

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: February 12, 2020

+ ARB.P. 370/2019, I.A. 1289/2020
BVSR-KVR (JOINT VENTURES)

..... Petitioner

Through: Mr. Rajshekhar Rao, Mr. Sarojanand
Jha, Mr. Suraj Malik, Mr. Tushar
Kumar and Mr. Areeb Y. Amanullah,
Advs.

versus

RAIL VIKAS NIGAM LTD

..... Respondent

Through: Mr. Anil Seth and Mr. Amar Panwar,
Advs.

**CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO**

J U D G M E N T

V. KAMESWAR RAO, J

1. The present petition has been filed by the petitioner under Section 11(6) of the Arbitration & Conciliation Act, 1996 ("Act", for short), with the following prayers:

"It is most respectfully prayed that this Hon'ble Court may be pleased to:

(i) appoint an independent and impartial arbitrator preferably a retired judge of the High Court, as may deem fit, to adjudicate the disputes between the Petitioner and the Respondent;

(ii) Pass such other and further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.”

2. The petitioner is a Joint Venture comprising of M/ s BVR Constructions Pvt. Ltd. (Lead Partner) and M/s K. Venkata Raju Engineers & Contractors (Joint Partner) registered under the Indian Partnership Act, 1932. The respondent Company is Rail Vikas Nigam Limited (RVNL), which is a 100% owned PSU of Ministry of Railways, incorporated under the provisions of Companies Act, 1956. The respondent Company on February 24, 2010, under international competitive bidding, invited bids through tender notice No. RVNL/CPM/MAS/OBVPVKT/ OT-6 for “Proposed new BG line between Obulavaripalle and Venkatachalam Execution of earthwork in formation, bridges, road under bridges, Station Buildings, Staff Quarter, General Electrical Works including power line crossings from Km. 00 to Km. 17 between Obulavaripalle and Nethavaripalle in South Central Railway” (“Project”, for short). The petitioner submitted its bid, and subsequent to opening of bids by respondent Company on March 30, 2010, Letter of Acceptance (“LOA”, for short) dated August 30, 2010, bearing letter No. RVNL/CPM/MAS/OBVP-VKT/OT-6, was issued in favour of the petitioner by the respondent Company. Thereafter, an agreement was entered into between the petitioner and the Chief Project Manager, Chennai, of the respondent Company on October 04, 2010 for a contract value of ₹59,87,92,084.15/- with a contractual duration of 24 months (“Contract”, for short). In

terms of Clause 2 of the Contract, General Conditions of Contract (“GCC”, for short) and other documents specified therein form part of the Contract.

3. It is the case of the petitioner that the designs and drawings furnished along with the Contract having undergone drastic deviations at the instance of the respondent Company, the scope of the contract had been altered drastically beyond comprehension, due to which various differences arose between the petitioner and the respondent Company with regard to completion of work as well as payments with regard to new rates for the increased quantities over and above the Bill of Quantities. It is averred that the petitioner continued with the work despite these issues on the assurance given by the respondent Company that all the differences / issues shall be settled amicably upon the completion of work. It is the case of petitioner that it undertook more than 90% of the work incurring huge financial losses in the process and that the respondent Company after completion of more than 90% of the work turned around and expressed their inability to remedy the grievances raised by the petitioner in an equitable manner.

4. It is averred by the petitioner that after various futile requests on its behalf to the respondent Company for redressal of its grievances and settlement of issues and consequent payment of the amounts, the petitioner wrote a letter dated September 06, 2013 to the respondent Company under clause 20.1 and 20.2 of the GCC, wherein various claims under the Contract were made against the respondent Company. The respondent Company vide

its letter dated October 25, 2013 replied to the said letter of the petitioner denying all the claims raised by the petitioner. Subsequent thereto, the petitioner invoked the arbitration clause, clause 20.3, under the GCC to commence arbitration proceedings in the light of the unresolved disputes between the parties.

5. The respondent Company subsequent to invocation of arbitration clause by the petitioner addressed a letter dated November 26, 2013 in terms of clause 20.3 of the GCC providing a panel of five Arbitrators, who were all serving employees of the respondent Company, to the petitioner from which the petitioner was to select its nominee Arbitrator.

6. It is the case of the petitioner that relying upon the terms of clause 20.3 of the GCC, which provides that at least one of the Arbitrators must be a retired officer, the petitioner wrote a letter dated November 27, 2013 to the respondent Company requesting for a revised list of names in compliance with clause 20.3 of the GCC. This request of the petitioner was denied by the respondent Company vide letter dated December 12, 2013 as well as vide letter dated January 11, 2014 against the similar repeated request of the petitioner raised through letter dated December 18, 2013.

7. It is averred in the petition that reeling under heavy losses, as well as under the pressure from the respondent Company to choose a nominee Arbitrator from the already provided panel of Arbitrators, the petitioner under undue force, nominated one Mr. J.S. Mehrotra, ED./P-II, as its nominee Arbitrator vide letter dated February 03, 2014.

8. That on failure of the respondent Company to appoint its

nominee Arbitrator after an expiry of the mandatory 30 days period prescribed under Section 11(4) of the Act and even after the lapse of two months from the date of appointment of the nominee Arbitrator, the petitioner filed a petition under Section 11(5) and 11(6) of the Act before the High Court at Hyderabad, being ARB. Application No.36 of 2014, requesting for an appointment of an Arbitrator to adjudicate upon the claims and dispute between the parties.

9. It is averred by the petitioner that after the filing of the said application before the High Court at Hyderabad, it received a letter dated April 30, 2014 from one Mr. Surendra Kumar on the letter head of respondent Company claiming to be the Presiding Arbitrator of the Tribunal constituted under the arbitration clause of the Contract. It is stated by the petitioner that in the said letter it was further stated that an Arbitral Tribunal had been constituted consisting of Mr. Surendra Kumar as Presiding Arbitrator, Mr. J.S. Mehrotra and Mr. Dinesh Kumar as Co-Arbitrators and that the Tribunal proposed to hold its first hearing on May 19, 2014. It is claimed by the petitioner that it did not receive such a letter regarding the appointment prior to the filing of the application for appointment of an Arbitrator before the High Court at Hyderabad and that the said letter was nothing but an attempt to cover up for the defaults of the respondent Company in failing to appoint its nominee Arbitrator in terms of the arbitration clause provided in the Contract. The petitioner in its reply letter dated May 09, 2014 objected to the constitution of the Arbitral Tribunal which had been done after the filing of the

application under Section 11 of the Act before the High Court at Hyderabad. The petitioner, in the said reply letter, also objected to the appointment of Mr. Dinesh Kumar as the nominee arbitrator of the respondent Company, as the letter of the respondent Company dated March 31, 2014 appointing Mr. Dinesh Kumar as its nominee Arbitrator was never received by the petitioner which amounts to gross violation of the settled position of law that the nomination of an Arbitrator would be taken to have been made only when it is communicated and received by the opposite party and the Arbitrator. The petitioner made its stand clear in the said reply letter that it would not adhere to the programme communicated vide the letter dated April 30, 2014 due to the pending proceedings before the High Court at Hyderabad.

10. Respondent Company issued another letter dated May 15, 2014 to the petitioner wherein it attached the letter dated March 31, 2014, stating that the letter dated March 31, 2014 would have got lost in transit during its initial dispatch. It is the case of the petitioner that the respondent Company failed to provide any proof that the letter dated March 31, 2014 appointing its nominee Arbitrator was sent/dispatched in proper course, due to which the nomination is non-est in the eyes of law and that the respondent Company had forfeited its right to make any nomination since an application under Section 11 of the Act had already been made before the High Court at Hyderabad.

11. It is the case of the petitioner that even if the letter dated March 31, 2014 is deemed to be valid and proper, as per clause

20.3 of the GCC read with clause 1.1.2.6 of the Special Conditions of Contract, the nominee Arbitrator is to be appointed by Chief Project Manager, Chennai, of the respondent Company, who is the persona designate of the respondent Company as per the Contract whereas the said letter had been issued by the General Manager, C&BD, New Delhi of the respondent Company, who is not authorized as per the Contract, making the appointment of Mr. Dinesh Kumar, illegal.

12. It is the case of the petitioner that the above mentioned objection to the appointment of Mr. Dinesh Kumar was communicated to the respondent Company vide letter dated May 23, 2014 and it was informed that Chief Project Manager, Chennai of the respondent Company, who is the authorized representative of the respondent Company as per the Contract, has effectively failed to appoint its nominee Arbitrator within 30 days of the intimation of petitioner's nominee Arbitrator and that the appointment of the respondent Company's nominee Arbitrator was void and illegal, making the constitution the Arbitral Tribunal itself illegal and unlawful.

13. It is the case of the petitioner that the respondent Company had taken a plea of nominating its Arbitrator vide letter dated March 31, 2014, prior to the petitioner filing an application under Section 11 of the Act before the High Court at Hyderabad, in its counter-affidavit to the said application without producing any documentary evidence in support of its plea.

14. The High Court at Hyderabad passed a final order dated December 31, 2018 on the application preferred by the petitioner

under Section 11 of the Act granting liberty to approach the appropriate High Court, as the seat of arbitration as per the Contract was at New Delhi. The relevant portion of the said order reads as under:

"6. For the aforesaid reasons, the Arbitration Application is eligible to be rejected without prejudice to due recourse before the appropriate Chief Justice/High Court, in accordance with Arbitration and Conciliation Act

7. In the result, the Arbitration Application is rejected with such liberty, as noted above."

(Emphasis added)

15. It is pursuant to this order of the High Court at Hyderabad that the petitioner has preferred this present petition before this Court.

16. Further, it is the case of the petitioner that while in the course of filing this petition also, the Arbitral Tribunal issued a letter dated April 17, 2019 seeking parties to hold a hearing on May 01, 2019. The petitioner registered its protest to the Arbitral Tribunal proceeding with the matter as well as informed the Arbitral Tribunal vide its letter dated April 27, 2019 that the petitioner was in the process of filing the present petition and also requested not to proceed in the matter till the final adjudication of this petition.

17. It is the case of the petitioner that in view Section 12(5) read with Schedule VII of the Act subsequent to the amendment brought about by the Arbitration and Conciliation [Amendment] Act, 2015 ('Amendment Act', for short), not only the appointment of Arbitrator by the respondent Company and the

Presiding Arbitrator become non-est and void in law but also the nomination of the Arbitrator by the petitioner, from the panel provided by the respondent Company, is hit by the prohibited relationship laid down in Schedule VII of the Act. Moreover, the arbitration clause, Clause 20.3 of the GCC, provides for the parties to the Contract to submit themselves to any statutory modification or re-enactment to the Act. The relevant portion of Clause 20.3 reads as follows, "*the disputes shall be settled in accordance with the Indian Arbitration Act, 1996 and any statutory modification or re-enactment thereof*". The Contract, thus mandates the parties to satisfy the requirements of the Amendment Act, which came into effect on October 23, 2015. Therefore, without prejudice to the challenge in the present petition, persons forming part of the Arbitral Tribunal are in any case ineligible in law to be appointed as Arbitrators.

18. In response, the reply filed by the respondent Company was returned under office objections and rejoinder thereto filed by the petitioner reiterate the averments and contentions raised by the petitioner in the petition.

19. Mr. Rajshekar Rao, learned counsel for the petitioner submitted that the Clause 20.3 of the GCC does satisfy the requirement as laid down under the Amendment Act and in support of his contention has relied upon a judgment of this Court ***SMS Ltd. v. Rail Vikas Nigam Limited, 2020 SCCOnline Del 77***; wherein same arbitration clause, in a case involving the respondent herein, was held to be invalid. Reliance is also placed on the Supreme Court judgment in ***Perkins Eastman Architects***

DPC and Ors. v. HSCC (India) Ltd., AIR 2020 SC59; to buttress his argument that as per Section 12(5) of the Act, if any person who falls under any of the categories specified in Schedule VII of the Act, shall be ineligible to be appointed as an Arbitrator.

20. He also relied upon the judgment of the Apex Court in ***Walter Bau AG v. Municipal Corporation of Greater Mumbai & Anr., (2015) 3 SCC 800***, to contend that this Court was well within its power to appoint an Arbitrator under Section 11(6) of the Act by deviating from the procedure initially agreed upon by the parties in the arbitration agreement unless the appointment of arbitrator was ex facie valid, which according to him was invalid in view of the Amendment Act.

21. On the other hand, Mr. Anil Seth learned Counsel appearing for respondent Company would submit that the petitioner had invoked the arbitration clause as per Clause 20.3 of the GCC prior to the Amendment Act coming into force and that the petitioner went ahead in appointing an Arbitrator from the panel forwarded by the respondent Company. He further submitted that the petition is not maintainable as there is already an Arbitral Tribunal in place, which has been duly constituted as per the terms of the Contract to adjudicate the differences/dispute existing between the parties.

22. He has, in support of his contention, relied upon the judgment of the Apex Court in ***Antrix Corporation Limited v. Devas Multimedia Private Limited, (2014) 11 SCC 560***; wherein it was held that when appointment of an Arbitrator/Arbitral Tribunal has already been made and the same has been duly

constituted, the appointment could not be questioned in a proceeding initiated by the other party also for the appointment of an Arbitrator, that is to say, that parties were free to challenge the appointment, but not under an independent proceeding for appointment under Section 11(6) of the Act.

23. He has further relied upon the judgment of the Supreme Court in ***Grid Corpn. Of Orissa Ltd. v. AES Corpn. & Ors, (2002) 7 SCC 736***; wherein it was held that once the Arbitral Tribunal has come into existence, a petition under Section 11(6) of the Act was not an appropriate remedy and that it was open for the parties to raise objections as to the constitution and jurisdiction of the Arbitral Tribunal before the Tribunal itself under the relevant provisions of the Act. Reliance is also placed on a co-ordinate judgment of this Court in ***Newton Engineering & Chemicals v. Indian Oil Corporation Ltd. 2007 (93) DRJ 127***; wherein it was also it was held that there was no provision under the Act empowering the Court to terminate the mandate of an Arbitrator appointed in terms of the agreement between the parties and remedy to any challenge against appointment of Arbitrator was under Section 13 of Act before the Arbitrator.

24. It is further the contention of Mr. Seth that reliance placed by the counsel for the Petitioner on ***SMS Rail (supra)*** was ill-founded as the same was distinguishable in facts to the extent that the invocation of arbitration clause was subsequent to the Amendment Act coming into force and also that the Arbitral Tribunal was yet to be constituted, whereas in the present petition, the arbitration clause was invoked by the petitioner on

March 30, 2013 much prior to the Amendment Act coming into force and that the petitioner had already nominated its nominee Arbitrator and the Tribunal was duly constituted thereafter.

25. This contention of Mr. Seth is rebutted by Mr. Rao, by vehemently submitting that the provisions of the Act as amended by Amendment of 2015 are applicable to an agreement entered into prior to the coming into effect of the Amendment Act. In this regard he has relied upon *Voestalpine Schienen GmbH v. DMRC, (2017) 4 SCC 665*; wherein it was held that VII Schedule mentions those circumstances which would attract provisions of Section 12(5) and nullifies any prior agreement to the contrary.

26. Having heard the learned counsel for the parties, the foremost issue, which has arisen for consideration is whether, as submitted by Mr. Seth, this petition is not maintainable as there is already an Arbitral Tribunal in place.

27. In this regard, the plea of Mr. Rao was that the respondent Company having forfeited its right to nominate its Arbitrator within time, the Arbitral Tribunal is illegally constituted. Mr. Rao in support, has contended that pursuant to the appointment of the petitioner's nominee Arbitrator, the respondent was to appoint its nominee Arbitrator within 30 days as prescribed under Section 11(4) of the Act, which it miserably failed to do even after two months thereafter, and in fact no appointment was made till the filing of the petition before the High Court at Hyderabad on April 10, 2014. The stand of the respondent Company in this regard is that it had already appointed Mr. Dinesh Kumar as its nominee

Arbitrator on March 31, 2014. This appointment is disputed by the petitioner, inasmuch as they have not received any communication dated March 31, 2014. In fact, it is the stand of the petitioner that it came to know about the appointment of Mr. Dinesh Kumar as nominee Arbitrator of the respondent Company and Mr. Surendra Kumar as Presiding Arbitrator, through the letter of Mr. Surendra Kumar dated April 30, 2014 wherein he has stated that the Arbitral Tribunal has been constituted with him as the Presiding Arbitrator, Mr. J.S. Mehrotra as petitioner's nominee and Mr. Dinesh Kumar as respondent Company's nominee. It is the case of the petitioner that it did not receive the communication dated March 31, 2014. I find that the respondent Company in its communication dated May 15, 2014 concede to the fact that communication dated March 31, 2014 intimating the appointment as Co-Arbitrators, got misplaced in transit which clearly suggests that till the date of the filing of the petition under Section 11 of the Act, the petitioner had no knowledge about the fact that the respondent Company had appointed its nominee Arbitrator and that the Co-Arbitrators thereafter, have appointed the Presiding Arbitrator. Even otherwise, I find that the communication dated March 31, 2014 appointing nominee Arbitrator on behalf of the respondent Company was beyond the period of 30 days from the date of appointment of the nominee Arbitrator by the petitioner. So, it must be said that the petitioner was justified in filing the petition before the High Court at Hyderabad for appointment of an Arbitrator to resolve the dispute between the parties.

28. Having said that, a larger issue has been raised by Mr. Rao, inasmuch as Clause 20.3 of the GCC relating to appointment of Arbitrators does not suffice the requirement of neutrality of Arbitrators as laid down under the Amendment Act. Clause 20.3 of the GCC reads as under:

“Any dispute in respect of which amicable settlement has not been reached arising between the Employer and the Domestic or Foreign contractor related to any matter arising out of or connected with this contract, the disputes shall be settled in accordance with the Indian Arbitration Act, 1996 and any statutory modification or re-enactment thereof. Further, it is agreed between the parties as under:

(i) Number of Arbitrators: The arbitral tribunal shall consist of 3 (Three) arbitrators.

(ii) Procedure for Appointment of Arbitrators: The arbitrators shall be appointed as per the following procedure:

a. Employer will forward a panel of 5 names to the contractor and contractor will give his consent for any one name out of the panel to be appointed as one of the Arbitrators.

b. Employer will decide the second arbitrator out of the remaining four names in the panel as mentioned in para (a) above.

c. 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 consensus with a period of 30 days from the appointment of the Arbitrators subsequently appointed, then, upon the request of either or both parties, the presiding Arbitrator shall be appointed by the Managing Director, Rail Vikas Nigam Limited, New Delhi.

(iii) Qualification and Experience of Arbitrators: the arbitrators to be appointed shall have minimum qualification and experience as under:-

(a) One member of the tribunal shall be necessarily and working (not below the rank of SAG) or a retired officer (retired not below the rank of SAG, age not exceeding 70 years and in reasonably good mental and physical fitness) of Indian Railway Accounts Service having experience in financial matters related to construction contracts.

(b) One member shall be a technical person having degree in Engineering and may be working (not below the rank of SAG) or retired officer (retired not below the rank of SAG, age not exceeding 70 years and in reasonably good mental and physical fitness) of any Engineering service of Indian Railways or equivalent service in RVNL, and having knowledge and experience of the Railway working.

(c) The Presiding Arbitrator shall necessarily be a serving railway / RVNL officer and he shall have some minimum qualification and experience as specified above for either of the two arbitrators.

(d) Out of 3 Arbitrators not more than One shall be a retired officer.

(iv) No other person other than the persons appointed as per above procedure and having above qualification and experience shall act as arbitrator.

(v) Neither party shall be limited in the proceedings before such arbitrators to the evidence nor did arguments previously put before.

(vi) The reference to arbitration may proceeding, notwithstanding that the Works shall not then be of the alleged to be complete, provided always that the obligations of the Employer, the Engineer and the contractor shall not be altered by the reason of the arbitration being conducted ruing the progress of the Works. Neither party shall be entitled to suspend the Works, nor shall payment to the Contractor be continued to be made as provided by the Contract.

(vii) Arbitration proceedings shall be held at New Delhi, India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be in English.

(viii) The decision of the majority of the arbitrators

shall be final and binding upon both the parties. The expenses of the conciliator / arbitrators shall be as per the scales fixed by the employer from time to time and shall be share equally by the Employer and the Contractor. However, the expenses incurred by each party in connection with the preparation, presentation will be borne by itself.

(ix) All arbitration awards shall be in writing and shall state the reasons of the award.”

29. It was Mr. Rao's plea that this Court in ***SMS Limited (supra)*** in unequivocal terms has held the arbitration clause as invalid as the same does not suffice the concept of neutrality of Arbitrators. Suffice would it be to state, that in ***SMS Limited (supra)*** this Court while dealing with the same arbitration clause in paragraph 32 has held as under:

“32. There is no dispute that there are only eight members out of thirty seven in the panel provided by the respondent Company who are Officers retired from organizations other than the Railways and PSUs not connected with the Railways. The Supreme Court in Voestalpine Schienen GMBH (supra) had observed as to why the panel should not be limited to Government departments or public sector undertakings; and went on to hold that in order to instill confidence in the mind of the other party, it is imperative that apart from serving or retired engineers of government departments and public

sector undertakings, Engineers of prominence and high repute from private sector should also be included, likewise panel should comprise of persons with legal background like Judges and Lawyers of repute as it is not necessary that all the disputes that arise would be technical in nature. In fact, I find in the judgment of the Coordinate Bench of this Court in Simplex Infrastructures Ltd. (supra), the respondent Company had provided 26 names with only nine being Officers who were not connected with Railways or other Railways organizations / Companies, still there being no persons with any legal, accountancy backgrounds or from other diverse fields, the Court went ahead to hold clearly that in spite of repeated judgments relying upon the judgment of the Supreme Court in Voestalpine Schienen GMBH (supra), the respondent refused to comprehensively broad base its panel and had appointed the nominee Arbitrator on behalf of the respondent in the said case. So, it must follow, that the panel of thirty seven names given by the respondent Company, also, does not satisfy the concept of neutrality of Arbitrators as it is not broad based.”

30. From the above narration it is clear that this Court in **SMS Limited (supra)** has held that the panel of 37 names (in this case only five names) given by the respondent Company does not

satisfy the concept of neutrality of Arbitrators as it is not broad based as contemplated by the Supreme Court in the case of *Voestalpine Schienen GMBH (supra)*. The said conclusion is squarely applicable in this case as the respondent Company has not even shown that they have broad based the panel keeping in view the mandate of the Supreme Court in *Voestalpine Schienen GMBH (supra)*.

31. Mr. Seth had only pleaded that the invocation being of the year 2014, i.e. pre-amendment (before October 23, 2015), the Amendment Act as well as the judgments relied upon by Mr. Rao shall not be applicable. I am afraid such a submission cannot be accepted for the reasons; firstly, the petitioner sought appointment of an Arbitrator in its petition before the High Court at Hyderabad after expiry of the mandate under Section 11(4) of the Act and later in this petition as well. Secondly, judicial notice has to be taken of a judgment which invalidated the same arbitration clause under which the Arbitral Tribunal has been constituted, as not satisfying the concept of neutrality of Arbitrators as emphasized by the Amendment Act.

32. Mr. Seth, during his arguments relied upon the judgment in *Antrix Corporation Limited (supra)*, wherein the Agreement between the parties provided for arbitration proceedings to be held in accordance with rules and procedure of either ICC or UNCITRAL. The issue before the Supreme Court was whether, once one party has purportedly invoked the arbitration clause under rules and procedure of ICC and got an Arbitrator appointed by ICC, the aggrieved party can interfere with the already

initiated arbitration proceedings under Section 11(6) of the Act; thereby raising the question of law relating to scope and ambit of powers of the Chief Justice under Section 11(6) of the Arbitration and Conciliation Act, 1996. Neither the neutrality of Arbitrator nor the validity of the arbitration clause was an issue for consideration before the Supreme Court. In view of my above conclusion, this Court is of the view that the judgment in **Antrix Corporation Limited (supra)** is clearly distinguishable.

33. Mr. Seth has also relied upon the judgment of the Supreme Court in **Grid Corpn. Of Orissa Ltd. (supra)** to contend that once Arbitral Tribunal has come into existence a petition under Section 11(6) of the Act was not an appropriate remedy and it was upon for the party to raise objections as to the constitution and jurisdiction of the Arbitral Tribunal itself under the provisions of the Act.

34. Similarly, he had also relied upon the judgment of this Court in **Newton Engineering & Chemicals (supra)** to contend that there was no provision under the Act empowering the Court to terminate the mandate of the Arbitrator appointed in terms of the agreement between the parties and the remedy to any challenge against the appointment of Arbitrator was under Section 13 of the Arbitration and Conciliation Act before the Arbitrator. I am not in agreement with the submissions made by Mr. Seth by relying upon aforesaid two judgments for the simple reason that in **Perkins Eastman Architects DPC and Ors. (supra)**, the Supreme Court while dealing with an application under Section 11(6) read with Section 11 (12) (a) of the Act of

1996 held that as per the scheme of Section 11 of the Act, if there are justifiable doubts as to the independence and impartiality of the persons nominated, and if other circumstances warrant appointment of an independent Arbitrator by ignoring the procedure prescribed, such appointment can be made by the Court.

35. If that be so, there is no impediment for this Court to appoint an independent Arbitrator for adjudicating the dispute and difference between the parties. Accordingly, this Court appoints Justice A.K. Sikri, a Former Judge of the Supreme Court as the Arbitrator, who shall adjudicate the dispute and differences between the parties. The fee of the learned Arbitrator shall be governed by the Fourth Schedule to the Act. Accordingly, the petition is disposed of. No costs.

I.A. 1289/2020 (by respondent for condonation of 45 days delay in filing the reply)

Since I have considered the stand of the respondent on the basis of the oral submissions and the judgments relied upon by Mr. Anil Seth, this application filed by the respondent for condonation of 45 days delay in filing the reply has become infructuous.

V. KAMESWAR RAO, J

FEBRUARY 12, 2020/aky