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

% *Date of Judgment : 3rd June, 2021*

+ **ARB. A. (COMM.) 26/2021 and IA Nos. 7261/2021
& 7262/2021**

HINDUSTANT PREFAB LTD.

..... Appellant

Through: Mr Gaurav Gupta and Mr
Samyak Gangwal, Advocates.

versus

M/S. NCC LIMITED

..... Respondent

Through: Mr S.K. Chandwani, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **03.06.2021**

[Hearing Held Through Videoconferencing]

VIBHU BAKHRU, J. (ORAL)

1. Hindustan Prefab Ltd. (hereinafter 'HPL') has filed the present appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act') impugning an order dated 09.04.2021 (hereinafter 'the impugned order') passed by the learned Arbitral Tribunal. By the impugned order, the Arbitral Tribunal rejected the appellant's application to implead National Law University, Orissa (hereinafter 'NLUO') in the arbitral proceedings

pending between HPL and the respondent (hereafter 'NCC').

2. HPL contends that since disputes between the parties arise in relation to a contract for construction of the proposed building of NLUO, NLUO would be a proper and necessary party to the arbitral proceedings.

3. Mr. Gupta, learned counsel appearing for the appellant, submitted that since HPL was only entitled to retain a small commission on the amounts payable by NLUO and the entire fund for the construction and development of the project in question was required to be paid by NLUO, it would necessarily have to be impleaded in the arbitral proceedings. He submitted that in absence of impleading NLUO, HPL may be held liable for the amounts due to NCC. However, HPL had little stake in the construction contract as it was only acting as an executing agency on behalf of NLUO.

4. I have heard the learned counsel for the appellant.

5. First of all, this Court has serious reservations as to whether the present appeal is maintainable. Impleadment of a party is not an "interim measure", which as the expression suggests would be operative till conclusion of the arbitral proceedings. The application for seeking impleadment of NLUO before the Arbitral Tribunal cannot be considered as an application for an interim measure of protection. Thus, such a relief would not fall within the scope of an application under Section 17 of the A&C Act. Consequently, it is doubtful whether any order of the Arbitral Tribunal for refusing to join any

other party in the arbitral proceedings can be made a subject matter of an appeal under Section 37 of the A&C Act.

6. Having stated the above, this Court also considers it apposite to examine the petitioner's claim, whether it is entitled to join NLUO as a party to the arbitral proceedings.

7. HPL and NLUO had entered into an agreement dated 07.09.2010 (hereinafter 'the Principal Agreement'). The first recital of the Principal Agreement indicates that NLUO had accepted the offer submitted by HPL and appointed HPL as a "*Principal Contractor for executing the construction work of proposed National Law University, Orissa, Naraj, Cuttack.*" In terms of Clause 18 of the Principal Agreement, HPL was required to submit a bar chart providing details for the items of construction as stated in the said Clause. In terms of Clause 19 of the said Agreement, HPL had agreed to "*complete all the work as per the bar chart submitted by them*". The said Clause also provided that in the event the Principal Contractor (HPL) failed to execute the contract on schedule, NLUO would have the power to employ any other agency. The Principal Agreement also contained provisions to enable HPL to appoint a sub-contractor. Clause 21 of the Principal Agreement is relevant and is set out below:

“21. M/s. HPL can appoint if required sub contractor’ whose engagement as sub contractor which will be confirmed by NLUO for executing works like Civil, Structural, P.H., Electrical etc.”

8. The Principal Agreement was amended by the concerned parties (HPL and NLUO) in terms of their agreement dated 23.02.2012 (hereinafter 'the Amendment Agreement'). Amongst other amendments, the reference to HPL as the Principal Contractor was amended to read as Executing Agency. The reference to a 'sub-contractor' was amended to read as 'Contractor'. Thus, HPL was now required to act as an executing agency and the works would be executed by a contractor selected by HPL. Clause 21 of the Agreement was amended to read as under:

“21. M/s. HPL can appoint 'contractor' whose engagement as contractor which will be confirmed by NLUO for executing works like Civil, Structural, P.H., Electrical etc. Engagement of contractor by HPL will not in any way absolve them from their duties, responsibilities and liabilities under this Agreement”.

9. As is apparent from the plain language of the last line of Clause 21 of the Principal Agreement as amended by the Amendment Agreement, HPL continued to be responsible for execution of the works and contracting the works to a Contractor (as subsequently did in favour of M/s NCC Ltd.). HPL did not absolve itself of its responsibilities and obligations under the Principal Agreement.

10. HPL floated a tender for construction of the proposed National Law University and, issued a Notice Inviting Tenders (NIT). Pursuant

to the NIT, on 09.10.2010, M/s NCC Ltd. (then known as 'Nagarjuna Construction Co. Ltd.') submitted its bid for execution of the said works. The rates of M/s NCC Ltd. (hereinafter 'NCC') were found to be the lowest and on 10.12.2010, HPL entered into an agreement (hereafter 'the Agreement') with NCC for construction of the proposed National Law University. Apparently, disputes arose between the parties (HPL and NCC) in connection with the Agreement and NCC invoked the Arbitration Clause as contained in the Agreement dated 10.12.2010.

11. It is relevant to note that the NIT tender issued by HPL indicated that it had been appointed as the executing agency for construction of the National Law University at Cuttack, Orissa. However, it did not indicate that the tenders were being invited for and on behalf of NLUO.

12. The Agreement entered into between HPL and NCC refers to NCC as a sub-contractor. Although the terminology may not be relevant, however, the said Agreement indicates that NCC had submitted its bid, which was accepted by HPL. The Agreement also does not state that HPL was entering the contract as an agent of NLUO. A plain reading of the Agreement indicates that it is a contract between a principal and a principal.

13. The General Conditions of the Contract (GCC), which form a part of the Agreement entered into between HPL and NCC, also includes an Arbitration Clause.

14. At the outset, Mr Gupta conceded that the said Arbitration Clause as included in the Agreement, is applicable only to the disputes between HPL and NCC and, NLUO is not a party to the said Agreement to refer the disputes arising from the Agreement to Arbitration.

15. It is also relevant to note that the Principal Agreement between HPL and NLUO also includes an agreement to refer the disputes to arbitration. Clause 46, 47 and 48 of the Principal Agreement are set out below:

- “46. All differences or dispute arising between M/s. HPL & NLUO on any matter connected with the agreement or in regard to the interpretation of the content their of shall be referred to the Vice Chancellor of the National Law University, Orissa whose decision will be accepted by M/s. HPL.
47. Any dispute arising under this agreement between the parties hereto shall be referred for adjudication to a sole arbitrator in the manner and in terms of the provisions as laid down in the General Conditions of Contract. The Chancellor of National Law University, Orissa will appoint an Arbitrator. The award of the arbitrator shall be final and binding on both the parties.
48. All disputes arising out of or in any way connected with this agreement shall be deemed to have arisen at Cuttack, Orissa and courts in

Cuttack alone shall have jurisdiction to determine the same.”

16. As is apparent from the above, reference of any disputes between HPL and NLUO to arbitration would be in terms of the aforesaid clauses and not in terms of the Arbitration Clause included in the Agreement between HPL and NCC.

17. Since it is conceded that NLUO is neither a signatory nor a party to the agreement between HPL and NCC to refer the disputes to arbitration, NLUO cannot be impleaded as a party to the pending arbitral proceedings between HPL and NCC.

18. The appeal is accordingly, dismissed. All pending applications are also disposed of.

JUNE 03, 2021
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VIBHU BAKHRU, J

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