

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

% **Reserved on: October 07, 2021**

Pronounced on: October 28, 2021

(i) + **ARB.P. 888/2021**

CG TOLLWAY LIMITED

..... Petitioner

Through: Mr. Vikram Nankani, Senior
Advocate with Mr. Ashish Batra,
Mr. Sarthak Sachdev & Ms. Teresa
R. Daulat, Advocates

Versus

NATIONAL HIGHWAY AUTHORITY OF INDIA
& ANR.

.... Respondents

Through: Mr. Sudhir Gupta, Senior Advocate
with Mr. Amarjit Singh Bedi,
Mr. Umang Gupta & Ms. Shweta
Chauhan, Advocates for respondent
No.1

(ii)+ **ARB.P. 889/2021**

KISHANGARH GULABPURA TOLLWAY
LIMITED

..... Petitioner

Through: Mr. Vikram Nankani, Senior
Advocate with Mr. Ashish Batra,
Mr. Sarthak Sachdev & Ms. Teresa
R. Daulat, Advocates

Versus

NATIONAL HIGHWAY AUTHORITY OF INDIA
& ANR.

.... Respondents

Through: Mr. Sudhir Gupta, Senior Advocate
with Mr. Amarjit Singh Bedi,
Mr. Umang Gupta & Ms. Shweta
Chauhan, Advocates for respondent
No.1

(iii) + **ARB.P. 892/2021**

UDAIPUR TOLLWAY LIMITED

..... Petitioner

Through: Mr. Vikram Nankani, Senior
Advocate with Mr. Ashish Batra,
Mr. Sarthak Sachdev & Ms. Terresa
R. Daulat, Advocates

Versus

NATIONAL HIGHWAY AUTHORITY OF INDIA
& ANR.

.... Respondents

Through: Mr. Sudhir Gupta, Senior Advocate
with Mr. Amarjit Singh Bedi,
Mr. Umang Gupta & Ms. Shweta
Chauhan, Advocates for respondent
No.1

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T

1. Petitioners in the above captioned three petitions are companies incorporated under the provisions of Companies Act, 1956 and are subsidiary of M/s IRB Infrastructure Developers Limited, who claims to be the largest infrastructure developers in India with vast experience in construction, operation & maintenance of highway projects. Respondent is a statutory body constituted under the National Highways Authority of India Act, 1988 (NHAI) and respondent No. 2 has been incorporated under

Societies Registration Act, 1860 formed by NHAI along with NHBF for settlement of disputes through arbitration.

2. Since similar relief has been sought in these petitions, therefore, with the consent of learned counsel for the parties, these petitions were heard together and are being disposed of by this common judgment.

3. In the above captioned first petition [ARB.P.888/2021], the petitioner-Company was awarded a project of six laning of Kishangarh Udaipur Ahmedabad Section from Km. 90.000 (near Gulabpura) to Km. 214.870 (end of Chittorgarh bypass) of NH-79 in the State of Rajasthan package - 2 under NHDP Phase-Von BOT (Toll) for which a Concession Agreement dated 09.12.2016 was executed between petitioner and respondent No.1-NHAI.

4. In the above captioned second petition [ARB.P.889/2021], the petitioner-Company was awarded a project of six laning of Kishangarh to Gulabpura section of NH-79A and NH-79 in the State of Rajasthan (Length 90.000km) on DBFOT (Toll) under NHDP Phase-V Package-1, for which a Concession Agreement dated 22.02.2017 was executed between the petitioner and respondent- NHAI.

5. In the above captioned third petition [ARB.P.892/2021], the

petitioner- Company was awarded the Project of six laning from Km 287.400 to Km 401.200 Section of NH-8 in the state of Rajasthan & Gujarat (Approx length 113.800 Km.) on DBFOT (Toll) under NHDP Phase-V (Package-V) i.e. on “Design Build Finance Operate Transfer Basis” (“the said Project”), for which a Concession Agreement dated 09.12.2016 was executed between petitioner and respondent, National Highways Authority of India (NHAI).

6. The Concession Agreements in question required the petitioners to undertake the entire cost of projects and in addition, to pay fixed premium of Rs.228.60 crores, Rs.186.30 crores and Rs.163.80 crores respectively to the respondent each year, with annual increase @3% p.a. till the subsistence of the agreement. In lieu of the above, petitioner was entitled to collect and retain toll, from which petitioner could satisfy the project costs, reasonable returns etc. The Appointed Date / Commercial Operation Date (COD) under the Concession Agreements in respect of the project of the petitioner were 04.11.2017, 21.02.2018 and 03.09.2017 respectively. Petitioners were, therefore, entitled to recover toll fee from the road users in accordance with the law for use of the subject section of National Highways as per “National Highways Fee (Determination of Rates and Collection) Rules, 2008” and the

right of way in respect of concerned land was to be provided by respondent –NHAI to petitioner within 120 days of respective COD.

7. According to petitioners, the originally scheduled “Completion Dates” on 910th day from COD was extended by NHAI to 31.01.2020, 09.09.2021 and 30.11.2020 respectively. However, in the wake of various instructions issued from time to time due to Covid pandemic, construing the same as a Force Majeure Event, the completion date was further extended till 30.07.2021 (in Arb.P. 888/2021); 31.05.2021 (in Arb.P.892/2021) and 09.09.2021 (ARB.P. 889/2021) respectively. Petitioners notified the occurrence of Force Majeure under Political Event in terms of Clause 34.5 in Article 34 of the MCA on account of the State-wide complete lockdown w.e.f. 22.03.2020 and submitted their claims for reimbursement of losses/costs directly attributable to such political force majeure event from 22.03.2020 to 03.05.2020 in all these petitions and consequential extension of concession period as per Article 34 of the MCA.

8. On 18.05.2020, the Office Memorandum was issued by the Central Government for implementation *inter alia* by the respondent-NHAI. Thereafter, on 26.05.2020, the “Policy Guidelines 1BOT (Toll) 12020” was issued by respondent- NHAI particularly for covid related reliefs and

further, a letter dated 26/27.05.2020 was issued intimating the amendment in toll fee notification.

9. It is averred in the petition that Clause - 44 of the Concession Agreement contained the Dispute Resolution mechanism. Further Clause - 44.3 of the Concession Agreement contained the Arbitration Agreement, which reads as under:-

“44.3 Arbitration

44.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 44.2, shall be finally settled by arbitration as set forth below:

i. The Dispute shall be finally referred to Society for Affordable Resolution of Disputes (hereinafter called as SAROD), a Society registered under Society's Act, 1860 vide Registration No. SIRSISW104912013 duly represented by Authority and National Highways Builders Federation (NHBF). The dispute shall be dealt with in terms of Rules of SAROD. The detailed procedure for conducting Arbitration shall be governed by the Rules of SAROD and provisions of Arbitration & Conciliation Act, 1996, as amended from time to time. The Dispute shall be governed by Substantive Law of India.

ii. The appointment of Tribunal, code of conduct for Arbitrators and fees and expenses of SAROD and Arbitral Tribunal shall also be governed by the Rules of SAROD as amended from time to time. The rules of SAROD are placed at Appendix- III.

iii. Arbitration may be commenced during or after the Concession Period, provided that the obligations of Authority and the Concessionaire shall not be altered by reason of the Arbitration being conducted during the Concession Period.

iv. The seat of Arbitration shall be New Delhi or a place selected by governing body of SAROD and the language for all documents and communications between the parties shall be English.

The expenses incurred by each party in connection with the preparation, presentation, etc. of arbitral proceedings shall be shared by each party itself.

44.3.2. There shall be a Board of three arbitrators of whom each party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

44.3.3 The arbitrators shall make a reasoned award (the 'Award'). Any award made in any arbitration held pursuant to this Article 44 shall be final and binding on the Parties as from the date it is made, and the Concessionaire and the Authority agree and undertake to carry out such Award without delay.

44.3.4 The Concessionaire and the Authority agree the an Award may be enforced against the Concessionaire and/or the Authority, as the case may be, and their respective assets wherever situated.

44.3.5. This Agreement and the rights and

obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.”

10. For adjudication of certain disputes with respondents, petitioner is said to have approached the Rajasthan High Court and vide Judgment dated 25.08.2021, it was held as under:-

“38. Accordingly, we pass the following order:-

(i) The challenge of the petitioners to Rule 4(9) of the National Highways Fee (Determination of Rates and Collection) Rules, 2008 is dismissed.

(ii) Challenge to the Office Memorandum dated 18.05.2020 and Policy Guidelines dated 26.05.2020 is dismissed.

(iv) The petitioners are permitted to invoke arbitration proceedings within a period of four weeks, and parties are free to raise all contractual disputes before the Arbitral Tribunal for their decision on merits.

(v) NHAI shall within two weeks communicate to the petitioners their decision on petitioners' claim for compensation for force majeure or extension. If aggrieved with the same, the petitioners would have remedy in arbitration, wherein all contentions of the parties in this regard would remain open.

(v) Considering prima facie case, for a limited period of three months from issuance of this order or till the date of completion of the project whichever is earlier, the alleged obligation of the

petitioners to pay premium under Article 26.2.1 shall remain stayed. This stay is subject to the petitioners furnishing undertaking to this Court within a period of one week that in the event the petitioners are unsuccessful in the Even though the clause of the Concession Agreement states arbitration, the disputed premium shall be payable by the petitioners with interest on the principle of "premium deferment scheme " (referred in the aforesaid order dated 16.04.2019 of the Bombay High Court in Writ Petition No.3415/2019, upheld by the Hon'ble Supreme Court vide order dated 11.09.2019 dismissing SLP(C) NO.21315/2019 filed by NHAI. The petitioners would also undertake that after appropriating the monthly liabilities sequentially towards taxes, payment towards construction, O&M Expenses and Debt Servicing in the order already given in Article 31, entire balance amount from the Toll Fee collected would remain available in the Escrow Account, which would be subject to the decision in Section 9 and/or 17 of the Arbitration & Conciliation Act, 1996, as the case may be.

(vi) Needless to state that the petitioner would be entitled to claim further appropriate interim relief under the provisions of Section 9 and/or 17 of the Arbitration & Conciliation Act, 1996.

39. We make it absolutely clear that the observations made hereinabove are only prima facie and we have not deliberated on the issue on the merits of the matter. The Arbitral Tribunal would resolve the disputes in accordance with law and the observations made herein would not bind the Arbitral Tribunal."

11. The petitioners and their group of companies had also approached the Hon'ble Supreme Court vide W.P. (C) 923/2021 seeking restraint of respondent-NHAI in dominant position in empanelling arbitrators on SAROD panel and quashing and setting aside the formation of the four member Committee for empanelment/ re-empanelment of Arbitrators to resolve disputes concerning NHAI as well as seeking setting aside or modifying the eligibility criteria for empanelment of arbitrators on SAROD, to bring it under the Schedule to the Arbitration and Conciliation Act, "General Norms" of the "Eighth 1996 (though now omitted in 2021) to ensure independent and impartial arbitration by SAROD". However, the said petition was dismissed as withdrawn with liberty to petitioners to approach the competent court of law.

12. At the hearing, learned senior counsel appearing on behalf of petitioners submitted that the Hon'ble Rajasthan High Court vide Judgment dated 25.08.2021 in DB CWP 11042/2020 has directed parties to invoke arbitration and Clause-44 of the Concession Agreement mandates that any dispute between the parties has to be referred to SAROD for redressal, which shall thereafter be dealt with by Arbitral Tribunal to be constituted in terms of Arbitration Rules of SAROD particularly Rule 11.4, from the list of

empanelled Arbitrators to be empanelled/ re-empanelled in terms of the rules, regulations, terms, conditions, guidelines and procedures, as per Article 2(h) of Memorandum of Association by SAROD. The concerned Rule 11 reads as under:-

“Rule 11- Appointment of Tribunal

11.1 The disputes shall be decided by a Sole Arbitrator when the total claim of dispute is Rs. 3 Crores or less.

11.2 In all cases of disputes claimed for more than Rs. 3 Crores, the tribunal shall consist of odd number of Arbitrators to be nominated by the patties. The Presiding Arbitrator shall be appointed by the Arbitrators nominated by the patties from amongst the panel maintained by SAROD. For deciding the Presiding Arbitrator, a draw of lots can be carried out from amongst the names suggested by the Arbitrators nominated by the Parties. The eligibility criteria for empanelment of Arbitrators will be decided by the Governing Body.

11.3 If a Sole Arbitrator is to be appointed, the Governing Body will appoint the Arbitrator within 21 days from the date the Respondent's Statement of Defence and Counterclaim (if any) is filed or falls due, whichever is earlier. The Governing Body will appoint the Arbitrator from the panel of Arbitrators by draw of lots.

11.4 An Arbitrator/Presiding Arbitrator to

be appointed under these Rules shall be a person on the SAROD Arbitration Panel as at the date of the appointment.

11.5 In the event of any party failing to appoint Arbitrator within 30 days of receipt of the notice of Arbitration, the Governing Body shall appoint the Arbitrator or Presiding Arbitrator as the case may be by a draw of lots.”

13. The grievance raised on behalf of petitioners is that even though Article 2(h) of the Memorandum of Association of SAROD formulates selection/ appointment of panel of Arbitrators, but till date it has not been formulated by SAROD. Learned senior counsel appearing on behalf of petitioners drew attention of this Court that even NHBF has raised grievance and lack of faith in the selection process of SAROD for its empanelment being dominated by the NHAI. Moreover, NHBF vide letter dated 21.07.2020 addressed to the President, Society for Affordable Redressal of Disputes-Ports (SAROD) informed its inability to fulfil the aspirations of members NHBF and stated that future disputes may have to be settled under *ad hoc* arbitration under the Arbitration and Conciliation Act, 1996.

14. Petitioner claims that the governing body of SAROD is mainly controlled by respondent No.1 and the key positions such as President, Secretary and Treasurer of SAROD are under the aegis of respondent No.1.

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Further, as per minutes of meeting of committee for empanelment/ re-empanelment of Arbitrators in SAROD held on 03.11.2020 and 09.11.2020, three out of four participants in the Committee are from NHAI and one is from NHBF.

15. Lastly, learned senior counsel submitted that *ex facie* the institution SAROD has failed to perform its functions with fairness, reasonableness and in accordance with law. The entire procedure adopted by the said Arbitral Institution is opaque, discriminatory, manifestly arbitrary and lacking in impartiality and independence and thus, petitioners are constrained to reach this Court seeking appointment of Arbitrator for adjudication of disputes.

16. To the contrary, the stand of respondent-NHAI is that these petitions have been filed contrary to the Concession Agreements dated 09.12.2016 (in ARB.P. 888 & 892 of 2021) and 22.02.2017 (in ARB.P.892.2021), whereunder the parties had agreed on a procedure for appointment of Arbitrator under Clause-44, sub-clause (3) of which provides that disputes have to be referred to SAROD. It further provides for appointment of Tribunal, code of conduct for Arbitrators and fees and expenses of Arbitral Tribunal to be governed by Rules of SAROD. Also, Clause 44.3.2 provides that there shall be a Board of three Arbitrators of whom each party shall

select one and the third Arbitrator, to be appointed by the two Arbitrators so selected, and in the event of disagreement, for the appointment to be made in accordance with the Rules of SAROD and sub-rule 11.4 of Rule 11 provides that the Arbitrator/Presiding Arbitrator has to be a person of “SAROD Arbitration Panel”.

17. Learned senior counsel appearing on behalf of respondents submitted that in fact no disputes with petitioners subsists and all disputes *inter se* parties were settled vide Settlement Agreement dated 04.11.2020, 26.08.2020 and 04.02.2020 executed between NHAI and the petitioners respectively, wherein petitioners have agreed upon not to raise any claims under the Concession Agreements in question. It was also submitted that these petitions under the provisions of Section 11(6) of the Act are not maintainable, as this Court can appoint Arbitrator only in the event when the party or a person including an institution fails to perform any function entrusted to it under the procedure agreed, as provided under Section 11(2) of the Act.

18. It was also submitted on behalf of respondents that according to petitioners, even if disputes, if any, remain to be adjudicated, the same shall be governed under the procedure prescribed in Concession Agreement,

which further stipulates that the disputes shall be dealt in accordance with SAROD and the persons to be appointed as Arbitrators have to be from the panel of SAROD only. It was also submitted that the allegations raised against SAROD are totally baseless, as the Society has a specific "eligibility criteria" depending on the qualification and experience for empanelling the Arbitrators for redressal of the disputes and the current panel of Arbitrators of SAROD are from various fields and backgrounds i.e. technical, former Judges of the High Court and the Supreme Court, Chief Engineers, Secretaries to Government of India, etc. So far as the plea that NHBF doubts the credibility of panel of Arbitrators of SAROD, learned senior counsel submitted that in the meetings held on 03.11.2020 and 09.11.2020, NHBF itself has advised for inclusion of renowned persons from construction industry/ Judges in the empanelment list and 15 fresh names considered for empanelment, which shows its fair and transparent functioning. To strengthen the above argument that where the appointment has been specifically agreed between the parties by an agreement, the Arbitrators have to be appointed as per the terms of Agreement, reliance was placed upon decisions in:-

- i. ***NHAI & Anr. Vs. Bumihway DDB Ltd. (JV) & Ors.*** (2006) 10 SCC 763;

- ii. *UOI & Anr. Vs. MP Gupta (2004)* 10 SCC 504
- iii. *You One Engg. & Const. Co. Ltd. & Anr. Vs. NHAI (2006)* 4 SCC 372 &
- iv. *IOCL & Ors. Vs. Raja Transport Private Limited (2009)* 8 SCC 520.
- v. *SBP & Co. Vs. Patel Engineering Ltd. & Anr. (2005)* 8 SCC 618

19. It was next submitted that vide judgment dated 25.08.2021, the High Court of Rajasthan had permitted the petitioners to invoke Arbitration, however, till today, petitioners have not invoked the arbitration clause. Further contended that against the judgment dated 25.08.2021, petitioners had reached the Hon'ble Supreme Court by filing a Special Leave Petition, which was dismissed vide its order dated 03.09.2021. Also submitted that petitioners' writ petition [W.P.(C) 923/2021] filed before the Hon'ble Supreme Court seeking quashing SAROD Arbitration Panel and for permitting persons outside the said list, was dismissed as withdrawn vide order dated 27.08.2021 with liberty to file appropriate petition before competent court, but the same cannot be construed as having granted permission to file petition under Section 11(6) of the Act. Lastly, it was submitted that SAROD is well equipped to resolve all disputes arising between the parties and therefore, these petitions deserve dismissal.

20. In rebuttal, learned senior counsel for petitioners submitted that ARB.P. 888/2021; 889/2021 & 892/2021

SAROD has failed to perform the functions entrusted to it as per the Arbitration Agreement and also it has failed to formulate any such Rules guidelines and procedures for selection/ empanelment of Arbitrators and the manner in which the institution has drastically reduced the total number of empanelled Arbitrators, it is in such circumstances the present petition has been filed.

21. Learned senior counsel for petitioners further submitted that originally SAROD had consisted equal members of NHAI and NHBF, so as to maintain impartiality and independence of the arbitral process, however, presently SAROD has become a sole custodian of the interests of NHAI and even NHBF itself has lost all confidence in SAROD. It was submitted that due to majority of NHAI representation on the Committee, NHAI has selected majority of Arbitrators of its choice on the panel and therefore, NHBF has considered itself disassociating with SAROD and in such circumstances, appointment of Arbitrator from the panel of Arbitrators maintained by SAROD would defeat the purpose of fair and transparent redressal of disputes between the parties. Also submitted that the stand of respondents that all the disputes have been amicably resolved in terms of Settlement Agreements, is erroneous, as the subject matter of disputes herein

is regarding illegal demand of premium by the respondent in contravention of 06 month time gap contemplated under the Concession Agreement between completion of construction and commencement of premium payment thereunder, which was not considered then. Further, the petitioners have claimed the specific contractual remedies regarding compensation and extension of the concession period, which is disputed by respondents and the Settlement Agreements in question were part of conciliation proceedings between the parties and the disputes are still pending, which are required to be adjudicated. Lastly, it was submitted that to seek impartial and independent arbitral process, petitioners have approached this Court seeking appointment of Arbitrators and these petitions, therefore, deserve to be allowed.

22. The arguments advanced by learned senior counsel representing both the sides were heard at length and the record of this case has been carefully perused.

23. During the course of hearing, it transpired that the basic dispute between the parties is not collection of toll fees but is regarding payment of premium to be payable to respondent-NHAI by the petitioners, which was to commence from the Scheduled Toll Tariff Revision/Scheduled completion

date. The claim of respondent-NHAI is that petitioners are trying to link between the collection of fee and payment of premium. It was submitted on behalf of respondents that petitioners have not placed before this court the complete Concession Agreement, wherein terms of concession fee have been enumerated in Para-26.2. However, this Court is not required to adjudicate the disputes between the parties but the question for determination is as to whether the present petitions invoking jurisdiction of this Court seeking appointment of Arbitrators, are maintainable or the Arbitrators have to be appointed in terms of SAROD.

24. It is not disputed that the Rajasthan High Court vide Judgment dated 25.08.2021 had permitted petitioners to invoke arbitration and also held that Arbitral Tribunal would resolve the disputes in accordance with law. Also, the petition filed by the petitioners before the Hon'ble Supreme Court [W.P. (C) 923/2021] seeking restraint of respondent-NHAI in dominant position in empanelling arbitrators on SAROD panel, was dismissed as withdrawn with liberty to petitioners to approach the competent court of law. However, petitioners have not yet invoked the arbitration clause but have approached this Court seeking appointment of sole Arbitrator.

25. The relevant Section 11(6) in The Arbitration And Conciliation Act,

1996 reads as under:-

- “(6) Where, under an appointment procedure agreed upon by the parties,-
- (a) a party fails to act as required under that procedure; or
 - (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
 - (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

26. During the course of hearing, reliance was also placed upon decision in ***Central Organization for Railway Electrification Vs. M/S ECI-SPIC-SMO-MCML (JV) A Joint Venture Company*** 2019 SCC Online SC 1635.

27. This Court is conscious that decision of Hon’ble Supreme Court in ***Central Organization for Railway Electrification (Supra)*** has been referred to the Larger Bench for consideration, however, it is still pending adjudication and, therefore, holds the field and so, has been relied upon by different Coordinate Benches of this Court in various decisions.

28. Pertinently, the Hon’ble Supreme Court in ***Central Organization for Railway Electrification (Supra)*** while dealing with a case of appointment of

Arbitrator in terms of arbitration agreement, as opposed to the appointment of an independent Arbitrator, observed and held that the jurisdiction of this Court under Section 11(6) of the Act can be invoked only once the procedure for appointment of the Presiding Arbitrator provided in the contract has been exhausted and has failed.

29. Also, the Hon'ble Supreme Court in ***National Highways Authority Of India And Another Vs. Bumihway Ddb Ltd. (Jv) And Others*** (2006) 10 Supreme Court Cases 763, has observed and held as under:-

*“30. It is pertinent to state that under Section 11(6) of the Act, the Court has jurisdiction to make the appointment only when the person including an institution, fails to perform any function entrusted to it under that procedure. In the present case, the relief claimed by the respondents by invoking Section 11(6) is wholly erroneous as prior to the order dated 1-7-2005, the respondents only sought a clarification from IRC and without making a reference to them, immediately filed the petition under Section 11(6) on the purported ground that the Indian Roads Congress had failed to make the appointment within the stipulated time. Therefore, the reliance placed by the respondent on the judgment of this Court in *Punj Lloyd Ltd. v. Petronet MHB Ltd.* [(2006) 2 SCC 638] is wholly erroneous and is not applicable to the facts of the present case.*

XXXXX

XXXXX

XXXXX

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46. In view of the order now passed setting aside the appointment of the presiding arbitrator by the High Court,

the appointment of the presiding arbitrator as per the procedure contemplated under the contract agreement has to be followed and IRC, Ministry of Shipping, Road Transport and Highways, R.K. Puram, New Delhi should be approached. The parties are at liberty to approach the arbitrators for any further interim directions.”

30. This Court finds that respondent has rightly relied upon Hon’ble Supreme Court decision in ***You One Engg. & Const. (Supra)*** wherein it is held that if the parties have entered into an agreement with open eyes, it is not open to ignore it and invoke exercise of powers in Section 11(6) of the Act. However, reliance placed by respondent upon decisions in ***IOCL & Ors. (Supra)*** and ***SBP & Co. (Supra)***, is of no help to respondent being distinguishable on facts.

31. Applying the aforesaid provisions of Section 11(6) of the Act and ratio of law laid down by the Hon’ble Supreme Court in respect thereof to the case in hand, this Court finds that sub-clause (i) of Clause 44.3.1 of the Contract Agreement set forth the arbitration clause and it specifically enumerates that the disputes shall be dealt with in terms of Rules of SAROD and provisions of Arbitration and Conciliation Act, 1996. Further, Clause 44.3.2 prescribes the mode of constitution of arbitral tribunal. Also, Rule 11 of Memorandum of Association by SAROD (as noted in Para-12 above),

stipulates that the Arbitrator appointed under the Rules shall be a person on the panel of SAROD and Clause 11.2 prescribes the manner for appointment of Presiding Arbitrator.

32. Also, a Coordinate Bench of this Court in ARB.P. 860/2019, titled as ***IRB Ahmedabad Vadodara Super Express Tollway Private Limited Vs. National Highways Authority of India***, dated 27.08.2020 had dealt with almost similar issue where the two nominee Arbitrators could not consent on appointment of Presiding Officer from the panel of SAROD. In the said case also the petitioner had raised concern about impartiality of Arbitrator to be appointed from the panel of SAROD and to refute the apprehension of petitioner, the Bench appointed the Presiding Officer from legal background on the panel of SAROD itself. The present case is distinguishable on facts that the parties have yet not nominated any of the Arbitrator, who shall further appoint the Presiding Officer to complete the arbitral tribunal.

33. So far as objection of petitioners with regard to the credibility of panel of SAROD is concerned, this Court has gone through the list of Arbitrators on the panel of SAROD (Document-5) and finds that there are total 89 Arbitrators on the panel of SAROD, which includes Bureaucrats, Chief Engineers, Secretaries to Government of India hailing from different

educational background and also Former Judges of the High Court and the Supreme Court and their trustworthiness and integrity cannot in any way be doubted.

34. In the aforesaid view of the matter, this Court is of the opinion that these petitions under Section 11(6) of the Act seeking appointment of sole Arbitrator are not maintainable and are hereby dismissed, while directing the parties to nominate one Arbitrator each from the panel of SAROD having 89 Arbitrators (as per Document-5) and the two so appointed shall appoint the third Arbitrator, strictly in terms spelt out in 44.3.2 of the Concession Agreement.

35. In view of the above, these petitions are accordingly disposed of.

(SURESH KUMAR KAIT)
JUDGE

OCTOBER 28, 2021

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