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Arb.O.P.(Com.Div.) Nos.530 and 531 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.10.2023

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)Nos.530 and 531 of 2022
and
A.Nos.3832 and 3833 of 2023

Tamil Nadu Road Sector Project II,
Highways Department,
Represented by its Project Director,
No.171, South Kesava Perumal Puram,
Chennai - 600 028, India.

... Petitioner in both petitions

Vs.

1.M/s.Sheladia Associates Inc.
"Amsri Shamira", 2nd Floor,
Flat Nos.206 and 207,
Door No.9-1-113 to 118, SD Road,
Old Lancer Lanes,
Secundrabad - 500 003.
Telangana.

... Respondent in
Arb.O.P.(Com.Div.)No.530 of 2022

2.M/s.IRCON International Limited and
Sumer Mitra Jaya (J.V)
Palika Bhavan, Sector-XIII,
R.K.Puram, New Delhi - 110 066.

... Respondent in
Arb.O.P.(Com.Div.)No.531 of 2022

Prayer in Arb.O.P.(Com.Div.)No.530 of 2022: Original Petition is filed under
Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint



Arb.O.P(Com.Div.) Nos.530 and 531 of 2022

a suitable person as the Sole Arbitrator as per the Arbitration clauses in the Agreement dated 10.09.2004 to decide the disputes which have arisen between the petitioner and the respondent.

Prayer in Arb.O.P.(Com.Div.)No.531 of 2022: Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint a suitable person(s) as Arbitrators as per the Arbitration clauses in the Agreement dated 04.02.2005 to decide the disputes which have arisen between the petitioner and the respondent.

For Petitioner	: Mr.A.Edwin Prabakar (In both Petitions)
For Respondent	: Mr.P.J.Rishikesh (in Arb.O.P.(Com.Div.)No.530 of 2022)
For Respondent	: Mr.P.J.Sri Ganesh (in Arb.O.P.(Com.Div.)No.531 of 2022)

COMMON ORDER

By this common order, both the original petitions are being disposed of.

2. Arb.O.P.(Com.Div.)No.530 of 2022 has been filed by the petitioner against the consultant appointed by the petitioner.



3. Arb.O.P.(Com.Div.)No.531 of 2022 has been filed by the petitioner against the contractor.

4. The petitioner had entered into a separate contracts with the respective respondents. Contract Agreement for Supervision Consultancy Services dated 10.09.2004 was entered with the respondent in Arb.O.P.(Com.Div.)No.530 of 2022). The said respondent was appointed to act as a consultant for the work which was to be handed over to the contractor, the respondent in Arb.O.P.(Com.Div.)No.531 of 2022 with whom, the petitioner has signed a separate Agreement dated 04.02.2005 titled as 'Contract Package No.TNRSP02'.

5. The respective Agreements dated 10.09.2004 and 04.02.2005 contemplate arbitration clause for resolution of dispute through arbitration.

6. As far as contract with the consultant, the respondent in Arb.O.P.(Com.Div.)No.530 of 2022 is concerned, the relevant clause in Contract Agreement for Supervision Consultancy Services dated 10.09.2004 relating to resolution of dispute through arbitration reads as under:-



"8.2.1 Selection of Arbitrators

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Each dispute submitted by a Party to arbitration shall be heard by a sole arbitrator or an arbitration panel composed of three arbitrators, in accordance with the following provisions:

(a) Where the Parties agree that the dispute concerns a technical matter, they may agree to appoint a sole arbitrator or, failing agreement on the identity of such sole arbitrator within thirty (30) days after receipt by the other Party of the proposal of a name for such an appointment by the Party who initiated the proceedings, either Party may apply to the President, Indian Roads Congress, New Delhi, for a list of not fewer than five nominees and, on receipt of such list, the Parties shall alternatively strike names therefrom, and the last remaining nominee on the list shall be the sole arbitrator for the matter in dispute. If the last remaining nominee has not been determined in this manner within sixty (60) days of the date of the list, the president, Indian Roads Congress, New Delhi, shall appoint, upon the request of either Party and from such list or otherwise, a sole arbitrator for the matter in dispute.

(b) Where the Parties do not agree that the dispute concerns a technical matter, the Client and the Consultants shall each appoint one arbitrator, and these two arbitrators shall jointly appoint a third arbitrator, who shall chair the arbitration panel. If the arbitrators named by the Parties do not succeed in appointing a third arbitrator within thirty (30) days after the latter of the two arbitrators named by the Parties has been appointed, the third



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arbitrator shall, at the request of either Party, be appointed by Secretary, the Indian Council of Arbitration, New Delhi.

(c) If, in a dispute subject to Clause SC 8.2.1 (b), one Party fails to appoint its arbitrator within thirty (30) days after the other Party has appointed its arbitrator, the Party which has named an arbitrator may apply to the Secretary, Indian Council of Arbitration, New Delhi, to appoint a sole arbitrator for the matter in dispute, and the arbitrator appointed pursuant to such application shall be the sole arbitrator for that dispute.

8.2.2 Rules of Procedure

Arbitration proceedings shall be conducted in accordance with procedure of the Arbitration & Conciliation Act, 1996, of India unless the Consultant is a foreign national/firm, where arbitration proceedings shall be conducted in accordance with the rules of procedure for arbitration of the United Nations Commission on International Trade Law (UNCITRAL) as in force on the date of this Contract."

7. As far as the main contractor the respondent in Arb.O.P.(Com.Div.)No.531 of 2022 is concerned, the relevant clause in Contract Package No.TNRSP02 dated 04.02.2005 for resolution of dispute through arbitration reads as under:-

"Sub-Clause 67.3 Arbitration:-

Any dispute, in respect of which the Recommendation(s), if any, of the Board has not become final and binding pursuant to



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Sub-Clause 67.1 shall be finally settled by arbitration as set forth below. The arbitral tribunal shall have full power to open up, review, and revise any decision, opinion, instruction, determination, certificate, or valuation of the Engineer and any Recommendation(s) of the Board related to the dispute.

(i) A dispute with an Indian Contractor shall be finally settled by arbitration in accordance with the Arbitration & Conciliation Act, 1996, or any statutory amendment thereof. The arbitral tribunal shall consist of 3 arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the Chairman of the Executive Committee of the Indian Roads Congress. For the purpose of this Sub-Clause, the term "Indian Contractor" means a contractor who is registered in India and is a juridic person created under Indian law as well as a joint venture between such a contractor and a Foreign Contractor.

(ii) In the case of a dispute with a Foreign Contractor, the dispute shall be finally settled in accordance with the provisions of UNCITRAL Arbitration Rules. The arbitral tribunal shall consist of three Arbitrators one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and



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shall act as Presiding arbitrator. In case of failure of the two arbitrators appointed by the Parties to reach upon a consensus within a period of 30 days from appointment of the arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Chairman of the Executive Committee, Indian Roads Congress. For the purposes of this clause 67, the term "Foreign Contractor" means a contractor who is not registered in India and is not a juridic person created under Indian Law.

(iii) Neither party shall be limited in the proceedings before such tribunal to the evidence or arguments before the Board for the purpose of obtaining its Recommendation(s) pursuant to Sub-Clause 67.1. No Recommendation shall disqualify and Board Member from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the dispute.

(iv) Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employer, the Engineer, the Contractor, and the Board shall not be altered by reason of the arbitration being conducted during the progress of the Works.

(v) If one of the parties fail to appoint its arbitrator in pursuance of sub-clause (i) and (ii) above, within 30 days after receipt of the notice of the appointment of its arbitrator by the other party, then the Chairman of the Executive Committee, Indian Roads Congress both in cases of Foreign contractors and Indian contractors, shall appoint the arbitrator. A certified copy



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of the order of the Chairman of the Executive Committee, Indian Roads Congress, making such an appointment, shall be furnished to each of the parties.

(vi) Arbitration proceedings shall be held at Chennai (India), and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

(vii) The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration proceedings will be paid as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation, etc., of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party or on its behalf shall be borne by each party itself."

8. As far as the dispute with the contractor, the respondent in Arb.O.P.(Com.Div.)No.531 of 2022 is concerned, there is a mechanism prescribed in Sub-Clauses 67.1 and 67.2 for settlement of disputes before the Disputes Review Board. Sub-Clauses 67.1 and 67.2 read as under:-

"Sub-Clause 67.1 Disputes Review Board

If any dispute arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the



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Works or after their completion and whether before or after the repudiation or other termination of Contract, including any disagreement by either party with any action, inaction, opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place, be referred to the Disputes Review Board ("the Board").

The Board shall be established when each of the three Board Members has signed a Board Member's Declaration of Acceptance as required by the DRB's Rules and Procedures (which, along with the Declaration of Acceptance form, are attached as Annex A to these Conditions of Particular Application-para 12).

"The Board shall comprise three Members experienced with the type of construction involved in the Works and with the interpretation of contractual documents. One Member shall be selected by each of the Employer and the Contractor and approved by the other. If either of these Members is not so selected and approved within 28 days of the date of the Letter of Acceptance, then upon the request of either or both parties such Member shall be selected as soon as practicable by the Appointing Authority specified in the Appendix to Bid of Section VII. The third Member shall be selected by the other two and approved by the parties. If the two Members selected by or on behalf of the parties fail to select the third Member within 14 days after the later of their selections or if within 14 days after the selection of the third Member, the parties fail to approve that



"In the event of death, disability, or resignation of any Member, such Member shall be replaced in the same manner as the Member being replaced was selected. If for whatever other reason a Member shall fail or be unable to serve, the Chairman (or failing the action of the Chairman then either of the other Members) shall inform the parties and such non-serving Member shall be replaced in the same manner as the Member being replaced was selected. Any replacement made by the parties shall be completed within 28 days after the event giving rise to the vacancy on the Board, failing which the replacement shall be made by the Appointing Authority in the same manner as described above. Replacement shall be considered completed when the new Member signs the Board Member's Declaration of Acceptance. Throughout any replacement process the Members not being replaced shall continue to serve and the Board shall continue to function and its activities shall have the same force and effect as if the vacancy had not occurred, provided, however, that the Board shall not conduct a hearing nor issue a Recommendation until the replacement is completed."



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Either the Employer or the Contractor may refer a dispute to the Board in accordance with the provisions of DRB's Rules and Procedures, attached as Annexure A to these Conditions of Particular Application.

"The Recommendation of the Board shall be binding on both parties, who shall promptly give effect to it unless and until the same shall be revised, as hereinafter provided, in an arbitral award. Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works in accordance with the Contract."

If either the Employer or the Contractor is dissatisfied with any Recommendation of the Board, or if the Board fails to issue its Recommendation within 56 days after receipt by the Chairman of the Board of the written Request for Recommendation, then either the Employer or the Contractor may, within 14 days after his receipt of the Recommendation, or within 14 days after the expiry of the said 56-day period, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence arbitration, as hereinafter provided, as to the manner in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4; no arbitration in respect thereof may be commenced unless such notice is given.

If the Board has issued a Recommendation to the Employer and the Contractor within the said 56 days and no notice of



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intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor within 14 days after the parties received such Recommendation from the Board, the Recommendation shall become final and binding upon the Employer and the Contractor.

Whether or not it has become final and binding upon the Employer and the Contractor, a Recommendation shall be admissible as evidence in any subsequent dispute resolution procedure, including any arbitration or litigation having any relation to the dispute to which the Recommendation relates.

All Recommendations which have become final and binding shall be implemented by the parties forthwith, such implementation to include any relevant action of the Engineer.

If during the contract period the Employer and the Contractor are of the opinion that the Disputes Review Board is not performing its functions properly, the Employer and Contractor may together disband the Disputes Review Board and reconstitute it. A new board shall then be selected in accordance with the provisions applying to the selection of the original Board as specified above, except that words "within 28 days after the letter of acceptance" shall be replaced by the words "within 28 days after the date on which the notice disbanding the original Board became effective."

The Employer and the Contractor shall jointly sign a notice specifying that the Board shall stand disbanded with effect from the date specified in the notice. The notice shall be posted by a



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registered letter with AD or delivered personally to each Member of the Board. A Member shall be deemed to have received the delivery of the letter even if he refuses to do so.

Sub-Clause 67.2 is deleted without a change in the numbering of the other sub-clauses of this Clause 67."

9. The petitioner herein had awarded work under Contract Package No.TNRSP02 to the respondent in Arb.O.P.(Com.Div.)No.531 of 2022 for upgradation of roads from Nagapattinam to Kattumavadi and new Bypass Roads at Nagapattinam, Tiruthuraipoondi and Muthupet.

10. The work involved a total 116.6 Kms as detailed below:-

Section & Location	Length in Km	Time for giving Possession of Site
1. Manora - Kattumavadi	17.8 km	With notice to commence
2. Muttupet - Manora including Muttupet Bypass	26.7 Km	6 months after notice to commence
3. Tiruthuraipundi- Muttupet including Tiruthuraipundi Bypass	25.0 Km	10 months after notice to commence
4. Nagapattinam- Tiruthuraipundi including Nagapattinam Bypass	47.1 Km	15 months after notice to commence
Total Length	116.6 Km	



11. The dispute in these two petitions relates to the defects noticed by the petitioner in the road over bridge in the year 2017 in ROB : 393 @ Nagapattinam (Contract No.TNRSP-02).

12. The petitioner had noticed a vettar bridge constructed by the respondent in Arb.O.P.(Com.Div.)No.531 of 2022 in respect of which, the respondent in Arb.O.P.(Com.Div.)No.530 of 2022 had given a Defect Liability certificate on 28.11.2012.

13. The petitioner herein had flagged its concern to the consultant in Arb.O.P.(Com.Div.)No.530 of 2022 as soon as the defect was noticed/pointed out by the Director, Highways Research Station, Highways Department. The defect was recorded in the Inspection Report.

14. The issue was also addressed to the contractor, the respondent in Arb.O.P.(Com.Div.)No.531 of 2022 and to the consultant, the respondent in Arb.O.P.(Com.Div.)No.530 of 2022 on 31.07.2017. The consultant, the respondent in Arb.O.P.(Com.Div.)No.530 of 2022 also addressed the concern of the petitioner by a report/letter dated 14.08.2017, wherein, it has been stated



that the defects were on account of several factors including poor quality of concrete in the cantilever portion of deck slab at A2.

15. The petitioner had earlier approached this Court in Arb.O.P.(Com.Div.)No.34 of 2020 for appointment of single arbitrator. By an order dated 19.01.2021, this Court had dismissed the petition and has answered the issues against the petitioner by holding that the petitioner has to file separate petitions for appointment of arbitrators under Section 11 of the Arbitration and Conciliation Act, 1996. Relevant portion of the order reads as under:-

"51. In these circumstances, the single petition seeking appointment of the arbitral tribunal in respect of two independent agreements is not maintainable and is accordingly dismissed.

52. There shall be no order as to costs.

53. As a post script, I would like to add that by resorting to different and complicated arbitral procedures with different parties and that too with reference to the same project, the petitioner is complicating the dispute resolution process by compelling parties to resort to separate procedures right from the stage of constituting the Arbitral Tribunal. In the process there would occur an inordinate delay in setting in motion the Arbitral proceedings before the Tribunal and consequently rendering the very object of the Act aimed at providing speedy remedy, otiose. It would be to the benefit of the petitioner if in future contracts they adopt a simple, unambiguous and uncomplicated procedure for dispute resolution through



Arbitration in respect of inter-related contracts with different parties in respect of the same project."

16. The above order also affirmed by the Hon'ble Supreme Court in a challenge to the aforesaid order in SLA(C)No.4845 of 2022.

17. It is pursuant to the aforesaid order, these two petitions have been filed. At the time of admission of these two petitions, a *prima facie* view was taken by this Court, although, no final determination was made. On 14.07.2023, this Court has observed as under:-

"5. After this Court has expressed its prima facie view, learned Special Government Pleader sought time to file an amendment to the petitions, by making the necessary pleadings, to prove that the petitions filed by the petitioner under Section 11 of the Arbitration and Conciliation Act, is within the period of limitation.

6. Learned counsel for the respondents would submit that apart from the limitation issue, the respondents are also raising the jurisdiction issue, relying upon the Arbitration Agreement contained in the contract and he would submit that the procedure contemplated therein, for appointment of an Arbitrator, has not been followed by the petitioner.

7. Learned counsel for the respondents has placed reliance on a judgment of the Hon'ble Supreme Court in the case of 'Bharat Sanchar Nigam Limited & another Vs. Nortel Networks India Private Limited' reported in (2021) 5 SCC 738' and relied upon paragraphs 46 to 51 of the said judgment and would submit that in an identical matter, the Hon'ble Supreme Court has held that when a claim is hopelessly barred by limitation, this Court cannot entertain an



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application filed under Section 11 of the Arbitration and Conciliation Act, seeking for appointment of an Arbitrator.

8. In order to render justice in this matter and to give one more opportunity for the respondents, to make out a case for appointment of an Arbitrator, this Court permits the petitioner to file an amendment application, seeking for an amendment of the pleadings in the petitions.

9. As a last chance, post the matter on 30.07.2023. It is made clear that if the amendment application is not filed before the next hearing date, this Court will have to dismiss these petitions on the ground of limitation."

18. The petitions are opposed by the respondents primarily on the ground of jurisdiction. It is further submitted that the respective Arbitration Clauses contemplate a specific method/machinery for appointing the Arbitrator. It is therefore submitted that the present proceedings are premature.

19. That apart, it is submitted that on merits, there is no scope for arbitration as the contract was executed between 2005 and 2011. The consultant, the respondent in Arb.O.P.(Com.Div.)No.530 of 2022 had given a Defect Liability Certificate on 28.11.2012. The limitation under the respective contract expired on 28.11.2013. Under these circumstances, the invocation of arbitration clauses on 29.08.2019 was beyond the period of limitation.



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20. The learned Counsel for the respondents have placed reliance on the decision of the Hon'ble Supreme Court in **Walter Bau AG, Legal Successor Vs. Municipal Corporation of Greater Mumbai and another**, 2015 (3) SCC

800. A reference is made to Paragraph 10, which reads as under:-

"10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. In the present case, the agreed upon procedure between the parties contemplated the appointment of the arbitrator by the second party within 30 days of receipt of a notice from the first party. While the decision in Datar Switchgears Ltd may have introduced some flexibility in the time frame agreed upon by the parties by extending it till a point of time anterior to the filing of the application under Section 11(6) of the Arbitration Act, it cannot be lost sight of that in the present case the appointment of Shri Justice A.D.Mane is clearly contrary to the provisions of the Rules governing the appointment of arbitrators by ICADR, which the parties had agreed to abide by in the matter of such appointment. The option given to the respondent Corporation to go beyond the panel submitted by ICADR and to appoint any person of its choice was clearly not in the contemplation of the parties. If that be so, obviously, the appointment of Shri Justice A.D.Mane is no est in law. Such an appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11(6) of the Arbitration Act. It cannot, therefore, be held that the present proceeding is not maintainable in law. The appointment of Shri Justice A.D.Mane made beyond 30 days of the receipt of notice by the petitioner, though may appear to be in conformity with the law laid down in Datar Switchgears Ltd, 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."

21. Countering the arguments, the learned Counsel for the petitioner submits that the limitation is always mixed question of law and fact and the Hon'ble Supreme Court has succinctly clarified the position in the following three cases:-

(i) **Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coal Field Limited**, (2020) 2 SCC 455.

(ii) **Bharat Sanchar Nigam Limited and another Vs. Nortel Networks India Private Limited**, (2021) 5 SCC 738.

(iii) **Geo Miller and Company Private Limited Vs. Chairman, Rajasthan Vidyut Utpadan Nigam Limited**, (2020) 14 SCC 643.

22. Specifically, a reference is made to the decision of the Hon'ble Supreme Court in **Uttarakhand Purv Sainik Kalyan Nigam Limited** case, wherein, in Paragraph 7.13, the Hon'ble Supreme Court held as under:-

"7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, "including any objections" with respect to the



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existence or validity of the arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator.

23. I have considered the arguments advanced by the learned Counsel for the petitioner and the learned Counsel for the respondents.

24. The objections regarding limitation for invocation of arbitration clause cannot be countenanced in the light of the decisions cited by the learned Counsel for the petitioner.

25. Therefore, this Court is not inclined to make any observations on the question of limitation while passing this order, except to the extent, by stating that all the issues can be decided by an Arbitrator to be appointed in accordance with the contract entered into between the petitioner with the respective respondents vide Agreement dated 10.09.2004 with the consultant the respondent in Arb.O.P.(Com.Div.)No.530 of 2022 and in terms of Agreement



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dated 04.02.2005 with the contractor the respondent in
Arb.O.P.(Com.Div.)No.531 of 2022.

26. The petitioner has however not agreed upon with/not complied with the procedure prescribed under the Agreements. Therefore, on this issue, the decision of the Hon'ble Supreme Court in **Walter Bau AG's case** cited by the learned Counsel for the respondents in the respective cases will apply.

27. Under these circumstances, Court is inclined to dispose these petitions by directing the petitioner to invoke the machineries prescribed under the respective Agreements by approaching the authorities before venturing to resolve the dispute through arbitration.

28. In case there is no settlement of dispute by the authorities prescribed under the respective Agreements or there is a failure to appoint an arbitrator by the authorities, the petitioner is at liberty to approach this Court. The time spent before this Court is to be excluded for computation of limitation.



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29. These Petitions are disposed accordingly, leaving the parties to bear their own costs. Liberty is given to the petitioner to approach the authorities under the respective clauses for appointing the Arbitrators in accordance with the procedures prescribed under the respective Agreements. Connected Applications are closed.

04.10.2023

Index : Yes/No

Internet : Yes/No

Speaking Order/Non-Speaking Order

Neutral Citation : Yes/No

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