

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

% **Reserved on: 16th December, 2022**

Pronounced on: 2nd February, 2023

+ **ARB.P. 1140/2022**

METCON INDIA REALTY AND INFRASTRUCTURE PVT.

LTD. Petitioner

Through: Mr. Ankur Sood, Advocate

versus

DELHI METRO RAIL CORPORATION LTD. Respondent

**Through: Mr. V. S. R. Krishna and
Mr. V. Shashank Kumar,
Advocates**

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant petition has been filed by the Petitioner seeking the appointment of an independent Arbitral Tribunal under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as “the Act”), and has inter-alia prayed for the following reliefs:

“(a) Appoint the Arbitral Tribunal under Section 11(6) of the Arbitration and Conciliation Act, 1996 to adjudicate disputes between the Petitioner and Respondent; and

(b) Pass such other or further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

FACTUAL MATRIX

2. The Petitioner is a firm engaged in civil contracting, land & property development, and real estate sectors. The Respondent is a Centre-State Joint Venture responsible for operating the Delhi Metro and the scope of its work involves planning and implementation of metro rail, monorail, and high-speed rail projects in India and abroad.

3. The Petitioner, on 08.09.2015, submitted its bid for Contract CC-95, pertaining to the construction of the viaduct, and roof portal along with finishing the work for the automatic walkaway/travelators at Dhaula Kuan and Rajouri Garden Interchange Stations of Line-7, Phase III of the Delhi MTRS.

4. Subsequently, in pursuance of the submitted bid, the Respondent on 11.01.2016 issued a Letter of Acceptance (hereinafter referred to as the "LOA") to the Petitioner for the said contract at a total cost of Rs. 55,07,87,249/-. Furthermore, the LOA stipulated the timeline for the competition of the work which was 15 months commencing from 1st February 2016.

5. The Petitioner's contention is that the Respondent had added extra work and had changed the scope of work provided for by the contract, and the same was undertaken by them on the Respondent's assurance that due payments will be made for the extra work. The Petitioner further

submits that while it had duly executed all the work and raised timely bills, the same was not honoured by the Respondents, despite their prior understanding on the same.

6. The Petitioner invoked arbitration by its notice dated 09.06.2022 whereby the Petitioner had inter *alia* sought the payment of claim amount of Rs. 55,50,91,763.36 including interest for the extra items/extra work done by the Petitioner and has accordingly, sought to refer the dispute to arbitration. However, the Respondent rejected the same on the ground that the Petitioner's notice had exceeded the prescribed time limit under Clause 17.4 of the GCC.

7. The Respondent further stated in its notice that the Petitioner had submitted the No Claims Declaration dated 19.03.2021, as per which once the final payment under the contract is released, then the contractual agreement including the arbitration clause would be instantly discharged and rescinded. However, it is contested by the Petitioner that the No Claims Declaration had been obtained by the Respondent under economic duress and coercion by refusing to release any payment which was due to the Petitioner, and thus, the No Claim Declaration should be rejected by the court.

8. The Petitioner has preferred this instant petition under Section 11(6) of the Act pertaining to the dispute regarding extra work that was assigned to the Petitioner.

SUBMISSIONS

(ON BEHALF OF THE PETITIONER)

9. Learned counsel appearing on behalf of the Petitioner submitted that the Respondent had added extra work items and had changed the scope of the work from time to time, and the Petitioner duly completed the extra work on the Respondent's assurance that they will make due payments for the same. It is submitted that the Petitioner had executed the extra work and had apprised the Respondent and raised bills for the extra work in a timely manner, however the same was not honoured by the Respondent and hence a due amount of Rs.55,50,91,763.36 has arisen.

10. It is further submitted that the Respondents were intentionally avoiding the same to unjustly enrich themselves, despite the prior understanding of the parties in this regard. Furthermore, they had never contested claims for extra work in the Petitioner's communications during the concerned time frame. They also failed to make the payment after the completion and acceptance of the Petitioner's services. It is stated that the Petitioner vide letter dated 30.06.2021 had delineated the extra work undertaken by them vis-à-vis the GCC and had enclosed the details pertaining to the extra work carried out and apprised them the costs for it amounting to Rs. 55,50,91,763.36, which is the value of the present dispute.

11. The learned counsel for the Petitioner has vehemently argued that the Petitioner is not barred by the 28 days' limitation period under Clause 17.4 of the GCC since it will be hit by Section 28 of the Indian Contract

Act, 1872 because the said Clause seeks to curtail the period of limitation and would be rendered void. Therefore, the Petitioner is within the prescribed time limit to raise the dispute and refer the same to arbitration. The Learned Counsel for the Petitioner has also relied on the precedents in *Grasim Industries Ltd. v. State of Kerala* (2018) 14 SCC 265 and *Visakha Petroleum Products Pvt. v. BL Bansal* (1997) 4 SCC 366.

12. Learned counsel for the Petitioner submitted that the No Claims Declaration that had been submitted stated that the contract would be discharged along with the arbitration clause on payment of the final bill. It is further submitted that the No Claim Declaration for not submitting any extra claims and items were wrongfully obtained by the Respondent under economic duress and coercion, and the same has been recorded on the cover letter submitted by the Petitioner.

13. Learned counsel for the Petitioner argued that the No Claims Declaration does not absolve the Respondent of making payments towards the extra work, since the same is baseless as they were apprised of the Extra Work done from time to time. Furthermore, the GCC has provided for the payment of extra work within the ambit of the contractual obligations under Clause 12.5. The Petitioner has relied upon the judgment in *Tarapore & Co. v. Cochin Shipyard Ltd.* (1984) 2 SCC 680 to further this contention.

14. Learned Counsel for the Petitioner further submitted that the Petitioner had sent a legal notice invoking arbitration, however, it was unreasonably rejected by the Respondent and had failed to provide a list

of arbitrators to the Petitioners, when the Petitioner raised a dispute for non-payment of dues. Hence, the current Petition under Section 11(6) of the Act has been preferred before this Court.

15. It is thus submitted that the requirements for appointment of arbitrator under Section 11 are fulfilled in the following manner:

- a. Arbitration Clause: Clause 17 of the General Conditions of Contract (hereinafter referred to as the “GCC”). The Respondent has also accepted that the contract contains an arbitration clause.
- b. Existence of Dispute: The Petitioner has made a claim for extra work done in terms of Clause 12 of the Contract which has been denied by the Respondent.
- c. Notice invoking Arbitration: The Petitioner invoked arbitration by way of notice dated 09.06.2022. The Respondent has refused to nominate the arbitral tribunal.

16. Accordingly, the necessary elements for appointment of the arbitral tribunal as prescribed under Section 11 of the Act stand satisfied. In terms of Section 11(6A) of the Act, the scope of enquiry under Section 11 of the Act is confined to determining the existence of an arbitration clause. The scheme of the Act contemplates that any other issues, including with regard to termination, discharge or subsequent agreement, are left to be determined by the Arbitral Tribunal under Section 16.

17. Section 11(6A) of the Act is extracted below for ease of reference:

"The court, shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

18. It is further submitted that the Hon'ble Supreme Court in the case of *Duro Felguera, S.A v. Gangavaram Port Limited*, (2017) 9 SCC 729 has held that:

"3. From a reading of section 11(6A), the intention of the legislature is crystal clear i.e., the court should and need to only look into one aspect- the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple- it needs to be seen if the agreement contains a clause which provide for arbitration pertaining to the dispute which have arisen between the parties to the agreement."

19. In the present case, the existence of the arbitration clause stands admitted and proved. Thus, it is submitted that the arbitral tribunal ought to be appointed by this Court.

(ON BEHALF OF THE RESPONDENT)

20. *Per contra*, learned counsel for the Respondent has submitted that the instant petition under Section 11(6) of the Act is liable to be dismissed since it is misconceived and unsustainable. It is stated that the Petitioner has approached the Court with a *mala fide* intent to deprive this Court the benefit of having the Complete Contract, since the Petitioner has not annexed the complete GCC.

21. Learned counsel for the Respondent further submitted that the Petitioner had provided the No Claims Declaration out of his own

volition and the same stated that on the release of Rs. 2,98,56,275.76 to the Petitioner, the Contract along with the arbitration clause would be instantly discharged and rescinded. It has been admitted by the petitioner that the said amount has been paid. Thus, since the arbitration clause is no more existent, therefore, the current matter cannot be referred to arbitration and the petition is liable to be dismissed.

22. It is further submitted that the Petitioner's plea that the No Claims Declaration was obtained under economic duress and coercion is an afterthought and the Petitioner never took any action for invoking the arbitration clause for 15 months since the Declaration was provided. Thus, it is evident that the Petitioner was satisfied with his payment and the present petition is merely an afterthought. Learned counsel for the Respondent has relied upon the judgment in *Continental Construction Ltd. v. Balfour Beatty Limited*, 2002 SCC OnLine Del 70.

23. Learned counsel for the Respondent has argued that the instant petition is liable to be dismissed since the Petitioner failed to invoke the contractual arbitration clause in terms of the Clause 17.4 pertaining to "notice of dispute", as per which the notice of dispute is to be served no later than 28 days after the issuance of the performance certificate. It is stated that the Petitioner had received the performance certificate on 8th April 2021 and the notice of dispute was served to the Respondent after nearly 14 months, on 9th June 2022. Furthermore, this also signifies that the instant petition is merely an afterthought of the Petitioner and the Petitioner has not invoked the arbitration in terms of Clause 17 of the GCC, and hence, the Respondent rejected the same.

24. It is further submitted by the learned counsel for the Respondent that as per the conditions of contract, any instruction pertaining to additional work or for changing the scope of work should be done entirely on the basis of written instructions from the Respondent. Furthermore, learned counsel vehemently denied the Petitioner's contention of not honouring the bills raised for the extra work and denied that the claim pertaining to the extra work done amounting to Rs.55,50,81,763.36 including interest is payable by the Respondent.

25. Learned counsel for the Respondent has vehemently denied the Petitioner's claims that the Respondent did not contest the claims for extra work or failed to make payments for any extra work that had been done by the Petitioner. It is further submitted that there was no commitment from the Respondent's side pertaining to the payments for any extra work done by the Petitioner and that all the legitimate payments had been done for the works allocated to the Petitioner under the said contract.

26. The learned counsel for the Respondent submitted that the Respondent rejected the notice invoking arbitration whilst solely relying upon Clause 17.4 of the GCC, since the Petitioner had not invoked the arbitration in terms of the contract. It is further submitted that neither did the claimant object the provision of submitting Notice to Disputes under Clause 17.4 of the GCC in light of Section 28 of the Indian Contract Act, 1872 nor did they raise any query with respect to the same before quoting the tender. It is further submitted that the instant petition is liable to be rejected in light of the Petitioner's actions which are not in accordance

with the terms of the Contract and the No Claims Declaration submitted by them.

27. It is submitted that it is evident from the record that the Petitioner had never raised the purported claim of Rs. 50,10,68,288.49 vide letter dated 30.06.2021, which is the disputed claim being sought to be referred for arbitration and that the same has been raised after the submission of No Claim Declaration by the Petitioner, and thus, is merely an afterthought.

28. Learned counsel further submitted that the Petitioner has not placed anything on record which shows in accordance with the GCC that the Petitioner had provided a notice to the engineer as soon as any event to claim any additional payment under the relevant clauses arose.

29. In light of the aforesaid, it is submitted that the instant petition is devoid of merits and this Court may be pleased to dismiss the present petition.

QUESTION FOR ADJUDICATION

30. Heard learned counsels appearing on behalf of both the parties and perused the records.

31. I have given thoughtful consideration to the submissions made by the parties. The only issue before this Court is whether the instant dispute as pleaded by the petitioner can be referred to arbitration notwithstanding the No Claim Declaration given by the petitioner.

ANALYSIS

32. The governing mechanism for any dispute arising between the parties herein would be the Contract CC-95 along with all the relevant clauses that have been laid out in the GCC since the Petitioner has sought the invocation of the arbitration clause which has been provided within the same.

33. The relevant clauses that have been relied on by the Parties in their pleadings pertain to the “Notice of Dispute” under Clause 17.4 as per which notice of dispute must be served within 28 days of the performance certificate being issued by the engineer, and “Arbitration” under Clause 17.9. The said clauses have been reproduced hereunder:

“17.4 Notice of Dispute

For the purpose of Sub-Clause 17.5, a Dispute shall be deemed to arise when one party serves on the other party a notice in writing (hereinafter called a "Notice of Dispute" stating the nature of the Dispute provided that no such notice shall be served later than 28 days after the date of issue of Performance Certificate by the Engineer.

17.9 Arbitration

If the efforts to resolve all or any of the disputes through conciliation fails, then such disputes or differences, whatsoever arising between the parties, arising out of touching or relating to construction/ manufacture, measuring operation or effect of

the Contract or the breach thereof shall be referred to Arbitration in accordance with the following provisions:

(a) Matters to be arbitrated upon shall be referred to a sole Arbitrator if the total value of the claim is upto Rs.5 million and to a panel of three Arbitrators if total value of claims is more than Rs.5 million. The Employer shall provide a panel of three arbitrators which may also include DMRC officers for the claims upto Rs.5 million and a panel of five Arbitrators which may also include DMRC officers for claims of more than Rs.5 million. The Contractor shall have to choose the sole Arbitrator from the panel of three and/ or one Arbitrator from the panel of five in case three Arbitrators are to be appointed. The Employer shall also choose one Arbitrator from this panel of five and the two so chosen will choose the third arbitrator from the panel only. The Arbitrator(s) shall be appointed within a period of 30 days from the date of receipt of written notice/ demand of appointment of Arbitrator from either party. Neither party shall be limited in the proceedings before such arbitrator(s) to the evidence or arguments put before the Engineer for the purpose of obtaining his decision. No decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the arbitrator(s) on any matter, whatsoever, relevant to dispute or difference referred to arbitrator/s. The arbitration proceedings shall be held in Delhi only. The language of proceedings, that of documents and communication shall be English.

(b) The Employer at the time of offering the panel of Arbitrator(s) to be appointed as Arbitrator shall also supply the information with regard to the qualifications of the said Arbitrator nominated in the panel along with their professional experience, phone nos. and addresses to the contractor.

(c) The award of the sole Arbitrator or the award by majority of three Arbitrators as the case may be shall be binding on all parties.”

34. For a better appreciation of the case at hand, it is pertinent to peruse and analyse the provisions of law invoked in the instant petition before delving deeper into the facts of the case.

35. The primary argument that is essential to this dispute is whether it can be referred to arbitration since the contract containing the arbitration agreement is contended to have been extinguished on account of the No Claims Declaration that has been submitted by the Petitioner.

36. This Court in ***Roshin Lal Gupta & Sons Pvt Ltd. v. Delhi Tourism & Transportation Corporation & Anr.*** (2009) SCC OnLine Del 502 has relied on the 21st Edition of “***Russell on Arbitration***” in adjudicating a similar petition, wherein the underlying contract was extinguished and the parties sought arbitration, and had stated as under:

“it would be a bizarre outcome if the arbitration clause did not survive discharge of the contract by breach, as the arbitration clause was agreed by the parties for the very purpose of providing the means by which disputes about the contract, including breach, would be determined. The first part of the answer is that the arbitration clause is treated as a separate and independent agreement which generally survives the termination of the underlying contract. This is known as the doctrine of separability.

Similarly, with regard to termination of a contract by breach or frustration it was held in Heyman v. Darwins Ltd., (1942) A.C. 356 that termination by breach of performance obligations does

not bring the contract's dispute resolution procedure to an end, and is entirely within the scope of the arbitration agreement.

I may add that as held in Astro VencedorCompania Naviera SA v. Mabanafit GmbH, (1970) 2 Lloyd's Rep. 267, "the court should if the circumstances allow lean in favour of giving effect to the arbitration clause to which the parties have agreed. (See Russell on Arbitration, 21st Edition, Page 32)

Furthermore, Russell on Arbitration has also given the rationale for the Doctrine of Separability being that "the reasoning behind the doctrine of separability was, therefore, that the arbitration clause constitutes a self-contained contract collateral or ancillary to the underlying or "main" contract. (See Russell on Arbitration, 21st Edition, Page 34)"

37. It is pertinent to note that an arbitration clause pertains to the resolution of disputes arising out of the contract, and thus in accordance with the aforementioned i.e. the Doctrine of Severability, the arbitration clause would be deemed as a separate and severable clause and thus, the arbitration agreement would subsist even after the contract between the parties had extinguished and the same has been statutorily recognised under Section 16(1) of the Act. The Hon'ble Supreme Court in ***National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Ltd., (2007) 5 SCC 692***, has held that:

"6. The respondent contends that the contract was abrogated by mutual agreement; and when the contract came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account

of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. (Vide Heyman v. Darwins Ltd. [1942 AC 356 : (1942) 1 All ER 337 (HL)] , Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 13] and Naihati Jute Mills Ltd. v. Khyaliram Jagannath [AIR 1968 SC 522] .) This position is now statutorily recognised. Sub-section (1) of Section 16 of the Act makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contract, has to be treated as an agreement independent of the other terms of the contract; and a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. The first contention is, therefore, liable to be rejected.”

38. This Court in ***Shrishti Infrastructure Development Corporation Ltd. v. Ircon International Limited***, 2022 SCC OnLine Del 2383 has held that an arbitration agreement that is embedded within a contract would always be considered as a separate and severable clause, and despite a reference being made by the court the arbitrator is free to decide on their jurisdiction including the existence of the arbitration agreement in accordance with the *kompetenz-kompetenz* principle, which has been recognized under Section 16 of the Act. This Court has held that:

“16. Therefore, insofar as reference to arbitration is concerned, keeping in view the position of law as expatiated in the aforementioned rulings, this court is of the view that : firstly, an arbitration agreement embedded in a contract is always considered a separate and severable clause, with a standing of its own; by reason of which, supersession of an arbitration agreement must not be lightly inferred. Secondly, in consonance with the overarching principle viz. 'when in doubt, do refer' whereby the extant, preponderant legal view is that if there is

an arbitration agreement between the parties, which is sought to be negated by a party by citing other provisions of a contract, which requires interpretation of the contract, courts must lean towards referring the matter to arbitration. And thirdly, despite reference being made by court, the arbitrator must be left free to decide on his/her own jurisdiction including the existence of the arbitration agreement, as permissible under section 16 of the A&C Act which enshrines the kompetenz-kompetenz principle.”

39. The Hon’ble Supreme Court in ***Vidya Drolia and Others v. Durga Trading Corporation, (2021) 2 SCC 1*** has held that in view of the clear legislative mandate of the Act, and the Doctrine of Severability and kompetenz-kompetenz principle, it is the Arbitral Tribunal which is the preferred first authority to adjudicate all questions of non-arbitrability and the Court has merely been conferred with the power of “second look” with regards to the same. The Hon’ble Supreme Court has held that:

“154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by

summarily portraying a strong case that he is entitled to such a finding.

244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. “when in doubt, do refer”.

244.5. The scope of the court to examine the prima facie validity of an arbitration agreement includes only:

244.5.1. Whether the arbitration agreement was in writing? Or

244.5.2. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?

244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?

244.5.4. On rare occasions, whether the subject-matter of dispute is arbitrable?”

40. The question of whether an Arbitral Tribunal is competent to rule on its own jurisdiction on the *kompetenz-kompetenz* principle, including on the existence or validity of the arbitration agreement is no longer *res integra* and the answer is in the affirmative. It has further laid down that the very purpose of the *kompetenz-kompetenz* principle is to minimize judicial interference in arbitral proceedings. The Hon’ble Supreme Court in ***Uttarakhand Purv Sainik Kalyan Nigam Limited vs. Northern Coal Field Limited***, (2020) 2 SCC 455, has held that:

“7.11. The doctrine of “kompetenz-kompetenz”, also referred to as “compétence-compétence”, or “compétence de la reconnue”, implies that the Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the

existence or validity of the arbitration agreement. This doctrine is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties. The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified [Dresser Rand S.A. v. Bindal Agro Chem Ltd., (2006) 1 SCC 751. See also BSNL v. Telephone Cables Ltd., (2010) 5 SCC 213 : (2010) 2 SCC (Civ) 352. Refer to PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust, (2018) 10 SCC 525 : (2019) 1 SCC (Civ) 1]. If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement “is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”. ”

41. In the present case, Clause 17.9 of the GCC to Contract CC-95 between the parties contains a valid arbitration agreement, and neither of the parties has disputed the validity and existence of the arbitration clause. Therefore, considering the aforementioned discussions and bearing in mind the precedents laid down by the Hon’ble Supreme Court, it can be reasonably understood that the arbitration agreement between the parties under Clause 17.9 would be deemed to be existent and a

separate agreement under the Doctrine of Severability, and the arbitration agreement would not have extinguished along with the contract between the parties.

42. It is also clear that the issues pertaining to the quantum of money for the extra work that has been done by the Petitioner and whether the Petitioner's claims would be maintainable on account of the No Claims Declaration are to be decided by the Arbitral Tribunal under the *kompetenz-kompetenz* principle and any decision by this Court would be deemed as going into the merits of the dispute, which is not at all warranted under law. Thus, these issues are not being dealt with in the instant petition under Section 11(6) of the Act.

43. Further, a close reading of the said arbitration agreement reveals that only those disputes arising between the parties which could not be successfully resolved through conciliation would be referred to arbitration, and the arbitrators would be appointed in accordance under the said agreement. It is clear that conciliation was a mandatory precondition before the parties could refer a dispute to arbitration.

44. After hearing the learned counsels for both parties, neither of whom argued with regards to the mandatory precondition of conciliation and after perusing the records submitted to this court, it is clear that the dispute with regards to payment for extra work was never taken up for conciliation and neither has the Petitioner sent a written invitation to the Respondent to resolve the said dispute through conciliation, in accordance with Section 62 of the Act.

45. In the present case, while both parties had exchanged communication raising the grievance pertaining to payment for the extra work done by the Petitioner and replies thereto, however, they have not sat together to resolve the same through conciliation. Nor in their submissions the said option has been discussed or proposed to be taken up. Therefore, it is evident that by way of their conduct the parties have given up the option to undergo conciliation, and thus the pre-condition clause of the agreement *qua* conciliation shall be construed as having been modified and accordingly, the option of conciliation is deemed to be waived off.

46. The issue with regard to whether the Petitioner's claims would be maintainable on account of the No Claim Declaration that has been submitted by the Petitioner must be adjudicated by the Arbitral Tribunal, in accordance with the judicial mandate of the Amendments to the Act which purports to minimise judicial intervention in arbitration proceedings. This would also be in accordance with the *kompetenz-kompetenz* principle.

47. Furthermore, the Learned Counsel for the Respondent has relied on the judgement in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd (2009) 1 SCC 267* to further their contentions, however, the same was rendered prior to the 2015 Amendment to the Act and thus, would not be applicable in the current dispute since the Court's Jurisdiction under Section 11(6) has been significantly narrowed down by the said Amendment. The Supreme Court in *BSNL v. Nortel Networks (India)*

(P) Ltd. (2021) 5 SCC 738 has upheld the aforementioned, wherein it has held that:

“27.3. Issues which must be left to the Arbitral Tribunal to decide are whether the claim made falls within the arbitration clause (for example, a matter which is reserved for final decision of a departmental authority, and is “excepted” or excluded from arbitration); merits of the claims involved.

28. In Union of India v. Master Construction Co. [Union of India v. Master Construction Co., (2011) 12 SCC 349 : (2012) 2 SCC (Civ) 582] this Court held that the issue whether a discharge voucher, or no-claims certificate, or settlement agreement had been obtained by fraud, coercion, duress, or undue influence, must be determined by the appointing authority at the Section 11 stage, when a prima facie determination as to whether such a dispute was raised bona fide and genuine must be made. If the dispute prima facie appears to be lacking in credibility, the matter would not be referred to arbitration. A bald plea of fraud, coercion, duress, or undue influence was not sufficient, unless the party who sets up such a plea was able to prima facie establish it, by placing material on record.

Post-amendment position

29. The 1996 Act was amended by the Arbitration and Conciliation (Amendment) Act, 2015 which came into force with effect from 23-10-2015. The said Amendment was based on the recommendations of the 246th Report of the Law Commission of India. The 2015 Amendment Act made three significant changes:

29.1. It replaced the Chief Justice of the High Court as the appointing authority for exercising the default power of appointment in the case of domestic arbitrations, by the High Court concerned; and, in respect of international commercial arbitrations, the default power would be exercised by the Supreme Court, in place of the Chief Justice of India.

29.2. It inserted sub-sections (6-A) and (6-B) in Section 11, which reads as:

“11. Appointment of arbitrators.—(1)-(6) ***

(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6-B) The designation of any person or institution by the Supreme Court, or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.”

Sub-section (6-A) by a non-obstante clause provided that notwithstanding any judgment, decree or order of any court, the scope of examination at the Section 11 stage, would be confined to the existence of the arbitration agreement. The effect of the amendment was that if the existence of the arbitration agreement was not in dispute, all other issues would be left for the Arbitral Tribunal to decide. This was in reinforcement of the doctrine of kompetenz-kompetenz, which empowers the tribunal to rule on its own jurisdiction, including any objections with respect to the validity of the arbitration agreement; and

thereby minimise judicial intervention at the pre-reference stage.

29.3. Sub-section (6-B) was inserted to provide that the designation of any person or institution, by either the Supreme Court or the High Court, as the appointing authority under Section 11, would not be regarded as a delegation of judicial power.

31. Sub-section (6-A) came up for consideration in Duro Felguera, S.A. v. Gangavaram Port Ltd. [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , wherein this Court held that the legislative policy was to minimise judicial intervention at the appointment stage. In an application under Section 11, the Court should only look into the existence of the arbitration agreement, before making the reference. Post the 2015 Amendment, all that the courts are required to examine is whether an arbitration agreement is in existence — nothing more, nothing less : (SCC pp. 759 & 765, paras 48 & 59)

48. Section 11(6-A) added by the 2015 Amendment, reads as follows:

‘11. (6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.’

From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP & Co. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]. This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.”

48. It is pertinent to note that with regard to the stipulated time period of 28 days under the Dispute Resolution Clause i.e. Clause 17.4 would go into the admissibility of the claim and as per the *kompetenz-kompetenz* principle, the same should be adjudicated by the arbitral tribunal since it is merely a challenge towards the admissibility of the Petition and not towards the jurisdiction of the arbitrator to decide the claim itself. Such issue of limitation with regards to the claim being time-barred must be adjudicated by the Arbitral Tribunal either as a preliminary issue or at the final stage after the parties have led the evidence.

49. Furthermore, the scope of the Court's power while hearing a Section 11 petition is to test whether or not a valid arbitration agreement exists on the basis of the facts and law. Only when the Court is certain that a valid arbitration agreement does not exist or that the subject matter is not arbitrable, then a referral may be refused, and this is strictly applicable to a very limited category of cases. However, if there is even the slightest doubt, the rule is to refer the dispute to arbitration, otherwise, it would encroach upon what is essentially a matter to be determined by the tribunal.

50. It is also pertinent to refer to various judgments dealing with this aspect. The Hon'ble Supreme Court in ***BSNL v. Nortel Networks (India) (P) Ltd, (2015) 5 SCC 738*** while referring to ***Vidya Drolia v. Durga Trading Corpn (Supra)*** has held as under:

“Issue of limitation

38. Limitation is normally a mixed question of fact and law, and would lie within the domain of the Arbitral Tribunal. There is, however, a distinction between jurisdictional and admissibility issues. An issue of “jurisdiction” pertains to the power and authority of the arbitrators to hear and decide a case. Jurisdictional issues include objections to the competence of the arbitrator or tribunal to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. Issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, since these issues pertain to the jurisdiction of the tribunal.

39. *Admissibility issues however relate to procedural requirements, such as a breach of pre-arbitration requirements, for instance, a mandatory requirement for mediation before the commencement of arbitration, or a challenge to a claim or a part of the claim being either time-barred, or prohibited, until some precondition has been fulfilled. Admissibility relates to the nature of the claim or the circumstances connected therewith. An admissibility issue is not a challenge to the jurisdiction of the arbitrator to decide the claim.*

40. *The issue of limitation, in essence, goes to the maintainability or admissibility of the claim, which is to be decided by the Arbitral Tribunal. For instance, a challenge that a claim is time-barred, or prohibited until some precondition is fulfilled, is a challenge to the admissibility of that claim, and not a challenge to the jurisdiction of the arbitrator to decide the claim itself.*

41. *In Swissbourgh Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho [Swissbourgh Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho, (2019) 1 SLR 263 : 2018 SGCA 81], the Singapore Court of Appeal distinguished between “jurisdiction” and “admissibility” in paras 207 and 208, which read as:*

“207. Jurisdiction is commonly defined to refer to the “power of the tribunal to hear a case”, whereas admissibility refers to “whether it is appropriate for the tribunal to hear it” : Waste Management Inc. v. United Mexican States [Waste Management Inc. v. United Mexican States ICSID Case No. ARB(AF)/98/2, dissenting opinion of Keith Highet dated 8-5-2000, para 58 (Arbitral Award).] . To this, Zachary Douglas adds clarity to this discussion by referring to “jurisdiction” as a concept that deals with “the existence of [the] adjudicative power” of an Arbitral Tribunal, and to “admissibility” as a concept dealing with “the exercise of that power” and the suitability of the claim brought pursuant to that power

for adjudication : [Zachary Douglas, The Press, 2009] at paras 291 and 310.

*208. The conceptual distinction between jurisdiction and admissibility is not merely an exercise in linguistic hygiene pursuant to a pedantic hair-spitting endeavour. This distinction has significant practical import in investment treaty arbitration because a decision of the tribunal in respect of jurisdiction is reviewable by the supervisory courts at the seat of the arbitration (for non-ICSID arbitrations) or before an ICSID ad hoc committee pursuant to Article 52 of the ICSID Convention (for ICSID arbitrations,) whereas a decision of the tribunal on admissibility is not reviewable : see Jan Paulsson, “Jurisdiction and Admissibility” in *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner* (Gerald Aksen et al, eds) (ICC Publishing, 2005) at p. 601, Douglas at para 307, Waibel at p. 1277, paras 257 and 258, Hanno Wehland, “Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules” in *ICSID Convention after 50 Years : Unsettled Issues* (Crina Baltag, Ed.) (Kluwer Law International, 2016) at pp. 233-234, and Chin Leng at p. 124.”*

42. The judgment in Lesotho [Swissbourgh Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho, (2019) 1 SLR 263 : 2018 SGCA 81] was followed in BBA v. BAZ [BBA v. BAZ, 2020 SGCA 53] wherein the Court of Appeal held that statutory time bars go towards admissibility. The Court held that the “tribunal v. claim” test should be applied for purposes of distinguishing whether an issue goes towards jurisdiction or admissibility. The “tribunal v. claim” test asks whether the objection is targeted at the tribunal (in the sense that the claim should not be arbitrated due to a defect in or omission to consent to

arbitration), or at the claim (in that the claim itself is defective and should not be raised at all).

43. Applying the “tribunal v. claim” test, a plea of statutory time bar goes towards admissibility as it attacks the claim. It makes no difference whether the applicable statute of limitations is classified as substantive (extinguishing the claim) or procedural (barring the remedy) in the private international law sense.

44. The issue of limitation which concerns the “admissibility” of the claim, must be decided by the Arbitral Tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties.

45. In a recent judgment delivered by a three-Judge Bench in Vidya Drolia v. Durga Trading Corpn. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , on the scope of power under Sections 8 and 11, it has been held that the Court must undertake a primary first review to weed out “manifestly ex facie non-existent and invalid arbitration agreements, or non-arbitrable disputes”. The prima facie review at the reference stage is to cut the deadwood, where dismissal is barefaced and pellucid, and when on the facts and law, the litigation must stop at the first stage. Only when the Court is certain that no valid arbitration agreement exists, or that the subject-matter is not arbitrable, that reference may be refused.

46. The upshot of the judgment in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] is affirmation of the position of law expounded in Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] and Mayavati Trading [Mayavati Trading (P) Ltd. v. Pradyut Deb Burman, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] , which continue to hold the field. It must be understood clearly

that Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] has not resurrected the pre-amendment position on the scope of power as held in SBP & Co. v. Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]

47. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.”

51. The Hon’ble Supreme Court in ***N.N. Global Mercantile (P) Ltd. vs. Indo Unique Flame Ltd (2021) 4 SCC 379*** has observed that:

“4.3.The doctrine of kompetenz-kompetenz implies that the Arbitral Tribunal has the competence to determine and rule on its own jurisdiction, including objections with respect to the existence, validity, and scope of the arbitration agreement, in the first instance, which is subject to judicial scrutiny by the courts at a later stage of the proceedings. Under the Arbitration Act, the challenge before the Court is maintainable only after the final award is passed as provided by subsection (6) of Section 16. The stage at which the order of the tribunal regarding its jurisdiction is amenable to judicial review, varies from jurisdiction to jurisdiction. The doctrine of kompetenz-kompetenz has evolved to minimise judicial intervention at the pre-reference stage, and reduce unmeritorious challenges raised on the issue of jurisdiction of the Arbitral Tribunal.

* * *

4.10. The doctrine of kompetenz-kompetenz is based on the premise that the arbitration agreement is separate and

independent from the substantive underlying contract in which it is embedded. Equally, an arbitration agreement exists and can be acted upon irrespective of whether the main substantive contract is valid or not.”

52. It is thus settled that the issue of limitation which concerns the “admissibility” of the claim must be decided by the Arbitral Tribunal as a preliminary issue.

53. The Respondent has also argued that the Petitioner was satisfied with his initial payment and the present claim, which has been raised after 15 months, is merely an afterthought and the No Claims Declaration dated 19.03.2021 is a testament to the same. However, a perusal of the record reveals that the Petitioner in its letter to the Respondent dated 31.03.2021 had stated that they were instructed to not include the extra work and to claim the same separately after submitting the final bill.

54. Furthermore, the Petitioner has alleged that they were asked to submit a blanket NOC to not claim anything against the extra work done by them. Additionally, as per the Petitioner’s claim, it had also submitted a fresh No Claims Declaration and the Respondent did not respond to the same. All of these claims cannot be adjudicated by this court at this stage.

55. This Court, without going into the merits of the case, is *prima facie* of the view that there is an arbitrable dispute between the parties and the same must be adjudicated by the Arbitral tribunal which would be the competent authority as per the *kompetenz-kompetenz* principle, including on the issue pertaining to whether the No Claims Declaration was

obtained under coercion or duress, and whether the present claim is merely an afterthought.

56. Hence, in light of the foregoing discussion and analysis, this Court is of the opinion that if there is an arbitration agreement between the parties, which is sought to be negated by a party by citing other provisions of a contract, which requires interpretation of the contract, then the Court, in line with the letter and spirit of the Act as well as the doctrine of *kompetenz-kompetenz*, must lean towards referring the matter to arbitration.

57. Therefore, in the facts and circumstances of this case, this Court refers the dispute raised herein to an Arbitral Tribunal. Hence, the following Order:

ORDER

- (i) Justice (Retd.) T.S. Thakur, former Chief Justice of India is appointed as the Chairperson of the Arbitral Tribunal to adjudicate the disputes between the parties which have arisen under the GCC *qua* the payment for extra works;
- (ii) Other members of the Tribunal shall include Justice (Retd.) Manmohan Singh and Justice (Retd.) Sudershan Misra;
- (iii) The learned Tribunal, before entering the arbitration reference, shall ensure the compliance of Section 12(1) of the Arbitration and Conciliation Act, 1996;
- (iv) The learned Tribunal shall be paid fees as prescribed under the Fourth Schedule of the Arbitration and Conciliation Act,

1996;

- (v) At the first instance, the parties shall appear before the learned tribunal within 10 days from today on a date which may be mutually fixed by the learned sole arbitrator;
- (vi) All contentions of the parties including that of maintainability are expressly kept open.

58. In the aforesaid terms, the instant petition stands allowed.

59. It is made clear that any observations made herein shall have no bearing whatsoever on the merits of the case arising from the set of facts and circumstances of this case, in the course of any proceedings before any other Court.

60. The judgment be uploaded on the website forthwith.

A copy of the order be forwarded to the learned arbitrators on the following addresses:

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(CHANDRA DHARI SINGH)
JUDGE

FEBRUARY 2, 2023

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