

**In the High Court at Calcutta
Original Civil Jurisdiction
Commercial Division**

The Hon'ble Justice Sabyasachi Bhattacharyya

AP-COM No. 751 of 2024

**Jayashree Electromech Private Limited
VS
The West Bengal State Electricity Transmission Company Limited**

For the petitioner	:	Mr. Debdut Mukherjee, Adv. Mr. Debartha Chakraborty, Adv.. Mr. Saptarshi Kar, Adv..
For the respondent	:	Mr. Pranit Bag, Adv. Mr. Anuj Kumar Mishra, Adv. Mr. Balaram Patra, Adv.
Hearing concluded on	:	17.09.2024
Judgment on	:	23.09.2024

Sabyasachi Bhattacharyya, J:-

1. The present application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”) has been filed for a composite reference in respect of six letters of award of contract issued by the respondent in favour of the petitioner pursuant to a tender floated by the respondent for construction of various electrical transformers and allied projects. The petitioner turned out successful in the tender and was awarded the six letters of award on different dates being May 26, 2016, August 26, 2016 and April 6, 2018.

2. The several letters of award pertained to supply of materials and equipment and installation, erection and construction of various transformers bay and feeder bay at different places in West Bengal.
3. Formal contracts were executed by and between the parties in terms of the letters of award on four different dates. As per the contracts, the parties were to be governed by the General Conditions of Contract (GCC) and Special Conditions of Contract (SCC).
4. Subsequently, the petitioner wrote to the respondent requesting enhancement of the existing contract amount on account of GST implementation. Several other letters were also written by the petitioner to the respondent, *inter alia* for enhancement of the contract amount and/or requesting waiver of liquidated damages, etc. The several representations of the petitioner having not been considered by the respondent, the petitioner filed a writ petition bearing WP No.5239(W) of 2020, which was decided on January 5, 2021 by directing the respondent to consider the said representations and pass a reasoned order.
5. On April 16, 2021, the respondent passed a reasoned order refusing the claims of the petitioner, upon which the petitioner filed another writ petition bearing WPA No.16876 of 2021 challenging the said reasoned order. The said writ petition is still pending and the petitioner undertakes to withdraw the same if the present application is allowed.
6. The petitioner, by a letter dated February 20, 2023, purportedly appointed an Adjudicator under Clause 6 of the GCC. The said

appointment, however, was unilateral. The Adjudicator passed an award on March 27, 2023, upon which the respondent filed an application under Section 34 of the 1996 Act, giving rise to AP No.193 of 2023, for setting aside the Adjudicator's award dated March 27, 2023.

7. A co-ordinate Bench of this Court, by an order dated June 26, 2023, observed that the challenge did not fit into the contours of an application under Section 34. The premise of the said conclusion was that the impugned order had not been passed by an Arbitrator but by an Adjudicator, which was recorded to be an admitted position of the parties before the Court.
8. Subsequently, the petitioner preferred a writ petition being WPA No.27644 of 2023, seeking implementation of the award of the Adjudicator. The said writ petition came up for hearing before another co-ordinate Bench on May 21, 2024. It was recorded by the learned Single Judge that at the outset, learned counsel for the petitioners stated that he was not pressing the writ petition and would take his remedies in accordance with the GCC Clause 6.2.3. It was also recorded that learned counsel for the respondents stated that he had no objection if the present dispute is referred to arbitration in terms of Clause 6.2.3.
9. The learned Single Judge held that in view of the statement made by the learned counsel for the petitioners, the writ petition was dismissed as withdrawn.

- 10.** The petitioner thereafter issued a notice invoking the arbitration clause on May 22, 2024, requesting the appointment of an Arbitrator from the options given in the said invocation notice. The respondent replied to the said notice by an e-mail dated June 26, 2024, raising objections, inter alia, to one of the names suggested by the petitioner and insisting upon compliance of the pre-arbitration stages in terms of Clause 6 of the GCC.
- 11.** A second invocation notice under Section 21 of the 1996 Act was issued by the petitioner on June 26, 2024, which was followed up by an e-mail dated June 29, 2024.
- 12.** The respondent having thus refused to accede to the request for appointment of Arbitrator, the present application under Section 11 has been filed.
- 13.** Learned counsel for the petitioner argues that in view of the specific concession given before the learned Single Judge on May 21, 2024 by learned counsel for the respondent, regarding the respondent having no objection if the dispute is referred to arbitration in terms of Clause 6.2.3, the prior procedure contemplated in Clause 6.1 and its sub-clauses need not be adhered to afresh. It is submitted that Clause 6.2.3 provides that any dispute submitted by a party to arbitration shall be heard by an arbitration panel composed of three arbitrators in accordance with the provisions set forth thereinbelow. Thus, the said clause refers to compliance of the subsequent provisions and not the prior provisions relating to pre-arbitration formalities.

14. Hence, it is argued that in view of the concession given by the respondent before Court, there is no bar to an Arbitrator being appointed without further ado.
15. Learned counsel cites *Demerara Distilleries Private Limited and another v. Demerara Distillers Limited*, reported at (2015) 13 SCC 610 in support of his contention that in view of the elaborate correspondence exchanged between the parties, as held by the Supreme Court in the said judgement, it would be an empty formality to direct the parties to resolve disputes by resorting to pre-arbitration procedure.
16. Learned counsel also cites a Single Judge decision of the Himachal Pradesh High Court in the matter of *Backend Bangalore Private Limited, Represented by its Managing Director, Mr. Gautam Hegde v. Chief Engineer-cum-Project Director, State Roads Project, Himachal Pradesh Road and Infrastructure Development Corporation Limited (HPRIDC)*, reported at 2022 SCC OnLine HP 1044, for the proposition that an Arbitrator can be appointed even if the disputes were not referred to an Adjudicator first in terms of the contract executed between the parties, especially since the respondent had failed to refer such disputes to the Adjudicator.
17. In controverting the contention of the respondent that the nature of the dispute was not elaborated in the Section 21 notice, learned counsel for the petitioner cites the judgment of this Court in *AP-COM No.701 of 2024 [Kakali Khasnobis v. Mrs Reeta Paul and Anr.]* where the court observed that since Section 21 is the commencement of the arbitral proceedings itself, the rigours applicable to the same are of a

much higher standard than a request under Section 11(5) of the 1996 Act, since the latter is merely a prior step intimating to the respondent the intention to arbitrate and appoint an Arbitrator, which would be followed up later by the actual appointment of Arbitrator. Thus, the tests applicable to Section 11(5) would be on a much liberal anvil in favour of arbitration than that of Section 21.

- 18.** Learned counsel for the petitioner also cites *State of Goa v. Praveen Enterprises*, reported at (2012) 12 SCC 581 to argue that the Chief Justice or his designate are neither required to identify disputes nor specifically refer them to the Arbitrator for adjudication but may take necessary measures by directing the appointing authority to formulate disputes/claims/counter claims for reference as required by the arbitration agreement, if he fails to do so.
- 19.** It is argued that in the facts of the present case, since all the contracts were awarded in terms of the same tender, the disputes emanate from a single transaction and, as such, ought to be the subject-matter of a composite reference.
- 20.** Learned counsel appearing for the respondent contends that the so-called concession given before the learned Single Judge in WPA No.27644 of 2023 cannot be construed as a waiver given by counsel on behalf of the respondent regarding the pre-arbitral stages as contemplated in Clauses 6.2.1 and 6.2.2 of the GCC.
- 21.** It is argued that the concession was merely to the extent of Clause 6.2.3 that is, if the dispute is referred to arbitration, the procedure as laid down in the said provision is to be followed.

- 22.** It is next argued that the unilateral appointment of Adjudicator by the petitioner was *dehors* the provisions of the GCC and, as such, was invalid. Hence, the petitioner is required to comply with the pre-arbitral formalities as per Clauses 6.2.1 and 6.2.2 prior to seeking arbitration.
- 23.** It is next argued that the Adjudicator unilaterally appointed by the petitioner was one of the suggested Arbitrators as well and the very appointment and thus purported decision of the Adjudicator were *non est* in the eye of law.
- 24.** Learned counsel for the respondent cites the following judgments in support of the contention that pre-arbitral conditions are required to be followed by the parties prior to initiation of arbitration:
- i. Dharamdas Tirathdas Constructions Pvt. Ltd. v. Government of India* in Misc. Civil Case No. 1043 of 2003.
 - ii. M/s Chabbras Associates v. M/s HSCC India Limited & Anr.* in ARB.P. 782 of 2022.
 - iii. M/s BCC-Monalisha (JV) v. Container Corporation of India Limited* in ARB.P. 933 of 2022 & I.A. 5219 of 2023
 - iv. Union Territory of J & K v. M/s S.P. Singla Constructions Pvt. Ltd.* in AA No.06 of 2020.
- 25.** It is next argued that the notice invoking arbitration is silent on the exact disputes sought to be referred and as such, is defective. Thus, the same cannot be a valid precursor for filing the present application under Section 11. It is argued that the petitioner was issued separate letters of award, followed up by different contractual agreements

which were signed by separate individuals on different dates and contemplate separate areas and scope of work. Hence, a composite reference is out of question.

- 26.** Learned counsel also relies on *Bharat Sanchar Nigam Limited and Anr. v. Nortel Networks India Private Limited*, reported at (2021) 5 SCC 738 for the proposition that Section 11 is maintainable only after a notice is issued under Section 21 of the 1996 Act.
- 27.** It is, thus, argued that the present application under Section 11 is premature and ought to be dismissed.
- 28.** The cardinal question on which the present matter hinges is whether the instant application under Section 11 of the 1996 Act is premature in view of the petitioner having not complied with pre-arbitral formalities. The purport of the concession given by the respondent through its counsel in WPA No.27644 of 2023 is crucial in that regard. The order dated May 21, 2024 passed in the said writ petition is set out below:

“At the outset itself, learned counsel for the petitioners states that he is not pressing that present writ petition and will take his remedies in accordance with the G.C.C. Clause 6.2.3.

Learned counsel for respondents states that he has no objection if the present dispute is referred to arbitration in terms of Clause 6.2.3.

In view of the statement made by the learned counsel for the petitioners, the present writ petition is dismissed as withdrawn.”

- 29.** The “no objection” given by the respondent’s counsel has to be construed in the light of the previous submission of the petitioners as

per the above order, learned counsel for the petitioners therein stated that he will take his remedies in accordance with the GCC Clause 6.2.3, to which the learned counsel for the respondent responded that he has no objection *if the present dispute is referred to arbitration in terms of Clause 6.2.3*. Clause 6.2.3 states that any dispute submitted by the party to arbitration shall be heard by an arbitration panel composed of three Arbitrators in accordance with the provision set forth thereinbelow. The respondent contends that a reference under Section 6.2.3 includes implicitly the compliance of the prior formalities as indicated in the previous clauses that is Clause 6.2.1 and Clause 6.2.2. However, the concession given before the co-ordinate bench in WPA No. 27644 of 2023 leaves no scope of such interpretation. The unambiguous concession was in respect of the dispute being *referred to arbitration in terms of Clause 6.2.3*. Once it is submitted before the court that the respondent agrees to a reference to arbitration, it cannot resile from that position and subsequently argue that the parties are required to be relegated back to the formalities preceding such arbitration as contemplated in the original agreement.

- 30.** The law does not mandate the compliance of prior formalities as a pre-condition of reference to arbitration. Such prior conditions emanate entirely from agreement between the parties. Thus, by necessary implication, what is agreed on consensus can also be waived by consensus. Before the co-ordinate Bench, as recorded in the order dated May 21, 2024, the parties were *consensus ad idem* to an immediate reference to arbitration, without any insinuation of the

requirement of prior proceedings being complied with. Thus, in view of such concession, the parties agreed clearly to waive the prior formalities and go ahead with arbitration.

- 31.** At best, the respondent could insist upon the procedure contemplated in Clause 6.2.3 and subsequent clauses to be complied with. There would be sufficient compliance with the subsequent clauses if a three-member Arbitral Tribunal is constituted, two of them being deemed nominees of the parties and the third to be chosen by the two nominees.
- 32.** However, by opposing the present application under Section 11 and insisting that the petitioner be relegated to pre-arbitral formalities, there is obvious and implied refusal to agree to appointment of Arbitrator, which provides sufficient ground to appoint an Arbitral Tribunal under Section 11 of the 1996 Act.
- 33.** In any event, the petitioner in its first notice under Section 21 of the 1996 Act, dated May 22, 2024, referred to a “relatively small amount” being involved in the current dispute. In the subsequent notice dated June 26, 2024, the claimant referred to previous letters seeking to know the name of the Project Manager and also to request letters to the Managing Director and Chief Engineer of the respondent informing them of the dispute. As per the allegation in the second Section 21 notice, despite such efforts, no decision was taken at the end of the respondent.

- 34.** Thus, the petitioner, in its invocation of the arbitration clause, clearly referred to previous correspondence between the parties where the dispute had been enumerated.
- 35.** Since such multiple correspondences yielded no result, it would be an “empty formality”, as envisaged in *Demerara Distilleries Private Limited (supra)*, to relegate the parties back to the rigmarole of pre-arbitration formalities. The learned Single Judge of the Himachal Pradesh High Court, in *Backend Bangalore Private Limited (supra)* had also held that since the respondent had failed to refer the dispute to an Adjudicator, an Arbitrator could be appointed even if there was no prior reference to the Adjudicator.
- 36.** In the present case as well, it is clearly seen that several correspondence between the parties were exchanged and all efforts of the petitioner to have the dispute resolve by the mutual discussion failed. The petitioner’s attempt to appoint an Adjudicator also met with resistance by the respondent and the respondent never took any step of its own, despite being aware of the dispute raised by the petitioner, to appoint an Adjudicator to resolve such dispute.
- 37.** Thus, it would be a useless formality to force the petitioner to return to the paraphernalia of red-tapism by re-starting the dispute resolution exercise from any prior stage than arbitration.
- 38.** Moreover, the two notices under Section 21, particularly the subsequent one, amply indicate the parameters of the disputes by referring to the previous correspondence between the parties. Hence, it cannot be said that the parties themselves did not understand the

nature and scope of the disputes. It is well-settled that a notice should not be read with a fault-finding approach but it has to be read in a manner so as to give meaning to it, since the parties themselves understood the contours of the dispute. In the present case, there is no reason why the parties would be construed not to understand the scope of the disputes, in view of the reference in the invocation notice to prior communications between them.

- 39.** Hence, it cannot be said that the notice did not sufficiently disclose the nature of the disputes. Moreover, the nature of a request for appointment of an Arbitrator in Section 11 is contradistinct from a notice initiating the arbitral process under Section 21. The two Sections are couched in different language. A request for appointment of an Arbitrator as contemplated in Section 11 is a pre-arbitral formality and has to be taken in much more lenient context than a notice under Section 21, which is itself the commencement of the arbitral process.
- 40.** I find from the subsequent Section 21 notice dated June 26, 2024 that the same is clear enough on the dispute falling under the agreement between the parties and refers to previous correspondence which, according to the notice itself, sets forth the parameters of the disputes. Hence, such prior notice was sufficient for the court to assume jurisdiction under Section 11 of the 1996 Act.
- 41.** Insofar as the alleged composite nature of the dispute is concerned, the same is, to say the least, is debatable. There is valid rationale behind both sides' arguments. Whereas the different work orders

pertained to the same work, contemplated under a single tender between the same parties and the underlying scope of work was substantially the same, although for different areas, which arguably is an indicator of the disputes being inter-connected, on the other hand, it is an equally valid argument that the disputes having arisen out of different contracts of different dates in respect of separate areas, the reference should also be separate.

- 42.** It is well-settled that the Section 11 court can only ascertain whether there is a valid arbitration clause and cannot enter into the merits of the disputes or determine the contours of the dispute or decide whether they should be taken up compositely by the Arbitrator.
- 43.** In the present case, there has been a valid invocation of the arbitration clause and such request of appointment of arbitrator has failed to elicit a positive response from the respondent. There being a valid arbitration clause in the form of Clause 6.2.3, there is no reason why the matter should not be referred to arbitration. Although Clause 6.2.3 provides for the appointment of an arbitral panel composed of three Arbitrators, the request of the petitioner to appoint an Arbitrator has failed. However, keeping in view the consensus between the parties to appoint a three-member Arbitral Tribunal, this Court deems it prudent to honour such agreement.
- 44.** Accordingly, AP-COM No.751 of 2024 is allowed, thereby appointing Sri Siddhartha Banerjee (Mobile No. 9830298922), a member of the Bar Association, as nominee-Arbitrator on behalf of the petitioner and Sri Krishnaraj Thaker (Mobile No. 9830116355), a member of the Bar

Library Club, as the nominee-Arbitrator on behalf of the respondent, subject to disclosures being obtained from the said proposed Arbitrators under Section 12 of the Arbitration and Conciliation Act, 1996. The two nominee-Arbitrators shall, preferably within a fortnight from tendering their disclosures under Section 12, agree upon the appointment of a third Arbitrator and communicate the particulars of the said learned Arbitrator to the learned Registrar, Original Side of this Court in writing. Thereafter, a disclosure under Section 12 of the 1996 Act shall similarly be obtained from the said third Arbitrator, upon which the said three Arbitrators shall form the three-member Arbitral Tribunal which will decide the disputes between the parties.

- 45.** The three-member Tribunal shall fix its own remuneration in consultation with the parties and in consonance with the provisions of the 1996 Act and its Fourth Schedule.
- 46.** All questions are kept open to be decided by the Tribunal, including the question as to whether the disputes arising out of the several agreements and/or power of attorney shall be clubbed together or decided separately by the Tribunal.
- 47.** The petitioner shall, as per the undertaking given by it, withdraw WPA No.16876 of 2021 with liberty to canvass the points urged therein before the Arbitral Tribunal.
- 48.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)