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

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Date of decision: 27.01.2020

+ ARB.P. 574/2019

PAVE INFRASTRUCTURE PVT. LTD. Petitioner

Through Mr. Sachin Datta, Sr. Advocate with
Mr. Jayant Kumar, Advocate.

versus

WAPCOS LTD. Respondent

Through Mr. Kapil Gupta, Advocate.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act') for appointment of a Sole Arbitrator.

2. The parties entered into an agreement dated 25.04.2017 for construction of boundary wall, toilet and providing access to disabled persons in the Centrally Protected Monuments under ASI-Jodhpur Circle, Rajasthan. The said agreement contains an Arbitration Clause, which reads as under:-

"Clause 5.30.2:-

Save as expressly stated to the contrary in the Contract, any Dispute shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996 by sole arbitrators appointed by CMD, WAPCOAS"

3. Learned counsel for the respondent contends that the present petition is not maintainable. First contention of the respondent is that the procedure
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envisaged in the Arbitration Clause was not followed inasmuch as the negotiation and good faith talks were still going on when the Arbitration was invoked. Second contention is that after the judgment of the Supreme Court in ***Perkins Eastman Architect DPC & Anr. Vs. HSCC (India) Ltd 2019 SCC OnLine SC 1517*** respondent has now initiated the process of finalizing a panel of Arbitrators and the order in the present petition be deferred to enable the respondent to furnish a panel to the petitioner, from which it can appoint an Arbitrator.

4. It is further contended that there is no Arbitral Dispute existing between the parties.

5. In so far as the contention of the respondent that the negotiation in good faith talks are still on between the parties, is concerned, learned counsel for the petitioner has rightly pointed out that it had approached the respondent for amicable settlement and had even written a letter dated 31.05.2019 for resolving the disputes. The petitioner had also nominated Mr. Bhattacharjee, the AGM of the company as a Representative to settle the matter, but the talks have failed and the respondent is no longer interested in resolving the matter.

6. Learned counsel for the petitioner is right in its contention that in view of the judgment of the Supreme Court in ***Perkins Eastman Architects DPC & Anr.(supra)***, the CMD, WAPCOS has now lost the right to make a unilateral appointment of the Sole Arbitrator as undoubtedly, the CMD would be interested in the outcome of the arbitration proceedings. Thus, the respondent cannot be permitted to exercise the right of appointment unilaterally, through its CMD. This Court also has recently in the case of ***Proddatur Cable TV Digi Services vs. SITI Cable Network Limitedv being***

OMP (T) (COMM) 109/2019, decided on 20.01.2020 has, relying on **Perkins Eastman Architects DPC & Anr. (supra)**, set aside the unilateral appointment by the respondent Company through its Board of Directors.

7. In so far as the question of the disputes being Arbitral disputes or not, is concerned, in a recent judgment in **Mayavti Trading Pvt.Ltd. Vs. Pradyut Deb Burman 2019 SCC OnLine SC 1164** the Supreme Court has clearly held that the mandate of the High court in examining a petition under Section 11(6) of the Act will be confined to examination of the existence and validity of the Arbitration Agreement.

8. Relevant para of the judgment is extracted hereinunder:-

“10) This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment Duro Felguera, S.A. (Supra) – see paras 48 & 59.

11) We, therefore, overrule the judgment in United India Insurance Company Limited (supra) as not having laid down the correct law but dismiss this appeal for the reason given in para 3 above.”
Thus in my view the present petition deserves to be allowed.”

9. Thus, in the present petition, the issue of arbitrability of a dispute cannot be examined by this Court. Liberty is, however, given to the respondent to raise the question of the disputes being Arbitral or otherwise, before the Arbitral Tribunal.

10. The argument of the respondent that they are in process of preparing the panel, only deserves to be rejected. There is admittedly no panel at present and thus the right to the petitioner to seek an appointment today cannot be defeated only for the reason that a panel is proposed to be prepared in future.

11. Dr. Justice A.K. Sikri, former Judge of Supreme Court is thus appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

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

Dr. Justice A.K. Sikri,
Former Judge, Supreme Court of India,
144, 1st Floor, Sunder Nagar,
New Delhi-110003
Mobile:9818000300.

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

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

15. The petition is allowed in the aforesaid terms.

JYOTI SINGH, J

JANUARY 27, 2020

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