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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 16.12.2019
Pronounced on: 12.05.2020

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ARB.P. 389/2019

AAIC BUILDING SOLUTIONS LTD. (FORMERLY, AIC
BUILDING SOLUTIONS LTD) Petitioner

Through Mr. Sahil Raveen, Advocate

versus

ARCHAEOLOGICAL SURVEY OF INDIA & ANR.

.... Respondents

Through Mr. Jayant Bhatt, Sr. Counsel
with Ms. Deepali Suri, Mr.
Mohit Dagar, Ms. Apoorva
Jain, Ms. Umang Verma,
Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Present petition has been filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act') for appointment of an Arbitrator to adjudicate the disputes between the parties in relation to a Work Order dated 21.12.2009.

2. The facts necessary to mention for deciding the present petition are that on 20.09.2009, Respondent No. 1 issued Notice Inviting Tender for the work of "S/R to Hauz Khas". On 16.12.2009, the Superintending Archaeological Engineer gave approval to the Superintending Archaeologist for awarding Tender

to M/s AIC Building Solutions Ltd., being the lowest Bidder. On 21.12.2009, a Work Order was issued to M/s AIC Building Solutions Ltd. Subsequently, M/s AIC Building Solutions Ltd. was taken over by the petitioner herein. Accordingly, the Agreement for the project was signed between ASI and the Petitioner and the payments relating to the Project were also made to the Petitioner, who executed the Project on Standard Terms, as set out in the General Conditions of Contract (hereinafter referred to as 'GCC') for CPWD Works as per the 2008 Manual.

3. It is the case of the petitioner that the Work Order had Clause 6(B) which clearly stipulated the material to be provided for execution of the work. Clause 6(B) is as under:

“P/L 10 em thick Hard Sand Stone flooring in pathways with top dressed with base lime Surkhi mortar 1:1:1 (1 U. Lime 1 Surkhi, 1.B.P. Sand) mixed with colouring Pigment to match the stone lead 150 mts.”

4. The execution of the aforesaid work item, according to the Petitioner was dependent on supply of the material provided in the Work Order. However, at the time of execution of the work, petitioner was provided “Hard Stone” instead of “Hard Sandstone” and the issue of the difference in the material so provided was raised before the concerned officer before the execution of the work. Petitioner avers that due to the Commonwealth Games approaching, the Petitioner was compelled to proceed with the work with the given material but was assured that additional money shall be paid for change in the scope of work. On the assurance so given,

petitioner had proceeded with the work.

5. As per the Petitioner, cost incurred by the petitioner was significantly higher than the specified cost in the Work Order. Due to the change in the material, the volume of work required to dress the stone and the cost of labour increased considerably. The Petitioner at all times had kept Respondent No. 1 informed of the difference in work and the cost.

6. Learned counsel for the petitioner submits that despite various letters written to Respondent No. 1, Final Bill for the work done at the increased cost was not been cleared on the pretext that it was under consideration, and payment is still pending. Even the Earnest Money Deposit has also not been released till date. Learned counsel for the petitioner further submits that on 08.11.2018, Respondent No. 1 in its internal letter to the Director General of Respondent No. 1 acknowledged the pending payment and has recorded that due to lack of instructions, no decision has been taken.

7. Learned counsel further submits that the Work Order contains Arbitration Clause, being Clause 25 in the GCC and the Petitioner on 20.04.2019 invoked the said Arbitration Agreement. Since there is no 'Chief Engineer', CPWD as envisaged in Clause 25 in ASI, Petitioner requested the Additional DG of the concerned Region to appoint an Arbitrator. It is submitted that the notice has been duly received by Respondent No. 1. Respondent No. 2 vide its letter dated 06.05.2019, replied to the notice and stated that the work was executed by the Petitioner for ASI and CPWD has nothing to do

with the Work Order or the Arbitration Agreement. Only the format of CPWD has been used in Work Order and CPWD has no concern with the Petitioner. This according to the Petitioner is an error, as Respondent No. 2 is the appointing Authority under the Arbitration Agreement. Since the Authority has failed to appoint the Arbitrator, the present petition has been filed for appointment of the Arbitrator.

8. Reply has been filed in opposition to the petition only by Respondent No. 1, ASI (Archaeological Survey of India). Stand of Respondent No. 1 is that on 20.09.2009, ASI had issued an NIT for the work at Hauz Khas Complex. The Tender for 'S/R to Hauz Khas' was divided into two components i.e, Labour Component and Material Component. Work Order No. 13/20/2008-W-65 was awarded to another Firm for supply of material and to M/s AIC Building Solutions Ltd., for executing the labour component. Petitioner was told by Respondent No. 1 to execute the labour component of the Work Order for Hard Sandstone in accordance with Serial No. 6(B) of the Work Order. The estimated rate of the flooring was 1424.20 per sq. meter. It is contended by the learned counsel for respondent that Petitioner had raised more than five running bills till 17.08.2011 and had completed 2009.30 sq. meters of work out of total assigned work for 2085.60 sq. meters, without raising any objection regarding the hardness of the stone supplied. It is argued that the malafide intent of the petitioner can be seen from the fact that the petitioner did not even raise the said issue by giving a written claim to the Engineer In-Charge in terms of Clause 25(i) of the GCC. Clause 25(i) relied upon by Respondent No. 1

reads as under:

“ If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the, Engineers- in -Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter. If the Superintending Engineer fails to give his instructions or decision in written within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal of the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desire, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for appointment of arbitrator failing which the 'Said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.”

9. Petitioner has for the first time raised the concern vide its letter dated 21.08.2012, after receiving several payments under the running account bills.

10. It is further argued that despite the fact that the Claim of the Petitioner was time-barred, in order to examine that there is no undue loss to the Petitioner, the Superintending Archaeologist wrote to the DG of Respondent No. 1 vide letter dated 12.12.2013 for constitution of a Committee to resolve the matter. It is submitted that the Inspection Report of the Committee

recommended that the Claim of the Petitioner was not appropriate, having been raised after completion of the work and having executed more than 85% of the assigned work. The Committee at the same time recommended that the stone used by the petitioner after necessary dressing be examined by GSI or MPL in their Laboratory, to determine its exact characteristic and hardness. Petitioner was also asked to clarify vide letter dated 11.12.2014 as to why the grievance was not raised till the final bill was settled, but the Petitioner never responded. Learned counsel points out that both the GSI and the MPL, however, never gave any report on the issue. Respondent No. 1, then, approached IIT-Delhi for conducting the test and it was found that two samples out of three were made out of Quartzite, which is nothing but hard sandstone. The sum and substance of the report was that there was no difference between hard stone and hard sandstone for the Work, as both require equal effort in dressing, by chiseling.

11. Learned counsel for the respondent further submits that the petitioner has tried to mislead the Court by giving an impression as if there was Tripartite Agreement between the parties i.e. the Petitioner and both the Respondents, whereas CPWD has nothing to do with the Agreement in question. Respondent No.1 merely follows the format/procedure of the CPWD Manual for awarding the Tender.

12. Learned counsel for Respondent No. 1 further contends that the petition is even otherwise not maintainable as the Claims sought to be raised by the Petitioner are time-barred.

13. Without prejudice to the above contentions, learned counsel for respondent No. 1 draws the attention of this Court to Clause 25 of the GCC and submits that the said Clause relied upon by the Petitioner lays down a completely different procedure for resolution of disputes than the one followed by the Petitioner. The Petitioner instead of writing a letter to the Superintending Engineer within 15 days of the arising of the dispute and thereafter writing to the Chief Engineer for appointment of an Arbitrator, has directly approached this Court.

14. It is further pointed out that as per the procedure, Petitioner in case of any dispute had to write to the Superintending Engineer for its decision and in case he failed to give a decision, then within 15 days, Petitioner ought to have filed an appeal before the Chief Engineer. If the Petitioner was dissatisfied with this decision, then he had to give a notice to the Chief Engineer for appointment of an Arbitrator. Petitioner has taken no recourse to this Clause and has approached this Court after several years of the arising of the dispute, if any.

15. Petitioner in its rejoinder argued that counsel for Respondent No. 1 is incorrect in his submission that it only follows the format or the procedure of the CPWD Manual. It has failed to bring to the attention of this Court that while making the Petitioner sign the Standard Form Agreement which is the 'CPWD General Conditions of Contract', Respondent No. 1 had given reference of the Work Order dated 21.12.2009 issued in favour of the Petitioner. Learned counsel for the petitioner has also drawn the attention to the

Agreement signed by Petitioner and Respondent No. 1, relevant part of which reads as under:

“I/We have read and examined the notice inviting tender Schedule A, B, C, D, E & F. Specifications applicable, Drawings & Designs, General Rules and Directions, Conditions of Contract, clause of contract, Special conditions, Schedule of Rate & other documents and Rules referred to in the conditions of contract and all other contents in the tender document for the work”.

16. It is submitted that this Agreement was entered into with open eyes, aware of Clause 25 which contains an Arbitration Clause. It is further argued that it is wrong for Respondent No. 1 to contend that the Petitioner should have first approached the SE and thereafter the CE and has failed to mention that Respondent No. 1 has no Engineer In-Charge, SE or CE. The details of hierarchy and the Authorities in Respondent No. 1 are available on the website and are as under:

Serial No.	Name and Designation	Contact Number	Mobile Number
1	 Superintending Archaeologist	011-24654832 011-24654833	N.A.
2	 Dy. Superintending Archaeological Engineer	011-24654830	N.A
3	 Dy. Superintending Archaeologist	011-24654829	N.A
4	 Dy. Superintending Archaeologist	011-24654829	N.A
5	 Asst. Superintending	011-24695350	N.A

	Archaeologist		
6	 Administrative Officer	011-24695347	N.A
8	 Assistant Archaeologist	N.A	N.A
9	 A.S.A.E.	011-24654830	N.A

17. It is denied that the Petitioner has raised the issue of difference in the material supplied only on 21.08.2012. As a matter of fact, when the Petitioner initiated the work, it had noticed that the stone supplied was hard stone and had immediately raised the issue with Shri S.N. Sharma, Deputy Superintending Archaeological Engineer, in May 2010. Counsel reiterates that on account of Common Wealth Games he was forced into continuing the work with the material supplied. Even subsequently, on 28.01.2011, the said issue was raised. Learned Counsel has drawn attention to various letters placed on record. It is further argued that Respondent No.1 in its letter has acknowledged that hard stone was in fact used in the floorings of the pathways and this shows that Respondent No. 1 was very well aware of the difference in material supplied.

18. Learned counsel further argues that this is fortified by the fact that a Committee was constituted to resolve the issue on 19.12.2013, which recommended a specialized Laboratory to test the material. IIT-Delhi was also requested to carry out the test. Further, on 08.09.2016, Superintending Archaeologist had written

to the DG requesting to sanction Rs.2,31,314/-, due to the Petitioner towards Security Deposit and the EMD. However, despite acknowledging the debt, Respondent No. 1 did not make the payment. Left with no other option, Petitioner again requested Respondent No. 1 on 24.10.2018 to release the payments. Despite assurances, money was not released and the Petitioner vide letter dated 19.01.2019, raised its grievance with the DG of Respondent No. 1.

19. Learned counsel for the Petitioner vehemently argues that even in the reply to the present petition, Respondent No. 1 has acknowledged that payment is due to the petitioner. Counsel has drawn the attention of the Court to para 11 of the petition which reads as under:

“ The Respondent No. 1 has continuously recognized that payment for the substituted work needs to be made to the Petitioner. However, despite various communications, no conclusive solution has been arrived at between the parties despite the complete execution of the work in the Project. The final bill for the work done by the Contractor in the Project has also not been made despite repeated assurances given by the officials of ASI. The present petition is limited in its scope of seeking appointment of an arbitrator for the adjudication of disputes between the Petitioner and the Respondent No. 1. The Petitioner seeks liberty to place on record additional documents, if need so arises.”

20. Counsel also points to the parawise reply to the said paragraph, which reads as under:

“That the contents of the Para 11 of the Petition are matter of record. However, it is submitted that the claim which is put forward by the Petitioner is not a dispute which is enforceable through arbitration proceedings reason being the

steps which were required to be taken by the Petitioner in accordance with clause 25 of GCC are not being taken. Furthermore, mere acknowledging the claim of the Petitioner does not mean that the claim that is put forward by the Petitioner is enforceable through Arbitration.”

21. It is thus prayed that the petition be allowed and an Arbitrator be appointed by this Court so that the disputes between the parties are adjudicated.

22. I have heard the learned counsels for the parties and examined their submissions.

23. It is undisputed that pursuant to the Notice Inviting Tender, Respondent No. 1, ASI, had issued Work Order to M/s AIC Building Solutions which was taken over by the Petitioner herein. The Work Order dated 21.12.2009, which is placed on record, contains the description, specification of work, total quantity to be executed and the amounts payable against the various Heads. Para 7 of the Work Order clearly mentions that the work would be executed as per CPWD specifications, IS Code and Archaeological Survey of India, Specifications.

24. Petitioner has also placed on record a document at page 26 which are the General Guidelines. Page 25 is a document titled ‘Percentage Rate/Item Rate Tender and Contract’. The Index of the said document mentions the Guidelines for use of standard form and there is also a reference to Tender Form CPWD-7/8. Petitioner has also filed a document at page 28 which is the CPWD Form-7/8 and bears the heading ‘Government of India-Central Public Works Department’.

25. Para (A) of the said Form reads as under:

(A) Tender for the work of:-
S.R. to Hong Kong Cables (LCC)

(i) To be submitted by 3.00 p.m. hours on 15/10/09 to
 (time) (date)

(ii) To be opened in presence of the tenderers who are present at 3.30 p.m. hours
 on 15/10/09 at the office of 9813/77-703

Issued to: M/S AIC Building Solutions Ltd.

Signature of officer issuing the documents: [Signature]

Designation: [Signature]

Date of Issue: [Signature]

It is clear from a reading of this document that there is a mention of award of Tender in favour of M/s AIC Building Solutions Ltd.

26. Page 30 contains the 'Acceptance of the Tender' and is signed by the concerned officer of Respondent No. 1 as well as the Managing Director of M/s AIC Building Solutions Ltd. Relevant part is scanned and placed below:

ACCEPTANCE

The above tender (as modified by you as provided in the letters mentioned hereunder) is accepted by me for and on behalf of the President of India for a sum of Rs. 7279624/- (Rupees.....)

The letters referred to below shall form part of this contract Agreement:-
W/O No. 13/2012-8-65 dt. 21/2/09

For A.I.C. Building Solutions Ltd.
[Signature]
 Managing Director

Dated: [Signature]

For & on behalf of the President of India.
[Signature]
 Secretary to the Government of India
 Department of Public Works
 Civil Engineering Division
 New Delhi-110055

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At the turn 150 Years of Engineering Excellence

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27. Perusal of page 28 which is the CPWD Form-7/8 clearly shows that the specifications, drawings and design and *General Rules & Directions, Conditions of Contract* would be applicable to the Tender in question. Relevant para has been reproduced in paragraph 15 of this judgment.

28. The General Rules and Directions have been annexed with the Petition and start from page 32 of the paper book. The document referred to as “Clauses of Contract in the Acceptance of Tender Document” is also annexed with the petition. Page 110 of the Clauses of Contract clearly refers to Clause 25 which contains the mechanism for Settlement of Disputes and Arbitration. The relevant clause reads as under:

“Settlement of Disputes & Arbitration Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the, Engineers- in -Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for

written instruction or decision. Thereupon, Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter. If the Superintending Engineer fails to give his instructions or decision in written within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal of the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desire, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Chief Engineer for appointment of arbitrator failing which the 'Said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or, difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Director General of Works, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is a term of this contract that the party invoking arbitration shall give a list disputes with amount claimed in respect of each such dispute alongwith the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal. It is also a term of this contract that that no person, other than a person appointed by such Chief Engineer CPWD or the administrative head of the CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to

arbitration at all. It is also a term of this contract that of the arbitrator does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer – incharge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government, shall be discharged and released of all liabilities under the contract in respect of these claims. The arbitration shall be conducted in accordance with the provision of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modification or reenactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.”

29. It is thus clear that the Tender in question was governed not only by the specifications as per the CPWD Manual, but was also governed by the General Rules and Clauses of Contract mentioned in the CPWD Manual and Guidelines. Clause 25 which is the part of the Clauses of Contract was intended by the parties to be the mechanism of resolution of disputes between the parties.

30. In my opinion, contention of respondent No. 1 that the CPWD Manual and the Guidelines therein, were relevant only to the extent that the Work Order was executed on a Form prescribed by the Manual, merits rejection. It is clear from perusal of the documents referred to above, that the Work Order and its Acceptance referred to and included the General Rules and Clauses of Contract mentioned in the CPWD manual which in turn contains Clause 25 as an Arbitration Clause. Thus there exists an Arbitration Agreement between the parties.

31. Under Section 11(5) of the Act, this Court is required to examine only the existence of an Arbitration Agreement, after insertion of (6A) in Section 11, by 2015 Amendment to the Act.

Following paras from the judgment of the Supreme Court in the case of *Mayavati Trading Private Limited v. Pradyut Deb Burman*, (2019) 8 SCC 714 are relevant in this regard and read as:

“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 & Engg. Ltd. [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : 2019 SCC OnLine SC 515] , this Court adverted to the said Law Commission Report and held: (Garware Wall Ropes Ltd. case [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : 2019 SCC OnLine SC 515] , SCC paras 8-14)

* * *

10. However, in SBP & Co. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] , a seven-Judge Bench overruled this view and held that the power to appoint an arbitrator under Section 11 is judicial and not administrative. The conclusions of the seven-Judge Bench were summarised in para 47 of the aforesaid judgment. We are concerned directly with sub-paras (i), (iv) and (xii), which read as follows: (SCC pp. 663-64).

(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.

* * *

(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.

11. This position was further clarified in *Boghara Polyfab* as follows: (SCC p. 283, para 22)

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. [SBP & Co. v. Patel Engg. Ltd., (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.

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12. 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.* [*SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618] and *Boghara Polyfab* [*National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] are concerned, the Law Commission examined the matter and recommended the addition of a new sub-section, namely, sub-section (6-A) in Section 11. In so doing, the Law Commission recommendations which are relevant and which led to the introduction of Section 11(6-A) are as follows:

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30. After a series of cases culminating in the decision in *SBP & Co. v. Patel Engg. Ltd.* [*SBP & Co. v. Patel Engg. Ltd.*, (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 (P) Ltd.* [*National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117], where the Supreme Court laid down as follows: (SCC p. 283, para 22)

22.1. 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?

22.2. 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?

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

(a) 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)?

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

* * *

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 Chemical Co. Ltd. v. Aksh Optifibre Ltd. [Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (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.

13. Pursuant to the Law Commission recommendations, Section 11(6-A) 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’

* * *

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—

* * *

(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;

14. 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. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] 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 Sections 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 [United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd., (2019) 5 SCC 362 : (2019) 2 SCC (Civ) 785] , as Section 11(6-A) 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 in Duro Felguera, SA — see paras 48 & 59.

32. Accordingly, Mr. Justice Pradeep Nandrajog, former Chief Justice of Bombay High Court, is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.

33. The address and mobile number of the learned Arbitrator is as under:

Mr. Justice Pradeep Nandrajog,
Former Chief Justice of Bombay High Court
K-29, Ground Floor, Hauz Khas Enclave,
New Delhi-110016
Mobile: 9818000130

34. The learned Arbitrator shall give disclosure under Section 12 of the Act before entering upon reference.

35. Fee of the Arbitrator shall be fixed as per Fourth Schedule of the Act.

36. Respondent is at liberty to raise the issue of the claims being allegedly time barred before the Learned Arbitrator. Needless to state that if the objection is raised by the Respondent, the same will be decided by the Arbitrator in accordance with law.

37. The petition is accordingly allowed.

JYOTI SINGH, J

MAY 12th, 2020
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