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

Decided on : 11th December, 2020

+ ARB.P. 461/2020

LARSEN AND TOUBRO LIMITED

..... Petitioner

Through: Mr. Gourab Banerji, Sr.
Advocate with Mr. Ananya
Kumar, Mr. Rajat Joneja and
Mr. Kartikey Gupta, Advs.

Versus

PUNATSANGCHHU-1 HYDROELECTRIC
PROJECT AUTHORITY

..... Respondent

Through: Mr. Bharat Singh, Adv.

CORAM:

HON'BLE MR. JUSTICE C .HARI SHANKAR

JUDGEMENT (ORAL)

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11.12.2020

(Video-Conferencing)

1. This petition, at the instance of the petitioner M/s. Larsen and Toubro Limited, calls on this Court, to appoint an arbitrator on behalf of the respondent Punatsangchhu-1 Hydroelectric Project Authority, so that the arbitrator appointed by the petitioner, and the arbitrator thus appointed by this Court on behalf of the respondent, could appoint a presiding arbitrator, and the Arbitral Tribunal, so constituted, could proceed to arbitrate on the dispute between the parties.

2. Mr. Bharat Singh, learned counsel for the respondent, very

fairly states that his client does not question the existence of an arbitrable dispute between the parties, or the necessity to refer the dispute to arbitration. He, however, submits that the petition is not maintainable before this Court, under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “1996 Act”), but that the petitioner would have to approach the High Court of Thimpu, Bhutan.

3. A fasciculus of the dispute. A contract was executed between the petitioner and the respondent on 14th April, 2009. The respondent was required by the contract, to execute work relating to the construction of diversion tunnel, dam, intake and de-silting arrangement, including hydro-mechanical works of the Punatsangchhu-I Hydroelectric Project, located in the Wangdue Phodrang District of Bhutan. The averments in the petition, setting out the dispute with the respondent, may, without prejudice to the right of the respondent to question the correctness thereof, be reproduced thus:

“(i) The Respondent invited bids for the Construction of Diversion Tunnel, Dam, Intake and Desilting Arrangement, including Hydro-Mechanical works of the Punatsangchhu-I Hydroelectric Project (1200 MW), located in Wangdue Phodrang District of Bhutan ("Project Works").

(ii) The Petitioner submitted its bid. Upon evaluation of the techno-commercial and the price bids submitted by various bidders, the Respondent found the Petitioner's bid to be the most qualified. Accordingly, by way of a Letter of Award dated 27.03.2009 ("LoA"), the Petitioner was awarded the Project Works by the Respondent.

(iii) Subsequently, the parties entered into the Contract.

(iv) Under the Contract, the Petitioner was required to carry out the Project Works on an item rate basis. The agreed contract price was INR 1245,51,73,905/- (Rupees Twelve Hundred Forty-Five Crore Fifty-One Lakh Seventy-Three Thousand Nine Hundred and Five only).

(v) In terms of Clause 43 of the Contract, the Petitioner was required to complete the Project Works within a period of 66 months from the 30th date of issue of the LoA. The commencement date of the Project works was 26.04.2009 and the scheduled completion date was 26.10.2014.

(vi) In addition to the overall completion date, the Contract stipulated certain Intermediate Milestones ("Intermediate Milestones"), which were agreed to in the construction programme in terms of Clause 14(i) of the Contract ("Work Programme").

(vii) Upon issuance of the LoA, Petitioner duly mobilized the required resources for completion of the work within the agreed timelines. However, right from inception, the Project Works were delayed on account of multiple variation orders issued by the Respondent. These variation orders resulted in an increased scope of work, substantially beyond what was originally agreed by the parties.

(viii) As a consequence, the timeline for achievement of the intermediate milestones was also impacted. Acknowledging the effect of the variation orders, the Respondent revised the duration for achievement of Milestone-1 and the completion date for the said milestone was extended from October 2010 to November 2011. The Petitioner achieved Milestone-1, in terms of the revised schedule.

(ix) In terms of the requirements of the Contract, Petitioner also mobilized resources and carried out the various preparatory works required for dam concreting (forming part of Milestone-2). The Petitioner mobilized and deployed a substantial number of resources, including specialized site-specific equipment, to be able to achieve the average excavation progress required as per the agreed Work Programme.

(x) Though the Petitioner was diligently executing the

work as required, in July 2013 there was a slope failure on the right bank of the river. As a consequence, the right bank worksite became unavailable for excavation and / or concreting of the dam. The dam excavation work was brought to a halt and all the resources deployed by the Petitioner for excavation works, as well as the concreting equipment, were rendered idle.

(xi) Acknowledging the slope failure that had taken place in July 2013, as well as the consequent non-availability of the worksite, the Engineer-in Charge issued variation orders in September 2013 for right bank stabilization works, in order to make the site available for excavation and concreting activity.

(xii) The Petitioner carried out the additional work required in terms of the variation orders issued by the Engineer-in-Charge. Thereafter, in June 2014 some portion of the excavation work was re-started at the right bank, albeit in a restricted manner. However, the concreting work could not be started.

(xiii) It was, however, found that the variation orders/remedial measures directed by the Engineer-in-Charge were insufficient to deal with the issue of slope failure, therefore, the excavation works at the dam pit could also not be continued after January 2015.

(xiv) Based on further variation orders issued by the Engineer-In-Charge, a second phase of stabilization work was started by the Petitioner in the month of June 2015. However, even before the stabilization work could be completed and excavation and concreting work could commence, there was another right bank slope failure in August 2016, in an area where additional stabilization measures had not been carried out.

(xv) Thereafter, even though further stabilization measures were ordered and executed, the Respondent could not arrive at a solution to address the slope failure issue. As a result, work at the right bank was completely suspended by the Engineer-in-Charge from May 2017 to September 2017, due to rock movement. While the excavation work resumed in October 2017, it progressed at a very slow pace since rock movement at the right bank had not stopped.

(xvi) The Petitioner was also instructed to carry out additional cable anchors at different elevations of right bank which were subsequently suspended or abandoned midway at a few locations.

(xvii) In December 2018, the Petitioner was instructed to off-load the mass that had slid in August 2016. While the off-loading activity was being carried out, on 22 January 2019 reactivation (slope failure) of the August 2016 slide took place at right bank.

(xviii) The excavation works have come to a complete standstill since the last major slope failure that occurred in January 2019.

(xix) Effectively, therefore, the Respondent has been unable to provide the Petitioner effective access to the right bank worksite, for both excavation and concreting works, right from 2013 till date. It is also unclear when the Respondent will be able to provide such access.

(xx) Though the Project Works were scheduled to be completed in 66 months, more than 135 months have already elapsed. The Petitioner, for no fault of its own has, however, been able to complete less than 40% of the intended scope of the Contract. The Respondent has already accorded approval for MileStone-2 till December 2019 (which has resulted in MileStone-3 & MileStone-4 standing extended to March 2021 and September 2022, respectively) and a request on behalf of the Petitioner, for further extension of time, is pending consideration.

(xxi) The Respondent's inability to provide access to the Site, as detailed above, has resulted in the Petitioner's deployed resources remaining idle for substantial periods of time. Despite the Petitioner's best efforts to mitigate the losses it was suffering, on account of the location of the Project as well as the uncertainties caused by the Respondent's lack of clear instructions, these losses were substantial. All these losses were caused on account of the Respondent's inability to provide access to the site to the Petitioner; and are reimbursable by the Respondent under the Contract.

(xxii) In addition, the Petitioner is also entitled to payment of various amounts under different provisions of the Contract. These payments are due as reimbursements for amounts spent by the Petitioner as well as compensation for additional work executed by the Petitioner on account of Respondent's instructions.”

5. Clause 67 of the General Conditions of Contract (hereinafter referred to as “GCC”) provided for resolution of the disputes, between the parties, by arbitration, and reads thus:

“67. ARBITRATION

Except where otherwise provided in the Contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein 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, design, drawings, specifications, estimates, instructions, orders to 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.

i) If the Contractor considers any work demanded of him to be outside the requirements of the Contract, or considers any decision of the Engineer-in-Charge on any matter in connection with or arising out of the Contract or carrying out of Work to be unacceptable, he shall promptly ask the Engineer-in-Charge in writing, for written instructions or decision. There upon the Engineer-in-Charge shall give his written instructions or decision within a period of thirty days of such request. Upon receipt of the written instructions or decision, the Contractor shall promptly proceed without delay to comply with such instructions or decision.

If the Engineer-in-Charge fails to give his instructions or decision in writing within a period of thirty days after being requested for or if the Contractor is dissatisfied with the instructions or decision of the Engineer-in-Charge, the Contractor may within thirty days after receiving the instructions or decision file a written appeal to the Managing Director, PHPA who will constitute a Committee of which the Director (Technical) will be convenor, to resolve the dispute. The Committee shall afford an opportunity to the Contractor to be heard and to offer evidence in support of his appeal within forty five days of the receipt of the appeal by the Director (Technical). The Director (Technical) shall give a decision on behalf of the Committee within a period of thirty days after the Contractor has been heard and the Contractor has given evidence in support of his appeal. If the Director (Technical) does not give a decision within thirty days, the Contractor will have the right to refer the dispute to arbitration.

If the Contractor is dis-satisfied with the decision of the Director (Technical), the Contractor, within a period of thirty days from receipt of the decision, shall indicate his intention to refer the dispute to arbitration failing which the said decision shall be final and conclusive.

ii) 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 to an Arbitral Tribunal of three arbitrators appointed jointly by the PHPA and the Contractor. Where the mandate of an arbitrator terminates a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

In the absence of an Arbitration Act in Bhutan, the Arbitral Tribunal shall follow/be guided by the basic principles and procedures as contained in the Indian Arbitration and Conciliation Act 1996. The parties shall be free to agree on a procedure for appointing the Arbitrators. Failing any agreement for appointment of Arbitrators, each party shall appoint one Arbitrator and the two appointed Arbitrators shall appoint the third Arbitrator, who shall act as the presiding Arbitrator.

iii) The said arbitrators shall have full power to open up, revise and review any decision, opinion, direction, certificate of valuation of the PHPA.

iv) If either of the parties fail to appoint its arbitrators in pursuance of sub-clause (ii) above, within 30 days after receipt of the notice of the appointment of its arbitrators or the two appointed Arbitrators fail to agree on third Arbitrator within thirty days from the date of their appointment *then the appointment shall be made, upon request of a party, by the Chief Justice, Delhi High Court, India/Thimphu High Court, Bhutan or any person or institutions designated by him.*

v) Neither party shall be limited in the proceedings before such arbitrators to the evidence or arguments put before any authority herein above for the purpose of obtaining its said decision. No decision given by any authority in accordance with the foregoing provisions shall disqualify it from being called as a witness and giving evidence before the arbitrators on any matter what-so-ever relevant to the dispute or difference referred to the arbitrators as aforesaid.

vi) The reference to arbitration may proceed notwithstanding that the works shall not then be or be alleged to be complete, provided always

that the obligations of the PHPA, and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works. Neither party shall be entitled to suspend such Work to which the dispute relates and payment to the Contractor shall be continued to be made in terms of the Contract.

vii)a) All arbitration shall be held at New Delhi, India/Thimphu, Bhutan.

b) The language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

viii) The decision of the majority of arbitrators shall prevail.

ix) The cost of the arbitration as fixed by the arbitrators shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. However, the expenses incurred by a party in connection with the preparation, presentation etc. of its cases prior to, during and after the arbitration proceedings shall be borne by that party.

x) All awards of arbitration shall be in writing and shall state reasons for the amount awarded.”

(Emphasis supplied)

6. Additionally, Clause 5 of the GCC, on which Mr. Bharat Singh places great reliance, reads as under:

“5. Language and Law

i)a) The Contract documents shall be drawn up in English. All correspondence and documents relating to the bid, exchanged by the bidder and the PHPA, shall be submitted in the prescribed form in English. All

supporting documents and printed literature in connection with the bid shall be preferably in English.

b) The law to which the Contract is to be subject and according to which the Contract is to be construed shall be the law for the time being in force in Bhutan and within the jurisdiction of Thimphu courts.

ii) Documents Mutually Explanatory

Several documents forming the Contract are to be taken as mutually explanatory of one another, but in case of ambiguities or discrepancies, the documents shall take precedence in the order in which they are set out in the Proforma of Agreement (Annex-III).”

7. As is apparent from the reading of Clause 67 of the GCC, any claim was, at the first instance, required to be raised before the Engineer-In-Charge of the project. Dissatisfaction, with the decision of the Engineer-In-Charge, entitled the petitioner to represent to the Managing Director of the respondent, who was required to constitute a Committee, with the Director (Technical), as its convenor. Rejection of the claim by the said Committee entitled the petitioner to seek recourse to arbitration.

8. The petition avers, and the respondent does not dispute, that the petitioner’s claims were submitted to, and successively rejected by the Engineer-In-Charge as well as the Committee constituted by the Managing Director of the respondent. The petitioner has, thus, undisputedly become entitled to seek reference of the dispute to arbitration.

9. On 28th July, 2020, a notice invoking arbitration was issued by

the petitioner to the respondent, in which the petitioner suggested the name of Hon'ble Mr. Justice Deepak Verma, a retired Judge of the Supreme Court, as its arbitrator. The respondent was requested to appoint its nominee arbitrator within 30 days from the said notice.

10. In its response, dated 4th August, 2020, the respondent while agreeing to reference of the dispute to arbitration, asserted that the arbitration would be covered not by the 1996 Act, but by the Alternative Dispute Resolution Act of Bhutan, 2013 (hereinafter referred to as “the 2013 Bhutan Act”), and that the place of arbitration would be Thimphu. The respondent called upon the petitioner to agree with these covenants and register for arbitration with the Bhutan Alternative Dispute Resolution Centre.

11. The petitioner wrote back to the respondent on 7th August, 2020, disagreeing with the contention of the respondent that the arbitration would abide by the 2013 Bhutan Act or that it would be conducted at Thimphu. The petitioner asserted that the covenants of the GCC clearly make the 1996 Act applicable to the arbitral proceedings, and fixed the seat of arbitration at New Delhi.

12. As the situation between the petitioner and the respondent has, thus, reached an impasse, the petitioner has invoked the jurisdiction of this Court under Section 11(6) of the 1996 Act. Mr. Bharat Singh would, however, submit that this Court does not possess any such jurisdiction in the facts of the present case.

13. The contest by Mr. Bharat Singh, to the jurisdiction of this Court to entertain the present petition, is essentially founded on what he perceives to be the correct interpretation of Clauses 5 and 67(ii) of the GCC, when seen in conjunction. Mr Bharat Singh contends thus:

(i) Clause 67(ii) of the GCC made the basic principles and procedures, contained in the 1996 Act, applicable *in the absence of an Arbitration Act in Bhutan*. In the first place, therefore, the 1996 Act has not bodily, or by reference, been incorporated into Clause 67(ii) of the GCC, which merely applies the “basic principles and procedures”, contained in the said Act. The basic principles and procedures contained in the 2013 Bhutan Act, were the same as those contained in the 1996 Act. As such, applying the 2013 Bhutan Act would not infract, in any manner, Clause 67(ii) of the GCC.

(ii) Besides, Clause 67(ii) of the GCC made the basic principles and procedures of the 1996 Act applicable only “in the absence of an Arbitration Act in Bhutan”. This covenant, in order to be correctly understood and interpreted, would have to be read in juxtaposition with Clause 5 of the GCC, which made “the law for the time being in force in Bhutan and within the jurisdiction of Thimphu Courts”, applicable to the contract. As such, the very enactment of 2013 Bhutan Act, resulted in the entire contract, *ipso facto*, being made subject thereto, and the application of the 1996 Act stood, thereby, completely ousted.

(iii) The applicable law would also be Bhutanese law. As such, the 1996 Act, being an Indian statute, would not apply for appointment of an arbitrator.

(iv) The project was located at Bhutan, and the parties are located at Bhutan. The entire cause of action has arisen within the jurisdiction of the Bhutan Court and, as such, this Court ought not to exercise jurisdiction, even for appointment of an arbitrator.

(v) Reliance has also been placed on the judgment of the Supreme Court in ***Radha Sunder Dutta v. Mohd. Jahadur Rahim***¹ to assert that, where there is a conflict between two provisions in a contractual instrument, the provision which occurs earlier in the contract would have precedence. As such, Mr. Bharat Singh submits that the issue of jurisdiction of this Court, to entertain the present petition, would have to be gauged on the anvil of Clause 5 of the GCC.

14. Mr. Gourab Banerji, learned Senior Counsel for the petitioner, responded by submitting that the arguments of Mr. Bharat Singh were completely tangential to the actual issue at hand. He drew my attention to Clause 67(iv) of the GCC, which specifically entitles the parties to approach *either the Chief Justice of this Court or the High Court of Thimphu*, for appointment of the arbitrator. As such, he submits, there being a specific dispensation, in the contract, allowing

¹ AIR 1959 SC 24

either party to approach this Court for appointment of an arbitrator, all other covenants in the contract pale into insignificance. Reliance is placed, in this context, on the recent judgment of this Court in *Cars24 Services Pvt. Ltd v. Cyber Approach Workspace LLP*².

15. Mr. Gourab Banerji also points out that the seat of arbitration is not Thimphu, but *New Delhi, India/ Thimphu, Bhutan*, as per Clause 67(vii)(a) of the GCC. Even on the basis of the “seat of arbitration test”, therefore, Mr. Gourab Banerji would submit that this Court has jurisdiction to adjudicate the present dispute and appoint the arbitrator on behalf of the respondent.

16. Apropos the submission of Mr. Bharat Singh that Clause 67 was to be read in juxtaposition with Clause 5 of the GCC, Mr. Banerji submits that this argument loses sight of the fundamental distinction between the substantive law governing the dispute and the curial law. Clause 5, he points out, relates to the substantive law governing the dispute, whereas Clause 67 deals with the curial law, and it would be completely fallacious to confuse these two aspects. He draws my attention to the following observations of the Supreme Court in *Government of India vs. Vedanta Ltd. & Ors.*³

“We will now briefly touch upon the four types of laws which are applicable in an international commercial arbitration, and court proceedings arising therefrom. These are:

- a) The governing law determines the substantive rights and obligations of the parties in the underlying

² MANU/DE/2017/2020

³ 2020 SCC OnLine SC 749

commercial contract. The parties normally make a choice of the governing law of the substantive contract; in the absence of a choice of the governing law, it would be determined by the tribunal in accordance with the conflict of law rules, which are considered to be applicable.

b) The law governing the arbitration agreement must be determined separately from the law applicable to the substantive contract. The arbitration determine the validity and extent of the arbitration agreement; limits of party autonomy, the jurisdiction of the tribunal, etc.

c) The curial law of the arbitration is determined by the seat of arbitration. In an international commercial arbitration, it is necessary that the conduct of the arbitral proceedings are connected with the law of the seat of arbitration, which would regulate the various aspects of the arbitral proceedings. The parties have the autonomy to determine the choice of law, which would govern the arbitral procedure, which is referred to as the *lex arbitri*, and is expressed in the choice of the seat of arbitration. The curial law governs the procedure of the arbitration, the commencement of the arbitration, appointment of arbitrator/s in exercise of the default power by the court, grant of provisional measures, collection of evidence, hearings, and challenge to the award. The courts at the seat of arbitration exercise supervisory or “primary” jurisdiction over the arbitral proceedings, except if the parties have made an express and effective choice of a different *lex arbitri*, in which event, the role of the courts at the seat will be limited to those matters which are specified to be internationally mandatory and of a nonderogable nature.

d) The *lex fori* governs the proceedings for recognition and enforcement of the award in other jurisdictions. Article III of the New York Convention provides that the national courts apply their respective *lex fori* regarding limitation periods applicable for recognition and enforcement proceedings; the date from which the limitation period would commence,

whether there is power to extend the period of limitation. The *lex fori* determines the court which is competent and has the jurisdiction to decide the issue of recognition and enforcement of the foreign award, and the legal remedies available to the parties for enforcement of the foreign award.”

14. Even without entering into the fine niceties of “conflict of jurisdiction” law, the controversy, to my mind, is elementary. Clause 67(iv) of the GCC is clear and categorical. It specifically states that, on failure of the arbitral mechanism provided in the contract, either party *could approach the Chief Justice of this Court or the High Court of Thimphu*, to appoint the arbitrator. Where such a specific contractual dispensation exists, this Court has already taken a view in its recent decision in *Cars24*², that such specific dispensation would take precedence over other contractual covenants. As in the present case, this Court was seized, in the said case, with a similar situation, wherein though the seat of the arbitration was fixed at New Delhi, India, specific jurisdiction for appointment of the arbitrator was vested in the Court of competent jurisdiction at Haryana. Following the judgment of the Supreme Court in *Mankastu Impex Pvt. Ltd. v. Airvisual Ltd.*⁴, which accorded pre-eminence to such contractual covenants, catering to specific exigencies contemplated by the 1996 Act, it was held that, once the contract permitted the parties to approach the Courts at Haryana for appointment of the arbitrator, the jurisdiction in that regard, would be possessed by that Court alone. Para 53 of the judgement in *Cars24*² may, in this context, be reproduced thus:

⁴ (2015) 12 SCC 225

“As already observed hereinabove, I am not inclined to agree with this submission. *Once the agreement between the parties specifically confers Section 11 jurisdiction, for appointment of an arbitrator, on courts at Haryana, this Court, in my view, would be doing violence to the contractual covenant, if it were to exercise such jurisdiction.* There is no judgment of the Supreme Court, to which my attention has been invited, which permits a Court to exercise jurisdiction contrary to the exclusive jurisdiction clause in the agreement between the parties. Rather, the decisions in ***Swastik Gases Pvt. Ltd., (2013) 9 SCC 32*** and ***Brahmani River Pellets Ltd. - both of which have been approvingly cited in BGS SGS Soma JV, (2020) 4 SCC 234*** - emphasised the need to adhere to the exclusive jurisdiction clause. At the cost of repetition yet again, all decisions, which decide the question of territorial jurisdiction on the basis of the seat of arbitration as delineated in the agreement, deal with contracts in which there is no separate exclusive jurisdiction clause, fixing jurisdiction elsewhere. Where such a clause exists, and, *especially, where such a clause fixes Section 11 jurisdiction with courts located elsewhere, I am not inclined to hold that this Court can, contrary to the explicit words and intent of said clause, exercise Section 11 jurisdiction and appoint an arbitrator.*”

(Emphasis supplied)

15. In the present case, too, Clause 67(iv) of the GCC entitles either party, on failure of the arbitral mechanism provided in the GCC, to approach this Court or the High Court of Thimphu, for appointment of the arbitrator. Section 11 jurisdiction, thereby, stands specifically conferred on this Court, by contract between the parties, and I fail to understand how the respondent could contend otherwise. The choice, between this Court and the High Court of Bhutan at Thimphu has been left to the party who seeks to approach the court for appointment of the arbitrator. Either which way, it cannot be gainsaid that this Court does not possess the jurisdiction to entertain the prayer of the petitioner for appointment of the arbitrator on behalf of the

respondent. Even on this sole ground, therefore, the present petition under Section 11(6) of the 1996 Act, would be maintainable before this Court.

16. Significantly, Mr. Bharat Singh did not choose to advance any submission regarding Clause 67(iv) of the GCC.

17. Mr. Bharat Singh has, instead, sought to question the very applicability of the 1996 Act. According to him, a conjoint reading of Clauses 5 and 67(ii) of the GCC would result in the applicability of the 1996 Act being entirely eviscerated, on the enactment of the 2013 Bhutan Act. According to Mr. Bharat Singh, the 1996 Act was applicable only till the enactment of 2013 Bhutan Act. This, in his submission, would also accord with Clause 5(b), which makes the contract subject to the law applicable in Bhutan.

16. I am unable to agree. Acceptance of this submission of Mr. Bharat Singh, in my view, would, in fact, require this Court to rewrite Clause 67(ii) of the GCC. There is nothing in the said Clause, which indicates that the applicability of the 1996 Act, is by way of an *ad hoc* arrangement, to subsist only till the enactment of an Arbitration Act in Bhutan. Mr. Bharat Singh, in my view, is seeking to read far too much into the expression “in the absence of an Arbitration Act in Bhutan”, as contained in Clause 67(ii). All that, this phrase indicates is that there was no Arbitration Act in Bhutan at the time when the contract was executed and that the Arbitral Tribunal would be guided by the principles and procedures contained in the 1996 Act. There is

not even the hint of a suggestion, in Clause 67(ii), that the 1996 Act would cease to apply, on an arbitration statute coming into effect in Bhutan. The words used in Clause 67(ii) cannot, by any stretch of imagination, be extrapolated to mean that, immediately on enactment of an Arbitration Act in Bhutan, the 1996 Act would vanish into thin air, insofar as the contract was concerned, and that the Bhutan Act would stand substituted in place of the 1996 Act, in Clause 67(ii). This, essentially, would require rewriting of the contractual provision, which no Court can do.

17. To reiterate, there is nothing in Clause 67(ii) which indicates that the stipulation, therein, that the Arbitral Tribunal would be guided by the principles and procedures contained in the 1996 Act, would subsist only till the enactment of the Arbitration Act in Bhutan, or that until there is an enactment of the Arbitration Act in Bhutan, or that, immediately on enactment of 2013 Bhutan Act, the procedure for appointment of arbitrator under the said Act would come into application and the 1996 Act would cease, *pro tanto*, to apply.

18. Mr. Bharat Singh also sought to submit that Clause 67(ii) of the GCC merely applied the “basic principles and procedures” contained in the 1996 Act, and did not bodily incorporate the Act into the Clause. He has advanced a somewhat ingenious submission that, as the principles and procedures contained in the 2013 Bhutan Act are similar to those contained in the 1996 Act, those principles and procedures should apply, once the 2013 Bhutan Act come into being, as application of the principles and procedures stipulated in the 2013

Bhutan Act would also be in accordance with Clause 67(ii) of the GCC. The argument is not only unacceptable, but is largely difficult to understand, even on first principles. To my mind, Clause 67(ii) of the GCC clearly stipulates that the Arbitral Tribunal would be guided by the principles and procedures contained in the 1996 Act, without altering this dispensation at any future point of time, either upon enactment of the 2013 Bhutan Act, or otherwise. Whether the principles and procedures for appointment of the arbitrator, under the 2013 Bhutan Act are, or are not, similar, or even identical, to those contained in the 1996 Act is, to my mind, wholly irrelevant. The point for determination is as to which Act would apply, and has obviously to be answered as per the contractual covenants which, in any relationship governed by contract, are supreme. Seen thus, the procedure for appointment of the arbitrator, which also finds mention in the same covenant, would necessarily abide by the 1996 Act. The enactment of the 2013 Bhutan Act cannot result in rewriting of Clause 67(ii) of the GCC, making the 2013 Bhutan Act applicable to the procedure to be followed by the Arbitral Tribunal as well as to the exercise of appointment of the arbitrator, consequent on the arbitral mechanism in the contract having failed.

20. I do not deem it necessary to enter any specific observation regarding the applicability of the judgment of the Supreme Court in *Radha Sunder Dutta¹*, on which Mr. Bharat Singh has relied. It is axiomatic, in law, that, if two covenants in a contractual instrument are in conflict with each other, and are irreconcilable, the former would have precedence over the latter. No such occasion, however,

arises in the present case. There is no conflict between Clauses 5 and 67(ii) of the GCC. As Mr. Banerji has correctly pointed out, and as enunciated most recently by the Supreme Court in *Vedanta Ltd.*³, Clauses 5 and 67(ii) of the GCC deal with two separate dispensations, the former dealing with the substantive law governing resolution of the dispute between the parties under the contract, and the latter relating to the applicable curial law. These provisions, therefore, operate in different spheres, and there is no conflict between the two, nor, for that matter, is there even occasion for any such conflict. As such, no occasion arises to seek recourse to the principles enunciated in *Radha Sunder Dutta*¹.

21. To my mind, therefore, the objection, of Mr. Bharat Singh, regarding the lack of territorial jurisdiction of this Court to entertain the present petition has necessarily to be rejected.

22. The arbitral procedure, as set out in the GCC, has failed, inasmuch as, though the petitioner suggested the name of Hon'ble Mr. Justice Deepak Verma, as its arbitrator, the respondent failed to appoint its arbitrator within the time stipulated in the GCC, thereby necessitating the appointment of an arbitrator, on behalf of the respondent, by this Court.

23. Accordingly, this Court appoints Hon'ble Ms Gita Mittal, former Chief Justice of the High Court of Jammu and Kashmir and Acting Chief Justice of this Court, as the arbitrator on behalf of the respondent. Her contract details are as follows:

Hon'ble Ms Justice Gita Mittal (Retired),
Former Chief Justice of the High Court of Jammu & Kashmir,
(Address : E-327, Greater Kailash Part - I, New Delhi – 110048
Email id : gitamittaloffice@gmail.com
Tel. No.: +91 98113 22190)

24. The respondent is directed to contact the learned arbitrator, as per the details furnished hereinabove, within a period of three days from the forwarding of a copy of this judgement to Mr Bharat Singh by e-mail by the Registry or the uploading of this judgement on the website of this Court, whichever is later, so as to obtain the concurrence of the learned arbitrator, to arbitrate on the disputes between the parties.

25. The learned Arbitrator would be entitled to fees in accordance with the Fourth Schedule to the 1996 Act.

26. The two arbitrators would, thereafter, proceed to appoint a presiding arbitrator, in accordance with the dispensation to that effect as contained in the GCC, and the arbitral proceedings would, thereafter, take off, in accordance with the provisions of the 1996 Act.

27. The petition stands disposed of in the aforesaid terms with no orders as to costs.

C. HARI SHANKAR, J.

DECEMBER 11, 2020

r.bararia