

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: November 15, 2022

+ ARB.P. 1263/2021, I.A. 17545/2021

MS BAREILLY HIGHWAYS PROJECTS LIMITED

..... Petitioner

Through: Mr. Rajesh Yadav, Sr. Adv. with
Mr. Gurpreet Singh, Advs.

versus

MS NATIONAL HIGHWAY AUTHORITY OF INDIA

..... Respondent

Through: Mr. Ankur Mittal and
Mr. Yash Kapoor, Advs.

**CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO**

J U D G M E N T

V. KAMESWAR RAO, J

1. The petitioner by way of the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act of 1996'), is seeking *inter alia*, reference of disputes for adjudication to an already constituted Arbitral Tribunal.

2. The petitioner, a company incorporated under the Companies Act, 1956 and the respondent, an autonomous body created through the promulgation of the National Highways Authority of India Act, 1988

entered into a Concession Agreement (hereinafter referred to as 'CA') dated June 22, 2010 for development and construction of Bareilly-Sitapur section of National Highway (NH) 24 from KM 262 to KM 413.2 in the State of Uttar Pradesh (hereinafter referred to as 'Project Highway') through private participation on Design, Build, Finance, Operate and Transfer (DBFOT) basis. The construction period for the same, which is a Greenfield Project, was 910 days from the 'appointed date' and the concession period was 20 years from the appointed date (including construction period). After completion of the construction, the petitioner being the concessionaire is to collect toll to recover its investment.

3. It is stated in the petition that the respondent, *vide* letter dated December 05, 2011, arbitrarily and unilaterally fixed the appointed date as March 01, 2011 and approved the 'financial close' as May 21, 2011. It is the case of the petitioner that the appointed date could have been fixed only when the parties have satisfied certain conditions precedent or there has been an express waiver. The respondent was to handover 80% of the land on or before the appointed date. The respondent was also under an obligation to provide access to such land without any hindrances as per Article 10.3.1 of the CA. It is stated that the delay in handing over land free from encumbrances by the respondent affected the construction work. Thus, the work could not be completed on the Scheduled Project Completion Date i.e., August 26, 2013, for which the respondent is solely and absolutely liable.

4. Various hindrances and obstructions said to have been faced by the petitioner while executing the project are listed as under:-

- i. Delay in providing vacant and unencumbered land to the concessionaire.
- ii. Delay in fixing the appointed date.
- iii. Delay in approving requests for extension of time.
- iv. Delay in grant of right of way.
- v. Suspension of work due to uncertainty in 'Change of Scope' works.
- vi. Not releasing the performance security.
- vii. Delay in obtaining clearances from the Ministry of Environment and Forest.
- viii. Delay in cutting down trees by the UP Van Nigam.
- ix. Delay in grant of approval for shifting of utilities lying on the project site.
- x. Delay in various approvals including toll plaza design.
- xi. Change in law.

5. It is submitted that the petitioner, in the interest of the project, has been carrying out maintenance even after surpassing the Scheduled Project Completion Date and had requested the respondent *vide* letter dated May 05, 2014, to bear the maintenance cost in light of various NHAI circulars. However, the respondent refused the same. However, the applicability of the said circulars when there is delay due to non-availability of unencumbered land, was confirmed by an Independent Engineer *vide* letter dated May 14, 2015. The petitioner *vide* letter dated December 18, 2013 informed the respondent that even after the date of the 4th Milestone, the land provided to the petitioner was only 49.042 KM as against the required 156.25 KM. Further the

Independent Engineer stated in a letter dated September 04, 2012 that it was the duty of the respondent as per Article 4.12 of the CA to obtain necessary approval from the Department of Forests.

6. On June 25, 2016, the petitioner intimated the respondent that even after a net delay of 1950 days, merely 78% of the land was allotted and requested the respondent to grant reasonable extension for meeting the Scheduled Project Completion Date. The Independent Engineer *vide* letter dated March 07, 2017 recommended the extension of construction period till October 31, 2017. The petitioner requested for extension of time *vide* letter dated December 23, 2017 till June, 2018; however, the same was rejected by the Independent Engineer.

7. The petitioner in exercise of his legal right requested the respondent for providing funds under One Time Fund Infusion Scheme (OTFIS) amounting to ₹280 crore, so that no further hindrances would be faced.

8. It is the case of the petitioner that the construction of the project and its completion was delayed due to which the project faced over run costs whereby the construction cost has increased, due to which additional equity was infused by the petitioner through lender banks. As per the petitioner, the delay is solely attributable to the respondent and for such breaches and failure to perform its obligations, the respondent is liable to pay damages.

9. As a result of these disputes, the dispute resolution clause, i.e., Article 44 of the CA, was invoked and disputes were referred to arbitration. The said arbitration clause reads as under:-

“44.1 Dispute resolution

14.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 44.2.

44.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

44.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Independent Engineer to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Independent Engineer or without the intervention of the Independent Engineer, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Concessionaire for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 44.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to

arbitration in accordance with the provisions of Clause 44.3.

44.3 Arbitration

44.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 44.2, shall be finally decided by 'reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 44.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules"), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Delhi and the language of arbitration proceedings shall be English.

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 that 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.

44.4 Adjudication by Regulatory Authority or Commission

In the event of constitution of a statutory Regulatory Authority or Commission with powers to adjudicate upon disputes between the Concessionaire and the Authority, all Disputes arising after such constitution shall, instead of reference to arbitration under Clause 44.3, be adjudicated upon by such Regulatory Authority or Commission in accordance with the Applicable Law and all references to Dispute Resolution Procedure shall be construed accordingly. For the avoidance of doubt, the Parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal against such adjudication has been decided by an appellate tribunal or High Court, as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law.”

10. The petitioner initiated arbitration proceedings by invoking the arbitration clause and a notice was issued on September 05, 2018 whereby an Arbitral Tribunal was constituted (hereinafter referred to as ‘Arbitral Tribunal-1’). The petitioner filed its Statement of Claim on February 02, 2019 and the respondent filed their Statement of Defense and counter claims on April 17, 2019. The claims of the petitioner amount to ₹3712 crore and the counter claims of the respondent amount to ₹3535 crore. The Arbitral Tribunal-1 in its 22nd sitting on September 02, 2021 framed the issues and passed following order:-

- "i. After hearing the learned counsel for the parties and with their Consent the issues/points for determination are framed as under-*
- ii. Whether the delay in execution of project up to the*

*termination of the concession agreement is attributable to the Respondent or the Claimant or to both? **Onus on parties.***

*iii. Whether the Supplementary agreement dated 30.03.2015 was executed by the Claimant on account of dress and undue influence exercised by the Respondent? If so, its effect? **OPC**"*

*iv. whether the claimant's claim Nos. 1 & 8,11,12,17,19,21,23,24,27 and 29 or any of them are barred by limitation as alleged by the Respondent? **OPR**
The claims and counterclaims shall continue the rest of the issues/points for determination."*

11. It is the case of the petitioner that to counterblast the above proceedings, the NHAI refused to extend benefits of OTFIS to the petitioner despite repeated representations by the petitioner and the consortium of banks. The respondent further terminated the CA by issuing notice bearing No. NHAI/BOT/11019/15/2008/UP/BSNH/24/13/134325 dated May 03, 2019. The petitioner replied to the said notice and notified the damages and losses caused due to the wrongful termination of the CA *vide* notice bearing No. BHPL/HN002/2019-20/75/CMO/D/75 dated July 11, 2019. It is stated that the petitioner has always performed its part of the contract and it was the respondent who failed to perform their obligations and have been exercising unlawful terms, dictates and directions to withhold approvals/extensions of time, which has resulted in huge monetary losses in terms of overrun costs etc. to the petitioner for which the proceedings are pending before the Arbitral Tribunal-1. It is the case of the petitioner that it is entitled to claim damages on account of continuous breaches committed by the respondent and also by the

termination of the CA, denying the petitioner of its potential toll fee. It is also stated that the petitioner had to bear additional costs for construction of highway structures and approaches, resulting in enhancement of costs. The respondent having agreed to pay the enhanced amounts, is liable to pay interest for additional costs and expenses incurred upon additional debt raised/infused in the project.

12. On account of the illegal termination of the CA, the petitioner in accordance with Article 44.1 issued noticed dated October 31, 2020 and November 09, 2020 requesting the respondent for amicable settlement of disputes. As the respondent failed to co-operate with the same, the petitioner issued notice on August 16, 2021 for referring the unsettled disputes for adjudication by arbitration and nominated its Arbitrator. The respondent was requested to nominate its Arbitrator within 30 days from receipt of the said notice.

13. During the proceedings before the Arbitral Tribunal-1, the petitioner filed an application seeking amendment of Statement of Claims to bring on record the subsequent events and additional claims on account of the termination of the CA. The said application was partly allowed for the claims mentioned in paragraphs 7.43 of the present petition and liberty was granted to the petitioner to invoke arbitration clause, i.e., Article 44.3 for the rest of the claims, as at that point, conciliation proceedings therein were pending.

14. Subsequently, the petitioner, aggrieved by the termination of the CA, invoked Article 44 and sent a second arbitration notice dated August 16, 2021, nominating Justice Rajiv Bhalla (Retd.), who is also a member of the Arbitral Tribunal-1, as their nominee Arbitrator, and

called upon the respondent to put forth their nominee within 30 days. The list of disputes that have arisen on account of the termination of the CA, as per the petitioner, is as under:-

SR. NO.	DESCRIPTION OF CLAIMS	AMOUNT (RS.)
1.	CLAIM FOR THE EXPENSES INCURRED ON THE CONSTRUCTION OF PROJECT HIGHWAY ON THE BASIS OF THE INVOICES ISSUED BY EPC CONTRACTOR.	17,932,879,753
2.	CLAIM OF INTEREST ON THE EXPENSES INCURRED ON THE REGULAR INVOICES OF CONSTRUCTION.	18,89,40,89,507
3.	CLAIM TOWARDS THE ENCASHMENT OF PERFORMANCE BANK GUARANTEE BY NHAI.	52,30,00,000
4.	CLAIM OF INTEREST ON THE PERFORMANCE GUARANTEE ILLEGALLY ENCASHED BY NHAI	2,98,41,541
5.	CLAIM AS INTEREST PAID BY THE CONCESSIONAIRE TOWARDS THE MARGIN GIVEN ON PERFORMANCE BANK GURANTEEE IN FAVOUR OF NHAI	8,19,42,754
6.	CLAIM FOR THE AMOUNT OF DEBT SERVICE INTEREST PAID TO THE CONSORTIUM LENDERS BY THE CONCESSIONAIRE UNDER THE COMMON LOAN AGREEMENT	1,66,00,00,000
7.	CLAIM FOR THE AMOUNT OF COST OF EIEL ASSETS ILLEGALLY TAKEN IN POSSESSION BY NHAI	112,88,12,942
8.	CLAIM OF INTEREST ON THE AMOUNT/COST OF EIEL ASSETS	53,76,00,519
9.	CLAIM OF INTEREST ON THE AMOUNT PAID TO THE	22,35,66,750

	CONSORTIUM BANKERS UNDER COMMON LOAN AGGREETMENT	
10.	CLAIM OF COMPENSSION FOR LOSS OF PROFITS (HURDSON FORMULA)	3,93,03,46,429
11.	PLANT AND MACHINERY IDLING/ RENTAL/ REHANDLING	141,560,560
12.	INTREST FOR PLANT AND MACHINERY IDLING/ RENTAL/ REHANDLING	225,028,779
	TOTAL	45,30,86,69,534

15. It is stated that the parties had mutually agreed that the arbitration proceedings would be governed by the rules of International Centre for Alternative Dispute Resolution ('ICADR Rules', hereinafter). The notice dated August 16, 2021 was duly served on the respondent and the respondent was to nominate its Arbitrator in accordance with Article 44.3.2 and also Rule 5 of the ICADR Rules within 30 days, failing which, the appointment was to be made by ICADR. Rule 5 reads as under:-

5- "Appointment of Arbitrator:- 1) Unless otherwise agreed by the parties, a person of any nationality may be an Arbitrator.

2) Where the arbitration agreement, provides that each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the presiding arbitrator, and –

a. A party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party:
or

b. The appointed arbitrators fail to agree on the presiding arbitrator within thirty days from the date of their appointment,

The appointment shall be made, upon request of a party, by the ICADR".

16. As the respondent failed to appoint their nominee Arbitrator within 30 days of notice dated August 16, 2021, the petitioner *vide* letter dated September 18, 2021 bearing No. BHPL/HN002/2020-21/130/CMO/D/130, requested the ICADR to appoint an Arbitrator on behalf of the respondent as per Rule 5 of the ICADR Rules. The said letter also found mention that disputes arising out of the same contract and involving similar issues were already pending adjudication before the Arbitral Tribunal-1.

17. It is stated that on December 01, 2021, the counsel for the petitioner received a call from an Arbitrator, regarding virtual/online hearing meeting link for conducting arbitral proceedings. As per the petition, it was at this point that the counsel for the petitioner got to know about the constitution of a second Arbitral Tribunal (hereinafter referred to as 'Arbitral Tribunal-2'). It is the case of the petitioner that from the above, it is clear that the respondent did not follow the due procedure in appointment of their nominee Arbitrator, and had denied the petitioner the opportunity to contest/challenge the said appointment. Nevertheless, the petitioner convened the meeting on December 02, 2021 as per the instructions from the Arbitrator and appeared in the same.

18. It is stated that the petitioner having already initiated the process for appointment of an Arbitrator on behalf of the respondent as per Rule 5 of the ICADR Rules, the action of the respondent in appointing its nominee Arbitrator beyond the period of 30 days in bad in law and in contravention to the due process of law.

19. It is also stated that the pending conciliation proceedings due

to which the application of the petitioner to bring the subsequent events on record of the Arbitral Tribunal-1 was only allowed partly, failed and the disputes still remain unsettled. It is their case that as the controversy and disputes before both the Arbitral Tribunals are similar in nature, in order to avoid confusion and any potential conflicting findings/awards, the same need to be referred to one single Arbitral Tribunal, preferably Arbitral Tribunal-1, as it is already seized of the disputes between the same parties.

20. A reply has been filed on behalf of the respondent to the petition, wherein the very maintainability of the petition has been disputed. It is the case of the respondent that the prayers as made in the petition cannot be granted by this Court under Section 11(6) of the Act of 1996, as the said provision only vests upon this Court, the power to appoint an arbitrator and not to transfer the matter from one Arbitral Tribunal to another. If the prayer as sought by the petitioner is granted, the same would amount to terminating the mandate of the duly constituted Arbitral Tribunal, which could not be done in a petition under Section 11(6) of the Act of 1996. Even otherwise, no ground has been made for terminating the mandate of the existing Arbitral Tribunal. Even if such grounds existed, the petitioner ought to have moved an application before the Arbitral Tribunal rather than approaching this Court.

21. As regards the averment of the petitioner that the right of the respondent to nominate the Arbitrator expired after 30 days period, it is stated that neither the CA nor Section 11(6) of the Act of 1996 provide any notice period / deadline in which the Arbitrator has to be appointed

by the parties, failing which the right to appointment would cease. The petitioner had served notice dated August 16, 2021 whereby the petitioner was called upon to appoint its nominee Arbitrator within 30 days. Resultantly, the respondent appointed its nominee Arbitrator *vide* letter dated November 10, 2021. Subsequent thereto, the two Arbitrators have appointed the Presiding Arbitrator and the preliminary meeting of the Arbitral Tribunal-2 was also conducted on November 02, 2021. Thus, the Arbitral Tribunal-2 duly stood constituted before the petitioner approached this Court by way of the present petition. That apart, the instant case is squarely covered by the decision of the Supreme Court in ***Datar Switchgears Ltd. v. Tata Finance Ltd. & Ors., (2000) 8 SCC 151***, wherein it was held that failure to appoint an Arbitrator within a period of 30 days of demand being made by the other party, would not forfeit the right of a party to appoint their nominee Arbitrator. The relevant paragraph of the judgment is reproduced as under:-

“20. In the present case the respondent made the appointment before the appellant filed the application under Section 11(6) though it was beyond 30 days from the date of demand. In our view, the appointment of the arbitrator by the respondent is valid and it cannot be said that the right was forfeited after expiry of 30 days from the date of demand.”

According to the respondent, in view of the above, the appointment of the nominee Arbitrator by the respondent is legal and valid and therefore, any challenge made by the petitioner on the ground that the nominee Arbitrator has been appointed after 30 days of notice is liable

to be rejected.

22. Further, it is stated that even the contention of the petitioner that the appointment of Arbitrator shall be governed by the ICADR Rules, is misplaced and contrary to the arbitration agreement, particularly Clause 44.3 of the CA. A perusal of Clause 44.3.2 would show that as far as the appointment of arbitrators is concerned, the applicability of ICADR Rules is limited to the appointment of the Presiding Arbitrator. The words '*in the event of disagreement between two Arbitrators, the appointment shall be made in accordance with Rules*', in Clause 44.3.2 clearly reflects the intention of the parties, inasmuch as, any reference to ICADR Rules would be limited to appointment of the Presiding Arbitrator. Had the parties intended for the ICADR Rules to be applicable to appointment of nominee arbitrators also, the same would have been expressly mentioned in the CA, as is the case with the Presiding Arbitrator. In the absence of such a stipulation, the contention of the petitioner is liable to be rejected.

23. As far as referring the dispute to the same Arbitral Tribunal is concerned, it is stated that there is no law which mandates that invocation of subsequent disputes shall always be referred to the Tribunal having the same composition. Appointment of panel of arbitrators is a freedom given to the parties, and compelling the parties to go to the same Arbitral Tribunal would defeat the purpose of arbitration.

24. Reference is made to the judgment of this Court in ***Gammon India Ltd. v. NHAI, AIR (2020) DEL 132*** wherein it is stated that there is no bar in multiple arbitrations pertaining to the same contract.

Relevant part of the said judgment is reproduced as under:-

“24. A perusal of the provisions of the Arbitration and Conciliation Act, 1996 shows that the statute envisages that disputes can be raised at different stages and there can be multiple arbitrations in respect of a single contract.....”

SUBMISSIONS:-

25. Mr. Rajesh Yadav, learned Senior Counsel appearing for the petitioner has stated that the appointment of the nominee Arbitrator is bad in law, being contrary to the procedure agreed under Article 44 of the CA. He states at the outset that, to avoid multiplicity of proceedings and to avoid contrary findings, it would be appropriate that the disputes between the parties be directed to be adjudicated by the same Arbitral Tribunal, as under both the references, the parties are common and the disputes are arising out of the same contract and has overlapping issues.

26. He has submitted that the second arbitration notice dated August 16, 2021 was duly served upon the respondent whereby the petitioner appointed the nominee Arbitrator and called upon the respondent to appoint an Arbitrator on their behalf within 30 days. As the respondent failed to appoint an Arbitrator within 90 days, the right of the respondent got forfeited and as per ICADR Rules, the right to appoint nominee Arbitrator of the respondent is vested with the ICADR. As the notice issued on September 18, 2021 under Rule 5(2)(a) for appointment of nominee Arbitrator on behalf of the respondent by the ICADR has neither been challenged nor disputed by the respondent, the procedure of arbitration has already commenced.

27. Reliance has also been placed on the Judgment of the Supreme Court in **Walter Bau AG v. Municipal Corporation of Greater Mumbai, 2015 3 SCC 800** wherein it was stated that the appointment of an arbitrator made before the aggrieved party moves under Section 11 (6) will be valid and such an appointment can be challenged only under Section 11 and Section 13 of the Act of 1996. The relevant portion of the said judgment is reproduced as under:

“....unless the appointment of the arbitrator ex facie valid and such appointment satisfies the court exercising jurisdiction under section 11(6) of the A and c act, acceptance of such appointment as a fait accompli to de bar the jurisdiction under section 11(6) cannot be countenanced in law.

Though may appear to be on conformity with the law laid down in DARTAR SWITCHGEARS LTD¹⁰, is clearly contrary to the agreed procedure which required the appointment made by the respondent corporation to be from the panel submitted by ICADR. The said appointment, therefore, is clearly invalid in law.”

28. In the above case, the subject matter of the challenge was the appointment of the nominee Arbitrator, which was made after 30 days of notice and the same was set aside as after such expiry, the right to appoint the nominee Arbitrator would exclusively vest with the ICADR. The view taken by the Supreme Court in **Walter Bau AG (supra)** was also followed in **Perkin Eastman Architects DPC and Anr. v. HSCC India Ltd., 2019 SCC OnLine SC 1517**.

29. The decision in **Walter Bau AG (supra)** and **Perkin Eastman (supra)** have also been followed in **BVSR-KVR (Joint Ventures) v. Rail Vikas Nigam Ltd., 2020 SCC OnLine Del 456**. That apart this

Court in the case of *M/s. Larsen and Toubro Ltd. v. NHAI and Anr., Arb. P. 208/2020 decided on July 6, 2020* has also followed *Walter Bau AG (supra)* and the appointment made therein by the NHAI was set aside.

30. He has vehemently contested the reliance placed by the respondent on *Datar Switch Gears (supra)* by stating that no particular institution was named therein, as has been done in the present case.

31. Mr. Yadav has also contested the stand of the respondent that no procedure has been agreed upon for appointment of nominee arbitrators and ICADR Rules are only applicable to the appointment of the Presiding Arbitrator, stating that as per the Act of 1996 the present disputes can be adjudicated either by a Sole Arbitrator or an Arbitral Tribunal and as per Clause 44.3.2 of the CA, the parties have agreed for a three member Arbitral Tribunal and as such, such a plea bears no merit.

32. That apart, it is the submission of Mr. Yadav that when the core issues that need to be adjudicated in arbitral proceedings are common, it would be proper that any subsequent disputes are referred to the earlier constituted Arbitral Tribunal and the practice of multiple Arbitral Tribunals should be depreciated.

33. He also submitted that, as the reason for termination of the CA is also the alleged non-completion of the Project Highway as agreed upon under the agreement, the issue of alleged breach of obligations by the parties under the CA are at the centre of the disputes in both first and second references. As the primary dispute between the parties is on the question as to who caused the delay in completion of the project

highway, whether the petitioner or the respondent, the same need to be adjudicated by the same Arbitral Tribunal.

34. He has listed out the grounds on which he is seeking adjudication of the dispute by the same Arbitral Tribunal as under:

- (i) Arbitral Tribunal – 1 is currently seized of the same disputes.
- (ii) Claims are arising out of the same contract
- (iii) There are overlapping of issues
- (iv) Both references involved similar nature of proceedings, common set of documents and evidence.
- (v) In order to avoid conflicting awards.

35. He has also referred to the Judgment of this Court in the case of ***Veekay Prestressed Pvt. Ltd. v. Union of India, 2021 SCC OnLine Del 3551*** wherein this Court, following the decision in ***Gammon India (supra)***, opined that disputes arising out of the same contract or even the same series of contracts, can be referred to the same Arbitral Tribunal, to avoid multiplicity of litigation and conflicting findings. Further has relied upon ***DLF Home Developers Ltd. v. Shipra Estate Ltd. and Ors. 2021 SCC OnLine 5517*** wherein it was held as under:

“22 The afore-noted observations in OMP(I)(COMM) 209/2021 and OMP (I) (COMM) 213/2021 clearly shows that the property in question is connected to the issues in the said petitions. It is also established that the Agreement to sell in question affects the rights of the parties in the present petition.

23However, without commenting on the merits of the disputes between the parties, in the considered opinion

of this Court it would be just and proper if the disputes are referred to the Arbitral Tribunal, who is already seized of the related matters.....”

36. Mr. Ankur Mittal, learned counsel appearing for the respondent has submitted that the respondent’s right to appoint its nominee Arbitrator does not come to an end on the expiry of 30 days of notice, as Section 11 (6) of the Act of 1996 does not prescribe an outer limit as against the time limit of 30 days set under Section 11 (4) and 11 (5) of the Act. To buttress his argument, he has referred to the case of **Datar Switchgears Ltd (supra)** and submitted that that in view of the proposition set out by the Supreme Court therein, the appointment of the nominee Arbitrator by the respondent is valid and in order.

37. Further, he has reiterated that in any case, ICDAR Rules have no application insofar as appointment of nominee Arbitrators of the parties are concerned. The said rules are relevant and applicable only for the appointment of the Presiding Arbitrator. He has referred to Clause 44.3.1 which reads as under:

“44.3.1. Any dispute which is not resolved amicably by conciliation as provided in clause 44.2 shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 44.3.2. Such arbitration shall be held in accordance with the rules of arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the “Rules”), or such other rules as may be mutually decided by the Parties, and shall be subject to provisions of the Arbitration Act.....”

A perusal of the above would reveal that (a) a Board of

Arbitrators has to be appointed in accordance with Clause 44.3.2 (b) the arbitration is to be conducted as per the ICADR Rules or such other Rules as may be mutually decided by the parties. For the purposes of Section 11 (6) of the Act of 1996, the agreed procedure relates to the procedure for appointment of Arbitrators. How such an arbitration is to be conducted, i.e., whether it is according to ICADR Rules, or some other Rules, is not a relevant factor and is not part of the agreed upon procedure for appointment of arbitrators under Section 11 of the Act. Clause 44.3.2 provides as under:

“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.”

It is submitted that as is evident from the above, each party has been conferred the right to appoint one arbitrator. The agreement does not provide any specific time limit within which such right is to be exercised, and therefore, each party would have a right to exercise such option till the other party approaches the Court seeking appointment of an arbitrator. Thus the ICADR Rules have no role in the appointment of nominee arbitrators of the parties.

38. That apart, it is also his contention that the letter dated September 18, 2021 is not a request to ICADR for appointment of the respondent's nominee Arbitrator, as (a) it does not make any such specific request for appointment of the respondent's nominee, (b) there is no proof that the letter was ever delivered to ICADR, (c) there is no

reply from ICADR on record. Therefore, no ingredient of Section 11 (6) of the Act of 1996 has been fulfilled.

39. He has also sought to distinguish the decision of the Supreme Court in *Walter Bau AG (supra)* by stating that in that case, the arbitration clause agreed upon by the parties specifically provided for a period of 30 days to the other party after receipt of notice to appoint its nominee, and ICADR Rules were also specifically adopted for appointment of arbitrators including nominee arbitrators, in case of default by either party.

40. That apart, Mr. Mittal has also submitted that the petitioner herein has concealed certain material facts before this Court and has also made some false statements on affidavit, as shown under:

- a. The petitioner filed an application under Section 13 of the Act of 1996 before the Arbitral Tribunal on December 16, 2021 pressing a similar issue which is not disclosed in this petition.
- b. The petitioner made an averment that the appointment of nominee Arbitrator by the respondent was not served upon it. This is patently incorrect as the respondent had duly served the appointment letter dated November 10, 2021.

41. In view of the above, he has sought dismissal of the petition.

42. Having heard the learned counsel for the parties, and perused the record, the short question which arises for consideration is whether the prayer of the petitioner for reference of the disputes pending before the Arbitral Tribunal-2 to Arbitral Tribunal-1 can be granted. The

ground on which such a prayer has been sought is primarily that the constitution of Arbitral Tribunal-2 is invalid being contrary to the arbitration agreement and law. I have already reproduced the dispute resolution clause in the agreement, including the clause related to arbitration, i.e., clause 44.3. A reading of the same makes it clear that the dispute shall be adjudicated by a Board of Arbitrators consisting of three arbitrators. Each party shall select one Arbitrator, and the two Arbitrators so selected shall appoint the third Arbitrator, i.e., Presiding Arbitrator.

43. Clause 44.3.1 contemplates that the arbitration shall be held in accordance with ICADR Rules. However, the process of appointment of Arbitrators is contemplated in clause 44.3.2, which states that in the event of disagreement between the two nominated Arbitrators to appoint the Presiding Arbitrator, such appointment shall be made in accordance with the Rules, i.e., ICADR Rules. So, it follows the appointment of the Arbitrators shall be in accordance with clause 44.3.2 of the agreement, and it is only the appointment of the Presiding Arbitrator which shall be made in accordance with the Rules of ICADR in the eventuality, there is a disagreement between the two Arbitrators.

44. The plea advanced by Mr. Yadav is that on the failure on the part of the respondent to appoint its nominee Arbitrator, the appointment should have been made by the ICADR is without any merit. The facts in this case reveal that vide notice dated August 16, 2021, the petitioner, under clause 44.3.2 had invoked arbitration and nominated its Arbitrator and called upon the respondent to nominate

its Arbitrator. The respondent appointed its nominee Arbitrator vide communication dated November 10, 2021, a copy whereof was sent to the petitioner herein. The Arbitrators so appointed by each of the parties had, vide communication dated November 12, 2021, appointed the Presiding Arbitrator after obtaining his consent. Pursuant to the constitution of the Board of Arbitrators, notice dated November 20, 2021 was issued to the parties for conducting a preliminary procedural hearing.

45. The notice was issued for hearing on December 2, 2021. On December 2, 2021, the learned counsel for the parties had appeared before the Tribunal. On a perusal of the proceedings held on December 2, 2021, it is noted that the only submission made by the learned counsel for the petitioner is with regard to the fact that since another dispute between the same parties and arising out of the same CA is pending adjudication before the another Arbitral Tribunal, the proceedings before the Arbitral Tribunal be not proceeded with. The Arbitral Tribunal observed that no written objection to these proceedings has however been filed.

46. It is also noted that the learned counsel for the respondent had submitted that the dispute is distinct from the pending arbitral process between the same parties and constitutes a distinct cause of action, hence the objection of the learned counsel for the petitioner is misconceived.

47. The Arbitral Tribunal-2 refrained from recording any opinion on the said submission of the learned counsel for the petitioner. I have purposefully referred to the proceedings dated December 2, 2021 only

to show that, no plea was made on the day by the learned counsel for the petitioner before the Arbitral Tribunal-2, with regard to the fact that the respondent has not nominated its nominee Arbitrator within thirty days of the receipt of notice dated August 14, 2021.

48. However, petitioner on December 16, 2021 had filed an application under Section 13 of the Act of 1996 seeking declaration that the appointment of the nominee Arbitrator by the respondent is invalid for being not in accordance with the agreed procedure and rules. The said application was considered by the Arbitral Tribunal-2 in its hearing dated January 17, 2022 and in view of the fact that the present proceedings are pending before this Court, it deferred the hearing to February 26, 2022, subject to any order to be passed by this Court in this petition.

49. This Court, *vide* order dated February 18, 2022, had directed the Arbitral Tribunal-2 not to proceed further with the matter.

50. The submissions of Mr. Yadav are primarily the following:

- (i) The appointment of the nominee Arbitrator of the respondent is bad in law, being contrary to the procedure agreed under Article 44 of the CA.
- (ii) To avoid multiplicity of proceedings and to avoid contrary findings, it would be appropriate that the disputes between the parties be directed to be adjudicated by the same Arbitral Tribunal, as under both the references, the parties are common and the disputes are arising out of the same contract and has overlapping issues.
- (iii) The second arbitration notice dated August 16, 2021 was duly

served upon the respondent whereby the petitioner appointed the nominee Arbitrator and called upon the respondent to appoint an Arbitrator on their behalf within 30 days. The respondent failed to appoint an Arbitrator within 90 days, and as such the appointment of the nominee Arbitrator of the respondent has to be under ICADR Rules.

- (iv) The respondent has not challenged the notice dated September 18, 2021 sent to the ICADR by the petitioner under Rule 5(2)(a) for appointment of nominee Arbitrator on behalf of the respondent by the ICADR.

51. The aforesaid submissions of Mr. Yadav are unmerited. I have already concluded above, that the appointment of Arbitrators by the parties is to be in terms of clause 44.3.2. It is only in the eventuality the two Arbitrators nominated by the parties disagree on the appointment of the Presiding Arbitrator, that the ICADR Rules shall be resorted to. It is not such a case here. The submission of Mr. Yadav by relying upon clause 44.3.1 is misplaced as it only contemplates that the proceedings of arbitration shall be held under ICADR Rules. It is one thing to say that the appointment is in terms of clause 44.3.2 and other that the arbitration proceedings shall be conducted in accordance with ICADR Rules.

52. Insofar as submission (ii) above is concerned, the same is also unmerited, inasmuch as, the dispute before the Arbitral Tribunal-2 is distinct from the dispute pending before Arbitral Tribunal-1, and constitutes a distinct cause of action. The petitioner is estopped from contending that the present disputes need to be referred to Arbitral

Tribunal-1, when the petitioner itself had invoked arbitration clause appointed its nominee Arbitrator, calling upon the respondent to appoint its nominee Arbitrator. It is pursuant to the notice dated August 14, 2021 that the respondent had nominated its nominee Arbitrator and the two Arbitrators nominated the Presiding Arbitrator. In other words, the procedure contemplated under clause 44.3.2 having been followed, the constitution of the Arbitral Tribunal-2 is valid and surely, this Court cannot grant the prayer in the manner prayed for by the petitioner, more so in a petition under Section 11(6) of the Act of 1996.

53. The submission of Mr. Yadav that the respondent having failed to appoint its nominee within thirty days, the right of the respondent to appoint its nominee Arbitrator gets forfeited, is also unmerited.

54. Though, it may be true that the respondent has not appointed its nominee Arbitrator within thirty days of the receipt of the notice, but the fact remains that the respondent had nominated its Arbitrator on November 10, 2021 and both the nominated Arbitrators have subsequently appointed the Presiding Arbitrator. The law with regard to forfeiture of the rights of a party upon failure to appoint its nominee Arbitrator within 30 days of notice invoking arbitration has been settled by the Supreme Court in **Datar Switchgears Ltd. (supra)** wherein the Apex Court held as under:-

“19. So far as cases falling under Section 11(6) are concerned — such as the one before us — no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and

Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.”

55. The judgment has been followed by the Supreme Court in its opinion reported as ***Punj Lloyd Limited v. Petronet MHB Limited, Civil Appeal No.2932/2005.***

56. It was also relied upon by a co-ordinate bench of this Court in ***Selmec Engineer Construction v. DSC Limited, ARB.P. 517/2015,*** decided on January 27, 2016 to hold as under:

“8. There is a force in the submission of the learned counsel for the respondent, as the present petition was filed in the Registry on 14th September, 2015 along with brief list of dates and events dated 12th September, 2015 and on the date of filing of petition, it was the admitted position that the Arbitrator was appointed on 5th September, 2015.....

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9. The respondent had appointed the sole Arbitrator on 5th September, 2015 to adjudicate the dispute between the parties. Once the sole Arbitrator has already been appointed before filing of the present petition, therefore, in view of the decision of the Supreme Court in the case of Datar Switchgears Ltd. (supra), the present petition is not maintainable.....”

57. Going by the above, it is clear that Section 11(6) of the Act of 1996 does not provide any time period as opposed to Section 11 (4) and Section 11 (5), which prescribes a period of 30 days. If one of the parties call upon the opposite party to appoint an arbitrator, and the opposite party does not make the appointment within 30 days of notice invoking arbitration, the right to appoint does not get automatically forfeited after expiry of such period. If the opposite party makes the appointment even after 30 days, but before the first party has moved the Court under Section 11, it would be a valid exercise of power under the contract. However, once the first party files an application before the Court, the right of the other party to appoint the Arbitrator gets forfeited.

58. It is to be noted that in the instant case, the petitioner had not moved the Court before the respondent had appointed/nominated its Arbitrator. It is only after such appointment/nomination was made, that the petitioner filed the present petition. If that be so, the rights of the respondent cannot be said to have been forfeited, and the appointment of its nominee Arbitrator is in accordance with law.

59. Insofar as the notice dated September 18, 2021 relied upon by Mr. Yadav is concerned, the said notice does not pertain to the project in question. In fact, the said notice has not even been issued by the petitioner herein. Even otherwise, the notice does not reveal that the petitioner had called upon the ICADR to nominate an Arbitrator on behalf of the respondent. If that be so, it must be concluded that the petitioner had not approached the ICADR at all, seeking appointment of nominee Arbitrator on behalf of the respondent. In any case, this issue is *non-est* as I have held earlier, the ICADR Rules shall have no applicability to the procedure for appointment of nominee Arbitrators.

60. The submission of Mr. Mittal that the prayers as made by the petitioner, i.e., for reference of claims pending before the Arbitral Tribunal-2 to Arbitral Tribunal-1 cannot be granted without terminating the mandate of the Arbitral Tribunal-2 is appealing. This I say so because, subsequent to the notice invoking arbitration by the petitioner, whereby it had nominated its arbitrator, the respondent appointed its nominee arbitrator and the two nominated arbitrators appointed the Presiding Arbitrator. I have already held the appointment of the nominee arbitrator of the respondent and the resultant constitution of the Arbitral Tribunal-2 to be in accordance

with law. In fact, the parties had appeared before the Arbitral Tribunal-2 and even attended its proceedings on December 2, 2021. The objection with regard to the validity of the constitution of the Arbitral Tribunal-2 was raised by the petitioner for the first time before the Tribunal on December 16, 2021 when it filed an application under Section 13 of the Act of 1996 before the Arbitral Tribunal and subsequently in this petition. The said application was deferred by the Arbitral Tribunal-2 in view of the pendency of the present proceedings before this Court. In view of my conclusion that the appointment of the nominee arbitrator of the respondent is in accordance with law, any reference of the claims from Arbitral Tribunal-2 to Arbitral Tribunal-1 without terminating the mandate of the validly constituted Arbitral Tribunal-2, is impermissible in a petition under Section 11 of the Act of 1996. It is also not the case of the parties that they have arrived at an understanding to terminate the mandate of the Arbitral Tribunal-2.

61. Insofar as the judgment in **Walter Bau AG (supra)** relied upon by Mr. Yadav is concerned, the same is distinguishable in the facts of this case. The arbitration clause agreed between the parties therein specifically provided for a period of thirty days to the other party after the receipt of notice to appoint its nominee Arbitrator. The ICDAR Rules were specifically prescribed for appointment of Arbitrators including nominee Arbitrators, in case of default by either party, which is not the case here.

62. The judgments of the Supreme Court in the cases of **Perkin Eastman Architects DPC and Anr. (supra)**, **BVSR-KVR (Joint Ventures) (supra)** and of this Court in **M/s. Larsen and Toubro Ltd.**

(*supra*), shall also have no applicability, as in this case, the nominee Arbitrator of the respondent has been appointed by the respondent much before the petitioner could approach this Court. In fact, by the time the petitioner filed this petition, the Arbitral Tribunal-2 was in place, and even the counsel for the petitioner had himself attended the proceedings of the Arbitral Tribunal-2 on December 2, 2021, without any demur or objection with regard to the invalidity of the appointment of the nominee Arbitrator of the respondent.

63. Insofar as the judgment in the case of ***Gammon India (supra)*** is concerned, therein the proceedings were under Section 34 of the Act of 1996, where the awards itself were challenged. While dismissing the petition, this Court laid down certain directions to avoid multiplicity of litigation. This Court was of the view that in petitions seeking appointment of Arbitrators/Arbitral Tribunals, the parties ought to disclose if any Arbitrators/Arbitral Tribunals have already been constituted, and in cases where such constitution has taken place, the Courts under Section 11 of the Act of 1996 may endeavor to refer the matter to such Arbitrators/Arbitral Tribunals to avoid conflicting and irreconcilable findings. It is pertinent to note that the guidelines laid down in ***Gammon India (supra)*** are with regard to petitions under Section 34 of the Act of 1996, and petitions seeking appointment of Arbitrators/Arbitral Tribunals under Section 11 of the Act of 1996, as can be seen from paragraph 44 of the judgment. However the present petition, though under Section 11 (6) of the Act of 1996, has not been filed seeking appointment of an arbitrator. It is also not a case where a challenge has been made to an arbitral award under Section 34 of the

Act of 1996. As such, the said judgment shall have no applicability in the instant case.

64. In *Veekay Prestressed Pvt. Ltd. (supra)*, this Court was considering Transfer Petitions seeking transfer of petitions filed under Section 34 of the Act of 1996 pending before Patiala House Courts to this Court. The said petitions under Section 34 were transferred to this Court, on the ground that adjudication of the disputes before different courts would lead to contradictory findings. Needless to say, that is not the case herein, and as such, the judgment is clearly distinguishable.

65. In *DLF Home Developers Ltd. (supra)*, this Court was concerned with an application *inter-alia* seeking recall of its previous order in a petition under Section 11 of the Act of 1996 appointing an Arbitrator to adjudicate the disputes between the parties, on the ground that the defendant No. 1 therein never consented to the said appointment. In fact, in an earlier round of litigation between the same parties involving the same agreement, a co-ordinate bench of this Court had appointed another Arbitrator, a fact which was not brought to the attention of this Court while passing the impugned order. Therefore, this Court, allowing the application, modified the impugned order and referred the disputes before it for adjudication by the already appointed Arbitral Tribunal. Suffice it to state, this judgment is also distinguishable, as in that case, the petition under Section 11 was seeking appointment of an arbitrator, which is not the case herein. That apart, in the present case, after the petitioner appointed its nominee Arbitrator and called upon the respondent to appoint its nominee Arbitrator, the respondent also appointed its nominee Arbitrator, and

both the nominee Arbitrators appointed the Presiding Arbitrator. In fact, the parties have appeared before the Arbitral Tribunal-2 and attended the proceedings.

66. In view of my above discussion, I do not see any merit in the petition, the same is dismissed. The order dated February 18, 2022 staying the proceedings before the Arbitral Tribunal stands vacated.

I.A. 17545/2021

Dismissed as infructuous.

V. KAMESWAR RAO, J

NOVEMBER 15, 2022/aky



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