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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 06.09.2019

Pronounced on: 29.11.2019

+ ARB.P. 6/2019

GOGOAL HYDRO PRIVATE LIMITED Petitioner
Through: Mr. A.K. Bajpai & Mr. Divakar
Kumar, Advocates

versus

BHARAT HEAVY ELECTRICALS LIMITED Respondent
Through: Mr. Rajat Kumar & Vedant Kumar,
Advocates

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. This is a petition filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 ('Act') for appointment of an Arbitrator to adjudicate the disputes between the parties.
2. Petitioner is engaged in Design & Engineering, Manufacturing, Installation, Testing and Erection & Commissioning of Electro Mechanics of New Hydro Electric Power Project on turnkey basis as also Renovation, Modernization and Upgradation of existing Hydro Electric Power Project upto 250MW.
3. On 29.03.2011, the respondent issued a work order No. NDA/DHR-1/2/VALVE/11_027/14009 for repair and maintenance of Rotary Valves of Unit 1 & 2, BBMB Dehar Power House, Slapper to the petitioner with a contract value of Rs. 36,00,000/-.

4. It was agreed that if Trunion is found to be damaged, then it shall be sent to the work shop for machining and the same shall be considered as additional work and will be executed at a charge and with additional time.

5. Accordingly, on 05.07.2011, respondent issued an amended Work Order for a value of Rs. 3,60,000/- for additional work.

6. It is the case of the petitioner that it had completed the work and also raised a final bill. Petitioner sent a letter dated 14.10.2017 to the respondent for settlement of the outstanding claim of Rs.3.97 lakhs on account of additional work and requested to settle the claim before 24.10.2017. A reminder letter dated 23.10.2017 was also sent to the respondent.

7. The petitioner further pleads that vide letter dated 25.10.2017, the respondent assured that the settlement of the outstanding claim is under active consideration and after approval, petitioner will be informed of the further course of action. However, there was no communication from the respondent. Vide letters dated 20.11.2017 and 15.12.2017, petitioner requested for appointment of the Arbitrator. Getting no response, the petitioner sent another invocation notice dated 06.06.2018, requesting for appointment of the arbitrator. However, even this elicited no response from the respondent. Thus, the present petition was filed for appointment of the Arbitrator, as according to the petitioner the respondent has forfeited its right to appoint the Arbitrator.

8. The arbitration clause between the parties reads as under:

“2.14 Arbitration

All disputes or differences between the parties to the contract arising out or in relation to the contract, other than those for which the decision of the Engineer or of any other person is by the contract expressed to be final and conclusive, shall after written notice by either party to the contract to other party be referred to sole arbitration of General Manager of BHEL or his nominee, the arbitration shall be conducted in accordance with the provisions of the INDIAN ARBITRATION AND CONCILIATION ACT 1996 OR REVISION THEREOF>The arbitrator shall give reasons for the award.

The parties to the contract understand and agree that it will be no objection that the said General Manager or the person nominated by him as arbitrator, had earlier in his official capacity to deal directly or indirectly with the matter to which the contract relates or that in the course of his official duties had expressed views on all of the matters in dispute of difference. The award of the arbitrator shall be final and binding on the parties to this contract.

In the event of the arbitrator. dying, neglecting or refusing to act or resigning or being unable to act for any reason. It shall be lawful for the said GM, or his successor, as the case may be, either to act himself as the Arbitrator or to appoint another in place of the outgoing arbitrator in the manner aforesaid.

The Arbitrator may from time to time, with consent of both the parties to the contract, enlarge the time for making the award.

Work under the contract shall be continued during the arbitration.

The venue of arbitration shall be the place from where the contract/ work order is issued or such other place as the arbitrator at his discretion may determine."

9. The principal contention of the petitioner is that an amount of Rs.3.97 lakhs is due and payable by the respondent. Despite several

letters the amount has not been released to the petitioner. The petitioner has been actively pursuing with the respondent and the respondent has in various letters dated 27.08.2015, 04.09.2017 and 25.10.2017 acknowledged the fact that the matter was under active consideration. It is submitted that in fact on 04.09.2017 a meeting was held between the parties and issues with respect to payments were discussed. It was also recorded in the minutes that since the parties could not come to an agreement on the payments, the petitioner requested for appointment of the Arbitrator, to resolve the issues.

10. Argument of the learned counsel for the petitioner is that since the respondent was actively considering the release of money to the petitioner, the petitioner did not resort to litigation in the hope that his money would be paid. However, when the respondent did not clear the outstanding and did not even appoint the Arbitrator, the present petition has been filed.

11. Per Contra, learned counsel appearing for the respondent relying on the reply filed, objects to the present petition on two grounds viz; (a) that the petitioner had received the claim amount from the respondents towards full and final settlement of its claim and cannot invoke the arbitration clause as no dispute survives between the parties and (b) even assuming for the sake of argument that the No-Claim issued by the petitioner was for the work order dated 29.03.2011, the present claim of the petitioner is time barred as the work was awarded in 2011 and the work was completed in 2011 itself. Thus, the cause of action, if any, arose in 2011 and the invocation of

the Arbitration Clause in 2017, as well as the present petition in 2019, is hopelessly barred by limitation.

12. Learned counsel for the respondent submits that in view of the full and final settlement, the Arbitration Clause cannot be invoked. Reliance is placed on the judgment of the Apex Court in ***United India Insurance Co. Limited vs. Antique Art Exports Private Limited, (2019) 5 SCALE 419***. The relevant para of the judgment relied upon by the respondent is as under:-

“20. The submission of the learned counsel for the respondent that after insertion of sub-section (6-A) to Section 11 of the Amendment Act, 2015 the jurisdiction of this Court is denuded and the limited mandate of the Court is to examine the factum of existence of an arbitration and relied on the judgment in Duro Felguera, S.A. v. Gangavaram Port Ltd. [(2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] The exposition in this decision is a general observation about the effect of the amended provisions which came to be examined under reference to six arbitrable agreements (five agreements for works and one corporate guarantee) and each agreement contains a provision for arbitration and there was serious dispute between the parties in reference to constitution of Arbitral Tribunal whether there has to be Arbitral Tribunal pertaining to each agreement. In the facts and circumstances, this Court took note of sub-section (6-A) introduced by the Amendment Act, 2015 to Section 11 of the Act and in that context observed that the preliminary disputes are to be examined by the arbitrator and are not for the Court to be examined within the limited scope available for appointment of arbitrator under Section 11(6) of the Act. Suffice it to say that appointment of an arbitrator is a judicial power and is not a mere administrative function leaving some degree of judicial intervention; when it comes to the question to examine the existence of a prima facie arbitration agreement, it is

always necessary to ensure that the dispute resolution process does not become unnecessarily protracted.

21. In the instant case, prima facie no dispute subsisted after the discharge voucher being signed by the respondent without any demur or protest and claim being finally settled with accord and satisfaction and after 11 weeks of the settlement of claim a letter was sent on 27-7-2016 for the first time raising a voice in the form of protest that the discharge voucher was signed under undue influence and coercion with no supportive prima facie evidence being placed on record in absence thereof, it must follow that the claim had been settled with accord and satisfaction leaving no arbitral dispute subsisting under the agreement to be referred to the arbitrator for adjudication.”

13. Learned counsel for respondent also relies on ***S.B.P. & Co. vs. Patel Engineering Ltd. & Anr. (2005) 8 SCC 618*** and ***National Issuance Co. Ltd. Vs. Boghpara Polyfab Pvt. Ltd. (2009) 1 SCC 267*** to argue that this Court would have to decide if the claim of the petitioner is long barred claim and if this court comes to the conclusion that the claim of the petitioner is time barred, then the Court would refuse to appoint an Arbitrator. Relevant portion of ***S.B.P. & Co. (supra)*** and ***National Issuance Co. Ltd. (supra)*** is as under:

“47...(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.”

“22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. [(2005) 8 SCC 618] This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.”

14. In rejoinder, learned counsel for the petitioner in order to counter the two objections raised by learned counsel for respondent,

submits that the No-Claim Certificate was issued on 28.02.2014, but the said certificate was in respect of the initial work order. Respondent has not paid the amount for additional work, which was awarded to the petitioner on 05.07.2011 and the claim in the present petition relates to the said additional work. Therefore, the respondent cannot argue that there is a full and final settlement and the Arbitrator cannot be appointed.

15. Without prejudice to the said argument, learned counsel further argues that pursuant to the Arbitration & Conciliation (Amendment) Act, 2015, Section 11(6A) has been inserted and by virtue of the said amendment while deciding a petition under Section 11(6), the Court has to only examine the existence of the arbitration agreement between the parties and nothing else.

16. Learned counsel for the petitioner has relied upon the judgement of the Apex Court in the case of ***Duro Felguera SA v Gangavaram Port Limited (2017) 9 SCC 729***, to argue that post 2015 amendment, only the existence of the arbitration clause has to be seen by the Court.

17. Addressing argument on the question of limitation, learned counsel for the petitioner has submitted that the present petition is not barred by limitation. The disputes had all through been alive between the parties. A meeting was held on 04.09.2017 wherein the respondent was actively trying to resolve the issue of outstanding claims. After the meeting the petitioner had written to the respondent on 14.10.2017 and 23.10.2017 to release the outstanding payments. Vide letter dated 25.10.2017 the respondent had duly communicated

to the petitioner that the case of the petitioner for additional work was under active consideration and after approval further course of action would be intimated. Learned counsel vehemently argued that in fact this letter is a clear admission on the part of the respondent that some amounts were due and were being looked into, else there was no necessity for the respondent to have issued such a letter. Since the respondent was assuring the petitioner till as late as October, 2017, the present petition filed in 2019, is within the period of three years from the said date and cannot be said to be barred by limitation.

18. I have heard the learned counsels for the parties and examined their contentions.

19. Under Section 11(6A) of the Act, the Court while deciding the petition has to concern itself only with examining the existence of the Arbitration Clause. It is thus not open to the respondent to raise a defense that the petitioner has given a no claim certificate in 2014 in full and final settlement of the amounts due to it. It is true that the Apex Court in the case of ***United India Insurance Co. Limited (Supra)*** had held that once a party settles a matter and accords a full and final settlement it cannot invoke Arbitration for settlement of the said disputes. However, in a recent judgment the Apex Court in the case of ***M/s. Mayavati Trading Pvt. Ltd. vs. Pradyut Deb Burman***, (Civil Appeal No.7023/2019 decided on 05.09.2019), has overruled the judgment in the case of ***United India Insurance (supra)***. Relevant portion of ***M/s. Mayavati Trading Pvt. Ltd. (supra)*** is as under:

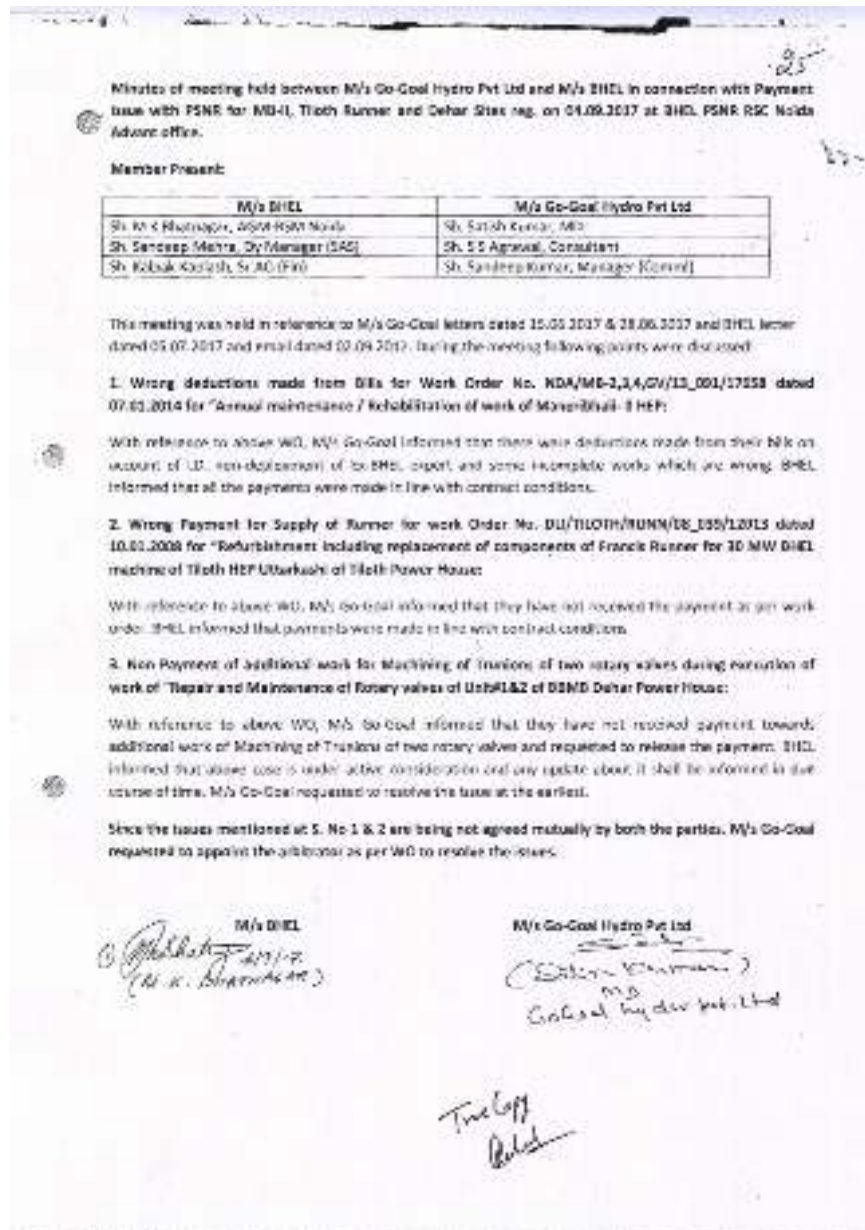
“10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether

accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment Duro Felguera, S.A. (supra) – see paras 48 & 59.

11) We, therefore, overrule the judgment in United India Insurance Company Limited (supra) as not having laid down the correct law but dismiss this appeal for the reason given in para 3 above.”

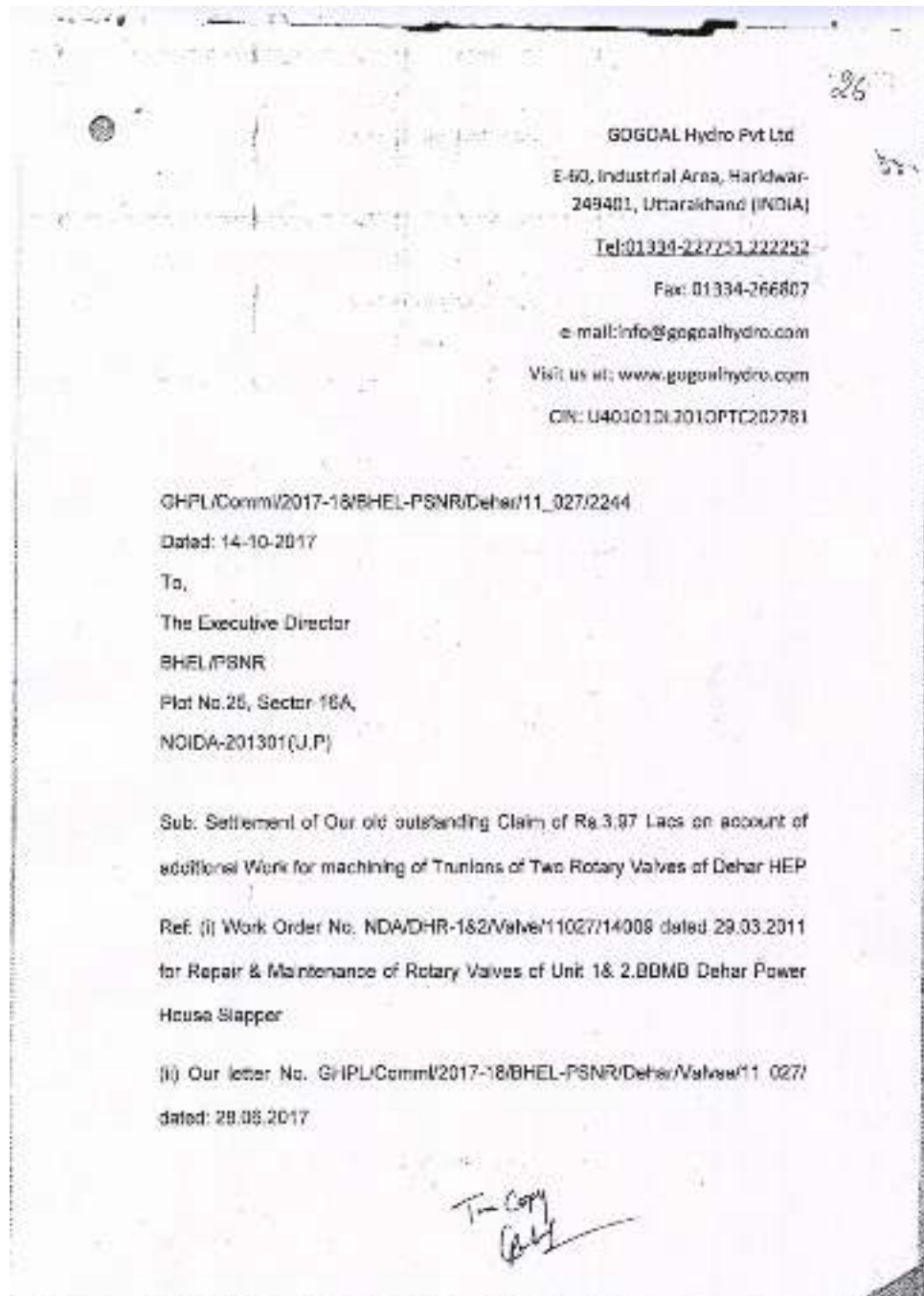
20. In view of the said judgment, this court cannot examine the plea of full and final settlement and the same would be examined by the arbitral tribunal assuming that the respondent has such a defense available to it. This is because the petitioner has taken a categorical stand that the No Claim certificate given by it was for the earlier work order and not for the claim of the additional work being sought in the present petition.

21. This Court would however be required to deal with the issue whether the present petition is barred by limitation. It is true that the claim of the petitioner pertains to the period 2011. However, it is equally true that the respondent was actively considering the claim of the petitioner till as late as October 2017. The Minutes of Meeting dated 04.09.2017 clearly indicate that discussions were taking place to resolve the payment issues. Since no fruitful decision could be arrived at, the payment was not released. However, the minutes record that the petitioner sought appointment of the Arbitrator. Relevant portion of the Minutes dated 04.09.2017 are scanned and placed below:-



22. There is merit in the contention of the petitioner that when the petitioner wrote to the respondent vide letters dated 14.10.2017 and 23.10.2017 seeking release of the outstanding payment, the respondent did not deny that the payments were due and also did not raise any objection to the claims being time barred. On the contrary, the letter clearly reveals that the matter was under 'Active consideration' of the

respondent and it had undertaken to intimate the further course of action. The above letters are scanned and placed below:



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(ii) Our letter No. GHPL/Comm/2017-18/BHEL_PSNR/Dohar/ 11-027/

Payment dated: 15.06.2017

Dear Sir,

We wish to bring to your kind attention towards following issues related to long outstanding payments pending with BHEL/PSNR.

1. Nonpayment of wrong deduction made by PSNR from our Bills for MB-II.
2. Nonpayment of supply of Runner of Tioth Power House.
3. Nonpayment of additional work for Machining of Trunions of Two Rotary Valves.

In this connection numbers of communications were exchanged between BHEL/PSNR and GoGoal Hydro Pvt.Ltd., Haridwar. Meetings were also held at PSNR on the request of BHEL with RSM on 04-08-2017 and with GM (PSNR) on 15-09-2017.

In both the meetings BHEL assured to release the payment of Rs3.87 Lakhs on account of additional work for machining of Trunions of Two Rotary Valves of Dohar HEP shortly.

It is regretted that despite commitment given by BHEL, the said payment has still not been released so far.

Kindly note that this payment is pending since last more than 8 years.

True Copy
(Rohit)

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You are requested to kindly settle our claim before 27-10-2017 the date fixed by Hon'ble Arbitrator appointed by you for dispute related to MB-II and Tiloth HEPs. This will avoid the settlement of Dehar claim through arbitration.

Hoping for an early action,

With best regards,

Satish Kumar

(Managing Director)

GoGoal Hydro Pvt.Ltd.

Encl
(2)

GOGOAL

GoGoal Hydro Pvt. Ltd.

E-90, Industrial Area, Haryana (Gurgaon), Haryana (INDIA)
Tel : 01204-277751, 222255
Fax : 01204-266807
e-mail: gogal@gogalhydro.com
Web site : www.gogalhydro.com
CIN : U40101DL2010PTC00781

GHPL/Comm/2017-18/HHPL-PSNR/Dehar/11.027/2.2.60
Dated : 21-10-2017

To,

The Executive Director
BHPL/PSNR
Plot No. 25, Sector-16A,
NOIDA-201301 (U.P.)

**Sub: Settlement of Our old outstanding Claim of Rs. 3.97 Lacs on account of additional Work for
machining of Trunnions of Two Rotary Valves of Dehar HEP**

**Ref : (i) Work Order No. NDA/DHS-1&2/Valve/11.027/14509 dated 29.03.2011 for "Repair &
Maintenance of Rotary Valves of Unit 1&2, BHPL Dehar Power House, Shaper"
(ii) Our letter No. GHPL/Comm/2017-18/BHPL-PSNR/Dehar/Valves/11.027/ dated: 28.06.2017
(iii) Our letter No. GHPL/Comm/2017-18/BHPL-PSNR/Dehar/11.027/Payment dated: 15.06.2017
(iv) Our letter No. GHPL/Comm/2017-18/HHPL-PSNR/Dehar/11.027/ dated: 14.10.2017**

Dear Sir,

Please refer to our letter dated 14.10.2017 regarding release of our payment of Rs.3.97 Lacs on account of work
for machining of Trunnions of Two Rotary Valves of Dehar HEP.

It is regretted to inform you that neither the payment has been received so far, nor any communication is
received. The hearing date i.e. 27th October, 2017 fixed by the Hon'ble Arbitrator appointed by you for the dispute
of MB-II and Tenth HEP is very near.

I, therefore, request you to please release our payment before 27th October, 2017, which will help us in taking
further course of action for getting our payment.

Thanking you,

Yours faithfully,

(Satish Kumar)
Managing Director
GoGoal Hydro Pvt. Ltd.,

Copy to:

- (i) The General Manager (PSNR),
Bharat Heavy Electricals Limited
Plot No. 25, Sector - 16A, NOIDA - 201301 (U.P.)
- (ii) The Regional Service Manager
(Regional Service Centre),
Bharat Heavy Electricals Limited
Plot No. 25, Sector - 16A, NOIDA - 201301 (U.P.)

With a copy of our letter Our letter
No. GHPL/Comm/2017-18/HHPL-
PSNR/Dehar/11.027/ dated:
14-10-2017

GOGOAL HYDRO PVT. LTD. (Formerly Known as GoGoal Hydro Power Pvt. Ltd.)
Regd. Office : FF-33, Gurgaon Square, Gurgaon, New Delhi - 110025

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BHARAT HEAVY ELECTRICALS LTD.
(A Govt. Of India Undertaking)
Power Sector – Northern Region, Noida
Regional Service Centre-Noida

BHEL: PSNR SER (Noida): GHP: DPH: EW: 11_027

Date: 25/10/2017

Managing Director,
Go Goal Hydro Pvt. Ltd,
Haridwar-249401

Email: info@goggoalhydro.com

Kind Attention: Sh. Satish Kumar

Subject: Settlement of our outstanding claim of Rs. 3.97 Lakh on account of additional work for Machining of Trunions of two rotary valves at Dehar Power House.

Ref: 1. Our WO No NDA/DHR-1&2/Valve/11_027/14009 dated 29.03.2011

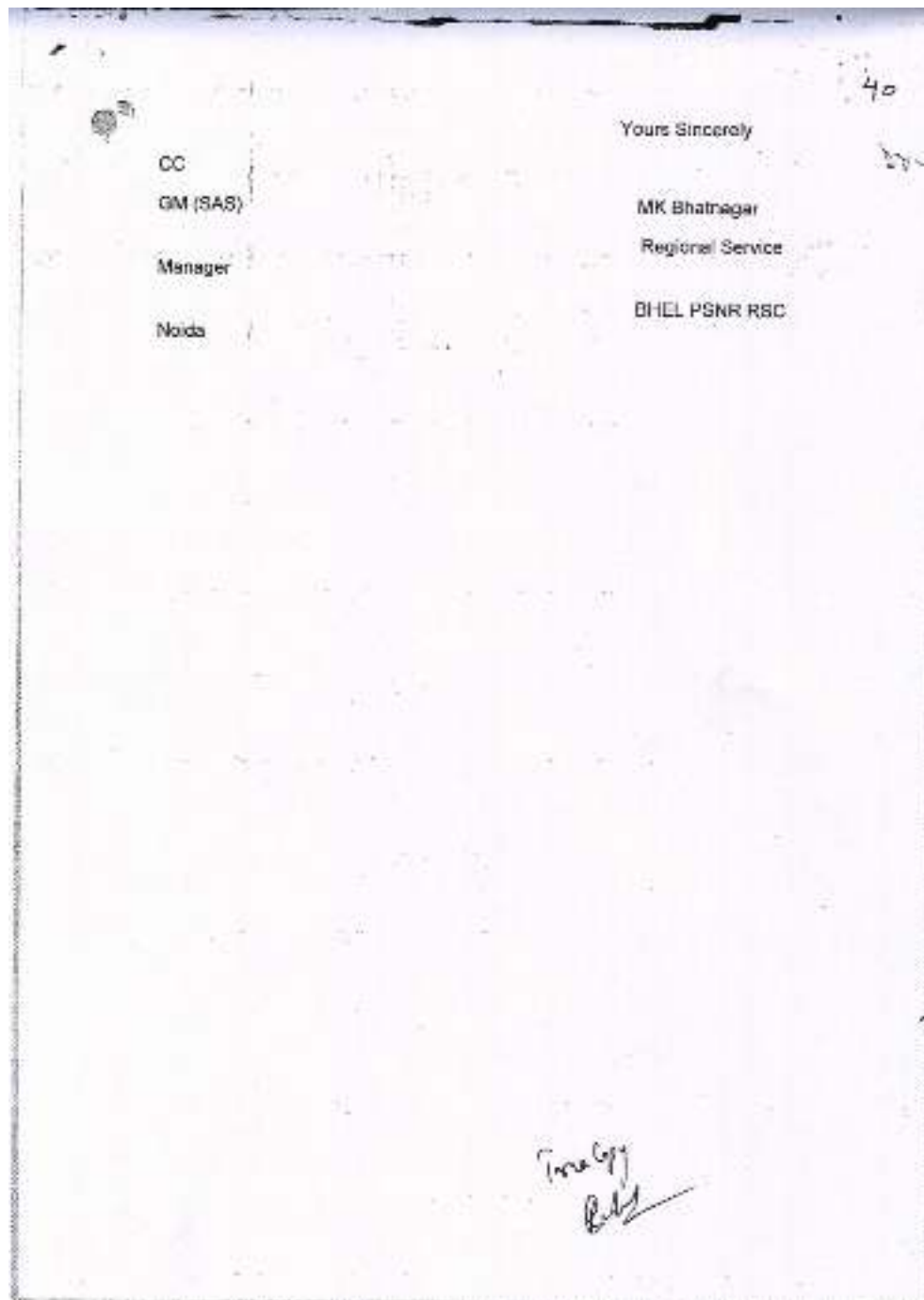
2. Your letter no.GHPL/Comm/2017-18/BHEL-
PSNR/Dehar/11_027/2260 dated 23/10/2017

Dear Sir,

With reference to your above referred letter this has already been communicated to you that your case for additional work Machining of Trunions of two rotary valves at Dehar Power House is under active consideration and after approval of same, we will inform you for further course of action.

Thanking you

True Copy
[Signature]



23. Thus, is it evident that the disputes were alive between the parties till end of 2017 and the petitioner is right in contending that the petitioner was hoping that the payments would be released by the respondent. The present petition was filed in 2019 and thus, in my

view, having being filed within 3 years from 25.10.2017, is not barred by limitation.

24. It is significant to note that the respondent has not disputed the existence of the Arbitration Clause between the parties. The petitioner has invoked the Arbitration Clause on 06.06.2018 but the respondent has failed to appoint the arbitrator. Learned counsel for the petitioner is thus right in contending that the respondent has forfeited its right for appointment of the Arbitrator.

25. A perusal of the Arbitration Clause between the parties, extracted above, shows that the disputes are required to be referred to sole arbitration of General Manager of BHEL or his nominee. In the opinion of this Court, the said clause is clearly in the teeth of the judgment of the Apex Court in ***TRF Ltd vs. Energo Engineering Projects Ltd.***(2017) 8 SCC 377, where a similar Arbitration Clause was in question. The Apex Court after examining the entire law on the subject and Section 12(5) of the Act, held that an ineligible Arbitrator like the Managing Director of one of the parties can neither function as an Arbitrator nor appoint his nominee to be an Arbitrator. Relevant part of the judgment is as under:

“54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription

contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.”

26. In view of the said judgment, the General Manager of BHEL or his nominee are ineligible to be appointed as a Sole Arbitrator to adjudicate the present disputes between the parties.

27. The parties are therefore, referred to the Delhi International Arbitration Centre (‘DIAC’). The arbitration proceedings would be conducted under the aegis of the DIAC.

28. The learned Arbitrator appointed by the DIAC will give a disclosure under Section 12 of the Act.

29. Fee of the Arbitrator would be fixed as per Fourth Schedule of the Act.

30. Copy of the order be sent to the DIAC for information and necessary action.

31. The respondent is nevertheless given the liberty to raise the issue of the claims of the petitioner being time barred as well as the issue of the full and final settlement allegedly accorded by the petitioner, before the Arbitral Tribunal.

32. The above petition is allowed in the above terms.

JYOTI SINGH, J

NOVEMBER 29th, 2019

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