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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 3rd February, 2021

Pronounced on: 17th February, 2021

+ ARB.P. 217/2020 and I.A.6503/2020

MAHINDRA SUSTEN PRIVATE LIMITED Petitioner

Through: Mr. K.V. Viswanathan, Mr. Sanjeev Kapoor, Mr. Prateek Kumar, Ms. Sneha Janakiraman, Mr. Apoorv Singhal, Ms. Smriti Nair, Advs.

versus

NHPC LIMITED Respondent

Through: Mr. Tejas Karia, Mr. Gauhar Mirza, Mr. Prakhar Deep and Mr. Nishant Doshi, Advs.

+ O.M.P.(I) (COMM.) 162/2020 and I.A.6502/2020

MAHINDRA SUSTEN PRIVATE LIMITED Petitioner

Through: Mr. K.V. Viswanathan, Mr. Sanjeev Kapoor, Mr. Prateek Kumar, Ms. Sneha Janakiraman, Mr. Apoorv Singhal, Ms. Smriti Nair, Advs.

versus

NHPC LIMITED Respondent

Through: Mr. Tejas Karia, Mr. Gauhar Mirza, Mr. Prakhar Deep and Mr. Nishant Doshi, Advs.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

1. This judgment disposes of Arb. P. 217/2020 and OMP (I) (Comm) 162/2020.

2. Arb. P. 217/2020 seeks reference of the disputes, between the petitioner and respondent, to arbitration, under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”). OMP (I) (Comm) 162/2020 seeks certain pre-arbitral interim reliefs. Mr. Viswanathan, learned Senior Counsel for the petitioner submitted, at the outset, that, if Arb. P. 217/2020 were to be allowed, and the disputes between the petitioner and the respondent referred to arbitration as prayed therein, he would have no objection to OMP (I) (Comm) 162/2020 being also referred for adjudication to the arbitrator, treating it as an application under Section 17 of the 1996 Act. As such, the necessity of adjudicating, on merits, OMP (I) (Comm) 162/2020 would arise only if Arb. P. 217/2020 were not to be allowed.

3. Mr. Tejas Karia, learned counsel for the respondent, vehemently opposed Arb. P. 217/2020. The ground for opposition would become clearer from the recital that follows. Suffice it to state, at this stage, that I am of the opinion that the opposition of Mr. Tejas Karia is without substance and that, therefore, the dispute between the petitioner and the respondent ought to be referred to arbitration. As such, in view of the submission made by Mr. Viswanathan, noted *supra*, OMP (I) (Comm) 162/2020 would also be decided by the

Arbitral Tribunal under Section 17 of the 1996 Act. The necessity of this Court adjudicating on the said petition, thereby, stands obviated.

Facts

4. A notice, dated 5th July, 2018, was issued by the respondent-NHPC, inviting tenders for “Engineering Procurement Construction (EPC) Contract for 10 MW capacity Floating Solar Power Project at West Kallada in the State of Kerala with its Comprehensive Operation and Maintenance for 10 years”. For the sake of convenience, the notice would be referred to, hereinafter, as “the NIT”.

5. The following Clauses of the NIT are relevant:

“3.2.A.1.2

The bidder should have experience of having successfully completed a project of any nature involving floating structures/platform/ deck/ underwater cable works, in last five (5) years on Engineering, Procurement and Construction (EPC) basis.

Note:-

Floatation Device Technology Provider: The bidder should propose name of the float technology provider with whom they expect to tie-up for supply of the floats. Bidder may propose any number of vendors (including bidders own design) along with their credentials as part of their technical bid. However, prior to signing of the contract agreement, the successful bidder shall communicate their finalised float vendor.”

“3.2.A.4 Bidders with Sub-contractors:

In case the Sole Bidder does not have all the required experience and also does not wish to enter into a joint-venture or wants to restrict the joint-venture partnership, he can associate Sub-contractor for specified activities (in case of Floatation Device Technology Provider or experience of installation of floating structures) in which he does not have the relevant experience. The criteria to be met by such Bidder shall be as follows:

- (i) The Bidder himself to fully meet the following:
 - Technical criteria specified in para 3.2.A.1.1 and 3.2.A.1.3
 - All criteria mentioned under financial capacity.
- (ii) The number of sub-contractors not to exceed one for meeting the technical experience Criteria as specified in para 3.2.A.1.2
- (iii) The proposed sub-contractor to meet the specified criteria for the component work listed Technical experience Criteria as specified in para 3.2.A.1.2
- (iv) The Bidder and his sub-contractor should submit separate undertakings that the Bidder/sub-contractor shall be responsible for execution of that item of work for which they claim to have specific construction experience.
- (v) The Applicant and his proposed sub-contractor should collectively satisfy as a whole all the specified experience requirements.
- (vi) Sub-contractor shall submit Performance Bank Guarantee equivalent to 5% of value of Work sublet in addition to the Performance Bank Guarantee for whole contract submitted by the Bidder on award of Work.”

“4. TIME FOR COMPLETION

The successful bidder shall complete the entire work within the time specified under S.No.-1 above, to be reckoned from the date of issue of Letter of Acceptance”

6. Annexed to the NIT were the “Bid Documents”, in six volumes, numbered Volume 0 to Volume 5.

7. Volume 0 constituted the “Instructions to Bidders” (hereinafter referred to as “ITB”). Though many of the clauses of the ITB were reproductions of the clauses of the NIT, in the interests of completion, the relevant clauses of the ITB may be reproduced thus:

“3.2.A.1.2 The bidder should have experience of having successfully completed a project of any nature involving floating structures/platform/ deck/ underwater cable works, in last five (5) years on Engineering, Procurement and Construction (EPC) basis.

Note:-

Floatation Device Technology Provider: The bidder should propose name of the float technology provider with whom they expect to tie-up for supply of the floats. Bidder may propose any number of vendors (including bidders own design) along with their credentials as part of their technical bid. However, prior to signing of the contract agreement, the successful bidder shall communicate their finalised float vendor.

3.7 To improve transparency and fairness in tendering process the Employer is implementing Integrity Pact as per Clause 33 of this ITB. The bidder must submit the Integrity Pact as per Annexure- 3 duly signed as per clause 33 of ITB.

Pre- contract Integrity Pact is to be executed on plain paper at the time of submission of Bid. The successful bidder (contractor) shall submit duly executed Integrity Pact on non-

judicial stamp paper of appropriate value prior to signing of Notification of Award.

27. AWARD CRITERIA

27.1) a) Subject to Clause 28, the Employer will award the contract to the successful bidder whose bid has been determined to be substantially responsive as per the “Conditions for conducting e- RA after e-tendering” which is enclosed as per Part-IV to the ITB. The Employer may request the substantially responsive lowest evaluated bidder to attend the pre-award discussions / Post Tender Negotiations (PTN), if required.

b) The mode of contracting with the successful bidder will be as per stipulation outlined in relevant GCC/SCC Clauses.....

29. NOTIFICATION OF AWARD

29.1 Prior to the expiration of the period of bid validity, the Employer will notify the successful Bidder in writing by registered letter/ speed post / fax,, that its bid has been accepted. The notification of award will constitute the formation of the contract and will be considered for all purposes of execution of contract provisions till such time the signing of the Contract Agreement.

29.2 Upon the successful Bidder’s furnishing of the performance security pursuant to ITB Clause 31, the Employer will promptly return/discharge the Bid Security to each unsuccessful Bidder, pursuant to ITB Sub-Clause 14.4.

29.3 The unsuccessful Bidders shall also be informed simultaneously about their status of Bids.

30. SIGNING OF CONTRACT AGREEMENT

After notifying the successful bidder that its bid has been accepted, the Employer will prepare the Contract Agreement as per Format provided in Volume 5: Forms & Procedures, incorporating all the correspondence exchanged between the parties, which have a bearing on the Contract.

Within 14 days of receipt of notice of readiness of the Contract Agreement by the Employer, the Employer and the successful bidder shall sign the Contract Agreement.

31. PERFORMANCE SECURITY

31.1 Within twenty-eight (28) days after receipt of the notification of award, the successful Bidder shall furnish the performance security as per GCC clause 13.3 and in the form provided in the section "Forms and Procedures" of the Bidding Documents or in any other form acceptable to the Employer.

31.2 Failure of the successful Bidder to comply with the requirements of ITB Clause 30 or Clause 31.1 shall constitute sufficient grounds for the annulment of the award and forfeiture of the bid security.

32. CORRUPT OR FRAUDULENT OR COLLUSIVE OR COERCIVE PRACTICES

32.1 It is expected from the Bidders / suppliers / contractors that they will observe the highest standard of ethics during the procurement and execution of such contracts. In pursuance of this policy:

(a) for the purposes of this provision, the terms set forth below shall mean as under:

i) "Corrupt practice" means the offering, giving, receiving or soliciting directly or indirectly of anything of value to influence the action of a public official in the procurement process or in contract execution; and

ii) "Fraudulent practice" means a misrepresentation/omission of facts in order to

influence a procurement process or the execution of a contract to the detriment of the Employer, and includes collusive practice among Bidders (prior to or after bid submission) designed to establish bid prices at artificial non-competitive levels and to deprive the Borrower of the benefits of free and open competition;

iii) “Collusive Practice” means a scheme or arrangement between two or more bidders, with or without the knowledge of Employer, designed to establish bid prices at artificial, non-competitive levels.

iv) “Coercive Practice” means harming or threatening to harm, directly or indirectly, person or their property to influence their participation in a procurement process or affect the execution of Contract.

(b) An agreement called Integrity Pact between the prospective bidders and the Employer shall be signed committing the persons /officials of both the parties, not to exercise any corrupt influence on any aspect of the Tender / Contract. The Independent External Monitor(s) (IEM) appointed by Employer shall oversee the compliance of obligation under the Integrity Pact.

(c) A Bid may be rejected by the Employer if it is determined at any stage that the respective Bidder has engaged in corrupt or fraudulent or collusive or coercive or undesirable or restrictive practices or default commitment under Integrity Pact in competing for the contract in question.

(d) The Employer may declare a firm ineligible, either indefinitely or for a stated period of time, if it at any time determines that the firm has engaged in corrupt or fraudulent or collusive or coercive practices in competing for or default commitment under Integrity Pact or in executing the contract.

(e) Banning of Business Dealings: It is not in the interest of NHPC to deal with Agencies who commit

deception, fraud or other misconduct in the tendering process. The grounds on which Banning of Business Dealings can be initiated are as follows:

- i) If the security consideration, including questions of loyalty of the Agency to NHPC so warrants;
- ii) If the director/owner of the Agency, proprietor or partner of the firm, is convicted by a court of law for offences involving moral turpitude in relation to its business dealings with the Government or any other public sector enterprises, during last five years;
- iii) If the Agency has resorted to Corrupt, Fraudulent, Collusive, Coercive practices including misrepresentation of facts and violation of the any provisions of the Integrity Pact provided in the Contract.
- iv) If the Agency uses intimidation / threatening or brings undue outside pressure on NHPC or its official for acceptance / performances of the job under the contract:
- v) If the Agency misuses the premises or facilities of the NHPC, forcefully occupies or damages the NHPC's properties including land, water resources, forests / trees or tampers with documents/records etc.
- vi) If the Agency does not fulfill the obligations as required under the Contract and Violates terms & conditions of the contract which has serious affect for continuation of the Contract.
- vii) If the work awarded to the agency has been terminated by NHPC due to poor performance of the contract in the preceding 5 years.

viii) If the Central Vigilance Commission, Central Bureau of Investigation or any other Central Government investigation Agency recommends such a course in respect of a case under investigation or improper conduct on agency's part in matters relating to the Company (NHPC) or even otherwise;

ix) On any other ground upon which business dealings with the Agency is not in the public interest.

x) If business dealings with the Agency have been banned by the Ministry of Power, Government of India OR any PSU/ any other authority under the MOP if intimated to NHPC or available on MOP Website, the business dealing with such agencies shall be banned with immediate effect for future business dealing except banning under Integrity Pact without any further investigation.

(Note: The examples given above are only illustrative and not exhaustive. The Competent Authority may decide to ban business dealing for any good and sufficient reason).

The procedure for banning of Business Dealings shall be governed as per NHPC's "Policy and Procedure for Banning Business Dealings". This policy is published in NHPC website under Integrity corner.

32.2 Furthermore, Bidders shall be aware of the provision stated in Sub-Clause 42.2 of the General Conditions of Contract and return their bid security as per Clause 13.4 of ITB.

33. INTEGRITY PACT

To improve transparency and fairness in the tendering process the Employer is implementing Integrity Pact.

The Integrity Pact, signed by all the prospective Bidders and the Employer, shall commit the persons/officials of both the

parties, not to exercise any corrupt/fraudulent/collusive/coercive practices in the Tendering process and also during implementation of the Contract. All Applicants shall enter into an Integrity Pact (to be executed on plain paper) with the Employer at the time of submission of their Bids. Only those Bidders who have entered into Integrity Pact with the Employer shall be eligible to participate in the bidding process. Entering into Integrity Pact as per Performa provided in the Section Forms & Procedure is a basic qualifying requirement.

The Integrity Pact digitally signed on behalf of the Employer is provided as Annexure-3 in ITB. The Integrity Pact shall be downloaded, printed and signed by the Applicant and the hard copy shall be submitted.

Successful bidder shall submit duly executed Integrity pact on Non-Judicial Stamp paper of appropriate value prior to signing of Contract Agreement.

To oversee the compliance of obligation under the Integrity Pact, Sh. Rajan Nair and Sh. Sudhir Krishna has been appointed as Independent External Monitor (IEM) by the Employer. The Contact address of IEM is as under:

Sh. Rajan Nair and
Sh. Sudhir Krishna,
Independent External Monitor for NHPC Ltd.,
NHPC Ltd.
NHPC Office Complex,
Sector –33 Faridabad – 121003”

8. Annexure 2 to the ITB constituted the pre-contract Integrity Pact (hereinafter referred to as the “Integrity Pact”), to be executed in accordance with the covenants of the NIT and ITB already reproduced hereinabove. The relevant clauses thereof may be set out thus:

- i) Clause 1.0 set out the commitments of the employer and the various other sub-clauses of Clause 3.0 set out the

commitments of the bidders/contractors under the Integrity Pact and they read thus:

“1.0 Commitments of the Employer

1.1 The Employer undertakes that no official of the Employer, connected directly or indirectly with the contract, will demand, take a promise for or accept, directly or through intermediaries, any bribe, consideration, gift, reward, favour or any material or immaterial benefit or any other advantage from the Bidder/Contractor, either for themselves or for any person, organization or third party related to the contract in exchange for an advantage in the bidding process, bid evaluation, contracting or implementation process related to the contract.

1.2. The Employer will, during the pre-contract stage, treat all the Bidders/Contractors alike, and will provide to all the Bidders/Contractors the same information and will not provide any such information to any particular Bidder/Contractor which could afford an advantage to that particular Bidder/Contractor in comparison to other Bidders/Contractors.

1.3. All the officials of the Employer will report to the appropriate Authority any attempted or completed breaches of the above commitments as well as any substantial suspicion of such a breach.

3.0 Commitments of the Bidder(s)/Contractor(s)

The Bidder(s)/Contractor(s) commits itself to take all measures necessary to prevent corrupt practices, unfair means and illegal activities during any stage of its bid or during any pre-contract or post-contract stage in order to secure the contract or in furtherance to secure it and in particular commit itself to the following:-

3.1. The Bidder(s)/Contractor(s) will not offer, directly

or through intermediaries, any bribe, gift, consideration, reward, favour, any material or immaterial benefit or other advantage, commission, fees, brokerage or inducement to any official of the Employer, connected directly or indirectly with the bidding process, or to any person, organization or third party related to the contract in exchange for any advantage in the bidding, evaluation, contracting and implementation of the contract.

3.2 The Bidder/Contractor further undertakes that it has not given, offered or promised to give, directly or indirectly any bribe, gift consideration, reward, favour, any material or immaterial benefit or other advantage, commission, fees, brokerage or inducement to any official of the Employer or otherwise in procuring the Contract or forbearing to do or having done any act in relation to the obtaining or execution of the contract or any other contract with Employer for showing or forbearing to show favour or disfavour to any person in relation to the contract or any other contract with Employer.

3.3 The Bidder(s)/Contractor(s) shall disclose the name and address of agents and representatives and Indian Bidder(s)/Contractor(s) shall disclose their foreign principals or associates.

3.4 The Bidder(s)/Contractor(s) shall disclose the payments to be made by them to agents/brokers or any other intermediary, in connection with this bid/contract.

3.5 Deleted.

3.6 The Bidder, either while presenting the bid or during pre-contract negotiations or before signing the contract, shall disclose any payments he has made, is committed to or intends to make to officials of the Employer or their family members, agents, brokers or any other intermediaries in connection with the contract and the details of services agreed upon for such payments.

3.7 The Bidder/Contractor will not collude with other parties interested in the contract to impair the transparency, fairness and progress of the bidding process, bid evaluation, contracting and implementation of the contract.

3.8 The Bidder/Contractor will not accept any advantage in exchange for any corrupt practice, unfair means and illegal activities.

3.9 The Bidder/Contractor shall not use improperly, for purposes of competition or personal gain, or pass on to others, any information provided by the Employer as part of the business relationship, regarding plans, technical proposals and business details, including information contained in electronic data carrier. The Bidder/Contractor also undertakes to exercise due and adequate care lest any such information is divulged.

3.10 The Bidder(s)/Contractor(s) commits to refrain from giving any complaint directly or through any other manner without supporting it with full and verifiable facts.

3.11 The Bidder(s)/Contractor(s) shall not instigate or cause to instigate any third person to commit any of the actions mentioned above.

3.12 If the Bidder/Contractor or any employee of the Bidder/Contractor or any person acting on behalf of the Bidder/Contractor, either directly or indirectly, is a relative of any of the officers of the Employer, or alternatively, if any relative of an officer of the Employer has financial interest/stake in the Bidder(s)/Contractor(s) firm(excluding Public Ltd. Company listed on Stock Exchange), the same shall be disclosed by the Bidder/Contractor at the time of filling of tender.

The term 'relative' for this purpose would be as defined in Section 2(77) of the Companies Act 2013.

3.13 The Bidder(s)/Contractor(s) shall not lend to or

borrow any money from or enter into any monetary dealings or transactions, directly or indirectly, with any employee of the Employer.

3.14 The representative of the Bidder(s)/ Contractor(s) signing Integrity Pact shall not approach the Courts while representing the matters to IEMs and he/she will wait their decision in the matter.

3.15 In case of sub-contracting, the bidder/principal contractor shall take the responsibility of the adoption of IP by the sub-contractor.”

ii) Clause 6.0 set out the sanctions for violations committed by the bidder/contractor, as per the Integrity Pact, and sub-clause 6.1 thereunder read thus:

“6.1 Any breach of the aforesaid provisions by the Bidder/Contractor or anyone employed by it or acting on its behalf shall entitle the Employer to take action as per the procedure mentioned in the "Guidelines on Banning of Business Dealings" attached as Annex-3A and initiate all or anyone of the following actions, wherever required:-

(i) To immediately call off the pre contract negotiations without assigning any reason or giving any compensation to the Bidder/Contractor. However, the proceedings with the other Bidder(s)/Contractor(s) would continue.

(ii) The Earnest Money Deposit (in pre-contract stage) and/or Security Deposit/Performance Bond (after the contract is Signed) shall stand forfeited either fully or partially, as decided by the Employer and the Employer shall not be required to assign any reason thereof.

(iii) To immediately cancel the contract, if

already signed, without giving any compensation to the Contractor. The Bidder/Contractor shall be liable to pay compensation for any loss or damage to the Employer resulting from such cancellation/rescission and the Employer shall be entitled to deduct the amount so payable from the money(s) due to the Bidder/Contractor.

(iv) Deleted.

(v) To encash the Bank guarantee, in order to recover the dues if any by the Employer, along with interest as per the provision of contract.

(vi) Deleted

(vii) To debar the Bidder/Contractor from participating in future bidding processes of NHPC Ltd., as per provisions of "Guidelines on Banning of Business Dealings" of NHPC Ltd.(Annex-3A), which may be further extended at the discretion of the Employer.

(viii) To recover all sums paid in violation of this Pact by Bidder(s)/Contractor(s) to any middleman or agent or broker with a view to securing the contract.

(ix) In cases where irrevocable Letters of Credit have been received in respect of any contract signed by the Employer with the Bidder/ Contractor, the same shall not be opened/operated.

(x) Forfeiture of Performance Security in case of a decision by the Employer to forfeit the same without assigning any reason for imposing sanction for violation of this Pact.”

(iii) Clause 10.0 stipulated, regarding the “law and place of jurisdiction”, as under:

“10.0 Law and Place of Jurisdiction”

This Pact is subject to Indian Law. The place of performance and jurisdiction is the Registered Office of the Employer, i.e. Faridabad (Haryana). The arbitration clause provided in the tender document/contract shall not be applicable for any issue/dispute arising under Integrity Pact.”

9. Annexure 2A to the ITB contained the “Guidelines on Banning of Business Dealings”, to which Clause 6.1 of the Integrity Pact referred. In as much as the merits of the disputes between the parties are not being examined by me in the present judgment, it is not necessary to refer to the specific clauses of the said guidelines.

10. In accordance with the covenants of the NIT and the ITB, the petitioner submitted the Integrity Pact on 3rd September, 2018, its online bid on 4th September, 2018 and its offline bid on 6th September, 2018. Security deposit of ₹ 97 lakhs was also submitted, by the petitioner, with a bank guarantee dated 31st August, 2018, which was extended from time to time.

11. As required by Clause 3.2.A.1.2, read with Clause 3.2.A.4 of the NIT and the ITB, the petitioner, vide communication dated 31st October, 2018, recommended the names of four suppliers as potential Float Device Technology Providers. The respondent responded thus, on 30th November, 2018:

“Date: 30.11.2018

Email: Sharma.shivmohan@mahindra.com/shubham.pratyush@mahindra.com

M/s Mahindra Susten Pvt. Ltd.,
6th floor, AFL House,
Lok Bharati Complex,
Marol Maroshi Road,
Mumbai, Maharashtra-400059

Kind Attention: Mr. Ankit Jain, General Manager

Subject: Engineering Procurement and Construction (EPC) contract for development of 10MW Floating Solar Power Project including evacuation arrangements at West Kallada Site, Dist.- Kollam in the state of Kerala, along with its comprehensive operation and maintenance for 10 (ten) years.

Ref: (i) E-TENDER NO. 2018_NHPC_355399_1

Dear Sir,

This is with reference to your Bid submitted against aforesaid Tender.

In this regard, it is informed that your bid has been found Techno-commercially responsive on the basis of following proposed sub-contractor as per Clause- 3.2.A.1.2 of ITB/NIT:

1. M/s Yellow 2 Gen Energy Pvt. Limited. Gurugram

Thanking you,

Yours faithfully,

Sd/-
General Manager (Civil Contracts-III)
Telephone No. : +91 (129) 2270974"

12. In the e-reverse auction which took place consequent to the aforesaid NIT, the petitioner emerged as the successful bidder. Clause 13.1 of the ITB stipulated that bids would remain valid for 120 days from the last date of submission of online bids, and required the respondent to issue letters of award within the said period, subject to the right to seek extension from the petitioner for exceptional

circumstances, *vide* Clause 13.2. The normal period, as per Clause 13.1, therefore, expired on 2nd January, 2019. The respondent, however, requested for extension of time for notification of the award of the tender to the petitioner *vide* letters dated 26th December, 2018, 23rd January, 2019, 25th March, 2019, 15th April, 2019, 19th June, 2019, 15th July, 2019, 26th July, 2019 and 19th August, 2019, to all of which the petitioner consented. Ultimately, the tender was awarded to the petitioner *vide* three Letters of Award (hereinafter referred to as “LOAs”), issued on 20th September, 2019, by the respondent. These three LOAs were for

- (i) supply of plant and equipment and materials,
- (ii) providing services such as port handling, insurance, inland transportation, site handling, installation, testing, commissioning etc., and
- (iii) operation and maintenance for a period of ten years, including 24 months’ defect liability period, from the date of commissioning of the project.

13. Para 5.0 of the of the first of the aforesaid three LOAs, for supply of plant and equipment and materials, stipulated thus:

“5.0 The Sub-contractor for the Float Device Technology provider shall be M/s Yellow 2 Gen Energy Pvt. Limited. Gurugram. The Sub-contractor shall submit Performance Bank Guarantee equivalent to 5% of value of work sublet in addition to the Performance Bank Guarantee for whole contract submitted by the Contractor.

The Contractor shall also submit a joint deed of undertaking (as per Annexure-B) from the proposed subcontractor and Contractor for joint and several responsibility of execution of work sub-contracted by the sub-contractor.”

14. The petitioner addressed several communications to the respondent, requesting the respondent to permit engagement of additional/alternative float technology providers, in view of the advancement in design and technology of the floater device that had taken place during the time consumed by the respondent in awarding the contract to the petitioner.

15. On 15th November, 2019, M/s Yellow 2 Gen Energy Private Limited (hereinafter referred to as “Y2G”), the float technology provider approved by the respondent, informed the respondent that it was unable to meet the project schedule requirements of the petitioner and suggested that a different float technology provider be engaged by the respondent for the remainder capacity which Y2G had been unable to provide. Admittedly, however, the 5% bank guarantee, which was required to be submitted by Y2G, *vide* Clause 3.2.A.4 of the NIT and ITB, was never so submitted.

16. On or around 3rd March, 2020, the respondent invoked the bank guarantees submitted by the petitioner towards earnest money deposit. At around the same time, on 2nd March, 2020, the respondent addressed the following communication to the petitioner:

“Date: 02.03.2020

Email;join.ankit@mahindra.com/shubham.pratyush@mahindra.com

M/s Mahindro Susten Pvt. Ltd.,
Mahindro Towers G. M. Bhosle Road
P. K. Kurne Chowk,
Mumbai, Maharashtra -400018

Kind Attention: Mr. Ankit Jain, General Manager

Subject; "Engineering Procurement and Construction (EPC) contract for development of 10MW Floating Solar Power Project including evacuation arrangements of West Kallada site, Dist.- Kollam in the state of Kerala, along with its comprehensive operation and maintenance for 10 (ten) years" - Cancellation of Award of work.

Ref:

- (i) E ·TENDER ID. 2018NHPC_355399_1
- iii) LOA No. NH/CCW/CC-III/Floating-Solar/LOA/2019/613, 614, 615 dated 20.09.2019
- iv) Your acceptance vide No. MSPL/NHPC/FSPV-10MW/2019/OO1 dated 30.09.2019
- v) Our letter No. NH/CCW/CC-III/Floating-Solar/EPC/2019/675 dated 10.10.2019
- vi) Your letter MSPL/NHPC/FSPV-10MW/2019/005 dated 16.10.2019
- vii) Your mail dated 18.10.2019
- (vi) Our letter No. NH/CCW/CC-III/Floating-Solar/EPC/2019/754 dated 25.10.2019
- viii) Your mail dated 05.11.2019
- ix) Our letter No. NH/CCW/CC-III/Floating-Solar/EPC/2019/781 doted 20.11.2019
- x) Our letter No. NH/CCW/CC-III/Floating-Solar/EPC/2019/839 doted 25.11.2019

Dear Sir,

This has reference to our letter of award no. NH/CCW/CC-III/Floating-Solar/LOA/2019/613, 614, 615 dated 20.09.2019 vide which subject cited work was awarded to you.

As you have failed to submit the Performance Bank Guarantee @ 5% from the Sub-contractor for the value of work sublet to the sub-contractor along with Joint Deed of Undertaking from the Sub-contractor i.e. M/s Yellow 2 Gen, signed integrity Pact between the Contractor and Sub-contractor and could not sign the contract agreement within the extended time for signing of Contract Agreement, the award of work is hereby cancelled and further action shall be initiated against you and your Sub-contractor as per bid conditions.

Thanking you

Yours faithfully,

Sd/-

General Manager (Civil Contracts-III)"

17. This was succeeded by the following communication, dated 9th March, 2020, from the respondent to the petitioner:

"Date: 09.03.2020

To,

**MAHINDRA SUSTEN PVT.LTD.
G.M. BHOSLE ROAD
P.K. KURNE CHOWK, WORLI
MUMBAI, MAHARASHTRA-400018**

Attention: **Shri Ankit Jain, General Manager**

Subject: **Intimation of Suspension of Business Dealings**

Dear Sir,

Whereas the work of "Engineering Procurement and Construction (EPC) contract for development of 10MW Floating Solar Power Project including evacuation arrangements at West Kallada site, Dist.- Kallam in the state of Kerala, along with its comprehensive operation and maintenance for 10 (ten) years" was awarded to your firm vide Letter of Award No. NH/CCW/CC-III/Floating-

Solar/LOA/2019/613, 614, 615 dated 20.09.2019 amounting to Rs. 59.70 Crores (Rs. Fifty Nine Crore Seventy Lac Only) with M/s Yellow 2 Gen Energy Pvt. Ltd., Gurugram as approved Sub-contractor for the "Float Device Technology Provider".

Whereas the conduct of your firm in respect of the following is under investigation:

Brief of the default: M/s Mahindra Susten Pvt. Ltd. have failed to submit Performance Guarantee @5% from the sub-contractor for the value of work sublet to the Sub-contractor along with Joint Deed of Undertaking from the sub-contractor i.e. M/s Yellow 2 Gen, signed Integrity pact between the Contractor & sub-contractor and could not sign the Contract agreement within the extended time for Singing of contract agreement even after giving adequate opportunity to sign the same by extending the date of signing of contract agreement thrice at M/s Mahindra Susten Pvt. Ltd. request.

"Whereas the Competent Authority prima facie considered the allegations (under investigation) are of a serious nature and decided pending investigation, it is not in the interest of the corporation to continue business dealing with your firm.

This order shall have the following effects:

- i) Further business dealings with your firm is Suspended within NHPC. The order of Suspension is effective with immediate effect and would operate for a period of six months or till the investigation is completed and whole process of final order is over within such period. However, if investigations are not completed in six months' time, the Competent Authority may extend the period of Suspension
- ii) During the period of Suspension, no business dealing shall be held with your firm. No enquiry / bid / tender shall be issued to your firm nor will the bids submitted by your firm be entertained.
- iii) In cases where tenders have already been issued to you and price bids are yet to be opened, the Price Bid submitted by you shall not be opened and BG/EMD, if any, submitted by you shall be returned.

iv) In cases where tenders have already been issued to you and Price Bids have already been opened, the tendering process shall be continued.

v) In case of ongoing contracts between you & NHPC, (including cases where contract has already been awarded before the issue of Suspension order) you will be required to continue with the execution and perform as per terms of the contract.

vi) a) In case the Firm is in Joint Venture the following would also be applicable:

i) Participation of Agency in Joint Venture:

Tenders in which your firm has been proposed as Joint Venture Partner by any of the bidders and price bids have been opened prior to Suspension of your firm in such cases the tendering process shall not be annulled on this ground and the Agency shall be permitted to continue as Partner in the Joint Venture for such bidding. However where event of Price Bid opening has not taken place prior to Suspension/Banning of Agency then in such case Agency shall not be permitted to participate as Partner in the Joint Venture.

ii) Banning of joint Venture:

As the Joint Venture is Banned, your firm intends to bid as Partner(s) of Joint Venture in bidding process then it shall be permitted to participate in the bidding process if it has not been Banned on grounds of its role and responsibility in the tendering process for which the Joint Venture has been Banned in Past. In case if the Joint Venture which has been Banned does not indicate the roles and responsibility of individual Partner(s) then, the partner of the Banned Joint Venture shall only be allowed to participate in the bidding process if its participation share is less than 35%.

b) Your firm shall not be allowed to participate as Sub-Vendor/Sub-Contractor in the tenders. Further if your firm is an approved Sub-vendor under any Contract for such

equipment/component/service, the Main Contractor shall not be permitted to place work order/Purchase order/Contract on your agency as a Sub-Vendor/Sub-Contractor after the date of Suspension/ Banning even though the name of the party has been approved as a Sub-Vendor/Sub-Contractor earlier.

c) There would be no bar on procuring the spares and awarding Contracts towards Annual Maintenance (AMC)/ O&M/ Repair works on Agencies pertaining to the packages for which they have been Banned provided the Equipment has been supplied by such Agency.

d) Banning of business dealing shall not be applicable to the Subsidiary company of the Banned agency provided subsidiary company has not participated on the strength of the Banned agency.

On expiry of the above period of Suspension/Banning, you may approach **Contracts Civil Division**, with request for revocation of the order mentioning inter-alia the steps taken by you to avoid recurrence of misconduct which has led to Suspension.

Yours faithfully,

Sd/-
General Manager (Contracts Civil -III)”

18. Disputing the legitimacy of the aforesaid communications dated 2nd March, 2020 and 9th March, 2020, the petitioner addressed a detailed notice to the respondent on 4th May, 2020, refuting all allegations made by the respondent against the petitioner, and seeking reference of the disputes to arbitration in accordance with Clause 6.3 of the GCC, which read thus:

“6.3 Arbitration

Except as otherwise provided, in GCC clause-6.2 hereinbefore, all questions, dispute or difference in respect of which the decision has not been final and conclusive arising

between the contractor and the Employer, in relation to or in connection with the contract shall be referred for arbitration in the manner provided as under:

6.3.1 Either of the parties may give to the other notice in writing of the existence of such question, dispute or difference which shall be settled in accordance with the Arbitration and Conciliation Act, 1996, as amended up to date.

6.3.2 Any dispute or difference what so ever arising between the parties and of or relating to the construction, interpretation, application, meaning, scope, operation /or effect of this contract or the validity of the breach thereof, shall be settled by arbitration in accordance with the rules of arbitration of the **Delhi High Court Arbitration Centre** and the award made in the pursuance thereof shall be final and binding on the parties. It is a term of the Contract that the Party invoking arbitration shall specify all disputes to be referred to arbitration at the time of invocation of arbitration and not thereafter.

6.3.3 The cost and expenses of arbitration proceedings will be borne by each party as per terms of **Delhi High Court Arbitration Centre** in equal shares. However, the expenses incurred by each Party in connection with the document preparation, presentation etc. to produce to arbitral tribunal on its behalf shall be borne by each Party itself. Majority award rendered by arbitral tribunal shall be final and binding on the Parties.”

19. The petitioner also suggested the name of a learned retired Chief Justice of the High Court of Punjab and Haryana as the arbitrator to arbitrate on the disputes.

20. The respondent replied to the aforesaid communication dated 4th May, 2020 of the petitioner, on 22nd May, 2020, thus:

“M/s Mahindra Susten Pvt. Ltd.,
7th floor, We Work Raheja Platinum,
Marol Co-operative Industrial Estate Road,

Sag Baug, Marol, Andheri East Mumbai,
Maharashtra-400059

Sub: Request for Arbitration in the matter between M/s.
Mahindra Susten Private Limited and NHPC Limited.

Ref: Your email dated 04/05/2020

Sir,

This is in reference to the above referred email whereby a request on your behalf for RFA has been received from legal firm Khaitan & Co. In this regard at the outset it is submitted that there is no arbitration agreement between the parties in terms of section 7 of A&C Act, 1996. Moreover terms of bid document does not confer power upon DIAC to act as Arbitral Institution, as Clause 6.3 of GCC does not confer power upon DIAC to act as Arbitral Institution. It only stipulates that dispute shall be settled by arbitration in accordance with the rules of DIAC.

However, without prejudice to above it is also submitted that the Claimant has unilaterally proposed the name Hon'ble Justice (Retd.) Vijender Jain as sole arbitrator, which is being opposed vehemently. In this regard it is brought within your kind notice that Hon'ble Justice (Retd.) Vijender Jain is an arbitrator in four cases either as NHPC's nominee arbitrator or as Presiding Arbitrator or as nominee arbitrator of the claimant. As such he is ineligible as per the provisions of Arbitration and Conciliation Act, 1996. Moreover in terms of recent decision of Hon'ble Supreme Court a person interested in outcome of the dispute cannot appoint a sole arbitrator.

In view of the above, your request for invocation of arbitration cannot be accepted.

Thanking you,

Yours faithfully,

Sd/-
General Manager (CC-III)”

21. The petitioner replied on 18th June, 2020, asserting that an

arbitration agreement did exist between the petitioner and the respondent, and that Clause 6.3.2 of the GCC required the arbitration to be in accordance with the rules of arbitration of the Delhi International Arbitration Centre (DIAC). However, as there was an objection to the name suggested by the petitioner as the arbitrator to arbitrate on the disputes, the petitioner suggested the name of another learned retired Judge of this Court, in place of the name earlier suggested.

22. The respondent responded by issuing, on 19th June, 2020, a Show Cause Notice to the petitioner, which read thus:

**“M/s Mahindra Suslen Pvt. Ltd .,
G.M. BHOSLE ROAD.
P.K. KURNE CHOWK. WORLI
MUMBAI. Maharashtra-400018.**

Attn.: Sh. Anklt Jain. General Manager

Subject: Show Cause Notice.

Ref: 1. LOA No. NH/CCW/CC-III/Floating-Solar/EPC/2019/613-615 Dated: 20.09.2019.

2. NHPC Letter No. NH/CCW/CC-III/Floating-Solar/EPC/2020/253 Dated: 02.03.2020.

3. NHPC Letter No. NH/CCW/CC-III/Floating-Solar/EPC/2020/289 Dated: 09.03.2020.

Dear Sir,

You are hereby required to Show Cause in writing within 15 days from the date hereof why Business Dealing with your firm should not be banned / your firm is placed in the Banning List (as the case may be) and be debarred from entering into any contracts with NHPC for the following reasons:

1. Non submission of Performance Guarantee @5% from the approved subcontractor for the value of work sublet to the sub-contractor along with Joint Deed of Undertaking from the Sub contractor i.e. Yellow 2Gen, signed Integrity Pact between Contractor & Sub Contractor for the work of "EPC Contract for development of 10 MW Floating Solar Power Project including evacuation arrangements, at West Kallada Site. Dist. - Kollam in the state of Kerala, along with its comprehensive O&M for 10 years" as per LOA/ Bid Conditions.

2. Non signing of Contract Agreement within extended time even after giving adequate opportunity by extending the date of Signing of Contract Agreement thrice at M/s Mahindra Susten Pvt. Ltd. request.

Your reply (if any) should be supported by documents and documentary evidence which you wish to rely in support of your reply. In case you desire to present your case in person to NHPC, an Oral Hearing shall be conducted on 29th June, 2020 at 15:00 Hours for which prior intimation be furnished to this office. Should you fail to reply to this Show Cause Notice within the time and manner aforesaid, it will be presumed that you have nothing to say and we shall proceed accordingly.

Your reply, if any, and the documents / documentary evidence given in support shall be taken into consideration prior to arriving at a decision.

Yours faithfully,
Sd/-
General Manager (CC-III)"

23. It is in these circumstances that the petitioner has moved this Court by means of the two petitions which are being disposed of by the present judgment, i.e. Arb. P. 217/2020, under Section 11(6) of the 1996 Act, seeking appointment of an arbitrator and OMP (I) (Comm) 162/2020 under Section 9 of the 1996 Act, seeking certain pre-arbitral

interim reliefs. As already noted at the commencement of the present judgment, Mr. Viswanathan, learned Senior Counsel for the petitioner agreed to OMP (I) (Comm) 162/2020 being adjudicated by the Arbitral Tribunal, to be constituted in accordance with the prayer contained in Arb P 217/2020, treating the OMP as an application under Section 17 of the 1996 Act.

24. This Court, therefore, is only required to adjudicate on Arb P 217/2020. Pleadings have been completed in the petition, and detailed written submissions have also been filed by learned Counsel.

Rival Contentions

25. The respondent opposes, in writing as well as orally through Mr. Tejas Karia, Arb. P. 217/2020, on the following grounds:

(i) The only concluded contract between the parties was the Integrity Pact. The GCC had not been signed by both parties. The Integrity Pact conferred jurisdiction exclusively on Courts at Faridabad. As such, this Court does not possess territorial jurisdiction to entertain the present matter.

(ii) The petition was not maintainable, as it was based on a “proposed EPC contract”, which had never come into existence, as it was never signed by the respondent. Reference has been invited, in this context, to the following passages, from OMP(I)(COMM) 162/2020:

“2. The brief facts pertaining to the present petition are that on 05.07.2018, the Respondent issued a Notice Inviting Tender ("NIT") for the purpose of inviting bids for "Engineering Procurement Construction (EPC) Contract for 10 MW capacity Floating Solar Power Project at West Kallada in the State of Kerala with its Comprehensive Operation and Maintenance for 10 Years" ("Proposed EPC Contract"). In response to the NIT, the Petitioner duly submitted the Pre-Contract Integrity Pact on 03.09.2018 ("Integrity Pact"), its online bid on 04.09.2018 and its offline bid on 06.09.2018 in compliance with the terms of the NIT and submitted bid security/Earnest Money Deposit ("EMD") amounting to INR 97,00,000 (Indian Rupees Ninety Seven Lacs Only) by way of a Bank Guarantee No. 136GM07182430001 dated 31 August 2018 issued by Yes Bank Limited ("EMD Guarantee"), which guarantee was extended from time to time basis requests from the Respondent.

3. It is the case of the Petitioner that the terms of the NIT and the Instruction to Bidders ("ITB") contained in the Bid Document for the Engineering Procurement Construction (EPC) Contract for 10 MW Capacity Floating Solar Power Project at West Kallada, Kollam District in the State of Kerala with its Comprehensive Operation and Maintenance for 10 Years ("Bid Document") stipulate that the bidder must propose the name of the float technology provider with whom the bidder expects to tie-up for the supply of floats for the 10 MW Capacity Floating Solar Power Project at West Kallada, Kollam District in the State of Kerala ("Project"). Accordingly, the Petitioner proposed the names of four float solar vendors namely, M/s. Ciel et Terre, M/s. Hefei Jntech New Energy Co. Ltd., M/s. Quant Solar Technologies Pvt. Ltd., and Yellow 2 Gen Energy Pvt. Ltd.

(“Y2G”). The Petitioner emerged as the successful bidder and was awarded three letters of award for the Proposed EPC Contract by the Respondent.

4. The First LoA (defined below) stated that Y2G shall be the subcontractor for the purposes of supplying Float Device Technology (“Float Provider”) and shall submit performance bank guarantee equivalent to 5% of the value of work sublet (“5% PBG”), in addition to the performance bank guarantee that was to be submitted for the entire Proposed EPC Contract by the Petitioner. Further, a joint undertaking was to be submitted by the Petitioner and Y2G for joint and several responsibilities of execution of work subcontracted by the Petitioner to Y2G as the subcontractor.

5. However, despite the Petitioner's repeated attempts at negotiations and sending reminders to expedite closure, Y2G refused to co-operate and failed to respond to the Petitioner's requests in respect of the same, for reasons best known to them. *Consequently, the Petitioner was unable to enter into the Proposed EPC Contract with the Respondent on account of the failure of Y2G to submit the 5% PBG and joint undertaking by Y2G despite the Petitioner's best efforts to close all issues regarding the same with Y2G.* In fact, Y2G itself informed the Respondent that it is unable to meet the project schedule requirements of the Petitioner and in fact even suggested that if the schedule proposed by the Petitioner is to be met then a different vendor be engaged for the remainder capacity that Y2G is unable to provide within the project schedule and that the 5% PBG may be accordingly split between the subcontractors.”

(Emphasis supplied)

(iii) Clause 10.0 of the Integrity Pact specifically stipulated that the arbitration clause in the tender documents/contract would not be applicable to any issue/dispute arising under the Integrity Pact. As such, there was no arbitration agreement between the petitioners and the respondent.

(iv) In its e-mail dated 18th October, 2019 *supra*, the petitioner had admitted that the submission of performance bank guarantee from Y2G was a pre-requisite for signing of the contract. The said bank guarantee having not been submitted by Y2G till date, the petitioners could not seek to contend that a concluded contract existed between the petitioners and the respondent. The relevant paragraphs from the letter dated 18th October, 2019 from the petitioner to the respondent, read thus:

“With reference to our letter MSPL/NHPC/FSPV-10MW/2019/005 dated 16th Oct 2019, MSPL had submitted PBG worth 10% of contract value, in original, in accordance with clause 13.3 of GCC and proposed the date of 22nd Oct 2019 for signature of the contract as per clause no 30 (ITB). In the said letter, we also proposed submission of performance bank guarantee from the float device technology provider upon finalization of floater subcontractor.

It is however understood that submission of performance bank guarantee from floater subcontractor is prerequisite for signing of the contract. As we are still in the process of discussion and finalization of floater subcontractor in light of our letter no. MSPL/NHPC/FSPV-10MW/2019/002 dated 30th Sep 2019, some more time will be required for submission of performance bank guarantee from floater subcontractor.”

(v) *Vide* its letter dated 20th November, 2019, the respondent

had informed the petitioners that final extension for execution of the contract was granted only till 30th November, 2019 and that if the conditions under the LOAs were not complied with, the respondent would cancel the LOAs, forfeit the bank guarantee furnished towards EMD and suspend business dealings with the petitioner and Y2G, as well as initiate action for banning of business dealings. As the joint undertaking and 5% performance bank guarantee was not submitted by Y2G, no contract was executed/signed by the respondent. Ultimately, on 2nd March, 2020, the respondent was constrained to issue a notice of cancellation of the award of the work.

(vi) It was understood between the parties that mere issuance of LOAs did not result in a concluded contract, unless and until the prerequisite of the LOAs were complied with by the petitioners and Y2G. Consensus, *ad idem*, on all material terms, is a prerequisite for a concluded contract.

(vii) Under Section 7 of the Indian Contract Act, 1972 (hereinafter referred to as “the Contract Act”), absolute and unqualified acceptance of an offer is necessary to convert a proposal into a promise. As there was no compliance by the petitioners, with the conditions stipulated in the LOAs dated 20th September, 2019, no concluded contract could be said to have come into being, between the petitioners and respondent, in view of Section 7 of the Contract Act.

(viii) All actions taken by the respondent against the

petitioners, including cancellation of the LOAs, suspension of business activities and issuance of Show Cause Notice were taken under the Integrity Pact, and not under the EPC contract.

(ix) By concealing the fact that Y2G was incapable of performing the contract, and by insisting on the respondent to add/substitute subcontractors, in violation of the covenants of the NIT and ITB, the petitioners had breached Clause 3.7 of the Integrity Pact, thereby justifying the invocation, against the petitioner, of the Guidelines for Banning of Business Dealings.

26. As against this, the petitioners in its first written submissions, dated 1st July, 2020, contended thus:

(i) Clause 6.3.2 of the GCC specifically required any dispute relating to the contract to be settled by arbitration in accordance with the rules of arbitration of the DIAC. Clause 1.1 of the GCC defined “contract” to mean the contract entered into between the employer and the contractor, and included the “contract documents”. “Contract documents” in turn, included, by definition, the GCC.

(ii) Clause 6.1 of the ITB specifically stipulated that the GCC formed part of the bid documents. The GCC was also communicated, electronically, by the respondent to the petitioners, with the bid documents and the NIT, and was accepted by the petitioners by submission of its bid in response

thereto.

(iii) The issuance of the three LOAs dated 20th September, 2019, issued by the respondent to the petitioners for proposed EPC contract, clearly vouchsafed the acceptance by the respondent, of the petitioners' bid, in accordance with the terms of the Bid Documents, including, specifically, the GCC.

(iv) It was trite, in law, that where the tender documents themselves contained an arbitration clause and had been accepted, a valid arbitration agreement existed between the parties. Clause 6.3 of the GCC satisfied the requirement of Section 7 of the 1996 Act and constituted a valid, binding and enforceable arbitration agreement between the petitioners and the respondent. Reliance was placed, in this context, on the judgment of the Supreme Court in *Unissi (India) Pvt. Ltd. v. Post Graduate Institute of Medical Education and Research*¹ and *State of U.P. v. Combined Chemicals Co. (P) Ltd.*².

27. In response to the aforesaid submissions of the petitioners, the respondent further contended thus:

(i) Clause 29.1 of the ITB could not be read in isolation. The Court had to examine whether a contract existed and whether non-signing of the contract vitiated the entire contract, including the LOAs.

¹ (2009) 1 SCC 107

² (2011) 2 SCC 151

(ii) Section 7 of the 1996 Act applied only where there was a defined legal relationship between the parties. Prior to applying Section 7 of the 1996 Act, therefore, it had to be examined whether a concluded contract existed between the parties, in terms of the Contract Act, for which purpose reliance was placed, by Mr. Karia, on the judgment of this Court in ***Benara Bearing & Pistons Ltd v. Mahle Engineering Components India Pvt. Ltd.***³.

(iii) Acceptance of a contract, while proposing variations therefrom, did not constitute acceptance in the eyes of law, but was in the nature of a counter proposal. A concluded contract came into being only when such counter proposal was accepted by the original proposer. Reliance has been placed, in this context, on ***Padia Timber Company (P) Ltd. v. Board of Trustees of Visakhapatnam Port Trust***⁴, as well as the judgment of this Court in ***National Aluminum Co. Ltd. v. Subhash Infraengineers Pvt. Ltd. and Ors.***⁵. The communication dated 20th September, 2019 (*supra*), from the respondent to the petitioners was in the nature of a conditional acceptance and, therefore, a counter proposal, as it required a joint undertaking from Y2G as well as furnishing by Y2G, of 5% performance bank guarantee. The LOAs were, therefore, in the nature of a counter offer. Compliance of the aforesaid

³ (2018) SCC OnLine Del 8272

⁴ 2021 SCC OnLine SC 1

⁵ MANU/PH/2107/2016

conditions contained in the LOAs by the petitioners, alone would result in a concluded contract between the parties. These conditions were never complied with; *ergo*, no concluded contract came into being between the petitioners and the respondent.

(iv) The Suspension Order dated 9th March, 2020 and the Show Cause Notice dated 19th June, 2020 were issued by the respondent in exercise of the authority conferred by Clause 6 of the Integrity Pact, specifically Clause 6.1(i) (which empowered the respondent to call off the pre-contract negotiations and forfeit the bank guarantee provided by the petitioners at the contract stage and Clause 6.1(vii) (which empowered the respondent to debar the petitioners in accordance with the guidelines for Banning of Business Dealings).

(v) Clause 13.3 of the GCC was required to be read in conjunction with Clause 3.2.A.4 of the ITB, which required submission of 5% performance bank guarantee by the float device service provider, i.e. Y2G.

(vi) The respondent wrote to the petitioners on 13th November, 2019 and, again, on 20th November, 2019 calling on the petitioners to sign the contract agreement. Both communications evinced the intention and readiness of the respondent to proceed with the contract. The petitioners, however, demurred from signing the contract and fulfilling the covenants of the LOAs, resulting in the respondent cancelling

the LOAs *vide* letter dated 2nd March, 2020, annulling the award of the contracts to the respondent in consequence. Mr. Karia was emphatic in pointing out that the respondent annulled the award and not the contract, the contract itself never having come into being in the first place.

(vii) *Unissi*¹ and *Combined Chemicals*², on which Mr. Viswanathan relied, were distinguishable. In *Unissi*¹, the products were delivered by M/s. Unissi (India) Pvt. Ltd. (hereinafter referred to as “Unissi”), pursuant to a purchase order issued by the Post Graduate Institute of Medical Education and Research (hereinafter referred to as “PGIMER”) and delivery of the products was accepted by PGIMER. In these circumstances, the Supreme Court held that the parties had acted upon the terms of the contract though it was signed by only one party and not by the other. In the present case, though the Letters of Award dated 20th September, 2019 were issued by the respondent to the petitioners, the petitioners failed to take steps in accordance with the said Letters of Award, resulting in non-conclusion of the contract. In *Combined Chemicals Co. (P) Ltd.*², the bid documents itself included an arbitration agreement, and the letter of acceptance stipulated that, if so required, the successful tenderer would have to execute a formal agreement deed within the time fixed by the director of industries. Execution of a formal contract in that case was, therefore, optional, and by issuance of the letter of acceptance, the arbitration agreement had become enforceable. In the present case, there was no arbitration agreement in the LOAs.

Rather, the petitioner, in its email dated 18th October, 2019 had specifically acknowledged the fact that submission of the performance bank guarantee by Y2G was a precondition for concluding of the contract with the respondent. In these circumstances, the petitioners could not legitimately contend that, without a concluded signed contract coming into being between the parties, Clause 6.3 of the GCC became applicable.

28. Without prejudice, it has been contended that the petitioners have failed to exhaust the avenue of amicable settlement, contemplated by Clause 6.3.2 of the GCC.

29. In rejoinder, the petitioner has submitted thus:

(i) Clause 29.1 of the ITB specifically stipulated that the notification of award would constitute the formation of the contract and would be considered for all purposes as execution of the contract provisions till signing of the contract agreement.

(ii) Moreover, the respondent had directed the petitioner to commence works under Clause 8.0 of the Letters of Award. The Letters of Award specifically incorporated the terms of the GCC, including Clause 6.3 thereof.

(iii) It was not open, therefore, for the respondent to contend that there was no valid and binding contract between the parties.

(iv) Insofar as the Integrity Pact, and the proposal to ban

business dealings, was concerned, Clause 32(e) of the NIT stipulated intentional wrongdoing in the form of deception, fraud or other misconduct, as a pre-requisite for banning of business dealings. Neither the suspension order dated 9th March, 2020, nor the Show Cause Notice, dated 19th June, 2020, even hinted at breach of any of the “commitments”, enumerated in Clause 3.0 of the Integrity Pact. The attempt, of the respondent, to pigeonhole the alleged infractions of the petitioner into Clauses 3.6, 3.7 and 3.9 of the Integrity Pact, was, therefore, a desperate attempt to invoke the Pact, *ex post facto*, to defeat the case of the petitioner.

(v) Even on merits, the breaches alleged in the suspension order dated 9th March, 2020 and the Show Cause Notice dated 19th June, 2020 could not be said to be breaches relatable to Clauses 3.6, 3.7 and 3.9 of the Integrity Pact. The Integrity Pact applied only in the cases of egregious default, in which the integrity of the contractor had become suspect. This was apparent from Clause 3 of the Integrity Pact itself.

(vi) Clause 6.2.2, or the application thereof, was never pleaded by the respondent in its counter affidavit, filed in the present proceedings. Even otherwise, once the petitioner had annulled the Letters of Award, suspended dealings with the respondent and issued Show Cause Notice, to ban all further business dealings, any possibility of amicable resolution of the disputes between the petitioner and the respondent stood

foreclosed, and any such attempt would be nothing other than empty formalities. In such a case, compliance with the covenants could not be insisted upon. Reliance has been placed, for this purpose, on *Demerara Distilleries (P) Ltd. v. Demerara Distillers Ltd.*⁶, *Visa International Ltd. v. Continental Resources (USA) Ltd.*⁷, *Ravindra Kumar Verma v. BPTP Ltd.*⁸, *Saraswati Construction Company v. East Delhi Co-operative Group Housing Society Ltd.*⁹, *Sikand Construction Co. v. State Bank of India*¹⁰ and *U.O.I. v. Baga Brothers*¹¹.

(vii) The reliance, by Mr. Karia, on Clause 31.2 of the ITB, was also misplaced, as no violation, of any of the covenants of Clause 30 or Clause 31.1, by the petitioner, could be said to have taken place.

(viii) The 14-day period for signing of the contract, post receipt of notice of readiness of contract agreement from the respondent under Clause 30 of the ITB, would not apply, as the respondent had itself waived the said requirement, even by the covenants of the three Letters of Award dated 20th September, 2019.

⁶ (2015) 13 SCC 610

⁷ (2009) 2 SCC 55

⁸ 2014 SCC Online Del 6602

⁹ 1994 SCC OnLine Del 563

¹⁰ ILR (1976) I Delhi 364

¹¹ 2017 SCC Online Del 8989

(ix) Even if it were to be presumed that the annulment of the Letters of Award was valid, the arbitration agreement, being in the nature of a separate agreement, would, nevertheless, survive, for resolution of dispute arising under or in connection with the contract. For this purpose, the petitioner has relied on ***National Agriculture Co-op. Marketing Federation India v. Gains Trading***¹², ***Naihati Jute Mills Ltd. v. Khyaliram Jagannath***¹³, ***Reva Electric Car Company v. Green Mobil***¹⁴ and ***Enercon (India) Ltd. v. Enercon GMBH***¹⁵.

Analysis

30. Section 11(6A) of the 1996 Act contains a statutory proscription against a court, exercising jurisdiction under Section 11(6), examining any aspect other than the existence of the arbitration agreement between the parties. A bench of three Hon'ble Judges of the Supreme Court has, in its recent judgement in ***Vidya Drolia v. Durga Trading Corpn***¹⁶, authoritatively delineated the scope and ambit of the jurisdiction of a Court, exercising authority under Section 11 (6), to examine the aspects of existence of the arbitration agreement and arbitrability of the dispute. The *ratio decidendi* of the judgement, on these two aspects, is captured in the following passages:

“121. The courts at the referral stage do not perform ministerial functions. They exercise and perform judicial functions when they decide objections in terms of Sections 8 and 11 of the Arbitration Act. *Section 8 prescribes the courts to refer the parties to arbitration, if the action brought is the*

¹² (2007) 5 SCC 692

¹³ AIR 1968 SC 522

¹⁴ (2012) 2 SCC 93

¹⁵ (2014) 5 SCC 1

¹⁶ 2020 SCC OnLine SC 1018

subject of an arbitration agreement, unless it finds that prima facie no valid arbitration agreement exists. Examining the term ‘prima facie’, in **Nirmala J. Jhala v. State of Gujarat**¹⁷, this Court had noted:

“48. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the case were [to be] believed. While determining whether a prima facie case had been made out or not the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence.”

122. *Prima facie case in the context of Section 8 is not to be confused with the merits of the case put up by the parties which has to be established before the arbitral tribunal. It is restricted to the subject matter of the suit being prima facie arbitrable under a valid arbitration agreement. Prima facie case means that the assertions on these aspects are bona fide. When read with the principles of separation and competence-competence and Section 34 of the Arbitration Act, referral court without getting bogged-down would compel the parties to abide unless there are good and substantial reasons to the contrary.*

123. *Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straight forward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial. This necessarily reflects on the nature of the jurisdiction exercised by the court and in this context, the observations of*

¹⁷ (2013) 4 SCC 301

B.N. Srikrishna, J. of ‘plainly arguable’ case in ***Shin-Etsu Chemical Co. Ltd.***¹⁸ are of importance and relevance. Similar views are expressed by this Court in ***Vimal Kishore Shah v. Jayesh D. Shah***¹⁹ wherein the test applied at the pre-arbitration stage was whether there is a “good arguable case” for the existence of an arbitration agreement. The test of “good arguable case” has been elaborated by the England and Wales High Court in ***Silver Dry Bulk Company Limited v. Homer Hulbert Maritime Company Limited***²⁰, in the following words:

“Good arguable case” is an expression which has been hallowed by long usage, but it means different things in different contexts. For the purpose of an application under Section 18, I would hold that what must be shown is a case which is somewhat more than merely arguable, but need not be one which appears more likely than not to succeed. It shall use the term “good arguable case” in that sense. It represents a relatively low threshold which retains flexibility for the Court to do what is just, while excluding those cases where the jurisdictional merits were so low that reluctant respondents ought not to be put to the expense and trouble of having to decide how to deal with arbitral proceedings where it was very likely that the tribunal had no jurisdiction. In this connection it is important to remember that crossing the threshold of “good arguable case” means that the Court has power to make one of the orders listed in Section 18(3). It remains for consideration whether it should do so as a matter of discretion.”

124. Appropriate at this stage would be a reference to the judgment of the Delhi High Court in ***NCC Ltd. v. Indian Oil Corporation Ltd.***²¹, wherein it has been held as under:

“59.1 In my view, the scope of examination as to whether or not the claims lodged are Notified Claims has narrowed down considerably in view of the language of Section 11(6A) of the 1996 Act. To my

¹⁸ (2005) 7 SCC 234

¹⁹ (2016) 8 SCC 788

²⁰ (2017) EWHC 44 (Comm)

²¹ Judgement dt 8th February, 2019 in Arb P 115/2018

mind, once the Court is persuaded that it has jurisdiction to entertain a Section 11 petition all that is required to examine is as to whether or not an arbitration agreement exists between the parties which is relatable to the dispute at hand. The latter part of the exercise adverted to above, which involves correlating the dispute with the arbitration agreement obtaining between the parties, is an aspect which is implicitly embedded in sub-section (6A) of Section 11 of the 1996 Act, which, otherwise, requires the Court to confine its examination only to the existence of the arbitration agreement. Therefore, if on a bare perusal of the agreement it is found that a particular dispute is not relatable to the arbitration agreement, then, perhaps, the Court may decline the relief sought for by a party in a Section 11 petition. However, if there is a contestation with regard to the issue as to whether the dispute falls within the realm of the arbitration agreement, then, the best course would be to allow the arbitrator to form a view in the matter.

59.2 Thus, unless it is in a manner of speech, a chalk and cheese situation or a black and white situation without shades of grey, the concerned court hearing the Section 11 petition should follow the more conservative course of allowing parties to have their say before the arbitral tribunal.”

125. The nature and facet of non-arbitrability could also determine the level and nature of scrutiny by the court at the referral stage. Stravos Brekoulakis has differentiated between contractual aspects of arbitration agreement which the court can examine at referral stage and jurisdictional aspects of arbitration agreement which he feels should be left to the arbitral tribunal. John J. Barcelo III, referring to some American decisions had divided the issue of non-arbitrability into procedural and substantive objections. The procedurals are ‘gateway questions’ which would presumptively be for the arbitrator to decide at least at the first stage. In the Indian context, we would respectfully adopt the three categories in ***Boghara Polyfab Private Limited***²². The first category of issues, namely, whether the party has approached the

²² *National Insurance Co. Ltd v. Boghara Polyfab Pvt Ltd*, (2009) 1 SCC 267

appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to more thorough examination in comparison to the second and third categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, we would add and include the question or issue relating to whether the cause of action relates to action in personam or rem; whether the subject matter of the dispute affects third party rights, have erga omnes effect, requires centralized adjudication; whether the subject matter relates to inalienable sovereign and public interest functions of the State; and whether the subject matter of dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s). Such questions arise rarely and, when they arise, are on most occasions questions of law. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the arbitral tribunal to decide. We would not like be too prescriptive, albeit observe that the court may for legitimate reasons, to prevent wastage of public and private resources, can exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the arbitral tribunal. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. Conversely, if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration and the court. There are certain cases where the prima facie examination may require a deeper consideration. The court's challenge is to find the right amount of and the context when it would examine the prima facie case or exercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non-arbitrable.

126. Accordingly, when it appears that prima facie review would be inconclusive, or on consideration inadequate as it requires detailed examination, the matter should be left for

final determination by the arbitral tribunal selected by the parties by consent. The underlying rationale being not to delay or defer and to discourage parties from using referral proceeding as a ruse to delay and obstruct. In such cases a full review by the courts at this stage would encroach on the jurisdiction of the arbitral tribunal and violate the legislative scheme allocating jurisdiction between the courts and the arbitral tribunal. Centralisation of litigation with the arbitral tribunal as the primary and first adjudicator is beneficent as it helps in quicker and efficient resolution of disputes.

127. *The Court would exercise discretion and refer the disputes to arbitration when it is satisfied that the contest requires the arbitral tribunal should first decide the disputes and rule on nonarbitrability. Similarly, discretion should be exercised when the party opposing arbitration is adopting delaying tactics and impairing the referral proceedings. Appropriate in this regard, are observations of the Supreme Court of Canada in **Dell Computer Corporation v. Union des consommateurs and Olivier Dumoulin**²³, which read:*

“85. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.

86. Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process.”

²³ (2007) 2 SCR 801

130. As observed earlier, **Patel Engineering Ltd.**²⁴ explains and holds that Sections 8 and 11 are complementary in nature as both relate to reference to arbitration. Section 8 applies when judicial proceeding is pending and an application is filed for stay of judicial proceeding and for reference to arbitration. Amendments to Section 8 vide Act 3 of 2016 have not been omitted. Section 11 covers the situation where the parties approach a court for appointment of an arbitrator. **Mayavati Trading Private Ltd.**²⁵, in our humble opinion, rightly holds that **Patel Engineering Ltd.** has been legislatively overruled and hence would not apply even post omission of sub-section (6-A) to Section 11 of the Arbitration Act. **Mayavati Trading Private Ltd.** has elaborated upon the object and purposes and history of the amendment to Section 11, with reference to sub-section (6-A) to elucidate that the Section, as originally enacted, was facsimile with Article 11 of the UNCITRAL Model of law of arbitration on which the Arbitration Act was drafted and enacted. Referring to the legislative scheme of Section 11, different interpretations, and the Law Commission's Reports, it has been held that the omitted sub-section (6-A) to Section 11 of the Arbitration Act would continue to apply and guide the courts on its scope of jurisdiction at stage one, that is the pre-arbitration stage. Omission of sub-section (6-A) by Act 33 of 2019 was with the specific object and purpose and is relatable to by substitution of sub-sections (12), (13) and (14) to Section 11 of the Arbitration Act by Act 33 of 2019, which, vide sub-section (3A) stipulates that the High Court and this court shall have the power to designate the arbitral institutions which have been so graded by the Council under Section 43-I, provided where a graded arbitral institution is not available, the concerned High Court shall maintain a panel of arbitrators for discharging the function and thereupon the High Court shall perform the duty of an arbitral institution for reference to the arbitral tribunal. Therefore, it would be wrong to accept that post omission of sub-section (6-A) to Section 11 the ratio in **Patel Engineering Ltd.** would become applicable.

131. We now proceed to examine the question, whether the word 'existence' in Section 11 merely refers to contract

²⁴ S.B.P. Ltd v. Patel Engineering Corpn Ltd, (2005) 8 SCC 618

²⁵ Mayavati Trading Pvt Ltd v. Pradyut Deb Burman, (2019) 8 SCC 714

formation (whether there is an arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an arbitration agreement and validity of an arbitration agreement. Such interpretation can draw support from the plain meaning of the word “existence’. However, it is equally possible, jurisprudentially and on contextualism, to hold that an agreement has no existence if it is not enforceable and not binding. Existence of an arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration. *Legalistic and plain meaning interpretation would be contrary to the contextual background including the definition clause and would result in unpalatable consequences. A reasonable and just interpretation of ‘existence’ requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement. An agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law. We would proceed to elaborate and give further reasons:*

(i) In **Garware Wall Ropes Ltd.**²⁶, this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, *albeit* the observations made and quoted above with reference to ‘existence’ and ‘validity’ of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing paragraph 29 thereof:

²⁶ **Garware Wall Ropes Ltd. v. Coastal Marine Construction & Engineering Ltd.**, (2019) 9 SCC 209

“29. This judgment in *Hyundai Engg. case*²⁷ is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did “exist”, so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-contract would not “exist” as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with “existence”, as opposed to Section 8, Section 16 and Section 45, which deal with “validity” of an arbitration agreement is answered by this Court's understanding of the expression “existence” in *Hyundai Engg. case*, as followed by us.”;

Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement.

(ii) The court at the reference stage exercises judicial powers. ‘Examination’, as an ordinary expression in common parlance, refers to an act of looking or considering something carefully in order to discover something (as per Cambridge Dictionary). It requires the person to inspect closely, to test the condition of, or to inquire into carefully (as per Merriam-Webster Dictionary). *It would be rather odd for the court to hold and say that the arbitration agreement exists, though ex facie and manifestly the arbitration agreement is invalid in law and the dispute in question is non-arbitrable. The court is not powerless and would not act beyond jurisdiction, if it rejects an application for reference, when the*

²⁷ *United India Insurance Co. Ltd v. Hyundai Engineering & Construction Co. Ltd*, (2018) 7 SCC 607

arbitration clause is admittedly or without doubt is with a minor, lunatic or the only claim seeks a probate of a Will.

(iii) *Most scholars and jurists accept and agree that the existence and validity of an arbitration agreement are the same.* Even Starvos Brekoulakis accepts that validity, in terms of substantive and formal validity, are questions of contract and hence for the court to examine.

(iv) Most jurisdictions accept and require *prima facie* review by the court on non-arbitrability aspects at the referral stage.

(v) Sections 8 and 11 of the Arbitration Act are complementary provisions as was held in ***Patel Engineering Ltd.*** The object and purpose behind the two provisions is identical to compel and force parties to abide by their contractual understanding. This being so, the two provisions should be read as laying down similar standard and not as laying down different and separate parameters. Section 11 does not prescribe any standard of judicial review by the court for determining whether an arbitration agreement is in existence. Section 8 states that the judicial review at the stage of reference is *prima facie* and not final. *Prima facie* standard equally applies when the power of judicial review is exercised by the court under Section 11 of the Arbitration Act. Therefore, we can read the mandate of valid arbitration agreement in Section 8 into mandate of Section 11, that is, ‘existence of an arbitration agreement’.

(vi) *Exercise of power of prima facie judicial review of existence as including validity is justified* as a court is the first forum that examines and decides the request for the referral. *Absolute “hands off” approach would be counterproductive and harm arbitration, as an alternative dispute resolution mechanism. Limited, yet effective intervention is acceptable as it does not obstruct but effectuates arbitration.*

(vii) Exercise of the limited *prima facie* review does not in any way interfere with the principle of competence-competence and separation as to obstruct arbitration proceedings but *ensures that vexatious and frivolous matters get over at the initial stage.*

(viii) *Exercise of prima facie power of judicial review as to the validity of the arbitration agreement would save costs and check harassment of objecting parties when there is clearly no justification and a good reason not to accept plea of non-arbitrability. In Subrata Roy Sahara v. Union of India*²⁸, this Court has observed:

“191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved to deter litigants from their compulsive obsession towards *senseless and ill-considered claims*. One needs to keep in mind that in the process of litigation, there is an innocent sufferer *on the other side of every irresponsible and senseless claim*. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him into defeat for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for what he has lost for no fault? The suggestion to the legislature is that a litigant who has succeeded must be compensated by the one who has lost. The suggestion to the legislature is to formulate a mechanism that anyone who initiates and continues a litigation senselessly pays for the same. It is suggested that the legislature should consider the introduction of a “Code of Compulsory Costs”.

²⁸ (2014) 8 SCC 470

(ix) Even in ***Duro Felguera***²⁹, Kurian Joseph, J., in paragraph 52, had referred to Section 7(5) and thereafter in paragraph 53 referred to a judgment of this Court in ***M.R. Engineers and Contractors Private Limited v. Som Datt Builders Limited***³⁰ to observe that the analysis in the said case supports the final conclusion that the Memorandum of Understanding in the said case did not incorporate an arbitration clause. Thereafter, reference was specifically made to ***Patel Engineering Ltd.*** and ***Boghara Polyfab Private Limited*** to observe that *the legislative policy is essential to minimise court's interference at the pre-arbitral stage and this was the intention of sub-section (6) to Section 11 of the Arbitration Act. Paragraph 48 in Duro Felguera specifically states that the resolution has to exist in the arbitration agreement, and it is for the court to see if the agreement contains a clause which provides for arbitration of disputes which have arisen between the parties. Paragraph 59 is more restrictive and requires the court to see whether an arbitration agreement exists - nothing more, nothing less. Read with the other findings, it would be appropriate to read the two paragraphs as laying down the legal ratio that the court is required to see if the underlying contract contains an arbitration clause for arbitration of the disputes which have arisen between the parties - nothing more, nothing less. Reference to decisions in Patel Engineering Ltd. and Boghara Polyfab Private Limited was to highlight that at the reference stage, post the amendments vide Act 3 of 2016, the court would not go into and finally decide different aspects that were highlighted in the two decisions.*

(x) In addition to ***Garware Wall Ropes Limited case***, this Court in ***Narbheram Power and Steel Private Limited***³¹ and ***Hyundai Engg. & Construction Co. Ltd.***, both decisions of three Judges, has rejected the application for reference in the insurance contracts holding that the claim was beyond and not covered by

²⁹ ***Duro Felguera S.A. v. Gangavaram Port Ltd.***, (2017) 9 SCC 729

³⁰ (2009) 7 SCC 696

³¹ ***Oriental Insurance Co. Ltd v. Narbheram Power & Steel Pvt Ltd.***, (2018) 6 SCC 534

the arbitration agreement. The court felt that the legal position was beyond doubt as the scope of the arbitration clause was fully covered by the dictum in **Vulcan Insurance Co. Ltd**³². Similarly, in **PSA Mumbai Investments PTE. Limited**³³, this Court at the referral stage came to the conclusion that the arbitration clause would not be applicable and govern the disputes. Accordingly, the reference to the arbitral tribunal was set aside leaving the respondent to pursue its claim before an appropriate forum.

(xi) *The interpretation appropriately balances the allocation of the decision-making authority between the court at the referral stage and the arbitrators' primary jurisdiction to decide disputes on merits. The court as the judicial forum of the first instance can exercise prima facie test jurisdiction to screen and knockdown ex facie meritless, frivolous and dishonest litigation. Limited jurisdiction of the courts ensures expeditious, alacritous and efficient disposal when required at the referral stage.*

132. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. *The court at the referral stage can interfere only when it is manifest that the claims are ex facie time barred and dead, or there is no subsisting dispute. All other cases should be referred to the arbitral tribunal for decision on merits.* Similar would be the position in case of disputed 'no claim certificate' or defence on the plea of novation and 'accord and satisfaction'. As observed in **Premium Nafta Products Ltd.**³⁴, *it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be*

³² **Vulcan Insurance Co. Ltd v. Maharaj Singh**, (1976) 1 SCC 943

³³ **PSA Mumbai Investments Pte Ltd v. Board of Trustees of the Jawaharlal Nehru Port Trust**, Civil Appeal No. 9352 of 2018, decided on 11th September, 2018

³⁴ **Filli Shipping Co. Ltd v. Premium Nafta Products Ltd**, 2007 UKHL 40 : 2097 Bus LR 1719 (HL)

rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.

136. *Which approach as to interpretation of an arbitration agreement should be adopted in a particular case would depend upon various factors including the language, the parties, nature of relationship, the factual background in which the arbitration agreement was entered, etc. In case of pure commercial disputes, more appropriate principle of interpretation would be the one of liberal construction as there is a presumption in favour of one-stop adjudication.*

137. *Accordingly, we hold that the expression ‘existence of an arbitration agreement’ in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the arbitral tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.*

138. Discussion under the heading ‘Who decides Arbitrability?’ can be crystallized as under:

(a) Ratio of the decision in ***Patel Engineering Ltd.*** on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23.10.2015) and even post the amendments vide Act 33 of 2019 (with effect from 09.08.2019), is no longer applicable.

(b) *Scope of judicial review and jurisdiction of the court under Section 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.*

(c) The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act

33 of 2019, and the principle of severability and competence-competence, is that *the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability*. The court has been conferred power of “second look” on aspects of nonarbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

(d) *Rarely as a demurrer the court may interfere at the Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is nonexistent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably ‘non-arbitrable’ and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”*

(Emphasis supplied)

31. The import of the above passages from **Vidya Drolia**¹⁶ is clear and unmistakable. Section 11(6A) of the 1996 Act has been held to continue to apply, as a guiding principle to be followed by courts at the referral stage, even after its omission. Even while holding that the “arbitrability” of the dispute, along with the aspect of existence of an arbitration agreement between the parties, could be examined, to a limited extent, by the Court exercising jurisdiction under Section 8 or

Section 11 of the 1996 Act, the Supreme Court has been circumspect, many times over, in emphasising the limitations of the Court in this regard. It has been made unmistakably clear that, in exercise of its limited scope of authority, to examine the questions of existence of the arbitration agreement and arbitrability of the dispute, at the referral stage, the Court has to be careful not to usurp the jurisdiction of the arbitral tribunal which, ideally, should examine these aspects. The scope of examination by the referral court under Section 11(6), into the aspects of existence of the arbitration agreement, or arbitrability of the dispute, is, strictly, *prima facie*. In other words, it is only if, *prima facie*, the Court finds that no valid arbitration agreement exists, that it would refuse to refer the dispute to arbitration. In undertaking this exercise, the Court should not get lost in thickets, or enter into debatable factual issues. Unless there are good and substantial reasons to the contrary, the Court is required to compel the parties to abide by the arbitration agreement. It is only in the case where the arbitration agreement is “*ex facie* non-existent or invalid”, or the dispute is *ex facie* non-arbitrable, that the court would refuse to refer the dispute to arbitration. The intention is “to cut off the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage”, and to ensure that “vexatious and frivolous matters get over at the initial stage”. This would also “save costs and check harassment of objecting parties when there is clearly no justification and a good reason not to accept the plea of non-arbitrability”. “Senseless and ill-considered claims” and “*ex facie* meritless, frivolous and dishonest litigation” were

required to be weeded out, as, “on the other side of a very irresponsible and senseless claim”, there was an innocent sufferer. Certainty, in the mind of the Court, that no valid arbitration agreement exists or that the disputes/subject matter are not arbitrable, is the *sine qua non* for rejection of the prayer for referring the dispute to arbitration, whether made under Section 8 or Section 11. The scope of examination at this stage is preliminary and summary and not in the nature of a mini-trial.

32. The Supreme Court also clarified that the “existence” of the arbitral agreement also included, within its scope, the enforceability thereof, as an unenforceable agreement could not be regarded as “existing”. As such, existence and validity were intertwined. An arbitration agreement does not exist if it is illegal or does not satisfy the mandate of the legal requirements. An invalid agreement is no agreement. “Existence” and “validity” were, to an extent, even synonymous. Examples were cited, to clarify the position, as in the case of an agreement with the minor, or a lunatic, or where the only claim was for probate of a will.

33. It has been made further clear that the dispute would be regarded as “non-arbitrable”, at the Section 8 or Section 11 stage, only where the nature of the dispute is *ex facie* non-arbitrable, or where the dispute does not relate to the arbitration agreement. The situation has to be “chalk and cheese” or, alternatively, “black and white... without shades of grey”. In all other cases, the Section 11 court should follow the more conservative course of allowing the parties to have their say

before the arbitral tribunal. Cases where the dispute is, by law, *ex facie* non-arbitrable, would, for example, be criminal cases, cases involving exercise of sovereign power, cases which, by statutory fiat, are required to be determined by courts, cases in which the cause of action is in rem, or where the subject matter of the dispute affects third parties or has *erga omnes* effect, requiring centralised adjudication. “On the other hand, *issues relating to contract formation, existence, validity* and non-arbitrability ... would be factual and disputed and for the arbitral tribunal to decide”. Questions involving mixed issues of fact and law have to be left to the arbitral tribunal.

34. In order to underscore the limitations of the Section 8, or Section 11 Court, in entering into debatable issues of existence of the arbitration agreement or arbitrability, the Supreme Court has emphasised the purpose behind conferring a limited jurisdiction, on the referral court, to examine these aspects. The conferral of such limited jurisdiction is intended “to prevent wastage of public and private resources”, and to protect parties from being forced to arbitrate when the matter is clearly non-arbitrable. Where, however, *prima facie* review appears to be inconclusive, or inadequate as it requires detailed examination, the matter has to be left for determination by the arbitral tribunal. Parties should not be allowed to use the referral proceedings as a ruse to delay or obstruct resolution of the dispute. Unjustified impairment of the referral proceedings should not be permitted. Even in cases which may fall under one of the limited categories where *prima facie* examination is permitted under Section

8 or Section 11, the Court may, nevertheless, decide that allowing the arbitrator to rule first on her, or his, competence would be best for the arbitration process.

35. This position was alternately exposited, by the Supreme Court, as clarifying that the requirement of the court was “to see if the underlying contract contains an arbitration clause for arbitration of the disputes which have arisen between the parties – nothing more, nothing less”. The court was permitted to interfere at the referral stage “only when it is manifest that the claims are *ex facie* time-barred and dead, or there is no subsisting dispute”, all other cases requiring to be referred to the arbitral tribunal for decision on merits. The position was summed up by holding that “in case of debatable and disputable facts and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the arbitral tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability”.

36. Significantly, the Supreme Court opined that, in the case of pure commercial disputes, the more appropriate principle of interpretation would be one of liberal construction, as there was a presumption in favour of one-stop adjudication.

37. On the aspect of examination of the arbitrability of the dispute at the referral stage, the Supreme Court held that “the court by default would refer the matter when contentions regarding to non-arbitrability are plainly arguable; when consideration in summary proceedings

would be insufficient and inclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings”, cautioning the court not to usurp the jurisdiction of the arbitral tribunal, but to affirm and uphold the integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

38. Nearly two decades ago, an Hon’ble Single Judge of the Supreme Court had, in ***Nimet Resources. Inc. v. Esaar Steel Ltd***³⁵, expressed much the same view, by holding that “in a matter where there has been some transaction between the parties and the existence of the arbitration agreement is in challenge, the proper course for the parties is to thrash out such question under Section 16 of the Act and not under Section 11 of the Act”.

39. ***Nimet Resources***¹⁶, I may note, was subsequently followed by the Supreme Court in ***Unissi***¹, which was also a case in which the formal contract was signed by one of the parties, on which Mr. Viswanathan placed reliance. ***Unissi***¹ also involved a case in which the contract had not been signed by both parties. Even so, in para 19 of the report, the Supreme Court concluded thus:

“Therefore, considering the above aspects of the matter in this case, we must come to this conclusion that no formal agreement was executed, the tender documents indicating certain conditions of contract contained an arbitration clause. It is also an admitted position that the appellant gave his tender offer which was accepted and the appellant acted on it. Accordingly, we are of the view that the learned Additional District Judge, Chandigarh erred in holding that there did not

³⁵ (2000) 7 SCC 497

exist any arbitration agreement between the parties and, therefore, the order passed by him is liable to be set aside.”

40. Can the objection, of Mr. Karia, be regarded as so impressive, as to reject the prayer for referring the disputes to arbitration, applying the standards prescribed in *Vidya Drolia*¹⁶ ? I think not. In my view, all the issues raised by Mr. Karia, in opposition to the case set up by the petitioner for reference of dispute to arbitration, stand answered by the aforesaid decisions.

41. Unquestionably, the parties – including the respondent – have acted in accordance with the covenants of the GCC. As has been correctly pointed out by Mr. Viswanathan, consequent to issuing of the letters of award, the respondent called upon the petitioner to perform in accordance with the said letters. In these circumstances, it would be appropriate for the issue of the existence of the arbitration agreement to be examined, not by this Court under Section 11(6), but by the Arbitral Tribunal under Section 16 of the 1996 Act.

42. Nevertheless, given the opposition put up by Mr. Karia to the very issue of existence of an arbitration agreement, the matter may be examined in somewhat greater detail.

43. For this purpose, it would be appropriate to proceed sequentially, through the various agreements and communications, in the present case.

44. The NIT was brought out by the respondent on 5th July, 2018.

Clause 3.2.A.1.2 required the bidder to propose the name of a Float Technology Provider, for supply of floats for use in the project. Clause 3.2.A.4 set out the criteria to be fulfilled by a bidder who sought to engage the services of a Float Technology Provider as sub-contractor. Sub-clause (vi) therein required the sub-contractor to submit a Performance Bank Guarantee (hereinafter referred to as PBG), equivalent to 5% of the value of work sub-let to it. This was in addition to the PBG for the entire contract, to be submitted by the bidder, i.e., in the present case, the petitioner. Clause 4 required the work to be completed within 10 years of Notice of Award/Letter of Award.

45. The covenants of the ITB were, to a large extent, overlapping with those of the NIT. Clause 3.2.A.1.2 of the ITB replicated the corresponding clause in the NIT. The requirement of an Integrity Pact is to be found in Clause 3.7 of the ITB, which required the bidder to submit an Integrity Pact, duly signed, as per Clause 33 of the ITB. The format of the Integrity Pact was contained in Annexure 2 to the ITB.

46. Clause 27 of the ITB set out the “Award Criteria”. Clause 27.1(b) stipulated that the mode of contracting, with the successful bidder, would be as per the relevant clauses of the GCC/SCC. Three contracts were to be executed, the first for supply of plant, equipment and materials, the second for providing services and the third for comprehensive operation and maintenance after commissioning of the project. Clause 29 dealt with notification of the award, and sub-clause

29.1 thereunder required the employer, i.e. the respondent to notify the successful bidder regarding acceptance of its bid prior to the expiry of the bid validity period. The said clause went on to state in clear and categorical terms, that “the notification of award (would) constitute the formation of the contract and (would) be considered for all purposes of execution of contract provisions till such time the signing of the Contract Agreement”. There can be, therefore, no manner of doubt that the contract between the parties cannot be said to have come into existence only when the Contract Agreement between them was signed, but that a contractual relationship commenced from the date of notification of award by the respondent, i.e. from the date of issuance of the three LOAs in the present case.

47. Clause 30 of the ITB required the employer to prepare a Contract Agreement. The second part of the said Clause required the employer and the bidder, i.e. the petitioner and the respondent, to sign the Contract Agreement within 14 days of receipt of notice of readiness of the Contract Agreement. I may note that there is no other reference, either in the NIT or in the ITB of the “notice of readiness” of the “Contract Agreement”.

48. Clause 31 of the ITB required the bidder to furnish performance security, as per Clause 13.3 of the GCC, within 28 days of receipt of notification of award. Clause 31.2 provided that, in the event of failure, by the bidder, to comply with Clause 30 or Clause 31.1, the employer i.e. the respondent could annul the award and forfeit the bid security. According to Mr. Karia, this has already happened in the

present case, *vide* letter dated 2nd March, 2020 addressed to the petitioner.

49. Clause 32 dealt with corrupt, fraudulent, collusive or coercive practices by the bidder. “Corrupt practice” was defined in Clause 32.1(a)(i) as meaning “the offering, giving, receiving or soliciting, directly or indirectly of anything of value to influence the action of a public official in the procurement process or in contract execution”. Clause 32.1(b) envisaged the signing of an Integrity Pact between the prospective bidder and the employer, binding both parties not to exercise any corrupt influence on any aspect of the tender/contract. Clause 32.1(e) dealt with banning of business dealings, and enumerated the various circumstances in which business dealings could be banned. These were if

- (i) any question of loyalty of the bidder to NHPC arose,
- (ii) the director, owner, proprietor or partner of the bidder firm was convicted by a court of law, for offences, involving moral turpitude, during the last five years,
- (iii) the bidder resorted to corrupt, fraudulent, collusive or coercive practices, including misrepresentation of facts and violation of any of the provisions of the Integrity Pact,
- (iv) the bidder used intimidation/threatening or exercised undue outside pressure on NHPC, for obtaining the contract,
- (v) the bidder misused the premises or facilities of the respondent,
- (vi) the bidder did not fulfil the obligations as required under the contract, and violated its terms and conditions, which

seriously affected the continuation of the contract,

- (vii) the work was terminated by the respondent due to poor performance of the contract in the preceding five years,
- (viii) banning of business dealings were recommended by any Central Government Investigating Agency or
- (ix) continuation of business dealings with the bidder was not in the public interest or
- (x) business dealings with the bidder have been banned by the Ministry of Power or any PSU or authority under the Ministry of Power.

50. Clause 33 specifically dealt with the Integrity Pact, which was required to be signed by the prospective bidder, as well as by respondent, and proscribed exercise of any corrupt, fraudulent, collusive or coercive practice by the prospective bidder in the tendering process and during implementation of the contract. Execution of the Integrity Pact was a qualifying requirement for participating in the bidding process.

51. The specifics of the Integrity Pact were to be found in Annexure-2 to the ITB. Clause 3.0 set out the various commitments of the bidder/contractor under the Integrity Pact, and also stands reproduced hereinabove. Any breach of the said provisions by the bidder entitled the employer, i.e. NHPC, to take action as per the “Guidelines of Banning of Business Dealings”, and initiate any or all of the eight courses of action contemplated by the various sub-clauses under Clause 6.1 of the Integrity Pact.

52. Annexure-2A to the ITB contained the “Guidelines on Banning of Business Dealings”. Clauses 4.0 and 5.0 dealt with suspension of business dealings and the procedure to be followed in respect thereof, and Clauses 6.0 and 7.0 dealt with banning business dealings. Clause 7.4 contemplated issuance of a Show Cause Notice. The Annexures to the NIT were in six volumes, of which (i) Volume 0 contained instructions to bidders (ITB), (ii) Volume-1 contained information to bidder (IFB), (iii) Volume-2 contained the conditions of contract, of which Part-A contained the General Conditions of Contract (GCC) and Part-B contained the Special Conditions of Contract (SCC), (iv) Volume-3 contained the employer’s requirement (Technical requirement) and (v) Volume-4 contained Technical Data Sheets and (vi) Volume-5 contained Forms & Procedures.

53. In the present case, the recital of facts hereinabove indicate, *prima facie*, that the respondent has proceeded in accordance with this procedure, by first suspending the business dealings with the petitioner, thereafter, banning business dealings and, thereafter, issuing the Show Cause Notice.

54. The GCC and the SCC constituted volume 2A and 2B to NIT. The notes on the GCC read thus:

“Notes on the General Conditions of Contract

The General Conditions of Contract in Volume 2A, read in conjunction with the Special Conditions of Contract in Volume 2B and other documents listed therein, is a complete document expressing all the rights and obligations of the parties.”

55. Volume-2 to the Annexure to the NIT, as already noted hereinabove, contained the conditions of contract, of which Part-A contained the GCC and SCC.

56. It is not necessary to go into the various clauses of the GCC. Suffice it to state that Clause 6.3 provided for arbitration as the mode of resolution of dispute between the parties.

57. *Vide* letter dated 30th November, 2018, the respondent informed the petitioner that its bid had been found techno-commercially responsive treating Y2G as the sub-contractor under Clause 3.2.A.1.2 of the NIT/ITB. Thereafter, the auction took place and the petitioner emerged as the successful bidder. After several extensions of the period of validity of the bid of the petitioner, the respondent issued three LOAs, on 20th September, 2019, to the petitioner, in accordance with Clause 27 of the ITB, which contemplated the execution of three contracts.

58. Para 2.0 of each of the said LOAs, dated 20th September, 2019, clearly stated that the respondent accepted the petitioner's proposal *and awarded the petitioner the contract for the work*. Para 3.0 of each of the said Letters of Award made cross-reference to the award, to the petitioner, of the other two contracts and went on to caution the petitioner that the "breach of any one contract (would) automatically be construed as breach of other contracts", resulting in a right, to NHPC, to recover liquidated damages under Clause 26.2 of the GCC

or terminate the other contracts. Para 5.0 confirmed the selection of Y2G as the sub-contractor for providing float device technology and required the sub-contractor to submit PBG equivalent to 5% of the value of work sub-let to it. Para 6.0 of the LOAs called upon the petitioner to prepare and finalise the contract documents for filing of the formal contract document, within 28 days from the LoA – which is, alternatively, referred to as “notification of the award”.

59. *Prima facie*, by virtue of Clause 29.1 of the ITB, with the communications of the aforesaid three LOAs/notification of award to the petitioner, a contract had come into being between the petitioner and the respondent, which would continue to remain in force till the formal contract agreements were signed.

60. On 13th November, 2019, the respondent called upon the petitioner to sign the Contract Agreement by 15th November, 2019. Thereafter, *vide* letter dated 20th November, 2019, the petitioner was requested to sign the Contract Agreement on or before 30th November, 2019, with the further stipulation that no further extension for signing of the Contract Agreement, beyond 30th November, 2019, would be granted.

61. Thereafter, *vide* communication dated 2nd March, 2020, the respondent cancelled the award of work to the petitioner on the ground that (i) the petitioner had not submitted bank guarantee equivalent to 5% of the value of work sub-let to Y2G, along with joint deed of undertaking from Y2G, (ii) the Integrity Pact, between the petitioner

and Y2G had not been signed, (iii) the petitioner had not signed formal Contract Agreement with the respondent within the extended time therefor.

62. It is in the backdrop of these facts, that I am required to examine whether a clear case for holding that no arbitration agreement existed between the parties, as there was no concluded Contract Agreement between them, save and except for the Integrity Pact, as Mr. Tejas Karia would seek to contend, exists, so as to non-suit the petitioner entirely, or whether this issue ought to be left for decision by an Arbitral Tribunal, to be constituted by this Court.

63. The first contention of Mr. Karia is that the invocation, by the petitioner, of Clause 6.3 of the GCC, was unjustified in law, as the only concluded agreement between the parties was the Integrity Pact. The judgements cited hereinabove make it clear that the mere non-signing of the contract by both parties does not conclude the issue, especially where there are other correspondences and transactions between them, or the parties have acted on the basis of the covenants of the unsigned contract. *Unissi*¹ appears to have dealt with a similar situation, and the attempt of Mr Karia to distinguish the said decision on the basis of some facts which may not obtain in the present case may be open to debate, especially in the light of the observations contained in para 19 of the report in the said case, already reproduced hereinbefore. The fact that the Integrity Pact is essentially in the nature of an Annexure to the Bid Documents, may also be relevant. Another consideration, to which Mr. Viswanathan has correctly

alluded, is that an arbitration agreement exists independent of the main contract, and the unenforceability of the main contract, even if presumed, does not invalidate, or render unenforceable, the arbitration agreement. Besides, the effect of Clause 29.1 of the ITB also merits examination.

64. In response to the submission, of Mr. Viswanathan, that, by virtue of Clause 29.1 of the ITB, a contractual relationship, between the petitioner and the respondent, was in existence consequent to the issuance of the LOAs dated 20th September, 2019, even before signing of the formal contract agreement, Mr. Karia sought to submit that the respondent had withdrawn the LOAs, *vide* communication dated 2nd March, 2020. Mr. Viswanathan contested, *inter alia*, the legality of such annulment. The letter dated 2nd March, 2020 cites, as a justification for the decision to annul the LOAs, (i) failure, on the part of the petitioner, to submit the Performance Bank Guarantee @ 5% from Y2G, for the value of work sublet, along with Joint Deed of Undertaking, as well as the Integrity Pact signed by Y2G and (ii) failure, on the part of the petitioner, to sign the Contract Agreement within the extended time provided by the respondent. Annulment of the LOAs is contemplated by Clause 31.2 of the ITB. (It may require consideration whether, having invoked Clause 31.2 of the ITB, it is open to the respondent to contend that the only contractual document, signed between the parties, having effect in law, was the Integrity Act.) Clause 31.2 permits annulment of the LOAs on failure, of the bidder, to comply with Clause 30 or Clause 31.1 of the ITB. Clause 31.1 envisages furnishing, by the bidder, of performance security as

per Clause 13.3 of the GCC. (Here, again, it becomes arguable whether the respondent can, on the one hand, allege infraction of Clause 31.1 of the ITB and, simultaneously, contend that the GCC was not enforceable.) Clause 13.3 of the GCC does not envisage furnishing of any bank guarantee by the subcontractor. It merits consideration, therefore, whether non-furnishing of the 5% bank guarantee by Y2G can be treated as constituting non-compliance with Clause 31.1 of the ITB. Similarly, Clause 30 of the ITB undoubtedly envisages signing of the Contract Agreement within 14 days of receipt of notice of readiness by the employer, i.e. by the respondent. Mr. Viswanathan has disputed the mandatory nature of the said 14-day period, once the respondent had itself extended the period. As to whether the said 14-day period is, therefore, of the essence of the contractual relationship between the petitioner and respondent also, therefore, becomes arguable. In sum, the legality of the decision, of the respondent, to annul the LOAs, is open to debate. The justifiability of the reliance, by the respondent, on the said “annulment”, *vide* the communication dated 2nd March, 2020 is also, therefore, debatable.

65. Issues relating to *formation of the contract, as well as its existence and validity* have, expressly, been held, in ***Vidya Drolia***¹⁶, to, ideally, merit resolution by the arbitral process, rather than by the referral Court, especially where the contract is commercial in nature.

66. Mr. Karia next contended that the actions against the petitioner had been taken under the Integrity Pact, and not under the main

contract. This, in my view, is highly contestable. There is no reference to the Integrity Pact, in the letter, dated 2nd March 2020, proposing to annul the LOAs, the communication dated 9th March, 2020, informing the petitioner that it had been decided to ban business dealings with it, or the Show Cause Notice dated 19th June, 2020. Nor do the allegations, contained in these communications, *prima facie*, relate to any of the commitments of the petitioner, under the Integrity Pact, or allege, directly or indirectly, collusion, corruption, or any other such misfeasance. The submission of Mr. Viswanathan, that the respondent has sought to piggyback on the Integrity Pact, only in its response to the present petition of the petitioner, so as to defeat the petition also, therefore, merits consideration. It cannot be said that the material on record unequivocally discloses that the communications from the respondents to the petitioner, with which the petitioner is aggrieved, have been issued under the Integrity Pact.

67. The objection to territorial jurisdiction being also premised on the contention that, apart from the Integrity Pact, there was no concluded contract between the petitioner and the respondent, I am not convinced that the present petition can be dismissed as incompetent before this Court.

68. Mr. Karia also sought to invoke Section 7 of the Contract Act, in juxtaposition with his contention that the petitioner had failed to comply with the requirements of the LOAs. This contention is, however, premised on the assumption that the LOAs constituted offers and that, *sans* any unconditional acceptance of these offers, no

contract came into being. Mr. Viswanathan contends, *per contra*, that the very issuance of the LOAs indicated acceptance of the petitioner's bids, in terms of the Bid Documents, which included the GCC – for which purpose reliance is placed on Clause 6.1 of the ITB. This, again, is an arguable issue, which ought, appropriately, to be examined by the Arbitral Tribunal.

69. All other questions on which the petitioner and respondent have joined issue, clearly, are amenable to resolution by the arbitral process, given the overarching jurisdiction of the Arbitral Tribunal under the provisions of the 1996 Act, including, *inter alia*, Section 16. I do not deem it necessary or appropriate to deal with all the submissions, here. I am, nevertheless, constrained to hold that Mr. Karia has not been able to make out a case either of clear non-existence of the arbitration agreement, contained in Clause 6.3 of the GCC, within the ***Vidya Drolia***¹⁶ parameters. The issue is, at the very least, arguable, and, especially given the fact that it relates to purely commercial contracts, ought, in my view, to be agitated before the learned Arbitral Tribunal which, in its *kompetenz-kompetenz* jurisdiction, is well within its authority to pronounce on the existence of the arbitration agreement as well.

70. The prayer for referring of the disputes to arbitration, as contained in Arb. P. 217/2020, therefore, deserves to succeed.

Conclusion

71. Accordingly, Arb. P. 217/2020 is allowed. The disputes between the petitioner and respondent are referred for arbitration to the Delhi International Arbitration Centre. The Delhi International Arbitration Centre would proceed in the matter in accordance with the various subclauses of Clause 6.3 of the General Conditions of Contract and in accordance with the DIAC (Arbitration Proceedings) Rules, 2018. The DIAC would appoint a suitable sole arbitrator to arbitrate on the disputes, out of the panel maintained by it or as otherwise agreed between the parties.

72. The learned arbitrator, appointed by the DIAC, would proceed with the matter uninfluenced by the observations contained in this judgement, which are only intended to address the objections, of Mr Karia, regarding the very maintainability of the present proceedings, especially regarding the existence, or otherwise, of the arbitration agreement. On all aspects, including the existence of the arbitration agreement as well as the arbitrability of the dispute, therefore, the learned arbitrator would be free to take a view, unencumbered by this judgement or the opinions expressed therein, which are merely *prima facie*.

73. OMP (I) (Comm) 162/2020 is disposed of, by allowing the petitioner to prefer the said petition before the Arbitral Tribunal to be constituted by the DIAC, as an application under Section 17 of the

1996 Act, to be decided by the Arbitral Tribunal in accordance with law.

74. There shall be no orders as to costs.

C. HARI SHANKAR, J.

FEBRUARY 17, 2021

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