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

+ **ARB.P. 106/2020 & I.A. 1557/2020**

NKC PROJECTS PVT. LTD.

..... Petitioner

Through: Mr.Narender Hooda, Sr. Adv. with
Mr.Simarjeet Singh and Ms.Nandita
Hooda, Advs.

versus

**NATIONAL HIGHWAYS AUTHORITY
OF INDIA**

..... Respondent

Through: Ms.Gunjan Sinha Jain, Advs.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

19.02.2020

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1. This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 with the following prayers:

“In the facts and circumstances as detailed above, this Hon’ble Court may be pleased to:

(i.) appoint a nomine Arbitrator on behalf of NHAI in terms of Clause 67.3 COPA of the Contract dated 14.01.2011 in accordance with Section 11 (6) of the Arbitration & Conciliation Act, 1996; and Substitute Sub-Clause 67:3 with the following:

Any dispute in respect of which the Recommendation(s), if any, of the Board has not become final and binding pursuant to Sub-Clause 67.1 shall be finally settled by arbitration as set forth below. The arbitral tribunal shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer and any

Recommendation(s) of the Board related to the dispute.

(i) A dispute with an Indian Contractor shall be finally settled by arbitration in accordance with the Arbitration & Conciliation Act, 1996, or any statutory amendment thereof.

The arbitral tribunal shall consist of 3 (three) Arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the Appointing Authority as specified in the Appendix to Bid. For the purposes of this Sub-Clause, the term "Indian Contractor" means a Contractor who is registered in India and is a juridical person created under Indian Law as well as a joint venture between such a Contractor and a Foreign Contractor.

(ii) In the case of a dispute with a Foreign Contractor, the dispute shall be finally settled in accordance with the provisions of UNCITRAL Arbitration Rules. If agreed to by both the parties, the disputes shall be settled in accordance with the Arbitration and Reconciliation Act, 1996. The arbitral tribunal shall consist of three Arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the parties, and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the Arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Authority specified in the Appendix to Bid. For the purposes of this Sub-Clause, the term "Foreign Contractor" means a Contractor who is not

registered in India and is not a juridical person created under Indian Law.

(iii) Neither party shall be limited in the proceedings before such tribunal to the evidence or arguments before the Board for the purpose of obtaining its Recommendation(s) pursuant to Sub-Clause 67.1. No Recommendation shall disqualify any Board Member from being called as a witness and giving evidence before the Arbitrator(s) on any matter whatsoever relevant to the dispute.

(iv) Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer, the Contractor and the Board shall not be altered by reason of the arbitration being conducted during the progress of the Works.

(v) If one of the parties fail to appoint its arbitrator in pursuance of Sub-paras (i) and (ii) above, within 30 days after receipt of the notice of the appointment of its Arbitrator by the other party, then the Appointing Authority specified in the Appendix to Bid shall appoint the Arbitrator.

(vi) Arbitration proceedings shall be held at Delhi or at the place near to the project site. The language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(vii) The decision of the majority of Arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc., of its proceedings as also the fees and expenses paid to the Arbitrator appointed by such party or on its behalf shall be borne by each party itself.

(ii) pass such other order(s) as this Hon'ble Court deems fit and proper in the interest of justice."

2. Some of the facts as noted from the petition are that on January 14, 2011 a contract was entered into between the petitioner and respondent / NHAI for completion of balance work of construction of 4-lane road from 111.0 km. to 127.0 km. of Lumding to Maibong section of NH-54D, in the State of Assam for a price of ₹2,25,33,51,850/-, ('Contract', for short).

3. It is averred in the petition that the works at the project site were to be completed by the petitioner within 30 months from the date of commencement of work, i.e. by August 14, 2013. However, owing to delays not attributable to the petitioner, the work could not be completed within the given time as a result of which the petitioner applied for Extension of Time ('EOT', for short) under Clause 44.1 of General Conditions of Contract to the Project Director, NHAI. Such request for EOT was made by the petitioner on 4 different occasions up to March 31, 2017. During this time the Petitioner continued to execute the work and successfully completed the contract on March 31, 2017 in pursuance to which 'Taking Over Certificate' was issued by respondent / NHAI for substantial completion of works as per provision of the Clause 48.1 of the Contract. It is the case of the petitioner that it successfully completed the Defects Liability Period and accordingly Defects Liability Certificate was issued by respondent / NHAI on March 31, 2018, in pursuance to Clause 62.1 of the Contract. Thereafter, the petitioner raised its claims on May 28, 2018 before the Project Director of the respondent / NHAI, for prolongation of the contract period for the reasons not attributable to the petitioner. However, the claims of the petitioner were

rejected by Project Director of the respondent / NHAI on June 29, 2018 based on the recommendation of the Engineer.

4. Subsequently, the petitioner submitted its 'Draft Final Statement' on July 10, 2018 pursuant to Clause 60.9 of COPA, again raising the claims with respect to prolongation of contract period for reconsideration of respondent / NHAI. Later it transpired that respondent / NHAI decided to grant EOT of the Contract to the petitioner for a total period of 1326 days in one go without imposing any liquidated damages. However, the respondent / NHAI agreed to grant such EOT to the petitioner on the condition that the petitioner would enter into a supplementary agreement with the respondent / NHAI and give up its claims arising out of the prolongation of the Contract.

5. It is the case of the petitioner that respondent / NHAI had coerced the petitioner to enter into a contract and give up its claims that had occurred due to the delays not attributable to the petitioner. In fact the Supplementary Agreement dated December 04, 2018 ('SA', for short) was also signed by the parties.

6. It is the case of the petitioner and so contended by the learned Senior Counsel appearing for the petitioner that the SA having been executed under coercion, the petitioner was entitled to the claim on account of prolongation of Contract. It is the case of the petitioner, that it revoked the SA on January 30, 2019 and simultaneously invoked the arbitration clause in the Contract vide notice dated January 30, 2019 and requested the respondent / NHAI to appoint its nominee arbitrator in terms of the provisions of the said Contract.

7. It is the case of the respondent that the request of the petitioner to the respondent / NHAI for appointment of its nominee arbitrator was rejected

vide letter dated October 23, 2019 on the ground that the SA had attained finality.

8. Ms.Gunjan Sinha Jain, learned counsel appearing for the respondent / NHAI contends that this petition is not maintainable on the ground of clear terms of the SA. In other words, there is no dispute which can be arbitrated between the parties. On this submission of the learned counsel for the respondent, Mr.Narender Hooda, learned Senior counsel appearing for the petitioner has relied upon the judgment of the Supreme Court in the case of ***Mayavati Trading Private Limited v. Pradyut Deb Burman, (2019) 8 SCC 714***, to contend that the question as to whether the petitioner was coerced by the respondent / NHAI for executing the SA needs to be adjudicated by the Arbitral Tribunal.

9. Having noted the case of the petitioner and also submissions advanced by the learned counsel for the parties, it is noted that the stand of the parties is primarily related to the execution of the SA, inasmuch as the case of the petitioner, as contended by the learned Senior counsel, is that the SA was executed under coercion and, was subsequently revoked by the petitioner.

10. On the other hand, the learned counsel for the respondent has heavily relied upon the SA to contend that there is no dispute between the parties which can be arbitrated upon. The position of law in this regard is quite well settled in terms of the judgment, as relied upon by the learned Senior counsel appearing for the petitioner, in the case of ***Mayavati Trading Private Limited (supra)***, wherein paragraphs 9, 10 and 11 reads as under:

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9. The 246th Law Commission Report dealt with some of these judgments and felt that at the stage of a Section 11(6)

application, only “existence” of an arbitration agreement ought to be looked at and not other preliminary issues. In a recent judgment of this Court, namely, Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engineering Ltd., (MANU/SC/0511/2019), this Court adverted to the said Law Commission Report and held:

14. The case law Under Section 11(6) of the Arbitration Act, as it stood prior to the Amendment Act, 2015, has had a chequered history. In Konkan Railway Corporation Ltd. v. Mehul Construction Co., (2000) 7 SCC 201 ["Konkan Railway I"], it was held that the powers of the Chief Justice Under Section 11(6) of the 1996 Act are administrative in nature, and that the Chief Justice or his designate does not act as a judicial authority while appointing an arbitrator. The same view was reiterated in Konkan Railway Corporation Ltd. v. Rani Construction (P) Ltd., (2002) 2 SCC 388 ["Konkan Railway II"].

15. However, in SBP & Co. (supra), a seven-Judge Bench overruled this view and held that the power to appoint an arbitrator Under Section is judicial and not administrative. The conclusions of the seven-Judge Bench were summarised in paragraph 47 of the aforesaid judgment. We are concerned directly with sub-paragraphs (i), (iv), and (xii), which read as follows:

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

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(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.

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(xii) The decision in Konkan Rly. Corporation Ltd. v. Rani Construction (P) Ltd. [(2002) 2 SCC 388] is overruled.

16. This position was further clarified in Boghara Polyfab (supra) as follows:

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.

17. As a result of these judgments, the door was wide open for the Chief Justice or his designate to decide a large number of preliminary aspects which could otherwise have been left to be decided by the arbitrator Under Section 16 of the 1996 Act. As a result, the Law Commission of India, by its Report No. 246 submitted in August 2014, suggested that various sweeping changes be made in the 1996 Act. Insofar as *SBP & Co.* (supra) and *Boghara Polyfab* (supra) are concerned, the Law Commission examined the matter and recommended the addition of a new sub-section, namely, Sub-section (6A) in Section 11. In so doing, the Law Commission recommendations which are relevant and which led to the introduction of Section 11(6A) are as follows:

28. The Act recognizes situations where the intervention of the Court is envisaged at the pre-arbitral stage, i.e. prior to the constitution of the arbitral tribunal, which includes Sections 8, 9, 11 in the case of Part I arbitrations and Section 45 in the case of Part II arbitrations. Sections 8, 45 and also Section 11 relating to "reference to arbitration" and "appointment of the tribunal", directly affect the constitution of the tribunal and functioning of the arbitral proceedings. Therefore, their operation has a direct and significant impact on the "conduct" of arbitrations. Section 9, being solely for the purpose of securing interim relief, although having the potential to affect the rights of parties, does not affect the "conduct" of the arbitration in the same way as these other provisions. It is in this context the Commission has examined and deliberated the working of these provisions and proposed certain amendments.

29. The Supreme Court has had occasion to deliberate upon the scope and nature of permissible pre-arbitral judicial intervention, especially in the context of Section 11 of the Act. Unfortunately, however, the question before the Supreme Court was framed in terms of whether such a power is a "judicial" or an "administrative" power - which obfuscates the real issue underlying such nomenclature/description as to -

- the scope of such powers - i.e. the scope of arguments which a Court (Chief Justice) will consider while deciding whether to appoint an arbitrator or not - i.e. whether the arbitration agreement exists, whether it is null and void, whether it is voidable etc.; and which of these it should leave for decision of the arbitral tribunal.

- the nature of such intervention - i.e. would the Court (Chief Justice) consider the issues upon a detailed trial and whether the same would be decided finally or be left for determination of the arbitral tribunal.

*30. After a series of cases culminating in the decision in *SBP v. Patel Engineering*, (2005) 8 SCC 618, the Supreme Court held that the power to appoint an arbitrator Under Section 11 is a "judicial" power. The underlying issues in this judgment, relating to the scope of intervention, were subsequently clarified by *RAVEENDRAN J in National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.*, (2009) 1 SCC 267, where the Supreme Court laid down as follows -*

1. The issues (first category) which 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?

2. The issues (second category) which the Chief Justice/his designate may choose to decide 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?

3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are:

(a) Whether a claim 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)?

(b) Merits of any claim involved in the arbitration.

31. The Commission is of the view that, in this context, the same test regarding scope and nature of judicial intervention, as applicable in the context of Section 11, should also apply to Sections 8 and 45 of the Act - since the scope and nature of judicial intervention should not change upon whether a party (intending to defeat the arbitration agreement) refuses to appoint an arbitrator in terms of the arbitration agreement, or moves a proceeding before a judicial authority in the face of such an arbitration agreement.

*32. In relation to the nature of intervention, the exposition of the law is to be found in the decision of the Supreme Court in *Shin Etsu Chemicals Co. Ltd. v. Aksh Optifibre*, (2005) 7 SCC 234, (in the context of Section 45 of the Act), where the Supreme Court has ruled in favour of looking at the issues/controversy only prima facie.*

33. It is in this context, the Commission has recommended amendments to Sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, it is recommended that in the event the Court/Judicial Authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties

to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, Under Sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained Under Section 37 only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator.

18. Pursuant to the Law Commission recommendations, Section 11(6A) was introduced first by Ordinance and then by the Amendment Act, 2015. The Statement of Objects and Reasons which were appended to the Arbitration and Conciliation (Amendment) Bill, 2015 which introduced the Amendment Act, 2015 read as follows:

STATEMENT OF OBJECTS AND REASONS

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6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely:

(i) to amend the definition of "Court" to provide that in the case of international commercial arbitrations, the Court should be the High Court;

(ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;

(iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;

(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;

(v) to provide that the arbitral tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period up to six months, beyond which period any extension can only be granted by the Court, on sufficient cause;

(vi) to provide that a model fee Schedule on the basis of which High Courts may frame Rules for the purpose of determination of fees of arbitral tribunal, where a High Court appoints arbitrator in terms of Section 11 of the Act;

(vii) to provide that the parties to dispute may at any stage agree in writing that their dispute be resolved through fast track procedure and the award in such cases shall be made within a period of six months;

(viii) to provide for neutrality of arbitrators, when a person is approached in connection with possible appointment as an arbitrator;

(ix) to provide that application to challenge the award is to be disposed of by the Court within one year.

7. The amendments proposed in the Bill will ensure that arbitration process becomes more user-friendly, cost effective and lead to expeditious disposal of cases.

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19. A reading of the Law Commission Report, together with the Statement of Objects and Reasons, shows that the Law Commission felt that the judgments in SBP & Co. (supra) and Boghara Polyfab (supra) required a relook, as a result of which, so far as Section 11 is concerned, the Supreme Court or, as the case may be, the High Court, while considering any application Under Section 11(4) to 11(6) is to confine itself to the examination of the existence of an arbitration agreement

and leave all other preliminary issues to be decided by the arbitrator.

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.”

11. The issue whether the SA was validly executed itself is a dispute which needs to be adjudicated through the process of arbitration in terms of the arbitration clause. This Court is of the view that this petition needs to be allowed and the nominee Arbitrator needs to be appointed on behalf of the respondent / NHAI.

12. This Court appoints Justice Kurian Joseph, a Former Judge of the Supreme Court as a nominee Arbitrator of NHAI.

13. It is expected that both the nominee Arbitrators shall appoint a Presiding Arbitrator as expeditiously as possible.

14. During the course of the hearing, I have been informed that the fee schedule of the Arbitral Tribunal is regulated under the Contract.

15. The petition and connected application are disposed of.

16. Let a copy of this order be sent to Justice Kurian Joseph for information.

V. KAMESWAR RAO, J

FEBRUARY 19, 2020/bh