agree thereby to have their disputes resolved before an arbitral tribunal as distinct from the ordinary courts of law in the jurisdiction;

(ii) Upon the termination of the main contract, the arbitration agreement does not *ipso facto* or necessarily come to an end;

(iii) The issue as to whether the arbitration agreement survives or perishes along with the main contract would depend upon the nature of the controversy and its effect upon the existence or survival of the contract itself;

(iv) If the nature of the controversy is such that the main contract would itself be treated as *non est* in the sense that it never came into existence or was void, the arbitration clause cannot operate, for along with the original contract, the arbitration agreement is also void. Similarly, though the contract was validly executed, parties may put an end to it as if it had never existed and substitute a new contract solely governing their rights and liabilities thereunder. Even in such a case, since the original contract is extinguished or annihilated by another, the arbitration clause forming a part of the contract would perish with it;

(v) There may, however, be cases where it is the future performance of the contract that has come to an end. Such an eventuality may arise due to a number of circumstances, in which one or both the parties may be discharged from further performance. Termination of the contract by one party, repudiation of the contract by one party and its acceptance by the other and frustration of the contract are some of the circumstances. The controversy in such matters arises upon or in relation to or in connection with the contract. In all such cases, the contract is not put an end to for all purposes because there

may be rights and obligations which had arisen earlier when it had not come to an end. The contract subsists for those purposes and the arbitration clause would operate for those purposes;

(vi) The doctrine of separability requires, for the arbitration agreement to be null and void, inoperative or incapable of performance, a direct impeachment of the arbitration agreement and not simply a parasitically impeachment based on a challenge to the validity or enforceability of the main agreement. In other words, arguments for impeaching the arbitration agreement must be based on facts which are specific to the arbitration agreement. There may, of course, be facts which are specific to both the main agreement and the arbitration agreement, but there may well be facts which are specific to the main agreement, but not to the arbitration agreement. In the former case, the arbitration clause would perish with the main contract while in the latter case, it would not. Another way of considering the matter is whether it is the further performance of the contract that is brought to an end or it is the existence of the contract which is brought to an end. In the former case, where the further performance of the contract has been brought to an end, the arbitration clause would survive whereas when the existence of the contract is itself brought to an end, the arbitration clause would not survive."

27] In "*Ashapura Mine-Chem Ltd. Vs. Gujarat Mineral Development Corporation*"³ in paragraphs 21 and 27 the Supreme Court has observed thus:-

"21. In *Today Homes and Infrastructure (p) Ltd.*, this Court approved the statement of law stated by the learned Judge of this Court in *Reva Electric Car Co. (P) Ltd.*, para 14 can be usefully referred to which reads as under:

(Today Homes and Infrastructure (P) Ltd. Vase, SCC p.73)

“14. The same reasoning was adopted by a member of this Bench (S.S.Nijjar, J.), while deciding *Reva Electric Car Co.(P)Ltd vs. Green Mobil*, wherein the provisions of Section 16(1) in the backdrop of the doctrine of *kompetenz kompetenz* were considered and it was inter alia held that under Section 16(1), the legislature makes it clear that while considering any objection with regard to the existence or validity of the arbitration agreement, *the arbitration clause, which formed part of the contract, had to be treated as an agreement independent of the other terms of the contract*. Reference was made in the said judgment to the provisions of Section 16(1)(b) of the 1996 Act, which provides that even if the Arbitral Tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. It was also held that Section 16(1)(a) of the 1996 Act presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. *By virtue of Section 16(1)(b) of the 1996 Act, the arbitration clause continues to be enforceable, notwithstanding a declaration that the contract was null and void.*

... ..

27. Having gone through the said paragraphs, we do not find any position in law contrary to what has been stated in *Today Homes and Infrastructure (P) Ltd., Reva Electric Car Co.(P) Ltd. And Enercon (India) Ltd.*”

28] In the present case there is nothing to indicate that the principal agreement has been superseded by any further agreement. The settlement agreement dated 9 October 2017 cannot be read to supersede the work contract and much less the arbitration agreement as entered between the parties. On a reading of the settlement agreement it is quite clear that the disputes under the principal contract were sought to be resolved. The settlement therein was also accepted by the applicant without prejudice to its rights as endorsed on the settlement agreement. The case of the applicant is that the respondent has failed to honour its obligation under the settlement agreement. In these circumstances, prima facie it cannot be said

that the works contract stood extinguished or stood superseded by the settlement agreement or that the arbitration agreement itself was rescinded or cancelled by the parties.

29] In the above circumstances, the arbitration application is required to be allowed by appointing the arbitral tribunal. Hence, the following order:-

ORDER

- (i) Dr. Justice S.Radhakrishnan (Retd.) is appointed as a prospective sole Arbitrator to arbitrate the disputes and differences between the parties under the work contract bearing No.PAB/SHIMP-REHAB/WO/004 dated 16th November, 2015 and another work contract bearing No.PAB/SHIMP-SALE/WO/005 dated 16th November, 2015;
- (ii) The learned prospective sole arbitrator, fifteen days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master of this Court, to be placed on record of this application with a copy to be forwarded to both the parties;
- (iii) Arbitration Petition (L.) No.111 of 2019 filed under Section 9 of the ACA is permitted to be converted in an application under Section 17 of the ACA to be adjudicated by the arbitral tribunal;
- (iv) At the first instance, the parties shall appear before the prospective arbitrator within 15 days from today on a date which may be mutually fixed by the prospective sole arbitrator;
- (v) All contentions of the parties on merits of the disputes as also on the

Section 17 application are expressly kept open;

(vi) The fees payable to the arbitral tribunal shall be in accordance with the scale specified in the schedule as contained in the Bombay High Court (Fee Payable to the Arbitrators) Rules, 2018;

(vii) The above application under Section 11 of the ACA as also Section 9 petition are disposed of in the above terms. No costs.

(viii) Office to forward a copy of this order to the learned Arbitrator on the following address:

110, Dalamal Chambers,
Behind Income Tax Office 29,
New Marine Lines, Mumbai 400 0201.
Email : radhakrishnans11@gmail.com

[G. S. KULKARNI, J]